

1 JAN I. GOLDSMITH, City Attorney  
ANDREW JONES, Assistant City Attorney  
2 WALTER C. CHUNG, Deputy City Attorney  
California State Bar No. 163097  
3 KRISTIN M. J. ZLOTNIK, Deputy City Attorney  
California State Bar No. 190694  
4 Office of the City Attorney  
1200 Third Avenue, Suite 1100  
5 San Diego, California 92101-4100  
Telephone: (619) 533-5800  
6 Facsimile: (619) 533-5856

Exempt from fees per Gov't code 6103  
To the benefit of the City of San Diego

7 Attorneys for Defendant  
CITY OF SAN DIEGO  
8

9 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO  
10

11 GUY McELROY, DAVID COOKSON,	)	Case No. 37-2009-00081178-CU-MC-CTL
JOSEPH KROUSS and SCOTT A.	)	
12 THOMPSON ,	)	DEFENDANT CITY OF SAN DIEGO'S
	)	POINTS AND AUTHORITIES IN
13 Plaintiffs,	)	SUPPORT OF ITS DEMURRER TO
	)	PLAINTIFFS' FIRST AMENDED
14 v.	)	COMPLAINT
	)	
15 CITY OF SAN DIEGO, and DOES 11 to 20,	)	I/C Judge: Hon. Judith Hayes
inclusive,	)	Date: February 26, 2010
	)	Time: 10:30 a.m.
16 Defendants.	)	Dept.: 68
	)	Complaint filed: January 13, 2009
	)	Trial: March 26, 2010

18  
19 ///  
20 ///  
21 ///

22  
23  
24  
25  
26  
27  
28

TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I. STATEMENT OF FACTS ..... 1

II. STATEMENT OF THE CASE..... 1

III. LEGAL ARGUMENT ..... 2

    A. Enabling Authority for Demurrer ..... 2

    B. Even Though the FAC is Styled as a Declaratory Relief Action, Plaintiffs Really  
        Seek Monetary Damages, and therefore, Need to Comply with the Government  
        Claims Act ..... 2

    C. Even Though Plaintiffs Have Requested Declaratory Relief, They Really Seek  
        Monetary Damages ..... 3

    D. This Court May Not Consider Plaintiffs’ Legal Conclusion Allegations that this  
        Complaint Does Not Seek Money or Damages ..... 5

    E. Gov’t Code Section 905(f) Does Not Excuse Plaintiffs From Filing a Claim as a  
        Prerequisite to the Filing of this Action ..... 6

    F. A Later Filed Case Brought By These Plaintiffs Own Union Encompasses the  
        Same Causes of Action ..... 7

    G. Plaintiff McElroy Executed a Release Agreement Regarding the Subject Matter of  
        this Litigation, and thus, is Barred From Pursuing the Relief Requested Based on  
        Res Judicata ..... 9

IV. LEAVE TO AMEND ..... 11

V. CONCLUSION..... 12

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**Cases**

*Agins v. Tiburon* (1980) 447 U.S. 255 ..... 6

*Baillargeon v. Department of Water & Power* (1977) 69 Cal.App.3d 670 ..... 6

*Baines Pickwick Ltd. v. City of Los Angeles* (1999) 72 Cal.App.4th 298..... 2, 3

*Burke v. Superior Court* (1969) 71 Cal.2d 276..... 6

*Canova v. Trustees of Imperial Irrigation District Employee Pension Plan* (2007) 150  
Cal.App.4th 1487 ..... 4, 5

*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189 ..... 6

*Crowley v. Katleman* (1994) 8 Cal.4th 666 ..... 10

*Dominguez v. City of Alhambra* (1981) 118 Cal. App. 3d 237..... 11

*Edwards v. Fresno Community Hospital* (1974) 38 Cal.App.3d 702 ..... 3

*Gates v. Superior Court* (1986) 178 Cal.App.3d 301 ..... 10

*Giffen v. United Transportation Union* (1987) 190 Cal.App.3d 1359..... 3

*Hanson v. Garden Grove Unified School Dist.* (1982) 129 Cal.App.3d 942 ..... 6

*Kamei v. Kumamoto* (1967) 256 Cal.App.2d 381 ..... 7

*Leadford v. Leadford* (1992) 6 Cal.App.4th 571 ..... 7

*Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071 ..... 2, 3

*Martell v. Antelope Valley Hospital Medical Center* (1998) 67 Cal. App. 4<sup>th</sup> 978 ..... 11

*Mattson v. City of Costa Mesa* (1980) 106 Cal.App.3d 441..... 10

*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888..... 10

*Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244 ..... 6

*Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699 ..... 3

*State of California v. Superior Court (Bodde)* (2004) 32 Cal.4<sup>th</sup> 1234 ..... 3

*TrafficSchoolOnline Inc. v. Clarke* (2003) 112 Cal.App.4th 736..... 4

*Trickey v. City of Long Beach* (1951) 101 Cal.App.2d 871 ..... 7

*Warga v. Cooper* (1996) 44 Cal.App.4th 371 ..... 11

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Statutes**

Civ. Code section 1542 ..... 11

Code Civ. Proc. section 342..... 11

Code Civ. Proc. section 430.10(c) ..... 2

Code Civ. Proc. section 430.10(e) ..... 2

Gov. Code section 810 ..... 11

Gov. Code section 905 ..... 2, 6

Gov. Code section 905(f)..... 6

Gov. Code section 911.2 ..... 11

Gov. Code section 945.4 ..... 2, 11

Gov. Code section 945.6 ..... 11

San Diego Municipal Code section 24.0103..... 1, 4, 9

San Diego Municipal Code section 24.0403..... 4

1 I.

2 **STATEMENT OF FACTS**

3 Four individual San Diego Police Officers, Plaintiff Guy McElroy, Plaintiff David  
4 Cookson, Plaintiff Joseph Krouss and Plaintiff Scott A. Thompson (collectively, "Plaintiffs")  
5 seek to increase their pensions. Plaintiffs are officers in either the motorcycle division or the  
6 canine division and who receive overtime pay for extra duties performed by officers in these  
7 divisions. (First Amended Complaint ("FAC") ¶ 13). Plaintiffs ultimate pension retirement  
8 payment is based on each officer's base compensation paid by the City of San Diego ("City").  
9 (FAC ¶ 11). San Diego Municipal Code section 24.0103 defines base compensation by  
10 referencing a document that specifically includes and excludes categories of payments from base  
11 compensation. (FAC ¶ 12). Motorcycle care pay and canine care pay were listed in the Earnings  
12 Code Document as being included in base compensation from July 1, 2000 and for five  
13 successive Earning Codes Documents published since July 1, 2000. (FAC ¶ 14).

14 On January 26, 2007, the City unilaterally changed the Earnings Code Document then in  
15 effect and moved motorcycle care pay and canine care pay from the included in based  
16 compensation category to the excluded from base compensation category. (FAC ¶ 24). Plaintiffs  
17 claim that the City's action was against the law and resulted in reducing Plaintiffs' pensions.  
18 (*Id.*)

19 II.

20 **STATEMENT OF THE CASE**

21 Plaintiffs filed their original complaint on January 13, 2009. The case was assigned to  
22 the Hon. David Oberholtzer, Judge of the Superior Court.

23 City filed a demurrer to Plaintiffs' complaint. The demurrer was scheduled to be heard  
24 on May 29, 2009.

25 Before that demurrer was heard, Plaintiffs noticed an ex parte hearing seeking to have  
26 this matter re-assigned to this Court. On February 25, 2009, the parties appeared before Judge  
27 Oberholtzer who agreed to re-assign this case to this Court. Additionally, at Plaintiffs' request,  
28

1 the parties stipulated to abating this action until a final resolution in *San Diego Police Officers'*  
2 *Association v. City of San Diego*, Case No. 37-2009-00081659-CU-WM-CTL.

3 On February 25, 2009, Judge Oberholtzer ordered this case re-assigned to this Court.  
4 Judge Oberholtzer also abated this case.

5 At a status conference on September 18, 2009, this Court lifted the order of abatement.  
6 Trial in this matter is currently set for March 26, 2009.

7 **III.**

8 **LEGAL ARGUMENT**

9 **A. Enabling Authority for Demurrer**

10 Code of Civ. Proc. section 430.10(e) provides that a party against whom a complaint has  
11 been filed may demur to the complaint on the grounds that the pleading fails to state facts  
12 sufficient to constitute a cause of action.

13 Additionally, Code Civ. Proc. section 430.10(c) provides that a party against whom a  
14 complaint has been filed may demur to the complaint on the grounds there is another action  
15 pending between the same parties on the same cause of action.

16 **B. Even Though the FAC is Styled as a Declaratory Relief Action, Plaintiffs Really**  
17 **Seek Monetary Damages, and therefore, Need to Comply with the Government**  
18 **Claims Act**

19 Under the Claims Act, no suit for “money or damages” may be brought against a public  
20 entity until a written claim has been presented to the public entity and the claim either has been  
21 acted upon or is deemed to have been rejected. (Gov. Code sections 905 and 945.4.) A suit for  
22 “money or damages” includes all actions where the plaintiff is seeking monetary relief,  
23 regardless whether the action is founded in “tort, contract or some other theory.” (*Baines*  
24 *Pickwick Ltd. v. City of Los Angeles* (1999) 72 Cal.App.4th 298, 307; *Loehr v. Ventura County*  
25 *Community College Dist.* (1983) 147 Cal.App.3d 1071, 1079.) The notice requirements ensure  
26 prompt claims investigation and possible settlement, enable the public entity to make appropriate  
27 fiscal adjustments, and provide the opportunity to avoid future liability by taking remedial steps  
28 to prevent a reoccurrence. (*Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699, 709; *Baines*

1 *Pickwick Ltd. v. City of Los Angeles, supra*, 72 Cal.App.4th at 303.) “Failure to allege facts  
2 demonstrating or excusing compliance with the claim presentation requirement subjects a claim  
3 against a public entity to a demurrer for failure to state a cause of action.” (*State of California v.*  
4 *Superior Court (Bodde)* (2004) 32 Cal.4<sup>th</sup> 1234, 1239.) In this instant action, Plaintiffs have not  
5 alleged facts demonstrating compliance or excusing compliance with the claim presentation  
6 requirement of the Claims Act and on this basis alone, City’s Demurrer should be sustained.

7 **C. Even Though Plaintiffs Have Requested Declaratory Relief, They Really Seek**  
8 **Monetary Damages**

9 Plaintiffs seek to increase their pensions. (See FAC ¶¶ 24, 31). Therefore, Plaintiffs’  
10 claim is subject to the Claims Act. The Claims Act generally applies to claims for money or  
11 damages, and not to actions for declaratory relief. However, the label on a complaint is not  
12 determinative. It is the substance or gravamen of the action that controls, not the form of the  
13 action or relief demanded. (*Edwards v. Fresno Community Hospital* (1974) 38 Cal.App.3d 702,  
14 704; *Giffen v. United Transportation Union* (1987) 190 Cal.App.3d 1359, 1362.) Therefore, the  
15 exception for declaratory relief actions does not apply where the demand for non-monetary relief  
16 is merely incidental or ancillary to a prayer for damages. (*Loehr v. Ventura County Community*  
17 *College Dist., supra*, 147 Cal.App.3d at 1081.)

18 Thus, in an action where the primary goal is monetary relief in the form of payment of  
19 public funds, and the ground for such recovery is the alleged malfeasance of the City, a claim is  
20 required to have been filed with the City. A review of Plaintiffs’ complaint supports this  
21 assertion. Plaintiffs allege that City’s unilateral removal of the motorcycle care pay and canine  
22 care pay “exclude that portion of plaintiffs’ Base Compensations from the calculations on which  
23 plaintiffs’ retirement allowances were or will be based.” (FAC ¶ 24.) The prayer of Plaintiffs’  
24 complaint requests that this Court “void[] the City’s unilateral amendment of the Earnings Code  
25 Document” and “take all necessary steps to correctly report plaintiffs’ Base Compensation to the  
26 San Diego City Employees’ Retirement System.” (FAC Prayer ¶ 1.) A finding as requested  
27 would result in City having to immediately pay additional monetary funds into the pension fund  
28 on behalf of each plaintiff.

1 Accordingly, without question, Plaintiff seeks monetary damages by their action. The  
2 effect of voiding City's action to remove canine care and motorcycle care overtime pay from the  
3 list of excluded items in the Earnings Code Document will, by definition, increase the reportable  
4 Base Compensation of Plaintiffs (FAC ¶ 24.) An increase in Base Compensation will cause an  
5 increase in Final Compensation.<sup>1</sup> If Final Compensation is increased, pension benefits payable  
6 are increased.

7 Therefore, the Government Claims Act ("Claims Act") applies because, while pleaded as  
8 a mandamus action, it seeks money and/or damages from City as City will have to pay an  
9 increased pension to these Plaintiffs. The Claims Act requirement applies to any monetary claim  
10 even if it is merely incidental to other relief sought. (*TrafficSchoolOnline Inc. v. Clarke* (2003)  
11 112 Cal.App.4th 736, 742.)

12 In a case very similar to this instant matter, the Court of Appeals, Fourth Appellate  
13 District, Division One, in *Canova v. Trustees of Imperial Irrigation District Employee Pension*  
14 *Plan* (2007) 150 Cal.App.4th 1487, held that a government claim was required when current and  
15 former employees of the irrigation district brought a mandamus and declaratory relief action to  
16 invalidate a change to the retirement plan that reduced their pension benefits. In 1999, the  
17 Imperial Irrigation District modified its pension plan and changed the interest rate on the lump  
18 sum pension payout from a variable rate to a fixed rate ("Rate Amendment.") (*Id.* at 1491.) In  
19 2001, the Imperial Irrigation District terminated the pension plan and gave participants three  
20 options. (*Id.*) One of those options included transferring the lump sum value of the accrued  
21 benefits, plus an equity adjustment, into a new plan. (*Id.*) Current and former employees of the  
22 Imperial Irrigation District brought a writ of mandate and declaratory action seeking "a writ of  
23 mandate declaring the Rate Amendment and rollover into the Contribution Plan invalid." (*Id.* at  
24 1493.) Plaintiffs' "prayer for relief requests that the Rate Adjustment be invalidated, the equity  
25

---

26 <sup>1</sup> "Final Compensation" is defined as "the Base Compensation for the highest one year  
27 period during membership in the Retirement System." (San Diego Municipal Code section  
28 24.0103.) The amount of benefits paid to the approximately 100 police officers at retirement  
depends on several factors, including these officers' "Final Compensation." (San Diego  
Municipal Code sections 24.0103 and 24.0403.)



1 adjustment be recalculated and appropriate transfers be made into the Contribution Plan account  
2 of each Plaintiff.” (*Id.*)

3 In *Canova*, the Court found that “Plaintiffs are not seeking to collect pension benefits  
4 wrongfully withheld; rather, they are seeking to invalidate one-time changes (the Rate  
5 Amendment and equity adjustment) made to their retirement plan that reduced the amount of  
6 money they would have otherwise been entitled to receive.” (*Id.* at 1495.) “Plaintiffs’ request to  
7 invalidate the Rate Amendment and recalculate the equity adjustment, although cast as a claim  
8 for mandamus, actually seeks money or damages. Accordingly, Plaintiffs were required to  
9 comply with the Claims Act...” (*Id.* at 1496.)

10 Similarly, in this case, Plaintiffs are asking this Court to invalidate the change to the  
11 Earnings Code Document made by the City on January 26, 2007 and take all steps necessary to  
12 report to City’s pension plan a higher base compensation for themselves. Because of this, the  
13 rationale and holding of *Canova* are controlling in this instant matter -- that Plaintiffs’ claim is a  
14 claim for money and Plaintiffs needed to file a claim prior to initiating this lawsuit.

15 In as much as the primary purpose of Plaintiffs’ FAC is to increase their pensions which  
16 would require City to immediately make larger pension contributions on their behalf to the  
17 pension fund, this action is a suit for money, and as such, an allegation that Plaintiffs have  
18 complied with the Claims Act is required.

19 **D. This Court May Not Consider Plaintiffs’ Legal Conclusion Allegations that this**  
20 **Complaint Does Not Seek Money or Damages**

21 Plaintiffs attempt to frame their FAC as a complaint not requesting money or damages so  
22 as to avoid the Government Claims Act requirement. In doing do, Plaintiffs allege three  
23 paragraphs of legal conclusions. (FAC ¶¶ 33-35.) However, Plaintiffs’ allegations are legal  
24 conclusions, not facts. Therefore, while a court takes “as true the well-pleaded factual  
25 allegations of the complaint,” a court “may not consider conclusions of fact or law, opinions,  
26 speculation or allegations which are contrary either to law or to judicially noticed facts.”  
27 (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 193; *see*  
28 *also Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244, 251, 255,

1 fn. 2; *Agins v. Tiburon* (1980) 447 U.S. 255, 259, fn. 6.) In other words, the pleading must  
2 conform to “the general rule that a complaint must contain only allegations of ultimate facts as  
3 opposed to allegations of ... legal conclusions ....” (*Burke v. Superior Court* (1969) 71 Cal.2d  
4 276, 279, fn. 4.)

5 In this case, Plaintiffs’ FAC contains conclusions of law allegations. Disregarding these  
6 conclusions of law allegations, as required by law, Plaintiffs’ FAC clearly is a claim for money  
7 and/or damages from City.

8 **E. Gov’t Code Section 905(f) Does Not Excuse Plaintiffs From Filing a Claim as a**  
9 **Prerequisite to the Filing of this Action**

10 Plaintiffs undoubtedly will argue that the exception codified in Gov. Code section 905(f)  
11 relieves them of the requirement of filing a claim as a prerequisite to the filing of this action.  
12 Gov. Code section 905(f) exempts “[a]pplications or claims for money or benefits under any  
13 public retirement or pension system” from the claim filing requirements. Any reliance Plaintiffs  
14 may place on this exception will be misplaced. This is because the limited exceptions set forth in  
15 Gov. Code section 905 have, for the most part, been narrowly construed. (*Hanson v. Garden*  
16 *Grove Unified School Dist.* (1982) 129 Cal.App.3d 942, 946.) Specifically, with regard to Gov.  
17 Code section 905(f), that exemption is limited to benefits earned *during the course of*  
18 *employment.* (*Hanson v. Garden Grove Unified School Dist.*, *supra.*, at 948; see also  
19 *Baillargeon v. Department of Water & Power* (1977) 69 Cal.App.3d 670, 681.)

20 Here, Plaintiffs are asking for prospective damages, not for damages related to benefits  
21 earned as a result of work already performed in the course of their employment. Each of the four  
22 plaintiffs are still employed by the City of San Diego.<sup>2</sup> (FAC ¶¶ 1-4.) Specifically, Plaintiffs  
23 argue that the removal of the motorcycle care pay and canine care pay in January 2007 will result  
24 in a reduced pension. (FAC ¶¶ 24). In other words, Plaintiffs do not seek to re-compute their  
25 pension calculations for work performed prior to January 2007, but for all work since January

26 \_\_\_\_\_  
27 <sup>2</sup> Plaintiff McElroy and Plaintiff Cookson allege to be in the City’s Deferred Retirement  
28 Option Plan. However, as the Ninth Circuit Court of Appeals held in *San Diego Police Officers’*  
*Association v. San Diego City Employees’ Retirement System* (2009) 568 F.3d 725, 737, it is a  
“legal fiction” that Deferred Retirement Option Plan members are “retired.”

1 2007 to the time Plaintiffs retire in the future. That being the case, the exemption of Gov. Code  
2 section 905(f) is inapplicable.

3 **F. A Later Filed Case Brought By These Plaintiffs Own Union Encompasses the Same**  
4 **Causes of Action**

5 Pendency of another earlier action growing out of same transaction and between the same  
6 parties is ground for abatement of the second action and a defendant may assert another pending  
7 action as a bar either by demurrer. (*Leadford v. Leadford* (1992) 6 Cal.App.4th 571.) In fact, a  
8 trial court has no discretion to allow a second action to proceed if it finds a first identical action  
9 is pending and involves substantially the same controversy between the same parties. (*Id.*)

10 In order for an action to be abated because of the pendency of another action, issues in  
11 the two actions must be substantially the same; and in determining whether such issues are  
12 substantially the same, the test applied is whether final judgment in one action could be pleaded  
13 as a bar to the second action. (*Kamei v. Kumamoto* (1967) 256 Cal.App.2d 381; *Trickey v. City of*  
14 *Long Beach* (1951) 101 Cal.App.2d 871.)

15 On January 13, 2009, Plaintiffs filed this instant action. On the very next day, the San  
16 Diego Police Officers Association filed a Complaint for Writ of Mandate and Declaratory Relief,  
17 San Diego Superior Court case number 37-2009-00081659-CU-WM-CTL (“POA FAC”).  
18 Following the sustaining of City’s demurrer with leave to amend, the San Diego Police Officers  
19 Association filed a First Amended Complaint. (A true and correct copy of said First Amended  
20 Complaint is attached as Exhibit “A” to the contemporaneously filed Request for Judicial  
21 Notice.)

22 In the POA FAC, Plaintiff San Diego Police Officers Association alleges that the “San  
23 Diego Police Officers Association is a mutual benefit corporation organized and doing business  
24 as a State of California sanctioned employee organization representing police officers holding  
25 the rank of lieutenant and below and who are employed by the City of San Diego.” (POA FAC ¶  
26 1.) By this definition, Plaintiffs are members of the San Diego Police Officers Association as  
27 they are officers of the San Diego Police Department who are not alleged to hold any rank above  
28 that of lieutenant. (Complaint ¶¶ 1-4).

1 The POA FAC, like the complaint in this action, alleges that the City's removal of  
2 motorcycle care pay and canine care pay were unlawful and affects future pension benefits.  
3 Indeed, many of the allegations in Plaintiffs' Complaint and the POA Complaint are identical.  
4 For example, both first amended complaints allege that on or about January 26, 2007, the City  
5 unilaterally changed the Earnings Code Document to exclude Motorcycle Care Pay and Canine  
6 Care Pay from Base Compensation, and as a result, underreported and/or excluded portions of  
7 plaintiffs' Base Compensation that will affect the amount of plaintiffs' retirement allowances."  
8 (Compare FAC ¶ 24 and POA FAC ¶ 13.)

9 Plaintiffs in this action and the plaintiff in the POA FAC pray for the identical relief.  
10 Specifically, both plaintiffs ask this Court to issue a peremptory writ of mandate voiding the  
11 City's unilateral amendment to the Earnings Code Document and take all necessary steps to  
12 correctly report plaintiffs' Base Compensation to the San Diego City Employees' Retirement  
13 System. (Compare FAC ¶ 31 and POA FAC ¶ 21).

14 As shown above, the issues and the relief requested in this action and via the POA FAC  
15 are identical. Rather, the only difference is the POA FAC presumably encompasses all  
16 individuals allegedly affected by the removal of motorcycle care pay and canine care pay from  
17 the City's Earnings Code Documents since January 2007. The POA FAC alleges that  
18 approximately 100 officers are affected by that lawsuit. (POA FAC ¶ 13.) The plaintiffs in this  
19 action, as motorcycle and canine officers, are included in the approximate 100 officers affected  
20 by the POA FAC. Therefore, a judgment arising from the POA FAC would be bar individual  
21 action by its members, including those of Plaintiffs in this action. That being the case, this Court  
22 has a mandatory duty to abate this action pursuant to Cal. Code Civ. Proc. section 430.10(c) in  
23 favor of the action filed by San Diego Police Officers Association the day after the initial  
24 complaint in this matter was filed.

25 ///

26 ///

27 ///

28

1 **G. Plaintiff McElroy Executed a Release Agreement Regarding the Subject Matter of**  
2 **this Litigation, and thus, is Barred From Pursuing the Relief Requested Based on**  
3 **Res Judicata**

4 Plaintiff McElroy previously settled the claim alleged herein in a prior lawsuit.

5 Therefore, this FAC, as to Plaintiff McElroy, fails to state facts sufficient to constitute a cause of  
6 action in that he is barred under the theories of res judicata and contractual release due to the  
7 release agreement he executed.

8 In this case, Plaintiff McElroy has previously executed a Release agreement arising out of  
9 the facts alleged in Plaintiffs' complaint. (A true and correct copy of the Release is attached as  
10 Exhibit "B" to the contemporaneously filed Request for Judicial Notice.) In that release,  
11 Plaintiff McElroy agreed as follows:

12 ... on behalf of myself and my heirs, executors, beneficiaries, administrators,  
13 representatives, successors in interest, agents and assigns, hereby fully, and  
14 without limitation, release, and forever discharge the City, SDCERS, and all  
15 persons acting by, through, under, or in concert with them, from any and all  
16 rights, claims, liabilities, obligations, assertions, or causes of action, known or  
17 unknown, that I may have, arising from, based on, or relating to the inclusion of  
18 [Canine Care Pay/Motorcycle Care Pay] in my Base Compensation during the  
19 Base Period, including, without limitation: (1) *claims pertaining to the City's*  
20 *correction of the annual Earnings Codes Document, effective July 1, 2006*, and  
(2) claims that were asserted or could have been asserted in the *Sloan* Complaint,  
filed June 6, 2005, or the *Lopez* Complaint, filed July 14, 2006 (collectively, "the  
Claims"). Those complaints sought, respectively: (a) *a declaration that the City*  
*improperly failed to include Canine Care Pay in Base Compensation* as required  
by San Diego Municipal Code § 24.0103; and (b) *a declaration that the City*  
*improperly failed to include Motorcycle Care Pay in base Compensation* as  
required by San Diego Municipal Code § 24.0103. [emphasis added]

21 (Exhibit "B" to the contemporaneously filed Request for Judicial Notice.)

22 "Res judicata" describes the preclusive effect of a final judgment on the merits. Res  
23 judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit  
24 between the same parties or parties in privity with them.... [Citation.] Under the doctrine of res  
25 judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be  
26 asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation  
27 of the same cause of action. [¶] A clear and predictable res judicata doctrine promotes judicial  
28 economy. Under this doctrine, all claims based on the same cause of action must be decided in a

1 single suit; if not brought initially, they may not be raised at a later date. ‘ “Res judicata  
2 precludes piecemeal litigation by splitting a single cause of action or relitigation of the same  
3 cause of action on a different legal theory or for different relief.” ’ [Citation.] A predictable  
4 doctrine of res judicata benefits both the parties and the courts because it ‘seeks to curtail  
5 multiple litigation causing vexation and expense to the parties and wasted effort and expense in  
6 judicial administration.’” [footnotes and italics omitted] (*Mycogen Corp. v. Monsanto Co.* (2002)  
7 28 Cal.4th 888, 896-897.)

8 “California’s res judicata doctrine is based upon the primary right theory.” (*Mycogen*,  
9 *supra*, 28 Cal.4th at 904.) “The primary right theory is a theory of code pleading that has long  
10 been followed in California. It provides that a ‘cause of action’ is comprised of a ‘primary right’  
11 of the plaintiff, a corresponding ‘primary duty’ of the defendant, and a wrongful act by the  
12 defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a  
13 primary right is that it is indivisible: the violation of a single primary right gives rise to but a  
14 single cause of action. [Citation.] ... [Citation.]” (*Crowley v. Katleman* (1994) 8 Cal.4th 666,  
15 681-682.) “Under this aspect of res judicata the prior final judgment on the merits not only  
16 settles issues that were not actually litigated but also every issue that might have been raised and  
17 litigated in the first action. [Citations.] It also precludes litigation of the same cause of action on  
18 a different legal theory or for different relief.” (*Mattson v. City of Costa Mesa* (1980) 106  
19 Cal.App.3d 441, 446.) A settlement agreement, in the appropriate case, can constitute a final  
20 decision on the merits for res judicata purposes. (See *Gates v. Superior Court* (1986) 178  
21 Cal.App.3d 301, 309-312.)

22 Based on this legal authority, Plaintiff McElroy is barred from re-litigating claims that  
23 were or could have been brought in that prior action, not only just because he specifically waived  
24 any “*claims pertaining to the City’s correction of the annual Earnings Codes Document,*  
25 *effective July 1, 2006,*” but also because he expressly waived his Cal. Civ. Code section 1542  
26 rights in the Release he executed. As a result, Plaintiff McElroy cannot now by negligence or  
27 design attempt to withhold issues and litigate them in consecutive actions. Hence the rule that  
28 the prior judgment (or in this case, the Release agreement) is *res judicata* on matters which were

1 raised or could have been raised, on matters litigated or litigable. (*See Warga v. Cooper* (1996)  
2 44 Cal.App.4th 371, 377-378.)

3 IV.

4 LEAVE TO AMEND

5 California public entity liability is governed by the tort claims statutes. The California  
6 Tort Claims Act (Government Code sections 810, et seq.) defines the substantive liability of  
7 public entities and employees and delineates the procedural requirements entailed in maintaining  
8 a suit against them. General statutes of limitation provided in the Code of Civil Procedure do not  
9 apply to claims against public entities: "An action against a public entity upon a cause of action  
10 for which a claim is required to be presented . . . must be commenced within the time provided in  
11 Section 945.6 of the Government Code." (Code of Civil Procedure section 342). "Suits against  
12 public entities are governed by the specific statute of limitations provided in the Government  
13 Code, rather than the statute of limitations which applies to private defendants." (*Martell v.*  
14 *Antelope Valley Hospital Medical Center* (1998) 67 Cal. App. 4<sup>th</sup> 978, 981, citing *Dominguez v.*  
15 *City of Alhambra* (1981) 118 Cal. App. 3d 237, 244.)

16 Pursuant to the Tort Claims Act, a public entity may be sued for damages only if a claim  
17 is first presented to the public entity no later than six months after the accrual of the cause of  
18 action. Government Code sections 911.2 and 945.4. If the claim is denied, Plaintiff must file a  
19 lawsuit within six months after the denial of the claim. (Government Code section 945.6).

20 Plaintiffs allege that the action giving rise to this lawsuit took place on or about January  
21 27, 2007. (FAC ¶ 24). Plaintiffs did not file a claim nor did they allege that they had. Plaintiffs  
22 are now time barred from filing a claim. Because over six months has elapsed from the time  
23 Plaintiffs acknowledge that their cause of action accrued, pursuant to Government Code section  
24 945.6, Plaintiffs are now beyond the time to file a claim. Accordingly, leave to amend should  
25 not be granted.

26 ///

27 ///

28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

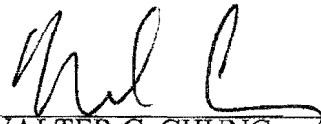
V.

**CONCLUSION**

Based on the foregoing, Defendant City of San Diego respectfully requests that its demurrer be sustained without leave to amend.

Dated: October 15, 2009

JAN I. GOLDSMITH, City Attorney

By   
WALTER C. CHUNG  
KRISTIN M.J. ZLOTNIK  
Deputy City Attorneys  
Attorneys for Defendant