

1 JAN I. GOLDSMITH, City Attorney
2 DANIEL F. BAMBERG, Assistant City Attorney
3 STACY J. PLOTKIN-WOLFF, Deputy City Attorney
4 California State Bar No. 174793
5 Office of the City Attorney
6 1200 Third Avenue, Suite 1100
7 San Diego, California 92101-4100
8 Telephone: (619) 533-5800
9 Facsimile: (619) 533-5856

6 Attorneys for Defendant
7 CITY OF SAN DIEGO

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 DAVID ACEVES,) Case No. 16cv865 BAS (DHB)
11 Plaintiff,)
12 v.) **DEFENDANT CITY OF SAN**
13 CITY OF SAN DIEGO; and DOES 1-10,) **DIEGO'S ANSWER AND**
14 Defendants.) **AFFIRMATIVE DEFENSES;**
15) **AND JURY DEMAND**
Judge: Hon. Cynthia Bashant
Court Room: 4B
Trial: Not Yet Set

16 Defendant City of San Diego (City) responds to Plaintiff's Complaint for
17 Damages as follows:

18 **I.**

19 Responding to Paragraphs 1, 2, and 3 of the Complaint, Defendant
20 affirmatively alleges that said Paragraph contains jurisdictional allegations that
21 present legal conclusions and questions of law to be determined solely by the Court,
22 to which no response is required. To the extent a response is required, Defendant
23 admits that Plaintiff purports to seek relief in this action pursuant to the various
24 laws cited in said Paragraphs. Except as expressly admitted, Defendant denies,
25 generally and specifically, each, all and every allegation contained in said
26 Paragraphs.

27 /////

28 /////

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

II.

Responding to Paragraphs 4 and 14 of the Complaint, Defendants admit the substantial truth of the allegations contained therein.

III.

Responding to Paragraph 5 of the Complaint, Defendant admits that Plaintiff is a man, is 25 years old, and at the time of the incident was in the County of San Diego. Except as expressly admitted, Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and based thereon, deny, generally and specifically, each, all and every remaining allegation contained therein.

IV.

Responding to Paragraphs 6, 7, and 8 of the Complaint, Defendant admits it is a public entity existing under the laws of the State of California but, except as expressly admitted, Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and based thereon, deny, generally and specifically, each, all and every remaining allegation contained therein.

V.

Responding to Paragraph 9 of the Complaint, Defendant admits that Plaintiff was under the influence of a narcotic and/or a controlled substance in the morning of August 15, 2015 and that he was naked running back and forth through a canyon in the University City neighborhood of San Diego, California.

VI.

Defendant denies the allegations contained in Paragraphs 10 and 12 of the Complaint.

/////
/////
/////

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

VII.

Responding to Paragraph 11 of the Complaint, Defendant admits that Plaintiff was naked and did not have a weapon in his hand but denies, generally and specifically, that Plaintiff was unarmed.

VIII.

Responding to Paragraph 13 of the Complaint, Defendant admits that Plaintiff sustained an operational bite on his right leg and, except as expressly admitted, Defendant is without knowledge or information sufficient to form a belief as to the truth of remaining the allegations contained therein and based thereon, deny, generally and specifically, each, all and every remaining allegation contained therein.

IX.

Responding to Paragraph 15 of the Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and based thereon, deny, generally and specifically, each, all and every allegation contained therein.

X.

Responding to Paragraph 16 of the Complaint, Defendant incorporates herein its responses to the allegations contained in Paragraphs 1 through 15.

XI.

Responding to Paragraphs 17, 18, 19, 20, 22, 23, and 24 of the Complaint, Defendant denies, generally and specifically, each, all and every allegation contained therein, and specifically denies any unlawful, unconstitutional, discriminatory, retaliatory, or otherwise wrongful conduct on the part of Defendant, or any agents, employees, officials, officers, offices, agencies, departments or divisions of the City of San Diego.

////

////

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

XII.

Responding to Paragraph 21 of the Complaint, Defendant incorporates herein its responses to the allegations contained in Paragraphs 1 through 20.

XIII.

Responding to Plaintiff’s Prayer for Relief, no responsive pleading is required. To the extent that said paragraph is deemed to allege facts to which a response is required, Defendant denies, generally and specifically, each, all and every allegation contained in said Paragraph, and specifically deny that Plaintiff is entitled to any relief whatever.

FOR SUCH FURTHER ANSWER AND AFFIRMATIVE DEFENSES,

Defendants allege as follows:

I.

Plaintiff’s Complaint fails to state facts sufficient to constitute a cause of action against this answering Defendant.

II.

Plaintiff failed to adequately mitigate his damages, if any, and any recovery or any other award to which he is entitled should be reduced accordingly.

III.

Defendant, City of San Diego, is immune from liability in that a public entity is not liable for an injury arising out of its acts or omissions or of a public employee, in the absence of a statute declaring such liability

IV.

Defendant, City of San Diego, is not liable for an injury arising out of an act or omission of its employees, where the subject employee is immune from liability.

V.

Income taxes must be deducted from all alleged past and future lost earnings, if any.

////

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

VI.

To the extent the events of which Plaintiff complains were undertaken by Defendant, Defendant denies any unlawful, unconstitutional, discriminatory, retaliatory, or otherwise wrongful motive and would have taken the same actions absent unlawful, unconstitutional, discriminatory, retaliatory, or otherwise wrongful motive.

VII.

Plaintiff's recovery, if any, is barred by the doctrine of unclean hands, laches, and estoppel.

VIII.

Some or all of Plaintiff's claims may be barred by the applicable statute of limitations.

IX.

An employee is not liable for his acts or omissions, while exercising due care, in the execution or enforcement of any law.

X.

Public employees are not liable for an injury caused by the act or omission of another person.

XI.

Defendant is not liable for injuries resulting from acts or omissions which were an exercise of discretion in the absence of a statute declaring such liability.

XII.

Defendant is not liable for actions taken by its police officers while acting within the scope of their duties for injuries resulting from judicial or administrative proceedings.

XIII.

Defendant is not liable for actions taken by its police officers for the execution or enforcement of the California Penal Code where due care is exercised.

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

XIV.

Defendant is not liable for violation of the plaintiff's civil rights in that the alleged wrongful acts were not under color of any statute, ordinance, regulation, custom or usage of the City of San Diego.

XV.

The conduct in question did not constitute a violation of a federally protected right.

XVI.

At the time of the contact, the San Diego Police Officers attempted to persuade Plaintiff to follow directions and in doing so, only used force necessary for the occasion.

XVII.

At all times, the conduct of the Defendants was reasonable, lawful, based on probable cause and within the scope of their official duties and employment.

XVIII.

Plaintiff was negligent in and about the matters alleged in the Complaint and said carelessness on his part proximately contributed to the happening of the alleged incident, injuries and damages complained of, if any such exist.

XIX.

The San Diego Police Officers were at all times alleged in the Complaint performing duties required by law under conditions required by law.

XX.

Any and all acts of Defendant or its officers at or near the time alleged in the Complaint were reasonable and Defendant and its officers had reasonable cause to act in the manner they did.

XXI.

At the time of the initial contact, the San Diego Police Officers at the scene were acting within the scope of their employment and had probable cause to believe

1 that Plaintiff was engaging in, or had just engaged in, a prohibited activity. During
2 the contact, the San Diego Police Officers were acting within the scope of their
3 employment and had probable cause to believe that said person had committed a
4 crime.

5 **XXII.**

6 The Court is without jurisdiction over the certain claims in the Complaint
7 which therefore fails as a matter of law, as against this answering Defendant.

8 **XXIII.**

9 The injuries and damages, if any, were the result of the exercise of the
10 discretion vested in the public entity/Defendant and each of them, and/or the
11 officers, agents and/or employees of the public entity, and there is no liability
12 therefore, including pursuant to the California Code, including the California
13 Government Code, including sections 815.2(b) and 820.2.

14 **XXIV.**

15 This answering Defendant and/or a public employees are not liable for their
16 acts or omissions, while exercising due care, in the execution or enforcement of any
17 law, including pursuant to a California or federal code or law, including pursuant to
18 the California Government Code, including sections 820.4 and/or 815.2.

19 **XXV.**

20 This answering Defendant and/or public employees are not liable for an
21 injury caused by the act or omission of another person, including pursuant to the
22 California Government Code, including section 820.8.

23 **XXVI.**

24 This answering Defendant and/or public employees are not liable for
25 Plaintiff's own acts and conduct or the acts and conduct of a third party, which
26 caused the underlying events at issue in the Complaint to occur, and but for the acts
27 of the Plaintiff or the third party, the events alleged in the Complaint would not
28 have occurred, and/or Plaintiff would not have been involved or engaged or

1 otherwise subject to the matters alleged in Plaintiff’s Complaint, including any
2 citation, detention, apprehension, arrest, or control or force, if any, or otherwise
3 having sustained the matters alleged, including any and all injuries, inconvenience
4 and damages alleged in the Complaint.

5 **XXVII.**

6 If Plaintiff is entitled to recover for any damages suffered at the time and
7 place alleged, then the total amount of damages to which Plaintiff would otherwise
8 be entitled should be reduced in proportion to the amount of fault attributable to
9 Plaintiff, or to a third person or persons, which fault directly and proximately
10 contributed to Plaintiff’s alleged damages.

11 **XXVIII.**

12 Pursuant to California Government Code section 985, any judgment entered
13 herein may be reduced for collateral source payments paid or obligated to be paid
14 for services or benefits that were provided before trial commenced.

15 **XXIX.**

16 All future damages, if any, must be reduced to present value.

17 **XXX.**

18 Plaintiff is not entitled to pretrial interest.

19 **XXXI.**

20 Plaintiff is not entitled to declaratory or injunctive relief, or prejudgment
21 interest.

22 **XXXII.**

23 Defendant is not liable for punitive damages.

24 **XXXIII.**

25 This answering Defendant reserves the right to allege and does affirmatively
26 allege and state the avoidance and affirmative defenses set forth in Rule 8 as if fully

27 ////

28 ////

1 set forth herein, and particularly including assumption of risk, contributory
2 negligence, negligence, estoppel, laches, res judicata, statute of limitations and
3 waiver

4 **XXXIV.**

5 A reservation of right is made to allow amendment of the answer, to change
6 or add an answer and/or affirmative defense as may become apparent during
7 discovery in this action and reserve the right to amend this Answer to assert any
8 such defenses.

9 **WHEREFORE**, Defendant prays that Plaintiff take nothing by his
10 Complaint and that Judgment be rendered in favor of Defendant and against
11 Plaintiff, for all costs of suit incurred herein, and for all other relief that the Court
12 deems proper.

13 **JURY TRIAL DEMAND**

14 Defendant demands a trial by jury in this action pursuant to Federal Rules of
15 Civil Procedure, Rule 38(d).

16 Dated: May 2, 2016

JAN I. GOLDSMITH, City Attorney

17
18
19
20
21
22
23
24
25
26
27
28

By /s/ Stacy J. Plotkin-Wolff
Stacy J. Plotkin-Wolff
Deputy City Attorney

Attorneys for Defendant
CITY OF SAN DIEGO