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12 **Attorneys for Petitioner/Plaintiff**
13 **ZACHARY GINSBURG, on behalf of**
14 **himself and all others similarly situated**

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF ALAMEDA**

16 ZACHARY GINSBURG, on behalf of
himself, and all others similarly situated,
17
18 Petitioner and Plaintiff,
19
20 v.
21 CITY OF ALAMEDA, and DOES 1 through
100,
22
23 Respondents and Defendants.

Case No. RG15791428
Hon. George Hernandez, Jr.
CLASS ACTION
SECOND AMENDED VERIFIED PETITION
FOR WRIT OF MANDATE
and
SECOND AMENDED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY
RELIEF AND REFUND OF ILLEGAL TAX
DEMAND FOR JURY TRIAL
Case Filed: October 29, 2015
Trial Date: Not yet assigned

Petitioner/Plaintiff Zachary Ginsburg, on behalf of himself and the Class of all other similarly situated persons defined below, alleges all of the following upon information and belief, except as to those paragraphs that state specifically that they are alleged on personal knowledge, as follows:

INTRODUCTION

1. Proposition 218, the Right to Vote on Taxes Act, was passed by the people of California in November 1996. The measure stated its purpose “was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.”

2. By passing Proposition 218, the California Constitution was amended to add Articles XIII C and XIII D. Article XIII C dealt with voter approval for local government general taxes and special taxes. Article XIII D sets forth procedures, requirements and voter approval mechanisms for local government assessments, fees and charges. This action pertains to both Articles, relating to taxes, fees and charges wrongly imposed by Defendants herein.

3. In November 2010, California voters approved Proposition 26, the Supermajority Vote to Pass New Taxes and Fees Act. Proposition 26 further amended Article XIII C to clarify that “[t]he local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.”

4. Petitioner/Plaintiff brings this action, on behalf of himself and all others similarly situated, to compel Respondents/Defendants to comply with Propositions 218 and 26. Specifically, he seeks to enjoin Respondents/Defendants from illegally transferring “surplus” funds collected under the guise of fees charged for electricity, into the General Fund of the City of Alameda. He

1 also seeks a refund of such sums and to obtain voter approval for what is in effect a tax.

2 **PARTIES**

3 5. Petitioner/Plaintiff Zachary Ginsburg, based on personal knowledge is currently,
4 and has been since 2005, a resident of Defendant the City of Alameda. Based on personal
5 knowledge, at all times, Petitioner/Plaintiff has paid the electricity fees at issue herein and at no
6 time did Mr. Ginsburg vote on any increase to his electricity rates.

7 6. Respondent/Defendant City of Alameda ("City") is located in the County of
8 Alameda, State of California. At all times herein mentioned, the City provides electrical power to
9 its citizens through a department it runs which is called "Alameda Municipal Power" ("AMP").

10 7. Respondents/Defendants DOES 1 through 100 are persons or entities whose true
11 names and identities are currently unknown to Petitioner/Plaintiff. This Complaint will be
12 amended to allege the true names and capacities of these fictitiously named Defendants when they
13 are ascertained. Each of the fictitiously named Defendants is responsible for the conduct alleged in
14 this Complaint. Through their conduct, the fictitiously named Defendants caused damages to
15 Petitioner/Plaintiff and the Class. At all times mentioned herein, each Defendant was acting as the
16 agent and/or employee of each of the remaining Defendants and was at all times acting within the
17 purpose and scope of such agency and employment. In doing the acts alleged herein, each
18 Defendant, and its officers, directors, members, owners, principals, or managing agents (where the
19 Defendant is a corporation, limited liability company, or other form of business entity) authorized
20 and/or ratified the conduct of each other Defendant and/or of his/her/its employees.

21 **GOVERNMENT CLAIM**

22 8. On or about October 29, 2015, counsel for Petitioner/Plaintiff delivered to
23 Defendant City of Alameda a written Claim for Damages, on behalf of Petitioner/Plaintiff and all
24 others similarly situated, pursuant to California Government Code section 910, *et seq.*, and *City of*
25 *San Jose v. Superior Court*, 12 Cal. 3d 447 (1974).

26 9. The City failed or refused to act on Petitioner/Plaintiff's Claim for Damages by
27 December 14, 2015, or within 45 days after the Claim was presented to the City. Thus,
28 Petitioner/Plaintiff's Claim is deemed to have been rejected, pursuant to California Government

1 Code section 912.4.

2 **GENERAL ALLEGATIONS**

3 10. The City operates AMP which is overseen by the Alameda Public Utilities Board.
4 Through AMP, the City provides electricity to its citizens. For that service, it collects fees from
5 the users on a monthly basis. The electricity services it provides are property-related services, and
6 the fees and charges are imposed by the City upon parcels and persons as an incident of property
7 ownership.

8 11. The City has engaged in, and continues to engage in, the illegal transfer of funds
9 collected by AMP into the City's General Fund. Such transferred funds are not earmarked or
10 designated for any specific purpose such as for reimbursement of shared costs, but instead are used
11 for general purposes. In this regard, AMP states on its website, "We maintain local control so that
12 we can re-invest in the island and provide value to enrich our lives, businesses and the community.
13 In fact, since 1887, AMP has contributed more than \$75 million to the City of Alameda's General
14 Fund." <https://www.alamedamp.com/about-us/history-2> (last visited October 28, 2015).

15 12. Such transfers to the General Fund do not occur by happenstance. As set forth in its
16 January 2015 five-year strategic plan, an ongoing goal of the City has been to set rates so as to
17 "Ensure mutually-agreeable transfer to City". This notion is repeated: "We support Alameda
18 through our annual transfer of funds." In other words, the rates Petitioner/Plaintiff and the
19 members of the Class are paying for electricity exceed the actual cost of the City providing the
20 service and are set intentionally so as to create a surplus to achieve the transfer into its General
21 Fund.

22 13. This action is based on violation of the State Constitution, Article XIII C, Section
23 1(e) which provides that a tax is any charge of any kind imposed by a local government for a
24 specific government product that exceeds the reasonable costs to the local government of
25 providing the product, and Article XIII D, Section 6(b) which provides that a user charge for a
26 property related service (1) shall not exceed the funds required to provide that service, and (2)
27 which requires that the amount of a charge imposed upon a person shall not exceed the
28 proportional cost of the service attributable to the parcel.

1 14. AMP imposes an illegal special tax on residential electric customers because,
2 among other reasons; (a) the charge imposed on them for electric service includes surplus capital
3 raised by AMP that is transferred to the City and results in electric charges that are not, and cannot
4 be, cost justified; (b) AMP has been illegally providing the City with free electrical power for its
5 street lights at ratepayer expense since about July 1, 2013; (c) AMP has also paid the City
6 excessive amounts for services provided by the City to AMP; (d) AMP has imposed an improper
7 and illegal tiered rate system upon its residential customers; and (e) commercial electrical
8 customers pay less for power than do residential and public authority rate payers, which is an
9 illegal cross-category subsidy.

10 15. Research has revealed no attempts by the City to obtain voter approval of an
11 otherwise illegal transfer of utility fees to the City's General Fund. Total costs of the illegal
12 transfer can be apportioned by multiplying the total amount of the transfer by each customer's
13 percentage of total energy usage.

14 16. The City has engaged in the illegal expenditure and waste of city funds by a)
15 colluding with commercial-rate payers to implement an illegal cross-category subsidy by which
16 residential and public authority rate payers are charged more for power than commercial electrical
17 customers, and b) budgeting and spending money in administering illegal ordinances, which
18 include Alameda Municipal Code sections 3-28.9, 3-28.10, and Alameda City Charter Article XII
19 section 6, which allow for the transfer of "surplus" funds from AMP into the City's General Fund.

20 17. Government Code Section 905(a) provides an exception from claim filing
21 requirements for money claimed under a statute prescribing procedures for the refund,
22 cancellation, modification or adjustment of any tax or fee, or any portion thereof. Article XIII C
23 and D of the State Constitution were enacted and amended by State Propositions 218 and 26, and
24 Government Code Section 811.8 defines "statute" to mean enactments adopted by the people of
25 California by initiative act.

26 18. In light of the foregoing, Petitioner/Plaintiff, on behalf of himself and all others
27 similarly situated, seeks relief from the illegal tax, return of all sums illegally collected and the
28 other relief set out herein.

CLASS ACTION ALLEGATIONS

19. Petitioner/Plaintiff brings this class action pursuant to California Code of Civil Procedure section 382 on his own behalf and on behalf of:

All customers of Alameda Municipal Power who were billed for electricity from October 2012 through the present.

20. The following persons and entities shall be excluded from the Class: (a) all persons who make a timely election to be excluded from the proposed Class, and (b) the judge(s) to whom this case is assigned and any immediate family members thereof. Also excluded are claims for personal injury alleged to have been suffered by any member of the Class.

21. Petitioner/Plaintiff reserves the right to redefine the Class prior to certification.

22. This action is properly maintainable as a class action.

23. The Class for whose benefit this action is brought is so numerous that joinder of all Class members is impracticable. While Petitioner/Plaintiff does not presently know the exact number of Class members, AMP states on its website that it provides power to more than 34,000 customers. Class members can be determined and identified through AMP's and Defendants' records and, if necessary, other appropriate discovery.

24. There are questions of law and fact that are common to Class members and which predominate over any questions affecting only individual members of the Class. A class action will generate common answers to the below questions, which are apt to drive the resolution of the litigation:

a. What was the reasonable cost of the electricity provided to Petitioner/Plaintiff and the members of the Class;

b. How was the reasonable cost of the electricity calculated;

c. Whether Defendants' fees or charges for electricity exceeded the proportional cost of the service attributable to parcels owned by Petitioner/Plaintiff and the members of the Class;

d. Whether the rates charged by Defendants for electricity exceed the cost of service and, as a result, operate as a tax not voted on by the citizens;

i.

1 e. Whether Defendants' actions violate Articles XIII C and XIII D of the
2 California Constitution;

3 f. Whether an election must be held before Defendants may impose the
4 electricity charges upon Petitioner/Plaintiff and the Class members;

5 g. Whether Petitioner/Plaintiff and other Class members have been damaged
6 by Defendants' actions or conduct;

7 h. The proper measure of damages; and

8 i. Whether Petitioner/Plaintiff and other Class members are entitled to
9 injunctive relief.

10 25. Petitioner/Plaintiff is committed to prosecuting this action and has retained
11 competent counsel experienced in litigation of this nature. Petitioner/Plaintiff's claims are typical
12 of the claims of other Class members and Petitioner/Plaintiff has the same interests as other Class
13 members. Petitioner/Plaintiff has no interests that are antagonistic to, or in conflict with, the
14 interests of the other members of the Class. Petitioner/Plaintiff is an adequate representative of the
15 Class and will fairly and adequately protect the interests of the Class.

16 26. The prosecution of separate actions by individual Class members could create a
17 risk of inconsistent or varying adjudications with respect to individual members of the Class,
18 which could establish incompatible standards of conduct for Defendants or adjudications with
19 respect to individual members of the Class which would, as a practical matter, be dispositive of
20 the interests of the members of the Class not parties to the adjudications.

21 27. Furthermore, as the damages suffered by some of the individual Class members
22 may be relatively small, the expense and burden of individual litigation makes it impracticable for
23 the individual members of the Class to redress the wrongs done to them individually. If a class
24 action is not permitted, Class members will continue to suffer and Defendants' misconduct will
25 continue without proper remedy.

26 28. Defendants have acted and refused to act on grounds generally applicable to the
27 entire Class, thereby making relief appropriate with respect to the Class as a whole.

28 29. Petitioner/Plaintiff anticipates no unusual difficulties in the management of this

litigation as a class action.

30. For the above reasons, a class action is superior to other available methods for the fair and efficient adjudication of this action.

FIRST CAUSE OF ACTION

Petition for Writ of Mandate Pursuant to Code of Civil Procedure section 1085 (By Petitioner/Plaintiff Against All Respondents)

31. Petitioner/Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein.

32. Defendants' charges for electricity above the cost of electricity were not approved by the voters in spite of the restrictions imposed by Propositions 218 and 26 and Articles XIII C and XIII D of the California Constitution.

33. All amounts transferred to Defendants' General Fund from the electrical rates are illegal taxes, and all amounts for electrical rates based on the conduct alleged in Paragraph 14 above are illegal taxes.

34. The imposition and collection of the illegal taxes from Petitioner/Plaintiff and the Class was, and is, improper because it is a violation of the State Constitution, Articles XIII C and XIII D. The imposition of the illegal taxes has caused Petitioner/Plaintiff and the Class to suffer monetary damages in amounts according to proof at trial, plus interest thereon.

35. Accordingly, Petitioner/Plaintiff is entitled to a writ of mandate pursuant to Code of Civil Procedure section 1085 so as to ensure compliance with the law by the City.

SECOND CAUSE OF ACTION

Declaratory Relief (By Petitioner/Plaintiff Against All Defendants)

36. Petitioner/Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein.

37. An actual, present, and substantial controversy exists between Petitioner/Plaintiff and Defendants. Petitioner/Plaintiff contends that Defendants have violated, and continue to

1 violate, the California Constitution. Defendants will no doubt contend that they have complied
2 with the law.

3 38. Petitioner/Plaintiff and other Class members have no adequate remedy at law.

4 39. By reason of the foregoing, there is a present and ongoing controversy between the
5 parties with respect to which this Court should enter a declaratory judgment determining the rights
6 and obligations of each. Petitioner/Plaintiff contends that such judgment should determine that the
7 conduct complained of herein is illegal.

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9 **THIRD CAUSE OF ACTION**

10 **Injunction Pursuant to C.C.P. § 526a
(Petitioner/Plaintiff Against All Defendants)**

11 40. Petitioner/Plaintiff hereby incorporates by reference each of the preceding
12 allegations as though fully set forth herein.

13 41. Petitioner/Plaintiff is entitled to, and seeks, an injunction pursuant to Code of Civil
14 Procedure section 526a to enjoin Defendants from their illegal expenditure and waste of city funds
15 – to wit, a) Defendants’ collusion with commercial-rate payers to implement an illegal cross-
16 category subsidy by which residential and public authority rate payers are charged more for power
17 than commercial electrical customers, and b) Defendants’ budgeting and spending money in
18 administering the illegal ordinances, which include Alameda Municipal Code sections 3-28.9, 3-
19 28.10, and Alameda City Charter Article XII section 6, which allow for the transfer of “surplus”
20 funds from AMP into the City’s General Fund, and the other conduct set forth in Paragraphs 14-16
21 herein – and further to restore all funds illegally transferred as set forth herein.

22 **FOURTH CAUSE OF ACTION**

23 **Refund of Illegal Tax
24 (Petitioner/Plaintiff Against All Defendants)**

25 42. Petitioner/Plaintiff hereby incorporates by reference each of the preceding
26 allegations as though fully set forth herein.

27 43. Petitioner/Plaintiff has substantially complied with any applicable requirements to
28 exhaust his administrative remedies pursuant to Government Code section 945.6.

44. Defendants never submitted the charges for electricity that exceed costs to the electorate for a vote.

45. Proposition 218, as amended by Proposition 26, is designed to “protect[] taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.” (Prop. 218 § 2)

46. Local governments must submit to the electorate for approval by vote laws that “impose, extend, or increase” any tax. (Cal. Const., art. XIII C, § 2(b), (d).)

47. Defendants’ collection of electricity rates without voter approval that exceed the costs of providing the service violates Proposition 218 as amended by Proposition 26.

48. Because the rates are in violation of Proposition 218 as amended by Proposition 26, they are unconstitutional under the California Constitution, are invalid and inapplicable.

49. For all of the foregoing reasons, Petitioner/Plaintiff and the Class have overpaid for electricity and thus are entitled to recovery in the form of a refund plus interest thereon.

PRAYER FOR RELIEF

WHEREFORE, Petitioner/Plaintiff, individually and on behalf of all others similarly situated, hereby prays that the Court determine that this action may be maintained as a class action and further prays that the Court enter judgment in his favor and against the Defendants, as follows:

1. An order certifying the proposed Class, designating Petitioner/Plaintiff as the named representative of the Class, and designating the undersigned as Class Counsel;
2. A refund to Petitioner/Plaintiff and the Class for all monies illegally collected in an amount to be proven at trial;
3. Injunctive relief;
4. An award of attorneys’ fees and costs, as allowed by law, including, but not limited to, under California Code of Civil Procedure section 1021.5;
5. An award of pre-judgment and post-judgment interest, as provided by law;
6. For the issuance of a writ of mandate directing Respondents/Defendants to stop all transfers of “surplus” sums collected for electricity charges into the General Fund

1 and to stop all improper or illegal electrical rate charges by order that a vote for the
2 tax complained of herein be held by the People;

3 7. For a judicial declaration of the rights and obligations of the parties, to guide the
4 parties' future conduct; and

5 8. For such other, further, and different relief as the Court deems proper under the
6 circumstances.

7 DATED: March 15, 2016

Respectfully submitted,

8 **KIESEL LAW LLP**

9
10
11 By: 

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Jeffrey A. Koncius

Nicole Ramirez

12
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Moris Davidovitz

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15 **KEARNEY LITTLEFIELD, LLP**

Thomas A. Kearney

Prescott W. Littlefield

16
17 Attorneys for Petitioner/Plaintiff

ZACHARY GINSBURG

DEMAND FOR JURY TRIAL

Plaintiff, on behalf of himself and the Class of all others similarly situated, demands a trial by jury as to all issues so triable.

DATED: March 15, 2016

Respectfully submitted,

KIESEL LAW LLP

By: 

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ZACHARY GINSBURG

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 8648 Wilshire Boulevard, Beverly Hills, CA 90211-2910.

On March 15, 2016, I served true copies of the following document(s) described as **SECOND AMENDED VERIFIED PETITION FOR WRIT OF MANDATE and SECOND AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND REFUND OF ILLEGAL TAX; VERIFICATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Kiesel Law LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY ELECTRONIC MAIL: I hereby certify that I served the above-described document on the interested parties in this action by attaching an electronic copy of the document to an email addressed to the parties listed below at their most recent e-mail address of record in this action. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on March 15, 2016 at Beverly Hills, California.



Jessica Mendez

SERVICE LIST

Ginsburg v. City of Alameda
Case No. RG15791428

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