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[Exempt from filing fees pursuant
to Government Code section 6103]

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9 CITY OF HUNTINGTON BEACH

10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

12 PACIFIC AIRSHOW, LLC, a California limited
13 liability company,

CASE NO. 30-2022-01287749

Judge Martha K. Gooding

14 Plaintiff,

15 vs.

**NOTICE OF DEMURRER AND
DEMURRER TO PLAINTIFF'S
COMPLAINT BY DEFENDANT CITY
OF HUNTINGTON BEACH;
MEMORANDUM OF POINTS AND
AUTHORITIES; AND DECLARATION
OF LAUREN ROSE**

16 CITY OF HUNTINGTON BEACH, a California
17 charter city; KIM CARR, an individual; and
18 DOES 1 through 50, inclusive,

19 Defendants.

Reservation No.: 73963028

DATE: July 3, 2023

TIME: 1:30 p.m.

DEPT: C31

[Filed and served concurrently with (1)
Defendant's Motion to Strike Portions of
Plaintiff's Complaint; and (2) Request for
Judicial Notice]

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1 **TO PLAINTIFF AND TO PLAINTIFF’S ATTORNEYS OF RECORD:**

2 **NOTICE IS HEREBY GIVEN** that on July 3, 2023, at 1:30 p.m., or as soon thereafter as
3 the matter may be heard in Dept. C31 of the above entitled Court, located at 700 Civic Center
4 Drive West, Santa Ana, CA 92701, Defendant, CITY OF HUNTINGTON BEACH (“City”),
5 demurs to Plaintiff, PACIFIC AIRSHOW, LLC’s (“Plaintiff”) Complaint in this matter on the
6 following grounds:

7 (1) Plaintiff’s cause of action for breach of contract against the City does not state facts
8 sufficient to constitute a cause of action against Defendant. Additionally, Defendant
9 was legally permitted to cancel the Airshow due to unforeseen circumstances rendering
10 performance impossible due to health and safety reasons. Moreover, *Gov. Code* §
11 818.4 grants immunity to a public entity for revocation of a permit.

12 (2) Plaintiff’s three claims for interference with contractual relations and prospective
13 economic damages are all barred by *Gov. Code* § 815.2 because the City’s employees’
14 actions are immune from liability pursuant to *Gov. Code* § 820.2. Additionally, all
15 three claims fail to assert facts that are sufficient to plead such claims and are
16 uncertain, ambiguous and unintelligible.

17 (3) The fifth cause of action for a 42 U.S.C. § 1983 violation is uncertain, ambiguous and
18 unintelligible and does not allege facts adequate to plead such a claim.

19 This Motion is based on *C.C.P.* §§ 430.10(e) & (f), 430.30 and 430.70 and Defendant’s
20 request for judicial notice which contains various official governmental publications regarding the
21 oil spill and beach closures and a map of where the Airshow was to be conducted. This Demurrer
22 will be based upon this Notice of Demurrer, Memorandum of Points and Authorities, Declaration
23 of Lauren Rose and attached exhibits, Defendant’s Request for Judicial Notice, documents and
24 other evidence served and lodged herewith, complete files and records of this action, and any other
25 matters of which the Court may or is required to take judicial notice and upon such other and
26 further relief as may be presented on the hearing of this Motion. The parties met and conferred
27 pursuant to 430.41(a) of the *C.C.P.*, see Declaration of L. Rose, ¶ 14.

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DEMURRER

Pursuant to *C.C.P.* § 430.10, Defendant City hereby demurs as to all causes of action in the Complaint of Plaintiff for: (1) Breach of Contract; (2) Intentional Interference with Contractual Relations; (3) Intentional Interference with Prospective Economic Advantage; (4) Negligent Interference with Prospective Advantage; and (5) Violation of 42 U.S.C. § 1983, on the following grounds: all Plaintiff's causes of action do not state facts sufficient to constitute a cause of action as against the City. (*C.C.P.* §§ 430.10(e)).

DATED: March 2, 2023

MICHAEL E. GATES, City Attorney


By: 
LAUREN L. ROSE, Deputy City Attorney
Attorney for Defendant
CITY OF HUNTINGTON BEACH

TABLE OF CONTENTS

	<u>Page</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
Table of Authorities	iii
MEMORANDUM OF POINTS AND AUTHORITIES	4
I. SUMMARY OF ARGUMENT	4
II. STATEMENT OF FACTS	4
III. LEGAL ARGUMENT	5
IV. THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AGAINST DEFENDANT CITY OF HUNTINGTON BEACH FOR A BREACH OF CONTRACT CLAIM.	6
A. The Permit Does Not Constitute a Contract.	6
B. Defendant was Legally Permitted to Cancel the Airshow Pursuant to the Health and Safety Provision.	6
C. Performance of a Contract is Excused when there is an Unforeseeable Event Rendering it Impossible for Defendant to Perform its Obligations.	8
D. The City is Immune from Revocation of a Permit Pursuant to Gov. Code § 818.4	8
V. THE CITY IS IMMUNE FROM THE THREE ASSERTED INTERFERENCE CLAIMS, NONETHELESS THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AGAINST THE CITY FOR ANY OF THE PLED INTERFERENCE CAUSES OF ACTION.	9
A. The City is Immune from Plaintiff’s Three Interference of Contract and Economic Claims Pursuant to the Discretionary Immunity Set Forth in Gov. Code § 815.2.....	9
B. Plaintiff does Not State Facts to Support an Intentional Interference with Contractual Relations Claim	10
C. Plaintiff does Not State Facts to Support an Intentional Interference with Prospective Economic Advantage Cause of Action.....	11
D. Plaintiff does Not State Facts to Support an Negligent Interference with Prospective Economic Advantage Claim	12
VI. THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AGAINST DEFENDANT CITY OF HUNTINGTON BEACH FOR AN ALLEGED VIOLATION OF 42 U.S.C. § 1983.	13
VII. THIS COURT SHOULD GRANT DEFENDANT’S DEMURRER WITHOUT LEAVE TO AMEND	14
VIII. CONCLUSION	14
DECLARATION OF LAUREN ROSE	15

TABLE OF AUTHORITIES

Page(s)

Cases

Blair v. Bethel Sch. Dist.
(9th Cir. 2010) 608 F.3d 540..... 14

Blue Dolphin Charters, Ltd. v. Knight & Carver Yachtcenter, Inc.
(S.D.Cal. Nov. 3, 2011), 2011 WL 5360074, at *5) 13

Burns v. City Council
(1973) 31 Cal.App.3d 999..... 9

Conso v. City of Eureka
(N.D.Cal. Feb. 10, 2022) 2022 WL 409958, at *8 14

Della Penna v. Toyota Motor Sales, U.S.A.
(1995) 11 Cal.4th 376..... 11

Drink Tank Ventures, LLC v. Real Soda in Real Bottles, Ltd.
(2021) 71 Cal.App.5th 528..... 11

Johnson v. State of California
(1968) 69 Cal. 2d 782..... 9

Korea Supply Co. v. Lockheed Martin Corp.
(2003) 29 Cal.4th 1134..... 11-12

LiMandri v. Judkins
(1997) 52 Cal.App.4th 326..... 11-12

Lipman v. Brisbane Elementary Sch. Dist.
(1961) 55 Cal. 3d 224..... 9

Marsh v. Anesthesia Services Medical Group, Inc.
(2011) 200 Cal.App.4th 480..... 11

Nieves v. Bartlett
(2019) 139 S.Ct. 1715 13

O’Hagan v. Bd of Zoning Adjustment
(1974) 38 Cal. App. 3d 722..... 8

Oosten v. Hay Haulers Dairy Employees & Helpers Union
(1955) 45 Cal. 2d 784..... 8

People ex rel. Harris v. Rizzo
(2013) 214 Cal.App.4th 921..... 14

Quelimane Co. v. Stewart Title Guaranty Co.
(1998) 19 Cal.4th 26..... 10

Richman v. Hartley
(2014) 224 Cal.App.4th 1182..... 6

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

TABLE OF AUTHORITIES (Cont.)

Page(s)

Cases (Cont.)

Soil Retention Products, Inc. v. Brentwood Industries, Inc.
(S.D.Cal. 2021) 521 F.Supp.3d 929 10

Stella v. Kelley
(1st Cir.1995) 63 F.3d 71 14

Stolz v. Wong Communications
(1994) 25 Cal.App.4th 1811..... 12

The Kind & Compassionate v. City of Long Beach
(2016) 2 Cal. App. 5th 116..... 10

Westside Ctr. Associates v. Safeway Stores 23, Inc.
(1996) 42 Cal.App.4th 507..... 12

Statutes and Other Authority

42 U.S.C. § 19832, 3, 5, 13, 14

C.C.P. § 430.103, 5

C.C.P. § 430.10(e)2, 3

C.C.P. § 430.10(f)2

C.C.P. § 430.302, 5

C.C.P. § 430.41(a)2, 6

C.C.P. § 430.702, 5

C.C.P. § 15506

C.C.P. § 35268

Gov. Code § 815.22, 9-10

Gov. Code § 818.42, 8-9

Gov. Code § 820.2.....2, 9-10

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. SUMMARY OF ARGUMENT**

3 Plaintiff's first claim for breach of contract is not adequately plead because the permit at
4 issue is not a contract. Even if the Court determines the permit does amount to a contract,
5 Defendant's actions fall within the exception to performance as stated within the permit and
6 Defendant was excused from performance due to the unforeseeable event that was the oil spill.

7 Plaintiff's three causes of action regarding contractual and economic interference with
8 third-parties all fail because Defendant is immune from liability pursuant to discretionary
9 immunity afforded to public entities. Further, Plaintiff's allegations are vague and ambiguous as
10 to the third-party relationships, Defendant's actual knowledge of these relationships, and what the
11 intentional act of Defendant was to induce such an interference. Plaintiff fails to assert Defendant
12 acted with the specific intent to harm Plaintiff's relationships with any third-party and/or how
13 Defendant's action amounted to negligence.

14 The last cause of action does not demonstrate any violation of Plaintiff's First Amendment
15 rights, or if there was a violation how it correlated with any harm to Plaintiff. The only damage
16 Plaintiff asserted was a raise in fees in the next year's Airshow and a removal of a parking offset.
17 However, it is speculative and unsubstantiated how this was in any way connected to Plaintiff's
18 negative comments regarding the City's reaction to the unexpected and disastrous oil spill.

19 **II. STATEMENT OF FACTS**

20 On September 29, 2021, the City signed a permit granting the Pacific Airshow, LLC
21 ("Plaintiff") the exclusive right to conduct an airshow in 2021 and the exclusive use and control of
22 the site for event purposes (the sites as listed out in the permit: Huntington City Beach, the
23 Huntington Beach Pier, Pier Plaza, 6th Street Parking lot and the RV Parking lot). (See Plaintiff's
24 **Exhibit A** to the Complaint). The Airshow was set to take place from September 30-October 3,
25 2021. (See **Exhibit A**). Plaintiff sold tickets to individuals who were then allowed to view the
26 Airshow from the beach in Huntington Beach, as well as interact with various vendors selling
27 food, drinks, etc. (See **Exhibit A** and Defendant's **Exhibit 9**, filed concurrently with Defendant's
28 Request for Judicial Notice ("RJN").

1 On October 2, 2021, the City was informed by the U.S. Coast Guard an oil spill just off its
2 shore had occurred. (See **Exhibits 1, 2 & 8**, filed concurrently with Defendant's RJN). With the
3 information presented, the City decided to close its beaches commencing on October 3, 2021,
4 where individuals who had purchased tickets to the Airshow would be gathering. (See **Exhibit 9**,
5 filed concurrently with Defendant's RJN). Due to the oil spill, the City decided the Airshow could
6 not go forward on its last day, October 3, 2021. Soon after, Governor Gavin Newsom issued a
7 "Proclamation of State of Emergency" regarding the oil spill; the Orange County Board of
8 Supervisors published its own countywide resolution declaring a state of emergency; and The OC
9 Health Care Agency's County Health Officer issued a health advisory recommending for anyone
10 who had been in contact with any containments from the oil spill to seek immediate medical
11 attention. (See **Exhibit 3, 5 & 7**, filed concurrently with Defendant's RJN). Various other coastal
12 cities, including Laguna Beach and Newport Beach closed their beach access. (See **Exhibits 4 &**
13 **6**, filed concurrently with Defendant's RJN).

14 Plaintiff now seeks damages for the cancellation of the last day of the Airshow and for the
15 alleged damages caused to future airshows, contractual and economic claims involving its
16 vendors, and a violation of 42 U.S.C. § 1983 claim.

17 **III. LEGAL ARGUMENT**

18 A party may demur to a Complaint pursuant to *CCP* § 430.10 in relevant part, on the
19 following grounds:

20 (a) The court has no jurisdiction of the subject of the cause of
21 action alleged in the pleading.

22 ...

23 (e) The pleading does not state facts sufficient to constitute a cause
24 of action.

25 (f) The pleading is uncertain. As used in this subdivision,
26 "uncertain" includes ambiguous and unintelligible."

27 ...

28 A demurrer must be sustained where the facts alleged do not entitle the plaintiff to relief
under any possible legal theory and the pleading is uncertain as is the case here. Additionally, a
demur may be based upon matters which the court may take judicial notice. (*CCP* §§ 430.30 and
430.70). Defendant demurs to Plaintiff's Complaint as to all causes of action as discussed below.

1 **IV. THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE**
2 **A CAUSE OF ACTION AGAINST DEFENDANT CITY OF HUNTINGTON**
3 **BEACH FOR A BREACH OF CONTRACT CLAIM.**

4 **A. The Permit Does Not Constitute a Contract.**

5 In the most traditional sense, a contract must have an offer, acceptance by both parties and
6 consideration. (*C.C.P.* § 1550). In order to bring a breach of contract claim, an actual contract
7 between the parties must first be established. (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182,
8 1186).

9 Here, the permit does not act as a contract. The permit gave Plaintiff the exclusive right
10 to conduct the Airshow in 2021 and the exclusive use and control of various City locations for
11 event purposes. However, there is nothing stated within the permit regarding consideration given
12 to the City. The only payment from Plaintiff to the City was for security from the City's Police
13 Department and usage of the City's Fire and Marine Safety Department. A permit allows for an
14 individual or group to use a public entity's space. It is not the same as a contract. Therefore,
15 Plaintiff's cause of action for breach of contract fails and the demurrer should be sustained as to
16 this claim.

17 **B. Defendant was Legally Permitted to Cancel the Airshow Pursuant to the Health
18 and Safety Provision.**

19 On October 2, 2021, the U.S. Coast Guard informed the City of an oil spill off its coast.
20 (See **Exhibits 1, 2 & 8**). Plaintiff admits in its Complaint an oil spill occurred on October 1, 2021.
21 It was quickly decided after the conclusion of the Airshow on October 2, 2021, Huntington Beach
22 had to close down its beaches in order to mitigate any damages and health hazards to individuals
23 and wildlife and to clean up the oil spill.

24 Governor Newsom issued a "Proclamation of State of Emergency" regarding an oil spill
25 five miles off the coast of Huntington Beach in Orange County stating the "United States Coast
26 Guard initiated an emergency response effort to locate, confine and attempt to remove the oil from
27 the water and mitigate further damage." (See **Exhibit 3**). Governor Newsom further declared
28 "**the oil has reached the Huntington Beach shoreline and threatens numerous jurisdictions
along the coast, resulting in beach disclosures.**" (**emphasis added**). Additionally the
proclamation announced the Department of Fish and Wildlife would coordinate **aircraft** to assist

1 in cleaning up the spill. (**emphasis added**). Finally, “all residents are to heed the direction of the
2 emergency officials... in order to protect their safety.”

3 Following the Governor’s State of Emergency, the Orange County Board of Supervisors
4 published a countywide resolution declaring a state of emergency and the OC Health Care Agency
5 issued a health advisory recommending for anyone who had been in contact with any
6 containments from the oil spill to seek medical attention. (See **Exhibits 5 & 7**).

7 Plaintiff’s permit with the City explicitly declares, “Except to **protect health and safety**,
8 City shall not act in anyway contrary to or in violation of the Permit to conduct the EVENT.”
9 (**emphasis added**) (See **Exhibit A**). It cannot be disputed that an effort to mitigate damages from
10 an oil spill, which was responded to by the Federal Government, the State, the County and other
11 local cities and included closing down the beaches in Huntington Beach constituted a protection of
12 “health and safety.” Plaintiff’s tickets sold for the Airshow allowed individuals to view the show
13 from the beach, the exact area that needed to be closed in order to protect individuals from oil spill
14 contaminants. (See **Exhibit 9**). The **only** reason the City cancelled the Airshow on its last day of
15 October 3, 2021, was for the ultimate **health and safety** of people and wildlife. Plaintiff has not
16 cited to any other justification for the City’s cancellation of the Airshow. Therefore, there was no
17 breach of contract because the condition contained in the permit which allowed the City to act
18 contrary to or in violation of the permit was met.

19 The permit also stated, “**Except as otherwise provided in the PERMIT**, the terms and
20 conditions of issuance of the Permit may not be cancelled, removed, or otherwise modified except
21 by providing applicant notice and opportunity for a public hearing.” (**emphasis added**). Plaintiff
22 contends that because there was no public hearing regarding the City shutting down the beach, the
23 City was in breach of contract. First, the permit states there need only be a public hearing, “except
24 as otherwise provided in the PERMIT,” which as discussed above the portion that was “otherwise
25 provided” was the provision in the permit allowing the City to violate the permit to **protect health**
26 **and safety**. Therefore, in strictly construing the language of the permit, no public hearing was
27 necessary if some other portion of the permit allowed the City to violate or act contrary to the
28

1 terms of the permit. The condition stating “except as otherwise provided” encompassed the health
2 and safety provision in the permit, and accordingly there was no breach committed by the City.

3 **C. Performance of a Contract is Excused when there is an Unforeseeable Event**
4 **Rendering it Impossible for Defendant to Perform its Obligations.**

5 *C.C.P.* § 3526 declares “No man is responsible for that which no man can control.”

6 Performance of a contract is excused when an unforeseeable even, outside the party’s control,
7 renders performance impossible or impractical. (*Oosten v. Hay Haulers Dairy Employees &*
8 *Helpers Union* (1955) 45 Cal. 2d 784, 788).

9 Here, as detailed above, the oil spill presented an impossibility for the Airshow to take
10 place as stated in the permit. With the beaches having to close to protect the health and safety of
11 individuals, it was impossible to allow people onto the beach where the Airshow was to be viewed
12 by ticketholders. (See **Exhibit 9**). Additionally, the airspace that was intended and permitted for
13 Plaintiff on October 3, 2021, in a state of emergency had to be used by the U.S. Coast Guard and
14 the City in order to monitor the spread and mitigate the oil spill devastation. (See **Exhibits 1, 2, 3,**
15 **8 & 9**). There was no method in which the public entities utilizing the airspace could share the
16 space in order to allow the Airshow to go forward, this would only cause further disaster and
17 safety hazards. The City acted as quickly as it could to assist in cleanup of the oil spill and
18 unfortunately through no fault of the City, it could not allow Plaintiff within the airspace allowed
19 in the permit, nor could it allow individuals to gather in an area deemed unsafe by several public
20 agencies for health and safety reasons. (See **Exhibits 1-8**). Allowing any such events would have
21 further endangered the public and exposed the City to additional litigation.

22 **D. The City is Immune from Revocation of a Permit Pursuant to Gov. Code §**
23 **818.4**

24 *Gov. Code* § 818.4 declares, “A public entity is not liable for an injury caused by the
25 issuance, denial, suspension or **revocation of**... any permit... where the public entity or an
26 employee of the public entity is authorized by enactment to determine whether or not such
27 authorization should be issued, denied, suspended or removed.” (**emphasis added**). A permit
28 gives a party a “vested property right;” however a permit is not irrevocable and this vested right
can be revoked if there “is a compelling public necessity.” (*O’Hagan v. Bd of Zoning Adjustment*

1 (1974) 38 Cal. App. 3d 722, 727). Courts have sustained demurrers pertaining to a public entity
2 and the immunity granted in *Gov. Code* § 818.4, when the decision to issue the permit was
3 discretionary. (*Burns v. City Council* (1973) 31 Cal.App.3d 999, 1000).

4 Here, the City is immune from liability regarding the revocation of its permit to Plaintiff
5 for the final day of the Airshow pursuant to *Gov. Code* § 818.4. The power to revoke was within
6 the City’s discretion and the permit was revoked for a very “compelling public necessity.” With
7 such immunity, the demurrer should be sustained.

8 **V. THE CITY IS IMMUNE FROM THE THREE ASSERTED INTERFERENCE**
9 **CLAIMS, NONETHELESS THE COMPLAINT DOES NOT STATE FACTS**
10 **SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AGAINST THE CITY**
11 **FOR ANY OF THE PLED INTERFERENCE CAUSES OF ACTION.**

12 **A. The City is Immune from Plaintiff’s Three Interference of Contract and**
13 **Economic Claims Pursuant to the Discretionary Immunity Set Forth in Gov.**
14 **Code § 815.2.**

15 Public employees are immune from lawsuits in which their discretionary authority was
16 utilized within their scope as a public employee. (*Lipman v. Brisbane Elementary Sch. Dist.*
17 (1961) 55 Cal. 3d 224, 233). *Gov. Code* § 820.2 codified this immunity for public employees.
18 Public entities are immune when its public employees are immune pursuant to *Gov. Code* § 820.2,
19 except as otherwise provided by statute. *Gov. Code* § 815.2. “Immunity applies only to deliberate
20 and considered policy decisions, in which a “[conscious] balancing [of] risks and advantages...
21 took place.” (*Johnson v. State of California* (1968) 69 Cal. 2d 782).

22 Plaintiff contends Defendant Carr and Chief of Police, Julian Harvey made the decision to
23 cancel the Airshow. Assuming Carr and Chief of Police Harvey “unilaterally” determined the
24 Airshow could not go forward on its last day, this was a discretionary act. These employees’
25 decision was based upon information and belief supplied by the U.S. Coast Guard and ultimately
26 they decided it was in the community’s best interest not to allow individuals to gather on the
27 beach. (See **Exhibits 1, 2 & 8**). Their decision was supported by Governor Newsom, the County
28 of Orange, OC Health Care Agency’s County Health Officer and the Department of Fish and
Wildlife, among other public entities. (See **Exhibits 3-7**). The cancellation of the Airshow was
based on incoming data and analysis regarding the oil spill. Therefore, the demurrer as to all of

1 Plaintiff's interference causes of action should be dismissed due to the discretionary immunities
2 set forth in *Gov. Code* §§ 820.2 and 815.2.

3 **B. Plaintiff does Not State Facts to Support an Intentional Interference with**
4 **Contractual Relations Claim**

5 In order to assert an intentional interference with contractual relations claims, Plaintiff
6 must demonstrate: (1) there was a valid contract between Plaintiff and a third-party; (2) defendant
7 had knowledge of the contract; (3) defendant's intentional acts were designed to induce a breach
8 of disruption of the relationship; (4) actual breach or disruption of the relationship; and (5)
9 resulting damages. (*The Kind & Compassionate v. City of Long Beach* (2016) 2 Cal. App. 5th
10 116, 129 [quoting] *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55).

11 The court in *The Kind & Compassionate*, held the lower court's ruling sustaining the
12 demurrer as to the intentional interference with contractual relations claim was appropriate
13 because the complaint failed to identify any actual agreement, the date of any contract or threat,
14 the nature of the threat, the actual breach or interference, and what damages occurred. (*The Kind*
15 *& Compassionate, supra*, 19 Cal.4th at p. 130). In *Soil Retention Products, Inc. v. Brentwood*
16 *Industries, Inc.*, the court dismissed a contractual-interference claim where plaintiff only generally
17 alleged that it had contracts with "its partners, including licensees," but failed to identify specific
18 contracting parties. (*Soil Retention Products, Inc. v. Brentwood Industries, Inc.* (S.D.Cal. 2021)
19 521 F.Supp.3d 929, 960).

20 Here, Plaintiff alleged very few, if any facts that amount to an intentional interference with
21 contractual relations claim, similar to the plaintiff in *The Kind & Compassionate*. Plaintiff alleges
22 it had "entered into various contracts with performers, ticket holders, sponsors, exhibitors, and
23 third party vendors," which is vague at best. Plaintiff failed to allege any specific contractual
24 relationships in which the City interfered.

25 Further, only the last day of the Airshow was affected, it was not pled that all of these
26 contracts involved the last day of the Airshow. Additionally, it is unclear if Defendant was aware
27 and how they were aware of all of the third-party contracts. Further, Plaintiff failed to identify the
28 intentional act conducted by Defendant that was specifically designed to induce a breach or

1 disruption of the third-party relationship. Defendant cancelled the last day of the Airshow due to
2 the health and safety concerns arising out of the oil spill. It is ambiguous how this cancellation
3 was “designed to induce a breach of disruption of the relationship” Plaintiff had with its
4 “vendors.” Plaintiff also alleged it was Defendant’s action that was a substantial factor in causing
5 Plaintiff harm, which assumes Plaintiff could have gone forward with the Airshow even with the
6 oil spill, which is speculative. Thus, Plaintiff failed to plead facts sufficient to assert an intentional
7 interference with contractual relations cause of action and the demurrer should be sustained.

8 **C. Plaintiff does Not State Facts to Support an Intentional Interference with**
9 **Prospective Economic Advantage Cause of Action**

10 To claim an intentional interference with prospective economic advantage, Plaintiff must
11 establish facts showing: (1) there was an economic relationship between Plaintiff and a third-party
12 that had a probability in the future economic benefit to Plaintiff; (2) defendant had knowledge of
13 the relationship; (3) intentional **wrongful** acts on the part of Defendant disrupted the relationship;
14 (4) there was an actual disruption of the relationship; and (5) the economic harm was proximately
15 caused by the defendant’s acts. (**emphasis added**) (*Marsh v. Anesthesia Services Medical Group,*
16 *Inc.* (2011) 200 Cal.App.4th 480, 504). “Whether an act is independently wrongful depends on its
17 unlawfulness if it is “proscribed by some constitutional, statutory, regulatory, common law, or
18 other determinable legal standard.” (*Ibid* [quoting] *Korea Supply Co. v. Lockheed Martin Corp.*
19 (2003) 29 Cal.4th 1134, 1159). Moreover, the wrongful act must have been conducted with the
20 **specific intent** to interfere with the third-party relationship. (**emphasis added**) (*Korea Supply*
21 *Co., supra*, 29 Cal.4th at p. 1154). Additionally, a plaintiff asserting this cause of action must
22 illustrate “defendant’s interference was wrongful ‘by some other measure beyond the fact of the
23 interference itself.’” (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 348, 342 [quoting] *Della*
24 *Penna v. Toyota Motor Sales, U.S.A.* (1995) 11 Cal.4th 376, 392-393). The mere breach of a
25 contract cannot amount to an independent wrongful act under this claim. (*Drink Tank Ventures,*
26 *LLC v. Real Soda in Real Bottles, Ltd.* (2021) 71 Cal.App.5th 528, 540.)

27 In the instant Complaint, similar to Plaintiff’s intentional interference with contractual
28 relations claim, it is vague as to what contracts Plaintiff alleges were affected by Defendant’s

1 behavior and only pleads “various parties as it related to future airshow.” Contentions that a party
2 interfered with an unidentified relationship is not enough to assert this cause of action. (*Westside*
3 *Ctr. Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 527.)

4 It also imprecisely asserted Defendant “knew of these relationships with the third parties,”
5 with no facts how Defendant knew of all of third-party relationships Plaintiff had in the future.
6 Most importantly, there was no facts pled that Defendant conducted “wrongful acts” and the
7 **unlawfulness** of those acts. Plaintiff does not assert Defendant acted with the **specific intent** to
8 harm Plaintiff’s relationships with any third-party. There are no facts asserted as to how
9 Plaintiff’s relationships with these third parties was “disrupted.” Further, it is speculative to
10 contend it was Defendant’s actions and not the oil spill that were the proximate cause of Plaintiff’s
11 future economic harm. Therefore, the demurrer as to this claim should be sustained.

12 **D. Plaintiff does Not State Facts to Support an Negligent Interference with**
13 **Prospective Economic Advantage Claim**

14 For this cause of action Plaintiff must plead facts that establish the following: (1) an
15 economic relationship between plaintiff and a third-party that had a probability of future economic
16 benefit to the plaintiff; (2) defendant’s knowledge of the relationship; (3) defendant was negligent;
17 and (4) the negligence caused damage to plaintiff in that plaintiff lost economic benefits expected.
18 (*Korea Supply Co., supra*, 29 Cal.4th at p. 1153). A plaintiff asserting this cause of action must
19 allege defendant owed plaintiff a duty of care. (*LiMandri, supra*, 52 Cal.App.4th at p. 348
20 [quoting] *Stolz v. Wong Communications* (1994) 25 Cal.App.4th 1811, 1825).

21 Here, as with the other two interference claims, Plaintiff failed to plead facts
22 demonstrating how or what Defendant knew about any future third-party relationships with
23 Plaintiff. Regarding negligence specifically, Plaintiff does not state why it contends Defendant
24 owed it a duty to act with “reasonable care” and/or how Defendant was negligent. Had Defendant
25 not cancelled the Airshow and allowed a gathering of people on the beach, would that not amount
26 to negligence? It appears according to Plaintiff no matter what action Defendant took in dealing
27 with the oil spill, Defendant was to blame for the outcome. However, Defendant did not cause the
28 oil spill in any manner, nor are any such facts alleged. Defendant reacted to a disastrous event,

1 with very little time to do so and with limited information, yet Plaintiff seeks to contend
2 Defendant acted in a negligent manner in handling the oil spill and therefore caused the Airshow
3 harm with regards to future airshows. It is speculative for Plaintiff to assert that the relationships
4 it had with third-parties was affected by Defendant's allegedly negligent actions. It is conclusory
5 to state "Defendants failed to act with reasonable care;" what would have constituted reasonable
6 care in this situation?

7 Further, Plaintiff did not identify a particular third-party relationship that the City
8 caused an interference with, as required to assert this claim. (*Blue Dolphin Charters, Ltd. v.*
9 *Knight & Carver Yachtcenter, Inc.* (S.D.Cal. Nov. 3, 2011), 2011 WL 5360074, at *5). Thus, the
10 facts pled within Plaintiff's fourth cause of action do not amount to a claim for negligent
11 interference with prospective economic advantage and the demurrer should be sustained.

12 **VI. THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE**
13 **A CAUSE OF ACTION AGAINST DEFENDANT CITY OF HUNTINGTON**
14 **BEACH FOR AN ALLEGED VIOLATION OF 42 U.S.C. § 1983.**

15 To recover under section 1983 for retaliation in violation of the First Amendment, a
16 plaintiff must establish (1) it engaged in conduct protected by the First Amendment; (2) as a result,
17 it was subjected to adverse action by the defendant that would deter or chill a person of ordinary
18 firmness from continuing to engage in the protected conduct; and (3) defendant's desire to chill
19 was the "but-for" cause of the subsequent injury. (*Nieves v. Bartlett* (2019) 139 S.Ct. 1715, 1722.)

20 Here, Plaintiff's allegation that after it voiced concerns online over Defendant's actions
21 regarding the Airshow, Defendant allegedly asked Plaintiff to take down the post and Plaintiff did
22 not, somehow amounts to a First Amendment violation. Simply asking a party, whom Defendant
23 has a working relationship with to delete a negative comment, does not equate to infringement of
24 Plaintiff's First Amendment rights. Plaintiff declares it did not remove the posting. Therefore,
25 there was no chilling effect on free speech as evidenced by Plaintiff's continuation of keeping its'
26 post criticizing the City online. (*Nieves, supra*, 139 S.Ct. 1715, 1722.)

27 The Airshow took place in 2022. Although fees might have been raised (inflation) or
28 Plaintiff was not given a parking offset (something that was not guaranteed year-to-year), the
allegation Defendant violated Plaintiff's freedom of speech is absurd. The "parking offset" was

1 not part of the subject permit, nor something the parties agreed would continue in perpetuity.
2 Plaintiff cannot claim that because it was not given this “offset” in future years, this action stems
3 from its comments disapproving the City’s actions in regard to the oil spill; there is no causal link
4 as required to assert this claim. (*Conso v. City of Eureka* (N.D.Cal. Feb. 10, 2022) 2022 WL
5 409958, at *8).

6 Moreover, legislative immunity bars this claim, as voting is within the authority of City
7 Council. (*People ex rel. Harris v. Rizzo* (2013) 214 Cal.App.4th 921, 928-929.) Also, City
8 Council votes are protected by First Amendment rights, as their votes constitute protected speech.
9 (*Blair v. Bethel Sch. Dist.* (9th Cir. 2010) 608 F.3d 540, 545 [quoting] *Stella v. Kelley* (1st
10 Cir.1995) 63 F.3d 71, 75). Therefore, Plaintiff failed to state facts that amount to the federal cause
11 of action for a 42 U.S.C. § 1983 violation.

12 **VII. THIS COURT SHOULD GRANT DEFENDANT’S DEMURRER WITHOUT**
13 **LEAVE TO AMEND**

14 There is no cure to the defects in Plaintiff’s Complaint. It cannot be amended to add facts
15 sufficient for the asserted claims. The Court should not provide Plaintiff an opportunity to address
16 incurable defects.

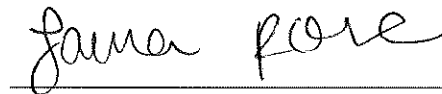
17 **VIII. CONCLUSION**

18 Defendant respectfully requests this Court sustain this Demurrer as to the breach of
19 contract, three interference claims, and violation of 42 U.S.C. § 1983 causes of action against
20 Defendant, City of Huntington Beach, without leave to amend, for the reasons stated herein.

21 DATED: March 2, 2023

MICHAEL E. GATES, City Attorney

22
23 By:



24 LAUREN ROSE, Deputy City Attorney
25 Attorney for Defendant,
26 CITY OF HUNTINGTON BEACH
27
28

1 **DECLARATION OF LAUREN ROSE**

2 I, Lauren Rose, declare and state:

3 1. I am an attorney at law duly licensed to practice before all the courts of this state
4 and am a Deputy City Attorney for the City of Huntington Beach, counsel for Defendant in the
5 above-entitled matter. The matters stated herein are within my own personal knowledge and, if
6 called as a witness, I could and would testify thereto.

7 2. On September 29, 2021, the City signed a permit granting the Pacific Airshow
8 (“Airshow”) the exclusive right to conduct an Airshow in 2021 and the exclusive use and control
9 of the site for event purposes (the sites as listed out in the permit were: Huntington City Beach,
10 the Huntington Beach Pier, Pier Plaza, 6th Street Parking lot, RV Parking lot). See Plaintiff’s
11 **Exhibit A** to the Complaint.

12 3. The Airshow was set to take place from September 30- October 3, 2021. See
13 **Exhibit A**. Plaintiff sold tickets to individuals who were then allowed to view the Airshow from
14 the beach in Huntington Beach, as well as interact with various vendors, selling food, drinks, etc.
15 See Plaintiff’s **Exhibit A** and Defendant’s **Exhibit 9**.

16 4. On October 2, 2021, the City was informed by the U.S. Coast Guard an oil spill
17 just off its shore occurred. See Defendant’s **Exhibits 1, 2** and **8**. With the information presented,
18 the City decided to close its beaches commencing on October 3, 2021.

19 5. Attached to Defendant’s Request for Judicial Notice as **Exhibit 1**: California
20 Department of Fish and Wildlife release dated October 2, 2021 regarding the oil spill.

21 6. Attached to Defendant’s Request for Judicial Notice as **Exhibit 2**: Initial United
22 Command releases dated October 3, 2021, October 4, 2021, October 5, 2021, and October 6, 2021
23 regarding the oil spill. The Unified Command consisted of the U.S. Coast Guard, California
24 Department of Fish and Wildlife’s Office of Spill Prevention and Response and Amplify Energy,
25 along with the supporting agencies of Long Beach, Newport Beach and Huntington Beach.

26 7. Attached to Defendant’s Request for Judicial Notice as **Exhibit 3**: California
27 Governor Gavin Newsom’s “Proclamation of State of Emergency” dated October 4, 2021
28 regarding the Southern California oil spill.

1 **PROOF OF SERVICE OF PAPERS**

2 STATE OF CALIFORNIA)
3) ss.
4 COUNTY OF ORANGE)

5 I am employed in the County of Orange, State of California. I am over the age of 18 and
6 not a party to the within action; my business address is 2000 Main Street, Huntington Beach, CA
92648.

7 On March 2, 2023, I served the foregoing document(s) described as: **NOTICE OF
8 DEMURRER AND DEMURRER TO PLAINTIFF’S COMPLAINT BY DEFENDANT
9 CITY OF HUNTINGTON BEACH; MEMORANDUM OF POINTS AND AUTHORITIES;
AND DECLARATION OF LAUREN ROSE** on the interested parties in this action by placing a
true copy thereof in a sealed envelope addressed as follows:

10 Suoo Lee, Esq.
11 SL LAW, PC
12 4343 Von Karman Avenue, Suite 250J
13 Newport Beach, CA 92660

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AIRHSHOW, LLC
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14 Mark J. Austin, Esq.
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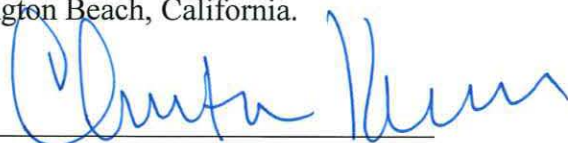
Attorneys for Defendant
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19 a. BY MAIL -- I caused such envelope to be deposited in the mail at Huntington
20 Beach, California. I am readily familiar with the business practice at my place of business for
collection and processing of correspondence for mailing with the United States Postal Service.
Correspondence so collected and processed is deposited with the United States Postal Service that
same day in the ordinary course of business.

21 b. BY EMAIL – Electronic Service through One Legal, LLC. I effected electronic
22 service by submitting an electronic version of the documents to One Legal, LLC,
www.onelegal.com, which caused the documents to be sent by electronic transmission to the
23 person(s) at the electronic service address(es) listed above.

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

26 Executed on March 2, 2023, in Huntington Beach, California.

27 
28 CHRISTINA KELEMEN