SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

ALAMEDA HEALTH SYSTEM, ANTHONY REDMOND, and GREGORY STEPHENS,

Plaintiffs/Petitioners,

v.

ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION; BOARD OF RETIREMENT OF THE ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION; DAVID NELSEN, in his Official Capacity as Executive Director of the Alameda County Employees' Retirement Association; ALAMEDA COUNTY; and DOES 1-100,

Defendants/Respondents.

Case No. CPF-19-516795

ORDER GRANTING ACERA RESPONDENTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

INTRODUCTION

This matter was set for hearing on May 2, 2022 in Department 304, the Hon. Ethan P. Schulman, presiding. The matter was reported; the appearances are stated in the record. The Court circulated a tentative ruling in advance of the hearing. Having reviewed and considered the arguments, pleadings, and written submission of all parties, the Court **GRANTS** the motion for summary judgment of Respondents Alameda County Employees' Retirement Association, the Board of Retirement of ACERA, and David Nelsen, in his official capacity (the ACERA Respondents).

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. The Parties

Respondent Alameda County Employees' Retirement Association (ACERA) is a county retirement system established under article XVI, section 17 of the California Constitution and the County Employees Retirement Law of 1937, Gov. Code §§ 31450-31898 (CERL). Respondent Board of Retirement (the Board) is the governing body of ACERA; Respondent David Nelsen is ACERA's Chief Executive Officer, a position he has held since 2016. (Nelsen Decl. ¶¶ 1, 5.) The Board has nine members and two alternate members. Five of the nine members are the County Treasurer and four county residents appointed by the Alameda County Board of Supervisors; the remaining members are elected by active general and safety members and retired members of ACERA. (*Id.* ¶ 7; see Gov. Code § 31520.1.)[2]

Member districts that participate in ACERA's pension plan are referred to as participating employers. (*Id.* ¶ 9.) Their employees who work in retirement-eligible positions are members of ACERA and earn retirement and other benefits. (*Id.*) ACERA's participating employers include the County of Alameda (the County), the Alameda County Superior Court, Petitioner Alameda Health System (AHS), First 5 Alameda County, the Housing Authority of the County of Alameda, Livermore Area Recreation

[1] Both parties' unopposed requests for judicial notice are granted. Petitioners' objections to the Yeung Declaration and Respondents' objections to the Moye Declaration are overruled. Petitioners' objections to new evidence submitted with Respondents' reply papers is overruled, as none of that evidence is material to the Court's ruling. Petitioners' objections to new arguments purportedly made in Respondents' reply papers are overruled; those arguments are within the proper scope of reply.

[2] This Order refers interchangeably to ACERA and its Board. Unless otherwise indicated, all further statutory citations in this Order are to the Government Code.

and Park District, and the Alameda County Office of Education. (*Id.*; UMF 4.) ACERA has approximately 24,000 members, and the Board invests trust funds on their behalf with a reported net market value of $9.6 billion as of December 31, 2020. (UMF 5.)

In 1996, the Legislature authorized the formation by the Alameda County Board of Supervisors of an independent hospital authority to be charged with governance of the Alameda County Medical Center (ACMC). (Health & Safety Code § 101850(a)(1); Third Amended Verified Petition for Writ of Mandate (Pet.) ¶ 12.) Under the authorizing legislation, the hospital authority "shall be governed by a board that is appointed, both initially and continually, by the Board of Supervisors of the County of Alameda." (*Id.* § 101850(c).) However, the hospital authority is an independent government entity, not an agency, division, or department of the County; any contract between it and the County shall provide that the authority's liabilities or obligations under the contract are its own, not those of the County. (*Id.* § 101850(j),(k).) Employees of the hospital authority are eligible to participate in the County Employees Retirement System to the extent permitted by law. (*Id.* § 101850(s).)[3]

In February 1998, the Alameda County Board of Supervisors enacted an ordinance that established the hospital authority, to be known as the Alameda County Medical Center (ACMC). (Pet. ¶ 13.) Subsequently, the County and ACMC entered into a Master Contract and associated agreements for the transfer of the health system to ACMC, which became effective on July 1, 1998. (*Id.* ¶¶ 14-16.) By a resolution adopted by ACMC on June 15, 1998, all eligible officers or employees of ACMC were included in ACERA effective January 9, 1999. (UMF 19.) As a result, ACMC became a participating employer in ACERA.

On January 1, 2013, ACMC became AHS, which assumed all rights that ACMC had under the Master Agreement. (Pet. ¶ 17.) AHS is an integrated public health care system in Alameda County consisting of five hospitals and four wellness centers that is charged with fulfilling the County's statutory obligation under the Welfare and Institutions Code to provide medical care to the indigent. (*Id.* ¶ 7.) Petitioners Anthony Redmond and Gregory Stephens are former and current employees of AHS, respectively, and members of ACERA. (*Id.* ¶¶ 8-9.)

[3] By separate legislation enacted in 2013, the Legislature limited the eligibility of certain employees of AHS to participate in the Retirement Association. (*Id.* § 101851; Yeung Decl. ¶¶ 59, 63.)

B. **The Actuarial Valuation Process**

AHS, like the other employers participating in ACERA, is required to make yearly contributions to ACERA. Respondent ACERA sets the annual contribution rates for each of its participating employers. The Board uses actuarial valuations to establish and adjust the "normal cost" that participating employers and ACERA's active members pay into the system to cover projected future retirement benefits and to cover any unfunded actuarially accrued liability (UAAL or Unfunded Liability). (Yeung Decl. ¶¶ 12, 14, 16; UMF 11.) UAAL refers to any cumulative deficit in the retirement fund when the "normal cost" contributions fall short of covering the promised benefits. (Yeung Decl. ¶ 16; UMF 12.)[4]

It is undisputed that since its inception in 1948, ACERA has used the percentage of payroll funding method to calculate contribution rates among its participating employers. (Yeung Decl. ¶ 18; UMF 13.) That method involves the pooling of actuarial liabilities so as to reduce volatility in both employer and active member contributions, to reduce complexity in the calculation of contributions, and ensure that sufficient funds are contributed to the retirement system on a timely basis. (*Id.*; UMF 13-14.) It is a common and well-accepted actuarial methodology for funding multiple employer defined benefits plans nationally and in California. (*Id.* ¶ 18; UMF 17.)

Each year from 1998 through 2020, the Board adopted the actuarial valuation recommended by its consulting actuary, including the employer and employee contributions within them. (Yeung Decl. ¶¶ 19,

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[4] As the Court of Appeal explained in *Mijares v. Orange County Employees' Retirement System* (2019) 32 Cal.App.5th 316,

> [T]he rate of contribution has two components, described in section 31453.5 as the normal contribution rate and the Unfunded Liability. The normal contribution is calculated each year based on a percentage of Employer's payroll. An Unfunded Liability represents the difference between actuarial accrued liability and the valuation assets in a fund. Most retirement systems have [Unfunded Liability]. They arise each time new benefits are added and each time an actuarial loss is realized. [Unfunded Liability] does not represent a debt that is payable today. The Unfunded Liability represents an estimate based on a series of assumptions that operate on demographic data of [the County Retirement System's] membership. Given the multiple assumptions about the future involved in calculating the [County Retirement System's Unfunded Liability] (investment returns, pay increases, marital status at retirement, retiree and beneficiary life expectancies, salary increases, contribution rates, and inflation), it is clear that the [Unfunded Liability] is a highly variable amount, which may or may not prove accurate depending upon actual future events and experience.

(*Id.* at 324 (citations and quotations omitted); see also *County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 34-35.)

20; UMF 9.) As set forth in the actuarial valuations and Annual Comprehensive Financial Reports (ACFRs) annually adopted by the ACERA Board, the percentage of payroll methodology applied to AHS based on its payroll at the applicable valuation date. (Yeung Decl. ¶¶ 22, 28-33, 45, 46, 69, 76; UMF 25.) Thus, AHS's contributions to ACERA have been determined on a percentage of payroll basis for over 20 years. (*Id.*; UMF 27.) As the annual reports and the chart of employer contribution rates in the Yeung Declaration illustrate, employer contribution rates have varied considerably from one year to the next, depending on a wide range of unanticipated developments and factors including demographic and economic changes, court decisions, etc. (Yeung Decl. ¶¶ 25-42, 45-46.)

C. **The Parties' Dispute**

AHS first raised concerns in 2015 about the manner in which the responsibility for ACERA's Unfunded Liability had been allocated to it. (Yeung Decl. ¶ 67; Response to UMF 37 ["Undisputed that from 1998 up until 2015, AHS did not question ACERA's application of the percentage of payroll methodology in allocating UAAL among participating employers"]; UMF 41.) In a June 16, 2015 memorandum by AHS's actuary, AHS asserted that it was paying higher contribution rates to ACERA because of the Board's "chosen allocation method," and argued that the costs had increased largely due to the "[g]rowth of AHS payroll relative to other employers in the system." (Yeung Decl. ¶¶ 67-70; UMF 42.) AHS requested ACERA to prepare a study to determine how using AHS's favored percentage of liability or actuarial accrued liabilities (AAL) methodology, if applied from 1998 through 2014, might have affected the annual contribution amounts due from ACERA's participating employers. (Yeung Decl. ¶ 73; UMF 45.)[5] ACERA's actuary did so, relying on two simplifying assumptions, the most significant of which assumed that AHS (then ACMC) was granted a "fresh start" when it separated from the County in that it would have no liability for the retirement benefits that employees of County-run hospitals and clinics earned prior to the separation. (Yeung Decl. ¶¶ 73, 74; UMS 46, 37.) As discussed below, the parties contest whether that assumption is in fact accurate. The 2015 study showed that had ACERA applied the percentage of liability method, based on the simplifying assumptions, AHS might have contributed about $12 million less to ACERA annually than it did under the percentage of payroll

[5] The parties appear to use the terms AAL and percentage of liability interchangeably to refer to Petitioners' preferred actuarial methodology.

methodology. (Yeung Decl. ¶ 75; UMF 51; Compendium of Evidence (Compendium), Tab 143.)

By letters dated September 28 and October 14, 2016, AHS requested that ACERA change its actuarial funding policy to the percentage of liability method. (Nelsen Decl. ¶ 15; Yeung Decl. ¶ 75; Compendium Tabs 108, 109.)[6] Those letters acknowledged that "the current methodology most likely approximated AHS's fair share of liability for cost of the pension when it was first introduced." (*Id.*) However, it asserted that "over the subsequent period, AHS's share of the applicable payroll obligation has grown significantly, without a corresponding increase in the cost of providing benefits to AHS participants." (*Id.*) It went on to assert, "Consequently, the current methodology results in a very disproportionate and inappropriate increase in the allocation of the pension cost liability to AHS. Over this period, the cost allocation has grown from approximately 18% to 28%, while we estimate that AHS' fair allocation of cost is 15.3%. This percentage represents the proportion of AHS's liability in the General tiers, as determined by Segal, ACERA's actuary. As this discrepancy has grown over the past 10+ years, AHS has in effect subsidized the cost of participation by other plan members disproportionately without measurable benefit." (*Id.*) It contended that the request, if granted, "would result in a retrospective reallocation of approximately $65 million (before any adjustments for investment earnings) and a prospective reallocation going forward of approximately $12 million per year." (*Id.*)[7]

ACERA organized a meeting of its participating employers for December 12, 2016 to address AHS's request, at which both AHS and ACERA's actuary made presentations. (Yeung Decl. ¶¶ 79-86; Nelsen Decl. ¶¶ 17-19; Compendium, Tabs 110-112.) In its presentation, AHS acknowledged that since it separated from the County, its compensation costs had increased relative to the County's as a result of its need to increase headcount of skilled healthcare staff and to adopt a competitive compensation structure, resulting in a substantial growth in salary of 32.4% since 2009, compared to only 7.4% for other ACERA participants. (Compendium Tab 110, at 5-6.)

The County objected to AHS's request for a change in methodology, as well as to certain factual assertions underlying AHS's claims. (Yeung Decl. ¶ 87; Nelson Decl. ¶ 19; UMF 57.) In a January 13, 2017 letter expressing its opposition to AHS's request, the County asserted that it "would result in

[6] The two letters appear to be identical.

[7] AHS's later presentation showed that this $65 million figure contemplated a retrospective application of the proposed methodology going back to 2002. (Compendium Tab 110 at 9.)

ACERA using a different methodology than the other '37 Act pension plans—almost all of which use the current ACERA contribution methodology. The change in methodology would also deviate from the methodology used by most local government defined benefit pension plans throughout the country." (Compendium Tab 115 at 791.) It also contended that "[t]he percentage of payroll methodology provides fairly consistent contributions from all employers from year-to-year while a change to a percentage of general liability methodology is likely to create more volatility in contributions, particularly for the smaller employers in the ACERA." (*Id.*) Further, the County asserted, "a consistent allocation methodology is the foundation of ensuring equity in a cost sharing plan. Each participating employer will have some years when the contribution methodology benefits them and some years when the contribution methodology is to their detriment. However, this generally evens out over the life of the plan." (*Id.*) The County agreed with AHS's assertion regarding the reasons for the growth in its payroll: "The growth in AHS's payroll is primarily due to increases in AHS employees' salary and benefits as well as increased hiring by AHS relative to other employers participating in AHS." (*Id.* at 792.) It pointed out, "These increased costs will result in higher pension liabilities in the future. The County believes it is reasonable for AHS to contribute proportionately to the liabilities it is generating." (*Id.*)

By letter dated April 5, 2017, AHS made a "formal request" that ACERA provide "additional data to support our efforts to analyze the unfunded liability allocated" to it. (Nelsen Decl. ¶ 20; Compendium Tab 115.) In a later letter, AHS "agreed that its analysis could be improved by the inclusion of more historical data," and submitted a proposed statement of work outlining the data needed from ACERA's actuary to complete the analysis. (Yeung Decl. ¶ 89; Nelsen Decl. ¶ 23; Compendium Tab 119, at 8 [May 6, 2017 letter from David Cox, Chief Financial Officer of AHS, to Ms. Margo Allen, Fiscal Services Officer, Actuarial Committee, ACERA].) On June 14, 2017, ACERA's Actuarial Committee held a meeting, at which ACERA's actuary made a detailed presentation regarding the various issues implicated by AHS's request, and AHS made its own presentation. (Yeung Decl. ¶¶ 92-99; Nelsen Decl. ¶¶ 25-27; Compendium Tabs 120-122.)

The Actuarial Committee again met publicly on September 13, 2017 to continue discussion of AHS's demands. (Nelsen Decl. ¶¶ 29-31; Compendium Tabs 126, 128, 129.) At that meeting, ACERA staff recommended that the Board not proceed with the further actuarial study requested by AHS on

several grounds, including the contested issue concerning AHS's pre-separation liability for services rendered by members who worked at ACMC's hospitals and clinics before 1998. (Nelsen Decl. ¶¶ 19, 31.) The basis for that recommendation was that "the outstanding issue of the pre-separation liability is unresolved, and that changing the methodology is such a significant change in plan design, staff did not believe that the issue was ripe for a study at this time." (Compendium Tab 128.) The ACERA Board met the same day and discussed the proposed study. (Nelsen Decl. ¶ 32; Compendium Tab 130.)

On January 18, 2018, ACERA held a Board meeting to address AHS's request, among other topics. (Nelsen Decl. ¶¶ 38, 39; Compendium Tabs 139, 140.) In connection with that meeting, ACERA's Chief Executive Officer presented the Board with a comprehensive memorandum, with attachments, summarizing AHS's requests and the history of the parties' discussions. (Nelsen Decl. ¶ 38; Compendium Tab 141, ACERA 2914-3095.) The memorandum recommended that the Board "exercise its discretion to deny the request by AHS for a further study given the challenges of the data and the unresolved underlying issue of pre-separation liability." (*Id.* at 2917.) It further recommended that the Board "exercise its discretion to deny AHS's request for a change to the existing cost-allocation methodology under the pooling arrangement as, in the opinion of the Board, the current arrangement is actuarially sound and fiscally prudent for the plan and fair to the employers as a whole." (*Id.*) The minutes of the Board's meeting reflect that the Board heard presentations by ACERA's Chief Executive Officer, AHS's general counsel, ACERA's actuary, considered a letter from the County, and that individual Board members directed questions to AHS. (Compendium Tab 139, at 4282-4286.) Following the presentations, the Board unanimously (8-0) voted "for the reasons summarized in the CEO's report and its accompanying materials" to "deny AHS's request for a further actuarial study and to deny AHS's request that the Board direct the ACERA actuary to change ACERA's long-standing methodology for determining UAAL obligations to be paid by ACERA's Participating Employers." (*Id.* at 4286.) This litigation followed.

D. **Petitioners' Claims in the Third Amended Petition and Complaint**

Petitioners' operative Third Amended Verified Petition for Writ of Mandate and Complaint for

Declaratory Relief[8] contains three remaining causes of action against the ACERA Respondents.[9] The first cause of action alleges among other things that ACERA and its Board have breached their duty of loyalty to Petitioners and other ACERA members who are AHS employees by imposing costs on AHS for pension unfunded liabilities that are not attributable to AHS employees. (Pet. ¶ 62.) It also alleges that ACERA has breached its duty to minimize employer contributions by rejecting AHS's demands for a further study and that ACERA adopt a fair and equitable method for determining the responsibility of participating employers for unfunded pension liabilities attributable to their workforce. (*Id.* ¶ 63.) Petitioners seek a writ of mandate under Code of Civil Procedure section 1085 "commanding ACERA and its Board to set aside the decision dated January 18, 2018, which denied AHS's demand that ACERA conduct a further actuarial study and change ACERA's methodology for assigning responsibility for pension system unfunded liabilities from Percentage of Payroll to Percentage of Liability, and reconsider AHS's demand based on factors that are legally valid and not pretextual." (Pet. at 26, Prayer ¶ 1; see also *id.* ¶ 64.) They also seek a writ of mandate "commanding ACERA and its Board to conduct a further study to determine which employees and retirees are attributable to AHS and which are attributable to the COUNTY, in order to determine the actual liability attributable to AHS under the Percentage of Liability method." (*Id.*, Prayer ¶ 2; see also *id.* ¶ 65.) The second cause of action seeks declaratory relief as to the same issues. (*Id.* ¶¶ 69-73; Prayer ¶ 3 [seeking "a declaration that the ACERA and its Board abused their discretion and breached their statutory duties in making the decision dated January 18, 2018, in which ACERA denied AHS's demand for further actuarial study and that ACERA reconsider its methodology for assigning responsibility for pension system unfunded liabilities to Participating Employers from Percentage of Payroll to Percentage of Liability"].)

The fifth cause of action, for breach of the covenant of good faith and fair dealing, alleges that when ACERA became a participating employer in ACERA, it did so through the Master Contract entered into between the County and ACMC. (Pet. ¶ 96, citing *id.* ¶¶ 14-17.) It alleges that in 2007, ACMC

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[8] Petitioners' original petition was filed on August 7, 2019. Petitioners filed a First Amended Petition on August 8, 2019 and, after a February 28, 2020 order sustaining Respondents' demurrer in part, a Second Amended Verified Petition on July 27, 2020. The Third Amended Petition (adding Petitioner Stephens as a party) was filed by stipulation on April 8, 2021.

[9] On February 28, 2022, Petitioner filed a request for dismissal of its causes of action against the County. Among the dismissed causes of action was the third cause of action, which sought declaratory relief as to the County's responsibility for pre-separation liability. (Pet. ¶¶ 74-87.)

entered into an Inter-Agency Agreement with ACERA that constitutes a binding and valid contract between ACERA and AHS, and that in 2008, ACERA published a Participating Employer Handbook, which "expands upon the parties' responsibilities described in the Inter-Agency Agreement." (*Id.* ¶¶ 98, 101.) It alleges further that by refusing to reconsider AHS's request for a modification of the method for assessing unfunded pension liabilities, ACERA has "unfairly interfered with AHS's right to receive the benefits of the contract with ACERA." (*Id.* ¶ 104; see also *id.* ¶ 108 [same allegation as to Master Contract].) AHS alleges that as a result, it has been damaged "in an amount of at least $12.4 million attributable to the year ending December 31, 2014," as well as additional amounts including amounts attributable to other years. (*Id.* ¶ 110; see also Prayer ¶ 6.]

DISCUSSION

I. PETITIONERS FAIL TO SHOW THAT ACERA HAS VIOLATED AN ENFORCEABLE MINISTERIAL DUTY OR THAT IT HAS ABUSED ITS DISCRETION.

Petitioners' first cause of action for a writ of mandate, and the derivative second cause of action for declaratory relief, fail on at least two independent grounds. First, ACERA has no duty under its governing statute to adopt a particular actuarial methodology, such as the percentage of liability methodology that Petitioners advocate. Nor does it have any mandatory duty to conduct a further retrospective study, as Petitioners demand. Because Petitioners' claims seek to control the ACERA Board's exercise of discretion on those subjects, mandamus does not lie. Second, Petitioners have not shown that the Board's actions in continuing to apply the same actuarial methodology it has used for over 20 years to determine participating employers' contributions to the plan, or in declining to conduct a further study, were arbitrary or capricious, entirely lacking in evidentiary support, or that the Board failed to follow proper procedures or failed to give required legal notice. Accordingly, the ACERA Respondents are entitled to summary adjudication of the first and second causes of action.[10]

A. Standard of Review

Petitioners' first cause of action seeks review of Respondents' decisions under Code of Civil Procedure section 1085. A writ of mandate is an appropriate form of relief to compel the performance of

[10] Because these grounds are dispositive, the Court need not reach Respondents' alternative argument that Petitioners' claims are barred by the statutes of limitations and laches. (Memorandum, 31-32.)

a ministerial duty. (Code Civ. Proc. § 1085(a).) "A ministerial duty is one that is required to be performed in a prescribed manner under the mandate of legal authority without the exercise of discretion or judgment." (*Cape Concord Homeowners Ass'n v. City of Escondido* (2017) 7 Cal.App.5th 180, 189.) Thus, "[w]here a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion." (*Id.*) Conversely, "the writ will not lie to control discretion conferred upon a public officer or agency." (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491; accord, *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442 ["Mandamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner."]; *Pacific Bell v. California State and Consumer Services Agency* (1990) 225 Cal.App.3d 107, 118 ["Mandamus is an appropriate remedy to compel the exercise of discretion by a government officer, but does not lie to control the exercise of discretion unless under the facts, discretion can be exercised in only one way."].) "A mandatory duty is created only when an enactment requires an act that is clearly defined and not left to the public entity's discretion or judgment. Such an act is mandated only to the extent of the enactment's precise formulation. When the enactment leaves implementation to an exercise of discretion, 'lend[ing] itself to a normative or qualitative debate over whether [the duty] was adequately fulfilled,' an alleged failure in implementation will not give rise to liability." (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 350 (citations omitted); see also *Mooney v. Garcia* (2012) 207 Cal. App.4th 229, 233 ["Mandate will not issue if the duty is not plain or is *mixed with discretionary power* or the exercise of judgment. Even if mandatory language appears in the statute creating a duty, the duty is discretionary if the [entity] must exercise significant discretion to perform the duty. We examine the entire statutory scheme to determine whether the [entity] must exercise significant discretion to perform a duty."].)

Judicial review of Respondents' quasi-legislative actions is highly deferential. "Indeed, such nonadjudicatory acts are accorded the most deferential level of judicial scrutiny." (*Weinstein v. County of Los Angeles* (2015) 237 Cal.App.4th 944, 964 (citations and internal quotations omitted).) "In a mandamus action arising under Code of Civil Procedure section 1085, judicial review is limited to an examination of the proceedings before the agency to determine whether its actions have been arbitrary, or capricious, entirely lacking in evidentiary support or whether it failed to follow proper procedures or

failed to give notice as required by law. [¶] In determining whether evidentiary support is present in a traditional mandamus action, the applicable standard of review is the substantial evidence test. The court may not reweigh the evidence and must view the evidence in the light most favorable to the District's actions and indulge all reasonable inferences in support thereof." (*Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1988) 195 Cal.App.3d 1331, 1340 (citations omitted).) "A presumption exists that an administrative action was supported by substantial evidence. The burden is on the appellant to show there is no substantial evidence whatsoever to support the findings of the District." (*Id.* at 1341 (citations omitted).)

The record on which a court is to decide these issues is narrowly limited. "An unbroken line of cases holds that in traditional mandamus actions challenging quasi-legislative administrative decisions, evidence outside the administrative record (extra-record evidence) is not admissible." (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1269.) "Judicial review of quasi-legislative agency actions is generally confined to the record that was before the agency. This rule is consistent with substantial evidence review generally, and ensures that courts appropriately defer to the agency's expertise and its role as part of the separate and coequal executive branch." (*Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency* (2016) 1 Cal.App.5th 1084, 1103 (citations omitted).) In particular, "extra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 578; accord, *Outfitter ProperWildlife Conservation Bd.* (2012) 207 Cal.App.4th 237, 251.) Further, "[i]n an ordinary mandamus review of a legislative or quasi-legislative decision, courts decline to inquire into thought processes or motives, but evaluate the decision on its face because legislative discretion is not subject to judicial control and supervision." (*San Joaquin Local Agency Formation Comm. v. Superior Court* (2008) 162 Cal.App.4th 159, 171.) In light of these principles, many of the emails and other evidence of purported "back-channel communications" upon which Petitioners rely to show that ACERA acted as it did in order to benefit the County (e.g., Opposition, 16-18) are almost certainly inadmissible, and in any event do not establish any abuse of discretion. (See *Bandt v. Board of Retirement* (2006) 136 Cal.App.4th 140, 162 ["evidence of communications between

Board members and local officials and evidence of discussions regarding the proposed action to be taken by the Board prior to the meeting at which the action was formally adopted, does not establish that the action harmed members' interests."][11]

Although Respondents discuss these controlling standards at length in their opening papers (Memorandum, 22-23, 30), Petitioners ignore them. They are a critical factor distinguishing *O'Neal v. Stanislaus County Employees' Retirement Ass'n* (2017) 8 Cal.App.5th 1184, upon which Petitioners place such heavy reliance. That reliance is misplaced. *O'Neal* involved claims by members of a retirement association for breach of fiduciary duty, not a petition for writ of traditional mandate. (See *id.* at 1196-1197, 1215-1216.) Those claims were not subject to the writ of mandate standards set forth in this section, including the highly deferential standard governing judicial review of quasi-legislative actions. The distinction is a critical one. As *O'Neal* observed, "the determination whether a breach of fiduciary duty occurs under a particular set of facts is mainly for the trier of facts." (*Id.* at 1215; accord, *Marzec v. California Public Employees Retirement System* (2015) 236 Cal.App.4th 889, 915 [whether the defendant breached a fiduciary duty towards the plaintiff is a question of fact].)[12] In contrast, as discussed in the

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[11] Relying upon *County of San Diego v. Superior Court* (1986) 176 Cal.App.3d 1009, called into doubt on other grounds, *Santa Rosa Memorial Hospital, Inc. v. Kent* (2018) 25 Cal.App.5th 811, Petitioners assert that the deliberations and motives preceding agency action are discoverable in order to establish that the arbitrary and capricious standard under Code of Civil Procedure section 1085 is met. (Opposition, 20.) *County of San Diego*'s facts and holding, however, are to the contrary. The court held that "the public interest in maintaining confidentiality of the [county department of health services Proposal Review] Committee's deliberative process prohibits production of materials which would disclose the Committee's thought processes." (176 Cal.App.3d at 1015.) The court issued a writ of prohibition preventing enforcement of the trial court's order for production of the committee members' informal notes, and transcripts or memoranda of their deliberations. (*Id.*) In any event, the court suggested only that the plaintiff hospital "will be materially hindered in its attempt to make this showing [under section 1085] if it is denied access to the data and materials which the Committee used in making its evaluation." (*Id.* at 1025.) Such data and materials are contained in the minutes, resolutions and other administrative record documents of which Respondents have sought judicial notice.

[12] Indeed, *O'Neal* itself illustrates the significance of these standards. There, the defendant retirement association "implemented several changes to the actuarial calculations used to determine how to amortize unfunded liabilities within the system and chose to utilize so-called nonvaluation funds, money not used to ensure the overall system was actuarially sound, to reduce or replace required employer contributions." (8 Cal.App.5th at 1192.) The court first concluded that plaintiffs were not entitled to summary judgment, holding there was "no constitutional or statutory barrier to the underlying decision [by the board of retirement] to reduce or close nonvaluation reserve, excess-funds accounts and to use those funds to offset required employer contributions." (*Id.* at 1213; see also *id.* at 1214-15 [same conclusion as to negative amortization claim.]) Thus, had the plaintiffs sought a writ of mandate to compel the board to change or reconsider its decisions, as Petitioners do here, the standards discussed above would have required judgment in the retirement board's favor. (See *Bandt*, 136 Cal.App.4th at 145 [affirming denial of petition for writ of mandate where "there is no constitutional principle that prohibited the Board from recognizing the County's voluntary contribution to the pension fund through an interim valuation" and

next section, whether the agency had a ministerial duty capable of direct enforcement presents an issue of statutory interpretation, which is a question of law for the court. (*Carrancho*, 111 Cal.App.4th at 1266.) Petitioners' opposition to Respondents' motion for summary judgment, including their repeated argument that there are disputed issues of material fact bearing on the "motive for ACERA's conduct" (Opposition, 20), is fatally flawed by Petitioners' reliance on the wrong legal standards.[13]

B. ACERA Does Not Have A Mandatory Duty To Employ A Specific Actuarial Methodology Or To Conduct A Further Study.

Whether statutes "impose a ministerial duty, for which mandamus will lie, or a mere obligation to perform a discretionary function is a question of statutory interpretation." (*AIDS Healthcare Foundation v. Los Angeles County Department of Public Health* (2011) 197 Cal.App.4th 693, 701.) "We examine the language, function and apparent purpose of the statute." (*Id.* (citation and internal quotations omitted).) Here, CERL does not impose a ministerial duty on the Board to adopt a particular actuarial methodology, such as the percentage of liability methodology that Petitioners advocate. Nor does it require the Board to conduct a retrospective study utilizing that methodology, as Petitioners further demand. Rather, ACERA has discretion under the statute to select a particular actuarial methodology and to direct its actuaries to perform (or not to perform) such further studies, if any, that it wishes. Because Petitioner is improperly seeking to control the ACERA Board's exercise of discretion, mandamus does not lie.

Article XVI, section 17 of the California Constitution provides that "the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system." That authority encompasses "sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries." (*Id.* § 17(a); see also Gov. Code § 31520 ["the management of the retirement system is vested in the board of retirement"].) "The retirement board of a public pension or retirement system, consistent with the exclusive fiduciary responsibilities vested in it,

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Board's actions were within its discretion].)

[13] Although Petitioners assert that ACERA's fiduciary duties are "implicated" here (Opposition, 21), as Petitioners' counsel conceded at the hearing, the Third Amended Petition for Writ of Mandate does not seek to state a separate cause of action for breach of fiduciary duty. (See, e.g., *Schmidt v. Citibank, NA* (2018) 28 Cal.App.5th 1109, 1117 fn. 6 ["Courts must decline to consider a theory raised by a plaintiff in opposition to summary judgment if the argument is not supported by the pleadings: 'The materiality of a disputed fact is measured by the pleadings . . . .'" (citation omitted)].)

shall have the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system." (Cal. Const., art. XVI, § 17(e).) Given the breadth of the fiduciary duties imposed on ACERA by section 17, that provision "necessarily vests the board with discretion in the manner in which it fulfills those duties." (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 342.)

"CERL governs the pension systems maintained by many of the state's counties. Each county system is administered by its own retirement board, which is tasked with implementing CERL's provisions." (*Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* (2020) 9 Cal.5th 1032, 1052.) "Both the county and its employees must make regular contributions to their plan's pension fund in amounts determined by the county's board of supervisors, upon recommendation of the retirement board." (*Id.* at 1056, citing Gov. Code §§ 31453, 31453.5, 31454, 31621.) The level of funding is based on actuarial valuations. In particular, CERL requires that each actuary for the retirement system conduct a formal actuarial valuation "within one year after the date on which any system . . . becomes effective, and thereafter at intervals not to exceed three years." (§ 31453; see also § 31454 [board of supervisors shall annually adjust the rates of interest, the rates of contributions of members, and county and district appropriations].) "The actuary is therefore required to conduct a new valuation of the retirement system at least every three years and determine the extent to which prior assumptions must be changed." (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 459-460.) "The valuation shall be conducted under the supervision of an actuary and shall cover the mortality, service, and compensation experience of the members and beneficiaries, and shall evaluate the assets and liabilities of the retirement fund." (§ 31453(a).) Recently, the Legislature expressly affirmed that county retirement association boards have "plenary authority to recommend adjustments to county and district contributions as necessary to ensure the appropriate funding of the system, and with respect to the mandate of Section 31454 that the county and districts adjust the rates of contributions of members and appropriations in accordance with the board's recommendations." (§ 31454.7 (eff. Jan. 1, 2021).)

Critically, nothing in article XVI, section 17 or CERL mandates the particular method or approach that the actuary should employ when conducting the required valuation. Thus, as the Attorney General has concluded with respect to the California Public Employees Retirement System (CalPERS), "[a]s long

as an actuarial method is reasonable and not arbitrary or irrational, it may be applied even though other approaches may be equally correct or even more precise or better." (89 Ops.Cal.Atty.Gen. 270, at *5 (citations and internal quotations omitted); see also *Mijares*, 32 Cal.App.5th at 329 ["the board may determine an employer's contribution using a different methodology" than the one set forth in § 31453.5]; *County of Orange,* 192 Cal.App.4th at 35 [same].) Because CERL does not impose any mandatory duty on ACERA to utilize a particular valuation methodology, Petitioners' demand that it utilize a percentage of liability approach to determine AHS's and other participating employers' contributions fails as a matter of law.

A case cited by Petitioners (Opposition, 22) squarely supports Respondents' position in this regard. In *California Assn. for Health Services at Home v. State Dept. of Health Services* (2012) 204 Cal.App.4th 676 (*CAHS*), petitioners sought a writ of mandate to compel the State Department of Health Services to consider provider costs in conducting an annual review of Medi-Cal reimbursement rates paid to providers of home health care agency services for certain years. The court held in pertinent part that the department was not required to consider provider costs or to employ any particular methodology in performing its rate review, noting that the applicable provision of the federal Medicaid Act "does not require states to utilize any particular methodology in setting reimbursement rates" or to consider provider costs in performing its rate review. (*Id.* at 684.) "In sum, we find that consideration of provider costs is not mandated; within the Department's discretion, provider costs may be considered or not, so long as its process of decision-making is not arbitrary or capricious." (*Id.* at 685-686 (footnote omitted).)[14] So, too,

[14] In contrast, in an earlier case relied upon by Petitioners (Opposition, 22-23), the court held that issuance of a writ of mandate was warranted where the Department of Health Care Services had "violated state and federal law." (*California Hospital Assn. v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 564 (*CHA*).) The court, following Ninth Circuit authority, held that the Department had violated section 30(A) of the Medicaid Act by imposing two separate limitations on the reimbursement rates for skilled nursing services rendered by certain hospital facilities to Medi-Cal beneficiaries by failing to rely on reliable cost data and to consider certain statutory factors, but instead acting for purely budgetary reasons. (*Id.* at 573-580.) The continued viability of the case's holding is dubious in light of subsequent authority. (See *CAHS*, 204 Cal.App.4th at 684 fn. 3 [disagreeing with *CHA*]; *Santa Rosa Memorial Hospital, Inc.*, 25 Cal.App.5th at 814, 820 [holding that "health care providers alleging a violation of [section 30(A)] may not obtain a writ of mandate against state officials to contest Medicaid rates approved by the federal agency that administers the program," declining to follow *CHA* and *CAHS* on the ground that they predated a United States Supreme Court decision finding no right to equitable relief under section 30(A)]; see also *Independent Living Center of Southern California, Inc. v. Kent* (9th Cir. 2018) 909 F.3d 272, 281 ["a recent California appellate court decision called into question the future viability of using § 1085 Writs to enforce Section 30(A) violations."].)

here: nothing in CERL requires ACERA to utilize any particular methodology in conducting actuarial reviews or in allocating UAAL among participating employers. The choice of methodology is within ACERA's discretion, and may not be controlled by writ.

O.W.L. Foundation v. City of Rohnert Park (2008) 168 Cal.App.4th 568, which the *CAHS* court cited, is similarly instructive. There, the defendant city public water system was required by the Water Code to prepare a water supply assessment (WSA) to analyze whether water supplies, including groundwater supplies, would be sufficient to meet the projected demand associated with certain proposed development projects. The trial court granted a writ of mandate requiring the city to set aside its resolution adopting the WSA, reasoning that the city had erred by failing to assess water demands and projected pumping by all others taking water from the same groundwater basin. The court reversed, emphasizing that "the relevant statute does not specify a particular methodology for a sufficiency analysis and in that respect affords the water supplier substantial discretion in determining how to measure groundwater sufficiency." (*Id.* at 574.) Stressing the deferential abuse of discretion standard governing judicial review under section 1085 (*id.* at 585-586), the court concluded that because the Water Code did not dictate the method to be used by the city, the trial court erred:

> [The Water Code] does not prescribe a particular analytical method for assessing groundwater sufficiency. The statute thus affords substantial discretion to the water supplier and its experts to select a methodology appropriate for assessing groundwater sufficiency for a proposed project. Furthermore, in our role as a reviewing court, we may not engage in a comparative analysis of methodologies employed by different experts. In technical matters requiring the assistance of experts and the use and interpretation of scientific data, we give substantial discretion to administrative agencies. Our task is limited to determining whether the agency action is arbitrary, capricious, or entirely lacking in evidentiary support. Thus, we decline [petitioner's] invitation to compare the methodology employed in the WSA with methodologies employed in earlier studies . . . . It is not for this Court to weigh the relative merits of different studies that have been performed in the Santa Rosa Valley Groundwater Basin.

(*Id.* at 592-593 (citations omitted).) While a local water supplier's "discretion to make technical and practical determinations about the appropriate geographical area to support a WSA" is "not boundless," it is subject to review only to the extent "the water supplier's decision to adopt a WSA is arbitrary, capricious, or entirely lacking in evidentiary support." (*Id.* at 594.) The court went on to find that the WSA complied with the requirements of the Water Code because there was "plainly a rational reason for choosing the particular study area used in assessing groundwater sufficiency for the WSA. [Petitioner]

may debate the relative merits of using the watershed area as the study area, but the fact remains that the choice of study area was not arbitrary, capricious, or completely lacking in evidentiary support." (*Id.* at 596.)

Again, the same conclusion follows here, for the same reasons: CERL does not prescribe a particular methodology to be employed by ACERA in its actuarial valuations, and thus it affords substantial discretion to the retirement association and its actuary to select an appropriate methodology for allocating responsibility for pension system unfunded liabilities among participating employers. Further, ACERA plainly had a rational basis for selecting the percentage of payroll valuation methodology, which is widely used by almost all county retirement associations and by most local government defined benefit pension plans throughout the country. Petitioners do not dispute that the percentage of payroll approach ACERA's actuary employed to determine the respective contributions of AHS and other participating employers is a common and well-accepted methodology. (See, e.g., *Mijares*, 32 Cal.App.5th at 321 [county retirement system set contribution rates for each of participating employers, applying percentage of payroll methodology for normal contribution rate].) Indeed, they admit that this methodology is the same one that ACERA's actuary has consistently employed since at 1948, and that AHS did not object to that approach until 2015 at the earliest. Petitioners' repeated contention that its favored methodology, the percentage of liability method, is superior or "fairer," or that one or two other retirement associations have recently adopted a different approach, cannot establish that ACERA abused its discretion when it declined to reconsider its decision to continue to employ the percentage of payroll methodology. Thus, while Petitioners "may debate the relative merits" of the competing approaches, "the fact remains that the choice of [valuation methodology] was not arbitrary, capricious, or completely lacking in evidentiary support." (*Id.*) Petitioners' contention that the ACERA Board abused its discretion when it declined to order the actuary to employ Petitioners' favored percentage of liability approach is meritless.

The same conclusion follows as to Petitioners' demand that Respondents conduct a further retrospective actuarial study utilizing the percentage of liability method. Petitioners seek issuance of a writ of mandate "commanding ACERA and its Board to conduct a further study to determine which employees and retirees are attributable to AHS and which are attributable to the COUNTY, in order to determine the actual liability attributable to AHS under the Percentage of Liability method." But because

ACERA has no ministerial duty under CERL or the California Constitution to utilize any particular valuation methodology, it necessarily follows that neither does it have any such duty to conduct a retrospective study utilizing Petitioners' preferred approach.[15] It is entirely within the Board's discretion whether or not to conduct a further study, and mandate does not lie to control that exercise of discretion. "It is the general rule that mandamus does not lie to compel a public administrative agency possessing discretionary power to act in a particular manner." (*Mahdavi v. Fair Employment Practice Com.* (1977) 67 Cal.App.3d 326, 337-338 [trial court properly denied petition for writ of mandate seeking to compel respondent commission to make "genuine" investigation of petitioner's complaint of employment discrimination; "While a more complete investigation was possible, the commission's decision to close the case on the facts found is well within its discretion."].)[16]

C. **Petitioners Fail to Show That ACERA's Decisions Were Arbitrary Or Capricious.**

Petitioners conceded at the hearing that boards of retirement have a great deal of discretion in carrying out their duties. They contend, however, that Respondents abused their discretion in two respects. First, they contend that ACERA and its Board are "dominated and influenced by the COUNTY to the extent that ACERA is not acting in a manner that is fair and equitable to all Participating Employers, but rather in a manner consistent with COUNTY objectives and discriminatory toward AHS." (Pet. ¶ 55; see also *id.* ¶¶ 62, 63 [alleging that ACERA has acted "in order to benefit the COUNTY at the expense of AHS"].) Second, they take issue with the reasons given by ACERA for declining to conduct a further actuarial study, asserting they are "pretextual or are without statutory authority." (Pet. ¶ 52; see also *id.* ¶ 61 [asserting that Respondents have abused their discretion "by the invocation of rationales that are pretextual, that are based on favoritism of one Participating Employer over the other, or that are not grounded in law"].) For at least two reasons, however, neither argument establishes a cognizable abuse of discretion that could warrant issuance of a writ of mandate.

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[15] Although neither party raises the issue, it appears to the Court that recently-enacted section 31454.7 would preclude the retrospective adjustment of UAAL dating to 2002 that Petitioners seek. (§ 31454.7 ["Under all circumstances, the county and districts shall each remain liable to the retirement system for their respective share of any unfunded actuarial liability of the system, as determined by the board."].)

[16] Moreover, as the Board observed, such a study would be of limited if any utility, given the parties' disagreement regarding whether AHS or the County is responsible for pre-separation liability. As noted, Petitioners voluntarily dismissed their cause of action against the County seeking declaratory relief as to that issue. (See footnote 9, *supra.*)

First, Petitioners' complaint that the ACERA Board is "dominated" by the County is feckless. As required by law, the County appoints or holds the majority of seats on the ACERA Board. Under CERL, a county board of retirement shall consist of nine members and one or more alternates, one of whom shall be the county treasurer. (§ 31520.1(a); see also *id.* § 31520.13.) Four members shall be qualified electors of the county who are not connected with the county government in any capacity, except one may be a supervisor, and shall be appointed by the board of supervisors. (*Id.*; see also Nelsen Decl. ¶ 7.) The remaining four members are elected by active general and safety members of ACERA, as are the alternates. (*Id.*) Thus, CERL mandates that a majority of ACERA's Board's voting members must be appointed by the County Board of Supervisors, and the Board must include the County Treasurer. That the County "dominates" ACERA's Board therefore is inherent in the statutory structure itself. (See *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1096-1096 [CERL's provisions reflect a model of decisionmaking mandating a decisional body composed of "a blend of individuals, each with a clear stake in many decisions, with the belief that through the representation of all stakeholders, fair and wise decisions will . . . emerge"].) It cannot possibly constitute an abuse of discretion that the statutorily-mandated composition of the Board results in majority representation by the County, nor that the Board's members take into account the interests of the County, which after all is also a participating employer.[17]

Second, Petitioners' attacks on ACERA's motives in declining to comply with their demands to change the valuation methodology and to conduct a further actuarial study, and on the supposedly "pretextual" reasons given by ACERA for declining to do so, are foreclosed by long-established restrictions on the scope of judicial review in traditional mandamus actions. "An unbroken line of cases holds that, in traditional mandamus actions challenging quasi-legislative administrative decisions, evidence outside the administrative record (extra-record evidence) is not admissible." (*San Joaquin Local Agency Formation Commission,* 162 Cal.App.4th at 167, quoting *Carrancho,* 111 Cal.App.4th at 1269; see also *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576.) Consistent with that general rule, "[i]n an ordinary mandamus review of a legislative or quasi-legislative decision, courts decline to inquire into thought processes or motives, but evaluate the decision on its face because

[17]Regardless, the Board vote to deny AHS's request for a further actuarial study and to direct ACERA's actuary to change ACERA's long-standing actuarial methodology was unanimous (8-0).

legislative discretion is not subject to judicial control and supervision." (*Id.* at 171; see also *Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1305 ["In general, due to separation of powers considerations, [t]he judiciary confines evaluation of a statute to the terms of the legislation itself and will eschew inquiry into what motivated or influenced those who voted on the legislation. It is not possible to establish an objective standard for a party to prove or for a court to review whether legislators followed a certain thought process or acted according to certain motives." (citing *Board of Supervisors v. Superior Court* (1995) 32 Cal.App.4th 1616, 1623, 1628)].)[18]

San Joaquin Local Agency Formation Commission is instructive. There, an irrigation district unsuccessfully sought approval of a local agency formation commission to provide retail electric service. During the proceedings on the application, several commissioners and other speakers had expressed concern about the possible use of eminent domain; at the hearing, counsel to the LAFCO advised the commissioners they were not to consider the issue because the LAFCO did not have jurisdiction to condition approval on the exercise or nonexercise of eminent domain. (*Id.* at 164.) The district sought a writ of administrative mandamus, claiming the LAFCO's decision was a prejudicial abuse of discretion that was not supported by substantial evidence, and sought to take the depositions of the commissioners to learn what extra-record information they had when they denied the application and what additional information they needed to approve the application. The trial court allowed the requested discovery, but the Court of Appeal issued a peremptory writ, holding that the applicant was not entitled to take the commissioners' depositions under the applicable standard governing judicial review in traditional mandamus actions challenging quasi-legislative administrative decisions. (*Id.* at 167-168.) Exactly as Petitioners contend here, the applicant argued that the reasons set forth in the commission's resolution denying the application were "pretextual." (*Id.* at 170 fn. 3.) The district also contended that that an exception to the rule that extra-record evidence is inadmissible applied because the commissioners were influenced by their bias against the exercise of eminent domain, thereby establishing agency misconduct. (*Id.* at 169-170.) The court was unpersuaded: "While the issue of eminent domain was mentioned, all of the commissioners voting against the Application cited a legitimate reason—the lack of information—as

[18] While there may be certain narrow exceptions to this general rule (*Western States Petroleum Assn.*, 9 Cal.4th at 575 fn. 5, 578-579), Petitioners do not show that any of those exceptions applies here.

the reason for their vote." (Id. at 170 (footnote omitted).) Nor, finally, could the district obtain the information "by casting it as an inquiry into procedural irregularities." (*Id.* at 171.) In short, "[t]he discovery order requires the deponents to provide information that is not admissible . . . because it is extra-record evidence and is privileged because it goes to the decision making process of the commissioners." (*Id.* at 172.) Permitting such discovery therefore was an abuse of discretion. (*Id.*)

Exactly the same conclusion follows here. Under the governing traditional mandamus rules, Petitioners' contention that ACERA abused its discretion because the members of its Board purportedly sought to advance the County's interests ahead of AHS's, or were acting out of improper "motives," is groundless. Just as in *San Joaquin Local Agency Formation Commission*, nothing in the text of the Board's January 8, 2018 decision, or in the minutes or transcript of that meeting, suggests that the Board members violated their fiduciary duty to members of ACERA or abused their discretion in any way. To the contrary, the record establishes, and the Court finds, that ACERA "adequately considered all relevant factors, and . . . demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." (*CAHS*, 204 Cal.App.4th at 686.) The minutes of the Board's January 18, 2018 meeting, Chief Executive Officer Nelsen's detailed memorandum to the Board in connection with that meeting, the extensive record of the parties' meetings and correspondence, and Actuary Yeung's exhaustive discussion of the factual background to the issues and the rationale for the actuarial decisions made by ACERA on his recommendation, all demonstrate serious consideration by the Board of Petitioners' requests. The Court further finds that there is substantial evidence in the record to support the Board's decision.

II. PETITIONERS' BREACH OF IMPLIED COVENANT CLAIM FAILS.

Petitioners' final claim is for breach of the implied covenant of good faith and fair dealing. Respondents are also entitled to summary adjudication of that claim, on two independent grounds: (1) AHS does not have an enforceable contract with ACERA that could serve as a basis for that claim; and (2) even if it did, Petitioners' claim improperly seeks to vary the express terms of that agreement.

"Every contract imposes on each party an implied duty of good faith and fair dealing. Simply stated, the burden imposed is that neither party will do anything which will injure the right of the other to

receive the benefits of the agreement. Or, to put it another way, the implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose." (*Chateau Chamberay HOA v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 345 (citations and quotations omitted).) "However, the implied covenant will only be recognized to further the contract's purpose; it will not be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself. This principle is consistent with the general rule that implied terms cannot vary the express terms of a contract; if the defendant did what is expressly given the right to do, there can be no breach. Thus, although it has been said the implied covenant finds particular application in situations where one party is invested with a discretionary power affecting the rights of another, if the express purpose of the contract is to grant unfettered discretion, and the contract is otherwise supported by adequate consideration, then the conduct is, by definition, within the reasonable expectation of the parties and can never violate an implied covenant of good faith and fair dealing." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1120-1121 (citations and quotations omitted).)

The first ground is elementary: "The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. . . . There is no obligation to deal fairly or in good faith absent an existing contract." (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032 (citations omitted).) That is because the covenant is implied "as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." (*Id.* (citations and quotations omitted).) Here, the contract upon which Petitioners rely is the Inter-Agency Agreement entered into in 2007 between ACMC (AHS's predecessor) and ACERA. (Compendium Tab 28.)[19] As that document reflects on its face, however, it expired three years later, on June 29, 2010. (*Id.* at 1 ["The term of this Agreement shall commence on the date set forth below (page 13) and continue for three years."].) Petitioners' contention that the Inter-Agency Agreement

[19] Petitioners' fifth cause of action also refers to the Master Contract entered into between the County and ACMC in 1998. (Pet. ¶¶ 96, 108.) In their opposition brief, however, Petitioners have abandoned any reliance on that contract, which they admit "did not specifically address the allocation of UAAL that may arise in the future." (Opposition, 4 fn. 3.) Petitioners do not genuinely contest Respondents' showing that AHS participates in ACERA by statute, not contract.

remained in effect as a result of the parties' subsequent conduct, such as references to it in handbooks or other documents (Opposition, 24), is groundless. By its express terms, the Inter-Agency Agreement "comprise[d] the entire contract between ACMC and ACERA," and "[a]ny waiver, modification or amendment of any provision of this Agreement will be effective only if in writing and signed by both parties." (Compendium Tab 28, at 1.) As Petitioners do not contend that the parties ever agreed in writing to extend the term of the Inter-Agency Agreement, their contention that it was somehow extended or renewed by the parties' conduct lacks merit. (See *Santa Clara Waste Water Co. v. Allied World National Assurance Co.* (2017) 18 Cal.App.5th 881, 889 [relief is available under an implied contract only "if the material terms do not conflict with the express contract"].)[20]

Second, even if the Inter-Agency Agreement had remained in effect as a result of continued performance, it left entirely to ACERA's discretion the selection of actuarial methodologies and the conduct of additional studies, and Petitioners' implied covenant claim would improperly vary the terms of that Agreement to limit or eliminate that discretion. The stated purpose of the Inter-Agency Agreement was to enable the parties to "meet their respective responsibilities in a timely fashion." (Compendium Tab 28, at 1.) While that agreement generally describes the annual actuarial valuation and review process resulting in ACERA setting employee and employer contribution rates (*id.* at 4-5), the only provision addressing members and participating employers' involvement in that process is a general provision which states as follows:

> The actuary submits a draft report of the valuation findings to ACERA prior to its final report and will be open to suggested changes in the draft report as proposed by ACERA or employers.
>
> The draft report is presented in an open meeting and the actuary will receive comments from employers and the public. Ultimately the Board will adopt the relevant assumptions as recommended by the actuary and commented on by the interested parties. ACMC is invited to participate in the actuarial process.

(*Id.* at 4.)[21] The Inter-Agency Agreement is silent as to the actuary's selection of valuation methodology,

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[20] Petitioners' authorities (Opposition, 23-24) are not to the contrary. (E.g., *Innovative Business Partnerships, Inc. v. Inland Counties Regional Center, Inc.* (2011) 194 Cal.App.4th 623, 630-631 [triable issues of fact existed as to plaintiff's cause of action for breach of contract, despite termination of written contract between the parties, where it was undisputed that plaintiff continued to provide service for which defendant was obligated by regulations to pay at standardized rates].)

[21] The record is undisputed that ACERA complied with these provisions: each year, its actuary submitted a draft report; presented that report in an open meeting; and received comments from the public and the public, including AHS. (See UMF 9-10.)

the allocation of UAAL among participating employers, or the conduct of additional studies at the request of members or participating employers. As set forth above, ACERA has plenary authority and retains discretion under CERL and the California Constitution, the terms of which are necessarily incorporated into the Agreement, as to those matters. As such, Petitioners' implied covenant claim improperly seeks to vary the terms of the Agreement. Accordingly, Petitioners' implied covenant claim fails as a matter of law.

CONCLUSION AND ORDER

For the foregoing reasons, the ACERA Respondents' motion for summary judgment is granted.

IT IS SO ORDERED.

Dated: May 2, 2022

ETHAN P. SCHULMAN
Judge of the Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.251)

I, Ericka Larnauti, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On May 3, 2022, I electronically served the attached document via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: May 3, 2022

T. Michael Yuen, Clerk

By: _____
Ericka Larnauti, Deputy Clerk