COURT OF APPEAL

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

TAXPAYERS FOR ACCOUNTABLE SCHOOL BOND SPENDING Plaintiff and Appellant, v. SAN DIEGO UNIFIED SCHOOL DISTRICT Defendant and Respondent.	)	No. D 066214 San Diego Superior Court Case No. 37-2011-85714

APPELLANT'S OPENING BRIEF

An Appeal From a Post-Judgment Order

of the Honorable Timothy B. Taylor, Presiding

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I.

INTRODUCTION

In this Court's opinion and disposition in Taxpayers for Accountable School Bond Spending v. San Diego Unified School District, ("Taxpayers") (2013) 215 Cal.App.4th 1013, 1066-1067, the Superior Court was ordered to grant Appellant "the injunctive and declaratory relief . . . to the extent consistent with this [Court's] opinion." Appellant contends that it has been denied its legally authorized course of declaratory and injunctive relief because the trial court did not follow the disposition order of this Court and misapplied substantial law and doctrine in response to Appellant's request that it provide a restitution remedy encompassed by the lawsuit and, thus, the order of this Court.

After this Court's remand, and following multiple requests by Appellant for appropriate judgment and remedial orders (through lodged writs and judgments, ex parte applications, and the final dispositive motion appealed here), the trial court refused to order Respondent to provide replacement money or other Proposition S listed projects to compensate for the Proposition S funds that were ruled illegally expended.

To effectuate this Court's ruling, and implement available remedies under its proven claims, Appellant prepared and presented a proposed judgment that included an order for repayment of Respondent's illegal expenditures. The trial court initially proceeded correctly by ordering an accounting to establish that $2,616,173 in unlawful expenditures had occurred. Appellant then brought a motion to implement the relief post-judgment. Despite the motion, the trial court refused to do anything beyond the accounting. Appellant requests review of the trial court's March 24, 2014 denial of Appellant's motion for declaratory and injunctive relief.

The trial court misapplied law regarding injunctions, declaratory judgments, and remedies available thereunder, to the detriment of the Appellant, thereby denying ordinary prevailing party relief.

The trial court erred by narrowly reading Appellant's pleading and denying relief from Appellant's proven claims, even though the relief sought is regularly included as part of a general prayer. The trial court essentially gave the District a "pass" on having to repay its illegal expenditures, based on what the court termed "good faith spending" that occurred during the time that the lawsuit was being prosecuted. The trial court additionally refused a restitution remedy by overlooking what it referenced should be "some sort of transfer of funds from one account to another" based on a later ruling there is a concern that repayment *might be difficult.*

The trial court erred by accepting the Respondent's incorrect argument that Appellant only requested, and could only obtain, *prospective* injunctive relief under Code of Civil Procedure section 526a at the time judgment was entered – three years after litigation in the trial and appellate courts. This ruling is contrary to existing law regarding taxpayer declaratory and injunctive relief actions, and additionally ignores undisputed facts that Appellant made an affirmative legal demand in its original pleading that Respondent suspend the illegal spending – when Appellant filed its original complaint on February 10, 2011.

The trial court rewarded Respondent for having spent the subject tax proceeds during the pendency of the litigation. Notwithstanding the harm done in this case, without effective repayment relief resulting from a proven taxpayers' Section 526a lawsuit, there will not be effective deterrence to curtail illegal government spending or waste. Such a ruling encourages front-loaded and rapid spending by agencies based on an argument they have safe harbor protection arising from purported "good faith" spending.

While legal actions brought under Sections 526a and 1060,[1] to suspend illegal taxes and spending, are intended to be swift and expedited to provide effective taxpayer relief, it is no secret that our state court system has

[1] All references are to the California Code of Civil Procedure unless stated otherwise.

significantly slowed such that years often pass before a matter can be adjudicated. In this case, Respondent was able to spend the subject property tax funds and complete the athletic facilities before the spending could be declared illegal.

Whatever moniker appropriate relief might be given – whether called repayment, restitution, disgorgement, suspension of spending (as of the lawsuit filing date), or replacement projects – such a form of relief is encompassed within the principal claim proven by Appellant. Based on the mandate of this Court that Appellant is entitled to all of its pleaded declaratory and injunctive relief, the trial court's refusal to grant any form of a repayment remedy warrants a reversal.

II.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. THE RELEVANT CLAIMS PLEADED AND LITIGATED IN THE TRIAL COURT PRIOR TO REVERSAL ON APPEAL

In the trial court, Appellant pleaded and litigated a *First Cause of Action* for declaratory and injunctive relief under Section 526a against Respondent based upon unauthorized spending for high school stadium

lighting projects that were not identified and disclosed as required by the California Constitution, Article XIII A, § 1(b)(3) and the *Strict Accountability in Local School Construction Bond Act of 2000* (Cal. Ed. Code §§ 15264-15286.). (AA 1-13)[2]

Appellant filed a *First Amended Complaint* (FAC) filed July 7, 2011 which contains the exact same pleading for the *First and Second Causes of Action* as in the original pleading and complaint and petition that was filed on February 10, 2011.

The trial court rejected all of Appellant's claims on the FAC and entered judgment on October 26, 2011 in favor of Respondent. (Taxpayers, at 1024.)

B. THIS COURT OF APPEAL REVERSAL OF THE TRIAL COURT'S RULINGS AND JUDGMENT

This Court reversed the trial court judgment and ordered that Appellant be granted its entitled relief under its *First and Second Causes of Action*. The specific disposition of this Court states:

> The judgment is reversed to the extent it dismissed the first and second causes of action; in all other respects, the judgment is affirmed. The matter is remanded with directions that the superior court grant the petition for writ of mandate and issue the

[2] References to the trial court record are "AA" for the 2-volume Appellant's Appendix and "RT" the 4-volume Reporter's Transcript.

> injunctive and declaratory relief sought in the first and second causes of action of the first amended complaint and petition, to the extent consistent with this opinion, including, but not limited to, (1) ordering District to vacate its approval of the Project and the mitigated negative declaration (MND) and to cause an EIR to be prepared, and (2) enjoining District from using Proposition S bond proceeds to pay for field lighting at Hoover's stadium and any other high school stadium for which Proposition S did not specifically list field lighting as part of their projects.

(Taxpayers, 215 Cal.App.4th at 1066-1067.)

C. FOLLOWING REMAND: BACKGROUND FACTS AND PROCEDURE IN THE TRIAL COURT – PRIOR TO THE APPEALED MARCH 24, 2014 POST-JUDGMENT ORDER

A remittitur was issued by this Court on August 5, 2013. (AA 30) On August 8, 2013, Appellant filed a *Peremptory Challenge* under Section 170.6. Appellant wished to avoid the reversed trial court judge (Hon. Timothy B. Taylor) from further adjudicating issues between the parties that he previously endorsed. (AA 32-34) On August 12, 2013, Judge Taylor granted the *Peremptory Challenge* and the case was assigned to the Honorable William Dato. (AA 35-36)

On August 20, 2013, Appellant lodged a proposed judgment, proposed injunction, and proposed writ requesting, among other things, that Respondent "rescind, refund, and repay all expenditures of Proposition S

funds used for planning, design, study, construction, and implementation of field lighting." (AA 37-48) The proposed judgment included a requirement for repayment of Respondent's illegal expenditures. (AA 41)

On August 27, 2013, Respondent wrote Appellant and lodged with the trial court a letter with a separate and varied proposed writ and judgment (AA 52-60) arguing against any repayment remedy based on an alleged incorrect argument that: Section "526a applies to an action to obtain a judgment, restraining and preventing . . ." expenditures, and that the subject Proposition S "money was not spent for the lights until after the Superior Court had ruled that the expenditure was valid." (AA 53 [stating injunctions are "Prospective Only"].) Respondent further objected to repayment of funds spent on "planning, design, study, construction and implementation." (AA 53) Respondent lodged different versions of a judgment, writ and injunction that did not require or allow any recourse for the illegal expenditures. (AA 55-60)

On September 3, 2015, Appellant filed a response objecting to Respondent's proposed judgment, writ, and injunction. (AA 61-66)

On September 5, 2013, Appellant appeared *ex parte* for a preliminary injunction based on this Court's ruling that required the project be rescinded and set aside due to improper approvals. (AA 67-141)

At the September 5, 2013 *ex parte* hearing, Judge Dato declined to hear the merits of Appellant's ex parte application, instead, the court held a hearing reconsidering reassignment of the case based on Judge Dato's questioning whether Appellant's Section 170.6 challenge could be applied to the instant and forthcoming post-trial proceedings. (RT 2-4; AA 153-154) The *ex parte* matter was continued (id.), and the parties were given an opportunity to brief the matter which they did. (AA 155-176)

On September 12, 2013, Judge Dato reconsidered and rejected Appellant's challenge under Section 170.6 (AA 177-180), after which the case was transferred back to Judge Taylor (AA 181-182), and a hearing was immediately held in Department 72 on the proposed judgment, writ, and injunction. (RT 35-49; AA 396 [¶1].)

On September 13, 2013, Judge Taylor signed, entered, and served the parties his revised judgment, writ, and injunction that did not include or consider suspension of project or repayment of illegally spent funds. (AA 186-192) Appellant's September 5, 2013 *ex parte* application and request for injunctive relief was continued to September 20, 2013 (RT 50-63; AA 183-185) with the trial court permitting Appellant to file a responsive pleading which it did on September 17, 2013. (AA 193-197)

At the September 20, 2013 hearing the trial court made and entered multiple orders and rulings (AA 198-200) that included:

(a) enjoining the operation of the incorrectly studied and approved stadium lighting (AA 198-200);

(b) declining to order (for the time being) repayment or restitution of any of the unconstitutional tax expenditures (id.; RT 52-53; AA 396 ¶ 3]);

(c) keeping open the issue whether restitution should be included as part of the Court of Appeal disposition and mandate noting the "including but not limited to" language "bespeaks that there's something more that [the Court of Appeal] anticipate[s] me doing." (RT 57:20-26-23);

(d) ordering Respondent to provide an accounting of the amount of illegal tax expenditures to determine how "much is at stake." (id.; RT 58:3-5); and

(e) the signing and issuance of an *Amended Peremptory Writ of Mandamus* that removed the "pay" term that was included in the previous writ. (AA 233-234)[3]

On October 21, 2013, Respondent filed a declaration stating that an amount of $2,616,173 in Proposition S funds was spent associated with planning, design, and construction of the stadium lighting facilities that are the subject of this lawsuit. (AA 243-248)

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[3] In response to Appellant's September 19, 2013 *ex parte* application (AR 201-221) requesting clarification that the word "pay" remain in the September 13, 2013 *writ of mandamus* (AA 190:2).

D. APPELLANT'S MARCH 21, 2014 MOTION REQUESTING A REPAYMENT REMEDY UNDER ITS FIRST CAUSE OF ACTION

In response to the October 21, 2013 accounting, counsel for Appellant obtained the first available hearing date of March 21, 2014 to request the relief relative to repayment, restitution, or disgorgement of the improper tax expenditures which had been deferred by the trial court. (RT 52-53; AA 414)

On February 27, 2014 Appellant filed its *Motion for Further Post-Judgment Relief Ordering Restitution & Repayment of Illegally Expended Taxpayer Funds* ("*Motion for Relief*") (AR 325-357) which was followed by ordinary responsive pleading of Respondent's opposition (AA 358-383) and the reply brief of Appellant. (AR 384-390)

A tentative ruling on the *Motion for Relief* was issued on March 18, 2014 (AA 391-394), and the matter was argued and submitted on March 21, 2014. (RT 64-78)

On March 24, 2014, for reasons more fully explained in the next section, the trial court issued its final *Ruling on Motion for Further Post-Judgment Relief* denying Appellant's requested relief. (AA 395-400)

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E. THE MARCH 24, 2014 POST-JUDGMENT RULING DENYING A RESTITUTION REMEDY THAT IS THE SUBJECT OF THIS APPEAL

Not intending to supplant or fully restate the March 24, 2014 ruling and findings of the trial court (AA 395-400), Appellant provides a summary of said ruling as it pertains to the principal issues and alleged errors that are the subject of this appeal.[4]

The trial court expressly found that it complied with all the aspects of the Court of Appeal's mandate and disposition (AA 398-399) because: (a) the relief sought by Appellant "was not ancillary to that ordered by the Court of Appeal" and "is of a completely different character and legal effect" (AA 399); (b) the trial court demanded and obtained an accounting which "had the effect of shedding light on the District's action" (AA 399); and (c) the trial court concluded the "including, but not limited to. . ." mandate language of the remand order supported the denial because further relief was "delimited by the phrase which immediately precedes it: 'to the extent consistent with [the Court of Appeal's] decision.'" (AA 399)

The trial court provided supporting reasons why it believed there was no specific or inherent order set forth in the Court of Appeal's disposition to grant Appellant the subject requested "declaratory relief sought in the first

[4] Presented in the order that Appellant argues this appeal.

and second causes of action of the first amended complaint." The trial court determined that "restitution" was nowhere mentioned or encompassed in the First Amended Complaint (FAC) even though, according to the trial court, "strictly speaking, 'restitution' is not what plaintiff seeks by this motion," as the Taxpayers entity is not "the actual taxpayers who would be entitled to restitution." (AA 398 [¶1], underscoring in original.)

The trial court further found that the requested relief was not properly *restitution*, but rather was more likely *disgorgement* and that the term "disgorgement" was also nowhere mentioned in the FAC. (Id.)

Examining the general prayer in the FAC for "such other and further relief as the Court deems just and proper," the trial court did not accept or address Appellant's arguments and case authorities that the requested legal and equitable relief was encompassed in such a demand. Instead, the court concluded "it would be neither *just* nor *proper* to award the relief." (AA 398, italics added.) The trial court supported its *justice* and *propriety* arguments based on finding that: (a) the Respondent was not put on fair notice of all the relief Appellant is now seeking; (b) Respondent "had the right to know . . . that it might have to reverse the financial transaction (in what would amount to a bookkeeping transaction)"; (c) Respondent proceeded in "good faith" on the errant decision and judgment of the trial court; (d) Appellant should have requested a preliminary injunction before this case was decided by the

Court of Appeal; and (e) case law which presumes a project applicant proceeds with knowledge and assumption of the risk while proceeding with a project during litigation, was not applicable. (AA 398)

In response to what Appellant believed was trial court error expressed in its tentative ruling – by a narrow reading of its allegations, claims and prayer for relief in the FAC – Appellant made an oral motion to amend the FAC to conform to proof, but was denied based on the court's ruling that (a) the motion was being made too late in the litigation such that it would deny the District "due process" and (b) that "there was no 'proof' to conform to." (AA 398)

Lastly, the trial court provided an additional reason for prohibiting the remedy of the claim proven in the FAC by refusing to involve the court "in the increasingly difficult and arcane world of public school finance" and speculating that replacement funding might "threaten . . . the tax exempt status of bonds" based on an unspecific and conclusory declaration submitted by Respondent's financial officer. (AA 399)

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III.

APPEALABILITY

This appeal arises from a post-judgment order of the trial court (AA 395-400), Judge Timothy B. Taylor presiding, that is expressly made appealable pursuant to Section 904.1(a)(2). There is no other litigation or disputes pending between the parties, and this appeal serves to adjudicate all issues between the parties.

IV.

STANDARD OF REVIEW

A. DE NOVO REVIEW IS REQUIRED ON THE ISSUE OF A TRIAL COURT FOLLOWING A COURT OF APPEAL'S DISPOSITION AND REMAND ORDER

The minute order of the trial court correctly references the *law of the case doctrine* as the standard that makes the ruling the Court of Appeal's disposition unequivocal and binding. (AA 397 [¶¶ 1-2].) As stated in Ayyad v. Sprint Spectrum, L.P., (2012) 210 Cal.App.4th 851, "[w]hether the trial court correctly interpreted our opinion is an issue of law subject to de novo review." Because the trial court's ruling in this appeal is substantially based on its interpretation of the Court of Appeal's opinion and disposition in Taxpayers, this matter should be reviewed *de novo*.

Trial court actions that fail to conform with directions from a court of appeal are void. (Hampton v. Superior Court, (1952) 38 Cal.2d 652, 655; Karlsen v. Superior Court, (2006) 139 Cal.App.4th 1526, 1530.) Here, this Court directed the trial court to "issue the injunctive and declaratory relief sought in the first[5] and second causes of action of the first amended complaint and petition." (Taxpayers, 215 Cal.App.4th at 1066-1067.)

B. MATTERS OF LAW ARE REVIEWED DE NOVO

It is well settled that questions of law are reviewed *de novo*. (Committee for Green Foothills v. Santa Clara County Bd. of Supervisors, (2010) 48 Cal.4th 32, 42.) Mixed questions of law and fact are also subject to *de novo* review. (*See* Haworth v. Los Angeles County Superior Court (2010) 50 Cal.4th 372, 383.)

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[5] As repeated from Appellant's original complaint filed February 10, 2011, the first cause of action in the FAC sought to "enjoin and prevent any conduct or action of the District proceeding with the project *or spending Prop S money for construction or building of new (and previously nonexisting) athletic field lights at any of the listed schools*." (AA 12 [(FAC ¶ 29], italics added.)

C. THE TRIAL COURT COMMITTED MULTIPLE LEGAL ERRORS IN DENYING THE REPAYMENT AND DISGORGEMENT RELIEF ENTITLED UNDER APPELLANT'S FIRST CAUSE OF ACTION

This appeal challenges the trial court's ruling on multiple legal grounds. First, the trial court misapplied the "including, but not limited" language of the Court of Appeal's opinion and disposition based upon a ruling of the trial court that it was precluded from undertaking a restitution remedial action because it was not directed to do so, and that the issue was not encompassed by the opinion. (AA 398-399)

Second, the trial court denied rights and remedies legally available to Appellant based on its narrow reading of the pleading – ruling it did not contain the words "restitution" or "disgorgement." (AA 398) However, state law supports that a plaintiff is not limited by such a narrow reading of its pleadings. Rather, a successful plaintiff's rights are determined by the alleged *violation of a right* and the relief that flows from a judgment *regarding that right*. (*See* McDowell v. Watson, (1997) 59 Cal.App.4th 1155, 1159.) Restitution and other similar remedies are encompassed by a general prayer despite any specific words in a complaint once a specific cause of action is proven. (*See* further and more complete discussions in Sections V.A.1 through V.A.3, and Section V.B.1, *post*.)

Third, the trial court failed to follow the liberal pleading rules when it conducted an unduly *narrow* review of Appellant's pleading to find that relief of "restitution" or "repayment" could not be awarded. (AA 398)

Fourth, despite confusing related concepts of restitution, disgorgement, and repayment, the trial court incorrectly ruled against repayment in a Section 526a taxpayer action because it found Appellant's representative members were not "actual taxpayers" that could be subject to reimbursement. (Id., emphasis in original.)

Lastly, the trial court established an unsupported new standard that Appellant should have first sought a preliminary injunction seeking to suspend expenditures. The trial court incorrectly ruled that Appellant needed to give *further* "due process" notice about the suspension of spending that had *already* been pleaded in the FAC. (*See*, e.g., footnote 5, *ante*.) The trial court found there was a resulting prejudice to Respondent that denied it "due process." (AA 398)

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V.

ARGUMENT

A. THE LANGUAGE IN THIS COURT'S DISPOSITION TO ENTER JUDGMENT AND RELIEF "INCLUDING, BUT NOT LIMITED TO . . ." ENCOMPASSES REPAYMENT AND RESTITUTION AS CONTAINED IN THE PLEADING AND GENERAL PRAYER

1. Restitution is a Proper and Necessary Remedy in Section 526a Taxpayer Cases

Restitution of illegal expenditures is proper under Section 526a. (Osburn v. Stone, (1915) 170 Cal. 480, 482 ["The provision of section 526a . . . does not in letter or in spirit forbid a taxpayer from seeking to recover on behalf of his municipality the same moneys if illegally expended"]; *see also* Hansen v. Carr, (1925) 73 Cal.App. 511, 518 ["This right of action is recognized in the decisions of our Supreme Court, though not specially granted by statute."].)

In Ontario v. Superior Court of San Bernardino County, the California Supreme Court affirmed the appropriateness and purpose of taxpayer actions to identify, rule and repay illegally obtained or received taxes. (Ontario v. Superior Court of San Bernardino County, ("Ontario")(1970) 2 Cal.3d 335, 345.) The Supreme Court found restitution under Section 526a to include

not only present and future expenditures, but also money already spent. (Id., ["In most large-scale public projects that a taxpayer may wish to challenge in the courts, some money will already have been spent and the authorities will be threatening future action more or less related to the project. The tripartite relief sought in this case would thus seem to be the rule rather than the exception."].)

2. Appellant Properly Pleaded a Section 526a Claim under its First Cause of Action for Declaratory and Injunctive Relief, that Provides a Restitutionary Remedy

This Court found that Appellant is a sufficient collection of school district taxpayers who can adjudicate this Section 526a action. (*See* Taxpayers, at 1031.) Respondent and the trial court nonetheless continue to suggest that Appellant cannot obtain or fulfill any restitutionary remedy in this action. (AA 398; *see also* SectionV.C.4, *post*.) It is without dispute that Appellant prevailed on its cause of action for declaratory relief which found the subject Proposition S spending to be illegal. (Id. at 1066-1067.)

Post-trial proceedings unequivocally established that at least $2,616,173 in illegal funds have been expended. (AA 337) When this Court of Appeal directed the trial court to enter judgment on the first cause of action – after finding that the Proposition S spending by Respondent was illegal (*See* Taxpayers, at 1030-1031, 1032) – this Court ordered the trial

court to issue "declaratory relief sought in the first and second causes of action." (Taxpayers, at 1066.)

Restitution naturally flows from the declaratory judgment that this Court mandated be entered and which is a proper remedy. (*See* discussion Section IV.C, *ante*; *see also* discussion Section V.A.3, *post*.) Instead, the trial court issued only *injunctive* relief and substantially omitted the mandate to issue *declaratory* relief (e.g., repayment of illegally expended funds). (*See* AA 186-192 [issued judgment, writ and permanent injunction].)

Appellant's multiple requests and penultimate motion for restitution was proper in this case and should have been granted. As ruled in Ontario, restitution is part of a tripartite relief that is the rule rather than the exception in Section 526a cases. (Ontario, *supra*, 2 Cal.3d at 345.) Whether or not the requested relief is ultimately deemed closer to restitution or disgorgement, Appellant pleaded and demanded the suspension of all illegal Proposition S spending – *as of the date of filing the initial complaint* – and therefore is entitled to a remedy of repayment of funds illegally spent subsequent from that date. (*See* discussion Section V.C.1, *post*; *see also* Slovensky v. Friedman, (2006) 142 Cal.App.4th 1518, 1527.)

As above, even without a specific mention in Section 526a of the term "restitution," it is a remedy encompassed by the statute and therefore should be considered part of Appellant's remedial rights under the disposition of

this Court upon remand. In order to determine the propriety of the relief sought by Appellant, the trial court relied on a definition of *disgorgement* from case law under California's Unfair Competition Law (UCL). (AA 398) Although Appellant contends that the trial court erred in its analysis of the application of "disgorgement" to the present case (*see* discussion V.B.2 *post*), UCL case law is relevant and additionally supports a determination here that restitution is proper under Section 526a.

A statute need not specifically state or mention restitution as an available remedy in order for restitution to be an appropriate remedy. (*See* People v. Superior Court, (1973) 9 Cal.3d 283, 286.) In that case, the court found that:

> Business and Professions Code section 17535 provided that false or misleading advertising 'may be enjoined' in an action by the Attorney General, but was silent as to the power of the trial court to order restitution in such a proceeding. On the other hand the statute did not restrict the court's general equity jurisdiction 'in so many words, or by a necessary and inescapable inference.' [] In the absence of such a restriction a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved.

(Id., *citing* Porter v. Warner Co., 328 U.S. 395, 398 (1946), internal citations omitted.)

Further, case law under the UCL is instructive to determine the meaning of restitution in this case and its availability as a remedy. In Colgan v. Leatherman Tool Group, Inc., the court found that

> [f]rom the authorities we conclude that restitution under the statutes involved here must be of a measurable amount to restore to the plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by evidence.

(Colgan v. Leatherman Tool Group, Inc., (2006) 135 Cal.App.4th 663, 698.)

Similarly here, Respondent violated a statute intended to *restrain* and *prevent* (*see* Section 526a) illegal expenditures. Evidence from declarations of Respondent, as ordered by the trial court, demonstrates the measurable amount to be restored by Respondent for the benefit of the taxpayers' proven case of illegality under Section 526a.

3. Restitution is a Proper and Necessary Remedy under the Declaratory Relief Claim Proven and Ordered Entered by this Court

"An action for declaratory relief is equitable, and a court of equity will administer complete relief when it assumes jurisdiction of a controversy." (Westerholm v. 20th Century Ins. Co., (1976) 58 Cal.App.3d 628, 632, c*iting* Laurance v. Security-First Nat. Bank, (1963) 220 Cal.App.2d 622, 626.) The court in Westerholm concluded that declaratory relief included reimbursement,

and that it was proper for a court to "grant any relief consistent with the evidence and the issues embraced by the pleadings." (Id., 58 Cal.App.3d at 632.)

Restitution is the equitable remedy where unjust enrichment has occurred and is "designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money." (Federal Deposit Ins. Corp. v. Dintino, (2008) 167 Cal.App.4th 333, 346-347 *citing* 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 1013, p. 1102.) A person or party is unjustly enriched if the person receives the benefit at another's expense and it is unjust for that party to keep the benefit. (First Nationwide Savings v. Perry, (1992) 11 Cal.App.4th 1657, 1662-1663.) The benefit to the person enriched need not be monetary for restitution to be a proper remedy. (Federal Deposit, 346.)

After finding Respondent's expenditures of Proposition S money illegal, as part of Appellant's declaratory relief cause of action (Taxpayers, 215 Cal.App.4th at pp. 1032, 1067), the relief of restitution naturally flows from the Court of Appeal order for a favorable declaratory relief judgment.

Federal authorities support the expectation and ordinary procedure providing for post-judgment restitution as naturally flowing from a declaratory judgment. (28 U.S.C. § 2202 ["Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable

notice and hearing, against any adverse party whose rights have been determined by such judgment."].) Here, this Court favorably adjudicated the entirety of the *First Cause of Action* in Appellant's favor. There are no further legal issues or rights between the parties to be adjudicated.

Consistent with the authorities in Section V.A.1 *ante*, the federal rule has been interpreted to specifically allow a post-judgment motion for restitution for a prevailing party based on a declaratory judgment. (Cedar Hill Hardware & Constr. Supply v. Ins. Corp. of Hannover, 563 F.3d 329, 354-355 (8th Cir. 2009) ["When Hannover moved for restitution or recoupment, it characterized the motion as a request for further relief under § 2202."].)[6]

After wholly prevailing on the matter of the illegal spending, Appellant is entitled to a post-judgment order for restitution. The trial court's demand for more specific pleading or for the original trial to have encompassed some separate or different adjudication on the issue of the illegality are errors of law.

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[6] To the extent that this Court finds the issues in this appeal novel, it should look to federal authority as persuasive and with an eye to harmonizing California law with settled federal law on the presented issues.

4. Unjust Enrichment and Restitution are Not Acceptably Pleaded Causes of Action in California

Being exclusively a post-trial and/or post-judgment issue and proceeding, Appellant need not have, nor could it, adjudicate a claim or cause of action for restitution in the original trial court proceeding. "[T]here is no cause of action in California for unjust enrichment." (Melchior v. New Line Productions, Inc., (2003) 106 Cal.App.4th 779, 793.)[7] This same principle and logic was recognized in Munoz v. MacMillan, (2011) 195 Cal.App.4th 648, 661 that "[t] here is no freestanding cause of action for 'restitution' in California." The trial court's acceptance of Respondent's arguments – that "Plaintiff alleged no existing unjust enrichment or claim for restitution" – is legally infirm. (*See*, e.g., AA 363, citing Osburn [170 Cal.480] and Hansen [73 Cal.App.511]; AA 368, citing the FAC including the prayer for relief.)

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[7] The court further explained that the "phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." (Melchior v. New Line Productions, Inc., (2003) 106 Cal.App.4th 779, 793, citing Lauriedale Associates, Ltd. v. Wilson, (1992) 7 Cal.App.4th 1439, 1448.) Unjust enrichment is "'a general principle, underlying various legal doctrines and remedies,'" rather than a remedy itself. (Dinosaur Development, Inc. v. White, (1989) 216 Cal.App.3d 1310, 1315.) It is synonymous with restitution. (*Id.* at p. 1314.) (Melchior, 106 Cal.App.4th at p. 793, citations in original.)

There should be little doubt that Appellant in this action sought to preserve proper spending for legally authorized projects. As supported by both the pleadings and the laws of this state, this Court's order for a judgment in Appellant's favor includes a rightful and ordinary remedy of repayment.

It should be noted that Appellant's members and other school district taxpayers have already been saddled with over 3 years of assessed tax payments on money illegally spent on high school stadium lighting systems. These particular tax payments come with the additional sacrifice of other specifically approved Proposition S listed projects for health and safety that will now be foregone due to Respondent's illegal spending.

Repayment of the improper expenditures fulfills the intended purpose of a statutory taxpayer enforcement action and benefits all represented taxpayers by preserving the political power of the people to decide how their tax dollars are spent. By the trial court denying any form of restitution, this taxpayer lawsuit becomes mostly an academic and philosophical exercise in which the offending bureaucracy will always win, to the detriment of the public who did not agree to pay taxes on unauthorized spending.

Based on the *de novo* standard of review on this issue, undisputed facts, and this Court's prior opinion and disposition, Appellant requests this Court to directly order the restitutionary relief requested by Appellant. (*See*

discussion, Sections V.D.1 and V.D.2, *post.*) In doing so, this Court need not inquire or further decide the additional below alleged errors of the trial court.

B. APPELLANT'S REMEDIES ARE DETERMINED BY THE ALLEGED VIOLATION OF A RIGHT; RELIEF FLOWING FROM ADJUDICATION OF THAT "RIGHT" ENCOMPASSES THE APPROPRIATE AND NECESSARY RELIEF REQUESTED IN THIS CASE

1. Relief is Not Limited by any Particular Language in the Pleading or the Prayer

It is settled law that courts of this state may grant "any relief consistent with the case made by the complaint and embraced within the issue[,]" and the rule is well settled that in a contested case the plaintiff may secure relief greater than or different from that demanded. (Section 580, subd. (a); Johnson v. Polhemus, (1893) 99 Cal.240, 244; Land & Livestock Co. v. Wiltcher, (1920) 48 Cal.App. 93, 96; Lawrence v. Shutt, (1969) 269 Cal.App.2d 749, 767 ["any relief justified by the allegations of the complaint and the evidence, even though the relief is greater than or different from that requested."].) This rule includes equitable relief sought through a general prayer even when not pled by special prayer. (Lawrence v. Shutt, *supra*, 269

Cal.App.2d at 767, citing Knox v. Wolfe, (1946) 73 Cal.App.2d 494, 505; *see also* Lachman Bros. v. Muenzer, (1956) 143 Cal.App.2d 520, 524-525.)

In McDowell v. Watson, the court found that "[t]he gravamen, or essential nature … of a cause of action is determined by the primary right alleged to have been violated, not by the remedy sought." (McDowell v. Watson, (1997) 59 Cal.App.4th 1155, 1159.)

Here, appellant has placed facts before the trial court (and this Court) to adjudge the parties' rights and duties such that declaratory relief, on stated and available claims, should not be denied. (*See*, Olszewski v. Scripps Health, (2003) 30 Cal.4th 798, 807.)

This Court ordered the case remanded "with directions that. . ." plaintiff be provided the relief requested in the complaint:

> The matter is remanded with directions that the superior court grant the petition for writ of mandate and issue the injunctive and declaratory relief sought in the first and second causes of action of the first amended complaint and petition, to the extent consistent with this opinion, including, but not limited to [an injunction]. . ."

(Taxpayers, 215 Cal.App.4th at 1066.)

Appellant's *First Cause of Action* alleged a violation of restricted government spending and waste and misuse of public funds. (AA 11-13) The primary rights alleged in the FAC are the rights of the public to direct and control how their tax dollars are spent. (Id.) The rights of taxpayers to

determine how their tax money is spent is well founded. As stated in the California Constitution, Article 2, Section 1, "[a]ll political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." (Id.) The voters, in enacting Proposition 39, directed California school systems how the money voted upon was to be spent, and if not spent correctly was to be enjoined by the courts. (Cal. Const. Art. XIII A, § 1(b)(3); Cal. Ed. Code § 15284.) The relief that flows from Respondent's usurpation of Appellant's rights, to determine how the bond money is spent, is suspension and repayment (through restitution or disgorgement), as that remedy is legally encompassed in the purpose and adjudication of taxpayers' Section 526a actions for injunctive and declaratory relief.

2. The Trial Court Erred by Foreclosing an Available Remedy Because it was Not Specifically Mentioned in the Pleading

As supported by the aforementioned authorities (Sections V.A.1 through V.A.3, *ante*), the trial court erred as a matter of law in conducting a limited and narrow review of the FAC for the word "restitution." (AA 398 [denying restitution based on defective pleading and lack of due process].)

In Slovensky v. Friedman, (2006) 142 Cal.App.4th 1518, the trial court based a dismissal of plaintiff's complaint partly on the grounds that the plaintiff in that case failed to state the term "disgorgement" in the complaint

and did not seek to amend to add the term prior to a summary judgment motion. (Id. at 1527.) The appellate court found that the trial court had erred based on a review of the applicable law that "[t]he prayer for relief is no part of the statement of fact, and the fact that too much is asked for does not affect the cause of action stated. *Under the prayer for general relief the court can give such judgment as plaintiffs show themselves entitled to, and as may be necessary to effect justice between the parties and protect the rights of both.*" (Id. at 1536-1537 citing Matteson v. Wagoner, (1905) 147 Cal. 739, 745, italics in original, internal quotes omitted.)

The Slovensky court noted that in earlier cases the "pleadings delimit the scope of the issues on summary judgment[,]" however, despite the appeal being applied in the scope as a summary judgment matter, the court still found that the plaintiff had "adequately pled the remedy of disgorgement of fees." (Id. at 1535.) The trial court here failed to take into account traditional rules of pleading when making its ruling even when not so limited.

Appellant's FAC included a general prayer for relief (AA 20 [FAC, ¶ 8]), and the *First Cause of Action* was filed to both (1) immediately suspend unlawful spending:

> [t]he district will continue to proceed in a manner not allowed by law and will continue to take action and spend and allocate Proposition S public money outside of its authority (AA 12 [FAC, ¶ 27]);

and (2) prospectively:

> enjoin and prevent any conduct or action of the District proceeding with the project or spending Prop S money for construction or building of new (and previously nonexisting) athletic field lights at any of the listed schools. (AA 12 [FAC ¶ 29]).

The trial court's citation to Nieto v. Blue Shield, (2010) 181 Cal.App.4th 60, demonstrates the error of the trial court. The trial court isolated and misapplied a quote from Nieto that "issues of an action are framed by the pleadings." What the appellate court in Nieto more fully said and intended was that "[i]t is well established that the pleadings determine the scope of relevant issues *on a summary judgment motion*." (Nieto v. Blue Shield of California Life & Health Ins. Co., (2010) 181 Cal.App.4th 60, 74, italics added.)[8] Unlike Nieto, the issue in this case is not based on a summary judgment motion. There was a full trial and a determinative appellate opinion on the sole issue of illegal spending in violation of Proposition 39 and Proposition S.

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[8] Despite the trial court's citation to page 73 of the decision, Appellant believes the court meant to cite to the above passage. Page 73 of the Nieto decision discusses the ability of a trial court to reconsider *sua sponte* prior interim orders.

3. The Trial Court Incorrectly Considered *Conforming the Pleading to Proof* Based on a Belief the Injunction and Declaratory Relief Claims Did Not Include Restitution

Assuming *arguendo* that Appellant did not plead and was not entitled to any restitutionary remedy, the trial court erred by denying Appellant the simple opportunity to conform the pleadings to proof. (RT 74:1-15) Upon encouragement of the trial court to "[s]eek leave to amend the petition" (RT 73), Appellant did so, but the trial court rejected the oral motion to amend incorrectly finding that "there was no 'proof' to conform to." (AA 398)

However, it is uncontested that the field lighting at issue was illegally built with restricted real property taxes *after* the time that Appellant filed its original lawsuit. (AA 53 [Respondent admission: "It is noteworthy that the Proposition S money was not spent for the lights until after the Superior Court had ruled"].) It is also uncontested that the funds used to build the field lighting came from property tax financing for specified projects at Hoover High School and the other similarly situated schools. (AA 243-248) It is further uncontested that Appellant and its taxpayer members continue to be obligated, under the bond measure request and imposed taxes by Respondent, to pay real property taxes on Respondent's illegal and unauthorized projects. (Taxpayers, 1031-1032.) The *proof to conform to* is

that Respondent should pay for those unauthorized projects, not school district taxpayers.

As ruled and ordered by this Court, Appellant prevailed on its *First Cause of Action* and was to be granted the declaratory and injunctive relief it alleged and prayed for in the FAC. (Taxpayers, at 1066.) This ruling, in conjunction with the above mentioned *uncontested* facts, is the sufficient "proof" achieved by Appellant in obtaining its judgment and therefore the trial court erred in not recognizing that *a proof was made* to ensure that the pleading, prayer and remedy included restitution. Any remedy that the pleading might need to conform to should have been allowed amendment (to the extent there was something missing – which there was not).

The trial court's additional reason for denying Appellant's oral motion to conform to proof was based on a finding that it would "deny due process" to Respondent. (AA 398) California law provides for an amendment to conform to proof under Section 576 without violating due process:

> Any judge, *at any time* before *or after* commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading or pretrial conference order.

(Section 576, emphasis added.)

Amendments to conform a pleading to proof are proper unless they "raise new issues not included in the original pleadings and upon which the

adverse party had no opportunity to defend." (Trafton v. Youngblood, (1968) 69 Cal.2d 17, 31, *citing* Lavely v. Nonemaker, (1931) 212 Cal. 380, 385.)

Restitution is not a new issue because, as indicated above, it is encompassed in the legal claims and prayer pleaded. Restitution is also not a new issue because it cannot be pleaded as a separate claim or cause of action and the declaratory relief cause of action includes restitution as an available and naturally flowing remedy. (*See* discussion, Sections V.A.1 through V.A.3 *ante*.) It is further not a new issue because the entirety of first cause of action was tried and conclusively decided by this Court.

The trial court's ruling – that there was *no proof to conform to* – is an additional error of law that the trial court used to preclude Appellant's requested and rightful relief in this case.[9]

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[9] The trial court's additional finding that the oral motion was "tardy" fails to account for the fact that the motion to amend and conform was made by Appellant only because the trial court contradicted existing California law that restitution was not a remedy legally encompassed within Appellant's Section 526a claim, the cause of action for declaratory relief, and the pleaded general prayer.

C. APPELLANT'S RESTITUTIONARY REMEDY IS NOT BARRED BY NOTICE, PROCESS, REPAYMENT REQUIREMENT, OR OTHER LEGAL PROHIBITION

In addition to the independent grounds for reversal in Sections V.A and V.B above, there are a number of other alleged errors that occurred as part of the trial court's denying relief entitled under Appellant's pleaded and proven claims.

1. There Was No Mandatory Prerequisite for Appellant to Seek a Preliminary Injunction in Order to Preserve an Otherwise Legally Provided Remedy or Give notice to Respondent

The trial court erred in determining a preliminary injunction to enjoin the expenditure of the funds was necessary to put Respondent on notice. (AA 398; RT 68-69)

Respondent was sufficiently on notice that it was proceeding with spending at its own risk, from the date of filing of the original *Complaint* and subsequent *First Amended Complaint* – which both pleaded a demand that Proposition S money not be spent. (*See* discussion in Section V.A.2, *post*.) Additionally, the trial court erred because a preliminary injunction is not ordinarily available to cease tax spending, nor would the trial court have issued one in this case. Furthermore, the trial court ignored its own prior

ruling and citation to legal authority and doctrine that a defendant that proceeds with a project in light of litigation is on notice and does so at its own risk. (AA 199, citing Kriebel v. City of San Diego, (1980) 112 Cal.App.3d 693, 704.)

More significantly, at an earlier stage during the post-appeal remand proceedings, the trial court correctly recognized that "the relevant 'status quo' is that which existed in 2011, not the one which existed after the stadium lights were built while the case was on appeal." (AA 199, emphasis added.) As succinctly stated by the trial court, "[t]he law is clear in this setting the proponent of the project here bears the risk of an adverse judicial determination." (Id.)

Further, as mentioned above, the original pleading filed on February 10, 2011 requested Respondent to cease the spending of Proposition S funds for unlawful purposes – and that pleading was ruled to be proven by this Court as alleged by Appellant.[10] This pleading was sufficient to give notice to Respondent that continuance of the act, if found unlawful, would result in

[10] As repeated from above, as of February 10, 2011, Appellant gave notice that is was seeking to "enjoin and prevent any conduct or action of the District proceeding with the project or spending Prop S money for construction or building of new (and previously non-existing) athletic field lights at any of the listed schools." (AA 12)

a judgment suspending the illegal spending and restoring the *status quo ante*. (*See* argument and authorities in Sections V.A and V.B, *ante*.)

Once the action was filed by Appellant seeking the suspension of the restricted bond tax proceeds, for the specific contested purposes, Respondent was sufficiently on notice and proceeded with spending at its own risk. (*See* Gogerty v. Cochella Valley Community College Dist., (1962) 57 Cal.3d 727, 732 [the school district "is not in a position at this late date to complain of an injury which it brought upon itself when it proceeded at its own peril to continue the construction of buildings upon the site before the courts had finally determined that it had a right to do so."].)

The trial court's basis and concern of "due process" is neither a factually nor legally supported reason for denying Appellant's request for repayment of the illegal expenditures that Respondent commenced and continued with during the pendency of this lawsuit.

2. Preliminary Injunctions are Ordinarily Not Available in Tax Expenditure Cases and the Trial Court Admits it Would Not Have Issued One

There is a long-standing rule of precedence in this state and nation that challenged tax collections are not ordinarily subject to interruption during the pendency of a taxpayer lawsuit. (*E.g.*, Chiatello v. City and County of San Francisco, (2010) 189 Cal.App.4th 472, 492-493.) Because

there is an adequate remedy at law – which includes a refund or monetary judgment procedure – the collection of a tax will not be halted by the courts. (Id., 189 Cal.App.4th at 493 [it is very rare for a tax to be enjoined where there is only a naked claim of illegality raised].)

> After a full and fresh reexamination of the issue, we believe there are weighty policy reasons why no California taxpayer plaintiff has ever been permitted to halt implementation of a local tax. The hostility to the interruption of local tax revenues—of which article XIII, section 32 is but one example—traces back to the 19th century.

(Chiatello, at 476.)

Some courts, including Division Two of this Fourth District Court of Appeal, have held that "pay first, litigate later" applies broadly beyond specific and statutory provisions. (*See*, Riverside County Community Facilities Dist. v. Bainbridge 17, (1999) 77 Cal.App.4th 644, 660-661.) The rationale that taxes may continue to be collected during the pendency of litigation is based on the remedy of available repayment. Notwithstanding that this case requests repayment of *spent* rather than *collected* money, the fact that there remains a legal remedy of repayment most often bars a preliminary injunction. (*See* Intel Corp. v. Hamidi, (2003) 30 Cal.4th 1342, 1352 ["The rationale in order to obtain injunctive relief the plaintiff must ordinarily show that the defendant's wrongful acts threaten to cause

irreparable injuries, ones that cannot be adequately compensated in damages."], italics in original.)

Repayment is required under statutes like Section 526a because, like other taxpayer statutes, Section 526a follows the constitutional principle that a taxpayer cannot bring a suit to enjoin an illegal tax until the taxpayer has actually been assessed for or paid the tax.[11] This principle goes back more than one hundred years. (Dows v. Chicago, 78 U.S. 108, 110 (1871).)

In the face of the California Constitution and 140 years of precedent under United States Supreme Court, the trial court's demand that Appellant should have asked for a preliminary injunction as a prerequisite to obtain its rightful remedies is an error of law. Once again, this is buttressed by the trial court's own acknowledgement that any preliminary injunction request would have been futile. (RT 70:6 - 70:16)[12]

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[11] Section 526a similarly requires standing by persons or members who are "assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein." (*See also*, Cal. Ed. Code § 15284, subd. (a) [plaintiff objectors must include members or a person "who is assessed and is liable to pay . . . or who has paid an ad valorem tax on real property . . . within one year before the commencement of the action"].)

[12] Without precedence or legal authority, the trial court nonetheless demanded that Appellant should have, in futility, made a motion for a preliminary injunction. (RT 70:6-70:16)

3. There is No Actual Legal Impediment Preventing an Order Allocating Money to Repay or Pay for Legally Authorized Projects

The trial court erred in accepting Respondent's argument that an order for restitution *might* violate tax or bond issuance rules. (AA 399) The trial court additionally erred by ruling a declaration submitted by Respondent was unrebutted, and further erred because there was no substantive law, regulation or other legal issue to rebut.

Contrary to the view of the trial court, Appellant *did* rebut Respondent's arguments that refunding the illegally spent money would be too difficult. (AA 385) Furthermore, the declaration submitted by Respondent financial officer Jenny Salkeld is nothing but a few naked conclusions without any legal authority or evidence to rebut. (AA 377)[13] The declaration contains no legal support, treasury regulation, or *evidence* that the bonds, or any investor holding a bond certificate, would have their tax rates or any tax-free status jeopardized. (AA 377) Furthermore, even if Respondent had provided authority that the bonds could be jeopardized, Respondent provided no information that such a result in any way absolves Respondent from repayment.

[13] Declarations providing only legal conclusions should be dismissed. (Leflore v. Grass Harp Prods., (1997) 57 Cal.App.4th 824, 837.)

Respondent's reliance on un-cited "IRS code and Treasury Regulations" is so broad as to be ineffectual. (AA 377)[14] As rebutted and argued by Appellant, under the same un-cited codes and purported regulations, it is equally plausible that allowing illegal expenditures to remain could cause problems and jeopardize tax exempt status of any issued bonds. (AA 385)

The trial court further based its ruling on speculation and fear that restitution "would carry with it the danger of involving the court in the increasingly *difficult* arcane world of public school finance. . ." (AA 399, emphasis added.) The trial court's speculation (of a legal prohibition) and fear (of difficulty) are not proper grounds for denying Appellant restitution, nor are they supported by any *facts* in the underlying record for this case.

As ruled by the California Supreme Court, "we cannot let the *difficulties* of adjudication frustrate the principle that there be a remedy for every substantial wrong." (Dillon v. Legg, (1968) 68 Cal.2d 728, 739, as

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[14] For the "Internal Revenue Code" *see* United States Code, Title 26, Sections 1 through 9834. For "Treasury Regulations" *see* Code of Federal Regulations, Title 26, parts 1 through 801. Respondent suggests there may be a prohibition, threat to tax exempts status, or expensive difficulties *somewhere* within those laws and rules. The trial court curiously suggests Appellant should have rebutted one or more of those unidentified laws, rules, or unstated expenses.

quoted in Beckwith v. Dahl, (2012) 205 Cal.App.4th 1039, 1051-1052, emphasis added.)

In addition to a separate fund, out of which listed Proposition S projects could be constructed (AA 326, 330; RT 66), there are a number of restitution options that never came up for discussion[15] because the trial court made a threshold ruling that it would not grant or allow restitution based on pleading, due process and other grounds.

The trial court refused to explore or address any direct, indirect, or alternative means of restitution, and there is no support that a court order providing some form of restitution would be too difficult or expensive, or even difficult or expensive at all.

4. The Appellant, as a Representative Class of School District Taxpayers, is Not an Impediment to Some Form of Restitution

The trial court erred in legally differentiating between Appellant and what it deemed to be "actual taxpayers." (AA 398, emphasis in original.) As a matter of law (and the law of this case), Appellant and its members are

[15] E.g., Restitution in the form of replacement projects paid from respondent's general or capital improvements fund, or property tax bill credits or rebates, are just a few examples of simple types of restitution that could be made and ordered via a judgment, injunction or writ.

a representative group of "taxpayers" for purposes of this taxpayer lawsuit.

As stated by this Court in Taxpayers:

> Liberally construing Code of Civil Procedure section 526a, we conclude Taxpayers has standing to bring the instant cause of action on behalf of its members who are residents of City and Respondent and are taxpayers.

(Taxpayers, 215 Cal.App.4th at 1031.)

This is consistent with the text of Section 526a which states in part:

> An action to obtain a judgment … may be maintained … either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.

The fact that restitution may not be directly made to any individual taxpayer is not an impediment to reverse and compensate for the illegal spending. Ratepayers will both directly and indirectly benefit by the repayment of funds in a manner that credits the funds in question or puts them to their lawfully authorized and intended use. In this manner, taxpayers will be relieved from paying for the illegal expenditures on their tax bills for years to come.

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D. APPELLANT REQUESTS THIS COURT TO ORDER RESTITUTION OR ALLOW A NEW JUDICIAL ASSIGNMENT UPON REMAND

1. This Court has Jurisdiction to Independently Order Restitution and Direct the Trial Court to Do So on Remand

Appellant requests this Court to exercise its powers to directly order restitution of the undisputed accounted amount of unlawful expenditures requested by Appellant. Such an action by this Court is both prudent, from the standpoint of judicial economy, and necessary considering the trial court's uncertainty in applying the decision and disposition of this Court and the mishandled laws and prevailing party equitable principles that should have been applied to Appellant's proven claims and request for repayment of the illegal expenditures. To the extent this Court needs to remand the matter to consider and decide the appropriate *form* of restitution, Appellant requests a supplemental order that a judicial reassignment under Section 170.6 may be exercised by Appellant. (*See* further discussion, Section V.D.3, *post*.)

This Court (as a reviewing court) has the power to order restitution to a prevailing party after reversing an erroneous judgment. (Western Hardwood Lumber Co. v. California Employment Com., (1943) 58 Cal.App.2d 403, 413.) Appellant contends this would clarify and fulfill the original mandate when this Court ordered that Appellant be granted its rights and remedies entitled under its *First Cause of Action*.

2. Additional Authority for Post-Judgment Restitution May be Ordered by this Court Under Section 908 Upon Reversal and Remand

In addition to the above points and authorities for restitution under Section 526a and Appellant's declaratory relief cause of action (Sections V.A and V.B, *ante*), Appellant is also entitled to restitution under Section 908 following money spent after a judgment was entered, but then later reversed. Section 908 states:

> When the judgment or order is reversed or modified, the reviewing court may direct that the parties be returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The reviewing court may take evidence and make findings concerning such matters or may, by order, refer such matters to the trial court for determination.

In its request to not repay anything, Respondent informed the trial court that "money was not spent for the lights until after the Superior Court had ruled that the expenditure was valid." (AA 53) Thus, under Section 908 Appellant has an additional and separate independent statutory right to restitution. As stated in Levy v. Drew, (1935) 4 Cal.2d 456:

> It is well settled in California that when a judgment is reversed on appeal the appellant is entitled to restitution of all things taken from him under the judgment. After reversal

> the respondent stands in the position of a trustee of appellant of the property obtained under the judgment. Restitution may be sought in the same or in an independent action.

(Id., at 459-460, citing Ward v. Sherman, (1909) 155 Cal. 287; *see also* Asato v. Emirzian, (1918) 177 Cal. 493.)

Although the posture of Appellant and its member taxpayers is not identical to cases involving the direct repayment via an executed money judgment, the principle remains the same. Respondent gained an unlawful benefit by illegally spending Proposition S funds, to the detriment of district taxpayers, after the original (reversed) judgment. (*See* discussion in Sections V.A.3 and V.A.4, *ante*.)

In Rogers v. Bill & Vince's, (1963) 219 Cal.App.2d 322, 326-327, the court of appeal affirmed a lower court's order granting restitution to a defendant after a reversal of judgment in favor of the plaintiff. In doing so, the court in adopted and restated the rule in American Jurisprudence 2d:

> Even where the reversal is not conclusive of the rights of the parties, as where … the cause [is] remanded for further proceeding, some courts, speaking of restitution as an absolute right, hold that it must be made without consideration of what the further result of the litigation may be …"

(*See* Rogers, 219 Cal.App.2d at 326-327, *citing* 5 Am.Jur.2d, § 998, pp. 424-425.) The court in Rogers went further, stating the principle that "[h]e who obtains money through enforcement of an erroneous judgment should surrender it when the judgment is reversed." (Id.)

Here, where Respondent proceeded with spending and taking advantage of the illegal proceeds during the time the matter was pursued on appeal, an order for repayment, reallocation, and restitution is appropriate and should be ordered.

3. Upon Reversal and Remand Appellant Seeks a Right to Exercise its Right For Assignment of a New Judicial Officer

Upon reversal and remand of the restitution matter to the trial court for further consideration, Appellant requests an advance order in this Court's disposition that Appellant may exercise its right for reassignment under Section 170.6.

This request is appropriate and necessary in light of what previously occurred in the trial court. Following remand of the Taxpayers decision by this Court, Appellant exercised its right for reassignment under Section 170.6 but was denied. (AA 177-179) At oral argument on the reassignment matter Judge Dato rejected Appellant's request because he believed there was no reexamination of any issue to be conducted for the case (RT 2), and the "term 'new trial' is intended to cover situations where the case is to be retried and not merely remanded with instructions to perform some specific task, for example recalculate interest." (RT 3) Judge Dato noted "that there may be an element of discretion" in some actions of the trial court, but his denial of the Section 170.6 reassignment was based on a belief the trial court's

interpretation of the Court of Appeal's ruling would not be a re-examination of any issues. (RT 7)

Appellant contends that the trial court's consideration of further remedial orders and other equitable considerations involve a "retrial" or "re-examination" of issues between the parties. Thus, Appellant respectfully requests that, in this Court's disposition upon reversal, an order be included allowing Appellant a right to exercise a Section 170.6 request for reassignment.

This requested order can prevent any incongruence (or "improvidence" as phrased by the trial court, AA 395-396) with what previously occurred in the trial court. There is authority for such an order and guidance where an issue is likely to be raised again. (*See* Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp., (1997) 16 Cal.4th 694, 719.)

VI.

CONCLUSION

Because the requested type of a restitutionary remedy is encompassed as a natural legal remedy in Appellant's pleaded claims and general prayer, it was included in the disposition and mandate of this Court upon remand.

Therefore, the post-judgment order of the trial court should be reversed with directions that that Respondent should be ordered to repay and make the amount of $2,616,173 available to provide for replacement voter-authorized Proposition S project or for a refund or credit to taxpayers so they will not have to pay for illegal expenditures and unauthorized projects.

Appellant requests its costs and attorneys' fees on appeal.

Respectfully Submitted,

Dated: November 7, 2014

LAW OFFICE OF CRAIG A. SHERMAN

/s

Craig A. Sherman, Esq.
Attorneys for Appellant
TAXPAYERS FOR ACCOUNTABLE
SCHOOL BOND SPENDING

VII.

CERTIFICATION OF WORD COUNT COMPLIANCE

Counsel of record for appellant, Craig A. Sherman, hereby certifies that pursuant to California Rules of Court, Rule 8.204, subd. (c), that the above *APPELLANT'S OPENING BRIEF* has been produced using 13-point Roman type, and contains 9,760 words (including footnotes, headings, and citations), which is less than the 14,000 words permitted by this rule, as counted by the word counter of the computer program used to prepare the brief.

Dated: November 7, 2014

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