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9 Joseph Krouss and Scott A. Thompson

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SAN DIEGO**

12 GUY McELROY, DAVID COOKSON, JOSEPH)
13 KROUSS and SCOTT A. THOMPSON,)

14 Plaintiffs,)

15 v.)

16 CITY OF SAN DIEGO, and DOES 1 to 20,)
17 inclusive,)

18 Defendants.)

CASE NO:

37-2009-00081178-CU-MC-CTL

COMPLAINT FOR
DECLARATORY RELIEF

19 1. Plaintiff Guy McEloy ("McEloy") is a San Diego Police Officer and employed by
20 the City of San Diego ("the City").

21 2. Plaintiff David Cookson ("Cookson") is a San Diego Police Officer and employed
22 by the City.

23 3. Plaintiff Joseph Krouss ("Krouss") is a San Diego Police Officer and employed by
24 the City.

25 4. Plaintiff Scott A. Thompson ("Thompson") is a San Diego Police Officer and
26 employed by the City.

27 5. The City is a municipal corporation with all municipal powers, functions, rights,
28 privileges and immunities authorized by the Constitution and laws of the State of California. The
City is a "charter city" under Article XI of the California Constitution, which authorizes the
organization of municipal corporations (cities) as either "general law cities" or "charter cities."

1 The City is authorized to enact ordinances consistent with its charter and is required to adhere to
2 its own ordinances.

3 6. The true names or capacities, whether individual, corporate, associate, or
4 otherwise, of defendants DOES 1 to 20, inclusive, are unknown to plaintiffs, who therefore sue
5 said defendants by such fictitious names.

6 7. Plaintiffs are informed and believe and thereon allege that each of the defendants
7 designated herein as a DOE is responsible in some manner for the events and happenings herein
8 referred to and caused injury and damages as herein alleged. Plaintiffs will seek leave of court to
9 amend this complaint, if necessary, to set forth the true names and capacities of such named
10 defendants when their identities become known to them.

11 8. Plaintiffs are informed and believe and thereon allege that each defendant named
12 in this action, including DOE defendants, at all relevant times, was the agent, ostensible agent,
13 servant, employee, representative, assistant, joint venturer, and/or co-conspirator of each of the
14 other defendants, and was at all times acting within the course and scope of his, her, or its
15 authority as agent, ostensible agent, servant, employee, representative, joint venturer, and/or
16 co-conspirator, and with the same authorization, consent, permission or ratification of each of the
17 other defendants.

18 **ADDITIONAL FACTUAL ALLEGATIONS**

19 9. In 1927, the City established a defined benefit pension plan to provide retirement,
20 disability, death, and retiree health benefits to City employees and their beneficiaries (“the
21 retirement plan”).

22 10. Pursuant to the San Diego City Charter, Article IX, sections 141 through 148.1,
23 Article X, section 1, and the San Diego Municipal Code section 24.0100, *et seq.*, each of the
24 plaintiffs makes contributions to the retirement plan, and the City makes substantially equal
25 contributions on the plaintiffs’ behalf which are considered “additional elements of
26 compensation.”

27 11. Both the contributions made by plaintiffs and the City, and the ultimate retirement
28 allowances paid on retirement are based in part on plaintiffs’ “Base Compensation.”

1 12. Pursuant to San Diego Municipal Code section 24.0103, as amended effective
2 July 1, 2000, “[a] complete listing of included and excluded items of compensation or
3 remuneration is memorialized in a document entitled ‘Earnings Codes Included in Retirement
4 Base Compensation [’] [the Earnings Codes Document], which is prepared annually and which
5 shall be kept on file in the Office of the City Clerk, and also maintained by the City Manager, the
6 City Auditor and the Personnel Director.”

7 13. In exchange for particular duties performed by the plaintiffs, they are each paid
8 either “Motorcycle Care Pay” or “Canine Care Pay.”

9 14. Both Motorcycle Care Pay and Canine Care Pay were listed in the Earnings Code
10 Document which was effective on July 1, 2000. They were both also listed in at least two
11 Earnings Code Documents published before July 1, 2000, and at least five Earnings Code
12 Documents since July 1, 2000.

13 15. On or about January 26, 2007, the City attempted to unilaterally change the
14 change the Earnings Code Document to exclude Motorcycle Care Pay and Canine Care Pay from
15 Base Compensation, and therefore exclude that portion of plaintiffs’ compensation from the
16 calculations on which plaintiffs’ retirement allowances will be based. This resulted in a
17 reduction of plaintiffs’ pensions.

18
19 **CAUSE OF ACTION FOR DECLARATORY RELIEF**

20 **(Against All Defendants)**

21 16. Plaintiffs incorporate by reference and reallege paragraphs 1 through 15 as though
22 fully set forth herein.

23 17. An actual and justiciable controversy has arisen, and now exists, between
24 plaintiffs, on the one hand, and the City, on the other hand, as to whether the City’s unilateral
25 exclusion of Motorcycle Care Pay and Canine Care Pay from Base Compensation in the January
26 2007 Earnings Code Document—which resulted in a reduction of plaintiffs’ pensions—is legally
27 effective.

28 18. The City contends that its January 2007 reduction in plaintiffs’ pensions was

1 lawful because prior versions of the Earnings Code Document were mistaken in including
2 Motorcycle Care Pay and Canine Care Pay Canine in Base Compensation.

3 19. Plaintiffs contend to the contrary, that the City may not unilaterally reduce their
4 pensions for various reasons, including that:

- 5 (a) the Court of Appeal held in *Sloan, et al. v. City of San Diego*, Case No. D049158,
6 that the inclusion of Canine Care Pay in prior versions of the Earnings Code
7 Document was not a mistake, and the City is barred by the doctrine of collateral
8 estoppel from re-litigating that identical issue;
- 9 (b) plaintiffs' pensions are a vested contractual right which may not be impaired by
10 the City¹;
- 11 (c) City Charter section 143.1² prohibits amendments to the City employees'
12 retirement system absent a majority vote of the members of the system; and
- 13 (d) the deletions of Motorcycle Care Pay and Canine Care Pay in the January 2007
14 Earnings Code Document had nothing to do with the City's budget adoption
15 process and therefore these changes were not authorized by San Diego Municipal
16
17

18
19 ¹ “[B]oth the federal and state contract clauses protect the vested pension rights of
20 public officers and employees from unreasonable impairment.” (*California Ass’n of Professional*
21 *Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 383.) “While some jurisdictions view
22 public employees’ retirement rights as a gratuity, California is firmly committed to the proposition
23 that these rights are contractual; that they are ‘vested’ in the sense that the lawmakers’ power to alter
them after they have been earned is quite limited.” (*Ibid.*) “As we have noted already, [b]y entering
public service an employee obtains a vested contractual right to earn a pension on terms substantially
equivalent to those then offered by the employer.” (*Ibid.*)

24 “A long line of California decisions has settled the principles applicable to [this situation].
25 A public employee’s pension constitutes an element of compensation, and *a vested contractual right*
26 *to pension benefits accrues upon acceptance of employment.* Such pension right *may not be*
destroyed, once vested, without impairing a contractual obligation of the employing public entity.”
(*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863, italics added.)

27
28 ² City Charter section 143.1 states, in relevant part: “[n]o ordinance amending the
retirement system which affects the benefits of any employee under such retirement system shall be
adopted without the approval of a majority vote of the members of said system.”

1 Code section 24.0103.³

2 20. Pursuant to Code of Civil Procedure section 1060, plaintiffs desire a judicial
3 determination that the City's January 2007 reduction their pensions was unlawful.

4 21. Such a judicial determination is necessary and appropriate at this time so that the
5 parties can ascertain their respective rights and duties.

6 22. There are no administrative remedies available to plaintiffs to compel the relief
7 sought herein. Therefore, plaintiffs, and each of them, have exhausted all available
8 administrative remedies.

9 23. Plaintiffs, and each of them, have no plain, speedy or adequate remedy at law.

10 24. The action, if successful, would enforce an important right affecting the public
11 interest, and would confer significant benefits, pecuniary and nonpecuniary, on the general
12 public and a large class of persons. Private enforcement is necessary and has placed a
13 disproportionate financial burden on the plaintiffs in relation to their stake in the matter.
14 Plaintiffs are therefore entitled to an award of attorney fees under Code of Civil Procedure
15 section 1021.5, the common fund doctrine, and the equitable, private attorney general doctrine.

16 **WHEREFORE, plaintiffs pray that, following a duly noticed hearing, the Court:**

- 17 1. Render a judicial determination that the City's January 2007 reduction their
18 pensions was unlawful.
- 19 2. Award plaintiffs costs of suit herein;
- 20 3. Award plaintiffs reasonable attorney fees; and
- 21 4. Award such other and further relief as it deems necessary and proper.

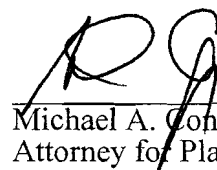
22 Dated: January 13, 2009

LAW OFFICE OF MICHAEL A. CONGER

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By:


Michael A. Conger
Attorney for Plaintiffs

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³ San Diego Municipal Code section 24.0103 states, in part: "The Earnings Codes Document shall be amended annually, *as necessary to reflect any changes or additions made during the City's budget adoption process.*" (Italics added.)