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and RALF SWENSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

ALPINE UNION SCHOOL DISTRICT, a California public school district, and ALPINE TAXPAYERS FOR BOND ACCOUNTABILITY, an unincorporated association,,

Plaintiffs,

v.

GROSSMONT UNION HIGH SCHOOL DISTRICT, a California public school district, RALF SWENSON, in his capacity as Superintendent of the Grossmont Union High School District, and DOES 1-10,,

Defendants.

Case No. 37-2014-00034850-CU-MC-CTL

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTIONS FOR RECONSIDERATION OF ALL PARTIES' SUMMARY JUDGMENT/SUMMARY ADJUDICATION MOTIONS

Date: December 17, 2015
Time 9:30 AM
Dept: C-66
Judge: Joel Pressman

[Declaration of Khai LeQuang filed concurrently herewith.]

Complaint Filed: October 14, 2014
Trial Date: None Set/Vacated

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I. INTRODUCTION

The Court should deny Plaintiffs' motions for reconsideration because the Court of Appeal decision affirming this Court's preliminary injunction Order is not law of the case and not new law that justifies reversing the Court's Order granting Defendants' motion for summary judgment and denying Plaintiffs' motions for summary adjudication.

The law of the case doctrine provides that when an appellate court states a principle or rule of law that is necessary to the decision, that principle or rule becomes the law of the case and must be followed in subsequent proceedings. The doctrine applies solely to (1) principles or rules of law; (2) that were necessary to the Court of Appeal's decision. Here, the Court of Appeal did not state a rule of law that Propositions H and U obligate Grossmont to build a school, and it was not ***necessary*** for the Court to make this finding to affirm the preliminary injunction. Accordingly, the Court of Appeal's conclusion that this Court did not err in finding that Propositions H and U contained a promise to build a new high school are not law of the case.

First, although the Court of Appeal concluded that this Court did not err in finding that Propositions H and U contained a promise to build a new school, the Court of Appeal expressly stated it was not establishing a principle of law that would bind this Court in later proceedings:

> For purposes of deciding Alpine's motion, the court found that under Prop. H and Prop. U, Grossmont promised to construct a new high school in the Alpine area if certain prerequisites were satisfied. Nevertheless, ***we believe the court's determination did not decide that issue on the merits***. Therefore, ***that issue will be subject to the presentation of additional evidence and argument at trial***, after which the court may then make a final determination of all of the legal and factual issues in this action.

Opinion at 10 (emphasis added).[1] In other words, in affirming the preliminary injunction, the Court of Appeal did not purport to state a principle of law that would bind this Court. To the contrary, it expressly acknowledged that whether Propositions H and U imposed an obligation to build a school would "be subject to the presentation of additional evidence and argument at trial, after which the court may then make a final determination of all of the legal and factual issues in this action." *Id.* This statement by the Court of Appeal is the very antithesis of law of the case.

[1] For the Court's convenience, a copy of the Court of Appeal Opinion is attached as Exhibit 5 to the Declaration of Khai LeQuang ("LeQuang Decl.") filed concurrently herewith.

Second, at the preliminary injunction stage, this Court did not make a final adjudication that Grossmont had a legal obligation to build a new high school in Alpine, and it was not "necessary" for the Court of Appeal to make a final determination of this issue when it reviewed the preliminary injunction. All it needed to do was find that Plaintiffs were likely to succeed, and that is all that it did. As the California Supreme Court has said, a court's affirmance of a preliminary injunction "is not a decision on the merits of the complaints filed by the parties. A full hearing at trial is still required to adjudicate the ultimate rights in controversy here." *IT Corp. v. City of Imperial*, 35 Cal. 3d 63, 75-76 (1983). While a preliminary injunction could in some cases turn on a pure question of law, this was not the case here. Here, the Court of Appeal opinion is rife with language that it was making only a preliminary finding of a likelihood of success and not a determination on the merits. *See* Opinion, pp. 5-6. The ultimate question of whether Propositions H and U imposed an obligation to build a school, the Court stated, "will be subject to the presentation of additional evidence and argument at trial, after which the court may then make a final determination of all of the legal and factual issues in this action." *Id.*

And ten months after issuing the preliminary injunction, this Court reviewed a far more robust evidentiary record on summary judgment, considered arguments squarely addressing whether Propositions H and U obligated Grossmont to build a school, and did just what the Court of Appeal acknowledged it would do: It made a final determination of the merits based on the presentation of additional evidence and argument. That record consisted of documents and deposition testimony that were not available when the Court decided the preliminary injunction motion. And that new evidence persuaded the Court to alter its earlier finding that Grossmont had "promised" to build a school, underscoring that the issue was largely factual and not a pure question of law controlled by the Court of Appeal's decision.

Third, the Court of Appeal ruling has no impact on the Court's finding that Plaintiffs' claims are time-barred. That issue was not litigated at the preliminary injunction stage or argued on appeal, and the Court of Appeal ruling presents no occasion for reconsidering this ruling.

Fourth, the Court of Appeal ruling has no impact on the Court's finding that there was no contract between Grossmont and Alpine to build a new school for Alpine. Alpine had not

advanced this theory when the Court decided the motion for preliminary injunction; it was not litigated at the time; and the Court of Appeal ruling does not address the existence of a contract between Grossmont and Alpine.

Accordingly, the Court should deny Plaintiffs' motions for reconsideration.

II. FACTUAL BACKGROUND

A. The Original Complaint and Preliminary Injunction

Fourteen months ago, Plaintiffs commenced this action with a complaint that alleged two causes of action: (1) for an injunction to stop all spending on any new Proposition U projects until the California Department of Education ("CDE") decided Alpine's petition for unification; and (2) for waste under Code of Civil Procedure § 526a and Education Code § 15284. Shortly after that, Plaintiffs filed a motion for a preliminary injunction to stop all spending or approvals on new Proposition U projects.

In their motion, Plaintiffs did not argue that Proposition U obligated Grossmont to build a new school in Alpine nor did they seek an injunction requiring Grossmont to build the school. Rather, they argued that Grossmont was spending bond funds on various projects that were not authorized by Proposition U, which they alleged (a) constituted waste; and (b) would prevent those funds from being allocated to Alpine if the CDE ultimately granted the unification petition. *See* Plaintiffs' Motion for Preliminary Injunction, pp. 8-13. Based on these claims and arguments, Defendants opposed the motion asserting three principal arguments: (1) there was no evidence of waste, as all of the projects Grossmont was spending bond funds on were authorized; (2) it is not waste not to spend money on the school because Grossmont has discretion to spend funds on projects it deems are in the best interests of the district; and (3) Plaintiffs' waste claims were political and the Court should not adjudicate primarily political complaints. *See* Defendants' Opposition to Motion for Preliminary Injunction, pp. 7-11.

Because the only claims asserted at the time were for (1) waste based on alleged unauthorized expenditures and (2) an injunction to stop the alleged waste (until unification), these were the issues the parties addressed on the preliminary injunction motion. Furthermore, at the time, the parties had not commenced discovery. No depositions had been taken; and no

documents had been produced. The evidence was limited to one-sided declarations that were not tested by cross-examination, and which focused largely on Plaintiffs' allegations that Grossmont was spending funds on projects not authorized by Proposition U.

In fact, after filing their motion for a preliminary injunction, Plaintiffs filed a first amended complaint that added a claim for a declaration that Grossmont has an affirmative obligation to build the school or support Alpine's unification. But this was six days after Defendants filed their opposition to Plaintiffs' motion. Thus, when the Court issued the preliminary injunction in this case, the Court cited only the two claims alleged in the original complaint. *See* Minute Order dated 1/22/15 ("PI Order").[2]

And while the PI Order found that the Grossmont had made "promises" in Propositions H and U to build a new school, whether the propositions obligated Grossmont to build the school was not squarely before the Court.

Defendants then appealed the preliminary injunction.

B. Plaintiffs' Amended Complaint and the Summary Judgment Rulings

On December 30, 2014, Defendants filed a demurrer to the first amended complaint, and on March 27, 2015, the Court sustained demurrers to all of Plaintiffs' claims, primarily on the ground that the claims were barred by the statute of limitations. However, specifically with regard to Plaintiffs' newly added claim that Grossmont has an affirmative obligation to build a school in Alpine, the Court also found that Plaintiffs had "not sufficiently alleged the legal basis for Grossmont's obligation to build a high school or required support for Alpine's Unification Petition." Minute Order dated 3/27/15 ("Demurrer Order").[3] Thus, it is apparent that when the Court earlier found that Grossmont had made "promises" to build a new school, it was not making a final determination that Grossmont had a legal obligation to do so.

The Court did not decide this issue until several months later when it decided the parties' motions for summary judgment concerning claims asserted in Plaintiffs' second amended complaint, which was filed after the Demurrer Order. That summary judgment ruling was made

[2] For the Court's convenience, a copy of the PI Order is attached as Exhibit 1 to the LeQuang Decl.
[3] For the Court's convenience, a copy of the Demurrer Order is attached as Exhibit 2 to the LeQuang Decl.

based on an extensive record that was not before this Court when it decided the preliminary injunction motion, including but not limited to the following.

- The 2002/2003 Master Plan referenced in Proposition H, which listed a new high school as a project that Grossmont believed it "should do" but not "must do";
- The Governing Board resolutions placing Proposition U on the ballot, which as a matter of law are considered part of the bond proposition;
- A detailed analysis of the language of Proposition U, including the prefatory language that Proposition U identified projects that were "authorized," not mandated;
- Arguments specifically addressing the unenforceability of unilateral promises;
- Declarations and deposition testimony of Grossmont Board members Jim Kelly and Robert Shield describing the concerns they raised about a new school and enrollment at the July 31, 2008 board meeting when the Governing Board voted to place Proposition U on the ballot, which resulted in the addition of the "enrollment threshold";
- Correspondence from the San Diego Taxpayer's Association responding to Alpine's complaint about the new high school, stating, "NOTHING requires a school district to build any project listed in the bond resolution (project list)";
- Documents and deposition testimony from Alpine's corporate representative and former board member describing Alpine's failed attempts to pass bond measures to build a high school for itself and its past failed attempts at unification, which were the backdrop to Propositions H and U; and
- Unrefuted declarations of Scott Patterson and Katy Wright establishing that the November 8, 2012 resolution placing the new high school at the end of the Proposition U project list (Phase 17U) was inextricably bound up with Grossmont's financial obligations and an integral part of its method of financing.

Based on this extensive record and addressing the issue squarely, the Court correctly concluded that Proposition H and Proposition U did not impose an obligation to build a new high school. It therefore granted Defendants' motion for summary judgment and denied Plaintiffs'

motions for summary adjudication. The Court further found that Plaintiffs' claims were time-barred and that Alpine had failed to present evidence raising a triable issue of fact as to the existence of a contract between Alpine and Grossmont under which Grossmont agreed to build a new school for Alpine. *See* Minute Order dated 10/30/15 ("SJ Order").[4]

C. The Court of Appeal Decision

Shortly after the Court issued the SJ Order, the Court of Appeal issued an Opinion affirming the preliminary injunction, concluding that this Court "did not abuse its discretion by granting Alpine's motion and issuing the preliminary injunction." Opinion, p. 2. The Court of Appeal further commented that:

> . . . the applicable abuse of discretion standard 'acknowledges that the propriety of preliminary relief turns upon difficult estimates from a record which is ***necessarily truncated and incomplete. . . . The evidence from which the trial court was forced to act may thus be significantly different from that which would be available after a trial on the merits.***

Opinion, p. 7 (quoting *Butt v. State of California*, 4 Cal. 4th 668, 678 fn. 8 (1992) (emphasis added)). And specifically with regard to whether Grossmont has an obligation to build the school, the Court of Appeal stated:

> ***For purposes of deciding Alpine's motion***, the court found that under Prop. H and Prop. U, Grossmont promised to construct a new high school in the Alpine area if certain prerequisites were satisfied. Nevertheless, ***we believe the court's determination did not decide that issue on the merits.*** Therefore, ***that issue will be subject to the presentation of additional evidence and argument at trial***, after which the court may then make a final determination of all of the legal and factual issues in this action.

Opinion, p. 10 (emphasis added) (citing *Butt*, 4 Cal. 4th at 678 fn. 8).

III. ARGUMENT

The Court should not reconsider the SJ Order because the Court of Appeal decision is not law of the case and not new law justifying reconsideration. Code Civ. Proc. § 1008.

A. The Court of Appeal Decision Is Not Law of the Case

Under the doctrine of law of the case, when an appellate court "states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to through its subsequent progress, both in the lower court and upon

[4] For the Court's convenience, a copy of the SJ Order is attached as Exhibit 4 to the LeQuang Decl.

subsequent appeal . . . ." *Kowis v. Howard*, 3 Cal. 4th 888, 892-93 (1992). The doctrine applies only to principles or rules of law, *Moore v. Trott*, 162 Cal. 268, 273 (1912), and it "does not apply to points of law that might have been determined, but were not decided in the prior appeal," *Sargon Enterprises, Inc. v. University of Southern California*, 215 Cal. App. 4th 1495, 1505 (2013). *See also* 9 Witkin, Cal. Procedure (5th), Appeal § 459 (emphasis added). Here, neither of these requirements is met.

First, the Court of Appeal explicitly stated it was not establishing a principle of law that Proposition H and Proposition U imposed upon Grossmont a legal obligation to build a school. As it stated in the Opinion, "that issue will be subject to the presentation of additional evidence and argument at trial, after which the court may then make a definitive determination of all of the legal and factual issues in this action." Opinion, p. 10.[5]

Second, not only did the Court of Appeal not establish a principle of law that Grossmont has an obligation to build the school, it was not "necessary" for the Court to make this finding to affirm the preliminary injunction. That is because, as the Court of Appeal observed, in deciding a preliminary injunction, the Court only needed to find that Plaintiffs were likely to succeed on the merits and that the balance of harms weighed in their favor. It did not have to decide the merits of Plaintiffs' claims, and it did not do so.[6] Opinion, pp. 5-6, 10. And this is precisely what Alpine argued on appeal when it asserted that "***this is an appeal concerning provisional relief, not a trial on the ultimate merits of the claims asserted***." Respondent's Brief on Appeal, p. 21 (emphasis in original).[7] As one court has said:

> The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. . . . It therefore follows that an appellate court in passing upon the propriety of the issuance or dissolution of a preliminary injunction will not determine the merits of the case in advance of the trial, and its decision as to the propriety of granting the writ is no intimation of what the judgment of the lower court should be at the final hearing; ***nor is it law of the case*** . . . .

Jomicra v. California Mobile Home Dealers Ass'n, 12 Cal. App. 3d 396, 401 (1970) (internal

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[5] The Court of Appeal also commented that any promise to build a school assumed that "sufficient bond funds are received." Opinion, p. 12.

[6] As discussed in Section II.A above, at the time they filed their motion for a preliminary injunction, Plaintiffs had not asserted a claim that Grossmont had an obligation to build the school.

[7] For the Court's convenience, a copy of Respondent's Brief on Appeal is attached as Exhibit 3 to the LeQuang Decl.

quotations omitted; emphasis added).

And while Plaintiffs also argue that a finding that Grossmont had an obligation to build the school was "necessary" because Defendants argued on appeal that this was a question of law, subject to de novo review, they fail to point out that they argued that the appropriate standard of review was an abuse of discretion because, according to them, the injunction was based not just on Propositions H and U but "all of the additional representations and promises Grossmont made to the voters when they approved those bond initiatives." Respondent's Brief on Appeal, p. 20. The Court acknowledged that the parties disputed whether the existence of an obligation to build the school was a pure question of law or mixed question of law and fact, but concluded that "for purposes of deciding this appeal, we need not resolve that dispute . . . ." Opinion, p. 11. The Court then proceeded to analyze the language of Propositions H and U and the evidence, ultimately concluding that this Court did not err in finding that Propositions H and U contained a promise to build the school.

But in reaching that conclusion, it is apparent that the Court was only making a determination about the ***likelihood*** of success and not a final determination on the merits. For if the Court of Appeal intended to establish a principle of law that would govern this Court's final adjudication of the case, it would not have said that the issue would be "subject to the presentation of additional evidence" and that it did not have to decide whether the obligation to build a school was a question of law. It simply would have stated that, as a matter of law and law of the case, Propositions H and U obligate Grossmont to build a school.

The Court of Appeal opinion here stands in stark contrast to *North Coast Coalition v. Woods*, 110 Cal. App 3d 800 (1980), upon which Alpine relies. In *North Coast*, the Department of Social Services appealed an order granting a preliminary injunction prohibiting it from enforcing a statutory welfare regulation. *Id.* at 802-803. Like Grossmont, the Department argued that the trial court's ruling was subject to de novo review because it presented a pure question of law, and like Alpine, North Coast argued that the injunction was subject to an abuse of discretion standard. *Id.* at 804. But unlike the Court of Appeal here, the Court of Appeal in *North Coast* expressly concluded that "a determination on the merits is appropriate because ***no fact questions***

are presented." *Id.* at 805 (emphasis added). And unlike the Court of Appeal here, the Court in *North Coast* expressly stated that its decision would be "law of the case." *Id.* It stated:

> The present case is "clear," and thus a determination on the merits is appropriate, because no fact questions are presented. The issue of the validity of the challenged regulations is solely one of law, and this court is in as good a position to resolve the issue now as the trial court would be after determination of this appeal. . . . A determination of the validity of the challenged regulations is thus within the scope of review on this appeal, ***and will be the law of the case.***

Id. (internal citations omitted; emphasis added). Here, on the other hand, the Court never stated it was establishing a principle of law, and it never said it was establishing the law of the case.

Nor was the Court of Appeal here in as good a position to resolve the merits of the case as this Court was on summary judgment (or would have been at trial). *See, e.g., University of Texas v. Camenish*, 451 U.S. 390, 395-96 (1981) (noting that preliminary injunctions are frequently granted "on the basis of procedures that are less formal and evidence that is less complete than a trial on the merits" and where the parties have not had the benefit of "a full opportunity to present their cases"); *State Bd. of Barber Examiners v. Star*, 8 Cal. App. 3d 736, 739 (1970) (noting that even where a preliminary injunction decision presents legal, rather than factual issues, "[a] party often is not as fully prepared to meet the issues as [it] would be at trial"). Here, in changing its view about the alleged promise to build a school, there can be little doubt that this Court benefited from a more extensive evidentiary record and arguments focused squarely on the obligation to build a new school and not the previous waste claims upon which the injunction was predicated. *See supra* section II.B.

An appellate court's determination is not law of the case if the facts in evidence later change and those facts were material to the outcome. *See City of Los Angeles v. Los Angeles Bldg. & Const. Trades Council*, 109 Cal. App. 2d 81, 84 (1952). That is because the law of the case doctrine applies to the trial court's subsequent adjudication only where "the precise question before the court has been decided in a former appeal in the same action and under ***substantially*** the same state of facts . . . ." *Id.* (emphasis in original). Where, however, new evidence is material to the outcome, the same precise issue is not being decided and the law of the case does not apply. *Id.*; *see also id.* at 87 (White, P.J., concurring) (noting that the appellate court's ruling

on appeal of a preliminary injunction was binding at trial only because the evidence at trial was "no[t] differen[t] in any material respect" from the evidence considered in the former appeal).

Here, new evidence was presented, and that new evidence was material. Indeed, the Court of Appeal did not even have before it the board resolutions authorizing the submissions of Propositions H and U to the voters, which as a matter of law are considered part of the bond measures. *See Associated Students of N. Peralta Community College v. Bd. of Trustees of Peralta Community College Dist.,* 92 Cal. App. 3d 672, 677-78 (1979) (citing cases). Those resolutions, as well as the testimony of Board members Jim Kelly and Rob Shield (also not part of the Court of Appeal's record), show how and why the word "begin" was added to the description of the new high school in Proposition U, and it had nothing to do with imposing an obligation to build the school, but rather the sequencing of the enrollment threshold. Yet based on Alpine's arguments and without the benefit of the resolutions, the Court of Appeal found that the word "begin" supported Alpine's contention that begin meant "must begin." Opinion, p. 12.

The Court of Appeal also did not have before it the 2002/2003 Master Plan, which was incorporated by reference into Proposition H. As stated in Proposition H, the 2002/2003 Master Plan identified the list of potential projects that could be funded with Proposition H funds and assigned to each project a priority. A new school was not listed among the highest priority projects that Grossmont believed it "must do," but rather was a project that it believed it "should do." These are just two examples of evidence that this Court needed to consider when determining whether Propositions H and U obligated Grossmont to build a new school and that were not before the Court when it decided the preliminary injunction motion.[8]

In sum, in affirming the preliminary injunction, the Court of Appeal did not make a final determination that Grossmont had an obligation to build a new school. Moreover, on appeal of the preliminary injunction, the Court of Appeal only needed to decide that Plaintiffs were likely to succeed, and that is all the Court did. Nowhere does the Court say it was confronted with a pure question of law that it would finally decide on appeal; rather, the Court emphasizes that it

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[8] Grossmont also could not have supplemented the record on appeal, because on review of a preliminary injunction order, a court of appeal may not consider documents and pleadings that were not before the trial court. *See People ex rel. Garamendi v. Am. Autoplan, Inc.,* 20 Cal. App. 4th 760, 769 n.7 (1993).

needed to find only a likelihood of success. *See* Opinion, pp. 5-6. If the Court had made a final determination on this issue, it would have said so. Instead, the Court said that the issue of an obligation to build a school "will be subject to the presentation of additional evidence and argument at trial." It could not be clearer in stating it was not establishing the law of the case.

B. The Court of Appeal Decision Has No Bearing on the Court's Summary Judgment Ruling That Plaintiffs' Claims Are Time-Barred

The Court of Appeal's decision also provides no basis for reconsidering the Court's summary judgment ruling that Plaintiffs' claims are barred by the statute of limitations.

1. Alpine

Alpine makes no argument that the Court of Appeal decision warrants reconsideration. *See* Alpine's Opposition, pp. 8-11. Instead, Alpine rehashes the same arguments it made on summary judgment. A motion for reconsideration, however, is not a device for rearguing points that were made or could have been made when the original motion was decided. *See Le Francois v. Goel*, 35 Cal. 4th 1094, 1106 (2005). Regardless, for all the reasons previously discussed on summary judgment, the Court correctly found that Alpine's claims are time-barred.

First, Alpine continues to argue that their claims are analogous to claims for anticipatory breach of contract. They are not. An anticipatory breach claim allows a plaintiff to claim a breach of contract immediately after the other party repudiates its obligations under the contract. As Alpine's own case states, a plaintiff "can treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his remedies for actual breach if a breach does in fact occur at such time." *Taylor v. Johnson*, 15 Cal. 3d 130, 137-38 (1975) (citations omitted). Putting aside that there is no contract giving rise to an anticipatory breach claim, and even assuming Grossmont repudiated a contract, Alpine has not elected either of these remedies. Anticipatory repudiation simply has no bearing on this case.

Second, as it did on summary judgment, Alpine continues to mischaracterize its claims as claims that it is impossible to build the school. But this is not the gravamen of Alpine's

complaint. In determining what statute of limitations applies to a plaintiff's claim, a court should look at the "gravamen of [the] complaint and the nature of the right sued upon." *McCleod v. Vista Unified Sch. Dist.*, 158 Cal. App. 4th 1156, 1165 (2008). The gravamen of Plaintiffs' complaint is that Grossmont is spending bond funds on various projects before a new high school in Alpine and that such spending ***threatens*** to exhaust all Proposition U bond and related state matching funds before a new high school can be built. Second Amended Complaint ¶¶52, 64-66. This ***threat*** to exhaust Proposition U bond and related state matching funds, however, resulted from Grossmont's November 8, 2012 decision to defer construction of the new high school and place the school in the last phase/priority of Proposition U bond projects. Every dollar that Grossmont now spends on a project other than a new high school is a result of that decision, and Plaintiffs' claim challenging those expenditures is a challenge to the November 8, 2012 decision to deprioritize the school.

Whether or not it is now impossible to build a new high school for Alpine, the gravamen of Plaintiffs' challenge to Grossmont's use of bond funds on any project ahead of a new school in Alpine is a challenge to the November 8, 2012 decision, which was subject to validation.

Third, Alpine's claim that it only just discovered there might not be enough money to build the school at the deposition of Scott Patterson taken on October 2, 2015 is highly disingenuous. To begin with, Scott Patterson's deposition is not new evidence because his testimony was available when Alpine filed its opposition to Defendants' motion for summary judgment on October 16, 2015. But, moreover, Alpine claimed almost two years ago that the November 8, 2012 resolution rendered the construction of the school impossible when it asked the State Board of Education to "expedite" review of its petition for unification. In the petition, it stated:

> B) Reprioritization of GUHSD Bond Projects Renders Impossible the Construction of an Alpine High School
>
> * * *
>
> . . . In ***November 2012***, GUHSD conducted a full bond review program and approved a revised bond project list to spend the available cash balance of bond proceeds. As mentioned above, the Alpine school was consciously moved to the bottom of the list (referenced as Phase 17U). ***Current ongoing work and all of the higher priority projects (through Phase 13U) will consume available funds through 2016/2017. . . .***[9]

[9] See also the virtually identical allegations in paragraph 52 of the Second Amended Complaint.

> 2) Actions by GUHSD Render Construction of the Alpine High School Mathematically Impossible
>
> . . . In ***November 2012***, GUHSD Superintendent Ralf Swenson recommended an indefinite suspension of site work and that recommendation was formally adopted by the GUHSD Board ***on Nov 8, 2012***. The effect of the re-allocation of site work and the demotion of the Alpine school to the last phase of the bond program has made construction of the school within the GUHSD program a near mathematical impossibility . . . .

Separate Statement of Undisputed Material Facts in Support of Grossmont's Motion for Summary Judgment ("UF") 51 (emphasis added).

This also is the position that Alpine took when it claimed an urgent need for a preliminary injunction. *See* Supplemental Declaration of Chris Loarie in Support of Plaintiffs' Motion for Preliminary Injunction dated 11/26/14 ("For all practical purposes, the Alpine high school will never be built under Grossmont's current bond and expenditure program because the cash flows are too small and too far apart."); Supplemental Declaration of Sal Casamassima in Support of Plaintiffs' Motion for Preliminary Injunction dated 12/18/14 ("But Grossmont's finances mathematically demonstrate the high school cannot be paid for if Grossmont continues to spend bond funds as it intends to.").

And it is the position Alpine took in the Second Amended Complaint, which alleged:

> More importantly, Grossmont will have exhausted its bonding capacity with the projected 2015 bond sale such that no more bonds can be sold until 2019, and that bond is estimated to be a mere $12 million. Subsequent bond issuances in years to follow will also be reduced such that ***there will not be enough, or timely (from a construction cost and payment perspective), Proposition U money available to ever build the Alpine High School.***

Second Amended Complaint ¶ 53 (emphasis added).

In short, there are no new facts justifying reconsideration, much less reversal, of this issue.

2. ATBA

Unlike Alpine, ATBA actually attempts to argue that the Court of Appeal established the law of the case barring this Court's ruling on the statute of limitations. The Court of Appeal did nothing of the sort. This Court's ruling on the statute of limitations turned on two issues: (1) the gravamen of Plaintiffs' complaint; and (2) whether the gravamen of the complaint is a challenge

to an action subject to validation.

Here, the Court found that the gravamen of Plaintiffs' complaint is that "Grossmont is spending bond funds on various projects before a new high school in Alpine and that such spending threatens to exhaust all Proposition U bond and related state matching funds before a new high school can be built." SJ Order, p. 3 (citing Second Amended Complaint ¶¶ 52, 64-66). The Court further found that this constituted a challenge to Grossmont's November 8, 2012 decision to defer construction of the new school and place it in the last phase/priority of Proposition U, thereby deciding to fund various other projects before the school. *See* SJ Order, pp. 3-4. The Court further found that the November 8, 2012 decision was "inextricably bound up with Grossmont's financial obligations and an integral part of its method of financing," and therefore subject to the 60-day statute of limitations applicable to reverse validation actions. *Id.*

The Court of Appeal Opinion did not determine or establish any principle or rule of law that controls any of these issues. It does not characterize the gravamen of the complaint, much less do so differently from the Court's summary judgment Order, and it does not address whether the November 8, 2012 resolution was subject to validation. Indeed, it does not discuss the statute of limitations because Grossmont had not raised the defense when the Court decided the motion for preliminary injunction.

ATBA does not and cannot point to any principle or rule of law set forth by the Court of Appeal that bears upon the statute of limitations issue. The only part of the Opinion that ATBA refers to is the "reference" to a finding that Alpine did not intend to interfere with Grossmont's ongoing projects. This was not a statement of a principle or rule of law, and it was not necessary to the Court's affirmance of the preliminary injunction.

ATBA also makes a bizarre argument that Defendants are barred or estopped from asserting the statute of limitations defense because Grossmont's decision to defer construction of the school constituted a challenge to the validity of Proposition U and is subject to the 60-day statute of limitations. But a statute of limitation "prescribes the time period beyond which ***suit may be brought***." *Life Sav. Bank v. Wilhelm*, 84 Cal. App. 4th 174, 177 (2000) (emphasis added). Grossmont has not brought any suit. Moreover, the Court of Appeal did not set forth any

principle or rule of law that has any bearing on this issue.

Nothing in the Court of Appeal's decision establishes law of the case, much less law of the case justifying the reversal of the Court's ruling on the statute of limitations.

C. The Court of Appeal Decision Has No Bearing on the Court's Summary Judgment Ruling That There Is No Contract To Build a School

The Court of Appeal's decision likewise provides no basis for reconsidering the Court's summary judgment ruling that there is no contract to build the school.

Alpine argues that if the Court of Appeal established the law of the case that Propositions H and U obligated Grossmont to build the school, the Court should reconsider its finding that there was no agreement between Grossmont and Alpine to build the school. As discussed in section III.A above, the Court of Appeal did not establish the law of the case that Propositions H and U obligate Grossmont to build the school. But, in any event, that issue would not alter the Court's finding that Alpine failed to present evidence raising a triable issue as to the existence of a contract to build the school. None of the documents that Alpine claims constitute an agreement between Alpine and Grossmont supports such a finding, and Alpine did not claim that Propositions H and U were part of the agreement. And even if the Court considered them to have contained promises to build the school, like every other document that Alpine relied upon, Propositions H and U do not contain any covenants by Alpine or reflect any exchange of consideration between Grossmont and Alpine. They do not support Alpine's contract theory.

IV. CONCLUSION

For all of the foregoing reasons, the Court should deny Plaintiffs' motion for reconsideration and enter summary judgment in favor of Defendants, as it did previously. Because the Court of Appeal also has now rendered a decision on the preliminary injunction, the Court has jurisdiction to vacate the preliminary injunction in light of its summary judgment ruling, which the Court also should do.

Dated: December 4, 2015

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: _____

KHAI LEQUANG
Attorneys for Defendants
GROSSMONT UNION HIGH SCHOOL DISTRICT and RALF SWENSON

PROOF OF SERVICE

I declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 2050 Main Street, Suite 1100, Irvine, CA 92614. On December 4, 2015, I served the within documents:

DEFENDANTS' OPPOSITION TO ALPINE UNION SCHOOL DISTRICT'S MOTION FOR RECONSIDERATION OF ALL PARTIES' SUMMARY JUDGMENT/SUMMARY ADJUDICATION MOTIONS

☐ BY FACSIMILE by transmitting via facsimile number (949) 567-6710 the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmission confirmation report is attached hereto.

☒ BY U.S. MAIL by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

☐ BY OVERNIGHT DELIVERY by placing the document(s) listed above in a sealed overnight envelope and depositing it for overnight delivery at Irvine, California, addressed as set forth below. I am readily familiar with the practice of this firm for collection and processing of correspondence for processing by overnight mail. Pursuant to this practice, correspondence would be deposited in the overnight box located at 2050 Main Street, Suite 1100, Irvine, CA 92614 in the ordinary course of business on the date of this declaration.

☐ BY HAND DELIVERY: I delivered the above-listed documents on the date set forth below to an authorized courier to be served by hand by said courier on the date set for the above to the person(s) at the addresse(es) set forth below.

☒ BY ELECTRONIC SERVICE by electronically mailing the document(s) listed above to the e-mail address(es) set forth below, or as stated on the attached service list per agreement in accordance with Code of Civil Procedure Section 1010.6.

☒ (*State*) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (*Federal*) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

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

Executed on December 4, 2015, at Irvine, California.

Karen Johnson

SERVICE LIST

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