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 REPLY BRIEF

An Appeal From a Post-Judgment Order

of the Honorable Timothy B. Taylor, Presiding

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I.

INTRODUCTION

Respondent raises a number of excuses for how and why it should not have to return the illegally spent bond proceeds. As far as Respondent is concerned - it *already* spent the money, it is *too hard*, and it was *never on notice* that it might be responsible for paying it back.

In this case, as Justice Holmes said, "a page of history is worth a volume of logic." (New York Trust Co. v. Eisner, (1921) 256 U.S. 345, 349.) Respondent cannot deny awareness of this Code of Civil Procedure[1] § 526a injunction, declaratory relief, and waste lawsuit when it decided to spend the subject bond funds on the project. Nevertheless, Respondent responds to this appeal with a purpose and conviction to ensure and capitalize on Appellant achieving as little effective and meaningful, and no financial restoration relief, as possible, even after Appellant prevailed in the underlying case. Respondent further argues that courts are powerless to order repayment of illegal expenditures, and even if courts did have such power, they could not exercise it unless a significant bad faith standard could be proven.

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

The arguments presented by Respondent are unsupported by law and, in many respects, are disrespectful to the purpose of taxpayer lawsuits and the finding of illegal spending decided by this Court. In effect, Respondent blames Appellant and the courts for its continued spending despite the initial and timely filed lawsuit (30 days after approval) to suspend expenditures. Notwithstanding receiving notice, Respondent continues to seek judicial endorsement that its unlawful expenditures remain substantially unaffected despite a dearth of legal authorities in support of its proposition.

Respondent fails to address the trial court's numerous errors of law presented in Appellant's opening brief or the substantial body of law supporting restitution in this case. (O.B. at 16-17.) Instead, Respondent misconstrues multiple case law authorities in arguing that restitution and repayment remedies do not apply to a conclusively determined representative taxpayer group prevailing in a taxpayer action:

> Code of Civil Procedure section 526a permits a taxpayer to bring an action to restrain or prevent an illegal expenditure of public money. No showing of special damage to a particular taxpayer is required as a requisite for bringing a taxpayer suit. [Citation.] Rather, taxpayer suits provide a general citizen remedy for controlling illegal governmental activity.

(Taxpayers for Accountable School Bond Spending v. San Diego Unified School District ("Taxpayers"), (2013) 215 Cal.App.4th 1013, 1031-1032, *citing* Connerly v. State Personnel Bd., (2001) 92 Cal.App.4th 16, 29.)

Respondent does not oppose the *de novo* appellate standard whereby the mandate and appellate ruling by this Court remains the *law of the case* (R.B. at 11-12.), but does oppose *de novo* review where the trial court applied the wrong legal standards. (R.B. 12 ["abuse of discretion is shown when the trial court applies the wrong legal standard."].) In addition, Respondent fails to recognize that *de novo* review is proper where facts are substantially undisputed. [2]

This Court should reject Respondent's effort to preclude an adverse judicial or practical result arising from Respondent's illegal spending. Appellant requests that this Court adhere to ordinary principles that illegally spent money must be repaid, and that Respondent assumed the risk (of repayment) by continually spending during the pendency of the lawsuit.

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[2] De novo review is appropriate where facts are substantially undisputed. (Silvers v. Board of Equalization, (2010) 188 Cal.App.4th 1215, 1219 ["We review the trial court's ruling de novo because the case concerns the application of constitutional and statutory provisions to undisputed facts."]; Schweitzer v. Westminster Investments, Inc., (2007) 157 Cal.App.4th 1195, 1204 ["The parties agree that we review de novo the court's interpretation of the statutory scheme, as well as its application to the undisputed facts."].)

II. NEITHER THIS COURT, NOR THE TRIAL COURT, LACK AUTHORITY TO ORDER SOME FORM OF A RESTITUTION REMEDY OR MONEY JUDGMENT FOR REPAYMENT

Respondent argues for the first time in this case that this Court and the trial court are powerless to order restitution. (R.B. at 19-20.) Respondent ignores the power of courts to define and direct law, as well as award monetary relief against government agencies in all types of cases. (County of San Diego v. State of California, (2008) 164 Cal.App.4th 580, 608 [recognizing that a court can award monetary relief in a declaratory relief action under appropriate circumstances]; Mandel v. Myers, (1981) 29 Cal.3d 531, 540 [recognizing the rule and authority allowing courts to order use of already appropriated funds, and further citing a variety of cases demonstrating a court implementing constitutional rights may result in the expenditure of funds in a manner that the Legislature has not contemplated and yet poses no separation of powers problems whatsoever.].)

While a court's powers might be limited in requiring other branches of government to *enact* laws or appropriate money through *new* legislation (County of San Diego v. State of California, (2008) 164 Cal.App.4th at 593-

594),[3] this does not detract from a court's primary role in ordering compliance:

> [O]nce funds have already been appropriated by legislative action, a court transgresses no constitutional principle when it orders the State Controller or other similar official to make appropriate expenditures from such funds.

(Id., at p. 594 *quoting* Mandel v. Myers, (1981) 29 Cal.3d 531, 540.)

Respondent, in two short paragraphs, attempts to upend jurisprudence on judicial review reaching back to Marbury v. Madison, (5 U.S. 137, 176-180 (1803) [establishing judicial review]) by arguing that neither the trial court nor this Court has the power to grant restitution. (R.B. at 19.) The single case cited by Respondent for this momentous revision of Constitutional law is contained in an opinion of this Court related to alleged unfunded mandates by the State Legislature. (R.B. at 20, *citing* California School Bds. Assn. v. State of California ("California School"), (2011) 192 Cal.App.4th 770.) California School does not apply to this case as Respondent dictates. In California School, the California School Boards Association sought to compel the Legislature to fully fund mandated programs. (Id. at p. 779.) This Court found that ordering the Legislature to

[3] There is a broader rule which forbids courts from compelling the legislature to enact *any* legislation, but the broader question is not at issue here. (Id. at pp. 593-594.)

appropriate funds to fulfill a mandate is not the role of courts under the Separation of Powers doctrine "*[u]nder the particular circumstances of the case*." (Id. at 798-799, 803, italics in original.)

This Court also addressed a similar separation of powers issue in County of San Diego v. State of California, (2008) 164 Cal.App.4th 580. In that case, this Court found that San Diego County and Orange County could not compel the State Legislature to appropriate funds "in future state budget acts" to reimburse certain statutory mandates. (Id. at pp. 587, 594.)

Other courts have found that the cases hold that the Legislature (or an agency) cannot make the claim that a court may not order a state agency to do anything requiring the expenditure of money it would not otherwise spend. (Newton-Enloe v. Horton, (2011) 193 Cal.App.4th 1480, 1491-1492; *see also* Estate of Cirone, (1987) 189 Cal.App.3d 1280, 1287, *disapproved in part,* Mandel v. Myers, (1981) 29 Cal.3d 531, 551, fn. 9; Id. at 540 ["a variety of cases demonstrate that under some circumstances a court decision implementing constitutional rights may result in the expenditure of funds in a manner that the

Legislature has not contemplated and yet pose no separation of powers problems whatsoever."].)[4]

Once again, Appellant does not seek a court order for future new funding or new legislation. Additionally, Respondent is not an agency or body that makes legislated or budget appropriations in the manner discussed in California School. (Id., at p. 799.) California Constitution Article IV, Section 1 clearly defines the Legislature as the Senate, House and the People of California, with the People having reserved for themselves the power of initiative and referendum. The People in this case are essentially the legislators who preside

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[4] There is a long line of consistent reported cases in federal Endangered Species Act matters whereby courts do not accept the lack of appropriations or other excuses to fulfill legislated mandates. As stated by the U.S. Supreme Court:

> [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with common sense and the public weal.

(Tennessee Valley Authority v. Hill, 437 U.S. 153, 195 (1978).)

> Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.

(Id. at 194.)

Agencies such as the Respondent school district, where the People have acted in their Constitutional and congressional legislative capacity, are not excused from ultimate lawful compliance despite a separation of powers appropriation and funding defense.

over the school district as voting taxpayers in the representational capacity of Appellant. This Court now stands to implement its decision on behalf of Appellant affecting the People's constitutional rights. (Taxpayers, at p. 1022 [interpreting article XIII A, section 1 of the California Constitution].)

Pursuant to Proposition 39, the taxpaying public voted to approve Proposition S for *authorized* spending on specific projects. (Taxpayers, at pp. 1024-1025.) An order or judgment for payment or repayment of money is not "interfer[ing] with powers exclusively committed to the other branches of government." (California School, at p. 799.) Rather, this Court is simply exercising its power of judicial review in declaring unlawful the expenditures outside the authorization of the People and Appellant under Proposition S, as well as the Constitutional restrictions under Proposition 39, and is ordering them unlawful and repaid via a remedy or vehicle under principles of restitution. (*See* Mandel v. Myers, (1981) 29 Cal.3d 531, 540.) The judiciary and this Court have such power and are not constrained, as Respondent suggests, in exercising it.

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III. *DE NOVO* REVIEW IS THE PROPER STANDARD OF REVIEW OF THIS COURT'S DISPOSITION, THE TRIAL COURT'S APPLICATION(S) OF LAW, AND SUBSTANTIALLY UNDISPUTED FACTS

All of the issues and matters presented in this appeal should be reviewed *de novo*. The parties agree that the appellate ruling disposition and mandate is reviewed *de novo*. (R.B. at 11.)[5]

Although Respondent fails to address it (as substantially presented in Appellant's opening brief at pages 14-17), the interpretations and misapplications of law are also reviewed *de novo*. Additionally, the facts in this case are substantially undisputed. There is undisputed language in the general and factual allegations of the pleading. (AA at 2-11.) There are admissions by Respondent that it expended restricted public funds *after* Appellant filed its lawsuit. (AA at 244.) There are undisputed facts and law of the case from the Taxpayers decision, as well as the procedural history of the parties and the trial court upon remand. (O.B. at 4-13; AA at 391-399.) Then, there are the remedies that are available as a matter of law and equity in the context of a taxpayer Section 526a lawsuit. The remaining issue – and the only possible matter that could have been a discretionary or evidentiary ruling – was whether the trial court accepted and believed Respondent's single declarant that

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[5] Appellant made the same argument using the same authority. (O.B. at 14, *citing* Ayyad v. Sprint Spectrum, L.P., (2012) 210 Cal.App.4th 851, 859.)

restitution would be *difficult* and could possibly put bonds in jeopardy due to undisclosed provisions in the IRS Code and Treasury Regulations. (AA at 376-377 [Declaration of Jenny Salkeld]; R.B. at 40-41; AA at 399.) However, Salkeld's conclusions, without any supporting law or facts, are also subject to *de novo* review.

A. The Parties (Possibly) Agree that *De Novo* Review is Applicable to Review of the Trial Court's Interpretations and Applications of Law

Respondent claims that "the *de novo* standard applies only to determination of what relief the Court of Appeal's Disposition *required* the Trial Court to award." (R.B. at 11, emphasis added.) Respondent ignores and does not address the substantial authorities and argument of Appellant that matters of law are review *de novo*. (O.B. at 14-17.)

Ignoring said rules, Respondent argues that all determinations and rulings of the trial court, except for the mandate question, are reviewed under an abuse of discretion standard. (R.B. at 12-13.) Respondent's position is incorrect and flies in the face of well-settled rule that questions of law are reviewed *de novo*. (*See*, e.g., Committee for Green Foothills v. Santa Clara County Bd. of Supervisors, (2010) 48 Cal.4th 32, 42; *see also* Haworth v. Los Angeles County Superior Court, (2010) 50 Cal.4th 372, 383 [mixed questions of law and fact reviewed *de novo*].)

Unfortunately for Respondent, the very cases it cites contradict its arguments. (R.B. at 11-12, *citing* Ayyad v. Sprint Spectrum, L.P., (2012) 210 Cal.App.4th 851, 859, which in turn cites Leese v. Clark, (1865) 28Cal. 26, 36.)

In Leese, the California Supreme Court determined that review of multiple judgments rendered against several defendants, "was a question of law and not a point of fact." (Id. at 35-36.) The reasoning of Leese is consistent with Appellant's position – that because the question of whether the judgment of a lower court is entered in accordance with the mandate of a higher court falls into the category of *question of law* it is reviewed *de novo* along with all other *questions of law*.

Further, the ruling In re Groundwater Cases, (cited by Respondent at R.B. pages 11-12), found that "the interpretation of the language of a judicial opinion is a legal determination, and it is therefore subject to de novo review." (In re Groundwater Cases, (2007) 154 Cal.App.4th 659, 674.) The decision in In re Groundwater Cases cites to Schering Corp. v. Illinois Antibiotics Co., 62 F.3d 903 (1995) in which Judge Posner clarified that:

> The construal of judicial opinions is a form of legal rather than factual determination, and the review of errors of law in an injunctive proceeding, as in other proceedings, is plenary.
>
> For the district judge appears to have based his interpretation of the injunction not on anything specific to this case, anything as to which he might have a greater familiarity than we, but merely on his reading of the cases that discuss the standard for interpreting injunctions.

(Id., at p. 908.)

Judge Posner makes clear that – where a lower court considers an injunction (or other ruling) based on a reading of cases discussing the legal standard for that ruling – then the lower court's construal of that standard, according to a reading of judicial opinions, is a matter of law that is reviewed *de novo*. (Id.) This is the very situation present in the facts of this appeal.

The trial court's reasons for denying the motion were based on the misreading and misapplication of law regarding availability and procedural requirements for restitution relief in a Section 526a taxpayer waste lawsuit. (AA 391-399; *see* discussion in Section IX, *post*.)

B. The Determinations Made by the Trial Court in This Appeal are Matters of Law Subject to *De Novo* Review

Where the trial court "is mistaken about the scope of its discretion . . . [and] if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law." (City of Sacramento v. Drew, (1989) 207 Cal.App.3d 1287, 1298.) As outlined in Appellant's opening brief (O.B. at 16-17), and as further explained and cited throughout the brief (O.B. at 18-48), the trial court was additionally mistaken about the scope of its discretion and acted in accordance with that mistaken view. A specific example is the trial court's determination that a preliminary injunction motion was a consideration and requirement of the court as part of the granting of restitution. (AA 398; RT

68-69; discussed in O.B. at 35-37.)[6] This is one example of both an incorrect construal of judicial opinions and a mistaken legal barrier affecting the trial court's own discretion and ability to act – which it used to deny Appellant appropriate and requested relief.

Appellant submits that all of the trial court's errors are the result of incorrect construal of judicial opinions and incorrect applications of those cases affecting the trial court's own determinations. (O.B. at 16-17.) Therefore, the substantial, if not all, considerations of the trial court are to be reviewed under a *de novo* standard.

C. Respondent's Misapplies the Abuse of Discretion Rule: Even Under an Abuse of Discretion Standard, the Trial Court's Error Warrants Reversal

Respondent cites to Costco Wholesale Corporation v. Superior Court, (2009) 47 Cal.4th 725, as legal authority supporting application of an abuse of discretion and "substantial evidence" standard of review for this case. (R.B. at 12-13, *citing* Id., at p. 733 ["[W]hen the facts asserted in support of and in opposition to the motion are in conflict, the trial court's factual findings will be upheld if they are supported by substantial evidence."].) A plain reading of Costco indicates that a substantial evidence standard applies when *facts* are in conflict. (Id.) The ruling in Costco was based on an appeal from a discovery order in which there was a dispute as to whether privilege applied. (Id. at 733

[6] *See* discussion and authorities in Section XI, *post*, dispelling such requirements.

["A trial court's determination of a motion to compel discovery is reviewed for abuse of discretion."].) Because discovery issues are fact specific and subject to (extreme) factual controversy, a trial court has the best knowledge and is in the best position to make a ruling.

Respondent further makes citation to cases involving a statute that expressly authorizes and directs *discretion* for a court to dismiss an action if not timely prosecuted. (R.B. at 13, *citing* Equilon Enterprises LLC v. Board of Equalization, (2010) 189 Cal.App.4th 865, 881; Denham v. Superior Court of Los Angeles County, (1970) 2 Cal.3d 557, 564 [instances applying California Code of Civil Procedure § 583, subd. (a)].)

Additionally, the abuse of discretion standard of review does not give the trial court arbitrary latitude, as Respondent would have this Court believe. Instead, stemming from the California Supreme Court decision in Bailey v. Taaffe, (1866) 29 Cal. 422, there is over one hundred years of jurisprudence contrary to Respondent's argument. The Supreme Court in Bailey explained it best:

> It is true . . . that orders like the present, in legal parlance, rest very much in the discretion of the Court below, and will not be disturbed by this Court unless we are satisfied that the order is so plainly erroneous as to amount to an abuse of discretion.
>
> **The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles.** It is not a mental discretion, to be exercised ex gratia, but a legal

> discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.

(Bailey, at pp. 423-424, citations omitted and emphasis added.)

In People v. Jones, (1927) 87 Cal.App.482 the Court of Appeal noted that "[c]itations might be multiplied almost without number showing that the rule stated in Bailey v. Taaffe has been followed and applied to the discretion conferred upon the court in a great variety of cases." (Id. at pp. 496-497 [explaining that a ruling based on grounds flatly contrary to provisions of law cannot be regarded as other than an abuse of discretion, under any accepted definition of that term].)

Even if this Court were to determine that some or all of the issue raised on appeal are subject to an abuse of discretion standard, the trial court's ruling here should still be reversed. As stated in City of Sacramento v. Drew, (1989) 207 Cal.App.3d 1287:

> The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action . . . .' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion . . .
>
> The legal principles that govern the subject of discretionary action vary greatly with context. [Citation.] They are derived from the common law or statutes under which discretion is conferred.

(Id., at 1297, *citing* Hurtado v. Statewide Home Loan Co., (1985) 167 Cal.App.3d 1019, 1021-1026.)

In this case, where this Court had already established that Appellant had proven Section 526a taxpayer waste and was entitled to a full judgment on the matter, the trial court had limited or no discretion to stray from and constrain ordinary legal principles to find reasons to deny the existence of a rightful and available remedy.

IV. PLAIN LANGUAGE OF THE COURT OF APPEAL'S DISPOSITION INCLUDES LAWFULLY AVAILABLE RELIEF UNDER THE SUBJECT FIRST CAUSE OF ACTION

The trial court and Respondent seize on the prospective ("stop spending") injunctive relief granted and claim it is sufficient. (AA 375; AA 394.) As discussed in Section I, *ante*, the language of this Court's disposition contemplated more than merely enjoining the "District from using Proposition S bond proceeds to pay for field lighting at Hoover's stadium and any other high school stadium. . ." (Taxpayers at pp. 1066-1067.)

This Court ordered that Appellant is entitled to a declaratory relief judgment "including but not limited to" an injunction suspending spending. This presumes *other* available relief under the claim for declaratory relief. The trial court precluded and cut-off consideration of Appellant's requested declaratory (and restitution) relief resulting in reversible error on this ground. (AA at 397-399 [trial court ruling saying it had no authority]; O.B. at 16-17 [arguing the legal error].)

This Court should reject Respondent's argument which reduces the ruling of this Court to mere surplusage. Respondent incorrectly argues that this Court did not expressly make a ruling or disposition that restitutionary relief is allowed or authorized. (R.B. at 21)[7] To the contrary, this Court granted Appellant's entire *First Cause of Action* including declaratory relief and did not limit the specific relief granted thereunder. (Taxpayers, at pp. 1066-1067.)

Respondent nonetheless incorrectly argues that because this Court did not expressly reference the term restitution or repayment,[8] Appellant's arguments about such additional or available relief does not fit under the Court's disposition and mandate. (R.B. at 20-21 ["The Disposition says nothing expressly about disgorgement or any other form of monetary relief. .

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[7] Respondent implicitly makes the contention that only "expressly" stated mandates of the Court of Appeal can be a mandate to the trial court. Appellant argues for the legal availability of restitution relief because there is, at a minimum, an implicit mandate for monetary relief included in the express language of the disposition - "including, but not limited to. . ."

[8] Throughout its brief Respondent argues for a most unlikely denomination and remedy of "disgorgement" so as to make its case and argument against restitution or repayment appear more egregious and compelling. A simple look at Respondent's demanded requirement (elements) for disgorgement (R.B. at 18) make it readily apparent that its denominated remedy is inapplicable here. (*See* a more complete discussion of Respondent's new disgorgement/restitution standard in Section VII, *post*.)

. . surely the Court of Appeal would have include [sic.] a specific reference to it"].)

In making its argument, Respondent simply re-quotes the findings of the trial court in its Minute Order (R.B. at 31-32 citing AA 391-399.) Respondent discounts the "including, but not limited to" language by proffering a block quote with additional argument that lies without citation and should be viewed in that light. (R.B. at 31 [Respondent phrases the issue as whether the trial court "*could have* or *should have*" come to a different result. Italics in original.) The trial court never reached such a decision because of a misinterpretation of judicial opinion and misapplication of the law whereby the trial court rejected its ability to grant restitution because the Court and the law did not authorize it. (AA at 397-398; *see* discussion in O.B. at 29-33.)

For example, Respondent states "[t]here was no express requirement for disgorgement in the Disposition and no mention of it in the Opinion or pleadings." (R.B. at 30.)[9] Respondent does not provide any authority whatsoever for its claims that only "express" mention in a disposition will restrict or entitle a party to further legally available relief. Once again, Respondent's argument is belied by the fact that this Court anticipated that

[9] As noted in Sections IX and X, *post*, the inclusion of particular pleading for "restitution" or "disgorgement" are not required for just relief for a prevailing party under as long as it falls within the gravamen of its action and/or general prayer for relief.

unexpressed (implied) relief was to be given by a plain reading of the "including, but not limited to" language in the disposition.

What is clear by this Court's disposition is that it remanded to the trial court to "issue" both injunctive and declaratory relief. (Taxpayers, at p. 1066-1067.) The trial court entered injunctive relief in stopping the current illegal activities and preventing Respondent from further using Proposition S funds. (AA 198-200)[10] However, the trial court refused to grant Appellant declaratory relief, instead only allowing a calculation of the amount of illegally spent. (AA 232 [¶C].)

Since the Court of Appeal had already determined that the spending was *illegal* (Taxpayers, at pp. 1030-1032), it must be taken that the Court of Appeal expected the trial court to issue some type of *declaratory relief*, namely addressing the types of rights and remedies that would apply to illegally spent money. (*Cf.*, County of San Diego v. State of California, (2008) 164 Cal.App.4th 580, 608 [recognizing that California law allows monetary relief as a remedy for a declaratory relief cause of action].)

Respondent argues that "[t]he Trial Court's Judgment (AA 186-188) and Peremptory Writ (AA 189-190) provided all appropriate declaratory relief by *confirming* that Respondent had no legal right to use Proposition S bond proceeds for field lighting." (R.B. at 32, emphasis added.) Respondent

[10] As both the trial court and Respondent have noted, the injunctive relief was only meant to serve and cease prospective activities; not address any past issues. (AA 394; R.B. at 27.)

uses the term "confirming" apparently acknowledging that this Court had already made the determination Respondent could not use Proposition S bond money for field lighting at Hoover and other schools. (Taxpayers, at pp. 1030-1031 ["(We conclude Proposition S does not authorize the use of bond funds to pay for new field lighting for Hoover's football stadium or for other high schools' stadiums for which Proposition S did not specifically list field lighting as part of their projects."].) However, a closer inquiry supports a conclusion that the trial court did not grant declaratory relief as ordered by the Court. The closest language in the *Amended Judgment* resembling declaratory relief is:

> Petitioner is granted judgment in its favor, and against defendant and respondent San Diego Unified School District, on its first and second causes of action set forth in the First Amended Verified Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate.

(AA at 187.)

As Respondent stated, the trial court is simply repeating (or "confirming") a core *part* of this Court's mandate. The operative elements of the trial court's ruling include ordering the Respondent to vacate the MND and prepare an EIR, as well as enjoining them from spending Proposition S money on field lighting at Hoover and unauthorized field lighting projects at other schools. (AA at 187-188.) A brief review of the judgment entered by the trial court shows it did not take even the limited step of "confirming" the

illegality of the Respondent's bond expenditures.[11] (Id.) Nor does the trial court follow through in granting Appellant declaratory relief as contained in the *First Cause of Action*.[12] It is telling that the trial court anticipated – and noted its nondiscretionary duty upon remand – of doing *something more* than the mere judgment and injunction. (R.T. at 57; O.B. at 9; AA 200.)

There is no merit to Respondent's argument that the trial court would have exceeded its authority by granting the restitutionary declaratory relief that is the subject of this appeal. The full panoply of legally available injunctive and declaratory relief was intended to be available to Appellant by this Court.

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[11] Although the issuance of the injunction *infers* that the spending must have been ruled illegal, the declaratory judgment is absent of the declaration of law that was requested by Appellant (AA AA 40-42 [proposed judgment]) and ordered by this Court in its disposition. (Taxpayers at 1066-1067 [ordering entry of declaratory judgment for that first cause of action].)

[12] The absurdity of Respondent's separation of powers argument (Section II, *ante*) is made clear here. Under the logic of Respondent, the Court had no power to order Respondent to vacate and rescind the MND and prepare an EIR because both, according to Respondent (R.B. 19-20), would have required ordering or allocating "appropriations" so it could take action to fund the rescission and subsequent EIR study.

V. THIS COURT SHOULD REJECT RESPONDENT'S REQUEST TO IMPOSE A NEW AND UNATTAINABLE STANDARD FOR AWARDING RESTITUTION OR REPAYMENT IN A SECTION 526a TAXPAYER WASTE LAWSUIT

In addition to Respondent arguing that this Court cannot review this case under the Separation of Powers doctrine (Section II, *ante*), Respondent simultaneously invites this Court to create a rule that the mental state of public officials, related to unlawful agency spending decisions, be established by a successful Section 526a taxpayer plaintiff in order to obtain a repayment or restitution remedy. (R.B. at 38.) Respondent argues this despite substantial contrary case law – that bad understandings or motives about *why* decision-makers or administrators did something (later challenged or found illegal) – are irrelevant. The rule on this issue, as stated in City of Fairfield v. Superior Court, (1975) 14 Cal.3d 768, is instructive:

> The first category of questions put by Commercial . . . inquired into the evidence examined and relied upon by the councilmen, and the reasoning process underlying their rejection of Commercial's application. The United States Supreme Court in *United States v. Morgan* (1941) 313 U.S. 409 [85 L.Ed. 1429, 61 S.Ct. 999] condemned as improper such inquiries directed to a quasi-judicial officer. In *Morgan*, the Supreme Court criticized a deposition in which the Secretary of Agriculture was asked what evidence he had read and what briefs he had considered in making a decision: 'the short of the business is that the Secretary should never have been subjected to this examination. ... We have explicitly held ... that 'it was not the function of the court to probe the mental processes of the Secretary.' (313 U.S. at p. 422 [85 L.Ed. at p. 1435].)

> In our recent decision in *State of California v. Superior Court (Veta)* supra, 12 Cal.3d 237, we reaffirmed our adherence to the *Morgan* rule.

(Id. at p. 777.)

This rule applies equally to local legislatures just as it would to decisions of local or executive state agencies such as Respondent. (*See* County of Los Angeles v. Superior Court (Burroughs), (1975) 13 Cal.3d 721, 726.) Respondent muddies the purpose of the rule and the role of the courts in rendering decisions in taxpayer cases (*see* R.B. 38-39) because courts do not look to the "subjective motivation of [the] draftsmen," but instead to the "objective effect of the legislative terms." (Id., at p. 727 ["judiciary must judge by results, not by the varied factors which may have determined legislators' votes. . ."] *citing* Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, (1966) 65 Cal.2d 349, 392.)

The reasoning and policy against using a bad faith or "motive" rule is further explained in County of Los Angeles as:

> Professor Bickel has captured the essence of the policies underlying the judicial principle which we apply in this case. 'It is simply unthinkable,' Professor Bickel has written, "that members of legislative majorities should from time to time be subject to cross-examination in various courts over the country regarding their state of mind when they voted. That is no more representative government than it would be judicial process for judges to be subject to cross-examination by legislative committees about their state of mind in deciding cases.

> It seems almost anticlimactic to add that legislatures whose members were subject to call for testimony in this fashion would be hard put to find the time to legislate. (Bickel, The Least Dangerous Branch (1962) p. 215.)

(Id., 13 Cal.3d at pp. 731-732.)

Respondent attempts to create a "bad faith" restitution standard by citing to cases brought against a "government official personally to account for and repay all improperly expended funds." (R.B. at 38-39, *citing* Stanson v. Mott ("Stanson"), (1976) 17 Cal.3d 206, 209, emphasis added.) Multiple reasons, including Respondent's own arguments, indicate why Stanson is inapplicable to this case.

Here, there is no intent or effort of Appellant to hold trustees or bond project administrators personally responsible for the illegal spending that occurred. Furthermore, Respondent grossly mischaracterizes Stanson:

> In many instances the propriety of expenditures may turn on an evaluation of such subtle factors as the "style" or "tenor" of the public agency's presentation. Under such circumstances, it is unrealistic to assert, as the *Mines* [*Mines v. Del Valle* (1927) 201 Cal.273] court did, that "[there] is no reason for . . . ever making any illegal expenditure of the public's moneys."

(R.B. at 39 *quoting* Stanson, at p. 224.)[13]

The remainder of Respondent's citation to Stanson is equally objectionable for failing to put the quoted passage in context where Respondent cites, "Numerous considerations may be relevant to the

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[13] Stanson was referring to the "line between unauthorized campaign expenditures and authorized informational activities." (Id.)

determination of whether a public official has acted with due care or not . . . or whether the official relied upon legal advice or on the presumed validity of an existing legislative enactment or judicial decision in making the expenditure." (R.B. at 39 *citing* Stanson at p. 227.)

The passage cited by Respondent for support of a good faith/bad faith standard is also contradicted by the holding of Stanson which rejected both, instead demanding an ordinary negligence or "due care" standard:

> We conclude instead that such public officials must use "due care," i.e., reasonable diligence, in authorizing the expenditure of public funds, and may be subject to personal liability for improper expenditures made in the absence of such due care.

(Stanson, at pp. 226-227.)

Additionally, contrary to Respondent's argument, considerations of equity do not apply to illegal actions (and contracts) to assist the wrongdoing party. (*See* Lexin v. Superior Ct., (2010) 47 Cal.4th 1050, 1073 [in the context of similar "bad faith" type of actions under Code Civ. Proc. § 1090].) Finally, the standard in Stanson has since been further explained that the "measure of the impropriety of an expenditure, within the meaning of *Stanson*, is not ill-wisdom but ultra vires." (Harvey v. County of Butte, (1988) 203 Cal.App.3d 714, 719.)

Respondent additionally argues for a *safe harbor* exception to paying back illegal expenditures based on the timing and expediency that taxpayer plaintiffs and the courts can obtain judgments. (R.B. at 1-2, 34-35.) Despite

the unavailability of a preliminary injunction,[14] Respondent seeks to create a legal void and untouchable time frame whereby taxpayer funds spent during the pendency of a lawsuit, that are later found to be illegal, are judicially and remedially off-limits and not subject to repayment.

This Court should reject Respondent's request to create a special rule excusing its illegal spending after the filing of this lawsuit. Not only does Respondent's proposed rule lack any strong basis in favor of fairness and government accountability, but also ignores substantial legal authorities against such a rule. (*See*, further discussion in Section XI, *post*.)

VI. POLICY AND EQUITY CONSIDERATIONS: FOR EVERY WRONG, THERE IS A REMEDY; AND ILLEGAL GOVERNMENT ACTION SHOULD BE SET ASIDE AND REVERSED TO THE *STATUS QUO ANTE* TO THE EXTENT POSSIBLE

Respondent incorrectly construes the equities against restitution. As stated in People ex rel. Mosk v. National Research Co., (1962) 201 Cal.App.2d:

> Equity is not limited in the scope or type of relief which may be granted. Its decrees are molded in accordance with the exigencies of each case and the rights of the persons over whom it has acquired jurisdiction. [citations omitted] . . . "It is often necessary, in order that the plaintiff may obtain full justice, that the relief granted him be as varied and diversified as the means that have been employed by the defendant to

[14] For which Respondent has no rebuttal argument to Appellant's points and authorities at O.B. pages 35-39

> produce the grievance complained of." Having assumed jurisdiction of the parties and of the subject matter, equity will attempt to make final disposition of the controversy and to that end will render a decree sufficiently comprehensive.

(Id. at pp. 775-776.)

This Appellate District has held that when voters approve a proposition, such as Proposition S, a contractual relationship exists between the voters and the agency authorized to issue bonds based upon the tax levied. (*See* County of San Diego v. Perrigo, (1957) 155 Cal.App.2d 644, 646 ["Without question the election created a contractual relation between the electors and the supervisors. [citation]. The terms of the contract are contained in the ballot proposal approved by the electors."].)

The creation of a contractual relationship between the electorate and a public entity has been recognized in elections pursuant to Proposition 39. (San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist., (2006) 139 Cal.App.4th 1356, 1397 (internal citations and quotes omitted); Sacks v. City of Oakland, (2010) 1901 Cal.App.4th 1070, 1084, emphasis added.)

Because Respondent and Appellant, as the representative plaintiff for the taxpaying voters, were in a contractual relationship with the terms being dictated by the ballot proposal of Proposition S, the actions of Respondent in approving field lighting projects not listed on Proposition S breached the contract between Respondent and taxpayers. Respondent's breach was

determined by this Court when the spending was determined *illegal*. (Taxpayers, at 1031-1032 *citing* Connerly v. State Personnel Bd., (2001) 92 Cal.App.4th 16, 29.)

Respondent apparently denies the Proposition S contract was ever in existence. (*See* R.B. at 15 [denying that Respondent received anything of value from the voters].) But the voters under Proposition S have obligated themselves to be taxed, otherwise Respondent could not have issued the bonds. Respondent's breach has made restitution necessary and proper; restitution is the only proper remedy whereby taxpayers can be afforded relief.

California Civil Code § 3523 provides that "[f]or every wrong there is a remedy." (Murdock v. Murdock, (1920) 49 Cal.App.775, 783 ["the legislative policy of the state is to provide a remedy for every legal wrong, by whomsoever or upon or against whomsoever committed."].) *See also* Civil Code § 3517 ["No one can take advantage of his own wrong."].)

Respondent has a number of excuses and reasons why there should be no restitution of the Proposition S bond funds that Respondent illegally spent. Respondent claims: (1) "Appellant never had an ownership interest in the Proposition S bond proceeds"; (2) Respondents showed "good faith" in spending the bond funds; (3) Respondents will spend taxpayer money for Hoover and other schools regardless; and (4) Respondent need not repay money via restitution because it is already prevented from *further* illegal spending since the time of the trial court injunction on September 13, 2013. (R.B. at 15-18.)

As repeated from Appellant's opening brief (O.B. at 23), 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.) Respondent questions whether it "benefited" from the illegal expenditures of Proposition S money (R.B. at 14), and attempts to circumscribe the opinion of this Court to whether Appellant is a representative plaintiff for which restitution can be ordered. (Id.) However, California case law contradicts Respondent's argument. In Dunkin v. Boskey, (2000) 82 Cal.App.4th 171, the court explained that:

> "In modern legal usage, [restitution's] meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another." [Citation.] "Ordinarily the benefit to the one and the loss to the other are co-extensive, and the result . . . is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered."

(Id. at 198, *citing* Restatement, Restitution, § 1, comment d., p. 13; and 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 95, p. 125.)

Under the facts of this case, based on (1) the timing of spending, (2) nature and purpose of the Constitutional limits and "strict accountability," (3) a breach of the bond measure "contract" that Respondent has with district voters (and taxpayers), (4) other projects being left unfunded, and (5) Appellant and taxpayers saddled with paying debt on that illegal spending for many years, there is no policy or practical reasons why expenditures found to be illegal by this Court should not be ordered repaid or replaced with lawfully valid projects or funds.

VII. RESPONDENT INCORRECTLY LABELS THE TYPE OF RESTITUTION UNDER UNFAIR COMPETITION LAW AS OPPOSED TO A TAXPAYER WASTE CASE; RESTITUTION OF THE ILLEGAL EXPENDITURES WILL RECTIFY TAKING TAXPAYERS MONEY FOR UNAUTHORIZED PROJECTS

Respondent relies on Kraus v. Trinity Management Services, Inc., (2000) 23 Cal.4th 116 to define restitution as that "which returns money to its rightful owner." (R.B. at 17.) Respondent fails to mention that Kraus is defining restitution in terms of an Unfair Competition Law ("UCL") claim. (Kraus, at p. 126 ["Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition."].) This is not a UCL case; it is a taxpayer case and Respondent

does not attempt to justify or analogize how to cure or discontinue future taxpayer payments on illegal expenditures as compared with "restor[ing] the parties in interest money or property taken by means of **unfair competition.**" (Id., emphasis added.)[15]

Most damaging to Respondent's argument is the clear line of cases supporting restitution and repayment of money under Section 526a taxpayer and waste claims. (E.g., Osburn v. Stone, (1915) 170 Cal. 480; Citizens Committee for Old Age Pensions v. Board of Supervisors, (1949) 91 Cal.App.2d 658, 660.)

Lastly on this point, Respondent argues that any restitution order would be unavailable and improper because "[n]o remedy would return money that belongs to Appellant, because it never belonged to Appellant." (R.B. at 2.) This is nonsense. All of the subject money is derived and paid by the representative plaintiff taxpayers who will be making tax bill

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[15] Compounding its error arising from using a UCL restitution definition for the present case, Respondent seeks to apply and require a non-restitutionary issue and cause of action for "disgorgement." (*See* R.B. at 18.) To do so, Respondent alters the meaning and application of Meister v. Mensinger, (2014) 230 Cal.App.4th 381, 399 by removing the word "business" from "**unfair business practice**" resulting in Respondent's contrived new standard for a Section 526a case. (R.B. at 18 ["[n]one of the important elements for non-restitutionary disgorgement required by the *Meister* decision – acting in conscious disregard of the rights of another, unjust enrichment, **unfair practices** . . ."].) Emphasis added.

payments on the illegal spending bond debt for many years.[16] Besides, in a Section 526a case, it does not matter that funds will not be directly returned to a plaintiff. (*See* Los Osos Community Services District v. America Alternative Insur. Corp., 585 F.Supp.2d 1195, 1207 (2008); Rizzo v. Insur. Co. of State of Pennsylvania, 969 F.Supp.2d 1180, 1196 (2013).)

Just as the this Court should reject Respondent's suggested new standards for restricting restitution under UCL law and imposing a new "bad faith" requirement (Section V, *ante*), this Court should reject Respondent's new interpretation that restitution can only be made where there is repayment of money to a particular person or plaintiff.

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[16] In Taxpayers, this Court was clear: "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 District and **are taxpayers**." (Taxpayers, at p. 1032, emphasis added.)

VIII. RESPONDENT IMPROPERLY SEEKS TO SHIFT THE BURDEN REQUIRING APPELLANT AND THE TRIAL COURT TO RESOLVE ADMINISTRATIVE MECHANICS TO ACHIEVE RESTITUTION; IT IS NEITHER THE PROVINCE OF THE COURTS NOR APPELLANT TO DETERMINE AND DIRECT RESPONDENT HOW TO ORGANIZE AVAILABLE ACCOUNTS OR FUNDS TO REPLACE ILLEGAL EXPENDITURES

As part of its strategy to prevent any repayment or restitution remedy in the case, Respondent argues it from two ends: from one side Respondent argues to convince the trial court (and this Court) that it is without authority to order Respondent to repay any of the illegal expenditures because this Court did not authorize it as part of its mandate (R.B. at 20-21); from the other side Respondent argues that Appellant has not successfully established and resolved the manner, ease, and administrative/accounting nuances in which a restitution repayment could be possible. (R.B. at 41). Respondent's contradictory two-sided defense is wrong for multiple reasons.

First, as argued above, there is no prohibition of state courts ordering a restitution remedy or repayment order. (Section II, *ante*.) Second, once the availability of a right and order for restitution becomes apparent, case law supports that courts do not direct an agency to exercise its authority in any particular manner. (Id.; Mandel v. Myers, (1981) 29 Cal.3d 531, 540.) Rather, it is up to Respondent (not Appellant or the courts) to figure out how it will comply, subject only to a court's review and confirming compliance. (*See*, e.g.,

Faulkner v. California Toll Bridge Authority, (1953) 40 Cal.2d 317, 326 [decided in the context of administrative mandamus, but similar concept to orders and judgments made to a government agency].)

Respondent's argument – that Appellant and the trial court never established that restitution was possible – is not well taken. (*See* R.B. at 22 [arguing relief would be inconsistent with this Court's decision], R.B. at 41 [Appellant did no successful work to inform the trial court of viable restitution options].) There is good reason Appellant was not able to inquire or establish the different methods for possible repayment and restitution. This is because the trial court never got close to ordering any type of repayment or restitution, instead making multiple determinations that *restitution was legally unavailable*. (O.B. at 16-17, AA 391-399.) The sole trial court consideration of a restitution remedy was not a consideration at all. Rather, it was an excuse to not delve into the restitution issue because it might be "difficult" or "arcane." (AA at 399.) As argued by Appellant before, the complexity of unexamined or arcane codes is not a valid excuse or "difficulty" for denying Appellant a proper and legally available remedy of restitution. (O.B. at 41-42, *citing* Dillon v. Legg, (1968) 68 Cal.2d 728, 739, as quoted in Beckwith v. Dahl, (2012) 205 Cal.App.4th 1039, 1051-1052, emphasis added.)

In any event, Respondent wrongly criticizes Appellant for not having litigated the issue of restitution and money repayment in the trial court *before* the matter legally and factually presented itself. (R.B. at 10 [inferring delay by

Appellant by waiting over three years to obtain its judgment and make its request].) Because Respondent admits that it did not expend any funds until *after* the initial trial court ruling (AA at 123), Respondent makes an untenable demand that Appellant should have pleaded and litigated a *possible* repayment/restitution remedy on its First Amended Complaint since July 7, 2011. Based on Respondent's own facts and pleading, litigation on this issue was not yet ripe.

Appellant has already established that Respondent's Internal Revenue Code, Treasury Regulations citations, and supporting Salkeld Declaration are so broad so as to be useless. (O.B. at 41, fn. 14.) On appeal, rather than address, correct, or refine the legal (and practical) meaning behind its purported sky-is-falling prohibitions, all Respondent has to offer is a new statement that Section 103 "Tax Certificates" were issued by bond counsel. (R.B. at 41.) Respondent fails, however, to address the status of its tax certificates based on Respondent's spending not being constitutionally compliant and violating the voters' authority for the issuance of bonds.

Respondent's own facts, and the law of the case from the Taxpayers decision, equally suggest that correction and repayment is necessary to prevent sacrificing the tax-exempt status that Respondent claims it is so preciously trying to protect.

IX. IN A SECTION 526a TAXPAYER WASTE CASE RESTITUTION IS THE GENERAL RULE, NOT THE EXCEPTION; DECLARATORY JUDGMENTS SHOULD INCLUDE RELIEF OF ALL RELATED ACTUAL CONTROVERSIES, INCLUDING MONETARY RELIEF

Respondent argues that restitution and disgorgement need to be specifically pleaded and stated as causes rather than awarded as remedies. (R.B. at 25.) Respondent's argument lacks merit and cannot overcome Appellant's legal authorities. (*See*, O.B. at 29-30.)

In County of San Diego v. State of California, (2008) 164 Cal.App.4th 580), this Court explained the general rule that "a court can award monetary relief in a declaratory relief action under appropriate circumstances." (Id. at 608.)[17]

Restitution is a remedy to a number of causes of action one of which is declaratory relief. (O.B. at 22-24.) Appellant established in its opening brief, and has not been successfully rebutted, that restitution is an appropriate remedy under a Section 526a cause of action. (O.B. at 18-22 [citing City of Ontario, (1970) 2 Cal.3d 335, 345 and other authorities].)

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[17] Appellant fully expects Respondent to argue, in a misreading of County of San Diego, that monetary relief is only available under a declaratory relief cause of action in **contract cases.** However, County of San Diego did not state such a rule. This Court made clear that monetary relief flowing from a declaratory relief cause of action, in a contract case, was an example, not the rule. (Id., at 608.)

This Court has recognized that monetary relief is a remedy available in a declaratory relief action in the appropriate case. (County of San Diego v. State of California, (2008) 164 Cal.App.4th 580, 608.) Money spent by a defendant *during the pendency* of Section 526a taxpayer case is the "appropriate" and "actual controversy" case, there being no other available remedy to address and rectify the issue save a separate *post hoc* lawsuit for recovery – an approach that has been rejected as a waste of judicial resources. (California Bank v. Diamond, (1956) 144 Cal.App.2d 387, 390.)

In County of San Diego, although this Court denied ordering a money payment to plaintiff as a declaratory relief remedy, it did so on the specific facts that there was no "actual controversy" because there was no controversy as to the amounts owed by the defendant to San Diego and Orange Counties, therefore this Court ruled it was proper to not grant declaratory relief. (Id. at pp. 605-606.) Not only was there legally no available restitution or money to award, but the matter of illegality had already been ruled on and decided by another court. In other words, the controversy, claim and right to declaratory judgment no longer existed. (Id.)

This case is distinguishable because (1) this Court *did* order the granting of declaratory relief in this case, and (2) the Respondent spent most or all of the unauthorized money during the pendency of the lawsuit creating both a new issue after Appellant filed its lawsuit, as well as an actual controversy that came into existence once the entry of Appellant's judgment occurred. Thus, this case

fits within the general rule for restitution as encompassed by City of Ontario (*supra,* 2 Cal.3d at p. 345) and meets the standard for "appropriate circumstances" to award monetary relief under County of San Diego, (164 Cal.App.4th at p. 608.)

The case California Bank v. Diamond, (1956) 144 Cal.App.2d 387 further illustrates the general rule that, "The complaint having stated a cause of action for declaratory relief, the court had jurisdiction of the entire matter and jurisdiction to render the money judgment here appealed from." (California Bank v. Diamond, (1956) 144 Cal.App.2d 387, 390.)

Respondent seeks to deflect and confuse the issue by asking "whether such relief [disgorgement] is a mandatory legal element of declaratory or injunctive relief" (R.B. at 26), and arguing that repayment, restitution and money relief judgments are not available in a declaratory relief cause of action. (R.B. at 28, 30, 33-42.) As argued throughout this brief, Respondent does this by misconstruing substantial authorities on the subject. It also does this by demanding anticipatory and very strict pleading requirements, as well as arguing that *remedies* for a successful declaratory relief case are not encompassed within a general prayer for relief.

The parties and trial court all acknowledged that the post-appellate judgment and rulings are bound by the *law of the case* doctrine. (O.B. at 14; R.B. at 31; AA 397 ¶¶ 1-2.) The parties differ on whether Appellant's pleading encompassed a possible remedy of restitution. Appellant argues and provides

support that the failure to place the word "restitution" in the body of the complaint does not preclude granting it as *appropriate relief*. (*See* O.B. at 16, *see also* Slovensky v. Friedman, (2006) 142 Cal.App.4th 1518, 1536.) This is supported by the fact that the notice and gravamen given by Appellant's filing of the original complaint was to enjoin and suspend spending (based on illegality). Respondent, however, proceeded to spend notwithstanding the lawsuit's filing. (AA 11-13; *see* O.B. at 35-37.)

The denial of restitution relief based on a hyper-technical demand for one or more missing words of *restitution* or *repayment* (which is not the legal standard required for pleading and defies the existence and purpose of a general prayer) would simply force Appellant to file a new lawsuit demanding the now apparent consequence of the illegal spending finding decided by this Court. (Los Osos Community Services District v. America Alternative Insur. Corp., 585 F.Supp.2d 1195, 1207 (2008) [direct and separate Section 526a claim for repayment is proper].)

One of the principal reasons dictating that a court should address all available legal relief in a successful *declaratory relief* complaint is to avoid an unnecessary multiplicity of suits that would follow and violate the policy of judicial economy as stated in California Bank v. Diamond, (1956) 144 Cal.App.2d 387:

> while the court may under certain circumstances, in its discretion, refuse to accept jurisdiction and declare the rights of the parties [citation omitted] it is not obligated to so exercise its

> discretion where the complaint shows that an actual controversy does exist; **and in a case such as this where a multiplicity of actions would result unless the rights of the parties were first declared and relief given accordingly in the same action**, **it would be an abuse of discretion to deny relief**[.]

(Id., at 390, emphasis added.)

A predominantly undisturbed line of declaratory relief cases have accepted this premise. (County of San Diego,164 Cal.App.4th at p. 608 *citing* Macmorris Sales Corp. v. Kozak, (1968) 263 Cal.App.2d 430, 439; California Bank v. Diamond, (1956) 144 Cal.App.2d 387; Bertero v. National General Corp., (1967) 254 Cal.App.2d 126, 145–148.)

It is understood that courts might be reticent in allowing or condoning pleading, adjudication and award of money in a **declaratory relief** cause of action. After all, declaratory relief claims are not replacement or alternative actions where direct legal causes of action exist, such as breach of contract, tort, and other bases for money recovery. However, Section 526a taxpayer waste and injunction lawsuits involve and implicate a different breed of cases. The principal (and only) claims recognized for a Section 526a case are through the vehicles of injunction, declaratory relief, and mandamus under Section 526a. (Los Osos Community Services District v. America Alternative Insur. Corp., 585 F.Supp.2d 1195, 1205-1206 (2008) [“it is clear however that the remedy allowing the **recovery of funds** under Section 526a

is meant primarily to protect members of the public from having their monies paid out in taxes, mismanaged, and wasted."], emphasis added.)

A post-trial or post-judgment request for restitution in a declaratory relief action is especially appropriate in a case, such as the one at bar, where the collection, spending and illegal act commences and is completed during the pendency of a lawsuit.

X. RESPONDENT ADMITS APPELLANT'S LAWSUIT CONTAINED PLEADING REQUESTING THAT RESTRICTED BOND PROCEEDS NOT BE SPENT (DUE TO ALLEGED ILLEGALITY), BUT RESPONDENT SPENT IT ANYWAY

The issue of whether Appellant pleaded a cause of action that includes a possible remedy of restitution is a *question of law*. (*See* discussion at Sections III.A and III.B, *ante*.) The pleading in Appellant's first cause of action, and the controlling law regarding the availability of restitution in a declaratory relief cause of action and under a general prayer, are not subject to dispute.

Respondent argues that pleading (and proof) of certain standards and elements were required to obtain restitution – as if restitution was a *cause of action* instead of remedy. (R.B. at 14, 18.) Respondent does not (and cannot)

refute the argument and authorities presented by Appellant on pages 25-27 of its opening brief that restitution (and disgorgement) are not pleaded causes of action.[18] (*See* e.g., R.B. at 18 for failure to address this issue.) Respondent also opposes that restitution is an appropriate remedy in a Section 526a case (R.B. at 27-28), but provides no supporting authorities to overcome Appellant's argument here and in its opening brief. (O.B. 18-22.)

By references to the operative complaint, Respondent admits that Appellant – as of the date of filing the complaint – requested spending to be ceased and desisted to prevent waste of public funds, and enjoin and prevent any conduct or action spending Proposition S money for construction." (R.B., citing the first amended complaint at ¶¶ 12, 27, 29.)

Having filed its lawsuit within 30 days of approval of the Hoover project, Appellant had little or no need to plead *for the return* of Proposition S money at that time. This fact is corroborated by the representation

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[18] *See*, additionally, Dunkin v. Boskey, (2000) 82 Cal.App.4th 171, 198 fn. 15 [noting the appellant did not need to amend the pleading to seek compensation under an unjust enrichment theory when based on a pleaded cause of action, and that unjust enrichment did not need a particular form of pleading]. Also, repeated here for the Court's convenience, restitution does not have required pleading elements; it is not a cause of action. (O.B. at 25; Munoz v. MacMillan, (2011) 195 Cal.App.4th 648, 661 ["There is no freestanding cause of action for 'restitution' in California."].) Rather, it is a remedy to a number of causes of action. Appellant proved one of those causes of action by this Court ruling that Respondent's spending was illegal. (Taxpayers at 1030-1032; *see* O.B. at 18-22)

Respondent made in a letter to trial judge – hoping to convey "good faith" conduct so it would not order any restitution – that "[i]t is noteworthy that the Proposition S money was not spent for the lights until after the Superior Court had ruled that the expenditure was valid." (AA 122-123.)[19]

This Court should reject Respondent's plea for imbalanced *equitable* favor based on its flip-flopping. However, it is lack of *legal* merit upon which Respondent's argument fail when compared with Appellant's case authorities that (1) the matter of restitution is a *remedy* contained within and naturally flowing from proven declaratory relief cause of action, (2) the issue of restitution need not even be specifically pleaded to be granted in the proper case, (3) a restitution remedy is contained within a general prayer, and (4) all available relief is to be accorded a party on a proven claim.

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[19] Respondent *now* claims that "[p]lanning and design work for Hoover had begun long before Appellant sued [and that] [c]onstruction at Hoover began in April 2011, prior to Appellant's July 2011 filing of the First Amended Complaint." (R.B. at 4.) Thus, evidence *now* ultimately suggests that Respondent proceeded with the Project despite notice of the litigation and pleading that illegal spending be suspended.

XI. RESPONDENT PROCEEDED AT ITS OWN RISK THAT ITS ACTIONS AND SPENDING WOULD BE FOUND ILLEGAL AND ORDERED RESCINDED

Respondent requests that this Court deny restitution because it lacked notice that it might have to un-do spending. Respondent claims such ignorance despite the principal gravamen and plain language in the complaint alleging illegality and seeking to prohibit Proposition S spending through an injunction and declaratory relief judgment. (*See* Section X, *ante*.) Respondent further argues against *notice* and *assumption of risk* by arguing Kriebel v. City Council, (1980) 112 Cal.App.3d 693, 707[20] only pertains to construction during environmental cases, not project spending. (R.B. at 37.) However, the policy behind the holding in Kriebel is identical for both Section 526a taxpayer and CEQA cases. Unlike CEQA cases, Appellant is not asking for a more drastic remedy of *removal* of stadium lights built with illegal expenditures – only that restitution be made to correct the spending wrong.

In Bakersfield Citizens for Local Control v. City of Bakersfield, (2004) 124 Cal.App.4th 1184, the court explained the policy reasons why a project

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[20] In which the court found that unless the party constructing a project bears the risk, construction would otherwise be an irretrievable and *de facto* judicial approval of the project approvals.

developer, such as Respondent here, should not be allowed to make the subject of litigation moot and without a remedy:

> As a matter of public policy and basic equity, developers should not be permitted to effectively defeat a CEQA suit merely by building out a portion of a disputed project during litigation or transferring interests in the underlying real property. Failure to obtain an injunction should not operate as a de facto waiver of the right to pursue a CEQA action.

(Id., at 1203.) Here, Respondent should not be able to defeat a successful taxpayer expenditure and waste lawsuit by simply expending all or most of the subject money during or after the pendency of a lawsuit. Additionally, Bakersfield supports Appellant's argument that a preliminary injunction is not a waiver of a right to pursue lawfully available remedies in a meritorious action. (Id.)

Respondent closes its circle of complete denial by ignoring the substantial law on the subject of repayment under Section 526a and declaratory relief remedies. (Section IX, *ante*; O.B. at 18-20.) The then-existing state-of-the-law available to Respondent the California Supreme Court in City of Ontario v. Superior Court, (1970) 2 Cal.3d 335, defeats Respondent's argument that it could not have known about a possible court order for repayment, as Respondent decided to continue spending during the litigation:

> [i]n 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."].)

(Id. at 345.) Rejecting an agency's insulation from such facts, that is the reason why the Supreme Court ruled that "[t]he tripartite relief [including restitution] would thus seem to be the rule rather than the exception." (Id.)

Before consideration and determination of the restitution issue, the trial court agreed with Appellant that:

> The law is clear that in this setting, the proponent of the project (here the SDUSD) bears the risk of an adverse judicial determination. Pub. Res. Code section 21167.3; *Kriebel v. City of San Diego*, 112 Cal. App. 3d 693, 704 (1980).

(AA 199.)

The trial court also agreed with Appellant that the *status quo ante* was that which existed in 2011. (AA 199; *see also* O.B. at 36-37 containing additional legal authorities.) As Judge Taylor explained, the status quo was not "the one which existed after the stadium lights were built **while the case was on appeal** (as argued by the District)." (Id., emphasis added.)

Respondent seeks to distinguish Kriebel v. City of San Diego, (1980) 112 Cal.App.3d 693, 704 from this case by arguing there are differences involving "statutory factors that pertain to environmental review . . . [and] equitable factors involved in disgorgement relief." (R.B. at 37) However, the differences Respondent purports and tries to create are dispelled by the substantial authorities, not only recognizing that some money might be spent during the pendency of a lawsuit (hence restitution is available), but also

claims for repayment are inherently encompassed in a Section 526a lawsuit. (Section IX, *ante*.)

There is no merit to Respondent's argument that it had no accountable or legal responsibility, or other pleading notice, that a finding of illegality might result in a judgment and reversal of what it was doing (and had done) – via an appropriate restitution remedy and order.

XII.

CONCLUSION

Based on the above-stated point and authorities regarding the remedy of restitution, along with ruling and order of Constitutional spending violations made by this Court, there is little or no legal support for the trial court's finding that restitution is unavailable.

The post-trial order denying restitution should be reversed as argued and prayed for in Appellant's opening brief.

Respectfully submitted,

Dated: February 2, 2015

LAW OFFICE OF CRAIG A. SHERMAN

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

VIII.

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 REPLY BRIEF* has been produced using 13-point Roman type, and contains 9,878 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: February 2, 2015

LAW OFFICE OF CRAIG A. SHERMAN

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

XIV.

DECLARATION OF SERVICE

Appeal No. D066214
Court of Appeal, Fourth District, Division One
San Diego Superior Court - Case No. 37-2011-00085714
Taxpayers for Accountable School Bond Spending v.
San Diego Unified School District

I, the undersigned, declare under the penalty of perjury that I am over the age of eighteen years, my place of business is in the County of San Diego, located at 1901 First Avenue, San Diego, CA, and I am currently the attorney to this action; that I served the below-named person(s) the following document(s):

APPELLANT'S REPLY BRIEF

On February 2, 2015 on the following person(s) in a sealed envelope or package, addressed as follows:

**** SEE ATTACHED SERVICE LIST ****

in the following manner:

1) ☐ By sending via overnight mail by the courier Fed Ex Express.

2) ☐ By hand delivering or having delivered by courier, during usual business hours, copies to the office(s) of the above-named addressee(s), and leaving said package or envelope with the person who was apparently in charge.

3) ☒ By placing a copy in a separate envelope, with postage fully pre-paid, for each person and address named above and depositing each in the U.S. Mails at San Diego, California.

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

Executed on February 2, 2015 at San Diego, California.

Paul Best

SERVICE LIST

Appeal No. D066214
Court of Appeal, Fourth District, Division One
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Taxpayers for Accountable School Bond Spending v.
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