Daphne M. Anneet, (SBN 175414)
E-mail: danneet@bwslaw.com
Timothy L. Davis, (SBN 181532)
E-mail: tdavis@bwslaw.com
BURKE, WILLIAMS & SORENSEN, LLP
444 South Flower Street, Suite 2400
Los Angeles, CA 90017
Tel: (213) 236-0600 Fax: (213) 236-2700

Attorneys for Petitioner and Plaintiff
CITY OF SAN DIEGO

FILING FEE EXEMPT PURSUANT TO GOVERNMENT CODE § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

CITY OF SAN DIEGO,

Petitioner and Plaintiff,

v.

SAN DIEGO POLICE OFFICERS ASSOCIATION INCORPORATED, DOES 1 through 100,

Respondent and Defendant.

Case No. 37-2009-00086499-CU-PT-CTL

Action Filed: April 1, 2009

Assigned to Hon. David B. Oberholtzer, Dept. C-67

THE CITY OF SAN DIEGO'S OPPOSITION TO SDPOA'S APPLICATION FOR PRELIMINARY INJUNCTION

Hearing Date: June 25, 2009
Time: 10:00 a.m.
Dept. C-67

[Filed Concurrently Herewith: (1) Opposition to Cross-Petition; (2) Supplemental Notice of Lodgment; (3) Supplemental Declaration of Woo-Jin Shim; (4) Supplemental Declaration of Daphne M. Anneet; (5) Supplemental Request for Judicial Notice; (6) Supplemental Appendix of Federal Authority; and (7) Objections to SDPOA's Evidence]

Petitioner and Plaintiff City of San Diego ("the City") hereby submits its Opposition to the San Diego Police Officers Association Incorporated ("SDPOA") Application for Preliminary Injunction.

I. PRELIMINARY STATEMENT

The City of San Diego (the "City") is grappling with financial difficulties in the wake of a worldwide recession coupled with an underfunded public employee retirement plan, administered by the San Diego Employees' Retirement System ("SDCERS"). To meet these challenges, the City has carefully considered and implemented a number of belt-tightening measures, which have included seeking concessions from its unions for benefit adjustments. During the negotiations for Fiscal Year 2010, the City identified the elimination of a benefit known as the Deferred Retirement Option Program (DROP) as a key priority. Although DROP was intended to be cost neutral, preliminary reviews of the program revealed its elimination would result in significant cost savings. Changes to the DROP interest rate and DROP entry age were also identified as important modifications that could be implemented immediately.

The City presented its DROP proposals during contract negotiations with the SDPOA that took place over several months in early 2009. However, SDPOA consistently refused to meet and confer with the City regarding the DROP proposals. After bargaining to impasse, the City, pursuant to its authority under the Meyers-Milias Brown Act ("MMBA") and the City's Local Rules, imposed the terms of the last, best and final offer ("LBFO"). On April 1, 2009, the City filed its Petition for Writ of Mandate to confirm the validity of the City's action and to require SDPOA to return to the table.

On June 1, 2009, the SDPOA responded by filing its own Cross-Petition and Motion for Preliminary Injunction. SDPOA's Cross-petition and this Preliminary Injunction Motion are thinly disguised attempts to achieve bargaining objectives, namely, a better contract than it was able to negotiate previously, in complete disregard for the City's financial crisis and the impact its actions could have on the public. SDPOA seeks a preliminary injunction to bar the City from instituting two changes to DROP when the LBFO becomes effective on July 1, 2009: (1) crediting interest to the SDPOA member's DROP account at a rate determined by the Retirement Board of the San Diego City Employees Retirement System ("SDCERS")(DROP interest rate"); and, (2) increasing the age for SDPOA's eligibility for DROP from 50 to 55 ("DROP entry age"). This request should be denied.

II. SUMMARY OF ARGUMENT

SDPOA cannot establish the most fundamental element – the likelihood of prevailing on the merits. As detailed in the City's Opening Brief on its Petition, and below, SDPOA's efforts to invalidate the terms of the LBFO are without merit. None of the terms of the LBFO impact protected contractual rights, flowing from either the Memorandum of Understandings ("MOUs") reached between the City and the SDPOA or the Contracts Clause of the federal and state constitution.

SDPOA's attempt to thwart the City's reform efforts by invoking the Charter is even further misplaced. The voting provisions set forth in Charter, Article IX, section 143.1(a) do not apply to the imposition of the DROP entry age and DROP interest rate because DROP was never duly enacted and the ordinance creating DROP never took effect under the Charter or its own terms. And even if DROP were duly enacted no vote is required in order for the LBFO to take effect because imposition of the terms does not require an "ordinance" affecting a "benefit" under the retirement system.

SDPOA likewise cannot demonstrate that irreparable injury would result in the absence of preliminary injunctive relief. First, its claim of "harm" is unsubstantiated by the proffered declarations of a handful of officers, which offer no financial evidence of harm and are based on sheer supposition. Second, SDPOA's purported harm cannot compare to the significant public interest that will be impaired by the requested relief and the balance of hardships that weigh heavily against the granting of a preliminary injunction. The City and its citizens should be entitled to manage this fiscal crisis and employ a sound political solution without being forced to treat one union with favoritism. Finally, and quite significantly, multiple remedies exist which could compensate affected SDPOA Members for any purported harm if the DROP changes are implemented on July 1, 2009. Accordingly, SDPOA's request for a preliminary injunction should be denied.

III. FACTUAL STATEMENT

Because the hearing on the motion for preliminary injunction is being held concurrently with the hearing on the City's Petition and the SDPOA's Cross-Petition, the City does not repeat

the factual statements set forth in the City's Opening Brief on the Petition and the City's Opposition to the SDPOA's Cross-Petition. Rather, the City respectfully requests that the Court incorporate the factual statements contained in those pleadings here.

IV. SDPOA HAS FAILED TO MEET ITS BURDEN OF PROOF TO WARRANT A PRELIMINARY INJUNCTION TO BAR CHANGES TO THE DROP PROGRAM BEFORE JULY 1, 2009

A. Legal Standard

A preliminary injunction is an extraordinary remedy to be granted only in circumstances where the necessity of immediate relief is clear. The court must evaluate two interrelated factors when evaluating SDPOA's preliminary injunction request: (1) the likelihood that SDPOA will succeed on the merits, and (2) the interim harm SDPOA will sustain if the injunction is denied as compared to the harm the City will likely suffer if the court grants a preliminary injunction. *King v. Meese* (1987) 43 Cal.3d 1217, 1226. The court must be guided by a mix of these potential-merit and interim-harm factors. *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1463. Thus, the less certain the court is of SDPOA's success on the merits, the more SDPOA must convince the court that the balance of hardship tips in its favor.

No preliminary injunction may be granted, regardless of the balance of interim harm, if there is no possibility that SDPOA will ultimately prevail on the merits. *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 446-447. Denial of the injunction is appropriate under such circumstances because a court should not delay injury, even if irreparable, that is inevitable. *Jessen v Keystone Savings & Loan Ass'n.* (1983) 142 Cal.App.3d 454, 459. A preliminary injunction cannot be granted unless there is a real threat of immediate, irreparable interim harm. *Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415, 431.

In reviewing this relief sought against the City, the court "must also bear in mind the extent to which separation of powers principles may affect the propriety of injunctive relief against state officials. In that context, our Supreme Court has emphasized that 'principles of comity and separation of powers place significant restraints on courts' authority to order or ratify acts normally committed to the discretion of other branches or officials. [Citations.] In particular

the separation of powers doctrine (Cal. Const., art. III, §3) obligates the judiciary to respect the separate roles of the Executive and Legislative Branch." *O'Connell*, 141 Cal.App.4th at 1464; *see also White v. Davis* (2003) 30 Cal.4th 528, 557-558.

B. SDPOA Has Not Shown and Cannot Show a Clear Likelihood of Success on the Merits of Its Claims

1. SDPOA Cannot Establish the LBFO Impairs Vested Contractual Pension Benefits

SDPOA seeks to invalidate the terms of the LBFO changing the DROP interest rate and DROP entry age. To do so, SDPOA must establish that the LBFO constitutes an unlawful impairment of the SDPOA members' rights. SDPOA asserts the LBFO terms impair the SDPOA member's rights under the memorandum of understanding and the Contracts Clause of the federal and state constitutions because DROP entry age and DROP interest rate are vested contractual pension rights. However, as set forth in detail in the City's Opening Brief in support of the City's Writ, filed on June 18, 2009, as well as the City's Opposition to SDPOA's Cross-Petition, filed concurrently with this Opposition, SDPOA has not and cannot establish a basis to invalidate the City's imposition of the LBFO.[1]

Neither the DROP entry age nor the DROP interest rate impair contractual rights. Although certain pension benefits may give rise to contractual rights entitled to constitutional protection, as a general rule, terms and conditions of public employment are governed by statute, not contract. *Miller v. State of California* (1977) 18 Cal.3d 808; *San Bernardino Public Employees Ass'n v. City of Fontana* (1998) 67 Cal.App.4th 1215; *Vielehr v. State of California*, (1980) 104 Cal.App.3d 392, 397; *San Diego Police Officers Association v. San Diego City Employees' Retirement System, et al.*, __F.3d __, 2009 WL 1607904 (C.A. 9 (Cal.)). As detailed in the City's substantive briefing, the DROP entry age and DROP interest rate are just such statutory rights, which do not create contractual rights protected by the Contracts Clause in the absence of an unmistakable intent by the City to be contractually bound. *International Ass'n of*

[1] Rather than repeat the arguments asserted in the City's Opening Brief and City's Opposition to the Cross-Petition, the City respectfully incorporates the arguments asserted in those pleadings here.

Fire Fighters, Local 145 v. City of San Diego (1983) 34 Cal.3d 292; *National RR Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*(1985) 470 U.S. 451.

The overwhelming weight of the evidence supports the City's position that DROP entry age and DROP interest rate are terms and conditions of employment, not vested contractual benefits. Initially, the right to participate in DROP does not arise until the SDPOA member reaches retirement age, making the right to participate in DROP a form of longevity benefit that hinges on the SDPOA member remaining in City employment. Since it is well-established a public employee has no vested right to continued employment, an SDPOA member can acquire no vested right to participate DROP. *Miller*, 18 Cal. 3d at 815-817; *San Diego Police Officers Association,* at *8-9. With no immediate vested interest in DROP, the SDPOA member can acquire no vested interest in a electing DROP at a specific age, or receiving a specific interest rate at some point in the future. *Id.*

Additionally, the Municipal Code provisions, the DROP manual, SDCERS publications, and, even the MOU set forth the numerous contingencies that must be satisfied before an SDPOA member is eligible to participate in DROP, including the important requirement that the SDPOA member be an active employee. (*See* City's Opposition to Cross-Petition, page 13, line 14- page 14, line 23; City's Opening Brief on the Writ, page 4, line 12 – page 6, lines 1-15; page 16, lines 24- page 20, lines 103, and the evidence cited therewith.)

As discussed in the City's Opening Brief on the merits, on June 10, 2009, the Ninth Circuit Court of Appeal, after reviewing a substantially similar evidentiary record, ruled the DROP salary is an employment benefit, not a vested pension right. The decision should be given preclusive effect as both the holding and rationale apply with equal force in the present case. *See San Diego Police Officers Association,* at *7-9.

2. SDPOA Cannot Establish Section 143.1(a) of the Charter Requires the Terms of the LBFO Be Presented For Vote

SDPOA also cannot establish a clear likelihood of success on the merits of SDPOA's position that the LBFO terms may not be modified until after they are presented for a vote of all members under Section 143.1(a) of the City Charter. As set forth fully in the City's Opposition to

the Cross-Petition, the voting provisions set forth in 143.1(a) do not apply to the imposition of the DROP entry age and DROP interest rate because DROP was never duly enacted and the ordinance creating DROP never took effect under the Charter or its own terms.[2] And, finally, even if DROP were duly enacted no vote is required in order for the LBFO to take effect: (1) a decision of the Board to change the amount of interest credited to DROP accounts is not an ordinance affecting the benefits of employees that is subject to a vote under Section 143.1(a);[3] and (2) the DROP entry age is a condition of eligibility, not a benefit under system, subject to Section 144 of Article IX, not Article 143.1(a).[4]

3. An Injunction Should Not Issue To Prevent The Imposition of the LBFO

A settled principle of equity jurisprudence prohibits the granting of injunctive relief "[t]o prevent the execution of a public statute by officers of the law for the public benefit." (Code Civ. Proc., § 526, 2d subd. 4; Civ. Code, § 3423, subd. Fourth.) That rule is here applicable, inasmuch as a regulation adopted by a state administrative agency pursuant to a delegation of rulemaking authority by the Legislature has the force and effect of a statute. *Zumwalt v. Trustees of Cal. State Colleges* (1973) 33 Cal.App.3d 665, 675 [109 Cal.Rptr. 344]; *Alta-Dena Dairy v. County of San Diego* (1969) 271 Cal.App.2d 66, 75; *Rigley v. Board of Retirement* (1968) 260 Cal.App.2d 445, 450, and cases cited therein. It is true the rule prohibiting such an injunction does not operate when the statute which is stayed is unconstitutional or otherwise invalid. *Conover v. Hall* (1974) 11 Cal.3d 842, 850. However, in this case, the City's imposition of the LBFO was wholly consistent with its rights and obligations under the MMBA and the City's Local Rules.[5]

---

[2] The City had understood the hearing on June 25th would encompass a hearing on the merits of the Cross-Petition as it related to the legal question of whether the imposed terms were employment benefits or vested pension rights, not City Charter 143.1. The City has not otherwise responded to the Cross-Petition because such response is not due until July 3, 2009. The City respectfully requests the opportunity to conduct full discovery on the 143.1 issue and be given an opportunity fully brief the Court on this important issue before the Court issues any ruling on the merits regarding 143.1. Given the unique procedural posture of this matter, the City has asserted its 143.1 defense to preserve all rights to raise it in any future proceeding.

[3] Exh. 53, Wescoe Depo., 11:24-25, 12:1-2, 12:5-13; Exh. 49, p. SD 906; Exh. 3, p. SD 834.

[4] Exh. 1, Charter Art. IX ¶ 144.

[5] Exh. 4, City of San Diego Policy, Policy No. 300-06.

C. A Preliminary Injunction Is Wholly Improper When SDPOA Has Failed to Show Immediate, Irreparable Harm From Any Changes to DROP

In evaluating SDPOA's Application, the court must likewise balance the interim harm SDPOA will allegedly sustain if the preliminary injunction is denied as compared to the harm that the City will suffer if the court grants the injunction. *O'Connell*, 141 Cal.App.4th at 1467-68. In addition to evaluating the degree of harm SDPOA alleges is irreparable, the court must balance that harm against the potential impact of an injunction on the City and the public interest and assess the adequacy of SDPOA's other remedies. *Tahoe Keys Property Owners' Ass'n v. State Water Bd. Resources Control* (1994) 23 Cal.App.4th 1459, 1471.

As shown above, the SDPO has *no* probability of success on the merits, such that the court can deny the preliminary injunction request outright. Nonetheless, even if the court balances the hardships, SDPOA's attempts to impose the 7.75% interest rate and entry age for DROP in perpetuity are legally and factually unsound when (1) the alleged harms are not actual or irreparable; (2) any alleged harm pales in comparison to the significant prejudice a preliminary injunction would impose on the City's ability to meet both its and the public's needs in this economic crisis; and (3) adequate alternative remedies are available.

D. SDPOA Cannot Meet Its Burden to Establish Irreparable Harm Based on the Interest Rate Changes

SDPOA's argument that ten officers[6] who are participating in DROP would be "forced" to retire by June 30 to maintain a 7.75% interest rate is utterly insufficient to demonstrate that the union would experience *irreparable* harm based on the interest rate change. The election to participate in DROP and continuation in the program is purely voluntary. Once that election is made, the employee gets to "double-dip" by continuing to work *up to* five years, while collecting salary, with his/her DROP participant account collecting (a) an amount credited monthly based on creditable service, final compensation and the retirement option, (b) supplemental benefits, and (c) contributions by the employee and employer based on 3.05% of the Member's base

[6] SDPOA submitted 9 declarations for this argument with Preliminary Injunction Motion, and has now added a 10th – from Carlos Garcia – which contains the same boilerplate statements.

compensation.[7] (SDMC § 24.1402, § 24.1404) DROP Members may decide to leave the program at any time without any reason (SDMC § 24.1403(a)). For example, the SDCERS CEO, David Wescoe, acknowledged that Members are leaving DROP because of uncertainty over retiree health care.[8] Participation can also cease if the Member is terminated for cause, dies or becomes disabled. (SDMC §24.1403(b)) DROP participants are also advised that the interest rate received in DROP is that in effect on the date of the retirement from DROP; it is not fixed when the Member enters DROP.[9] The interest rate for the Member's account fluctuates with each change SDCERS makes to the crediting rate.[10] Under these circumstances, and because DROP is not a contractual right as discussed at length in the City's Opening Brief, DROP members are not guaranteed a permanent position with the City *or* a permanent interest rate during the five-year maximum term of DROP to establish that they would be harmed if the interest rate changes..

Any alleged harm from the interest rate change would be quite speculative, particularly for those ten officers who signed cookie-cutter declarations claiming that they intend to retire by July 1 *because* of this rate change. Their DROP periods will be expiring in a very short time: of the ten declarants, five have less than a year remaining of their DROP periods, four have slightly more than a year, and one has one year, 10 months.[11] All of the officers are also quite close to or past age 55, which DROP anticipates will be the retirement age; of the ten declarants, five officers are or are very close to 54, two are 57, and one is 59 years old.[12] After all, in the federal case of *SDPOA v. City of San Diego* case, the United States District Court denied SDPOA's preliminary injunction and found no harm, let alone irreparable harm, in part because DROP participants typically retire before their DROP periods expire – i.e., they work for about *four years*, rather than the maximum five- year period.[13] With the likelihood of retirement in such a

---

[7] Woo-Jin Shim Decl. to City's Petition ("Shim Decl."), From City's NOL - Exh. 9, p. SD 835; Exh. 10, p. SD 879.
[8] Exh. 53 to City's NOL, Wescoe Depo., 46:9-24.
[9] Exh. 53 to City's NOL, Wescoe Depo., 17:5-15, 18:15-17; Shim Decl., ¶3; From City's NOL - Exh. 9, pp. SD 836, 839; Exh. 10, p. SD 879.
[10] Exh. 53 to City's NOL, Wescoe Depo., 18:10-14, 42:7-21.
[11] Supplemental Daphne M. Anneet (Supp. Anneet Decl.), ¶3; Exh. 55 to City's Supp. NOL; Supp. Shim Decl., ¶7; Exhs. 14-23 from SDPOA's NOL.
[12] Supp. Shim Decl., ¶7; Supp. Anneet Decl., 3, Exh. 55to City's Supp. NOL.
[13] Exh. 60 to City's Supp. NOL and Supp. RJN. Lawrence Decl., ¶¶11-13; Exh.59 to City's Supp. NOL and Supp. RJN, pp. 9-10 (federal court order denying preliminary injunction to SDPOA on *same* vesting issue).

short time, and the fact these individuals are *still* employed and have long reaped the benefit of double-dipping in DROP, SDPOA cannot demonstrate harm, let alone irreparable harm from the interest rate change.

The SDPOA's argument of harm from the interest rate change also ignores its own evidence. As shown in the contracts *every* DROP participant must sign,[14] the more than 240 safety officers who are currently participating in DROP[15] were warned of the risks of entering the program when they signed their DROP contracts. The DROP participants acknowledged in the contracts that they are *bound* by the SDCERS Retirement Board's rules – which, in this instance, means SDCERS' change of interest rates and the City's decision to enforce those rates through the LBFO.[16] They were also advised to consult financial and legal counsel to plan accordingly before they entered DROP.[17] The officers even *waived* any right to sue the City for changes that might occur while they participated in DROP *and* under California Civil Code § 1542 for any unknown consequences of their elections – which would include interest rate changes![18] SDPOA cannot now attempt an end run around these waivers or use these officers' declarations as purported "evidence" of irreparable harm in the face of these binding waivers.

Notably, of the 243 officers actively participating in DROP as of June 4, 2009[19] – all of whom would be affected by the interest rate change, SDPOA has only offered *ten* declarations. Perhaps the hundreds of other officers in DROP have realized the truth – that they have long been receiving a windfall of the interest rate – initially at 8% and in 2009 at 7.75%. These rates are far beyond what the market has offered in past years and more than SDCERS has been earning on its investments; the new rates chosen by the Board more accurately reflect SDCERS' current rate of

---

[14] Exh. 53 to City's NOL, Wescoe Depo., 71:21-72:3 (DROP election contracts signed by participants are identical).
[15] Supp. Shim Decl., ¶ 6; *see also* Exh. 50 to City's NOL, p. SD 1243 (234 officers as of 5/31/09).
[16] Exhs. 14-23 to SDPOA's NOL, pp. 1, 3 ("I will abide by the terms and conditions of DROP, as specified in: . . . (2) the Rules established by the Retirement Board"). The DROP Manual likewise confirmed to the officers that they vested only in the principal balance of their DROP account upon entering the program . Exh. 53 to City's NOL, Wescoe Depo., ¶24:24-25, 25:3-4, 25:15-21; Shim Decl., ¶3; Exh. 9 to City's NOL, p. SD 836.
[17] Exhs. 14-23 to SDPOA's NOL, p. 2.
[18] Exhs. 14-23 to SDPOA's NOL, pp. 3, 4 (signing express waiver against Retirement Board and City from "any and all claims based upon my decision to participate in DROP and my agreement to retire and leave City employment" and all rights under CCP §1542, plus agreement not to sue the Board or City for any claim arising out of a decision to participate in DROP, participation in DROP or the decision to retire at the end of the DROP period).
[19] Supp. Shim Decl., ¶6; *see also* Exh. 50 to City's NOL, p. SD 1243 (234 safety officers in DROP as of 5/31/09).

investment.[20] The CEO/Administrator of SDCERS even told the Retirement Board when interest rate changes were being discussed, "Obviously, it would be imprudent to pay a higher rate of interest on a member's DROP account than the System itself expects to receive on its portfolio assets."[21] This change was a much-needed adjustment to an unrealistic interest rate that has contributed to the pension deficit.

The DROP interest rate reduction is no different than if a Member had put his money in a private institutional savings account and the bank changed the interest rates for monies on deposit. The only resulting "harm" would be that his funds are growing at a slower rate than before – earning less money because of the influences of the market. Interest rate fluctuations are a fact of life. That is exactly what is happening here. The DROP participants facing a July 1, 2009 interest rate change can choose either to (a) retire and maintain a 7.75% interest rate on their accounts and *continue* to receive the windfall of the higher interest rate, *or* (b) not retire and be bound by SDCERS' interest rate reduction. Members who forego retirement until after July 1, 2009 still maintain their vested principal balances, but their money earns interest at a lesser rate. Their accounts do *not* and can never reflect a loss at the end of the DROP period.[22] This scenario is not irreparable harm, but simply a reality of the DROP program when SDCERS retains the power to change interest rates. Indeed, SDCERS may change the rates again in the future, and there is no dispute it has the right to do so.

SDPOA has not and cannot show that it is *permanently entitled* to a 7.75% interest, which it must do to show irreparable harm from the interest rate change. No actual, irreparable harm will result to DROP participants *choosing* to retire before July 1.

E. SDPOA Cannot Show That a Change in the DROP Eligibility Age Would Cause *Irreparable* Harm to the Union, Let Alone Harm to "Several" Officers

SDPOA contends that the age increase for DROP eligibility would somehow cause irreparable harm to the union as a whole because "*several* San Diego police officers" may have to

[20] From City's NOL - Exh. 34, p. SD 1044, Exh 43, p. SD 1101; Exh. 45, pp. SD 1106-1117; Exh. 53, Exh. 48; Exh. 53, Wescoe depo., 14:12-15:7, 16:15-20.
[21] Exh. 30 to City' NOL, p. SD 1015.
[22] Exh. 43 to City's NOL, p. SD 1100.

decide whether to opt in to DROP before July 1, which would result in their retirement in five years; otherwise, if they wait until after July 1, they would have to wait until age 55 to make this election. (SDPOA's Mtn., 12:18-20) SDPOA cannot meet this significant threshold of harm by relying on the skeletal, albeit objectionable, declarations of a handful of officers.

To the contrary, opting into DROP before July 1 could actually provide significant economic advantage to the officers over a later retirement date by offering certainty that they can continue to "double-dip" for the next five years – drawing a salary while working, yet vesting in their principal pension balance, to which contributions and interest are added.

Moreover, the boilerplate claims of the seven officers who allege that electing DROP now, then retiring in five years, would somehow cause them harm are entirely speculative. All of these officers are beyond the retirement age of 50, since they are between the ages of 50 and 52 and all but one have been with the City for over 20 years.[23] So much could happen between now and their retirement dates if they did not elect DROP – disability, termination for cause, death, even insolvency of the City or the pension, etc. Joining now, then retiring within five years would still allow them to work for other law enforcement agencies outside the City or to pursue other interests. SDPOA has not offered *any evidence* – financial or otherwise – to show the possibility, or even the actuality, of irreparable financial damage to those few officers who elect to participate in DROP by July 1.

The self-serving claim of potential financial harm by yet an eighth officer – Jeff Jordon, the Vice- President of SPDOA and a recruitment officer – is equally untenable. He has only been employed by the City for nine years and is not yet 41 years old.[24] As with the other officers, the potential for entering DROP was not a vested benefit that Jordon has had at any time since he was hired in 1991. Nothing was a guarantee – not his employment and not even the continuing existence of DROP. After all, employee benefits have changed since then and will continue to do so until his retirement age. It is unknown what benefits may or may not be available to safety

[23] Zdunich is not yet eligible for DROP since she has only had 18 years of service. Zdunich Decl., ¶2.
[24] Jordan Decl., ¶2; Supp. Shim Decl., ¶7; Supp. Anneet Decl., ¶4, Exh. 56 to City's Supp. NOL.

officers in nine years when Jordon turns 50 or even 55. His claim of financial harm is mere guesswork and cannot be substantiated.[25]

For what these declarations lack in substance, SDPOA cannot make up for in number. These eight officers amount to a mere 00468% of over 1,700 members employed with the City who have not elected DROP. This number is not statistically relevant and certainly cannot corroborate SDPOA's claim of widespread, irreparable harm.

Finally, there is no urgent need for SDPOA's requested relief when David Wescoe, the CEO and administrator of SCDERS, has confirmed that SDCERS will wait until a vote is held to invoke the age eligibility change to DROP. With no vote currently scheduled, SDCERS will continue to accept and honor DROP election requests by persons who are 50 until the voting process is completed.[26] Thus, there could be no immediate, irreparable harm because the Court will have decided the issues at stake in the parties' cross-writs well before any vote takes place.

F. Balancing the Hardships, The City Would Certainly Experience Irreparable Harm if an Injunction is Issue

Where injunctive relief is sought, consideration of possible hardship on the City is mandatory. *Loma Portal Civic Club v. American Airlines, Inc.* (1964) 61 Cal.2d 582, 588; *see also White*, 30 Cal.4th at 558-562 (finding plaintiffs' broad constitutional argument was no so unquestionably meritorious as to obviate any need to consider the balance of relative widespread harms on public and impact on exercise of legislative powers); *Tahoe*, 23 Cal.App.4th 1472-72. The court must also consider whether the public interest is affected by the requested relief and how the public interest would best be served. *Triple-A Machine Shop v. State of California* (1989) 213 Cal.App.3d 131, 128. In this case, both the balance of hardships and the public interest weigh heavily against granting SDPOA's requested relief.

If an injunction is issued, the City would certainly experience irreparable harm, particularly when it is facing a serious financial crisis. Implementing the changes to DROP are vital to the City's overall efforts in addressing a budget deficit for the next fiscal year of nearly

[25] As discussed in the City's other papers filed concurrently, an officer's reliance on the previous terms of DROP are utterly irrelevant to the court's analysis.

[26] Exh. 53 to City's NOL, Wescoe Depo., 23:14-24:18.

$60 million and a funding gap in its pension system that has grown to $1.3 billion.[27] To balance the budget, the City has sought concessions of approximately $29.8 million from its five labor organizations, through a combination of cost-cutting measures, benefit adjustments and benefit controls.[28] SDPOA is the sole hold-out, refusing to bargain on key issues, like changes to the DROP program, to balance the budget.[29] Without these changes, the budgetary deficit could increase exponentially.

For example, the City has laid out the need for these changes to SDPOA since the outset of its negotiations. In February 2009, it explained that without changes to the 7.75% DROP interest rate, the budget deficit could expand by $28.2 million in fiscal year 2011 and $37.4 million through fiscal year 2012.[30] It likewise estimated that *without* this interest rate reduction, it would increase the ARC contribution by tens of millions through fiscal years 2011-2014.[31] The City explained again in the following months that the reduction in DROP interest rates and eligibility age would have a powerful impact on the City's finances, even if the rate was simply reduced by 3.75%: (1) in the next fiscal cycle, savings of $3 to 4 million for the City's Annual Retired Contribution ("ARC") and $35 to 45 million for Unfunded Actuarial Accrued Liability ("UAAL"), (2) by fiscal year 2012, a reduction of the UAAL by $250 million to $350 million; and (3) by fiscal year 2012, a savings in the City's ARC contribution of between 2.5-3.5% of covered payroll of $16 million to $22.5 million.[32]

---

[27] Declaration of Scott Chadwick ISO City's Petition for Writ ("Chadwick Decl."), ¶¶7-10; From City's NOL, Exh. 32; Exh. 46, p. SD 1138; *see also* Exh. 53 to City's NOL, Wescoe Depo., 68:8-13.

[28] Supp. Shim Decl., ¶4; Exh. 57 to City's Supp. NOL and Supp. RJN, pp. vii (Mayor's Budget Message), p. 22 (Executive Summary); Chadwick Decl., ¶9.

[29] Chadwick Decl., ¶¶13-20. Actuary Gene Kalwarski advised SDCERS on 2/2/09 of the advantages and likely impact of lowering DROP interest rates: (1) expect future DROP elections to decline from past levels; (2) expect behavioral change of later retirements than in the past; (3) lowering the annuity interest rate will lower SDCERS' investment risk; and (4) all of the foregoing should serve to decrease future SDCERS' liabilities and related costs. Exh. 45 to City's NOL, pp. 1106, 1129. The actuarial analysis confirms that the changes to DROP would have a significant impact on the City's pension problems.

[30] Exh. 12 to City's NOL, pp. SD 1389, 1396, 1401-1402

[31] Exh. 12 to City's NOL, pp. 1395-1396

[32] Chadwick Decl., ¶12; From City's NOL - Exh. 14 to City's NOL, p. SD 1424; Exh. 15, p. SD 1430; Exh. 16. "ARC" is the City's annual contribution into SDCERS, as defined by the City's actuary. "UAAL" is a liability generally representing the difference between the present value of all benefits estimated to be payable to plan members as a result of their service through the valuation date and the actuarial value of plan assets available to pay those benefits. This amount changes over time as a result of changes in accrued benefits, pay levels, rate of return on investments, changes in actuarial assumptions, and changes in the demographics of the employee base. Supp. Shim Decl., ¶4; Exh. 57 to City's Supp. NOL and Supp. RJN, pp. 147, 157.

After SDCERS decided to lower the DROP interest rate credited to Member's participation accounts from 7.75% to 3.54% interest and the DROP annuity interest from 7.75% to 5% for City employees, SCDERS' actuary refined his calculations and confirmed that these changes would yield the City *approximately $310 million in savings*.[33] Changes of this scale are imperative if the City is to meet the immediate financial needs of its 3.173 million citizens.[34]

The City is required by law to balance its budget. To do so, it relied on the assumption that the changes at issue would be made to DROP.[35] As Mayor Jerry Sanders explained when the proposed budget was issued for fiscal year 2010: "This budget recognizes that deeper cuts to the City workforce cannot be achieved without long-term harm to our service levels -- through the closure of libraries and recreation centers, reduced levels of public-safety coverage, and similar diminutions in City functions – that are not acceptable to me or to the public."[36]

The City would suffer even greater economic strain if the modifications to DROP were prohibited. The City would lose the anticipated savings of hundreds of *millions* of dollars . The resulting budget deficit might well compel a reallocation of funds from one project to another, or even worse, delay or forego other public projects or benefits, which could ultimately harm the public interest. *See, e.g., Tahoe*, 23 Cal.App.4th at 1472 (finding no irreparable harm to property owners when fee benefited lake preservation, and injunction could work to the detriment of other projects, and in turn, harm the public interest). Quite simply, the hardship imposed by a preliminary injunction would require the City to contribute millions in public funds for DROP that it otherwise would not have had to pay, which could, in turn, have dire effects that the City has attempted to avoid,[37] *See White*, 30 Cal.4th at 557-558 (finding no irreparable harm when preliminary injunction sought as a sanction or leverage against legislature's budgetary actions and for challenging determination of funds expenditures). It would be highly unlikely that the City could ever recover these distributed funds should the court ultimately determine on the merits that

[33] Supp. Shim Decl., ¶¶4-5; Exh. 62 to City's Supp. NOL (savings of approximately $150 million from rate change on DROP participation accounts and $160 million from rate changes on DROP annuity accounts).
[34] Supp. Shim Decl., ¶4; From City's Supp. NOL and Supp. RJN - Exh. 57, pp. vi, vii, 22.; Exh. 58, p .4.
[35] San Diego City Charter, Article VII, § 99 contains the City's balanced budget requirement that mirrors California Constitution, Article XVI, § 18.
[36] Supp. Shim Decl., ¶4; Exh. 57 to City's Supp. NOL and RJN, p. vi.
[37] Shim Supp. Decl., ¶4; Exh. 57 to City's Supp. NOL and RJN, p. vi.

these changes to DROP were legal and appropriate. *See, e.g.*, *Tahoe*, 23 Cal.App.4th at 1472-1473 (state could refund fees if it did not prevail, but might not be able to later collect fees if it did, and fee was negotiated solution to environmental degradation caused by development).

Granting SDPOA's requested injunctive relief would also interfere with the City's internal affairs and the management of its budget to resolve a growing budgetary crisis. *See White*, 30 Cal.4th at 558 ("[C]ourts must be especially sensitive about intruding upon the Legislature's fundamental – and essentially political – legislative and budget powers, and must be vigilant not to depart from established principles governing preliminary injunctions simply in order to lend support to an effort to increase the leverage on the Legislature . . ."); *see also Sampson v. Murray* (1974)415 U.S. 61, 83 ("the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs'")(citing *Cafeteria and Restaurant Workers Union, Local 473, A.F.L.-C.I.O. v. McElroy* (1961) 367 U.S. 886, 896). The public's interest in the City's ability to manage its relations with its employees weighs heavily in favor of denying the SDPOA's requested relief. *See, e.g.*, *See Fresh Int'l Corp v. Agricultural Labor Relations Board* (9th Cir. 1986) 805 F.2d 1353, 1360 (finding court should have abstained from hearing merits of agricultural labor dispute governed by California state labor law, in part, because "California's interest in ensuring peaceful collective bargaining and in protecting farm laborers' freedom of association, is entitled the same respect and recognition as a state's interest in promoting fair employment practices, teacher discipline and police integrity"). Injunctive relief invites the court to insert itself into the midst of a political maelstrom and interfere with the City's ability to manage its own budget and resolve its current financial crisis. There is simply no need to do so.

Even if the court disagrees with the manner in which the City has addressed these DROP issues, it cannot replace the judgment of the governing administrative agency, particularly when SDCERS has followed the appropriate protocol and rules for determining interest rates and SDPOA was repeatedly on notice of its right to change the rates. To do so would be an "egregious violation of the separation of powers." *King*, 43 Cal.3d at 1235 (affirming denial of preliminary injunction when financial responsibility law was not unconstitutional delegation of legislative authority to insurance industry). This dispute is a situation of SDPOA's own making.

It has refused to collectively bargain regarding the very issues on which it seeks injunctive relief. Its own conduct should therefore be a bar to this extraordinary equitable relief. *See London v. Marco* (1951) 103 Cal.App.2d 450, 453 (relief not warranted if party seeking preliminary injunction has unclean hands).

Quite simply, SDPOA cannot show irreparable harm with woefully inadequate declarations from eight officers disputing the age change and ten officers disputing the interest rate change, when weighed against the immense harm an injunction would impose on the City and over 3 million citizens. The balance of hardships strongly favors denial of SDPOA's requested relief.

G. Alternative Remedies Exist, Rendering a Preliminary Injunction Unnecessary

Even if SDPOA can quantify the DROP changes as "harm," it certainly cannot show it is "irreparable," which Merriam-Webster's Dictionary defines as "irremediable" and "impossible to repair, rectify or amend."[38] An injunction cannot be issued because other adequate remedies exist for those who elect DROP or retire before July 1, 2009 due to these changes. *See* B.E. Witkin, *California Procedure*, Provisional Remedies, Vol. 6, §§337, 338, 339, 341, 344 (5th Ed. 2008); *Jessen*, 142 Cal.App.3d at 459.

1. The SDPOA Can Resume Contract Negotiations

The SDPOA has a clear, appropriate remedy – going back to the bargaining table, as the City requests through its Writ Petition. As a benefit of employment, DROP is a mandatory subject of bargaining under applicable labor relations laws. SDPOA's consistent refusal to meet and confer with the City regarding its proposal to eliminate DROP has impeded the City's efforts to move forward with its reform process in an efficient matter. SDPOA has created this situation, unlike other bargaining units who have resolved these issues with the City. SDPOA cannot be rewarded for its delays and bad faith tactics.

[38] Exh. 92 to City's Supp. NOL and Supp. RJN.

2. The Alleged Harm Can Be Adequately Remedied By Monetary Damages

SDPOA recognizes and has threatened the City that it has a legal remedy, citing California Labor Code § 970 as just one of its "claims" for monetary damages, if the DROP changes are implemented on July 1, 2009.[39] If the party seeking an injunction can be fully compensated by the payment of damages in the event he prevails, then preliminary injunctive relief should be denied. *Tahoe,* 23 Cal.App.4th at 1471; *Helms Bakeries v. State Bd. Of Equalization* (1942) 53 Cal.App.2d 417, 426 (no irreparable injury if respondent, after paying disputed tax, prevailed and could seek recovery of tax with interest from payment).

The SDPOA's claims based on the DROP changes amount, at most, to purported financial hardship. Claims for money damages in the employment context rarely give rise to an irreparable injury justifying injunctive relief. *See Sampson*, 415 U.S. at 90 (holding that lost earnings in wrongful discharge could be compensate by money damages); *see also Anderson v. U.S.F. Logistics, Inc.* (7th Cir. 2001) 274 F.3d 470, 475 (preliminary injunctions disfavored in the employment context). After July 1, affected SDPOA Members can attempt to seek the difference in interest rates and salary for their purported injury and be fully compensated by an award of damages equivalent to the monetary value of the DROP changes made – i.e., (1) the difference in interest rates for the brief period the few officers have in the DROP period, or (2) allegedly lost salary for electing DROP and possibly retiring early. Other courts, ***including the district court in SPDOA v. City of San Diego***, have routinely denied preliminary injunctions in union and employment situations because adequate damages exist to remedy the claimed harm.[40] *See, e.g., Cahill v. City of New Brunswick* (D.N.J. 2000) 99 F.Supp.2d 464, 480-481 (preliminary injunction denied where police officers claiming impermissible pay cut could not show irreparable injury because "[a]lthough such prospective loss of wages may cause hardship to the plaintiff officers, it is clearly the type of injury which is readily calculated and remedied after the fact by monetary damages"); *International Ass'n of Machinists and Aerospace Workers v. Alaska Airlines, Inc.* (W.D. Wash. 1986) 1986 WL 15573 at *6 ("While the availability of monetary

[39] Supp. Anneet Decl., ¶5; Exh. 61 to City's Supp. NOL.
[40] Exh. 59 to City's Supp. NOL and Supp. RJN (federal order denying SPDOA's preliminary injunction request).

relief at a later date must surely be a little comfort to those out of work employees faced with immediate financial hardship, the law is clear in this circuit that lost wages do not constitute irreparable harm where the financial injury falls on an easily ascertainable group of employees capable of ultimately being redressed"). Although the SDPOA has not clarified the grounds for the purported Labor violations, and thus has not given the City sufficient opportunity to address the intricacies of its claims, it is obvious that SDPOA believes monetary damages are available, which seriously undermines its position of irreparable harm.

3. Other Alternative Remedies Exist to Render a Preliminary Injunction Unnecessary

Beyond monetary damages, SDPOA can seek other remedies. A judicial remedy already exists because SDPOA has filed a Cross-petition for writ of mandate to direct the City to maintain the 7.75% interest rate and DROP entry age. SDPOA has asked the court to address these issues at the June 25 hearing. *See Witkin*, Provisional Remedies at § 338; *see Common Cause*, 49 Cal.3d 441-447 (evaluating preliminary injunction in light of legal principles governing mandamus action). Any hearing on the merits of SDPOA's claim would render the injunction moot.

Finally, *if* no preliminary injunction is issued and the court determines that the City's actions are somehow unlawful, the officers who elected DROP or retired before July 1 could pursue reinstatement to their original positions to dissolve their "irrevocable" elections. *Walsh v. Northrop Grumman Corp.* (E.D.N.Y. 1994) 871 F.Supp. 1567, 1571-1572 (finding employee claims that they were forced to "voluntarily resign" did not constitute irreparable harm for purposes of preliminary injunction when employee may be made whole by reinstatement and money damages, absent extraordinary circumstances).

With this cornucopia of alternative remedies available, SDPOA has no grounds to establish irreparable harm to support a preliminary injunction.

H. A Bond Would Be Required As A Condition to Any Injunctive Relief

The City is confident that there are no factual or legal grounds for granting an injunction. Nonetheless, in the unlikely event the court is inclined to grant SDPOA's requested relief, no

injunction should be issued without the SDPOA posting a bond sufficient to cover all costs and damages sustained by the City if its determine it was wrongfully enjoined. C. Civ. Proc. §529(a).

V. CONCLUSION

SDPOA has simply not met its burden to warrant preliminary injunctive relief. Not only has it failed to establish a likelihood of success on the merits of its claims, but the complete lack of irreparable harm is detrimental to its request. With the balance of hardship tipping in favor of the City and the public at large, and multiple alternative remedies available, SDPOA's Application should be denied.

Dated: June 22, 2009

Burke, Williams & Sorensen, LLP
Daphne M. Anneet
Timothy L. Davis

By: _____
Daphne M. Anneet
Attorneys for Petitioner and Plaintiff
CITY OF SAN DIEGO