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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF LOS ANGELES**

10 **GLENDALE COALITION FOR**
11 **BETTER GOVERNMENT,**

12 **Petitioner,**

13 **vs.**

14 **CITY OF GLENDALE and DOES 1**
15 **through 10, inclusive,**

16 **Respondents.**
17
18

19 _____
20 **AND RELATED CASE**
21 _____
22 _____

) **CASE NO: BS147376**
) **JUDGE JAMES C. CHALFANT**
) **DEPT 85**

) **NOTICE OF MOTION AND MOTION**
) **FOR JUDGMENT ON THE**
) **PLEADINGS; MEMORANDUM OF**
) **POINTS AND AUTHORITIES;**
) **REQUEST FOR JUDICIAL NOTICE**

) **Date: May 31, 2016**
) **Time: 1:30 p.m.**
) **Dept: 85**

) **CASE NO: BC539160**

23 **TO: Respondent, City of Glendale, and to its attorney of record:**
24

25 **NOTICE IS HEREBY GIVEN** that on May 31, 2016 at 1:30 p.m., or as soon
26 thereafter as the matter may be heard, in Department 85 of the above-entitled court located at
27 111 N. Hill Street, Los Angeles California, Petitioner, Glendale Coalition for Better
28 Government, shall move this court for Judgment on the Pleadings with respect to the

1 **Seventh Cause of Action** and the **Eighth Cause of Action** of the First Amended Petition
2 filed August 5, 2014. This motion shall be based upon C.C.P. ¶430.20 in that the First
3 Amended Answer fails to state facts sufficient to constitute a defense to the Seventh and
4 Eighth Causes of Action of the First Amended Petition.

5 This motion shall also be based upon this notice of motion, the accompanying
6 memorandum of points and authorities, the pleadings and documents on file herein, those
7 matters of which the court may take judicial notice and upon such other and further evidence
8 as may be presented at the hearing of said motion.

9 Those matters of which the moving party requests that judicial notice be taken are all
10 pleadings filed in the case at bar. Judicial notice is to be taken pursuant to Evidence Code
11 §§ 452 and 453.

12
13 LAW OFFICES OF
14 ARTHUR JARVIS COHEN

15
16 DATED: April 11, 2016

17 By: 

18 Arthur Jarvis Cohen,
19 Attorney for Petitioner
20 Glendale Coalition for Better Government
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- LAW OFFICES OF
ARTHUR JARVIS COHEN

By: _____

Arthur Jarvis Cohen,
Attorney for Petitioner
Glendale Coalition for Better Government

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 This is a simple motion. It is being filed concurrently with Petitioner's Opening Brief
3 and a Stipulation of Facts. **The Seventh and Eighth Causes of Action of the First**
4 **Amended Petition allege a violation of Article XIIC of the California Constitution**
5 **(Proposition 26).** This motion is based upon the **failure** of defendant, City of Glendale
6 ("City"), to **PLEAD** an affirmative defense which it is required to do as a matter of law. It is
7 the City which has the burden of proof to refute the allegations of the Seventh and Eighth
8 Causes of Action and to assert an exception to Proposition 26. The failure to plead an
9 affirmative defense should be dispositive as to these two causes of action.

10
11 **I. THE PLEADINGS - Petitioner Requests that the Court take judicial notice of**
12 **the following pleadings on file herein:**

- 13
- 14 • On **February 25, 2014**, a Petition was filed by the Glendale Coalition for
15 Better Government ("Coalition").
 - 16
 - 17 • On **August 5, 2014**, a First Amended Petition was filed. *[The Operative*
18 *pleading]* The Seventh and Eighth Causes of Action allege a violation of
19 Article XIIC (Proposition 26), to wit, **an increase in the electric rates**
20 **without a vote of the electorate.**
 - 21
 - 22 • On or about **September 4, 2014**, the City filed an improper unverified general
23 denial to the Petition which was verified.
 - 24
 - 25 • On **September 16, 2014**, the City filed a First Amended Answer. *[The*
26 *Operative pleading]* **The Answer alleges no affirmative defenses directed to**
27 **the Seventh and Eighth Causes of Action which assert that the increase in**
28 **electric rates was subject to any of the exceptions set forth in Proposition 26.**

1 **II. MOTION FOR JUDGMENT ON THE PLEADINGS MAY BE MADE AT ANY**
2 **TIME IN THE PROCEEDINGS ON THE SAME GROUND AS A DEMURRER**

3
4 A motion for judgment on the pleadings may be made at any time and is based upon
5 the same grounds as a demurrer. The motion may assert that an answer fails to state a
6 defense. The rule was stated in *Stoops v Abbassi* (2002) 100 Cal.App.4th 644, 650:

7
8 **“A motion for judgment on the pleadings may be made at any time either**
9 **prior to the trial or at the trial itself. [Citation.]” (citation omitted) Such**
10 **motion may be made on the same ground as those supporting a general**
11 **demurrer, i.e., that the pleading at issue fails to state facts sufficient to**
12 **constitute a legally cognizable claim or defense. (citation omitted)**

13
14 C.C.P. §430.20 states, in pertinent part:

15
16 **A party against whom an answer has been filed may object, by demurrer**
17 **as provided in Section 430.30 to the answer upon any one or more of the**
18 **following grounds:**

19 **(a) The answer does not state facts sufficient to**
20 **constitute a defense.**

21
22 C.C.P. §438, which addresses a motion for judgment on the pleadings, states, in
23 pertinent part:

24
25 **(c) (3) (A) If the motion is granted in favor of the plaintiff, it shall be based**
26 **on the grounds that the complaint states facts sufficient to constitute a**
27 **cause of action against the defendant and the answer does not state facts**
28 **sufficient to constitute a defense to the complaint.**

1 The differences between a demurrer to an answer and a demurrer to a complaint was
2 aptly discussed in *South Shore Land Co. v Petersen* (1964) 226 Cal.App.2d 725, 733:

3
4 **There are, however, certain important differences between**
5 **these two kinds of demurrer. An important difference is that**
6 **in the case of a demurrer to the answer, as distinguished from**
7 **a demurrer to the complaint, the defect in question need not**
8 **appear on the face of the answer. The determination of the**
9 **sufficiency of the answer requires an examination of the**
10 **complaint because its adequacy is with reference to the**
11 **complaint it purports to answer. (citations omitted)**

12
13 **III. BURDEN OF PROOF AND BURDEN OF PRODUCTION IS UPON THE CITY**

14
15 The City has the burden of proof with respect to any exception identified by Article
16 XIIC (1) (e). This is not a matter of dispute. XIIC (1) (e) states: "... 'tax' means any levy,
17 **charge, or exaction of any kind imposed by a local government, except the following:**"
18 XIIC (1) (e) then sets forth **seven exceptions**. XIIC (1) (e) further states, in no uncertain
19 terms:

20
21 **The local government bears the burden of proving by a**
22 **preponderance of the evidence that a levy, charge, or**
23 **exaction is not a tax, that the amount is no more than**
24 **necessary to cover the reasonable costs of the governmental**
25 **activity, and that the manner in which those costs are allocated**
26 **to a payor bear a reasonable relationship to the payor's**
27 **burdens on, or benefits received from, the governmental activity.**
28

1 The burden set forth in XIIIIC is mandated by the California Evidence Code, to wit,
2 §110, “Burden of producing evidence,” §115, “Burden of proof,” § 500, “Party who has
3 the burden of proof,” and §550, “Party who has the burden of producing evidence.”

4 The burden mandated by XIIIIC was *acknowledged* both by counsel for the City,
5 Michael Colantuono, and by this court at a hearing on January 22, 2015 at page 9, lines 4-11
6 of the Reporter’s Transcript (copy attached hereto as Exhibit “A”) as follows:

7
8 **MR. COLANTUONO:** I believe they bear the burden of persuasion
9 on their Charter claims. *I acknowledge that I bear the burden of*
10 *persuasion on Prop. 218 and Prop 26 claims, and I bear the burden*
11 *of production on both claims.*

12
13 **THE COURT:** *So the Prop 218 and 26. You have the burden of proof.*
14 *You don’t show that the transfer was for the cost of service, you lose.*
15 *And if it’s not in the record, you lose.*

16
17 **IV. REQUIREMENT TO PLEAD AN AFFIRMATIVE DEFENSE**

18
19 A defendant which has the burden of proof on a particular issue has the duty to plead
20 an affirmative defense. The rule was stated in *Wiese v Steinauer* (1962) 201 Cal.App.2d 651,
21 656 as follows:

22
23 It is the duty of a defendant to plead matters which are not
24 provable under a general or specific denial but which avoid the action
25 or at least the theory outlined in the complaint. If the burden of
26 proof is thrown upon the defendant (Code Civ. Proc., § 1981 [now
27 Evidence Code §§ 500, 550]) the matter pleaded comes under the
28 general heading of new matter, which must be proved with the

1 purpose of defeating plaintiff's case. (*Dieterle v. Bekin*, 143 Cal. 683
2 [77P. 664] Whether defendants failed to prove the new matter is a
3 question to be determined by the trial court. [emphasis added]
4

5 The following is from the Law Revision Committee Comments to Evidence Code
6 §500 and is applicable to the case at bar:
7

8 “The basic rule, which covers most situations, is that
9 whatever facts a party must affirmatively plead he also has
10 the burden of proving.” Section 500 follows this basic rule.
11 However, Section 500 is broader, applying to issues not necessarily
12 raised in the pleading.

13 Under Section 500, the burden of proof as to a particular
14 fact is normally on the party to whose case the fact is essential...
15 And, “as a general rule, the burden is on the defendant to prove
16 new matter alleged as a defense....
17

18 Witkin, California Procedure, 5th Edition, Pleading, contains a thorough discussion of
19 the necessity of pleading new matter as an affirmative defense. Witkin states at §1082:
20

21 An affirmative defense must be pleaded in the same manner
22 as if the facts were set forth in a complaint. In other words,
23 the general requirement of stating the ultimate facts applies and, where
24 particularity in pleading is necessary in a complaint, it is equally necessary
25 in an affirmative defense involving the issue.
26

27 One pertinent example herein is that under the Government Tort Claims Act.
28 Statutory immunities are affirmative defenses which must be *pleaded*. In *Cameron v*

1 California (1972) 7 Cal3d 318, the Supreme Court said at page 325: *"The immunity of section*
2 *830.6 is an affirmative defense which must be **pleaded and proved.**"*

3
4 Perhaps the best statement of the rule may be found at *Joseph E. Di Loreto, Inc. v*
5 *O'Neill* (1991) 1 Cal.App.4th 149. Although this case dealt with a summary judgment motion,
6 the legal principle is the same. The court stated at page 156:

7
8 **The moving party's burden on a motion for summary judgment**
9 **is only to negate the existence of triable issues of fact in a fashion**
10 **that entitles him to judgment on the issues raised by the pleadings;**
11 **he is not required to refute liability on some theoretical possibility**
12 **not included in the pleadings. (citation omitted) What issues are**
13 **material is determined mainly by the pleadings, the rules of**
14 **pleading, and the substantive law relating to the particular kind**
15 **of case. (citation omitted)**

16
17 **V. CITY MAY NOT NOW AMEND AT TIME OF TRIAL**

18
19 On September 16, 2014, the City filed a First Amended Answer. **The Answer to the**
20 **Seventh and Eight Causes of Action** simply states to the extent any paragraph *"contains*
21 *any factual allegations, the City denies each and every allegation contained therein."* The
22 Answer then admits the City increased electric rates without a vote. The Answer states in ¶48:

23
24 *"However, the City avers that on August 13, 2013, the Glendale*
25 *City Council adopted Resolution No. 13-138 to set electric rates*
26 *for five years from 2014 through 2018; the City further avers*
27 *that it did not submit the rates adopted in Resolution No. 13-138*
28 *to a vote of the electorate."*

1 One year later, in **September 2015**, the City and the Coalition entered into a
2 Stipulation of Facts. *In paragraph 34 of the Stipulation of Facts it is stipulated that the City*
3 *increased the electric rates on August 13, 2013 without a vote of the electorate. This Court*
4 **may take judicial notice of the Stipulation of facts.**

5 It is now **April 2016**. Trial is scheduled for **May 31, 2016**. At no time during this
6 litigation which began in **February 2014** did the City ever seek to assert an affirmative
7 defense alleging an exception to Proposition 26. In the 19 months since the City filed its First
8 Amended Answer, the City and the Coalition have entered into a Stipulation of Facts and a
9 Joint Exhibit List and depositions which focused solely on the Charter were taken.

10 The Answer to the First Amended Petition, which contains nine Affirmative Defenses,
11 alleges no affirmative defenses directed to the Seventh and Eighth Causes of Action that the
12 increase in electric rates was subject to any of the exceptions set forth in Proposition 26 which
13 would negate the need of a vote. Further, the City's Ninth Affirmative Defense states:

14
15 ***"The City has insufficient knowledge and information on which***
16 ***to form a belief as to whether additional, unstated defenses are***
17 ***available. The City reserves the right to assert additional defenses***
18 ***in the event that future discovery or available information***
19 ***indicates that such defenses would be appropriate."***

20
21 **Are we to believe that, for the past two years, the City had "*insufficient***
22 ***knowledge and information on which to form a belief as to whether additional, unstated***
23 ***defenses are available*"? Does that question actually need a response?**

24
25 It is far too late to permit the City to now plead a new affirmative defense and raise
26 new issues. The Coalition is well aware of the general rule that a court may abuse its
27 discretion if it does not permit a party to amend after a demurrer is sustained where an
28 amendment is reasonable. However, the burden of establishing abuse is upon that party.

1 The oft stated rule was set forth in *Harrison v Hanson* (1958) 165 Cal/App.2d 370, 276 as
2 follows:

3
4 **It is also true that, where a demurrer has been sustained**
5 **without leave to amend, the reviewing court should reverse**
6 **only where there is manifest an abuse of discretion in refusing**
7 **leave to amend. The burden of showing such abuse of discretion**
8 **rests with appellant. (citation omitted)**
9

10 This is not a demurrer to a complaint filed at the onset of the litigation. It is a motion
11 to be heard at trial. Upon a review of the events at bar, we must consider the following:

- 12
13 **(1) We are at trial more than two years after the petition was filed.**
14 **(2) An amended Answer was filed in September 2014 which is 19 months ago.**
15 **(3) Counsel for the City confirmed the burden in open court 15 months ago.**
16 **(4) Stipulations of Fact were entered into 7 months ago.**
17 **(5) A joint exhibit list was reached.**
18 **(6) Depositions have been taken.**
19 **(7) An opening brief has been filed.**
20

21 Directly on point is *Hulsey v Koehler* (1990) 218 Cal.App.3d 1150 in which the Court
22 of Appeal affirmed a trial court which **rejected** a motion to amend the answer at trial. The
23 Hulsey court recognized that courts ordinarily exercised “liberality” in permitting
24 amendments at any stage of the proceeding, but held at page 1159:

25
26 **“[N]evertheless, whether such an amendment shall be allowed**
27 **rests in the sound discretion of the trial court. [Citations.] And**
28 **courts are much more critical of proposed amendments to**

1 answers when offered after long unexplained delay or on the eve
2 of trial [citations], or where there is a lack of diligence, or there
3 is prejudice to the other party (citations).”

4
5 **Here, Koehler moved to amend at trial to conform to proof**
6 **more than three years after she answered the Hulseys' amended**
7 **complaint. Defense counsel's excuse for this delay was simply**
8 **that he discovered section 426.30 as a potential defense only two**
9 **days before trial while reading the transcript of Mrs. Hulsey's**
10 **deposition. In denying the motion as untimely, the trial court**
11 **impliedly found an unreasonable lack of diligence in the belated**
12 **assertion of this defense. Moreover, the trial court noted that**
13 **the delay had prejudiced the Hulseys: “I think that's**
14 **particularly true in this case, wherein we have an attorney's fee**
15 **provision...**

16 **On the facts before it, the trial court did not abuse its discretion**
17 **in denying the motion to amend.**

18 To now permit new defenses will raise issues not before the court, will delay the
19 matter interminably, and will cause the Coalition to incur much additional time and expense.
20 As a matter of law, the City has waived any right to now assert additional Affirmative
21 defenses.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **VI. CONCLUSION**

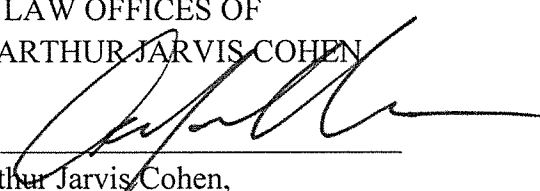
2
3 Affirmative Defenses alleging an exception to XIIC (*assuming such defenses exist*)
4 should have been asserted in **September 2014, not in May 2016**. They certainly should have
5 been pleaded by now. The burden was upon the City. The failure to do so cannot be legally
6 justified.

7 **The Coalition is entitled to Judgment on the Pleadings with respect to the Seventh**
8 **and Eighth Causes of Action of the First Amended Petition.**

9
10
11 Respectfully submitted,

12
13 LAW OFFICES OF
14 ARTHUR JARVIS COHEN

15 DATED: April 11, 2016

16 By: 
17 Arthur Jarvis Cohen,
18 Attorney for Petitioner
19 Glendale Coalition for Better Government
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 85

HON. JAMES C. CHALFANT, JUDGE

GLENDALÉ COALITION FOR BETTER)
GOVERNMENT,)
PETITIONER,)
vs.) NO. BS147376
CITY OF GLENDALÉ,)
RESPONDENT.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THURSDAY, JANUARY 22, 2015

FOR PETITIONERS: ARTHUR JARVIS COHEN, ATTORNEY AT LAW and
HARRY ZAVOS, ATTORNEY AT LAW
FOR SAAVEDRA: WILLIAM HEINE, ATTORNEY AT LAW
FOR RESPONDENT: MICHAEL G. COLANTUONO, ATTORNEY AT LAW

BUFORD J. JAMES
OFFICIAL REPORTER 9296
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012

Buford J. James, CSR 9296

EXHIBIT A(1)

1 MR. ZAVOS: Reimbursement.

2 THE COURT: If they don't show that from the
3 record, they lose; right?

4 MR. COLANTUONO: I believe they bear the burden
5 of persuasion on their Charter claims. I acknowledge that
6 I bear the burden of persuasion on Prop 218 and Prop 26
7 claims, and I bear the burden of production on both claims.

8 THE COURT: So the Prop 218 and 26. You have the
9 burden of proof. You don't show that the transfer was for
0 the cost of service, you lose. And if it's not in the
1 record, you lose.

2 MR. ZAVOS: But that's not the constitutional
3 issue. That's a Charter issue. The constitutional issues
4 are failure to have a vote after the increase in the
5 electrical rates.

6 THE COURT: No. That's a different
7 constitutional issue. That's not what the Redding case is
8 about.

9 MR. COHEN: It's a Prop 26 issue.

10 MR. HEINE: If it is a hidden tax, that's the
11 concept. If the payment to the City is not -- cannot be
12 construed as a tax on the residents, then it's all right.
13 But if it's a hidden tax, i.e., that the amount is greater
14 than the amount necessary to reimburse the City for
15 services provided, to that extent it's a hidden tax. If it
16 is a tax under Prop 13 and subsequent enactments, it has to
17 go before the electorate for a vote to increase taxes so.

8 THE COURT: Right. So they lose if they don't

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF _____

I have read the foregoing _____ and know its contents.

CHECK APPLICABLE PARAGRAPHS

- ☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.
- ☐ I am ☐ an Officer ☐ a partner ☐ a _____ of _____, a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.
- ☐ I am one of the attorneys for _____ a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing documents are true.

Executed on _____, at _____, California.

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

Printed Name

Signature

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the county of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2 Venture, Suite 120, Irvine, California 92618.

On, April 11, 2016, I served the foregoing document described as: **Notice of Motion and Motion for Judgment on the Pleadings; Memorandum of Points and Authorities; Request for Judicial Notice**

on interested parties in this action

- ☐ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:
☒ by placing ☐ the original ☒ a true copy thereof enclosed in sealed envelopes addressed as follows:

David Ruderman, Esq.
Michael G. Colantuono, Esq.
Colantuono, Highsmith & Whatley, PC
300 S. Grand Avenue, Suite 2700
Los Angeles, CA 90071-3137
(Electronic Service also)

D. William Heine, Esq.
Steven Zimmerman, Esq.
Schwartz, Steinsapir, Dohrmann & Sommers, LLP
6300 Wilshire Boulevard, Suite 2000
Los Angeles, California 90048
(Electronic Service also)

☒ BY MAIL

☐ *I deposited such envelope in the mail at _____, California. The envelope was mailed with postage thereon fully prepaid.

☒ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on April 11, 2016 at Irvine, California.

- ☐ **(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

Executed on _____, at _____, California.

- ☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
☐ (Federal) I declare that I am employed in the office of a member of the bar of this courts at whose direction the service was made.

Arthur Jarvis Cohen, Esq.

Printed Name

Signature

*(BY MAIL SIGNATURE MUST BE OF PERSON DEPOSITING ENVELOPE IN MAIL SLOT, BOX OR BAG)

** (FOR PERSONAL SERVICE SIGNATURE MUST BE THAT OF MESSENGER)