

1 those claims without prejudice. The Court notes that its decision does not leave Plaintiffs
2 without the possibility of a remedy, since Plaintiffs are free to pursue their state law claims,
3 if any, in an appropriate state court forum, where extensive litigation over these issues is
4 ongoing involving these and other parties.

5 **Background**

6 Plaintiffs' federal claims in this case arise from (1) the alleged under funding of the
7 San Diego City Employees Retirement System ("SDCERS") and (2) the terms of the City's
8 last, best and final offer ("LBFO"), which the City implemented following failed labor
9 negotiations between the City and the San Diego Police Officers Association ("SDPOA")
10 in 2005. (See FAC ¶¶ 14, 172-213, 238-249, 255-258.) The SDPOA is the organization
11 that represents police officers employed by the City.

12 **I. This Case – Operative Complaint and Remaining Claims/Defendants**

13 This action commenced on July 18, 2006. (Doc. No. 1.) The individual police
14 officer plaintiffs filed a complaint against Michael Aguirre; the City of San Diego ("City");
15 SDCERS; several current and/or former City Council members and City officials; KPMG
16 LLP; and KPMG. (Doc. No. 1.) Plaintiffs' complaint asserted five federal claims under 42
17 U.S.C. § 1983: (1) retaliation in violation of the First Amendment, as to Aguirre, the City
18 and the Individual Defendants, see Compl. ¶ 65; (2) violation of the Contracts Clause, U.S.
19 Const., art. I, § 10, as to all defendants, see Compl. ¶ 72; (3) violation of the Takings
20 Clause, as to all defendants, see Compl. ¶ 79; (4) violation of procedural due process, as to
21 all defendants, see Compl. ¶ 86; and (5) conspiracy to violate the federal rights asserted in
22 the previous four claims, as to all defendants, see Compl. ¶ 94. Plaintiffs' complaint
23 asserted several state law claims pursuant to the Court's supplemental jurisdiction under 28
24 U.S.C. § 1367. (Compl. ¶ 1.)

25 On April 9, 2007, following extensive motion practice directed at the sufficiency of
26 Plaintiffs' allegations, Plaintiffs filed a fourth amended complaint ("FAC"), see Doc. No.
27 139, which is the operative complaint in this action. Plaintiffs' FAC asserts claims against
28 Aguirre; the City; SDCERS; council members Scott Peters, Jim Madaffer, Ralph Inzunza,

1 Toni Atkins, Tony Young, Brian Maienschein, Donna Frye and Michael Zucchet, City
2 officials Cathy Lexin, Mary Vattimo, Terri Webster, Ed Ryan, Bruce Herring, Lamont
3 Ewell and Michael Uberuaga (“Individual Defendants”); KPMG LLP and KPMG. (Doc.
4 No. 139.) The FAC alleges claims under § 1983 and various state law claims.

5 On June 12, 2007, the Court issued an order granting in part and denying in part
6 several motions to dismiss Plaintiffs’ FAC, with the result that the following federal claims
7 remain:

- 8 • As to Defendant Aguirre, Plaintiffs’ remaining claims are § 1983 claims for
9 violation of the Contracts Clause, Takings Clause, procedural due process,
10 and conspiracy to violate Plaintiffs’ civil rights. The Court granted Aguirre’s
11 motion to dismiss Plaintiffs’ First Amendment retaliation claim, on the
12 ground of qualified immunity. (See Doc. No. 167.)
- 13 • As to the City and most of the Individual Defendants, all five of Plaintiffs’
14 federal claims remain. With respect to individual defendants Young and
15 Zucchet, the Court dismissed all of Plaintiffs’ under funding claims.
16 (See Doc. No. 167.)
- 17 • As to SDCERS, Plaintiffs’ remaining claims are § 1983 claims for violation
18 of the Contracts Clause, the Takings Clause and procedural due process.
19 Plaintiff’s fourth amended complaint did not assert a First Amendment
20 retaliation claim against SDCERS, and the Court granted (without leave to
21 amend) SDCERS’s motion to dismiss Plaintiffs’ conspiracy claim. (See Doc.
22 No. 167.)

23 **II. SDPOA v. Aguirre, Case No. 05-CV-1581 H (POR)**

24 On August 9, 2005, the SDPOA filed a complaint against Aguirre, the City,
25 SDCERS and individual Council members and City officials. (SDPOA Doc. No. 1.) The
26 SDPOA represents police officers employed by the City, and the SDPOA’s complaint
27 specified (as did subsequent amended complaints) that the SDPOA brought the action on
28 behalf of its members. The SDPOA’s complaint asserted state law claims as well as the

1 following federal claims under § 1983: (1) retaliation in violation of the First Amendment;
2 (2) violation of the Contracts Clause, U.S. Const., art. I § 10; (3) violation of the Takings
3 Clause of the Fourteenth Amendment; and (4) conspiracy to commit the foregoing civil
4 rights violations. (SDPOA Doc. No. 1.)

5 After motion practice directed at the sufficiency of the SDPOA's pleadings, as well
6 as motions for injunctive relief, the SDPOA filed a third amended complaint on March 21,
7 2006. (SDPOA Doc. No. 353.) On June 9, 2006, the Court issued an order granting in part
8 and denying in part motions to dismiss by the defendants.¹ (SDPOA Doc. No. 406.) After
9 the close of extensive discovery, the parties filed motions and cross motions for summary
10 judgment, partial summary judgment, or summary adjudication. The Court permitted
11 supplemental briefing and heard oral argument. (See SDPOA Doc. No. 737.) On May 18,
12 2007, the Court issued an order granting summary judgment in the defendants' favor on the
13 SDPOA's federal claims in several respects that have significance to the present case. (Id.)

14 After additional supplemental briefing and a further hearing, the Court on June 26,
15 2007 entered an order granting summary judgment in the defendants' favor with respect to
16 the SDPOA's remaining federal claims. (SDPOA Doc. No. 753.) The Court declined to
17 continue to exercise supplemental jurisdiction under 28 U.S.C. § 1367 over the SDPOA's
18 remaining state law claims. On August 24, 2007, the Court directed the Clerk to enter final
19 judgment against the SDPOA and in favor of the defendants. (SDPOA Doc. No. 766.)

20 The crux of the motions before the Court in the present case is that certain issues
21 resolved by the Court in its summary judgment rulings in the SDPOA action have
22 preclusive effect against Plaintiffs here. Accordingly, the Court provides the following
23 brief summary of its two summary judgment orders in the SDPOA case:

- 24 • First Amendment Retaliation: The SDPOA alleged that Aguirre, the City,
25 and the Individual Defendants imposed the 2005 LBFO and publicly
26 criticized the SDPOA in retaliation for the SDPOA and its members engaging
27

28 ¹ Approximately two months later, the individual plaintiffs filed the complaint that commenced this case.

1 in protected speech. The Court granted summary judgment in the defendants'
2 favor on this claim. With respect to Aguirre, the Court concluded that the
3 SDPOA failed to point to evidence indicating that Aguirre exerted control
4 over the 2005 labor negotiations and the terms of the LBFO, or evidence
5 showing that Aguirre orchestrated the City's imposition of the 2005 LBFO as
6 a form of retaliation for the SDPOA's failure to go along with Aguirre's plan
7 to improve the City's financial situation. (See SDPOA Doc. No. 737 at p.
8 22.) With respect to all defendants, the Court concluded that Plaintiff could
9 not establish that the protected expression of the SDPOA and/or its members
10 was a "substantial motivating factor for the implementation of the 2005
11 LBFO." (Id. at p. 31.)

- 12 • Contracts Clause and Takings Clause: The SDPOA brought a claim for
13 violation of the Contracts Clause and Takings Clause of the U.S.
14 Constitution. With respect to the 2005 LBFO, the Court concluded that the
15 SDPOA failed to demonstrate a genuine issue for trial regarding whether the
16 terms of the LBFO affected protectable benefits. (SDPOA Doc. No. 737 at p.
17 34.) Accordingly, the SDPOA's Contracts Clause and Takings Clause claims
18 failed as to all defendants to the extent those claims were based on the 2005
19 LBFO. In the Court's June 26, 2007 order regarding the SDPOA's remaining
20 federal claims, the Court concluded that the SDPOA failed to demonstrate the
21 existence of a federal constitutional right to an actuarially sound pension
22 system. Accordingly, the SDPOA's Contracts Clause and Takings Clause
23 claims also failed to the extent those claims were based on pension under
24 funding. (See SDPOA Doc. No. 753.)
- 25 • Conspiracy: Since the Court granted summary judgment in all defendants'
26 favor on the SDPOA's First Amendment, Contracts Clause and Takings
27 Clause claims, no federal claim remained. In the absence of an actionable
28 federal constitutional violation, a conspiracy to violate federal constitutional

1 rights cannot exist as a matter of law. Accordingly, the Court granted
2 summary judgment in all defendants' favor and against the SDPOA on the
3 SDPOA's conspiracy claim under § 1983. (SDPOA Doc. No. 753 at p. 12;
4 see also SDPOA Doc. No. 737 at p. 43.)

5 The Court concludes that the doctrine of issue preclusion bars Plaintiffs from re-
6 litigating those issues in this case. This negates at least one essential element of each of
7 Plaintiffs' federal claims, making summary judgment in Defendants' favor warranted on
8 those claims.

9 **Discussion**

10 **I. Summary Judgment – Legal Standard**

11 Summary judgment is appropriate when “the pleadings, the discovery and disclosure
12 materials on file, and any affidavits show that there is no genuine issue as to any material
13 fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).
14 The moving party bears the burden of demonstrating the absence of a triable issue of fact.
15 That burden may be satisfied, however, “by showing – that is, pointing out to the district
16 court – that there is an absence of evidence to support the non-moving party's case.”
17 Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). To be entitled to summary judgment, a
18 defendant need not disprove each element of a plaintiff's claims. E.g., Nissan Fire &
19 Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000). Rather, a defendant
20 may succeed either by negating a single essential element of each claim, or by
21 demonstrating that the plaintiff cannot establish the existence of a genuine issue on a single
22 essential element of each claim. Id.

23 Once the party moving for summary judgment satisfies its burden of pointing out
24 that there is an absence of evidence to support the non-moving party's case, Celotex Corp.,
25 477 U.S. at 325, to avoid summary judgment a plaintiff must set forth specific facts
26 showing the existence of a genuine issue. It is not sufficient to “simply show that there is
27 some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith
28 Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party must point to specific

1 evidence “from which a reasonable jury could return a verdict in its favor.” Triton Energy
2 Corp. v. Square D. Co., 68 F.3d 1216, 1221 (9th Cir. 1995).

3 **II. Issue Preclusion – Legal Standards**

4 A nonparty may be bound by a prior judgment because the nonparty “was
5 adequately represented by someone with the same interests who was a party to the suit.”
6 Taylor v. Sturgell, ___ U.S. ___, 128 S.Ct. 2161, 2172 (2008). The general principle of
7 issue preclusion “is that a right, question, or fact distinctly put in issue and directly
8 determined by a court of competent jurisdiction, as a ground of recovery, cannot be
9 disputed in a subsequent suit between the same parties or their privies.” Southern Pacific
10 Railroad v. United States, 168 U.S. 1, 48-49 (1897). Under the Ninth Circuit’s modern
11 formulation of the doctrine, the party seeking to apply issue preclusion must establish that
12 (1) the party to be precluded (or that party’s privy) had a full and fair opportunity to litigate
13 the issue; (2) the issue was actually litigated and decided; (3) the party sought to be
14 precluded lost on the issue as a result of a final judgment; and (4) the party to be precluded
15 was a party to the prior action or stood in privity to a party in the prior action. State of
16 Idaho Potato Comm’n. v. G & T Terminal Packaging, Inc., 425 F.3d 708, 713 (9th Cir.
17 2005).

18 **III. Whether Plaintiffs Have a Commonality of Interest With the SDPOA**

19 The primary dispute for purposes of Defendants’ motions for summary judgment is
20 whether Plaintiffs are in privity with respect to the SDPOA, which acted as the plaintiff in
21 the prior case. Generally, issue preclusion extends only to parties and persons in “privity”
22 with a party. See Wright, Miller & Cooper, Fed. Practice and Procedure 2d § 4448.
23 Although older definitions of privity were very narrow, “[a]s the preclusive effects of
24 judgments have expanded to include nonparties in more and more situations, . . . it has
25 come to be recognized that the privity label simply expresses a conclusion that preclusion is
26 proper.” See id. § 4449. As the Ninth Circuit has recognized, privity is “a legal conclusion
27 designating a person so identified in interest with a party to former litigation that he
28 represents precisely the same right in respect of the subject matter involved.” In re

1 Schimmels, 127 F.3d 875, 881 (9th Cir. 1997); see Taylor v. Sturgell, 128 S.Ct. at 2172
2 n. 8 (noting that privity has “come to be used more broadly, as a way to express the
3 conclusion that nonparty preclusion is appropriate on any ground”).

4 “[P]rivity may exist if there is substantial identity between parties, that is, when
5 there is sufficient commonality of interest.” Tahoe Sierra Preservation Council, Inc. v.
6 Tahoe Regional Planning Agency, 322 F.3d 1064, 1081 (9th Cir. 2003); see Taylor v.
7 Sturgell, 128 S.Ct. at 2172 (“nonparty may be bound by a judgment because she was
8 adequately represented by someone with the same interests who was a party to the suit”).
9 The Ninth Circuit has used this “commonality of interest” standard in several cases to
10 support a conclusion of privity. Stratosphere Litigation L.L.C. v. Grand Casinos, Inc., 298
11 F.3d 1137, 1142 n. 3 (9th Cir. 2002) (finding privity when a party is “so identified in
12 interest with a party to former litigation that he represents precisely the same right in
13 respect to the subject matter involved”); Shaw v. Hahn, 56 F.3d 1128, 1131-32 (9th Cir.
14 1995) (finding privity when the interests of the party in the subsequent action were shared
15 with and adequately represented by the party in the former action); United States v. ITT
16 Rayonier, Inc., 627 F.2d 996, 1003 (9th Cir. 1980) (“a privy may include those whose
17 interests are represented by one with authority to do so”); see also In re Schimmels, 127
18 F.3d at 881 (noting that privity has been found “where the interests of the nonparty and
19 party are so closely aligned as to be virtually representative”).

20 Significantly, “[o]ne of the relationships that has been deemed sufficiently close to
21 justify a finding of privity is that of an organization or unincorporated association filing suit
22 on behalf of its members. Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional
23 Planning Agency, 322 F.3d at 1082. “[T]he organization must adequately represent the
24 interests of its individual members” in order that issue preclusion does not violate the due
25 process rights of the individual members. Id. “However, if there is no conflict between the
26 organization and its members, and if the organization provides adequate representation on
27 its members’ behalf, individual members not named in a lawsuit may be bound by the
28 judgment won or lost by their organization.” Id. In this case, the record does not support

1 the conclusion that the SDPOA provided inadequate representation on its members' behalf.
2 Indeed, Plaintiffs would be hard pressed to establish that point, since the same lawyers have
3 represented the SDPOA and the Plaintiffs here.

4 Here, the Court concludes that for purposes of issue preclusion privity exists
5 between the SDPOA and the Plaintiffs in the present case. First, the Court concludes that
6 there is "substantial identity" and "commonality of interest" between the SDPOA and the
7 individual police officers who are the Plaintiffs in this action. Tahoe Sierra Preservation
8 Council, Inc., 322 F.3d at 1081. The SDPOA is the organization representing police
9 officers who are employed by the City. Every complaint and amended complaint in the
10 prior case alleged that the SDPOA brought the action on behalf of its members. (See
11 SDPOA Doc. No. 353, TAC ¶ 3.) Under the legal standards for establishing organizational
12 standing, the SDPOA was required to establish that "(a) its members would otherwise have
13 standing to sue in their own right; (b) the interests it seeks to protect are germane to the
14 organization's purpose; and (c) neither the claim asserted nor the relief requested requires
15 the participation of individual members of the lawsuit." Hunt v. Washington State Apple
16 Advertising Comm'n., 432 U.S. 333, 343 (1977). In the SDPOA action, the Court
17 specifically concluded that the SDPOA met those requirements.² (See SDPOA Doc. No.
18 335.)

19 Since the federal claims in both cases arise out of the same factual occurrences, the
20 fact that the SDPOA's members would have had standing to sue in their own right in the
21 first action demonstrates the high degree of "identity" and "commonality of interest"
22 between the SDPOA in the first case and Plaintiffs here. Tahoe Sierra Preservation
23 Council, Inc., 322 F.3d at 1081. Under all the circumstances of the SDPOA action, a suit
24 by an organization on its members' behalf may have preclusive effect as to the
25 organization's members even if they were not named parties to the first action. Id.; see also

26
27 ² Plaintiffs focus on the Court's conclusion that the SDPOA could not seek monetary
28 relief on behalf of its members. (See SDPOA Doc. No. 335.) However, that is irrelevant for purposes
of these motions for summary judgment. Plaintiffs must first establish Defendants' liability before
seeking damages. Defendants' motions are premised on the contention that issues decided in the
SDPOA action have preclusive effect in a manner that is fatal to Plaintiffs' theories of recovery.

1 Monahan v. New York City Dept. of Corrections, 214 F.3d 275, 285 (2d Cir. 2000); Panza
2 v. Armco Steel Corp., 316 F.2d 69, 70 (3d Cir. 1963) (holding that after a union lost an
3 action to enforce contract seniority rights for a specific group of employees, the same
4 employees could not bring an individual action to enforce the same claim). Moreover, the
5 Court concludes that several factors in addition to the SDPOA's status as Plaintiffs'
6 representative weigh in favor of the conclusion that the SDPOA and Plaintiffs possess
7 sufficient "commonality of interest" for preclusion purposes. Tahoe Sierra Preservation
8 Council, Inc., 322 F.3d at 1081.

9 The commonality of interest between the SDPOA and Plaintiffs is well illustrated by
10 a comparison of the operative complaints in each action (third amended complaint in
11 SDPOA; fourth amended complaint in this action). The complaints, which were filed by
12 the same lawyers, alleged (in nearly identical fashion) the same federal claims based on
13 exactly the same set of facts and occurrences. For instance, in both actions the first claim
14 for relief is a § 1983 claim, based on First Amendment retaliation, against Aguirre, the
15 City, the Council defendants and the City official defendants. The SDPOA third amended
16 complaint sought "injunctive relief directing Defendant City to immediately restore all
17 benefits taken away from Plaintiff's Members by Defendant City's unilateral imposition of
18 the Last, Best and Final Offer, [and to] fund SDCERS so it is actuarially sound." (SDPOA
19 Doc. No. 353, TAC ¶ 77.) The operative complaint in this action repeats almost verbatim
20 that request, by seeking "injunctive relief directing Defendant City to immediately restore
21 all past and future benefits and/or compensation taken away from LBFO Plaintiffs and
22 DROP Plaintiffs as a result of the unilateral imposition of Defendant City's 2005 last, best
23 and final offer." (FAC ¶ 178.)

24 Moreover, the complaint in this case makes clear that Plaintiffs' legal claims do not
25 involve any individualized allegations. Although (assuming Plaintiffs succeeded in
26 establishing Defendants' liability) individualized questions regarding damages might arise,
27 it is clear that the federal claims in each case are otherwise identical. Contrary to Plaintiffs'
28 arguments, the SDPOA represented the interests of both active and retired police officers in

1 the prior action, and the Court concludes that the interests of the Plaintiffs in this case are
2 identical to the interests of the SDPOA in the prior case for purposes of the federal claims.
3 (Compare SDPOA Doc. No. 353 (TAC) ¶ 50 (allegations regarding under funding of
4 retiree medical benefits) with Doc. No. 139 (the FAC in this case) ¶ 32 (SDPOA “facing
5 reduced membership and pressure for current and former members about the status of
6 pension and retirement benefits”).) After complete discovery in the SDPOA action,
7 Plaintiffs have not amended the complaint in this case to allege any individualized theories
8 of recovery.

9 Looking beyond the complaints in each case, it is clear that the SDPOA action and
10 this case have been conducted essentially in parallel. The motion practice by the
11 plaintiff(s) in each case provides a good example of this, since it has overlapped to such an
12 extent that the Court on at least one occasion had to advise the lawyers representing the
13 SDPOA and these Plaintiffs to be sure to file their papers in both cases. In September of
14 2006, the SDPOA and the Plaintiffs in this case both sought temporary restraining orders
15 staying state court proceedings relating to the pension crisis. (See SDPOA Doc. No. 474.)
16 The Court noted that “[t]he same counsel recently filed a related case, Aaron v. Aguirre, in
17 the name of over 1,600 individual police officers. The application for the temporary
18 restraining order concerns both federal cases, and the Court has issued separate but
19 identical orders in both dockets.” (SDPOA Doc. No. 474.) The Court denied the requests
20 for a temporary restraining order and/or stay of the state court litigation, and noted that “the
21 Court will deem the pleadings to have been filed in both SDPOA, 05-CV-1581-H and
22 Aaron, 06-CV-1451-H.” (SDPOA Doc. No. 474.) The Court, however, advised counsel
23 that in the future they “must file an original pleading for each docket.” (Id.) In addition to
24 the factors discussed above, the manner in which these cases have been litigated supports
25 the conclusion that a sufficiently high degree of “identity” and “commonality of interest”
26 exists between the SDPOA in the first case and Plaintiffs here, such that Plaintiffs are
27 subject to the preclusive effects of issues decided in the prior action. See Tahoe Sierra
28 Preservation Council, Inc., 322 F.3d at 1081.

1 In sum, the Court concludes that based on the above discussion and all the
2 circumstances of this case and the prior action by the SDPOA, the Plaintiffs stand in privity
3 to the SDPOA for purposes of issue preclusion as to the federal claims. The Court
4 concludes that applying issue preclusion to Plaintiffs furthers the purpose of the doctrine,
5 which (subject to the restrictions of due process) is to “conserve[] judicial resources and
6 foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions.”
7 In re Schimmels, 127 F.3d 875, 881 (9th Cir. 1997); see Taylor, 128 S.Ct. at 2171.
8 Accordingly, the Court concludes that Plaintiffs here are precluded from re-litigating issues
9 that meet the other requirements for issue preclusion— i.e., issues that in the prior action
10 were “actually litigated and decided” after Plaintiffs’ representative had a “full and fair
11 opportunity” to do so, and resulted in a “final judgment” adverse to Plaintiffs’
12 representative. See State of Idaho Potato Comm’n. v. G & T Terminal Packaging, Inc., 425
13 F.3d at 713.

14 **IV. Additional Issue Preclusion Requirements**

15 In addition to demonstrating that there exists sufficient commonality of interest
16 between Plaintiffs and the SDPOA, Defendants must establish that the relevant issues were
17 “actually litigated and decided” after a “full and fair” opportunity to litigate the issues, and
18 that the resolution of those issues resulted in a final judgment. See State of Idaho Potato
19 Comm’n. v. G & T Terminal Packaging, Inc., 425 F.3d at 713. For each of the issues
20 discussed below, the Court concludes that those requirements are satisfied. In the SDPOA
21 action, before ruling on the defendants’ motions for summary judgment, the Court
22 permitted extensive briefing and supplemental briefing and heard oral argument spanning
23 two days regarding the SDPOA’s federal claims. (See SDPOA Doc. No. 737.) After
24 issuing an order granting summary judgment as to some of the SDPOA’s federal claims,
25 the Court once again permitted supplemental briefing regarding whether there exists a
26 federal constitutional right to an actuarially sound pension system. (See SDPOA Doc. No.
27 753.) The Court concludes that this constituted a “full and fair” opportunity to litigate each
28 issue specified below as having preclusive effect on Plaintiffs’ federal claims in this case.

1 Additionally, the Court's orders in the SDPOA case make clear that each issue was
2 "actually . . . decided." See State of Idaho Potato Comm'n. v. G & T Terminal Packaging,
3 Inc., 425 F.3d at 713. After deciding each issue in the summary judgment orders dated
4 May 18 and June 26, 2007, the Court by separate order directed the Clerk to enter final
5 judgment in the defendants' favor with respect to Plaintiffs' federal claims. (SDPOA Doc.
6 No. 766.) Therefore, the resolution of each issue set forth below "resulted in a final
7 judgment." State of Idaho Potato Comm'n., 425 F.3d at 713. The Court concludes that
8 Defendants have satisfied the requirements under the law for issue preclusion based on the
9 prior SDPOA action.

10 **V. Which Issues Have Preclusive Effect**

11 The Court addresses in turn the preclusive effect of the federal issues decided in the
12 SDPOA action on Plaintiffs' federal claims in this case.

13 **A. First Amendment Retaliation**

14 To prevail on a First Amendment retaliation claim, a plaintiff must prove that (1) he
15 was subject to an adverse employment action; (2) "he engaged in speech that was
16 constitutionally protected because it touched on a matter of public concern and (3) the
17 protected expression was a substantial motivating factor for the adverse action." Ulrich v.
18 City and County of San Francisco, 308 F.3d 968, 976 (9th Cir. 2002).

19 In the SDPOA case, the Court concluded that "Defendants have demonstrated that
20 Plaintiff cannot establish that the protected expression of the SDPOA and its members was
21 a substantial motivating factor for the implementation of the 2005 LBFO." (SDPOA Doc.
22 No. 737 at 31.) The SDPOA failed to "direct[] the Court to evidence showing a disputed
23 issue of fact as to whether retaliation was a substantial motivating factor in the decision to
24 impose the 2005 LBFO." (Id. at 29.) Accordingly, the Court granted summary judgment
25 in the defendants' favor on the SDPOA's "First Amendment retaliation claims premised on
26 the 2005 negotiations and imposition of the LBFO." (Id. at 31.)

27 For the reasons discussed above, the doctrine of issue preclusion bars Plaintiffs from
28 re-litigating this issue. Accordingly, the Court concludes that Defendants have satisfied

1 their burden on summary judgment to demonstrate the absence of a genuine issue with
2 respect to at least one essential element of Plaintiffs' First Amendment retaliation claim.
3 See Celotex Corp., 477 U.S. at 325. Since Plaintiffs cannot establish that any protected
4 expression by City police officers was "a substantial motivating factor" for the alleged
5 retaliation by Defendants, the Court concludes that Defendants are entitled to summary
6 judgment in their favor on Plaintiffs' First Amendment retaliation claim.

7 **B. Contracts Clause, Takings Clause and Procedural Due Process**

8 As noted above, Plaintiffs' claims under the federal Contracts Clause and Takings
9 Clause arise from the allegation that by under funding SDCERS and/or implementing the
10 terms of the 2005 LBFO, Defendants unlawfully eliminated or reduced vested pension
11 benefits owed to Plaintiffs.

12 The Contracts Clause of the federal Constitution provides that "[n]o State shall . . .
13 pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1.
14 However, the clause's "prohibition is not an absolute one." State of Nev. Employees'
15 Assn. v. Keating, 903 F.2d 1223, 1226 (9th Cir. 1990). An impairment of state contractual
16 obligations is permissible if it is "reasonable and necessary to serve an important public
17 purpose." U.S. Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977). Federal law controls
18 whether state statutes create contractual rights that are protected by the Contract's Clause.
19 See Keating, 903 F.2d at 1227.

20 To succeed on a Takings Clause claim, a plaintiff must prove that he or she
21 possesses a constitutionally protected "property interest." Gammoh v. City of La Habra,
22 395 F.3d 1114, 1122 (9th Cir. 2005). To establish a constitutionally protected property
23 interest, the plaintiff must show not merely a unilateral expectation but "a legitimate claim
24 of entitlement." Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). The scope of property
25 interests protected by the Takings Clause is determined by "existing rules or understanding
26 that stem from an independent source," such as state or federal statutory law. Lucas v. S.C.
27 Coastal Council, 505 U.S. 1003, 1030 (1992); see Bd. of Regents v. Roth, 408 U.S. at 577-
28 78. Whether a particular interest is constitutionally protected is a question of federal law.

1 See Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).

2 In the SDPOA case, the Court concluded that the SDPOA failed to demonstrate a
3 genuine issue regarding whether the terms implemented in the 2005 LBFO affected
4 protectable benefits. (SDPOA Doc. No. 737 at p. 34; see id. at p. 38 ("Plaintiff has not
5 demonstrated a triable issue regarding whether DROP salary is a vested interest subject to
6 constitutional protection under either the Contracts Clause or Takings Clause.") and p. 40
7 (no issue of material fact regarding whether decrease in City's pick up percentage violated
8 Takings or Contracts Clauses.) Additionally, the Court concluded that the SDPOA failed
9 to demonstrate that it possesses a federal right to an actuarially sound pension system and,
10 therefore, could not demonstrate the existence of a genuine issue regarding the existence of
11 a constitutionally protected right under the Takings Clause or Contracts Clause. (See
12 SDPOA Doc. No. 753 at p. 7.)

13 Based on the principles of issue preclusion, the Court concludes that Plaintiffs in this
14 case may not re-litigate the issues decided in the SDPOA action regarding the federal
15 Contracts Clause and Takings Clause claims. Therefore, Defendants in this case have
16 satisfied their burden on summary judgment to demonstrate the absence of a genuine issue
17 for trial with respect to an essential element of Plaintiffs' claims under the Contracts Clause
18 and the Takings Clause. Celotex Corp., 477 U.S. at 325. Since Plaintiffs cannot establish
19 the deprivation of a protected interest for purposes of the Contracts Clause and the Takings
20 Clause, the Court concludes that summary judgment in Defendants' favor is warranted with
21 respect to those claims. The same is true for Plaintiffs' federal procedural due process
22 claim, since succeeding on that claim requires Plaintiffs to establish the deprivation of a
23 federally protected right. Parks v. Watson, 716 F.2d 646, 656 (9th Cir. 1983) ("A property
24 interest in a benefit protected by the due process clause results from a legitimate claim of
25 entitlement created and defined by an independent source, such as state or federal law.").

26 C. Conspiracy

27 In the absence of an independent actionable federal constitutional violation, a
28 conspiracy to violate federal constitutional rights cannot exist as a matter of law. E.g.,

1 Woodrum v. Woodward County, 866 F.2d 1121, 1126 (9th Cir. 1989). The Court already
2 concluded that Defendants are entitled to summary judgment in their favor with respect to
3 Plaintiffs' claims for violations of the First Amendment, the Contracts Clause, the Takings
4 Clause and procedural due process. Therefore, the Court concludes that Defendants satisfy
5 their burden on summary judgment to demonstrate the absence of a genuine issue with
6 respect to Plaintiffs' conspiracy claim. The Court grants summary judgment in
7 Defendants' favor on that claim.

8 In sum, the Court concludes that Plaintiffs in this case are bound the Court's
9 determination in the prior action, brought by Plaintiffs' representative the SDPOA, that:

- 10 • Defendants' implementation of the 2005 LBFO was not substantially
11 motivated by retaliatory intent.
- 12 • Plaintiffs do not have a federally protected right to an actuarially sound
13 pension system.
- 14 • Even assuming that Plaintiffs possessed constitutionally protected rights in an
15 adequately funded pension system, the mitigating measures implemented by
16 Defendants establish that any such rights were not "substantially impaired."
- 17 • The 2005 LBFO did not impair any vested contractual rights protected by
18 federal law.

19 As in the previous action, the Court's conclusions regarding these issues dooms
20 Plaintiffs' federal claims based on under funding as well as the terms of the 2005 LBFO.
21 The Court therefore grants summary judgment in all Defendants' favor with respect to
22 Plaintiffs' federal claims.

23 **VI. Plaintiffs' Remaining State Law Claims – Supplemental Jurisdiction**

24 Since no federal claims remain as to any defendant, Defendants contend that the
25 Court should decline to continue to exercise supplemental jurisdiction over Plaintiffs' state
26 law claims and therefore dismiss those claims. Under 28 U.S.C. § 1367, a district court
27 may decline to exercise supplemental jurisdiction over a state claim if "the district court has
28 dismissed all claims over which it has original jurisdiction" or if, "in exceptional

1 circumstances, there are other compelling reasons for declining jurisdiction.” 28 U.S.C.
2 § 1367(c)(3)-(4).

3 Ordinarily, a court should dismiss the state claims when all federal claims have been
4 resolved prior to trial. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726
5 (1966) (“Certainly, if the federal claims are dismissed before trial . . . the state claims
6 should be dismissed as well.”); Acri v. Varian Associates, Inc., 114 F.3d 999, 1000-1001
7 (9th Cir. 1997) (en banc). Declining to exercise supplemental jurisdiction is especially
8 appropriate when the remaining state claims involve “important, unsettled, and policy-
9 laden issues of California law.” Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1181 n. 28
10 (9th Cir. 2003). If a court concludes that it should decline to exercise supplemental
11 jurisdiction over a plaintiff’s state law claims, the court should dismiss those claims
12 without prejudice. Gini v. Las Vegas Metro. Police Dept., 40 F.3d 1041, 1046 (9th Cir.
13 1994).

14 Here, none of Plaintiffs’ federal claims remain. Accordingly, the Court may dismiss
15 the state claims pursuant to 28 U.S.C. § 1367(c)(3). Additionally, several of Plaintiffs’
16 state law claims involve complex policy-laden questions of California law. For instance,
17 Plaintiffs bring a claim for “violations of public policy” under the California Pension
18 Protection Act of 1992. (See FAC ¶ 212.) Plaintiffs’ state law claims involve sensitive
19 questions of substantial local importance, since they involve a municipal employee pension
20 system and questions regarding the administration and funding of that system. Several
21 cases are pending in state court that raise the same complex and sensitive issues of state law
22 and policy asserted by Plaintiffs in this case. At the September 2, 2008 hearing on
23 Defendants’ motions for summary judgment, counsel for defendants noted that in
24 September of 2007, the SDPOA filed another lawsuit in California court regarding the
25 same issues dismissed without prejudice in this case.

26 In view of all the circumstances of this case, including the ongoing state court
27 litigation related to the issues in this case, the Court concludes that in addition to the
28 dismissal of Plaintiffs’ federal claims there are “compelling reasons” within the meaning of

1 28 U.S.C. § 1367(c)(4) to decline to exercise supplemental jurisdiction over Plaintiffs' state
2 law claims. By granting summary judgment in Defendants' favor with respect to Plaintiffs'
3 federal claims, the Court leaves the California state courts free to resolve Plaintiffs'
4 complex state law claims regarding pension funding and the implementation of the 2005
5 LBFO. The Court's decision here leaves Plaintiffs free to pursue their state claims (if any)
6 in an appropriate state forum. The Court also concludes that any preclusion arguments
7 with respect to Plaintiffs' state claims should be addressed by the state courts. For all of
8 the reasons cited above, the Court declines to exercise supplemental jurisdiction over
9 Plaintiffs' state law claims and dismisses those claims without prejudice.

10 **VII. Plaintiffs' Renewed Request to Stay**

11 Plaintiffs request that the Court stay this action while the SDPOA action remains
12 pending on appeal. In December of 2007, Plaintiffs made a similar request for stay, see
13 Doc. No. 188, which the Court denied. (Doc. No. 193.) Defendants oppose Plaintiffs'
14 request for a stay, and for the following reasons the Court once again denies a stay.

15 The power to stay a case is "incidental to the power inherent in every court to
16 control the disposition of the causes on its docket with economy of time and effort for
17 itself, for counsel, and for litigants." Landis v. North American Co., 299 U.S. 248, 254-55
18 (1936); see CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962). The decision to grant
19 or deny a stay is within the sound discretion of the trial court. CMAX, Inc., 300 F.2d at
20 268. Courts frequently consider judicial economy and prejudice to the parties in
21 determining whether to grant a stay. Landis, 299 U.S. at 254-55. Here, considering all the
22 circumstances of the present case, the Court once again concludes that a stay of this action
23 would not advance the interests of judicial economy and is not necessary to avoid potential
24 prejudice to the parties. Therefore, the Court in its discretion denies Plaintiffs' renewed
25 request for a stay.

26 **VIII. Requests for Judicial Notice**

27 The Court grants SDCERS's request, see Doc. No. 244, for judicial notice of various
28 pleadings, orders and judgments in the SDPOA action and the cases Gleason v. San Diego

1 City Employees' Retirement System, et al., San Diego Superior Court Case No. GIC
2 803779; and William McGuigan v. City of San Diego, et al., San Diego Superior Court
3 Case No. GIC 849883. The Court concludes that the requested documents are proper
4 subjects of a request for judicial notice under Fed. R. Evid. 201. See Lee v. City of Los
5 Angeles, 250 F.3d 668 (9th Cir. 2001); Quackenbush v. Allstate Ins. Co., 121 F.3d 1372,
6 1377 n.3 (9th Cir. 1997). Similarly, the Court grants the requests for judicial notice by
7 Aguirre, the City and the Individual Defendants, as well as the request by Plaintiffs. (Doc.
8 Nos. 246-5; 250-3; 285-5.) Finally, as requested by SDCERS, see Doc. No. 244, the Court
9 takes judicial notice of the pleadings and other documents in this case.

10 **Conclusion**

11 For the reasons discussed above, the Court concludes that Defendants are entitled to
12 summary judgment in their favor on all of Plaintiffs' federal claims. The Court dismisses
13 without prejudice Plaintiffs' remaining state law claims.

14 IT IS SO ORDERED.

15 DATED: September 3, 2008

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17 MARILYN L. HUFF, District Judge
18 UNITED STATES DISTRICT COURT
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