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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA

EILEEN A. STAATS,  
Plaintiff,  
vs.  
CITY OF PALO ALTO,  
Defendant.

Case No.: 2015-1-CV-284956  
**ORDER AFTER HEARING ON  
MAY 17, 2019**  
**Motion by Defendant City of Palo  
Alto for Summary Adjudication of All  
Causes of Action Barred by  
Government Code Section 911.2**

The above-entitled matter came on regularly for hearing on Friday, May 17, 2019 at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Brian C. Walsh presiding. A tentative ruling was issued on May 16, 2019. The appearances are as stated in the record. Having reviewed and considered the written submissions of all parties, having heard and considered the oral argument of counsel, and being fully advised, the Court orders as follows:

**I. Background**

This class action lawsuit brought by Eileen A. Staats (“Plaintiff”) against the City of Palo Alto (“the City”) arises from the City’s imposition of a Utility Users Tax (“UUT”) on customers of cellular phone providers.

1 According to the allegations of the Class Action Complaint (“Complaint”), in 1987, the  
2 City adopted an ordinance establishing the UUT, which authorizes a local tax for telephone  
3 services. (Compl., ¶¶8-9.) The UUT is automatically charged to City taxpayers each month by  
4 cellular phone providers as part of their normal billing practice on behalf of the City. (*Id.* at ¶¶1,  
5 9.)

6 For purposes of the UUT ordinance, the City adopted the definition of taxable telephone  
7 services prescribed by federal statute in relation to excise taxes. (Compl., ¶10.) Beginning in  
8 2005, five federal appellate courts held the federal excise tax statute did not permit the Internal  
9 Revenue Service (“IRS”) to tax telephone services for which there is a toll charge that varies  
10 with elapsed transmission time and not distance. (*Id.* at ¶12.) The IRS subsequently issued a  
11 notice reflecting the same in May 2006, and announced it would cease collecting the federal  
12 excise tax on amounts paid for time-only service after July 31, 2006. (*Id.* at ¶¶13, 72.)

13 Based on these authorities, Plaintiff’s telephone services are not taxable under federal  
14 law. (Compl., ¶12.) And since the City adopted the definition of taxable telephone services  
15 under the federal excise tax statute, after 2006, it could no longer apply the UUT to mobile  
16 phone service among others. (*Id.* at ¶14.) Yet the UUT was still charged and collected thereafter  
17 relative to exempt services. (*Id.* at ¶¶1, 16.) It was not until late 2014 that the UUT ordinance  
18 was amended to remove any reference or connection to the federal excise tax. (*Id.* at ¶26.)

19 Plaintiff claims she and other similarly situated persons have been unlawfully subject to  
20 the UUT, such that they are entitled to a refund for taxes collected after at least August 1, 2006.  
21 (Compl., ¶¶1, 27.)

22 The Complaint, filed August 27, 2015, asserts the following causes of action:  
23 (1) declaratory relief; (2) money had and received; (3) unjust enrichment; (4) writ of mandamus;  
24 (5) invalidity of tax under Government Code section 53723; and (6) violation of California  
25 Constitution Article XIII, C § 2 and invalidity of tax due to failure to obtain voter approval.

26 Plaintiff alleges she was not required to present a government claim to the City prior to  
27 bringing this action, but did so nonetheless on December 24, 2014 out of an abundance of  
28 caution, seeking the return of money the City improperly retained and collected in the form of

1 the UUT. (Compl., ¶35.) The City rejected Plaintiff’s claim on February 19, 2015. (*Id.* at ¶38.)

2 The City now moves for summary adjudication “of every cause of action” in the  
3 Complaint “that accrued on or before December 23, 2013” on the basis “each cause of action  
4 challenging the collection of telephone users tax on or before December 23, 2013 is barred by  
5 sections 911.2 and 945.4 of the Government Code because Plaintiff and the class did not present  
6 a written claim to the City within one year of the accrual of these causes of action, as required by  
7 law.” (Notice of Motion, p. 2:4-10.)

8 Plaintiff opposes the motion on the merits, and alternatively requests a continuance to  
9 conduct further discovery in the event the Court is inclined to grant the City’s motion.

10  
11 **II. Legal Standards**

12 “A party may move for summary adjudication as to one or more causes of action within  
13 an action...if the party contends the cause of action has no merit[.]” (Code Civ. Proc., § 437c,  
14 subd. (f)(1).) “A motion for summary adjudication shall be granted only if it completely  
15 disposes of a cause of action[.]” (*Ibid.*)

16 To demonstrate a cause of action has no merit, a defendant moving for summary  
17 adjudication must “show[] that one or more elements of the cause of action, even if not  
18 separately pleaded, cannot be established, or that there is a complete defense to the cause of  
19 action.” (Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant meets that burden, “the burden  
20 shifts to the plaintiff [ ] to show that a triable issue of one or more material facts exists as to the  
21 cause of action or a defense thereto.” (*Ibid.*)

22 The motion must be supported by evidence, such as declarations and discovery responses.  
23 (Code Civ. Proc., § 437c, subd. (b).) As appropriate, any opposition shall also be supported by  
24 evidence. (*Ibid.*) In ruling on the motion, the court must consider all evidence and inferences  
25 reasonably drawn therefrom, and view the same in the light most favorable to the opposing party.  
26 (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

1 **III. Evidentiary Matters**

2 The City and Plaintiff each filed requests for judicial notice. Plaintiff additionally filed  
3 objections to evidence presented by the City.  
4

5 **A. Requests for Judicial Notice**

6 A motion for summary adjudication may be supported by judicially noticed matters.  
7 (Code Civ. Proc., § 437c, subd. (b)(1).) "Judicial notice is the recognition and acceptance by the  
8 court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is  
9 relevant to an issue in the action without requiring formal proof of the matter." (*Unruh-Haxton v.*  
10 *Regents of University of California* (2008) 162 Cal.App.4th 343, 364 [internal quotation marks  
11 and citations omitted].)  
12

13 **1. The City's Requests**

14  
15 The City filed two requests for judicial notice, the first with its moving papers and the  
16 second with its reply.

17 In the first request, the City asks for judicial notice of 13 documents denominated as  
18 Exhibits A-M, which are comprised of local enactments (e.g., city ordinances, resolutions, etc.),  
19 IRS notices/rulings, and court records. The City's second request covers two court documents  
20 denominated Exhibits N and O.

21 Generally speaking, these matters are appropriate subjects for judicial notice under  
22 sections 451 or 452 of the Evidence Code. That said, judicial notice is properly denied where the  
23 matter is not relevant or necessary to resolving an issue under review. (*People ex rel. Lockyer v.*  
24 *Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2 [precondition to taking judicial notice is  
25 relevance to issue under review; see also *Jordache Enterprises, Inc. v. Brobeck, Phleger &*  
26 *Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials not  
27 "necessary, helpful, or relevant"].)  
28

Here, Exhibits A-F, H-K, and N-O are relevant in that the City cites them as evidence in  
its supporting and/or responsive separate statement. But Exhibits G, L and M are not cited

1 therein or otherwise helpful to resolving any issue raised by the motion for summary  
2 adjudication or opposition thereto. As such, the City's request for judicial notice is GRANTED  
3 as to Exhibits A-F, H-K and N-O but DENIED as to Exhibits G, L and M.  
4

## 5 **2. Plaintiff's Request**

6 Plaintiff requests judicial notice of three categories of matters comprised of federal legal  
7 authorities and a court record. These matters are proper subjects for judicial notice under  
8 sections 451 or 452 of the Evidence Code and relevant by virtue of being relied on by Plaintiff in  
9 opposing the City's motion. Plaintiff's request for judicial notice is therefore GRANTED.  
10

## 11 **B. Evidentiary Objections**

12 Plaintiff filed written objections to evidence submitted by the City, particularly portions  
13 of the Declaration of Beth Minor, the Declaration of Joseph Saccio, the Declaration of Christina  
14 Lawrence, and the Declaration of Gabriel McWhirter.

15 As provided in Code of Civil Procedure section 437c, subdivision (q), courts are only  
16 obligated to rule on evidentiary objections deemed material to the disposition of a motion for  
17 summary judgment or adjudication. Here, the challenged evidence is not material to the Court's  
18 resolution of the City's motion. The Court therefore declines to rule on Plaintiff's objections.  
19

## 20 **IV. Merits of Motion**

21 Once again, the City moves to summarily adjudicate all causes of action accruing before  
22 December 23, 2013 on the ground they are barred for noncompliance with the claims  
23 presentation requirement prescribed by the Government Code. In this regard, the City does not  
24 challenge the entirety of any cause of action as enumerated in the Complaint since the conduct  
25 complained of relative to each claim includes collection of the UUT after December 23, 2013.

26 Recognizing the same, the City cites *Lilienthal & Fowler v. Superior Court* (1993) 12  
27 Cal.App.4th 1848 ("*Lilienthal*") for the proposition that a "cause of action" for purposes of the  
28 summary adjudication statute means any separate and distinct wrongful act, even if alleged with

1 other wrongful acts in a single count. To be clear, the City maintains that each collection of the  
2 UUT gives rise to a separate cause of action that may be summarily adjudicated.

3 In *Lilienthal*, the court held “that under subdivision (f) of [Code of Civil Procedure]  
4 section 437c, a party may present a motion for summary adjudication challenging a separate and  
5 distinct wrongful act even though combined with other wrongful acts alleged in the same cause  
6 of action.” (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854–1855.) In  
7 reaching that conclusion, the court observed that the term “cause of action” means an obligation  
8 sought to be enforced—the invasion of a primary right. (*Id.* at p. 1853.)

9 The application of *Lilienthal* in *Edward Fineman Co. v. Superior Court* (1998) 66  
10 Cal.App.4th 1110 is particularly instructive here. In that case, the plaintiff sued Bank of  
11 America for honoring 83 company checks signed by only one of two required signatories. Each  
12 of the three causes of action were predicated on all 83 checks. Bank of America moved for  
13 summary adjudication on the ground that claims as to 23 of the 83 checks were time-barred. The  
14 trial court granted the motion. On appeal, the plaintiff argued the trial court’s order was  
15 improper because it did not completely dispose of any cause of action as required under Code of  
16 Civil Procedure section 437c, subdivision (f). The court of appeal disagreed, holding that  
17 payment of each of the checks constituted a separate and distinct wrongful act that could be  
18 summarily adjudicated despite the aggregation of the checks in the complaint.

19 Likewise, here, each collection of the allegedly illegal UUT constitutes a separate and  
20 distinct wrongful act giving rise to a new cause of action. (See *Baxter v. State Teachers’*  
21 *Retirement System* (2017) 18 Cal.App.5th 340, 378–382 [addressing theory of continuous accrual  
22 of new causes of action for series of wrongs/injuries]; see also *Howard Jarvis Taxpayers Ass’n v.*  
23 *City of La Habra* (2001) 25 Cal.4th 809, 812 [continued imposition and collection of illegal tax  
24 “is an ongoing violation, upon which the limitations period begins anew with each collection”].)

25 Accordingly, the City can seek summary adjudication of each such “cause of action”  
26 despite how the Complaint is organized. Plaintiff does not advance any arguments to the  
27 contrary; at no time does she suggest that *Lilienthal* cannot be applied in this case as a general  
28 matter. The Court will therefore reach the merits of the motion.

1 “Government Code section 900 et seq., part of the Tort Claims Act, ‘prescribes the  
2 manner in which public entities may be sued.’ [Citation.]” (*V.C. v. Los Angeles Unified School*  
3 *Dist.* (2006) 139 Cal.App.4th 499, 507.) Prior to bringing suit for money or damages, the  
4 plaintiff must present a written claim to the public entity. (Gov. Code, §§ 911.2, 945.4;  
5 *California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581,  
6 1591.) “The purposes of the claim filing requirement are: ‘(1) to give notice to the public entity  
7 so it will have a timely opportunity to investigate the claim and determine the facts; and (2) to  
8 give the public entity an opportunity to settle meritorious claims thereby avoiding unnecessary  
9 lawsuits.’ [Citation.]” (*V.C. v. Los Angeles Unified School Dist., supra*, 139 Cal.App.4th at pp.  
10 507–508.)

11 “Timely claim presentation is not merely a procedural requirement, but is a condition  
12 precedent to the claimant's ability to maintain an action against the public entity.” (*California*  
13 *Restaurant Management Systems v. City of San Diego, supra*, 195 Cal.App.4th at p. 1591.) In  
14 other words, compliance with the requirement is an element of a plaintiff’s case. (*State of*  
15 *California v. Superior Court* (2004) 32 Cal.4th 1234, 1241-1244 [rejecting proposition that  
16 compliance with claim presentation requirement is not an element of a cause of action]; see also  
17 *Castaneda v. Department of Corrections & Rehabilitation* (2013) 212 Cal.App.4th 1051, 1060–  
18 1061.) Thus, “[t]he failure to timely present a claim to the public entity bars the claimant from  
19 filing a lawsuit against that public entity.” (*Ibid.*)

20 As relevant here, a government claim must be presented “not later than one year after the  
21 accrual of the cause of action.” (Gov. Code, § 911.2.) Thus, “[t]he date of accrual of a cause of  
22 action marks the starting point for calculating the claims presentation period.” (*V.C. v. Los*  
23 *Angeles Unified School Dist. supra*, 139 Cal.App.4th at p. 508; see also Gov. Code, § 901.)

24 “ ‘A cause of action accrues for purposes of the filing requirements of the Tort Claims  
25 Act on the same date a similar action against a nonpublic entity would be deemed to accrue for  
26 purposes of applying the relevant statute of limitations.’ [Citations].” (*V.C. v. Los Angeles*  
27 *Unified School Dist., supra*, 139 Cal.App.4th at p. 508.) Generally, a cause of action accrues  
28 when it is complete with all of its elements, i.e. wrongdoing, harm, and causation. (*City of*

1 *Pasadena v. Superior Court* (2017) 12 Cal.App.5th 1340, 1348.) Applying that rule relative to  
2 the imposition and collection of an illegal tax, a cause of action accrues each time collection  
3 occurs. (*Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809, 812  
4 [continued imposition and collection of illegal tax “is an ongoing violation, upon which the  
5 limitations period begins anew with each collection”].)

6 Here, under the general accrual rule, a cause of action for recovery of any UUT paid  
7 would have accrued upon payment, at which time the alleged wrongful conduct of charging the  
8 tax for exempt services and resulting harm of monetary loss for paying the tax existed. Since the  
9 record reflects Plaintiff presented her government claim to the City on December 24, 2014, it  
10 follows that recovery would be limited to any UUT paid on or after December 24, 2013. In other  
11 words, applying the general rule of accrual, Plaintiff and class members would be barred from  
12 recovering any UUT collected on or before December 23, 2013, more than one year before the  
13 government claim was presented.

14 But there are exceptions to the general rule of accrual, two of which Plaintiff relies on in  
15 opposing the City’s motion. First, Plaintiff insists accrual of any cause of action was extended  
16 based on the doctrine of equitable estoppel. Alternatively, Plaintiff argues the accrual period was  
17 tolled under the continuing violation doctrine. As such, the central dispute here is the issue of  
18 accrual. At the end of her opposition brief, Plaintiff also cursorily contends the claims  
19 presentation requirement does not apply in the first instance to some of her claims. Since this  
20 argument is limited in scope to only some claims, the Court will similarly address this issue last.

21  
22 **A. Equitable Estoppel**

23 “ ‘A public entity may be estopped from asserting the limitations of the tort claims  
24 statutes where its agents or employees have prevented or deterred the filing of a timely claim by  
25 some affirmative act. The required elements for an equitable estoppel are: (1) the party to be  
26 estopped must be apprised of the facts; (2) the party to be estopped must intend his or her  
27 conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to  
28 believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4)



1 the other party must rely upon the conduct to his or her injury. [Citation.]’ [Citation.]” (*J.J. v.*  
2 *County of San Diego* (2014) 223 Cal.App.4th 1214, 1227.)

3  
4 In the present context, “ ‘[e]stoppel most commonly results from misleading statements  
5 about the need for or advisability of a claim.’ [Citations.]” For example, “[e]stoppel may be  
6 allowed in factual situations where claimants have been misled by governmental agents with  
7 respect to the procedural and time requirements of the claims statute.” (*McLaughlin v. Superior*  
8 *Court* (1972) 29 Cal.App.3d 35, 40.) “ ‘Estoppel may also be invoked where conduct on behalf  
9 of the public entity induces a reasonably prudent person to avoid seeking legal advice or  
10 commencing litigation.’ [Citations.]” (*J.P. v. Carlsbad Unified School Dist.* (2014) 232  
11 Cal.App.4th 323, 334.)

12 “*Fredrichsen v. City of Lakewood* (1971) 6 Cal.3d 353 [ ] is instructive. There, the  
13 plaintiff was injured while walking on a defectively maintained sidewalk in the City of  
14 Lakewood. [Citation.] The plaintiff called the city and requested that it supply her with the  
15 necessary claim form so that she could properly assert her claim for damages against it.’  
16 [Citation.] Instead of a claim form, the city sent a letter advising the plaintiff that the  
17 responsibility for maintaining the sidewalk rested with a third party. The plaintiff thereafter filed  
18 a lawsuit against the third party. During discovery, it was determined that the defective sidewalk  
19 was in fact maintained by the city. [Citation.] After the city was added as a defendant, it  
20 demurred to the complaint on the ground that no claim had been filed against it. [Citation.] Our  
21 Supreme Court concluded that as a matter of law, the city was estopped from asserting  
22 noncompliance with the Act: ‘In the instant case, plaintiff immediately inquired as to the proper  
23 procedure and form for filing her claim, which indicates her willingness to supply whatever  
24 information was necessary for the proper settlement of her claim. She was deterred from  
25 supplying the necessary information by the city’s action. ... [Citations.]” (*Santos v. Los Angeles*  
26 *Unified School Dist.* (2017) 17 Cal.App.5th 1065, 1076–1077.)

1 Here, in contrast, there is no evidence the City affirmatively made misleading statements  
2 about the need for or advisability of a government claim or otherwise engaged in conduct  
3 deterring Plaintiff or other taxpayers from pursuing a claim against the City.

4  
5 Plaintiff's equitable estoppel claim is based on the proposition the City misled taxpayers  
6 by continuing to charge the UUT despite knowing it was not legally collectible, including  
7 budgeting for the same in public documents and instructing telephone service providers to  
8 continue collecting the tax. But Plaintiff cites no legal authority holding or suggesting that mere  
9 continuation of conduct claimed to be unlawful may give rise to application of the doctrine of  
10 equitable estoppel against a public entity. If that were the rule, a plaintiff could easily avoid the  
11 government claim presentation requirement any time a public entity does not cease the  
12 challenged conduct, which outcome would be inconsistent with the public policy underlying the  
13 claims presentation requirement.

14 The cases cited by Plaintiff for the proposition that the City's conduct was "on a  
15 spectrum of behavior that the California Supreme Court has found time and again to warrant  
16 estoppel" (Opp., p. 15:11-18) do not actually support that proposition. Those cases involved  
17 specific conduct directed to a claimant, such as the provision of erroneous advice or information  
18 upon inquiry. Plaintiff does not offer any evidence that the City engaged in conduct of a similar  
19 nature or quality. There is no evidence the City directly or affirmatively provided Plaintiff or  
20 other taxpayers incorrect or misleading advice/information about the UUT or the requirements of  
21 the claim presentation statute.

22  
23 While the existence of an estoppel is ordinarily a question of fact, it appropriately  
24 becomes a question of law "[w]hen the evidence is not in conflict and is susceptible of only one  
25 reasonable interpretation." (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.) Based  
26 on the foregoing, the Court finds there is no triable issue of fact regarding application of the  
27 equitable estoppel doctrine; estoppel is not warranted under the circumstances presented.

1           **B. Continuing Violation Doctrine**

2  
3           “The continuing violation doctrine aggregates a series of wrongs or injuries for purposes  
4 of the statute of limitations, treating the limitations period as accruing for all of them upon  
5 commission or sufferance of the last of them.” (*Aryeh v. Canon Business Solutions, Inc.* (2013)  
6 55 Cal.4th 1185, 1192.)

7           “The continuing violation doctrine serves a number of equitable purposes. Some injuries  
8 are the product of a series of small harms, any one of which may not be actionable on its own.  
9 [Citation.] Those injured in such a fashion should not be handicapped by the inability to identify  
10 with certainty when harm has occurred or has risen to a level sufficient to warrant action.  
11 [Citations.] Moreover, from a court-efficiency perspective, it is unwise to impose a limitations  
12 regime that would require parties to run to court in response to every slight, without first  
13 attempting to resolve matters through extrajudicial means, out of fear that delay would result in a  
14 time-barred action. [Citations.] Allegations of a pattern of reasonably frequent and similar acts  
15 may, in a given case, justify treating the acts as an indivisible course of conduct actionable in its  
16 entirety, notwithstanding that the conduct occurred partially outside and partially inside the  
17 limitations period.” (*Aryeh v. Canon Business Solutions, Inc., supra*, 55 Cal.4th at pp. 1197–  
18 1198.)

19  
20           Here, there is no basis for concluding that application of the continuing violation doctrine  
21 might be justified. This action involves a series of discrete, independently actionable wrongs—  
22 the collection of the UUT on a monthly basis; it does not involve a wrongful course of conduct  
23 that could only become apparent through the accumulation of a series of harms. As pointed out  
24 by the City, Plaintiff cites no case applying the continuing violation doctrine to a tax dispute, and  
25 at least one case—*Kovacs v. U.S.* (7th Cir. 2010) 614 F.3d 666, 676—rejected application of the  
26 doctrine in the tax collection context because the IRS’s attempts to collect taxes from the  
27 plaintiff were separate and discrete acts rather than a continuing violation or part of the original  
28 violation.

1           **C.       Applicability of Claims Presentation Requirement to Plaintiff's Other Claims**

2           Plaintiff posits that her claims are not all subject to the claims presentation requirement  
3 prescribed by the Government Code. Her presentation on this point is somewhat unclear.  
4

5           Plaintiff first complains that the City “asserts that a one year statute of limitations applies  
6 across the board to all of Plaintiff’s claims, ignoring the fact that [she] has pled several causes of  
7 action- each with different statute of limitations.” (Opp., p. 20:6-8.) To that point, Plaintiff  
8 states a three-year statute of limitations applies to her claims predicated on a violation of  
9 Government Code section 53723 and that the limitations period for her claim for money had and  
10 received is no less than three years. The significance of these assertions is unclear since  
11 application of the “statute of limitations” is not the issue before the Court; rather, the issue is  
12 whether Plaintiff’s claims accruing on or before December 23, 2013 are barred for failure to  
13 present a government claim no later than one year after accrual. While the underlying statute of  
14 limitations may serve as a benchmark for evaluating accrual, the overall length of the limitations  
15 is immaterial to determining whether a government claim has been timely presented.

16           Plaintiff otherwise suggests, albeit unclearly, that her claims for declaratory relief (first  
17 cause of action) and writ of mandate (fourth cause of action) are not subject to the claims  
18 presentation requirement. She asserts: “The general rule is that the Claims Act applies only to  
19 claims for money or damages, and not to actions for declaratory relief. [Citation.]. Here,  
20 Plaintiff [sic] claims are more than ancillary. Specifically, Plaintiff makes claims for a  
21 declaration that the taxes were wrongfully collected and for a writ of mandate.” (Opp., p. 20:12-  
22 15.)  
23

24           For context, the declaratory relief claim is predicated on the alleged unlawful collection  
25 of the UUT; Plaintiff seeks a declaration that the UUT was illegally applied and collected. The  
26 claim for writ of mandamus incorporates all preceding allegations, and adds that the City “failed  
27 to provide adequate pre-deprivation or post deprivation remedies for the illegal collection of the  
28 UUT from Plaintiff.” (Compl., ¶66.) “Plaintiff seeks a writ of mandamus requiring the City to

1 comply with its clear duty to provide an adequate remedy for taxpayers subjected to the illegal  
2 collection of the UUT and to transfer Plaintiff's property in the form of the illegally collected  
3 and wrongfully detained monies to Plaintiff." (*Id.* at ¶67.)

4  
5 It is true that the claims presentation requirement applies to a suit for "money or  
6 damages." (Gov. Code, § 945.4.) Absent a specific exception, a suit for "money or damages"  
7 broadly encompasses any action for which monetary relief is sought, irrespective of theory of  
8 recovery. (*Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1152.)  
9 Although the general rule is that the claims presentation requirement does not apply to  
10 nonpecuniary actions, such as an action for declaratory relief, that rule is inapplicable where such  
11 relief "is merely incidental or ancillary to a prayer for damages." (*Loehr v. Ventura County*  
12 *Community College Dist.* (1983) 147 Cal.App.3d 1071, 1081–1082.) If the primary purpose of  
13 an action is pecuniary in nature, the claims presentation requirement may apply to self-styled  
14 causes of action for nonmonetary relief. (*Ibid.*; see also *Branciforte Heights, LLC v. City of*  
15 *Santa Cruz* (2006) 138 Cal.App.4th 914, 931–932 ["Of course, an action's label is not  
16 determinative and an action seeking recovery of money may be subject to the Tort Claims Act,  
17 regardless whether it is denominated a mandamus petition."].)

18 Reading the Complaint as a whole, it is apparent the primary aim of this case is to recover  
19 money or damages. The majority of Plaintiff's causes of action affirmatively seek monetary  
20 relief. Plaintiff prays for a "refund" of all sums illegally collected; "restitution in the amount of  
21 the illegal benefit" to the City; and "damages in the form of illegally collected UUT." (Compl.,  
22 Prayer, p. 16:16-22.) Even the mandamus claim, in part, essentially requests recovery of a  
23 monetary nature by calling for the "transfer [of] Plaintiff's property in the form of the illegally  
24 collected and wrongfully detained monies to Plaintiff." (Compl., ¶67.) The fact the declaratory  
25 relief and mandamus claims are self-styled as seeking nonpecuniary relief is not dispositive;  
26 these claims are clearly incidental or ancillary to the claims for monetary relief. Thus, here, all  
27 causes of action are subject to the claims presentation requirement.  
28

1           **D. Summary**

2  
3           In sum, the City satisfied its burden of showing Plaintiff's causes of action that accrued  
4 on or before December 23, 2013 are barred for failure to timely present a government claim, and  
5 Plaintiff failed to raise a triable issue of material fact. The City is therefore entitled to an order  
6 granting summary adjudication of those causes of action.

7           **V. Plaintiff's Alternative Request for Continuance**

8  
9           In the event the Court is inclined to grant the City's motion, Plaintiff requests a  
10 continuance to conduct further discovery to uncover facts supporting its opposition.

11           Code of Civil Procedure section 437c, subdivision (h) states: "If it appears from the  
12 affidavits submitted in opposition to a motion for summary judgment or summary adjudication,  
13 or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be  
14 presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained  
15 or discovery to be had, or make any other order as may be just." Thus, "[t]he statute mandates a  
16 continuance of a summary judgment [or adjudication] hearing upon a good faith showing by  
17 affidavit that additional time is needed to obtain facts essential to justify opposition to the  
18 motion. [Citations.] Continuance of a summary judgment [or adjudication] hearing is not  
19 mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to  
20 make the necessary showing under section 437c, subdivision (h)." (*Cooksey v. Alexakis* (2004)  
21 123 Cal.App.4th 246, 253–254.)

22  
23           "A declaration in support of a request for continuance under section 437c, subdivision (h)  
24 must show: '(1) the facts to be obtained are essential to opposing the motion; (2) there is reason  
25 to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these  
26 facts. [Citations.]' [Citation.]" (*Cooksey v. Alexakis, supra*, 123 Cal.App.4th at p. 254.) "The  
27 purpose of the affidavit required by Code of Civil Procedure section 437c, subdivision (h) is to  
28 inform the court of outstanding discovery which is necessary to resist the summary judgment  
motion. It is not sufficient under the statute merely to indicate further discovery or investigation

1 is contemplated. The statute makes it a condition that the party moving for a continuance show  
2 facts essential to justify opposition may exist.” (*Ibid.*, internal quotation marks and citations  
3 omitted.)

4  
5 Here, Plaintiff failed to file the requisite declaration in support of her continuance  
6 request; instead, she merely asserts her position in her memorandum of points and authorities.  
7 There, Plaintiff first states she is relying in part on two letters of Mr. Saccio that were belatedly  
8 produced by the City, and she would like the opportunity to further depose him about the letters  
9 in the event the City objects to their authenticity. But no such objection has been made. Next,  
10 Plaintiff indicates a former City employee, Mr. Yeats, was identified in discovery as having  
11 knowledge about the UUT at or near the time of the change in law, but his whereabouts were not  
12 discovered until recently and his deposition has yet to occur. This is insufficient. There is no  
13 indication of particular facts Mr. Yeats may possess that could potentially defeat the instant  
14 motion.


15 Thus, the Court declines to grant Plaintiff a continuance.

16  
17 **VI. Conclusion**

18 In consideration of the foregoing, the City’s motion for summary adjudication is  
19 GRANTED as to all causes of action alleged in the complaint challenging the collection of  
20 telephone users tax that accrued on or before December 23, 2013.

21  
22 IT IS SO ORDERED.

23 Dated: May 20, 2019

24   
25 Honorable Brian C. Walsh  
26 Judge of the Superior Court  
27  
28