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Los Angeles Superior Court

NOV 30 2010

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

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THE PEOPLE OF THE STATE OF CALIFORNIA ex rel EDMUND G. BROWN JR.,
Attorney General of The State of California,

Plaintiffs,

v.

ROBERT A. RIZZO, PIER' ANGELA SPACCIA,
RANDY G. ADAMS, OSCAR HERNANDEZ,
TERESA JACOBO, GEORGE COLE, VICTOR
BELLO, AND GEORGE MIRABAL, in their
official and personal capacities, CITY OF BELL,
AND DOES 1-100, inclusive,

Defendants.

) CASE NO. BC445497

) *Complaint Filed: Sept. 15, 2010*

) *[Assigned to the Honorable Ralph W. Dau,*
) *Dept. 57]*

) DEFENDANT AND CROSS-
) COMPLAINANT ROBERT A. RIZZO'S
) NOTICE OF DEMURRER AND
) DEMURRER TO FIRST AMENDED
) COMPLAINT; MEMORANDUM OF
) POINTS AND AUTHORTIES IN
) SUPPORT THEREOF

) *[Filed concurrently with Request for*
) *Judicial Notice, [Proposed] Orders]*

ROBERT A. RIZZO, an individual,

Cross-complainant,

v.

CITY OF BELL, and DOES 101 through 130,
inclusive,

Cross-defendants.

) Date: January 6, 2011
) Time: 8:30 a.m.
) Dept.: 57

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1 TO THIS HONORABLE COURT, ALL PARTIES AND TO THEIR ATTORNEYS
2 OF RECORD:

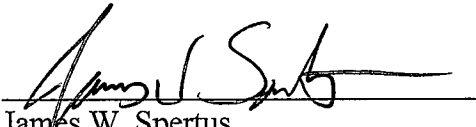
3 PLEASE TAKE NOTICE THAT on January 6, 2011 at 8:30 a.m., in Department 57 of
4 the above-entitled Court, located at 111 North Hill Street, Los Angeles, California 90012,
5 before the Honorable Ralph W. Dau, defendant and cross-complainant Robert A. Rizzo ("Mr.
6 Rizzo"), will demur to the first, second, third, fourth, fifth and sixth causes of action in
7 plaintiff The People of the State of California ex rel Edmund G. Brown Jr.'s ("plaintiff" or
8 "Attorney General" or "AG") First Amended Complaint ("FAC").

9 This demurrer is based upon this Notice of Demurrer and Demurrer, Mr. Rizzo's
10 concurrently filed Request for Judicial Notice, the attached Memorandum of Points and
11 Authorities in support of Mr. Rizzo's demurrer, all pleadings, records and documents on file
12 herein, and any further evidence or argument that the Court may properly receive at or before
13 the hearing.

14 Dated: November 30, 2010

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15
16 By:


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Demurrer to the Fourth Cause of Action

(Fraudulent Deceit)

1. The Fourth Cause of Action fails to state facts sufficient to constitute a cause of action. (Cal. Civ. Proc. Code § 430.10(e) (2010).)
2. The AG does not have the legal capacity to sue. (Cal. Civ. Proc. Code § 430.10(b) (2010).)

Demurrer to the Fifth Cause of Action

(Conflict of Interest (Cal. Govt. Code § 1090))

1. The Fifth Cause of Action fails to state facts sufficient to constitute a cause of action. (Cal. Civ. Proc. Code § 430.10(e) (2010).)
2. The AG does not have the legal capacity to sue. (Cal. Civ. Proc. Code § 430.10(b) (2010).)

Demurrer to the Sixth Cause of Action

**(Breach of Fiduciary Duty and
Violation of Public Trust)**

1. The Sixth Cause of Action fails to state facts sufficient to constitute a cause of action. (Cal. Civ. Proc. Code § 430.10(e) (2010).)
2. The AG does not have the legal capacity to sue. (Cal. Civ. Proc. Code § 430.10(b) (2010).)

Dated: November 30, 2010

LAW OFFICES OF JAMES W. SPERTUS

By:

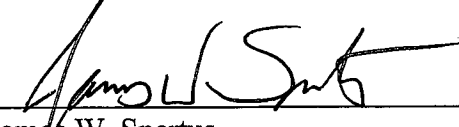

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On September 15, 2010, the Attorney General (“AG”), on behalf of the People of the
4 State of California, filed a Complaint alleging seven causes of action against Mr. Rizzo. On
5 November 4, 2010, Mr. Rizzo demurred to all seven causes of action, and the Court sustained
6 the demurrers to the second through fifth causes of action on the ground of uncertainty. On
7 November 15, 2010, the AG filed the First Amended Complaint (“FAC”) and alleged the six
8 causes of action that are the subject of this demurrer.

9 The procedural and legal deficiencies of the FAC are apparent from the face of the
10 complaint, and the deficiencies cannot be cured by amendment. The AG lacks the legal
11 capacity to prosecute an action for waste of public funds, and none of the six causes of action
12 alleged in the FAC state facts sufficient to constitute a cause of action separate and apart from
13 the AG’s lack of standing. The AG alleges all facts necessary to establish from the face of the
14 complaint that (1) Mr. Rizzo has discretionary and legislative immunity for the acts underlying
15 each and every cause of action, and (2) the AG failed to comply with the Governmental Tort
16 Claims Act, failed to allege facts excusing compliance with the Act, and the statute of
17 limitations for presenting claims under the Act has long since run. Since none of these
18 deficiencies can be cured by amendment, Mr. Rizzo requests that the FAC be dismissed
19 without leave to amend.

20 **II. DISCUSSION**

21 **A. THE ATTORNEY GENERAL LACKS THE LEGAL CAPACITY TO**
22 **PROSECUTE AN ACTION FOR WASTE OF PUBLIC FUNDS.**

23 The AG does not have standing to prosecute an action for waste of public funds. As
24 the chief law enforcement officer of the state, the AG possesses statutory powers and “powers
25 derived from the common law relative to the protection of the public interest.” (D’Amico v.
26 Board of Medical Examiners (1974) 11 Cal.3d 1, 14 (citations omitted).) This authority gives
27 the AG the power “to file any civil action or proceeding directly involving the rights and
28 interests of the state, or which he deems necessary for the enforcement of the laws of the state,

1 the preservation of order, and the protection of public rights and interest.” (*Id.*) Nonetheless,
2 the legislature can limit the AG’s authority to bring an action, and the AG may stand in the
3 shoes of the People only “in the absence of any legislative restriction.” (*Id.*; see also People ex
4 rel. Lynch v. San Diego Unified School District (1971) 19 Cal.App.3d 252, 258, 96 Cal.Rptr.
5 658 (“Attorney General is authorized to file any civil action . . . which in the absence of
6 legislative restriction he deems necessary”).) The statute authorizing actions for waste of
7 public funds, CCP Section 526a, contains just such a legislative restriction on the AG’s power
8 to file the causes of action set forth in the FAC.

9 Section 526a provides that an action for waste of public funds “may be maintained . . .
10 either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay
11 . . . a tax therein.” (Cal. Civ. Proc. Code § 526a (2010).) This section “declares what persons
12 or corporations shall be entitled to maintain that kind of action” and “[t]he effect of the
13 legislative act must be regarded as one intending to limit the right to prosecute such an action
14 to suitors of the kind mentioned therein, or it can be given no effect at all.” (Thomas v. Joplin
15 (1910) 14 Cal.App. 662, 664-65.) Because Section 526a restricts the right to sue under the
16 statute to resident citizens and corporate taxpayers, the AG lacks the legal capacity to maintain
17 an action for waste of public funds in this case. All six causes of action are based on the
18 allegation that defendants’ actions constituted a waste of public funds. (FAC, ¶¶ 94, 103, 107-
19 08, 113, 117, 123-24, 130, 133-34, 137.) Because the AG lacks the legal capacity to bring a
20 cause of action for waste of public funds, all six causes of action based on the alleged waste of
21 public funds fail.

22 **B. THE AG’S FIRST CAUSE OF ACTION FOR “WASTE OF PUBLIC**
23 **FUNDS” FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A**
24 **CAUSE OF ACTION.**

25 In addition to the AG’s lack of capacity to file an action under Section 526a, the first
26 cause of action also fails because the AG clearly and unequivocally alleges that Mr. Rizzo’s
27 purported liability rests in “a clear abuse of discretion.” (FAC, ¶¶ 96-98.) However, Mr.
28 Rizzo has absolute immunity for any alleged abuses of discretion, and consequently the first
cause of action fails to state a cause of action.

1 Government Code Section 820.2 provides that: “Except as otherwise provided by
2 statute, a public employee is not liable for an injury resulting from his act or omission where
3 the act or omission was the result of the exercise of the discretion vested in him, whether or
4 not such discretion be abused.” (Cal. Govt. Code § 820.2 (2010) (emphasis added).) Not only
5 does the AG specifically allege that Mr. Rizzo’s acts underlying the first cause of action were
6 discretionary, but the allegations in the FAC in no way resemble “ministerial” acts that could
7 possibly fall outside the scope of Section 820.2. “Decisions” rendered by government officials
8 are discretionary acts, while the execution or implementation of those decisions are ministerial
9 acts. (See Johnson v. State (1968) 69 Cal.2d 782, 796-97, 73 Cal.Rptr. 240 (citing the
10 following examples of discretionary versus ministerial acts: “decision as to where [to] place
11 wire across canyon was assumed to be discretionary, but failure to warn pilot was not,”
12 “decision as to how and when and in what manner to conduct nuclear tests was discretionary,
13 but failure to give proper notice was not,” “decision to use coyote traps assumed to be
14 discretionary, but failure to warn is not.”).) Since all of the acts alleged in the FAC involve
15 decisions relating to the “how,” “what,” “where” and “when” of the matters at issue, such acts
16 are discretionary as a matter of law, which the AG conceded on the face of the FAC.

17 In addition to the discretionary immunity set forth in Government Code Section 820.2,
18 the acts alleged in the FAC are separately protected by the common law doctrine of
19 “legislative immunity.” Mr. Rizzo has “absolute immunity from damage suits based on
20 legislative acts.”” (D’Amato v. Super Ct. (2009) 167 Cal.App.4th 861, 871, 84 Cal.Rptr.3d
21 497 (quoting Steiner v. Super Ct. (1996) 50 Cal.App.4th 1771, 1784, 58 Cal.Rptr.2d 668).)
22 “For purposes of legislative immunity, protected legislative activities includes those ‘activities
23 involving planning or enacting legislation.’ . . . Moreover, the principle of legislative
24 immunity ‘protects not only the conduct of municipal legislators, but also the acts of municipal
25 administrators and executives ‘taken in direct assistance of legislative activity.’” (Id. at 876.)
26 “Budgetary” and “fiscal questions” fall within the protections of legislative immunity. (Id. at
27 879; Steiner, 50 Cal.App.4th at 1788 (citing Taylor v. Buff (1985) 172 Cal.App.3d 384, 390,
28 218 Cal.Rptr. 249).) The FAC clearly and unequivocally alleges that “[t]he excess

1 compensation paid to defendants was authorized by City ordinances and/or defendants'
2 employment contracts.” (FAC, ¶ 95.) Consequently, such legislative acts are absolutely
3 privileged.

4 Finally, the compensation paid to Mr. Rizzo, Ms. Spaccia and Police Chief Adams
5 cannot properly be classified as “waste” under Section 526a. A claim for “waste” under
6 Section 526a focuses solely upon the purpose for which the subject public funds are used.
7 (See Sundance v. Municipal Ct. (1986) 42 Cal.3d 1101, 1137-39, 232 Cal.Rptr. 814.) A
8 taxpayer complaining of government “waste” must prove that “funds are being expended . . .
9 with no public benefit *and* no useful purpose.” (Cota v. County of Los Angeles (1980) 105
10 Cal.App.3d 282, 290, 164 Cal.Rptr. 323.) The term “waste” as used in Section 526a “means
11 more than the difference of opinion as to whether the expenditure is a good idea or not” and
12 “more than an alleged mistake by public officials in matters involving the exercise of judgment
13 or wide discretion.” (Sundance, 42 Cal.3d at 1137-38.) Since compensating public employees
14 for their services serves a public purpose, the compensation paid to the public employees
15 cannot constitute “waste,” as that term is defined under California law.

16 **C. THE AG’S SECOND CAUSE OF ACTION FOR NEGLIGENCE FAILS TO**
17 **STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.**

18 The second cause of action fails for the same reason that the first cause of action fails.
19 The second cause of action is based on the same facts alleged in the first cause of action for
20 “waste,” and merely recasts that claim for waste as a claim for “negligence.” The FAC
21 specifically alleges that Mr. Rizzo had “a duty to use due care and reasonable diligence in
22 authorizing the expenditure of public funds” (Id. at ¶ 104), and that Mr. Rizzo “failed to
23 exercise due care and reasonable diligence in approving the employment contracts of Spaccia
24 and Adams.” (Id. at ¶ 106.) The FAC alleges that Mr. Rizzo “failed to determine whether the
25 terms of the contract were reasonable, appropriate, and commensurate with their respective
26 duties and responsibilities,” and that this constitutes a breach of Mr. Rizzo’s duties. (Id. at
27 ¶¶ 106-07.)
28

1 Once again, Mr. Rizzo has absolute discretionary and legislative immunity for the
2 alleged wrongdoing and, therefore, cannot be held liable for “failing to exercise due care and
3 reasonable diligence” in approving certain employment contracts. (FAC, ¶¶ 105-06.) The
4 only scenario under which Mr. Rizzo could possibly be held liable for “negligence” is if the
5 alleged acts were not “discretionary.” (See McCorkle v. City of L.A. (1969) 70 Cal.2d 252
6 (traffic accident caused by police officer’s negligence is not a discretionary act).) However,
7 the acts that constitute the second cause of action are the same exact acts alleged under the first
8 cause of action, and the AG has conceded on the face of the FAC that these acts were
9 “discretionary acts.” Therefore, the second cause of action for negligence fails to state facts
10 sufficient to constitute a cause of action.

11 **D. THE AG’S THIRD AND FOURTH CAUSES OF ACTION FOR**
12 **FRAUDULENT DECEIT FAIL TO STATE FACTS SUFFICIENT TO**
13 **CONSTITUTE CAUSES OF ACTION.**

14 The third and fourth causes of action fail for the same reasons that the previous two
15 causes of action fail, and they also fail for additional reasons. First, the acts alleged, which
16 include the publication of the title of Ordinance No. 1158 in the minutes of the City Council
17 meeting and the publication of a memorandum containing Mr. Rizzo and the Council Member
18 defendants’ salaries (FAC, ¶¶ 63-65, 80, 82-84, 112-16, 120-22), are discretionary acts for
19 which Mr. Rizzo has absolute immunity. Second, Mr. Rizzo’s legislative immunity for the
20 alleged mislabeling of an ordinance could not be more self-evident, and there is also immunity
21 for the legislative act of allegedly publishing a memorandum relating to the salaries of
22 government employees. Mr. Rizzo also has immunity under Government Code Section 821
23 for the alleged acts relating to Ordinance No. 1158. Section 821 provides: “A public employee
24 is not liable for an injury caused by his adoption of . . . an enactment or by his failure to
25 enforce an enactment.” (Cal. Govt. Code § 821 (2010).)

26 Third, Mr. Rizzo’s alleged conduct is absolutely privileged under Civil Code Section
27 47. Section 47(a) provides: “A privileged publication or broadcast is one made . . . [i]n the
28 proper discharge of an official duty.” The privilege is absolute, and extends to officials at any
level who act in a policymaking capacity within the scope of their duties. (Slaughter v.

1 Friedman (1982) 32 Cal.3d 149, 155, 185 Cal.Rptr. 244; Royer v. Steinberg (1979) 90
2 Cal.App.3d 490, 501, 153 Cal.Rptr. 499.) “Unlike qualified privileges, it is not negated by
3 malice or other personal motivation.” (Kilgore v. Younger (1982) 30 Cal.3d 770, 778, 180
4 Cal.Rptr. 657 (emphasis added).) The AG specifically alleges that Mr. Rizzo made two
5 “publications” (the title of the Ordinance in the City Council’s minutes and the memorandum),
6 and alleges that these publications were made during the discharge of Mr. Rizzo official duties,
7 and not in Mr. Rizzo’s “private capacity.” (Slaughter, 32 Cal.3d at 156.) Consequently, both
8 publications are absolutely privileged under Section 47(a).

9 The two publications are also privileged under Section 47(b), which provides an
10 “absolute privilege” for a publication made in any “legislative proceeding” or “in any other
11 official proceeding authorized by law.” The Section 47(b) privilege “is broad and
12 comprehensive, including proceedings of all legislative bodies, whether state or municipal.”
13 (Scott v. McDonnell Douglas Corp. (1974) 37 Cal.App.3d 277, 286 & n.7, 112 Cal.Rptr. 609
14 (holding that the Santa Monica City Council was entitled to Section 47(b) privilege).) The
15 privilege for all legislative publications has been recognized since 1688 and applies to all
16 publications by a member of a legislative body, as long as the publication “bears some
17 connection to the work of the legislative body.” (Id. at 285) The title of an Ordinance and a
18 memorandum regarding the salaries of the legislators are publications that “bear some
19 connection to the work of the legislative body” and are, therefore, absolutely privileged under
20 Section 47(b).

21 Finally, the third and fourth causes of action fail because the AG fails to allege facts to
22 prove each element of a cause of action for fraudulent deceit. “The elements of fraud, which
23 give rise to the tort action for deceit, are (1) a misrepresentation, (2) with knowledge of its
24 falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) justifiable
25 reliance, and (5) resulting damage.” (Conroy v. Regents of Univ. of Cal. (2009) 45 Cal.4th
26 1244, 1255 (citation omitted).) Here, the AG has not alleged any facts to show how or
27 whether the public actually relied on the alleged misrepresentations and acted to its detriment,
28 and thus the AG cannot recover on its fraudulent deceit causes of action. (Slakey Bros.

1 Sacramento, Inc. v. Parker (1968) 265 Cal.App.2d 204, 207-08, 71 Cal.Rptr. 269 (“An
2 essential element in recovery for deceit is proof of the plaintiff’s justifiable reliance on the
3 defendant’s fraudulent representations.”).) The fact that the AG offers nothing but speculation
4 that the public actually relied on and was harmed by the alleged misrepresentations is fatal to
5 the AG’s claims for fraudulent deceit. (See Williams v. Wraxall (1995) 33 Cal.App.4th 120,
6 132-33, 39 Cal.Rptr.2d 658 (“An action for fraud or deceit . . . demands proof of damages
7 caused by misrepresentations or concealment of information. . . . A plaintiff cannot recover
8 damages based upon speculation or even a mere possibility that the wrongful conduct of the
9 defendant caused the harm.”).)

10 **E. THE AG’S FIFTH CAUSE OF ACTION FOR “CONFLICT OF INTEREST”**
11 **FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF**
12 **ACTION.**

13 The AG’s fifth cause of action attempts to transform obvious legislative acts for which
14 Mr. Rizzo is entitled to the privileges and immunities described above into an alleged
15 “contract,” with the hope that the claim could survive when couched as a Section 1090 conflict
16 of interest claim. The AG alleges that Mr. Rizzo “violated Section 1090” because “Rizzo,
17 Spaccia, and other defendants directed the modification of the City’s Supplemental Retirement
18 Plan in their official capacities and had a cognizable financial interest in the Plan above and
19 beyond other members of the Plan.” (Id. at ¶ 128.) The alleged “cognizable financial interest”
20 to Mr. Rizzo is based on the allegation that defendants modified the benefits under “the Plan
21 based solely upon when they expected to retire.” (Id. at ¶ 88.) The AG does not allege the
22 date on which this modification occurred. The AG further alleges that “Rizzo, Spaccia, and
23 other defendants . . . modified the Plan in 2009 to reduce the eligible retirement age” as an
24 incentive for a council member to resign. (Id. at ¶ 89.) The AG alleges that “[e]ach time the
25 Plan was modified, it was done at the direction of Rizzo, Spaccia, and/or other defendants.”
(Id. at ¶ 90.)

26 “To determine whether section 1090 has been violated, a court must identify
27 (1) whether the defendant government officials or employees participated in the making of a
28 contract in their official capacities, (2) whether the defendant has a cognizable financial

1 interest in that contract, and (3) . . . whether the cognizable interest falls within any one of
2 section 1091's or section 1091.5's exceptions for remote or minimal interests." (Lexin v.
3 Super. Ct. (The People) (2010) 47 Cal.4th 1050, 1074, 103 Cal.Rptr.3d 767.) "What
4 differentiates section 1090 from other conflict of interest statutes . . . is its focus on the making
5 of a contract in which one has an impermissible interest." (Id. (emphasis in original).)

6 The AG alleges that the so-called contract at issue, the City's Supplemental Retirement
7 Plan, was implemented in August 2003. (FAC, ¶ 86.) The AG then claims that "Rizzo,
8 Spaccia and other defendants have modified the terms of the Plan to maximize their own
9 benefits" since the making of that contract in 2003. (Id. at ¶ 87.) However, these alleged
10 "modifications" do not fall within the ambit of this statute. Section 1090 protects against the
11 "two masters" problem, meaning those conflict of interest scenarios where a public employee
12 in his official capacity approves a contract between the City that employs him and an outside
13 entity in which the employee has a financial interest. (Thomson v. Call (1985) 38 Cal.3d 633,
14 637, 214 Cal.Rptr. 139.) Under the AG's reading of the statute, the City could not even
15 implement, let alone modify, a retirement plan for its employees since the officials charged
16 with implementing the plan would have a financial interest in the plan. Any modification to
17 the City's retirement plan for its own employees is an act protected by the doctrines of
18 discretionary and legislative immunity, and the alleged modifications also constitute
19 publications that are absolutely privileged under Section 47.

20 **F. THE AG'S SIXTH CAUSE OF ACTION FOR "BREACH OF FIDUCIARY**
21 **DUTY AND VIOLATION OF PUBLIC TRUST" FAILS TO STATE FACTS**
22 **SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.**

23 The sixth cause of action fails for the same reasons set forth above. The sixth cause of
24 action against Mr. Rizzo alleges breach of fiduciary duty and violation of public trust. The
25 AG alleges that the prior allegations regarding Mr. Rizzo's acceptance and approval of
26 compensation for City employees, and the alleged deceit regarding Mr. Rizzo's compensation
27 and the compensation of others, constituted a violation of the public trust and a breach of Mr.
28 Rizzo's "fiduciary duty to the City and its citizens." (Id. at ¶¶ 132-35.) The AG's sixth cause

1 of action is derivative of the previous five causes of action and is based on the same exact
2 allegations, and fails for the same reasons set forth above.

3 **G. THE ATTORNEY GENERAL FAILED TO COMPLY WITH THE**
4 **GOVERNMENTAL TORT CLAIMS ACT.**

5 **1. The AG Fails To “Allege Facts Demonstrating Or Excusing**
6 **Compliance With The Claims Presentation Requirement.”**

7 Under the Governmental Tort Claims Act, no suit for money or damages can brought
8 against a public entity or a public employee unless a formal claim has been presented to the
9 entity and it has been rejected. (Cal. Govt. Code §§ 945.4, 950.2; Briggs v. Lawrence (1991)
10 230 Cal.App.3d 605, 613, 281 Cal.Rptr. 578 (“[O]ne who sues a public employee on the basis
11 of acts or omissions in the scope of the defendant’s employment have filed a claim against the
12 *public-entity employer* pursuant to the procedure for claims against public entities. Failure to
13 allege compliance renders the complaint in such an action subject to general demurrer.”); see
14 also Cal. Govt. Code § 950.2 (2010) (“[A] cause of action against a public employee or former
15 public employee for injury resulting from an act or omission in the scope of his employment as
16 a public employee is barred if an action against the employing public entity for such injury is
17 barred.”)¹ As set forth below, the AG is not exempt from the claim presentation requirement,
18 but even if such an exemption did exist, a plaintiff must still “allege facts demonstrating or
19 excusing compliance with the claim presentation requirement.” (State v. Super. Ct. (Bodde)
20 (2004) 32 Cal.4th 1234, 1239, 13 Cal.Rptr.3d 534 (emphasis added).) The failure to allege
21 such facts “subjects a claim against a public entity to a demurrer for failure to state a cause of
22 action.” (Id.) The FAC does not allege any facts stating that it has either complied with or is
23 exempt from the claim presentation requirement, and the FAC, therefore, must be dismissed
24 on that ground. Even though this defect was raised by Mr. Rizzo in his demurrer to the

25 _____
26 ¹ The City of Bell and specifically Mr. Rizzo are listed on the 2010 California Roster of
27 Public Agencies pursuant to Government Code Section 53051, which further confirms that the
28 claims procedure requirement applies to Mr. Rizzo. (See Request for Judicial Notice, Ex. B
(California Roster 2010) (which reads: “Chief Administrative Officer: Robert A. Rizzo”); also
available at <http://www.sos.ca.gov/admin/ca-roster/2010/pdf/00-entire.pdf>)

1 complaint, the AG has made no attempt to cure the defect by alleging that it is exempt from
2 the claim presentation requirement.

3 **2. The AG Is Not Exempt From The Claims Presentation Requirement.**

4 The AG cannot bring a suit against Mr. Rizzo unless the AG has fully complied with
5 the claim presentation requirement because, in this case, the AG is not exempt from complying
6 with the requirement. Under Government Code Section 905(i), claims by the AG would
7 generally be exempt from compliance with the Tort Claims Act, and generally the AG could
8 cure this particular defect in the FAC by alleging the 905(i) exemption. (Cal. Govt. Code
9 § 905(i) (2010).) However, Section 935 creates an exception to Section 905(i). Section 935
10 “specifically empowers local public entities to establish their own policies and procedures for
11 the presentation of those claims against them which are excepted by section 905.” (City of
12 Ontario v. Super. Ct. (Dept. of Transp.) (1993) 12 Cal.App.4th 894, 898, 16 Cal.Rptr.2d 32,
13 36-37.) Section 935 states: “Claims against a local public entity for money or damages which
14 are excepted by Section 905 . . . shall be governed by the procedure described in any charter
15 . . . adopted by the local public entity.” (Cal. Govt. Code § 935 (2010).) “The statute then
16 expressly permits the local public entity to establish a claim requirement, so long as the
17 procedures are similar to, and not more restrictive than, those established by the Tort Claims
18 Act with respect to claims not exempted by section 905.” (City of Ontario, 12 Cal.App.4th at
19 898 (emphasis added).) Under City of Ontario, if a city elects to establish a claim presentation
20 requirement, then the city is entitled to exercise “the authority affirmatively granted to it by the
21 State in section 935” as long as the procedures do not “contradict[]” or “exceed[]” the State’s
22 procedures for presenting claims. (Id. at 900.)

23 The City of Bell’s Charter does “establish a claim requirement,” and the procedures do
24 not contradict or exceed the State’s procedures. The FAC incorporates and quotes the City of
25 Bell’s Charter (FAC, ¶ 32), and Mr. Rizzo respectfully requests that the Court take judicial
26 notice of the Charter and the relevant provisions contained therein. (See Defendant’s Request
27 for Judicial Notice, Ex. A; see also City of Ontario, 12 Cal.App.4th at 899 n.5 (noting that the
28 trial court took judicial notice of the City of Ontario’s ordinance containing the claim

1 presentation provision).) Specifically Sections 1113 and 1114 of the City of Bell's Charter
2 state:

3 Section 1113. CLAIMS AND DEMANDS. PRESENTATION AND
4 PAYMENT. Procedures prescribed by State law governing the presentation,
5 consideration and enforcement of claims against chartered cities or against
6 officers, agents and employees thereof shall apply to the presentation,
7 consideration and enforcement of claims against the City.

8 Section 1114. ACTIONS AGAINST CITY. No suit shall be brought for
9 money or damages against the City or any board, commission or officer
10 thereof on any cause of action for which this Charter or the general law
11 requires a claim to be presented, until a claim or demand for the same has
12 been presented as in this Charter provided and such claim and demand has
13 been rejected in whole or in part. If rejected in part suit may be brought to
14 recover the whole. Failure to complete action approving or rejecting any
15 claim or demand within the timeframe prescribed by State Law shall be
16 deemed a rejection thereof.

17 (Request for Judicial Notice, Ex. A.) Since the City of Bell's Charter requires all claims to be
18 presented to the City before an action can be filed against the City, the AG cannot file a suit
19 without first complying with this requirement. The FAC, therefore, fails to state facts
20 sufficient to constitute a cause of action because it does not allege compliance with the Tort
21 Claims Act's claim presentation requirement.

22 **3. A Claim Presentation Requirement Enacted By A City Charter Creates**
23 **An Automatic Exemption To Government Code Section 905.**

24 The only reason for a city to establish a claim presentation requirement is to require
25 those plaintiffs who would normally be exempt under Government Code Section 905 to
26 present their claims to the city before filing suit. If the City of Bell's charter did not include a
27 claim presentation requirement, a plaintiff not falling within the Section 905 exceptions would
28 still be required to present a claim to the City of Bell before filing a suit, pursuant to
29 Government Code Sections 945.4 and 911.2. (See also Cal. Govt. Code §§ 811.2, 900.4 (a
30 "city" is a "public entity" subject to the claim presentation requirements of Section 911.2).)
31 Consequently, the claims procedures set forth in the City of Bell's charter must apply to the
32 AG for that provision to have any meaning at all.

33 There is no requirement that the provision in the charter specifically state that its
34 enactment is pursuant to Section 935. Nor should there be such a requirement because any

1 claim presentation provision included in a city's charter automatically invokes Section 935's
2 exception to Section 905. The express language of Section 935 specifically states that Section
3 935's sole purpose is to create an exception to Section 905:

4 Claims against a local public entity for money or damages **which are**
5 **exempted by Section 905 . . . shall** be governed by the procedures
6 prescribed in any charter . . . The procedure so prescribed may include a
requirement that a claim be presented and acted upon as a prerequisite to
suit thereon.

7 (Cal. Govt. Code § 935(a)-(b) (2010) (emphasis added).) As the statute clearly states, if a
8 charter includes a claim presentation requirement, then any action brought against the public
9 entity, specifically those that would normally be "exempted by Section 905 . . . shall be
10 governed by the procedures prescribed" in the charter.

11 **4. The AG's Claims For Restitution And Reimbursement Are Subject To**
12 **The Tort Claims Act.**

13 The fact that the AG is asserting claims for restitution and reimbursement does not
14 impact the application of the Tort Claims Act to this case. Restitution and reimbursement
15 claims are subject to the Tort Claims Act, except for the very narrow exception created for
16 plaintiffs seeking the return of specific property held by the government as a bailee. (Sparks v.
17 Kern County Bd. of Supervisors (2009) 173 Cal.App.4th 794, 799, 93 Cal.Rptr. 173 ("Actions
18 for restitution or reimbursement are subject to the claim requirements."); id. at 798-99
19 ("Sparks identifies no specific property held by respondents that he is entitled to recover. The
20 exemption Sparks relies on has not been applied outside the bailee context."); id. at 798
21 ("Accordingly, the claims presentation requirement applies to all forms of monetary demands,
22 regardless of the theory of the action."); City of L.A. v. Super Ct. (Collins) (2008) 168
23 Cal.App.4th 422, 429, 85 Cal.Rptr.3d 560 ("When a claim for 'money or damages' is not
24 based on a governmental obligation to return specific property, it is subject to the claim
25 requirements."); TrafficSchoolOnline, Inc. v. Clarke (2003) 112 Cal.App.4th 736, 742, 5
26 Cal.Rptr.3d 408 ("Minsky and the cases relying upon it have not been applied outside the
27 bailee context."))
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5. The AG's Claims Are Barred Because The Claims Were Not Timely Presented, The Statute Was Not Tolloed, And There Is No Basis For Relief For Failure To Present A Timely Claim.

The AG cannot establish compliance with the Tort Claims Act. Any "claim relating to a cause of action . . . for injury to person or to personal property . . . shall be presented not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented . . . not later than one year after the accrual of the cause of action." (Cal. Govt. Code § 911.2 (2010).) The AG alleges an injury to the People of the State of California and their property. (FAC, ¶¶ 1-9.) All claims, therefore, had to have been presented within six months of accrual of the causes of action. The accrual date is the date upon which the statute of limitations would begin to run if there were no claim-filing requirements. (Cal. Govt. Code § 901 (2010).)

As a general rule, the statute of limitations begins to run on the date of the event necessary to create a cause of action, regardless of plaintiff's knowledge or ignorance of the facts. (See Cal. Civ. Proc. Code § 335.1 (2010).) "The traditional rule in tort cases is that the statute of limitations begins to run upon the occurrence of the last fact essential to the cause of action. Although sometimes harsh, the fact that plaintiff is neither aware of his cause of action nor of the identity of the wrongdoer will not toll the statute." (Leaf v. City of San Mateo (1980) 104 Cal.App.3d 398, 406, 163 Cal.Rptr. 711.) The harshness of this rule is ameliorated by "the discovery rule," which "protects the plaintiff . . . when, despite diligent investigation, he is blamelessly ignorant of the cause of his injuries. It also protects the defendant, who is spared precipitous litigation." (Bastian v. San Luis Obispo County (1988) 199 Cal.App.3d 520, 529, 245 Cal.Rptr. 78.) "In order to raise the issue of belated discovery, the plaintiff must state when the discovery was made, the circumstances behind the discovery, and plead facts showing that the failure to discover was reasonable, justifiable and not the result of a failure to investigate or act." (Id. at 527.)

When a plaintiff fails to file a timely claim pursuant to the claim presentation requirement, the plaintiff has up to one year "after accrual of the cause of action" to apply to the public entity for permission to file a late claim. (Cal. Govt. Code § 911.4 (2010).) The

1 grounds for relief from the failure to file a timely claim are “mistake, inadvertence, surprise or
2 excusable neglect” and the public entity was not prejudiced by plaintiff’s failure to file a
3 timely claim. (Cal. Govt. Code § 911.6 (2010).) “Plaintiff must show more than that she did
4 not discover a fact until too late; she must establish that in the use of reasonable diligence she
5 failed to discover it.” (Cole v. City of Los Angeles (1986) 187 Cal.App.3d 1369, 1376, 232
6 Cal.Rptr. 624.) If the entity denies the application to file a late claim, a plaintiff may petition
7 the court for relief from the claims procedure requirements within six months after the
8 application to file a late claim is denied. (Cal. Govt. Code § 946.6 (2010).) The grounds for
9 relief from the court are the same as the grounds on which the public entity can grant an
10 application to file a late claim. (Id.) A plaintiff therefore must be able to show the court that
11 the causes of action were not discovered despite “reasonable diligence” on the part of the
12 plaintiff. (Cole, 187 Cal.App.3d at 1376.)

13 All of the acts alleged in the FAC occurred more than six months ago and all of the
14 allegations are based on facts that could have easily been ascertained through a “diligent
15 investigation” at any time starting from the date on which the causes of action accrued,
16 especially since the allegations in this case are based almost entirely on public records. The
17 AG, with its enormous investigative resources and easy access to public records, cannot plead
18 facts showing that the failure to discover was “reasonable” and “justifiable” and “not the result
19 of a failure to investigate or act.” (Bastian, Cal.App.3d at 527.)

20 The FAC, therefore, is fatally defective because (1) the AG failed to present a claim
21 within six months, (2) the AG cannot now show “reasonable diligence” that would allow him
22 to prevail on an application to file a late claim and the AG has exceeded the one year period of
23 limitation “after accrual of the cause of action” to request permission from the public entity to
24 file a late claim, (3) the AG similarly cannot show “reasonable diligence” that would allow the
25 AG to prevail on a petition for relief from the Court, which, in any event, cannot be presented
26 to the Court because the request for leave can no longer be presented to the public entity,
27 which is a condition precedent for seeking leave from the Court, and (4) based on the facts
28

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1 pleaded, the AG cannot invoke the “belated discovery rule” in order to argue that the six
2 month statute of limitations has not yet run.

3 **H. THE DEFICIENCIES IN THE COMPLAINT CANNOT BE CURED BY**
4 **AMENDMENT.**

5 A court has discretion to sustain a demurrer without leave to amend when “it appears
6 from the complaint that under applicable substantive law there is no reasonable possibility that
7 an amendment can cure the complaint’s defect.” (Heckendorn v. City of San Marino (1986)
8 42 Cal.3d 481, 486, 229 Cal.Rptr. 324.) Moreover, when granted leave to amend, the plaintiff
9 cannot plead facts that contradict the allegations that appear in the prior pleading. (See Cantu
10 v. Resolution Trust Corp. (1992) 4 Cal.App.4th 857,877, 6 Cal.Rptr.2d 151 (“A plaintiff may
11 not avoid a demurrer by pleading facts or positions in an amended complaint that contradict
12 the facts pleaded in the original complaint. . . . When the plaintiff pleads inconsistently . . . the
13 plaintiff’s complaint is nothing more than a sham that seeks to avoid the effect of a
14 demurrer.”).) The AG cannot survive a third demurrer without directly contradicting the
15 allegations pled in the Complaint and the FAC. The AG, therefore, should be denied leave to
16 amend.

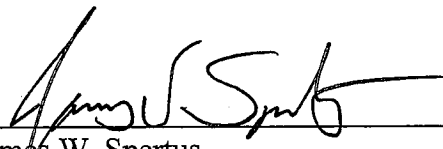
17 **III. CONCLUSION**

18 For the foregoing reasons, Mr. Rizzo respectfully requests that the Court sustain his
19 demurrer in its entirety without leave to amend.

20 Dated: November 30, 2010

LAW OFFICES OF JAMES W. SPERTUS

21
22
23 By:


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Ezra D. Landes
Attorneys for Defendant and
Cross-complainant Robert A. Rizzo

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Proof of Service

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1990 South Bundy Dr., Suite 705, Los Angeles, CA 90025.

On the date indicated below, I served the foregoing documents described as:

DEFENDANT AND CROSS-COMPLAINANT ROBERT A. RIZZO'S NOTICE OF DEMURRER AND DEMURRER TO FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORTIES IN SUPPORT THEREOF

on the interested parties in this action by placing a true copy thereof, enclosed in sealed envelopes, addressed as follows:

(SEE ATTACHED SERVICE LIST)

BY U.S. MAIL

I placed such envelope for deposit in the U.S. Mail for service by the United States Postal Service, with postage thereon fully prepaid for all addressees, except for those served via Federal Express.

BY FED EX

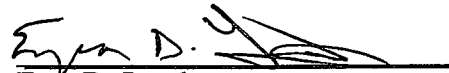
I placed such envelope for deposit with Federal Express Overnight Delivery with fees thereon fully prepaid for the Attorney General and Meyers Nave addressees.

BY E-MAIL

I electronically served all of the interested parties via email.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 30, 2010, at Los Angeles, California.


Ezra D. Landes

SERVICE LIST

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