

In the
SUPREME COURT
of the
STATE OF CALIFORNIA
No. S139237

THE CITY OF STOCKTON, a California municipality,
THE REDEVELOPMENT AGENCY OF THE CITY OF STOCKTON, a California
municipal redevelopment agency,

Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SACRAMENTO,

Respondent,

CIVIC PARTNERS STOCKTON, LLC,

Real Party in Interest.

The Court of Appeal of the State of California, Third Appellate District, No. C048162
Superior Court of the State of California, Sacramento County, No. 03AS00193

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I. INTRODUCTION

This case involves an attack on California's long-established claims presentation statutes and policy. The statutory language at issue could not be more clear or expansive: "all claims" means all claims; "money or damages" means money or damages, and "no suit" means no suit. The simple fact is that Plaintiff has always sued for money or damages, but failed to comply with California's claims presentation requirements.

For over 150 years, persons alleging claims for money or damages against California public entities have been required to submit a formal claim to the entity as a prerequisite to filing suit. This pre-suit claim requirement reflects important public policies to allow the governing boards of public entities an opportunity to avoid the costs of litigation by evaluating and settling meritorious claims early, and to budget early for claims that must be litigated. Claimants who file a complaint without first submitting a claim defeat those policies.

Government Code Section 905¹ broadly makes "all claims for money or damages against local public entities" subject to the pre-suit claim requirement, unless specifically excepted. The theory of liability for monetary recovery is irrelevant. This inclusiveness advances the strong

¹ Unless otherwise indicated all statutory references are to the California Government Code.

public policy of promoting early settlement of, and allows early budgeting for, all monetary claims against public entities.

Plaintiff and real party in interest, Civic Partners Stockton LLC (“Civic”), ignored the pre-suit claims requirement before it filed suit against defendants and petitioners below, the City of Stockton (“City”) and the Redevelopment Agency of the City of Stockton (“Agency”) (collectively “Stockton”). The after-the-fact reasons Civic now offers for its failure to present a claim are based on a convoluted and incorrect interpretation of the Government Code that, if adopted, would rewrite the claims statutes and undermine the strong and enduring public policy behind them. Civic’s attempt to manufacture an excuse for not filing a claim should be rejected.

The issues and their resolution are straightforward:

- *Do the claims statutes apply to all of Civic’s monetary claims?*
Yes. Section 905 makes “all claims for money or damages” subject to the claims presentation rules. This includes Civic’s breach of contract claims as well as its tort claim.
- *Is Civic required to plead facts demonstrating or excusing compliance with the claims statutes for all of its claims against Stockton?* Yes. *State v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234 applies to all of those claims.

- *Did Civic plead facts demonstrating or excusing compliance with the claims presentation requirements?* No. This is undisputed. Thus, Stockton's Demurrer below should have been sustained.
- *Should Civic be granted leave to amend to assert monetary claims?* No.
 - *Can Civic truthfully plead facts demonstrating or excusing compliance with the claims statutes?* No.
 - *Did Civic comply or "substantially comply" with the claims statutes?* No. Civic's relevant communications with Stockton omitted numerous requirements of Sections 910, 910.2 and 915.
 - *Did Civic submit a "claim as presented" under Section 910.8?* No. Civic's negotiations and alleged agreements with Stockton were not readily discernible as intending to convey the assertion of a compensable claim that will result in litigation if not resolved.
 - *Can Civic truthfully plead "estoppel" as an excuse for non-compliance?* No. Stockton did not engage in calculated conduct or make affirmative misrepresentations that induced Civic to delay filing a claim. Nor did Stockton have any

obligation to advise Civic to file a claim. In any event, estoppel would only warrant *tolling* the claim period—which, even with any tolling, long ago expired.

- *Did Stockton, through filing its compulsory cross-complaint, “waive” Civic’s compliance with the claims statutes?* No. Civic sued first. The claims period expired long *before* Stockton filed its compulsory Cross-complaint.
- *Can Civic reframe its complaint to seek monetary restitution?* No. Civic’s proposed monetary restitution claims, based on state law theories, all seek money or damages, and are thus subject to the claim statutes. All such claims are now barred by operation of Section 945.4. Civic’s monetary copyright claims are within federal court exclusive jurisdiction.
- *Can Civic amend its complaint to state a valid claim for something other than money or damages?* Possibly, but the utility of doing so seems problematic. Civic might allege a claim for return of the physical copy of the Hotel plans, or for a declaration of ownership of the plans, but not a claim for money or damages for Stockton’s alleged

use of the plans. Civic's pleadings have never sought return of the plans or a declaration of only ownership. Civic's case is all about money.

II. FACTUAL BACKGROUND

To revive Stockton's downtown, the Agency acquired the historic Hotel Stockton property for redevelopment purposes. (Stockton, p. 0025.)² The plans called for the upper floors of the Hotel to be converted into office space, (Stockton, p. 0038, §2.5.), and the construction of a cineplex on adjoining property. (Stockton, p. 0099.) The Hotel Disposition and Development Agreement ("Hotel DDA") provided that Civic would acquire the Hotel property from the Agency and redevelop it. (Stockton, p. 0030, ¶F.) The Cinema Disposition and Development Agreement ("Cinema DDA") provided that Civic would acquire property adjacent to the Hotel and develop a cineplex. (Stockton, p. 0099.) Later, the City entered into an office lease ("Hotel Lease") that would have made the City the tenant of the Hotel office space that Civic had contracted to build. (Stockton, p. 0161, §2.4, p. 0168, §5.1.)

Civic was to obtain all necessary land use approvals for the Hotel project. (Stockton, p. 0039, §2.7.) Civic's redevelopment of the historic

² Stockton and Civic filed one volume of exhibits each below. References to those exhibits are by party name and page number, with further references, where applicable, to paragraph or section.

Hotel property was subject to approvals administered by the California Office of Historic Preservation (“OHP”); the requirements OHP eventually imposed added about \$6 million in unanticipated expense to the cost of redeveloping the Hotel. (Civic, p. 4, ¶8.)³

This created a shortfall in financing for the Hotel project. (Civic, p. 5, ¶12.) Civic nonetheless claims that it was the *City’s* alleged August 2001 repudiation of the Hotel Lease, that made it impossible for Civic to move forward under the Hotel DDA. (Stockton, p. 0003, ¶¶6-8.) Civic also alleges that a viable Hotel project was necessary for it to obtain financing for the Cinema DDA. (Stockton, p. 0004, ¶8.)

Civic worked on a new alternative for the Hotel, subsidized senior housing. (Stockton, p. 0005-6, ¶¶13-14.) Stockton also worked with another developer, CFY Development (and its principal, Cyrus Youssefi)(collectively, “Youssefi”), on a different senior housing alternative for the Hotel. (Stockton, p. 0007, ¶17.)

Civic alleges that, upon learning of Youssefi’s involvement, Civic demanded, and Agency staff agreed, that the Agency “repay Civic’s investment and overhead to develop the Hotel project.” (Stockton, p. 0008,

³ Stockton understands that only the allegations of Civic’s pleadings and the Offer of Proof are relevant to determining the sufficiency of Civic’s pleadings on demurrer. There are two sides to this story, however. Civic’s story ignores that it could not and did not perform the DDAs and the Lease as required. (Civic, pp. 107-132.)

¶20.) Civic contends the terms of this agreement are evidenced by a February 19, 2002 letter (“February Letter”) (Stockton, p. 0008, ¶21; pp. 0181-0182) and a March 15, 2002 unsigned memorandum prepared by Civic (“March Memorandum”) (Stockton, pp. 0009-0010, ¶¶22-23; pp. 0183-185). A January 29, 2002 e-mail (“January E-mail”) from City staff, however, made clear any discussions were subject to City Council approval. (Offer of Proof [“OP”], p. 4, Fig. 1.)⁴

Civic alleges that, based on the February Letter, Civic provided certain Hotel plans to the Agency (Stockton, p. 0011, ¶26), who gave them to Youssefi (Stockton, p. 0012, ¶30) to facilitate application for housing tax credits (Stockton, p. 0009, ¶23). However, the Hotel DDA gave the City the right to the plans without any separate agreement. (Stockton, p. 0062, §9.7.)

The Agency and Youssefi entered into a DDA for the senior housing project on March 19, 2002. (Stockton, p. 0019, ¶57.)

Civic does not allege that it was ever successful in obtaining either financing or design approvals for the projects, as required by the DDAs. (Stockton, p. 0036, §2.1, p. 0038, §2.6, p. 0040, §2.9.) Civic alleges in August 2002, the Agency terminated the Hotel DDA (Stockton, p. 0019,

⁴ References to briefs, pleadings, and Civic’s Offer of Proof to the Court of Appeal are designated by initials. (e.g., Offer of Proof is referred to as “OP”; Opening Brief is “OB.”)

¶58), and the City terminated the Hotel Lease (Stockton, p. 0017, ¶47). Civic alleges the Agency breached and repudiated the Cinema DDA in “late 2002”. (Stockton, p. 0020, ¶62.)

III. PROCEDURAL HISTORY

A. In The Trial Court

On January 14, 2003, Civic filed its Complaint against Stockton and Youssefi. Against Stockton, the complaint sought a declaration that Civic owned the plans for the Hotel and the federal copyright thereto and alleged a claim for money for use of the plans (Civic, p. 19, ¶65), and sought damages for breach of the DDAs and the alleged “February 19, 2002 agreement.” Stockton demurred. By order dated March 9, 2004, the demurrer was sustained, in pertinent part, (1) without leave to amend as to all copyright infringement claims (2) with leave to amend for breach of contract claims against the Agency and (3) without leave to amend for the breach of Hotel DDA and Cinema DDA claims against the City. (Civic, pp. 50-51.)

Civic then filed its “Amended Complaint”—alleging causes of action against the City for breach of the Hotel Lease, against the Agency for breaches of the DDAs, against the City for intentional interference with the DDAs, and against all defendants for a declaration that Civic owned the plans for the Hotel project and for recovery of lost profits from their use. Civic also loosely alleged that the February Letter and the March

Memorandum were themselves enforceable agreements. (Civic, pp. 60-64, ¶¶21, 25, 27 and 31.) Stockton again demurred. The Trial Court's order of May 25, 2004 sustained Stockton's demurrer to Civic's re-alleging its federal copyright infringement claims without leave to amend, and either granted Civic leave to amend or overruled other parts of Stockton's demurrer. (Request for Judicial Notice ["RJN"], p. 0013.) Civic did not seek appellate review of that order.

On May 24, 2004 this Court's opinion in *Bodde, supra*, 32 Cal.4th 1234, was published, which clearly placed the burden on plaintiffs to plead facts demonstrating compliance or excuse from compliance with the claims statutes.

Civic filed its Second Amended Complaint on June 8, 2004. Civic realleged the contract claims based on the Hotel DDA, the Cinema DDA and the Hotel Lease; and the tort claim against the City for intentional interference with Civic's contractual relations. Notwithstanding a reference in the title of the Second Amended Complaint, there was no cause of action or prayer seeking declaratory judgment regarding ownership of the Hotel Stockton plans. Nor did Civic plead facts demonstrating compliance or excuse from compliance with the claim presentation requirements as to any of its causes of action.

On June 24, 2004, Stockton demurred on the ground that Civic had failed to plead compliance with the claim presentation requirements or an

adequate excuse for noncompliance. (Stockton, pp. 0192-0194, 0210-0211.)

The Trial Court overruled Stockton's Demurrer, stating as to Civic's three breach of contract claims:

The contention that Plaintiff has failed to allege compliance with the Govt. Tort Claims Act, and therefore cannot state a cause of action, is overruled. Govt. Code Section 814 expressly provides that nothing in the Tort Claims Act "affects liability based on contract." *E.H. Morrill Co. v. State* (1967) 65 Cal.2d 787, 793. The case cited by Defendants, *State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, is factually distinguishable, as it involves the alleged misdiagnosis of a prisoner's lung cancer and failure to provide medical care, not breach of contract.

(Stockton, p. 0258.) The Trial Court failed to address whether Civic's tortious interference claim was subject to the pre-suit claim requirement.

B. In The Court of Appeal

Stockton initiated a Petition for Writ of Mandate seeking to compel the Trial Court to sustain the demurrer. The issue presented was limited to whether the three contract claims and one tort claim in Civic's Second Amended Complaint were barred under Section 945.4 and *Bodde*, because Civic had not alleged compliance or excuse from compliance with pre-suit claims requirements.

Civic's Return almost entirely omitted any discussion of whether express breach of contract claims were subject to the claim statutes, and

entirely ignored the application of the claim statutes to its intentional interference tort claim.

The Court of Appeal reversed the Trial Court's order overruling Stockton's demurrer, and remanded to the Trial Court to consider whether leave to amend should be granted.

IV. STANDARD OF REVIEW

The standard of review for an order overruling a demurrer is de novo. The reviewing court accepts as true all facts properly pleaded in the complaint to determine whether the demurrer should be overruled. (*Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal.App.3d 318, 327.) The Court may also consider any matter that is judicially noticeable under Evidence Code sections 451 or 452 (Code Civ. Proc., §430.30, subd. (a)), as well as allegations in superseded pleadings (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1058). This Court independently reviews lower appellate court decisions concerning a trial court's order on a demurrer. (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146.)

V. ARGUMENT

A. The Claims Presentation And Pleading Rules Apply To All Of Civic's Claims.

The Second Amended Complaint pleads four causes of action against Stockton – three based on breaches of contract, and a fourth alleging tortious interference with contract—but does *not* allege

compliance, or excuse for compliance, with the claims statutes (Stockton p. 0001, et seq.), as *Bodde* requires. All Civic's claims pray for *damages* as relief. (Stockton, pp. 0018-0023.) Section 905 subjects "all claims for money or damages against a local public entity," unless excepted, to the pre-suit claim requirement. Monetary claims for breach of contract are claims for "money or damages." The Trial Court erroneously concluded that contract claims were not within the claims statutes, and that *Bodde* was limited to tort claims. (Stockton, p. 0258.) The Court of Appeal reversed.

Civic argues that it is exempt from the claims presentation requirements (1) under Section 814, because it excepts contract claims, and (2) under *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, because Civic is seeking "restitution" or equitable relief rather than "money or damages." Civic also claims its Offer of Proof provides facts demonstrating it can amend its pleadings to allege either compliance, or excuse from compliance, with the claims rules, for all of its claims to pass muster under *Bodde*. Civic's arguments are without merit.

1. Civic's Breach Of Contract Claims Are Subject To The Claims Statutes

(a) Public Policy Supports A Broad Application Of The Claims Presentation Statutes.

In *Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699, 705, this Court stated that "[i]t is well settled that the purpose of the claims statutes 'is to provide the public entity sufficient information to enable it to

adequately investigate claims and to settle them, if appropriate, without the expense of litigation.’ [Citation.]”

As specifically applied to contract claims, another case noted:

Such requirements allow the governmental entity an opportunity to settle claims before suit is brought, permit an early investigation of the facts, facilitate fiscal planning for potential liabilities, and help avoid similar liabilities in the future. (*Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 123; *Stanley v. City and County of San Francisco* (1975) 48 Cal.App.3d 575, 581.) **The purposes served by the act clearly apply whether an underlying action sounds in tort or contract.**

(*Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, emphasis added.) The same public policy is served by including all claims for money or damages—including those based on contract or restitution—in the claims presentation requirement. Civic offers no policy reason for excluding monetary breach of contract or restitution claims from those subject to the claims presentation rules.

(b) Proper Statutory Construction Under The Plain Meaning Rule Confirms The Claims Statutes Apply to Civic’s Claims for Breach of Contract.

(1) Under The Plain Meaning Rule, All Of Civic’s Claims Are For “Money Or Damages” And Subject To The Claims Statutes

Statutory construction begins with examining “the statutory language, giving the words their usual and ordinary meaning.” (*City & County of San Francisco v. Jen* (2005) 135 Cal.App.4th 305, 310.) “First, we look to the words of the statute itself as the most reliable indicator of

legislative intent.” (*Mills v. Superior Court* (2006) 135 Cal.App.4th 1547, 1551.) “If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs.” (*Jen, supra*, 135 Cal.App.4th at 310.)

(2) Section 905 Applies to Civic’s Contract Claims

Section 905 provides in relevant part:

There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part all claims for money or damages against local public entities except [12 enumerated exceptions, none of which are applicable here].

Civic’s breach of contract claims are claims for money or damages. (Stockton, p. 0001, pp. 0018-0023.) The exceptions enumerated in Section 905 do not include Civic’s breach of contract claims. Accordingly, all of Civic’s claims for breach of contract and tort fall within the plain meaning of the claims presentation statutes. It really is that simple. That is why all of the recent Court of Appeal decisions, in a variety of contexts, have held that breach of contract claims are subject to the claims presentation rules.⁵

⁵ (*Baines Pickwick Ltd. v. City of Los Angeles* (1999) 72 Cal.App. 4th 298; *Alliance Financial v. City and County of San Francisco* (1998) 64 Cal.App.4th 635; *Schaefer Dixon Associates v. Santa Ana Watershed Project Authority* (1996) 48 Cal.App.4th 524; *Crow v. State of California* (1990) 222 Cal.App.3d 192; *White v. State of California* (1987) 195 Cal.App.3d 452; *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071; *accord Pacific Gas & Electric Co. v. City of Union City* (N.D.Cal. 2002) 220 F.Supp.2d 1070, 1077-1078.)

Even Civic has *admitted* in this case that “the government claim statute applies by its explicit terms to actions on express contract or in tort...” (Preliminary Response to Petition for Writ, p. 1.)⁶

(3) Section 945.4 Applies to Civic’s Contract Claims

Section 945.4 provides in pertinent part:

[N]o suit for money or damages may be brought against a public entity ...

... until a written claim therefore has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board in accordance with Chapters 1 and 2 of Part 3 of this Division.

In describing this statutory requirement, one court has unequivocally held that “no suit for money or damages” means just what it says—“no” means no:

Section 945.4 explicitly states “no” damage suit may be pursued unless there is compliance with the claim statutes. As we noted in connection with a land use statute, which used the word “no,” **“No’ means no.”** [Citations omitted.] **The only common sense meaning of the word “no” is just that.** Since an incidental damage claim seeks monetary relief, the express language of Government Code Section 945.4 requires presentation of a claim as a precondition to the filing of suit.

(Trafficsschoolonline, Inc., v. Clarke (2003) 112 Cal.App.4th 736, 741 (emphasis added).)

⁶ This statutory scheme has sometimes been referred to as the “Tort Claims Act,” even though that term appears nowhere in the statutes. As recent Court of Appeal authority notes (particularly *Baines*), that label only causes

These authorities clearly establish that actions against local public entities alleging monetary claims for breach of contract are included among the broad spectrum of actions for “money or damages” for which a plaintiff must comply with the claim presentation requirement before filing suit. The plain meaning of both Section 905 and 945.4 compel the conclusion that Civic’s causes of action are subject to the claims statutes.

**(4) Section 814 Does Not Bar Application Of The
Claims Presentation Rules to Contract
Claims**

Civic’s primary response to the plain meaning of Sections 905 and 945.4 is to cite Section 814. Section 814 states “[n]othing in this *part* affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee.” (Emphasis added.) Civic relies upon *E.H. Morrill Co. v. State* (1967) 65 Cal.2d 787 and *Longshore v. County of Ventura* (1979) 25 Cal.3d 14 for the proposition that Section 814, which makes *sovereign immunity* provisions of Part 2 (Sections 814-895.8) inapplicable to breach of contract claims against public entities, also makes the *claims presentation requirements* of Part 3 (Section 900 *et seq.*) inapplicable to breach of contract claims. This argument is based on a *misreading* of these cases and of Section 814.

confusion and is irrelevant in construing the claims statutes. (*Baines, supra*, 72 Cal.App.4th at 309-310.)

Baines, supra, 72 Cal.App.4th 298 rejected the same argument as contrary to the express statutory language of the Government Code. *Baines* correctly noted that the term “this part” in Section 814 refers only to Part 2 of Division 3.6 of the Government Code (Sections 814-895.8). (*Id.*, at p. 308-309.) *Baines* observed that Part 2 defines the *substantive liabilities and immunities* of public entities and employees for *tort* claims. But the *claims presentation rules* are *not* found in Division 3.6, part 2. They are found in part 3 (Sections 900-935.8). *Id.* Thus, Section 814 on its face does *not* act as a limitation on the claims presentation rules. *Accord, Loehr, supra*, 147 Cal.App.3d at p. 1079. Civic would read the words “this part” out of Section 814 – which is not a proper statutory construction.

Longshore is distinguishable and does not support Civic’s position. *Longshore’s* holding that the claims presentation statute did not apply was *in no way* based on Section 814’s sovereign immunity bar – but rather on an *express statutory exception* to the claim requirement – specifically Section 905, subdivision (c), excluding employee wage claims from the claims presentation rules. (*Id.* at p. 22.) Civic’s claims do not fall under any of Section 905’s specific exceptions.

Therefore, nothing in Section 814 changes the plain meaning of Section 905 and 945.4 that all claims for money and damages including contract claims are subject to the claim requirements.

**(c) Construction Of Section 905 In The Context Of
Other Statutory Provisions Supports Application
Of The Claims Statutes to Civic's Claims**

Case law makes clear that: "The meaning of a statute may not be determined from a single word or sentence, but must be construed in context and given a reasonable construction." (*Mills, supra*, 135 Cal.App.4th at 1551.) "[W]henver possible, significance must be given to every word [in a statute] in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage." (*California Highway Patrol v. Superior Court* (2006) 135 Cal.App.4th 488, 499.) In addition, a court must consider "the entire scheme of law of which it is a part that the whole may be harmonized and retain effectiveness." (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1042-1043.) When viewed in the context of other similar and related statutes, Section 905 clearly applies to contract claims.

**(1) A Comparison with Section 905.2 Confirms
That Section 905 Includes Contract Claims**

Under Section 905, apart from twelve narrowly enumerated exceptions, the claim presentation requirements broadly apply to "*all* claims for money or damages against local public entities." Section 905.2, takes a different, and narrower, approach than Section 905 in defining the claims *against the state* that are subject to the claims presentation rules. It limits "all claims for money or damages" against the state to those

expressly falling within its further subdivisions, including for breach of express contract:

(b) There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) all claims for money or damages against the state:

....

(3) For money or damages on express contract, or for an injury for which the state is liable.

Section 905.2's specific inclusion of express contract claims as a subset of "all claims for money or damages" supports the conclusion that Section 905's much broader use of "all claims for money or damages" (unless specifically excepted) against local public entities also includes express contract claims.

(2) If Contract Claims Were Not Subject To The Claims Statutes, Section 930.2 Would Be Unnecessary

Section 930.2 permits, as an exception to the general claims presentation rules, a local public entity to include "in any written agreement ... provisions governing the presentation . . . of any or all claims arising out of or related to the agreement and the consideration and payment of such claims." The phrase "claims arising out of the agreement" obviously includes breach of contract claims. Section 930.4, by its express language, is a modification of the statutory claims process:

A claims procedure established by agreement made pursuant to Section 930 or Section 930.2 exclusively governs the claims to which it relates . . . Subdivision (b) of Section 911.4, Sections 911.6 to 912.2, inclusive, and Section 946.6 are applicable to all such claims, and the time specified in the agreement shall be deemed the "time specified in Section 911.2" within the meaning of Sections 911.6 and 946.6.

Allowing such *contractually* specified claims processes to control over the general claims statutes presumes that such claims statutes *already* apply to breach of contract claims. Indeed, a Court of Appeal decision, *Gelman v. Superior Court* (1979) 96 Cal.App.3d 257, 262, refers to Section 930 *et seq.* as a "statutory exception" to the claim presentation requirements.

**(3) Public Contract Code Section 20104
Supports Inclusion Of Contract Claims In
The Claims Presentation Rules**

Similarly, Public Contract Code section 20104 requires local public entities and contractors, for *contract claims* less than \$375,000, to follow certain procedures *before* the contractor can file a claim pursuant to Sections 910 *et seq.* Public Contract Code Section 20104 would be unnecessary if the Legislature did not intend contract claims to be the subject of the claims statutes.

**(d) Legislative History Supports Treating Monetary
Breach Contract Claims As Within The Claims
Statutes**

As the foregoing shows, the plain language and context of Section 905 and 945.4 make reference to legislative history of those sections

unnecessary in this case. As the courts have noted: “In construing the terms of a statute we resort to the legislative history of the measure only if its terms are ambiguous.” (*Title Ins. Co. v. County of Riverside* (1989) 48 Cal.3d 84, 96.) “It is one of the best-established and most sensible rules of the law that courts should not imaginatively construe – or meddlesomely fiddle with – statutes which are clearly written.” (*City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 901, [construing §935].) If statutory language is clear and unambiguous, “there is no need for construction.” *Id.* But even if the Court concludes that reference to legislative history is necessary in this case, that legislative history points to the same result – making all claims for money or damages subject to the pre-suit claims requirement.

**(1) Predecessors to Section 905 *et seq.* Replaced
Numerous Statutes and Local Ordinances
That Required Pre-Suit Claims for Contract
Actions**

Claims statutes in California date back to at least 1855.⁷ Before 1959, claims presentation rules were scattered throughout the California codes and in scores of local ordinances. In 1956, the Legislature authorized a study of the existing claims presentation rules to determine whether they should be made uniform or otherwise revised. This study was conducted

⁷ (Cal. Stat. 1855, c. 47, §24, p. 56.)

under the direction of Professor Arvo Van Alstyne of the UCLA School of Law.⁸ Of 102 cities studied that had claims statutes, 75 imposed pre-suit claims “for damages for breach of contract.” (*Id.*, p. A-43.) Many then-existing California statutes also required pre-suit claims for “money or damages” for both tort *and* contract claims. (*Id.*, pp. A-43 - A-44; A-82 - A-83.)

The study recommended that the Legislature adopt uniform claims presentation procedures for local public entities. (*Id.* pp. A-16—A-17.) The study proposed statutory language requiring a pre-suit claim to be presented for “all claims for money or damages against local public entities,” with specified exceptions. (*Id.*, p. A-11.) In explaining the proposed exceptions, the study noted with respect to claims for breach of contract that “the need for early investigation and negotiation of claims is frequently as important as in the case of tort claims,” but that subjecting claims *for money due* on a contract [i.e., presentation of invoices for payment] to a formal claims procedures might be administratively inconvenient. Thus, the study recommended that “the new claims statute permit public entities to waive by contract compliance with the claims

⁸ (California Law Review Commission, Recommendation and Study Relating To The Presentation of Claims Against Public Entities (Jan. 1959) (2 Cal. Law Revision Com. Rep. (1959) p. A-1.) [hereafter, “Van Alstyne Study”].)

statutes as to causes of action founded upon express contract *other than claims for damages for breach of contract.*” (*Id.* p. A-117.) From this language proposing that local public entities be given the option of exempting some contract claims from the claim presentation requirement, it is clear that the study’s authors intended for the phrase “all claims for money or damages” generally to include contract claims.

Thereafter, the Legislature adopted a claims presentation statute closely modeled on the proposed statutory provisions in the Van Alstyne study, including a code section, then numbered Section 703, that adopted the “all claims for money or damages against local public entities” language proposed in the Van Alstyne study. (Stats. 1959, ch. 1724, p. 4133, §1.)[statute as enacted].) Thus, the legislative history indicates that former Section 703, today found in Section 905, was intended to apply to actions for money or damages based upon contract. *Alliance Financial v. City and County of San Francisco* (1998) 64 Cal.App.4th 635, 642 and *Baines Pickwick Ltd. v. City of Los Angeles* (1999) 72 Cal.App.4th 298, 304-307 examined the same legislative history set forth above and concluded that the phrase “all claims for money or damages” includes breach of contract claims within its scope.

(2) **Construction of Former Section 703, In Light of Former Section 701, Supports A Legislative Intent To Include Contract Claims Within The Claims Presentation Requirements**

The Van Alstyne study noted that an obstacle to adopting uniform statewide claims presentation requirements for all local public entities was that charter cities and counties might be exempt from them unless a constitutional amendment were adopted. Thus, former Section 703 was enacted with a companion statute, former Section 701, which provided

Until the adoption by the people of an amendment to the Constitution of the State of California confirming the authority of the Legislature to prescribe procedures governing the presentation, consideration and enforcement of claims against chartered counties, chartered cities and counties, and chartered cities . . . , this chapter shall not apply to causes of action founded on contract against a chartered city . . . while it has an applicable claims procedure prescribed by charter or pursuant thereto.

Former Section 701. (Stats. 1959, ch. 1724, p. 4133, §1.) This intent was readily apparent to legal commentators at the time:

By its own terms, the new act will apply to contract claims against chartered cities after a constitutional amendment is passed confirming the Legislature's authority to prescribe claims procedures for chartered cities. (Emphasis added.)

(Review of Selected 1959 California Legislation, C.E.B. p. 688-689 (1959).) This exception in former Section 701 became moot upon the later

adoption in 1960 of former Art. XI, sec. 10 of the California Constitution, which provided:

No provision of this article shall limit the power of the Legislature to prescribe procedures governing the presentation, consideration and enforcement of claims against chartered counties, chartered cities and counties, and chartered cities, or against officers, agents and employees thereof.

Therefore, the condition subsequent for contract claims against chartered cities and counties to fall within the claims statutes was satisfied in 1960.

(3) Neither *Muskopf*, Nor the Legislation Enacted in Response, Changed Which Claims Were Subject To The Claims Statutes

In 1961, after the Legislature enacted former Section 703, this Court held that sovereign immunity was not applicable to tort claims. (*Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d. 211, 221.) *Muskopf* did not invalidate any claims presentation requirements—for either tort or contract claims. (*Dias v. Eden Township Hospital Dist.* (1967) 57 Cal.2d 502, 503.)

In 1963, the Legislature enacted legislation restoring certain sovereign immunities. That legislation included Section 814 on which Civic relies. As a part of this legislation, certain amendments to the claims presentation requirements were also enacted. But, as this Court recently observed in *Bodde*,

[T]hese amendments did not alter the fundamental nature of the claim presentation requirement—which still required plaintiffs to submit a timely claim for money or damages to a

public entity in order to maintain an action against that entity.
(Citations omitted.)

(32 Cal.4th at p. 1243.)

Thus, in restoring certain sovereign immunities, the Legislature did not intend the new governmental *immunities* statutes applicable to tort to disturb the existing *rights and procedures* applicable to contract actions against public entities:

“The various provisions of this part determine only whether a public entity or public employee is liable for money or damages.”

....

“The doctrine of sovereign immunity has not protected public entities in California from liability arising out of contract. This section makes clear that this statute has no effect on the contractual liabilities of public entities or public employees.”

(2 Sen. J. (1963 Reg. Sess.) p. 1886 (April 24, 1963) [emphasis added].)

The legislative history confirms what Section 814 says on its face. It applies to the *immunities* provisions of Division 3.6, Part 2, and nothing more. It says nothing about whether a claim is required.

2. Civic’s Tort Claim Is Subject To The Claims Statutes

Civic’s Second Amended Complaint alleges a claim against the City for intentional interference with contract. (Stockton, p. 0021.) This tort claim is clearly subject to the claims statutes, which cover claims for intentional as well as negligent torts. (*Tietz v. Los Angeles Unified Sch. Dist.* (1965) 238 Cal.App.2d 905, 911-912.) Here, the Trial Court’s order

overruling Stockton's demurrer to that claim was properly reversed by the Court of Appeal. Civic has never disputed that this tort claim is subject to the claims statutes.

3. All Claims Seeking Lost Profits, Lost Rents And Recovery Of Extra Expenses Are Subject To The Claims Statutes

In addition to its allegations that contract claims are outside the claims statutes, Civic contends that its monetary claims seek "restitution," and thus do not seek "money or damages" within the meaning of Section 905. Civic's argument misstates the law and mischaracterizes its own claims.

Civic's position relies principally on *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, a case holding only that claims against public entities seeking the return of *specific property* are not claims for "money or damages" within the meaning of Section 905. Civic attempts to stretch the very limited holding of *Minsky* not to require a claim: (1) for all monetary restitution claims, and (2) when the public entity would otherwise profit from its wrongs. These ideas have no basis in *Minsky*, run afoul of unambiguous statutory language to the contrary ("all claims"), and should be rejected.

(a) The Plain Meaning of "Money" Includes Lost Profits, Lost Rents, and Extra Expenses

Civic's *monetary* "claim for restitution" theory—whether it is based on implied contract or some other theory of unjust enrichment—is different

than simply asking for the return or “restitution” of *physical* property, i.e., the copy of the Hotel plans. Indeed, nowhere in Civic’s pleadings to date has Civic *ever* sought the physical return of the copy of the Hotel plans. Rather, Civic’s allegations have always alleged that Civic wants *money and damages* from the Agency for use of the plans and various other breaches of contract. Civic has consistently alleged that because the Agency obtained and made use of plans for the Hotel through allegedly improper means, Civic is entitled to recover substantial monetary relief for breach of contract, benefit of the bargain and lost profits, including:

- The alleged cost of the plans (\$600,000) (Stockton, p. 0020, ¶59);
- Its lost profits it would have earned pursuant to the Hotel DDA (\$5.0 million) (Stockton, p. 0020, ¶59);
- Its extra expense of performance related to the Hotel and the Hotel DDA(\$1.6 million) (Stockton, p. 0020, ¶59);
- Repayment of a loan of \$800,000 incurred to finance its obligations under the DDA’s (Stockton, p. 0020, ¶59);
- Its losses on the Cinema DDA (alleged to be at least \$1.0 million)(Stockton, pp. 0020-0021, ¶63); and

- Its lost rents from the City's alleged breach of the Hotel Lease (alleged to be \$975,000 per year for 19 years)(Stockton, p. 0018, ¶50).

There is no rule—and this Court should *not create* a rule—that excepts such monetary claims from the claims presentation requirements, when it is clear that the primary relief the plaintiff is seeking is *monetary* relief, whether or not characterized as for “restitution.” *The exception should not swallow the rule*—particularly in the face of a clear legislative intent broadly to include “*all* claims for money or damages” within the claims presentation requirements of Section 905, unless specifically excepted by statute. *Minsky* itself distinguished between the two kinds of cases, and expressly restricted its ruling to those cases where a plaintiff was seeking return of *specific property* which is not *money or damages*. At issue in *Minsky* was whether the government claims statutes applied to an action by an arrestee for the return of property taken by local police officers at the time of arrest, and wrongfully withheld following the disposition of criminal charges. As the *Minsky* court noted, in such cases the plaintiff must make an *election* of remedies:

“Where a wrongdoer has converted . . . personal property, the injured owner must elect between his right of ownership and possession (with the remedy of specific recovery) and his right to compensation (with the remedies of damages for conversion or quasi-contract recovery of value on theory of waiver of tort).” (2 Witkin, Cal. Procedure (2d ed. 1970) Actions, §114, p. 983.)

Id. at p. 121. The plaintiff in *Minsky* sought to recover physical possession of the money seized, which the Court held the City was holding as a bailee:

Although the instant complaint does not expressly seek specific recovery of the money in question, it does contain a general prayer for any such relief as the court may deem just and proper, and under established California authority, the facts alleged by the complaint are sufficient to support a claim for specific recovery of the sums seized and allegedly wrongfully withheld from plaintiff. [Citation omitted.] As such, we hold that noncompliance with the claims statutes erects no bar to the instant action.

(*Id.* at pp. 121-122.) Simply put: *Minsky* and its progeny were actions to compel a ministerial act required by an official duty, unlike Civic's action for monetary damages for alleged acts and omissions of Stockton's employees. See *Branciforte Heights, LLC v. City of Santa Cruz* (April 21, 2006) 06 C.D.O.S. 3271; *Madera Community Hospital v. County of Madera* (1984) 155 Cal.App.3d 136.

(b) *Minsky* Is Properly Limited To The Bailee Context

Civic seeks to expand *Minsky*'s limited holding not only to *all* claims for restitution, but also for all claims on any theory where the public entity otherwise would profit from its wrong. (OB, p. 30.) *Minsky* says no such thing. In fact, since *Minsky* was decided, no case has ever applied the rule of *Minsky* outside the bailee context. (*Trafficschoolonline, supra*, 112 Cal.App.4th at 742; and see *Hart v. Alameda County, supra*, 76 Cal.App.4th at 780-781.) The Court should not take that step now. In the bailee situation, "there is no need to give the public entity a timely opportunity to

investigate the factual basis of the claim because the target of the lawsuit is limited to that property legally required to be held for the petitioner.” (*Hart v. Alameda County* (1999) 76 Cal.App.4th 766, 781.) There is a need, however, to provide pre-suit notice when the lawsuit arises out of business dealings, and the target is lost profits, lost rents, and the like.

Minsky lends no support to the idea that there is some kind of equitable exception to the claim presentation requirement. “All claims for money or damages” (§905), and “no suit for money or damages” (§945.4) do not discriminate among legal theories of recovery.

(c) Monetary Claims Disguised As “Incidental Damage” Are “Claims For Money Or Damages” Outside The Holding Of *Minsky*

Nor should Civic be allowed to disguise its massive damage claims as damages “incidental to” a restitution claim for specific property. (*Trafficschoolonline, supra*, 112 Cal.App.4th at 742; *Loehr v. Ventura County Community College Dist., supra*, 147 Cal.App.3d at p. 1081 [equitable claims were incidental to prayer for damages].) Allowing such “incidental” damages theories to bypass pre-suit claims requirements would threaten the very strong public policy behind the claims presentation rules—that the governing bodies of public entities should get an opportunity to resolve and budget for monetary claims at an early opportunity, before a lawsuit is filed (*Phillips, supra*, 49 Cal.3d 699, 705),

and would also ignore the broad Legislative mandate to require “all claims for money or damages” to fall within the claims requirement.

Holt v. Kelly (1978) 20 Cal.3d 560 provides no exception for Civic’s substantial monetary claims. In *Holt*, arresting officers seized 32 specific items of property from plaintiff and later wrongfully withheld the property upon the plaintiff’s release from custody. The plaintiff sought to recover either the property or its value by means of a writ of mandate. (*Id.* at p. 562.) Since the defendant was under a duty to return the claimed property to the plaintiff (Section 26640), the court held that a writ of mandate was available to compel its return. Some of the property had been dissipated and the plaintiff therefore sought its equivalent value; however, such claim was still not for “damages.” The return of the equivalent value was still a ministerial duty that could be compelled through mandamus. (*Id.* at p. 565, fn. 5.) The dissipated property was readily identifiable, and had a specific and undisputed value of \$500. (*Id.* at p. 566.)⁹ Here, Civic just wants substantial amounts of *money and damages*.

⁹ Civic’s remaining cases are easily distinguishable as seeking only the return of specific property or its value. (*Long v. City of Los Angeles* (1998) 68 Cal.App.4th 782; *Hibbard v. City of Anaheim* (1984) 162 Cal.App.3d 270; *Bertone v. City & County of San Francisco* (1952) 111 Cal.App.2d 579; *Leach v. Dinsmore* (1937) 22 Cal.App.2d 735 [No claim issue discussed]; *Gonzalez v. State* (1977) 68 Cal.App.3d 621.) Money or damages have only been allowed in cases where the property was lost, destroyed or dissipated. (*Long, supra*, 68 Cal.App.4th, at 787; *Hibbard, supra*, 162 Cal.App.3d. at 277-278.)

The only “property” Civic alleges that it ever gave to the Agency are copies of the Hotel plans. (Stockton, p. 0009, ¶23, pp. 0010-0011, ¶26.) In the three iterations of its pleadings, Civic has never alleged any demand that the copies of the Hotel plans (or any other specific property that Civic delivered into Stockton’s possession—as in *Minsky, Pitchess and Holt*) be returned to Civic. Nor has it ever alleged that the plans have been lost or destroyed as in *Holt*, such that Civic would be entitled to the replacement value of that specific property. Indeed, Civic does not allege that the copies themselves have any specific value. Civic is not seeking restitution of anything. Rather, Civic is seeking millions of dollars in damages in the form of lost profits, benefit of the bargain and costs that arise from the alleged breaches of the various contracts discussed in Civic’s complaints.

No plaintiff may evade the claim statutes by simply “recasting” monetary claims for breach of contract, tort or any other theory as claims for “incidental” monetary relief based upon an alternative theory of “restitution” under an implied contract or constructive trust. The reasoning of *Minsky* does not relieve Civic of its statutory obligation to afford Stockton an early opportunity to investigate, budget and possibly settle Civic’s claims for money or damages.

B. Because Civic Did Not Plead Facts Demonstrating Or Excusing Compliance With The Claims Statutes, Stockton's Demurrer Should Have Been Sustained.

In a suit against a public entity alleging claims subject to the claims statutes, the plaintiff bears the burden as an element of its case to plead facts demonstrating or excusing compliance with the claims statutes. (*Bodde*, 32 Cal.4th at p. 1237.)¹⁰ Civic has unquestionably failed to do this, and the Court of Appeal correctly found that the Trial Court should have sustained Stockton's demurrer.

C. Civic Cannot Cure Most Of Its Pleading Deficiencies Through Amendment

To be granted leave to amend, Civic has the burden of demonstrating how it can amend its pleading truthfully to state a valid cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Civic's Offer of Proof fails this test.

1. Civic Cannot Demonstrate Compliance, Or Excuse From Compliance, With The Claims Statutes

(a) Civic Did Not File A Claim Or "Substantially Comply" With The Claims Statutes

Civic has never alleged it filed a formal pre-suit claim. The Court of Appeal also properly rejected Civic's contention that it had substantially

¹⁰ To the extent the Trial Court (in stating that *Bodde* was factually distinguishable because it was a tort case) suggests that this Court intended *Bodde* to apply only to tort claims, the Trial Court was wrong.

complied with the claims statutes.

Where a purported claim entirely fails to comply with one or more of the requirements of §910, it cannot be “substantially compliant” with the section. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 456.) Neither the January E-mail, February Letter nor the March Memorandum that Civic asserts constitute the substantially compliant “claim” are sufficient to meet that test, because they fail to comply with Section 910, including subdivisions (c), (d) and (e), and Section 915(a).

Each of these documents seeks to describe the terms of negotiations and a purported new *agreement* between the Agency and Civic.¹¹ Thus, it is not surprising that they do not discuss or mention any facts or circumstances concerning alleged past breaches or claims arising therefrom. Specifically, these documents:

- Do not provide the date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted (§910, subd. (c));
- Do not provide a general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim. (§910, subd. (d).) Indeed, there is no

¹¹ Civic previously pleaded (if vaguely) that these documents constituted an enforceable agreement. (Civic, pp. 8-9, ¶¶ 23-25; p. 20, ¶ 68.)

mention at all of the millions of dollars in damages Civic now alleges for any wrongful conduct; and

- Do not name specific public employees causing injury to Civic (§910, subd. (e)), (Stockton, p. 0002, ¶5, p. 0004, ¶10).

The January e-mail is not even from Civic at all, but rather is Agency Director Steven Pinkerton's e-mail to Civic, and therefore fails to satisfy any element of a claim under Section 910.

Civic's purported "claims" were not even addressed and presented (i.e., delivered or mailed), to the "clerk, secretary or auditor" of the "governing body" of the local public entities to which the purported claim is directed—in this case the Clerk of the City of Stockton, the City Council and the Agency Board. (§915, subd. (a).)

In short, Civic's Second Amended Complaint, even read with Civic's Offer of Proof, demonstrates *on its face* that Civic cannot truthfully plead that it has substantially complied with the claim presentation requirements.

(b) Civic's Communications Do Not Meet The Requirements Of A "Claim As Presented"

Civic contends that even if its documents fail to comply substantially with statutory requirements of a claim, they are sufficient to constitute a "claim as presented" or "trigger claim" under Section 910.8. Civic is wrong as a matter of law.

Although Section 910.8 uses the term “claim as presented,” that term is otherwise not defined by statute. This Court addressed what constitutes a “claim as presented” in *Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699. In *Phillips*, an appeal from a demurrer sustained without leave to amend, the complaint alleged that the plaintiff sent the defendant hospital a notice of her intention to commence a malpractice action against the hospital, but did not separately submit a formal claim prior to filing suit. The Court held that the notice was not a “claim” within the meaning of the Government Claims Act. However, the notice was a “claim as presented,” because it disclosed “the existence of a ‘claim’ which, if not satisfactorily resolved, will result in a lawsuit against the [public] entity.” (*Id.* at p. 709.)

Court of Appeal cases have construed Section 910.8 in light of *Phillips*. *Green v. State Center Community College Dist.* (1995) 34 Cal.App.4th 1348) involved another appeal from a demurrer sustained without leave to amend. In *Green*, the plaintiff alleged that a letter from the claimant’s attorney to the public entity – which only advised that the plaintiff had retained counsel, without discussing the substance of the claim – was sufficient to be a trigger claim. The *Green* court held that such a letter could not qualify as a “claim as presented”:

We hold that to be sufficient to constitute a trigger-claim under section 910.8, the content of the correspondence to the recipient entity must at least be of such nature as to make it readily discernible by the entity that the intended purpose thereof is to convey the assertion of a compensable claim against the entity which, if not otherwise satisfied, will result in litigation.

(*Id.* at p. 1358 [Emphasis added].)

The “readily discernible” test was applied in *Schaefer Dixon Associates v. Santa Ana Watershed Project Authority* (1996) 48 Cal.App.4th 524 and in *Alliance Financial v. City and County of San Francisco* (1998) 64 Cal.App.4th 635. *Schaefer Dixon* involved a dispute over the amount of additional compensation a contractor should receive for extra work from the project’s owner (“Authority”). The Authority and the contractor negotiated extensively about this issue. In the course of these negotiations, the contractor sent a letter to the Authority’s general manager, demanding full payment of its fees, but making no mention of potential litigation. The complaint alleged that this letter was a claim. The Court of Appeal affirmed the trial court’s ruling that this letter could not be a trigger claim, because it was not “readily discernible” as a claim. (*Id.* at p. 536.) The plaintiff sought to amend its complaint to allege that two later letters from the contractor, that did threaten suit, could be claims as presented. The order denying the motion to amend was affirmed. The Court reasoned the demand for immediate action contained in these letters was inconsistent with treating them as a claim or “claim as presented,” because such

treatment would be inconsistent with the purposes of the claims statutes, which is to allow public entities sufficient time to investigate claims before suit is filed. (*Id.* at pp. 536-537.)

In *Alliance Financial*, the claimant's attorney sent a demand letter to the City Attorney's office setting forth the substance of the claim, closing with the statement "We look forward to your confirmation of the date and time when these [invoices] will be paid. I would be happy to meet with the City's representatives prior to filing an action for recovery of those sums." (*Id.* at p. 640.) Because the letter set forth the substance of the claim, the issue was whether the correspondence gave sufficient notice of impending litigation to count as a trigger claim under *Phillips*. The *Alliance* court held that it did, because it sufficiently provided notice to the public entity that a valid claim existed and that litigation "may ensue" if it is not resolved. (*Id.* at p. 647.)

In contrast, Civic appears to rely on the January e-mail, February Letter and March Memorandum as constituting a claim as presented. None of those documents, alone or together, placed Stockton on notice that Civic had a ripe claim and that litigation would ensue if the claim were not satisfied. The January e-mail (OP, p. 4, figure 1) came *from Stockton*, made clear that any new agreements were subject to City Council approval, and specifically referred to negotiations and deal terms. The February Letter (Stockton, p. 0181-0182.) is plainly not the submission of a claim,

and certainly does not threaten litigation; in form, the document is a letter agreement consistent with ongoing discussions. The March Memorandum (Stockton, p. 0183-0185) is titled "General Terms of Agreement between City of Stockton and Civic Partners Stockton," but is in form a memorandum setting forth proposed terms of an agreement, that neither party signed. This is neither the submission of a claim nor any notice that litigation may ensue if Stockton does not accept the proposed terms of the deal.

None of these communications:

- Apprised Stockton of a *claim* for breach of contract based on alleged breaches of the Hotel Lease, Hotel DDA and Cinema DDA. (In fact, none of these communications even mentions the Hotel Lease.)
- Notified the City that it had allegedly interfered with the Hotel DDA and Cinema DDA.
- Notified Stockton of Civic's purported position that these communications constituted a "settlement" with Stockton of Civic's claims arising out of the Hotel DDA, Cinema DDA, or the Hotel Lease.

Civic mistakenly relies upon cases where one plaintiff was allowed to "piggy-back" upon a formal claim submitted by another plaintiff. (*See Lacy v. City of Monrovia* (1974) 44 Cal.App.3d 152; *San Diego Unified Port District v. Superior Court* (1988) 197 Cal.App.3d 843, 848.) These

cases are inapposite. In those cases, because a claim had been submitted to the public entity, the public entity had received sufficient notice of the claim to investigate and pursue settlement with both plaintiffs prior to litigation. (*Lacy, supra*, 44 Cal.App.3d, at 155; *San Diego Unified Port Dist., supra*, 197 Cal.App.3d at 848.) Here, in contrast, there is no other claim submitted from which Stockton could gather information about Civic's contentions.

Civic's reliance upon *Ocean Services Corp. v. Ventura Port District* (1993) 15 Cal.App.4th 1762 is grossly misplaced—the plaintiff in *Ocean* actually submitted a claim. (*Id.* at p. 1771.) This fact alone has been held to distinguish *Ocean* from cases where, as Civic tries here, the plaintiff seeks to avoid the claim statutes by attempting to rely upon a series of correspondence, none of which is sufficient to establish a claim or "claim as presented." (*Green, supra*, 34 Cal.App.4th at p. 359.)

The Court of Appeal was correct in rejecting Civic's argument that Civic had submitted a trigger claim to Stockton through these documents.

(c) Civic's Communications Also Are Not Claims Because They Pre-Date The Accrual Of Any Breach Of The Hotel And Cinema DDAs.

Pre-suit claims must set forth facts that constitute a then-actionable "cause of action." (Sections 911.2 and 946; *Tapia v. County of San Bernardino* (1994) 29 Cal.App.4th 375, 384-385.) A valid claim therefore cannot precede the accrual of the cause of action that is alleged in the

Complaint. This rule further defeats Civic's claim that the January e-mail, February Letter and March Memo (all written in early 2002) constitute a "claim" for a breach of the Hotel DDA and Cinema DDA. Civic's Second Amended Complaint alleges that the Agency "repudiated" the Hotel DDA in "August 2002" and breached the Cinema DDA by terminating it in "late 2002" without cause. (Stockton, p. 0020, ¶62.) Thus—by Civic's own admission—its claims for breach of these DDAs had not yet accrued as of the time the January E-mail, February Letter and March Memorandum were prepared.

Likewise, claims based on breach of any purported "settlement," as allegedly documented in the January E-mail, February Letter and March Memorandum, could not have accrued until sometime *after* the date of those documents. These documents cannot simultaneously be both a contract and a breach of that contract, much less a notice of breach of that same contract.

(d) Stockton Is Not Estopped To Assert Its Right To A Pre-suit Claim

Civic contends that Stockton is equitably estopped from raising Civic's failure to comply with the claims statutes as a defense. The Court of Appeal correctly rejected this claim.

(1) Applicable Standards For Estoppel

Generally speaking, equitable estoppel has four elements:

(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts and (4) he must rely upon the conduct to his injury.

(*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305 [city estopped from relying on statute of limitations defense].) If even one of the essential elements is missing, no excuse based on estoppel can exist. (*Hill v. Kaiser Aetna* (1982) 130 Cal. App. 3d 188, 195.)

There is an important consideration that limits application of equitable estoppel principles against public entities: the effect that applying estoppel principles has on public policy objectives.

It is settled that “[T]he doctrine of equitable estoppel may be applied against the government where justice and right require it. [Citation.]” [Citations.] Correlative to this general rule, however, is the well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify “a strong rule of policy, adopted for the benefit of the public. . . .” [Citation.] The tension between these twin principles makes up the doctrinal context in which concrete cases are decided.

(*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.)

“Estoppel requires some affirmative representation or acts by the public agency or its representatives inducing reliance by the claimant.”

(*Tammen v. County of San Diego* (1967) 66 Cal.2d 468, 480; see *In re Marriage of Comer* (1996) 14 Cal.4th 504, 523)[no affirmative statements by county relieving father of duty to pay child support].) In *Ortega v.*

Pajaro Valley Unified School District (1998) 64 Cal.App.4th 1023, 1047,

the court summarized the existing case law as follows:

These cases have the following in common: In each, the public entity or one of its agents engaged in some *calculated conduct* or made some representation or concealed facts which induced the plaintiff not to file a claim or bring an action within the statutory time; and in each, the plaintiff acted promptly, almost always within a year, after the public entity's conduct which caused the estoppel ceased.

(*Id.* at 1047 (emphasis added.); *Doe v. Bakersfield City School Dist.* (2006) 136 Cal.App.4th 556, 571.) Thus, courts have uniformly given estoppel a narrow application as an excuse for noncompliance with the claims statutes.

Civic wrongly asserts that “not every element of traditional estoppel must be met” for estoppel principles to excuse otherwise required compliance with the claims statutes. The cases Civic relies upon do not so hold. *Fredrichsen v. City of Lakewood* (1971) 6 Cal.3d 353 holds only that a public agency may be estopped from enforcing the claims presentation rules where the public agency acted “in an unconscionable manner or otherwise set out to, or did take unfair advantage of plaintiff” by affirmatively providing bad advice concerning the claimant’s substantive rights. (*Id.* at p. 306.) That does not mean that the claimant’s *reliance* upon the agency’s conduct is unnecessary, as Civic appears to argue; indeed, *Fredrichsen* expressly applied the four-factor test of *Driscoll*. (*Id.*) Similarly, *Bertorelli v. City of Tulare* (1986) 180 Cal.App.3d 432, which applied estoppel to preclude reliance on the claims statutes, is not authority

for Civic's proposition that "unconscionable conduct" by the public entity, *without reliance by the claimant*, triggers an estoppel.¹² Here Civic has made no showing of unconscionable conduct by Stockton that would excuse Civic from proving reliance.

**(2) Stockton Engaged in No Affirmative
Conduct Inducing Civic Not To File A Claim
Timely**

To establish estoppel, Civic must demonstrate that it relied on an affirmative misrepresentation. In *Shank v. County of Los Angeles* (1983) 139 Cal.App.3d 152, 158, a premises liability case against a county hospital, the claimant's attorney wrote three letters to the hospital, advising it of his client's claim and requesting that the hospital forward the claim to its insurance carrier, but without filing a claim. The hospital advised the claimant's attorney of the claims filing requirement after the time for filing a claim had expired. The *Shank* court held that estoppel did not apply to excuse nonperformance; the hospital had made no affirmative misstatements and had no obligation affirmatively to inform that it was a public entity subject to the claims statutes. (*Id*; accord, *Tyus v. City of Los*

¹² Civic's remaining cases purportedly supporting this point are inapposite. *Lacy v. City of Monrovia* (1974) 44 Cal.App.3d 152 and *San Diego Unified Port Dist. v. Superior Court* (1988) 197 Cal.App.3d 843 are cases finding that there was no bar to suit under Section 945.4, even though the plaintiffs had submitted defective claims; but these cases do not even discuss, much less rely upon, estoppel principles as a basis for their holdings.

Angeles (1977) 74 Cal.App.3d 667, 672-673 [City not estopped to assert claim requirement based upon correspondence between claimant and the City containing no misleading representations regarding the claim requirement].)

Civic makes no allegation that Stockton induced Civic not to comply with the claims statutes. Further, there is nothing in the January E-mail, the February Letter the March Memorandum, or Civic's Offer of Proof that constitutes affirmative conduct by Stockton upon which Civic could have relied in deciding to delay submitting a claim. Indeed, *Civic makes a critical admission* by acknowledging that it had not "stood by [its] rights" during the time it was negotiating with Stockton for a new deal, *because it was trying to preserve a relationship with Stockton.* (Stockton, p. 0007, ¶16.) This was a *business decision* on Civic's part, not the product of some City or Agency misrepresentation. Civic's Offer of Proof does not save Civic from this admission in its pleadings; it is absolutely devoid of *any* allegations that Stockton in any way *misled* Civic to believe that a *pre-suit claim* was unnecessary. Under these circumstances, Civic must be charged with the consequences of its fateful decision to sit on its rights, while trying to cultivate an alternative to its failed Hotel office development.

**(3) Stockton Owed No Obligation To Advise
Civic To File A Claim**

Seeking to shift the blame, Civic contends Stockton had some obligation to tell Civic to file a claim, or how to write its pleadings to allege compliance with the claims statutes. Stockton had no obligation affirmatively to advise Civic of its legal obligations, including its need to file a claim. Courts have so ruled for over 40 years. (E.g., *McGranahan v. Rio Vista Joint Union High School* (1964) 224 Cal.App.2d 624, 630 [“[I]n the absence of a duty to speak (citation omitted), silence alone will not create an estoppel”]; *Shank, supra*, 152 Cal.App.3d at 158, [public entity is not required to tell the plaintiff to file a pre-suit claim].)

This principle is especially applicable in this case, where Civic was represented by counsel during the relevant claim period (Civic filed its complaint in January 2003). Civic must be able to allege that it was “actually and permissibly” ignorant of the law. *Life v. County of Los Angeles* (1991) 227 Cal.App.3d 894, 902. This circumstance cannot occur when attorneys represent the claimant. (*Id.*; *Romero v. County of Santa Clara* (1970) 3 Cal.App.3d 700, 705; *Tubbs v. Southern California Rapid Transit Dist.* (1967) 67 Cal.2d 671, 679; *Stromberg, Inc. v. Los Angeles County Flood Control Dist.* (1969) 270 Cal. App. 2d 759, 767-768.) Under these principles, Civic simply has no argument that Stockton was obligated

to apprise Civic of the claims statutes. It was *Civic's* affirmative duty, particularly once it was represented by counsel, to know the procedural requirements and to comply with them; it cannot allege ignorance of the law as an excuse for noncompliance.

(4) Equitable Estoppel Only Tolls The Time To File A Claim

Civic fails to acknowledge that, at most, equitable estoppel only *tolls* the time to file a claim. Civic must plead (1) what conduct Civic relied upon in not acting to file a claim, (2) when the conduct ceased, and (3) whether Civic acted within a reasonable time thereafter to file a claim. (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 446.)

Civic alleges that the City repudiated the Hotel Lease in August 2001 (Stockton, p. 0018, ¶49) and terminated it in August 2002 (Stockton, p. 0017, ¶47), Civic also alleges the Agency repudiated the Hotel DDA in August 2002 by terminating it (Stockton, p. 0019-0020, ¶58), and breached and repudiated the Cinema DDA in "late 2002" (Stockton, p. 0020, ¶62). Although unclearly stated, the City's alleged "tortuous interference" with the Hotel DDA and Cinema DDA necessarily ripened with the Agency's alleged termination of the contracts no later than 2002. Breach of any "implied contract" would also necessarily have occurred at the latest with the termination of the DDA agreements. The terminations would have been clear notice to Civic that all of its alleged contracts with Stockton were

ended—commencing the one year period specified in Section 911.2 to file a claim. Thus, even *if* there were tolling based on the January through March dealings, such tolling would have ended at the latest at the time of contract terminations later in 2002. The claims period would therefore have expired *at the latest* in late 2003.

Civic has never alleged to this day that it filed a formal claim with Stockton. It is now far too late for Civic to do so.

2. Stockton's Cross-Complaint Did Not Retroactively Waive the Claim Requirements

(a) Civic Contradicts its Own Argument

Civic's argument of waiver—based upon Stockton's Cross-complaint—is self defeating. Civic argues that “[i]t is not filing its cross-complaint that determines estoppel, but the government's delay in raising the act as a defense, either by suing after the claims period has run, or by withholding the defense until the claims period has run.” (OB, p. 68.) Thus, Civic appears not to be arguing waiver based upon Stockton's Cross-complaint, but rather estoppel based solely upon the fact that the City did not affirmatively advise Civic of the pre-suit claim requirement earlier. As discussed immediately above, Civic's allegations are insufficient to allege that Stockton is estopped from asserting the claim requirement. Further, Stockton first asserted the pre-suit claim requirement in its Demurrer,

which *preceded* the compulsory cross-complaint. Thus, the Cross-complaint is irrelevant to this analysis.

(b) Civic Commenced This Litigation and Allowed the Claims Period to Expire Before the Cross-complaint Was Even Filed.

To the extent Civic does argue waiver based upon the Cross-complaint, the critical question is: Who started the litigation? (*Krainock v. Superior Court* (1990) 216 Cal.App.3d 1473, 1478.) Civic sued Stockton first. There is no basis in the statute or public policy for a later (and compulsory) cross-complaint to waive the claims presentation requirement. This is especially so when the claims presentation period had *already expired* well before the Cross-complaint was filed.

In *Krainock*,¹³ a public entity did effectively waive the claim presentation requirement by filing a cross-complaint in a multi-party action *that initiated the litigation as between the public entity and the party who asserted waiver*. Here, Civic—not Stockton—started this litigation when Civic filed its Complaint in January 2003. This clearly distinguishes *Krainock*. Other cases addressing this issue are in accordance with

¹³ *Krainock* allowed the claimant—who fails to comply with the claim requirement—still to assert *defensive* cross-claims (i.e., that would only reduce or negate the affirmative claims of the public entity). (*Id.* at p. 1478.) However, Civic’s Complaint, Civic’s Amended Complaint and Civic’s Second Amended Complaint are not “defensive” pleadings, and are not—and cannot be—in response to Stockton’s later-filed Cross-Complaint.

Krainock. (See e.g., *People ex rel Department of Parks & Recreation v. West-A-Rama, Inc.* (1973) 35 Cal.App.3d 786; *People ex rel Department of Public Works v. Douglas* (1971) 15 Cal.App.3d 814.)

(c) **Civic's Waiver Argument is Contrary To Public Policy**

This Court has repeatedly explained that the purpose of the claims statutes “is to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation.” (*Phillips, supra*, 49 Cal.3d at 705.) The key principle is giving the public entity notice of the claim *before* any litigation commences. In *Krainock*, this policy had been served. In cases where the *public entity initiates* the litigation concerning the same subject matter as the proposed cross-complaint—the public entity has had an opportunity to investigate the facts and circumstances giving rise to the action—and presumably has decided not to settle, but to initiate litigation. (*Krainock, supra*, 216 Cal.App.3d, at 1478-1479.) Not so in this case, where Civic, not the public entity, was the first to sue.¹⁴

¹⁴ Civic's hypothetical argument about allowing the public entity to sue after the claims presentation period has expired, also ignores that an opposing party may always file a defensive cross-complaint by way of offset.

(d) **Civic's Premature Litigation Did Not Toll The Claims Period.**

Civic mistakenly argues that because a *statute of limitation* on a defendant's cross-claims may be tolled when the plaintiff files his complaint under the relation-back doctrine (*Trindade v. Superior Court* (1973) 29 Cal.App.3d 857, 859-860; *Elkins v. Derby* (1974) 12 Cal.3d 410), Stockton's Cross-Complaint somehow retroactively revived the long-expired *deadline for Civic to submit a pre-suit claim*. However, the reasoning behind the relation-back doctrine for cross-complaints is that the plaintiff initiating the action presumably has notice of the facts, and the purpose of the statute of limitations to protect defendants against stale claims is satisfied. *Trindade, supra*, 29 Cal.App.3d at 859 (distinguishing cases where the relation back doctrine does not apply because the cross-complaint alleges claims against new parties to the action.). This reasoning has no application to pre-suit claims requirements. Civic violated those requirements, and deprived Stockton of the protections afforded by the claims statutes, when it wrongly filed suit without submitting a pre-suit claim. Civic should not be rewarded for its violations of the claims statutes and the strong public policies behind them. Indeed, if claimants were allowed to simply toll the claims presentation period by initiating litigation,

the pre-suit claims requirements would be rendered nugatory.¹⁵ (*See Stromberg, supra*, 270 Cal. App. 2d 759 [previously-filed and dismissed complaint did not serve as a pre-suit claim to later complaint].)

When a complaint is filed within the statutory claim period under Section 911.2 but without first filing a pre-suit claim (or having an excuse for failing to file a claim), the complaint is premature, and the deadline to file the claim is not tolled. (*Wilson v. People* (1969) 271 Cal.App.2d 665 [Demurrer properly sustained without leave to amend where plaintiff filed a complaint without first filing a pre-suit claim, and then failed to file a new complaint or amend her complaint to name the public entity within 30 days of obtaining relief under Section 946.6.]) “A subsequent pleading which sets out the subsequent performance of a statutory condition precedent to suit cannot relate the time of its performance of the condition back to the time of the filing of the original complaint, since the rule of relation back does not operate to assign the performance of a condition precedent to a date prior to its actual occurrence.” (*Id.* at 669 [emphasis added]; *accord, Gardner v. Shreve*, (1949) 89 Cal.App.2d 804, 810.)

¹⁵ Cases holding that the claim presentation period is tolled while the plaintiff files and pursues an administrative worker’s compensation claim are inapplicable here, because *Civic does not allege that it filed any claim at all*. Thus, *Baillergeon v. Department of Water & Power* (1977) 69 Cal.App.3d 670, is inapplicable.

Accordingly, because Civic did not file a claim, and did not have an excuse for filing a claim—either at the time it filed its complaint or any time before the one year claim period under Section 911.2 expired—the pre-suit claim deadline was not tolled. “It is a settled rule of our law that the plaintiff’s right of action must exist when he commences his action.” (*Gardner, supra*, 89 Cal.App.2d, at p. 810 (citations omitted).) “The plea that an action is prematurely brought is a perfect defense to the merits.” (*Id.* [Citation omitted].) “The defect cannot even be cured by a supplemental complaint founded on what subsequently occurred.” (*Id.*) Once the claims submission deadline expired, no subsequent action by Stockton could revive the deadline.

Nor is Civic automatically entitled to an evidentiary hearing on waiver and estoppel. (*See, e.g.*, OB, p. 65.) In the cases Civic has cited on this issue (*Rand v. Andreatta* (1964) 60 Cal.2d 846, 850; *John R., supra*, 48 Cal.3d at p. 444), this Court carefully reviewed the plaintiff’s allegations to determine *whether* the matter should be remanded for an evidentiary hearing on estoppel. Here, because Civic’s *best-case* showing utterly fails to provide any possibility of truthfully amending to plead facts demonstrating or excusing compliance with the claims statutes, there is *no need* for either an evidentiary hearing, or for granting leave to amend on that issue.

3. Civic Has No Implied Contract Claim As A Matter Of Law.

Civic alleges that it relied on promises made by City or Agency staff in continuing to work on its proposal to acquire and develop the Hotel property into senior housing. Civic characterizes these promises as "implied contracts." Longstanding California law, however, precludes Civic from asserting such a theory of recovery against Stockton.

A public entity generally cannot be sued on an implied in law or quasi-contract theory, because such a theory is based on restitution considerations which are outweighed by the need to protect and limit a public entity's contractual obligations. (*Miller v. McKinnon* (1942) 20 Cal.2d 83, 88; *Lundeen Coatings Corp. v. Department of Water & Power* (1991) 232 Cal.App.3d 816, 831, fn. 9; *Los Angeles Equestrian Center, Inc. v. City of Los Angeles* (1993) 17 Cal.App.4th 432, 448-449.) As this Court stated long ago: "[t]he law never implies an agreement against its own restrictions and prohibitions," or expressed differently, "the law never implies an obligation to do that which it forbids the party to agree to do." (*Zottman v. San Francisco* (1862) 20 Cal. 96, 106.) Thus, California courts have "consistently reject[ed]" the proposition that a local public entity may be estopped to deny the formation of a contract under such circumstances." (*First Street Plaza v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 667-668; see also *Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th

228, 235; *Dynamic Ind. Co. v. City of Long Beach* (1958) 159 Cal.App.2d 294, 299 ["When the charter provision has not been complied with, the city may not be held liable in quasi contract, and it will not be estopped to deny the validity of the contract"]; *Stratton v. City of Long Beach* (1961) 188 Cal.App.2d 761, 773 [same].)

Thus, when public contracts must be approved by a legislative body, and/or signed by the mayor or other appointed official, failure to do so renders the contract void and unenforceable. That is the case here, for both the City and Agency.

The Stockton City Charter requires the City Council to approve contracts with the City and its agencies that are not awarded through competitive bidding: (RJN, p. 0002 [City Charter, Art. XX, §2001; p. 0005] [Stockton Municipal Code §3-105, the City ordinance implementing Section 2001 of the City Charter].) Furthermore, Section 40602, subdivision (b) requires Stockton's mayor to sign "[a]ll written contracts and conveyances made or entered into by the city."

The Agency is similarly precluded by statute from entering into a contract to lease or sell an interest in real property without a vote of the Agency Board. Any "sale or lease shall first be approved by the legislative body by resolution after a public hearing." (Health & Saf. Code §33430 and §33431). In addition, the Agency has adopted bylaws requiring the Mayor of Stockton to sign all contracts, deeds or other instruments.

(RJN, p. 0007 [Agency Bylaws, §2].)

The “agreements” Civic alleges here are not alleged to meet any of these requirements. Thus, under longstanding principles of law, these agreements are not enforceable either as contracts, and cannot be enforced as “implied contracts.”

There is nothing in *Youngman v. Nevada Irr. Dist.* (1959) 70 Cal.2d 240 that grants authority to bind public entities to implied contracts in the face of these provisions. *Youngman* holds that public entities may be bound by an implied contract “if there is no statutory prohibition against such arrangements.” (*Id.* at p. 246.) As demonstrated above, here there are such prohibitions. Likewise, *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 (“*Mansell*”) is inapplicable. *Mansell* involved a city which belatedly began asserting property rights after decades of not having done so, casting a cloud on property titles held by thousands of homeowners. (*Id.* at p. 500.) In holding that the City could be equitably estopped from doing so, *Mansell* noted that the facts of the case demonstrated a “rare combination of government conduct and extensive reliance” that would make the holding of *Mansell* “an extremely narrow precedent for application in future cases.” (*Id.* at p. 500.)

Claims for restitution against a local public entity based on an implied contract theory are properly disposed of at the demurrer stage of a case. (*Pasadena Live, LLC v. City of Pasadena* (2004) 114 Cal.App.4th

1089, 1094 [demurrer properly sustained on unjust enrichment claim]; *G.L. Mezzetta, Inc., v. City of American Canyon* (2000) 78 Cal.App. 4th 1087, 1093-1095.) Civic should not be given leave to assert an implied contract claim here.

4. Civic's Copyright Argument Is Not Proper

(a) No Copyright Claim Is Properly Before This Court

Civic did *not* allege any copyright claims in its Second Amended Complaint. For that reason, the City and Agency did not address copyright in their demurrer. Neither does Civic mention copyright in its Offer of Proof. Civic always could have alleged copyright ownership only, but did not do so.¹⁷ (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966 (fn.2).)

¹⁷ Civic misstates the record on this issue. The Trial Court did not dismiss claims *limited to ownership* of copyright. Civic's Complaint alleged ownership of the "federal copyright" and that the copyright had been "infringed," and sought damages and disgorgement of profits. (Civic, p. 19, ¶65; Civic, pp. 49-51.) The Amended Complaint also alleged claims for ownership of the copyright *and* for disgorgement of Hotel profits (Civic, pp. 74-75, ¶¶74, 79-80.)

Civic never appealed the Trial Court's prior rulings dismissing its copyright infringement claims, and the Alternative Writ is directed only to the Trial Court's ruling on the Second Amended Complaint. Further, Civic failed to provide an adequate record, including Civic's own opposition papers, Stockton's reply papers and hearing transcripts. (*Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186-187.) Accordingly, the copyright issue is not properly before the Court.

(b) Any Copyright Claim Would be Preempted

Even *if* copyright were before this Court, it would be for a short stay, because Civic's claims for "ownership" of the copyright in the Hotel plans have always sought *restitution or disgorgement of profits* based on the alleged use of the copyrighted plans (OB, p. 71), and are therefore preempted because they "do not allege anything in essence beyond defendants' alleged unauthorized use of a copyrighted work," i.e., copyright infringement. (*Trenton v. Infinity Broadcasting* (C.D.Cal. 1994) 865 F.Supp. 1416, 1428-1429.)

It does not matter how Civic tries to dress up the *copyright infringement claim*—it will still be subject to exclusive federal court jurisdiction—whether characterized as conversion (*Worth v. Universal* (C.D.Cal. 1997) 5 F.Supp.2d 816, 822-823; *Gemcraft Homes, Inc. v. Sumurdy* (E.D.Tex. 1988) 688 F.Supp. 289, 295); disgorgement for breach of implied or express contract not to use the plans (*Del Madera Props. v.*

Rhodes & Gardner Inc. (9th Cir. 1987) 820 F.2d 973, 977; *Selby v. New Line Cinema* (C.D.Cal. 2000) 96 F.Supp.2d 1053, 1061-1062; *Higher Gear v. Rockenbach* (N.D.Ill. 2002) 223 F.Supp.2d 953, 958); quasi-contract (*See Worth, supra*, 5 F.Supp.2d at 822, *citing* 1 Nimmer, Nimmer on Copyright, Section 1.01 [B][1]g[g] 1-34 (1997)); or unjust enrichment (*Kunycia v. Melville Realty Co., Inc.* (S.D.N.Y. 1990) 755 F. Supp. 566, 576 [unjust enrichment claims for unauthorized use of architectural plans preempted]; *Cassway et al. v. Chelsea Historic Properties, et al.*, (E.D.Pa. 1993) 1993 WL 64633 (same).)

5. Any Potential State Law Claims Relating to the Hotel Plans Would be Barred or Useless

Even *if* it were possible for Civic to allege an “extra element” to transform the claim arising out of use of the plans to one that protects rights qualitatively different than copyright rights¹⁸ (*Grosso v. Miramax Film Corp.*, (9th Cir. 2004) 383 F.3d 965, *Del Madera, supra*, 820 F.2d at 977)—*something Civic has not done to date*—any such claim seeking money or damages would be barred for Civic’s failure to comply with the pre-suit claim requirement.

¹⁸ The relevant “copyright rights” are set forth in 17 U.S.C. section 106, including: “the exclusive rights of reproduction, preparation of derivative works, distribution, and display.” *Del Madera, supra*, 820 F.2d at p. 977.

Hypothetically, Civic might allege a conversion claim for restitution *if* Civic were seeking *only possession* of the physical Hotel plans. However, to the extent Civic's claim is for disgorgement of Hotel profits based upon the alleged *use* of the Hotel plans, the claim is equivalent to one of the rights enumerated in 17 U.S.C. section 106 and is preempted. The other hypothetical claim that would not be barred by preemption or the pre-suit claim bar would be a declaratory relief action *limited to ownership* of the alleged copyrighted plans—something Civic has never alleged to date. There would be no utility in such a claim, however, because a declaration of copyright ownership alone would not be helpful to Civic, and the claim would be subject to dismissal as neither necessary nor proper. (Agency Bylaws, §2.) *What Civic wants is money.*

VI. CONCLUSION

The claims presentation requirements apply to all of Civic's state law claims against Stockton for money or damages—whether arising out of contract, tort, restitution, or otherwise. This is supported by strong public policy that has existed since before the Civil War and clear statutory language that is broadly inclusive. This strong public policy is reflected in this Court's ruling in *Bodde*.

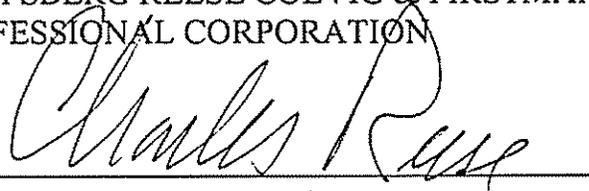
Civic has not pleaded facts demonstrating or excusing compliance with the claims presentation requirements, as required. On this basis alone, the Trial Court's order overruling Stockton's demurrer to the Second

Amended Complaint was properly reversed by the Court of Appeal. Further, Civic's Offer of Proof fails to state facts sufficient to allow amendment of its pleadings for monetary relief as a matter of law. Therefore, the Court of Appeal's decision should be affirmed, with instructions to *limit* any leave to amend to claims not seeking monetary relief.

DATED: April 21, 2006

WULFSBERG REESE COLVIG & FIRSTMAN
PROFESSIONAL CORPORATION

By



CHARLES W. REESE

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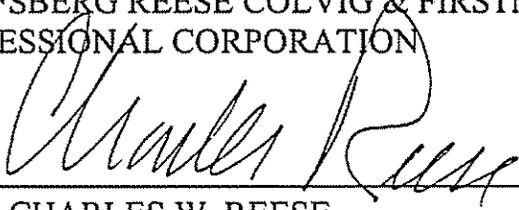
**Certification under California
Rule of Court Rule 29.1(c)**

The undersigned counsel for petitioners The City of Stockton and The Redevelopment Agency of The City of Stockton certifies that this Answer Brief on the Merits is produced in 13 point font, and that, according to the word count of the computer program used to prepare the document, this Answer Brief on the Merits, including footnotes, and excluding the title page, tables, the (optional) signature block and this Certification, contains 13,982 words.

DATED: April 21, 2006

WULFSBERG REESE COLVIG & FIRSTMAN
PROFESSIONAL CORPORATION

By _____



CHARLES W. REESE

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of Stockton and Redevelopment Agency of the
City of Stockton

PROOF OF SERVICE

I, KATHERINE A. TAYLOR, certify and declare that I am over the age of 18, and not a party to this action. My business address is Wulfsberg Reese Colvig & Firstman Professional Corporation, 300 Lakeside Drive, 24th Floor, Oakland, California 94612, located in Alameda County, which is the County where the below-described mailing took place. I am readily familiar with the business practice at my place of business for collection and processing of correspondence and other documents. Correspondence and documents so collected and processed are deposited with the United States Postal Service or other delivery service that same day in the ordinary course of business.

On April 21, 2006, at my place of business, I served the enclosed document(s) entitled:

ANSWER BRIEF ON THE MERITS

on all party(s) listed in the attached mailing list in this action, by providing a true copy of each said document(s) to the following person(s) in the following manner:

- (By Overnight Delivery) I caused a copy of the original document to be transmitted via Federal Express and marked for delivery on the next business day.

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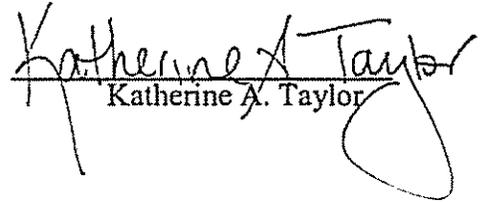
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I declare under penalty of perjury under the laws of the State of California, that
the foregoing is true. Executed at Oakland, California, on April 21, 2006.


Katherine A. Taylor