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PUBLIC CORRUPTION: MAXIMIZING REMEDIES

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PUBLIC CORRUPTION – MAXIMIZING REMEDIES

By Leonard L. Gumport[1]

I. INTRODUCTION

A public office is a public trust. Bribery of a public official violates that public trust and causes "incalculable harm" to the ability of government to deliver efficient and honest services. Terry v. Bender, 143 Cal.App.2d 198, 208-09 (1956). This article describes civil remedies that can be used to redress that incalculable harm. Those remedies include compensatory, punitive, and treble damages, a constructive trust on ill-gotten gains, and restitution without proof of loss.

Laws that provide significant civil remedies for public corruption include: (a) Govt. Code § 1090, (b) the Political Reform Act of 1974 (the "PRA"), Govt. Code § 81000 et seq., (c & d) common law causes of action for breach of fiduciary duty and fraud; (e) Civil Code § 2224, (f) the unfair competition law ("UCL"), Bus. & Prof. Code § 17200 et seq., (g) the False Claims Act ("FCA"), Govt. Code §§ 12650-55, (h) Labor Code § 2860, and (i) the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq.

Instructive cases on civil remedies for public corruption include: (a) Thomson v. Call, 38 Cal.3d 633 (1985) ("Thomson"); (b) Miller v. City of Martinez, 28 Cal.App.2d 364 (1938); (c) Seminole Nation v. United States, 316 U.S. 286, 296, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942); (d) United States v. Carter, 217 U.S. 286, 30 S.Ct. 515, 54 L.Ed. 769 (1910); (e) Chicago Park District v. Kenroy, Inc., 78 Ill.2d 555, 402 N.E.2d 181 (1980); and (f) City of Chicago v. Keane, 64 Ill.2d 559, 357 N.E.2d 452 (1976).

II. GOVERNMENT CODE § 1090

A. Elements of Cause of Action under Govt. Code § 1090

Govt. Code § 1090 provides:

> Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. . . .

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[1] Partner in Gumport|Reitman. This article includes ideas developed with substantial assistance from Michael A. Sachs, Chief Deputy County Counsel of the County of San Bernardino. Mr. Sachs and I are counsel for the County in pending litigation by the County against former officials and private businessmen who pleaded guilty to bribery charges. The opinions (and any errors) in this article are mine and do not reflect the views of Mr. Sachs, the County, its affiliates, or my clients.

Govt. Code § 1090 is violated when (1) any county, district, and city official or employee (2) is "financially interested" (3) in "any contract" (4) "made" by that person (5) in his or her "official capacity," or "by any body or board of which" the official is a member. Remedies for violations of Govt. Code § 1090 include restitution without proof of loss.

Section 1090 "is founded on the ancient and self-evident principle that no man can faithfully serve two masters, a principle which has always been an essential attribute of every rational system of positive law." People v. Watson, 15 Cal.App.3d 28, 38 (1971); see People v. Darby, 114 Cal.App.2d 412, 425 (1952); Thomson, 38 Cal.3d at 633-34. Section 1090's terms "cannot be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose." People v. Honig, 48 Cal.App.4th 289, 315 (1996) ("Honig").

B. First Element – Public Official

A violation of Govt. Code § 1090 requires proof that the allegedly prohibited misconduct was committed by a county, district, or city official or employee within the meaning of § 1090. As set forth below, the remedies provided for violations of § 1090 are not limited to the public official who committed the § 1090 violation.

C. Second Element – Financially Interested

Under Govt. Code § 1090, a public official is "financially interested" whenever the official has a direct or indirect pecuniary interest in the contract. Honig, 48 Cal.App.4th at 316; Terry v. Bender, supra, 143 Cal.App.2d at 207-08. Honig approved this jury instruction:

> The phrase 'financially interested' as used in Government Code section 1090 means any financial interest which might interfere with a state officer's unqualified devotion to his public duty. The interest may be direct or indirect and includes any monetary or proprietary benefits, or gain of any sort, or the contingent possibility of monetary or proprietary benefits. The interest is direct when the state officer, in his official capacity, does business with himself in his private capacity. The interest is indirect when the state officer makes a contract in his official capacity with an individual or entity, which individual or entity, by reason of the state officer's relationship to the individual or entity at the time the contract is entered into, is in a position to render actual or potential pecuniary benefits directly or indirectly to the state officer based on the contract the individual or entity has received. [48 Cal.App.4th at 322-23 (quotations and citations omitted).]

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Honig further held:

> In a similar vein, the term "financially interested" in section 1090 cannot be interpreted in a restricted and technical manner. The law does not require that a public officer acquire a transferable interest in the forbidden contract before he may be amenable to the inhibition of the statute, nor does it require that the officer share directly in the profits to be realized from a contract in order to have a prohibited financial interest in it. [Citations omitted.] . . . The fact that the officer's interest might be small or indirect is immaterial so long as it is such as deprives the [state] of his overriding fidelity to it and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than public good. [Citations and quotations omitted.] And, [w]e must disregard the technical relationship of the parties and look behind the veil which enshrouds their activities in order to discern the vital facts. [Citations and quotations omitted.]
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> Moreover, prohibited financial interests are not limited to express agreements for benefit and need not be proved by direct evidence. Rather, forbidden interests extend to expectations of benefit by express or implied agreement and may be inferred from the circumstances. [48 Cal.App.4th at 315 (citations omitted; brackets in original text).]

"The types of financial interests prohibited by section 1090 are many and varied." Honig, 48 Cal.App.4th at 315. For example, a public official is financially interested in a contract when: (1) the official has a debtor-creditor or ownership relationship with a party to the contract (see Moody v. Shuffleton, 203 Cal. 100, 104-05 (1928)); (2) the official has an ownership interest in a company that will make commissions from contracts made by the public entity (Fraser-Yamor Agency, Inc. v. County of Del Norte, 68 Cal.App.3d 201, 205 (1977)); (3) a party to the contract is, through a nominee, a tenant of the official (People v. Darby, supra, 114 Cal.App.2d at 754-55)); (4) a party to the contract has an implied agreement to rent equipment from a partnership in which the official has an interest (People v. Deysher, 2 Cal.2d 141, 146-50 (1935)); or (5) the official is an employee of a party to the contract (Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal.App. 592, 601-02 (1924); Hobbs, Wall & Co. v. Moran, 109 Cal.App. 316, 317-18 (1930)); and (5) the official conspires to receive a bribe in return for influencing the

public entity to make the contract (see People v. Deysher, supra, 2 Cal.2d 141; People v. Vallegra 67 Cal.App.3d 847 (1977); Terry v. Bender, supra 143 Cal.App.2d at 207-08).

"Where the interest is remote and speculative, no conflict of interest is held to be presented under the statute." Breakzone Billiards v. City of Torrance, 81 Cal.App.4th 1205, 1231 (2000). A public official's receipt of a campaign contribution does not, standing alone, suffice to establish that the official has a prohibited financial interest in a contract sought by the campaign contributor. See id., at 1231 ("It is not sufficient that a city council member desires to advocate the position of a campaign supporter; there must be some financial or pecuniary benefit to the governmental official which could sway his or her judgment").

Govt. Code § 1091 provides bright-line, narrowly circumscribed exceptions for a financial interest that is only a "remote interest" provided that "the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest." See Govt. Code § 1091(d). Govt. Code § 1091.5 provides additional narrowly circumscribed circumstances when a public official is deemed not to be interested in a contract. The exceptions are so narrow that they will rarely apply.

D. Third Element – Any Contract

By its terms, § 1090 applies to "any contract." That term is construed broadly. For example, Honig, 48 Cal.App.4th 289, ruled that a "contract" includes a public grant:

> [T]he Legislature defined "grant" in Civil Code section 1053 as a transfer in writing. . . . Pursuant to Civil Code section 1040 the Legislature included "grants" within the broader subject of "contracts" and subjected them to the same rules of law. Accordingly, where a state official makes a contract in which he has a financial interest we see no basis upon which he can escape responsibility under sections 1090 and 1097 by claiming that the transfer was actually a "grant."

Honig, 48 Cal.App.4th at 350.

A public entity's decision to modify or renew a pre-existing contract constitutes a contract within the scope of § 1090. 81 Ops. Cal. Atty. Gen. 134, 1998 WL 125378 (1998), citing City of Imperial Beach v. Bailey, 103 Cal.App.3d 191 (1980) and Millbrae Assoc. for Residential Survival v. City of Millbrae, 262 Cal.App. 2d 222, 236-37 (1968).

A lease is a contract. "A lease of real property is both a conveyance of an estate in land (a leasehold) and a contract." Vallely Investments, L.P. v. Bancamerica Commercial Corp., 88 Cal.App.4th 816, 822 (2001). Further, an assignment of a lease agreement constitutes the making of a new contract. Vallely Investments, supra, 88 Cal.App.4th at 822 ("The assumption agreement creates a new privity of contract between landlord and assignee, enforceable by the landlord as a third party beneficiary, regardless of whether the landlord was a party to the assumption agreement").

A public entity's decision to permit an assignment of a contract constitutes the making of a contract within the meaning of Govt. Code § 1090. 76 Ops. Cal. Atty. Gen. 118, 1993 WL 195353 at *5 (Cal.A.G.) (Govt. Code § 1090 prohibited councilman from participating in city's decision to approve transfer of cable television franchise; Attorney General stated: "We view the entire exchange, with the council's approval of the franchise agreement transfer, as one interrelated transaction for purposes" of section 1090).

E. Fourth Element – That the Contract Was Made

> Although section 1090 refers to a contract "made" by the officer or employee, the word "made" is not used in the statute in its narrower and technical contract sense but is used in the broad sense to encompass such embodiments in the making of a contract as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation of bids.

Millbrae Assoc. for Residential Survival v. City of Millbrae, 262 Cal.App. 2d 222, 237 (1968) (affirming conviction of public official for violating Govt. Code § 1090).

A contract is "made" within Govt. Code § 1090 when a public entity decides to affirm or renew an existing contract. City of Imperial Beach v. Bailey, 103 Cal.App.3d 191, 195-96 (1980) see Thompson, 38 Cal.3d at 644-45 ("Moreover, the policy goals of section 1090 support the rule that public officers 'are denied the right to make contracts with themselves *or to become interested in contracts thus made*'") (italics in original; citations omitted); 77 Ops.Cal.Atty.Gen. 112, 1994 WL 184320, at *3 (1994) ("We have consistently determined that any modifications to a contract would also fall within the proscription of section 1090"); see also Terry v. Bender, supra, 143 Cal.App.2d at 202-04, 207-08; Salada Beach etc. Dist. v. Anderson, 50 Cal.App.2d 306, 310-11 (1942); People v. Vallegra, supra, 67 Cal.App.3d at 869.

A public entity's decision to permit an assignment of a contract constitutes the making of a contract within the meaning of Govt. Code § 1090. 76 Ops.Cal.Atty.Gen. 118, 1993 WL 195353, at *5 (1993). In that matter, the franchisee sought the city's consent to the franchisee's proposed sale of the franchise to a third party. A city councilman had a financial interest in the current franchisee. The Attorney General advised:

> Turning to the question of the application of section 1090 to the sale of the councilman's franchise, we find that under the terms of the franchise agreement, a sale or other transfer is subject to the approval of the city. Without such approval, no transfer may occur. The council's approval is just as necessary to the "making" of the contract, whether it is a contract of sale, assignment, or other transfer, as is the consent of the councilman and the new owner. [Id., at *5.]

A contract can be made within § 1090 when a public entity makes a decision not to renegotiate an existing contract. 81 Ops.Cal.Atty.Gen. 134, 1998 WL 125378 (1998). In that matter, a city entered into a real property lease and water purchase agreement with a general partnership. The lease and purchase agreement required renegotiation of the rental rate and water fees every five years in accordance with specified guidelines. After the city entered into the lease, one of the partners in the partnership was elected to the city council. Five years after the signing of the lease, the question arose whether § 1090 precluded the city from renegotiating or not renegotiating the rental rate. The Attorney General opined that § 1090 precluded the city council from taking either step (but did not preclude the partner from divesting his interest):

> The decision not to renegotiate the payments terms has the same effect as renegotiating and agreeing to keep the existing payment terms unchanged. A determination not to renegotiate is the equivalent of establishing the rates for the new period and therefore constitutes the "making" a contract. . . .

81 Ops.Cal.Atty.Gen. 134, 1998 WL 125378, at *3 (1998).

F. Fifth Element – Official Capacity

Any participation by the official within the course and scope of official business satisfies the "official capacity" requirement. Campagna v. City of Sanger, 42 Cal.App.4th 533 (1996) (attorney negotiated contract in official capacity under § 1090 because negotiating the contract "was unquestionably within the course and scope of his official business as city attorney").

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"[T]he test is whether the officer or employee *participated in* the making of the contract in his official capacity." People v. Gnass, 101 Cal.App.4th 1271, 1292-93 (2002) (italics in original) (quoting Millbrae Assn. etc. v. City of Millbrae, supra, 262 Cal.App.2d at 236-37).

A public official's duty of undivided loyalty precludes the official from changing hats in an effort to avoid acting in an official capacity. People v. Gnass, supra, 101 Cal.App.4th at 1291 ("Just as Campagna could not 'change hats' from city attorney to private attorney in his negotiations with the San Francisco firm, Gnass could not switch from representing the interests of the Waterford PFA in relation to the Marks-Roos PFAs to representing his own private interest in becoming disclosure counsel for them"); Stigall v. City of Taft, 58 Cal.2d 565, 569 (1962) (§ 1090 applied to contract even though the official resigned before the city voted to approve the contract).

G. Remedy – Restitution

"It is settled law that where a contract is made in violation of section 1090, the public entity is entitled to recover any compensation that it has paid under the contract without restoring any of the benefits it has received." Finnegan v. Schrader, 91 Cal.App.4th 572, 583 (2001) (public official was required to disgorge all compensation paid to him by public entity); Miller v. City of Martinez, supra, 28 Cal.App.2d at 370 (city had right to recover entire purchase price paid for goods from contractor who employed city official); Thomson, 38 Cal.3d at 647 ("Moreover, the city or agency is entitled to recover any consideration which it has paid, without restoring the benefits received under the contract").

In Miller v. City of Martinez, supra, 28 Cal.App.2d 364, the public official (Severns) was a council member of a city (Martinez). Severns was a shareholder and manager of Shell Oil, which sold product to Martinez. A taxpayer filed an action to recover all payments made by Martinez to Shell Oil, not merely contract proceeds traced to Severns. The trial court sustained demurrers to the complaint. The Court of Appeal reversed, holding that: (1) the facts alleged in the complaint reflected that Severns was financially interested in Shell Oil's sales to Martinez; and (2) the complaint stated a valid cause of action to recover all payments made to Shell Oil by Martinez. Miller, 28 Cal.App.2d at 370-71. As illustrated by Miller v. City of Martinez, supra, the restitution provided by § 1090 is not limited to the amount of the public official's financial interest in the contract. Any other view would dilute the efficacy of § 1090 by leaving contractors with a powerful incentive to pay small bribes for big public contracts.

In Thomson, the California Supreme Court affirmed a judgment that required a city official (Call) to make restitution to the city (Albany) of the full $258,000, plus interest, that Call received in return for conveying his property to Albany through a third party (IGC/Cebert). In addition to requiring Call to make restitution of all sale proceeds received by him, the judgment permitted Albany to keep the land without offset for its reasonable value. In affirming, the Supreme Court ruled:

> The trial court's solution – allowing the city to retain the land and, at the same time, recover the $258,000 plus interest from the Calls – finds ample support in California case law. Clearly, no recovery could be had for goods delivered or services rendered to the city or public agency pursuant to a contract violative of section 1090 or similar contract-of-interest statutes.
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> Moreover, the city or agency is entitled to recover any consideration which it has paid, without restoring the benefits received under the contract. Confronting this issue directly, the court in [County of Shasta v. Moody, 90 Cal.App. 519 (1928)] rejected the appellant's contention that the county was estopped from maintaining an action against him without first restoring or offering to restore to him the benefits it received from him under the contract. . . . [38 Cal.3d at 646-47 (citations and footnote omitted).]

Under § 1090, the public entity is entitled to restitution of proceeds that flow indirectly from the public entity to the recipient. See Thomson, 38 Cal.3d at 646 fn. 18.

Govt. Code § 1092.5 provides narrowly circumscribed protection for the interests of good faith purchasers for value and good faith encumbrancers for value. A knowing participant in a violation of Govt. Code § 1090 is not entitled to this protection. See Govt. Code § 1092.5.

H. Spurious Defenses – Waiver, Estoppel, and Lack of Fraud or Loss

In Thomson, the Supreme Court held that the public entity's right to restitution does not require proof of fraud, dishonesty, loss, or damage. "[T]he violation of section 1090 cannot turn on the question of whether actual fraud or dishonesty was involved." Thomson, 38 Cal.3d at 648. "In short, if the interest of the public officer is shown, the contract cannot be sustained by showing that it is fair, just and equitable as to the public entity." Id., at 649. See also People v. Gnass, supra, 101 Cal.App.4th at 1287-88 ("In view of the purposes of our conflict-of-interest statutes, it is well established that their scope is not limited to instances of actual fraud,

dishonesty, unfairness or loss to the governmental entity . . . .") (quoting Honig, 48 Cal.App.4th at 314-15). "[T]he full disclosure of an interest by an officer is also immaterial, as disclosure does not guarantee absence of influence." Thomson, 38 Cal.3d at 649-50 (footnote omitted). In contrast, criminal liability for violation of Govt. Code § 1090 requires proof that the public official "willfully" violated § 1090. See Govt. Code § 1097.

Estoppel is not a valid defense. See Salada Beach Public Utility District v. Anderson, 50 Cal.App.2d 306, 310 (1942); County of Shasta v. Moody, supra, 90 Cal.App. 519, held:

> Appellant strenuously contends that the court is estopped from maintaining this action without first restoring, or offering to restore, to him the benefits received from the job work, printing, advertising, etc. There is no merit in this contention. The contracts being void under the express provisions of the statute, and also being against public policy, there is no ground for any equitable considerations, presumptions, or estoppels. [90 Cal.App. at 523.]

Waiver is not a valid defense. Terry v. Bender, supra, 143 Cal.App.2d at 214 (rejecting demurrer based on waiver defense to causes of action for violation of conflict-of-interest laws, fraud, and breach fiduciary duty, because "Laws of this nature are for the protection of the public by promoting honesty in governmental affairs").

III. THE POLITICAL REFORM ACT OF 1974

A. Elements of Cause of Action under Govt. Code § 87100

The PRA prohibits a public official from participating in any way in a governmental decision in which the public official knows or has reason to know that he or she has a financial interest. Unlike Govt. Code § 1090, the PRA is not limited to contracts.

Govt. Code § 87100, a provision of the PRA, provides:

> No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

A violation of Govt. Code § 87100 occurs when: (1) a public official (2) participates in making or attempting to use public office to influence a governmental decision (3) in which the official knows or has reason to know that the official has a financial interest (including a

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financial interest as defined in Govt. Code § 87103). The remedies for a violation of Govt. Code § 87100 include restitution under Govt. Code § 91003(b) as set forth below.

In Hays v. Wood, 25 Cal.3d 772 (1979) the Supreme Court ruled:

> The broad policy of the chapter, as expressed in section 87100, prohibits any public official from knowingly participating in or influencing a governmental decision in which he has a financial interest. On the assumption that this policy is served by a public awareness of the financial interests of government officials, chapter 7 requires affected public officers to make annual disclosures of sources of income. [Id., 25 Cal.3d at 778-79.]

B. First Element – Public Official

Govt. Code § 87100 by its terms applies to public officials "at any level of state or local government."

C. Second Element – Participation in the Governmental Decision

Govt. Code § 87100 applies when the public official participates in making or attempting to use public office to influence a "governmental decision." Thus, unlike Govt. Code § 1090, Govt. Code § 87100 is not limited to the making of a "contract."

D. Third Element – Financial Interest in the Decision

Govt. Code § 87103 includes a bright-line test that specifies when a public official has a "financial interest" as a matter of law under Govt. Code § 87100. Section 87103 states:

> A public official has a financial interest within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or immediate family, or on any of the following:
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> (c) Any source of income, other than gifts or loans . . . aggregating two hundred fifty dollars ($250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made. . . .
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> (e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred

> fifty dollars or more in value provided to, received by or promised to the public officials within 12 months prior the time the decision is made. The amount of the value of gifts shall be adjusted biennially by the commission [FPPC] to equal the same amount determined by the commission pursuant to subdivision (f) of Section 89503.

The definition of "gift" in Govt. Code § 82028 includes, subject to limited exceptions, "any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to status." Govt. Code § 82028(a). A gift does not, however, include campaign contributions. Id., § 82028(b)(4). Similarly, Govt. Code § 82030(a) broadly defines "income" to include gifts, including food and beverages, and loans, but excludes campaign contributions from the definition of "income." Id., § 82030(a)-(b)(1); see Woodland Hills Residents Association, Inc. v. City Council of the City of Los Angeles, 26 Cal.3d 938, 945-46 (1980) ("While the act [i.e., PRA] precludes an elected official from participating in a decision in which he or she has 'a financial interest' (Gov[t]. Code § 87100), it expressly excludes from definition of 'financial interest' the receipt of campaign contributions. (Gov[t]. Code §§ 87103, subd. (c), 82030, subd. (b).") (footnotes omitted).

Effective January 1, 2005, the FPPC adjusted upwards the annual gift limit from $340.00 to $360.00 pursuant to Govt. Code § 89503. To facilitate enforcement of the PRA's conflict-of-interest provisions, the PRA requires public officials to file periodic financial reports. See Govt. Code §§ 87200-87203. For reporting purposes, gifts from a single source that aggregate $50.00 or more must be reported by the official, while gifts aggregating $360.00 or more may subject the official to disqualification and sanctions. See Govt. Code § 87207(a).

E. Remedies, Including Restitution under Govt. Code § 91003(b)

The PRA includes a variety of civil and criminal remedies in Govt. Code § 91000 et seq. The most important of the civil remedy provisions is Govt. Code § 91003(b), which provides:

> If it is ultimately determined that a violation [of the PRA] has occurred and that the official action might not otherwise have been taken or approved, the court may set the official action aside as void. The official actions covered by this subsection include, but are not limited to orders, permits, resolutions and contracts, but do

> not include the enactment of any state legislation. In considering the granting of preliminary or permanent relief under this subsection, the court shall accord due weight to any injury that may be suffered by innocent persons relying on the official action. [Emphases added.]

The language of § 91003(b) and the construction placed on the similar provisions of Govt. Code § 1090 and related statutes (see Thomson, supra, 38 Cal.3d at 648; Miller v. City of Martinez, supra, 28 Cal.App.2d at 370) justify the conclusion that § 91003(b) permits restitution, and any other interpretation leads to absurd results. For example, § 91003(b) expressly permits a court to set aside a contract; this remedy would be meaningless if the court, in exercising its power to set aside the contract, lacked the power to require the contracting party to disgorge the consideration received under the contract. Similarly, the power to set aside an order or permit would be meaningless if the party obtaining the order or permit had a right to keep the benefits provided to that party pursuant to the order or permit.

Section 91003(b) by its terms is not limited to contracts between public officials and public entities. To date, certain defendants' in pending litigation by the County of San Bernardino have successfully argued that Citizens for Oxnard v. Maron, 145 Cal.App.3d 702 (1983), limits § 91003(b) to contracts between a public official and a public entity. However, Citizens for Oxnard construed Govt. Code § 91006, not § 91003(b). Further, Citizens for Oxnard, ruled that a "person" in Govt. Code § 91006 did not include a public official and overlooked that the definition of "person" in Govt. Code § 82407 is not limited to public officials. Recently, in construing other provisions of the PRA, the California Supreme Court in People v. Snyder, 22 Cal.4th 304, 311-12 (2000), rejected the contention that the PRA's definition of "person" in Govt. Code § 82047 contains an implied limitation on the kinds of individuals that fit within its broad definition.

The PRA contains civil remedies in addition to Govt. Code § 91003(b). Section 91003(a) provides for injunctive relief. Section 91004 provides that a person who violates the reporting requirements of the PRA "shall be liable in a civil action brought by the civil prosecutor or by a person residing within the jurisdiction for an amount not more than the amount or value not properly reported." Section 91005(a) provides that a person "who makes or receives a contribution, gift, or expenditure in violation" of specified provisions of the PRA may be liable for three times the amount of the unlawful contribution, gift, or expenditure. Section 91005(b)

provides that, except for elected state officials, a public official who receives a benefit as a result of violating Govt. Code § 87100 is liable for up to three times the amount of the benefit. Govt. Code § 91005.5 provides for the recovery of civil penalties in an action brought by the FPPC, district attorney, or city attorney of up to $5,000 per violation. Govt. Code § 91006 imposes joint and several liability when "two or more persons are responsible for any violation."

IV. BREACH OF FIDUCIARY DUTY

A. Breach of Fiduciary Duty and Conspiracy/Aiding and Abetting Liability

"The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68 Cal.App.4th 445, 483 (1998) ("City of Atascadero"); accord Pierce v. Lyman, 1 Cal.App.4th 1093, 1101 (1991).

When an agent fraudulently colludes with third parties to obtain secret profits, the principal may recover restitution of all secret profits from the agent and the colluders. See St. James Armenian Church of Los Angeles v. Kurkjian, 47 Cal.App.3d 547, 552 (1975) ("A person, though himself not a fiduciary, is liable for the breach of fiduciary duty if he colludes with a disloyal fiduciary") (citing Gray v. Sutherland, 124 Cal.App.2d 280, 290 (1954) (citing Restatement of Restitution, § 138(2) (stating: "A third person who has colluded with a fiduciary in committing a breach of duty, and who obtained a benefit therefrom, is under a duty of restitution to the beneficiary"); Certified Grocers of Calif. Ltd. v. San Gabriel Valley Bank 150 Cal.App.3d 281, 289 (1984) ("Further, a person not himself a fiduciary may be liable for breach of fiduciary duty as a result of colluding with a disloyal fiduciary"); J.C. Peacock, Inc. v. Hasko, 196 Cal.App.2d 363, 370-71 (1961) ("If through fraud and conspiracy other defendants assisted defendant Thacher in violating his obligation to his principal by making a secret profit and by retaining the proceeds therefrom, they as well as the fiduciary are equally liable for all the consequences of the conspiracy, regardless of the extent of their participation or the share of the secret profits obtained by them") (quotations and citation omitted); Anderson v. Thacher, 76 Cal.App.2d 50, 71 (1946) ("[W]here, after the violation of a fiduciary obligation, an amount is found to be due from the agent, judgment for the same amount may also be rendered against those proven to have fraudulently aided in the attempt of the fiduciary to obtain secret profits, although they themselves are not fiduciaries, and even though they receive no share of the profits"); Chicago Park District v. Kenroy, supra, 78 Ill.2d 555, 402 N.E.2d 181 (public entity

was entitled to recover all ill-gotten gains of persons who colluded with public official); Continental Management Inc. v. United States, 527 F.2d 613, 616 (Ct. Cl. 1975) ("It is well established, as plaintiffs seem to concede, that a third party's inducement of or knowing participation in a breach of duty by an agent is a wrong against the principal which may subject the third party to liability"); Seminole Nation v. United States, supra, 316 U.S. at 296 ("It is a well established principle of equity that a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor to the beneficiary").

B. First Element – A Fiduciary Relationship

> A public office is a public trust created in the interest and for the benefit of the people. Public officers are obligated, *virtue officii*, to discharge their responsibilities with integrity and fidelity.

Terry v. Bender, supra 143 Cal.App.2d at 206.

"The duties of public office demand the absolute loyalty and undivided, uncompromised allegiance of the individual that holds the office." Honig, 48 Cal.App.4th at 314.

Public officials are fiduciaries for the same reason that other agents are fiduciaries:

> Fidelity in an agent is what is aimed at, and, as a means of securing it the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case that comes within its reason . . . .

Clark v. City of Hermosa Beach, 48 Cal.App.4th 1152, 1171 (1996) (emphasis added; quoting Noble v. City of Palo Alto, 89 Cal.App.47, 51 (1928); see Schaefer v. Berinstein, 140 Cal.App.2d 278, 289 (1956) (officers of municipal corporation "are agents of the corporate body and may not use their official position for their own benefit, or for the benefit of anyone except the municipality itself").

"The obligations of an agent are the same as those imposed on a trustee." Wade v. Diamond A Cattle Company, 44 Cal.App.3d 453, 458 (1975) (citing Civil Code § 2322 and Haurat v. Superior Court, 241 Cal.App.2d 330, 334 (1966). "The relations of principal and agent, like those of beneficiary and trustee, are fiduciary in character." Kinert v. Wright, 81

Cal.App.2d 919, 925 (1947); J.C. Peacock, Inc. v. Hasko, 196 Cal.App.2d 353, 359 n. 6 (1961) ("The relationship of principal and agent is of a fiduciary nature") (citations and quotations omitted).

C. Second Element – Breach of Fiduciary Duty

Disloyal or dishonest conduct by an agent constitutes a breach of fiduciary duty. "An agent is charged in full measure with the duty of honesty and loyalty toward his principal, not only in form but in substance." Kinert v. Wright, supra, 81 Cal.App.2d at 925. Affirming in part a judgment against a dishonest agent, Kinert ruled:

> The relations of principal and agent, like those of beneficiary and trustee, are fiduciary in character. An agent may not do anything which a trustee is forbidden to do, and may not act in his own name unless it is the usual course of business so to do. If a trustee acquires any interest adverse to that of his beneficiary in the subject of the trust he must immediately inform the latter thereof and a failure so to do is a fraud against the beneficiary. . . . [81 Cal.App.2d at 925 (citations omitted).]

A public official has a duty to avoid conflicts of interest and to refrain from using public office for personal profit. As set forth in Terry v. Bender, supra, 143 Cal.App.2d 198:

> Since the officers of a governmental body are trustees of the public weal, they may not exploit or prostitute their official position for their private benefits. When public officials are influenced in the performance of their public duties by base and improper considerations of personal advantage, they violate their oath of office and vitiate the trust reposed in them, and the public is injured by being deprived of their loyal and honest services. [143 Cal.App.2d at 206.]

D. Remedies – Damages and Restitution of Secret Profits

An agent's breach of the fiduciary duty of honesty results in a presumption of damage. "From the requirement of disclosure by a fiduciary, there arises a presumption that the principal is damaged by a breach of that duty." St. James Armenian Church of Los Angeles, supra, 47 Cal.App.3d at 551 (fiduciary was liable for secret profits).

Bribery of an agent causes damage as a matter of law to the agent's principal. United States v. Gaytan, supra, 342 F.3d at 1012. Citing Labor Code § 2860, the Ninth Circuit ruled:

> Thus, under California law, the bribe money accepted by Gaytan properly belonged to the City of Colton. So long as Gaytan

keeps the money, the City suffers an actual loss and ordering disgorgement in the form of restitution is proper.

Other jurisdictions acknowledge this principle. See Kewaunee Scientific Corp. v. Pegram, 130 N.C. 576, 503 S.E.2d 417, 420 (1998) ("[W]e have already concluded that commercial bribery harms an employer as a matter of law, with damages measured at a minimum by the amount of the commercial bribes").

Punitive damages are also recoverable if the plaintiff establishes by clear and convincing evidence that the breach of fiduciary duty was committed oppressively, fraudulently, or oppressively. See Civil Code § 3294(a).

In addition to damages, the principal of a dishonest agent is entitled to recover all secret profits made by the agent and third parties acting in collusion with the agent in violating the agent's duties of honesty and loyalty:

(1) **Liability of Agent for Secret Profits:** "An agent stands in a fiduciary relationship to his principal, and if he makes a secret profit from the subject matter of his agency, his principal may recover such profit." Terry v. Bender, supra, 143 Cal.App.2d at 211. "The duty of the agent to account to his principal for secret profits and kickbacks is fundamental." Arcturus Manufacturing Corp. v. Rork, 198 Cal.App.2d 208, 210 (1962). "An agent . . . is not permitted to make any secret profit out of the subject of his agency." Savage v. Mayer, 33 Cal.2d 548, 551 (1949). See 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment § 49, p. 58 ("If an agent makes any secret profits from his agency, the principal can recover them"); B.F. Goodrich v. Naples, supra, 121 F.Supp. at 348 (employer entitled to recover kickbacks paid to employee); Kinert v. Wright, supra, 81 Cal.App.2d at 926 ("A trustee may not use the trust property for his own profit and if he does so may be required by the beneficiary to account for all profits made by him") (citations omitted); Continental Management, Inc.v. United States, supra, 527 F.2d at 619 (". . . the amount of the bribe provides a reasonable measure of damage, in the absence of a more precise yardstick").

(2) **Liability of Agents for Secret Profits of Colluders:** The disloyal agent is liable for secret profits that the agent causes to flow to participants in the agent's scheme. "[W]here a fiduciary, in breach of his duty of disclosure, causes secret profits to flow to a third party, the fiduciary may be held liable for those profits even though he did not personally receive any part of them." St. James Armenian Church of Los Angeles v. Kurkjian, supra, 47 Cal.App.3d at 553

(quotations, citations, and footnotes omitted); see Probate Code § 16440(a)(3) (trustee's liability for breach of trust includes "[a]ny profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust").

(3) Liability of Third Party Colluders for Secret Profits Generated by the Corrupt Enterprise: Third parties who, for substantial personal gain, knowingly collude with the agent in defrauding the principal are also liable for damages or the secret profits obtained by all of the participants in the agent's fraudulent conduct.

> [W]here, after the violation of a fiduciary obligation, an amount is found to be due from the agent, judgment for the same amount may also be rendered against those proven to have fraudulently aided in the attempt of the fiduciary to obtain secret profits, although they themselves are not fiduciaries, and even though they receive no share of the profits.

Anderson v. Thacher, supra, 76 Cal.App.2d at 71; accord Prince v. Harting, 177 Cal.App.2d 720, 731 (1960) "[O]ne is not privileged, by persuasion, bribery or otherwise, to cause a servant or other agent to violate any of his duties of loyalty." Rest. (Second) of Agency, § 312.

In Jackson v. Smith, 254 U.S. 586, 41 S.Ct. 200 (1921), the U.S. Supreme Court, applying common law, addressed the liability of those who collude with a disloyal fiduciary to make secret profits. Justice Brandeis wrote for the Court:

> The course taken was one which a fiduciary could not legally pursue. Since he did pursue it and profits resulted the law made him accountable to the trust estate for all the profits obtained by him and those who were associated with him in the matter, although the estate might not have been injured thereby. And others who knowingly join a fiduciary in such an enterprise likewise become jointly and severally liable with him for such profits. [Id., 254 U.S. at 588-89 (citations omitted).]

J.C. Peacock, Inc. v. Hasko, supra, 196 Cal.App.2d 363, affirmed a judgment against non-fiduciaries for all secret profits generated from an agent's scheme to defraud the agent's principal. See also J.C. Peacock, Inc. v. Hasko, 196 Cal.App.2d 353 (1961) (related case). The Court of Appeal ruled:

> It is also claimed that the judgment against the various defendants is unsupported by the findings [footnote omitted] and the law. As discussed above, all parties who knowingly join a conspiracy wherein an agent is a co-conspirator become jointly

> liable for the profits of the enterprise . . . . It is also argued that each appellant is liable only for the amount of profits received. The language and reasoning of Anderson and Hickson are dispositive of such claims, including the contention that it was incumbent on the court to find as to the respective interests of each partner in Pacific Aircraft. . . . [196 Cal.App.3d at 371-72 (footnotes and citations omitted).]

In Hickson v. Gray, 91 Cal.App.2d 684 (1949), a broker defrauded his principal by making a secret profit on the sale of the principal's real estate. Hickson held that the principal had a right to recover from the broker and the third party who knowingly participated in the broker's scheme:

> If through fraud and conspiracy another person assists a real estate broker in violating his fiduciary duty to his principal by making a secret profit and retaining the proceeds therefrom, he, as well as the fiduciary, is equally liable for all consequences of the fraud and conspiracy regardless of the extent of his participation or the share of the profits he has obtained. [91 Cal.App.2d at 686-87.]

"In nearly unbroken succession, courts have declared that victimized principals may obtain non-statutory remedies against outsiders who have knowingly participated in or induced an agent's breach of duty." Continental Management, Inc. v. United States, supra, 527 F.2d at 616. In Continental Management, supra, the federal court, relying on common law, including Anderson v. Thacher, supra,76 Cal.App.2d 50, held that the Government had a common law cause of action to hold a bribor liable for bribing a public official.

In B.F. Goodrich Co. v. Naples, supra, 121 F.Supp. 345, the federal court, applying California law, held that an employer had the right to recover the amount of the kickbacks from both the employer's disloyal employee and the contractors who paid the kickbacks:

> If he [the agent] makes any [secret profit] unbeknown to the principal, the principal is entitled to recover them as a fraud upon the relationship. And all who participate in it are liable to the principal along with the agent, despite the fact that the participant, other than the agent, may not have benefitted from the transaction. Their participation is a civil wrong resulting in damage, and the doctrine of civil conspiracy is resorted to merely in order to fasten joint liability on all participants, whether they gain anything from the transaction or not. [121 F.Supp. at 348 (bracketed information added).]

In Doctors' Co. v. Superior Court, 49 Cal.3d 39 (1989), the Supreme Court revisited the law of civil conspiracy and addressed why Anderson v. Thacher, supra, 76 Cal.App.2d 50, and a related case correctly imposed conspiracy liability when third parties, for substantial personal gain, conspire in a fiduciary's actual fraud:

> In each of those cases a plaintiff, defrauded by means of one defendant's violation of a fiduciary duty, was allowed to recover against another defendant who, though not subject to the fiduciary duty, had conspired in the fraud. Since the nonfiduciary defendants had acted not simply as agents or employees of the fiduciary defendants but rather in furtherance of their own financial gain, they could not have been relieved of liability under the *Gruenberg-Wise* rule. [49 Cal.3d at 47.]

Liability may also be imposed on aiders and abettors of a tort:

> Liability may also be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.

Saunders v. Superior Court 27 Cal.App.4th 832, 846 (1994) (citing, inter alia, Rest. Torts 2d, § 876(b)-(c)). Recently, addressing California's evolving common law rules of vicarious liability, U.S. District Judge Margaret Morrow ruled that California law permitted imposing vicarious liability on a non-fiduciary who deliberately aids and abets a fiduciary's breach of duty, even when the law of civil conspiracy does not justify vicarious liability. Neilson v. Union Bank of California, N.A., 290 F.Supp.2d 1101, 1133 (C.D. Cal. 2003). Judge Morrow ruled:

> No California case, however, holds that a party must owe the plaintiff a duty before he or she can be held liable as an aider or abettor. Rather, California cases outlining the elements of aiding and abetting liability have consistently cited the elements of the tort as they are set forth in the Restatement (Second) of Torts, § 876, and have omitted any reference to an independent duty on the part of the aider and abettor. Under this formulation, liability may properly be imposed on one who knows that another's conduct constitutes a breach of duty and substantially assists or encourages the breach. [290 F.Supp.2d at 1133 (citations omitted).]

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V. FRAUD

A. Elements of Fraud

> The well-established common law elements of fraud which give rise to the tort action for deceit are: (1) misrepresentation of a material fact (consisting of false representations, concealment or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to deceive and induce reliance; (4) justifiable reliance on the misrepresentation; and (5) resulting damage.

City of Atascadero, 68 Cal.App.4th at 481. See Schaefer v. Berinstein, supra, 140 Cal.App.2d at 288 ("A cause of action based on fraud must aver a fraudulent representation; that the representation was false; that it was known by the defendant to be false; that it was made with intent to deceive the plaintiff; that the plaintiff relied on the representation; and that the plaintiff was damaged"). "Constructive fraud arises on a breach of duty by one in a confidential or fiduciary relationship to another which *induces justifiable reliance* by the latter *to his prejudice*." Estate of Gump, 1 Cal.App.4th 582, 601 (1992) (emphasis in original). "Constructive fraud allows conduct insufficient to constitute actual fraud to be treated as such where the parties stand in a fiduciary relationship." Id.

The plaintiff does not have to show fraud by clear and convincing evidence. Liodas v. Sahadi, 19 Cal.3d 278, 291 (1977) (overruling "clear and convincing" standard). Further, "the reliance element is relaxed in constructive fraud to the extent we may presume reasonable reliance upon the misrepresentation or nondisclosure of the fiduciary, absent direct evidence of lack of reliance." Estate of Gump, supra, 1 Cal.App.4th at 601.

B. First & Second Elements – Representation and Its Falsity

The first two elements of a fraud cause of action, i.e., a representation and its falsity, are met when a non-fiduciary (or a fiduciary) utters a falsehood or half-truth, or when a fiduciary fails to disclose a material fact. "Regardless of whether one is under a duty to speak or disclose facts, one who does speak must speak the whole truth, and not by partial suppression or concealment make the utterance untruthful and misleading." American Trust Co. v. California Western States Life Ins. Co., 15 Cal.2d 42, 64 (1940).

Civil Code § 1709 states:

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> One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.

Civil Code § 1710, subd. 3, provides that "deceit" within Civil Code § 1709 includes:

> The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact.

Under Civil Code § 1710, subd. 3, "deceit" includes the suppression of a fact, by one who is bound to disclose it. This provision imposes liability on a fiduciary for failure to disclose material facts. See 5 Witkin, Summary of California Law (9th ed. 1988) Torts § 698, p. 800 ("The first situation in which liability is imposed for concealment is where the defendant is in a fiduciary or other confidential relationship which imposes a duty of disclosure"); see Estate of Gump, supra, 1 Cal.App.4th at 601 (1992).

"If a trustee acquires any interest adverse to that of his beneficiary in the subject of the trust, he must immediately inform the latter thereof and a failure to do so is a fraud against the beneficiary." Kinert v. Wright, supra, 81 Cal.App.2d at 925.

C. Third & Fourth Elements – Intent to Deceive and Justifiable Reliance

The third and fourth elements are met by proof that the defendant intended to deceive the plaintiff and that the plaintiff justifiably relied on the misrepresentation, half-truth, or omission.

"[T]he reliance element is relaxed in constructive fraud to the extent we may presume reasonable reliance upon the misrepresentation or nondisclosure of the fiduciary, absent direct evidence of lack of reliance." Estate of Gump, supra, 1 Cal.App.4th at 601; see Schaefer v. Berinstein, supra, 140 Cal.App.2d at 296 ("it is recognized that in cases involving a fiduciary relationship facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required") (quotations and citation omitted).

D. Remedies – Damages and Restitution of Secret Profits

Recoverable damages include secret profits, including those of the agent and the agent's colluders, that result from the agent's fraud on the principal as discussed above. See Anderson v. Thacher, supra, 76 Cal.App.2d at 72 ("And where, after the violation of a fiduciary obligation, an amount is found to be due from the agent, judgment for the same amount may also be rendered against those proven to have fraudulently aided in the attempt of the fiduciary to obtain secret

profits, although they themselves are not fiduciaries, and even though they receive no share of the profits"); Prince v. Harting, supra, 177 Cal.App.2d at 731.

Moreover, each participant in a conspiracy "is in law a party to every act previously or subsequently done by any one of the others in pursuance of it." DeVries v. Brumback, 53 Cal.2d 643, 648 (1960) (emphasis added).

Punitive damages are recoverable for fraud provided that the it is established by clear and convincing evidence. See Civil Code § 3294 (a).

VI. CIVIL CODE § 2224 – CONSTRUCTIVE TRUST

A. Requirements for Imposing Constructive Trust

Civil Code § 2224 states:

> One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other or better right thereto, an involuntary trustee of the thing gained, for the person who would otherwise have had it.

Under Civil Code § 2224 (and a related provision, Civil Code § 2223), the requirements for a constructive trust are: (1) a thing (2) that the defendant wrongfully detains or gained by fraud, the violation of a trust, or some other wrongful act, and (3) that the plaintiff either owns or otherwise would have had the thing wrongfully detained or acquired by the defendant. There are no other requirements:

> In order to create a constructive or involuntary trust, as defined in section 2224 of the Civil Code, no conditions other than those stated in that section are necessary. [Citation omitted.] By section 2223 of the code the rule of constructive trust is extended to the case where one person wrongfully detains a thing from another. The rule extends to almost any case where there is a wrongful acquisition or detention of property to which another is entitled, since it is based upon the equitable principle that no one may take advantage of his own wrong. Civ. Code § 3517. . . .

Rankin v. Satir, 75 Cal.App.2d 69, 81 (1946).

"Constructive trusts are creatures of equity. In dealing with them, equity will disregard mere form, and will ascertain and act on the substance of things, regarding that as done which should have been done." Elliott v. Elliott, 231 Cal.App.2d 205, 211-12 (1964).

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B. First Element – A "Thing" or Res

"California Civil Code sections 2223 and 2224 do not require that the involuntary trustee acquire the trust res directly from its rightful owner, as a prerequisite for imposition of a constructive trust." GHK Associates v. Mayer Group, Inc., 224 Cal.App.3d 856, 879 (1991).

> The constructive trust doctrine is a remedial device which would lose its efficacy if a trustee were permitted to defeat recovery by wrongfully permitting the res to become valueless, as here. The courts have recognized the right of a beneficiary under a constructive trust, to obtain a money judgment in lieu of a destroyed res, and to recover the value of trust property commingled by a constructive trustee with his own properties, so that the identity thereof could no longer be traced.

Elliott v. Elliott, 231 Cal.App.2d at 209-10 (1964).

Secret profits earned by means of fraud constitute a "thing" that may be subjected to a constructive trust. See Ward v. Taggart, 51 Cal.2d 736, 741-42 (1959) ("Thus, Taggart is an involuntary trustee for the benefit of plaintiffs on the secret profit of $1,000 per acre that he made from his dealings with them").

A bribe received by an employee is property that rightfully belongs to the employer. Labor Code § 2860 provides: "Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment."

Wrongfully transferred trust property constitutes a thing that may be subjected to a constructive trust. City of Atascadero, 68 Cal.App.4th at 465. "Thus if the trustee in breach of trust transfers trust property to a third person who knows of the breach of trust, the third person holds the property on constructive trust for the beneficiary." Id. (quoting 4 Scott on Trusts (4th ed. 1989), § 282, p. 28; footnotes omitted in original text); see Rest. of Restitution, § 190, comment c ("Where a fiduciary holds property upon a constructive trust for the beneficiary under the rule stated in this Section and exchanges the property for other property, the beneficiary is entitled to enforce a constructive trust or equitable lien upon the property so acquired in exchange, under the rules stated in §§ 202-215 (Chapter 13)").

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C. **Second Element – Defendant's Wrongful Act**

Civil Code §§ 2223-24 are not limited to a specific type of wrongful conduct. "Fraud or intentional misrepresentation is not required for a constructive trust to be imposed." GHK Associates v. Mayer Group, Inc., supra, 224 Cal.App.3d at 878.

"Where a fiduciary in violation of his fiduciary duty to the beneficiary transfers property or causes property to be transferred to a third person, the third person, if he gave no value or if he had notice of the violation of duty, holds the property upon constructive trust for the beneficiary." Rest. of Restitution, § 201(1).

D. **Third Element – Plaintiff's Interest in the Thing Detained or Acquired**

Public officials are agents and have a duty to disgorge to their employer all secret profits. As stated in Terry v. Bender, supra, 143 Cal.App.2d 198:

> A public officer may not make an unauthorized profit out of the particular business which has been entrusted to his care. An agent stands in a fiduciary relationship to his principal, and if he makes a secret profit from the subject matter of the agency, the principal may recover such profit. [143 Cal.App.2d at 211.]

"A fiduciary who has acquired a benefit by a breach of his duty as a fiduciary is under a duty of restitution to the beneficiary." Rest. of Restitution, § 138(1); see Gray v. Sutherland, supra, 124 Cal.App.2d at 289 (fiduciaries who violated their fiduciary duties to corporation "hold the funds acquired in violation of their fiduciary duty upon a constructive trust") (citing with approval Rest. of Restitution, § 138(1)). Further, "[a] third person who has colluded with a fiduciary in committing a breach of duty, and who obtained a benefit therefrom, is under a duty of restitution to the beneficiary." Rest. of Restitution, § 138(2); see Gray v. Sutherland, supra, 124 Cal.App.2d at 290 (citing with approval Rest. of Restitution, § 138(2)).

> [W]here, after the violation of a fiduciary obligation, an amount is found to be due from the agent, judgment for the same amount may also be rendered against those proven to have fraudulently aided in the attempt of the fiduciary to obtain secret profits, although they themselves are not fiduciaries, and even though they receive no share of the profits.

Anderson v. Thacher, supra, 76 Cal.App.2d at 71; accord Prince v. Harting, supra, 177 Cal.App.2d at 731. In finding that an employer had the right to hold its employee and third

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parties liable for kickbacks that the third parties paid to the employee, B.F. Goodrich Co. v. Naples, supra, 121 F.Supp. 345, held:

> If he [the agent] makes any [secret profit] unbeknown to the principal, the principal is entitled to recover them as a fraud upon the relationship. And all who participate in it are liable to the principal along with the agent, despite the fact that the participant, other than the agent, may not have benefitted from the transaction. Their participation is a civil wrong resulting in damage, and the doctrine of civil conspiracy is resorted to merely in order to fasten joint liability on all participants, whether they gain anything from the transaction or not. [121 F.Supp. at 348 (bracketed information added).]

In Chicago Park District v. Kenroy, supra, 78 Ill.2d 555, 402 N.E.2d 181, the Illinois Supreme Court cited Rest. of Restitution, § 138(2) in holding that bribors of public officials held the bribors' ill-gotten gains subject to a constructive trust and a duty of restitution:

> It is well established that a public officer occupies a fiduciary relationship to the political entity on whose behalf he serves. [Citations omitted.] Upon allegations that those fiduciary responsibilities have been breached, a cause of action on the part of the represented beneficiaries to seek restitution has been recognized. [Citations omitted.] That the defendants rather than Alderman Wigoda are the parties against whom the City now seeks recovery does not warrant dismissal of its amended complaint. It is a fundamental rule in the law of restitution that "(a) person who has colluded with a fiduciary in committing a breach of duty, and who obtained a benefit therefrom, is under a duty of restitution." (Restatement of Restitution sec. 138(2) (1937); see also Seminole Nation v. United States (1942), 316 U.S. 286, 296, 62 S.Ct. 1049, 1054, 86 L.Ed. 1480, 1490; Restatement (Second) of Trusts sec. 326 (1959); Ashbell, The Third Party Trusteeship: An Equitable Remedy Against Bribers and Corrupters of Public Officials, 67 Ill.B.J. 160 (1978).)) Recognition of this salutary principle has resulted in the imposition of constructive trusts on benefits obtained by third persons through their knowledge of or involvement in a public official's breach of fiduciary duty. (See United States v. Carter (1910), 217 U.S. 286, 30 S.Ct. 515, 54 L.Ed. 769, City of Boston v. Santosuosso (1940), 307 Mass. 302, 30 N.E.2d 278; see also Lenhoff, The Constructive Trust as a Remedy for Corruption in Public Office, 54 Colum.L.Rev. 214 (1954).) Since the allegations here charge defendants with intimate participation in the scheme of bribery and fraud involving Alderman Wigoda, the City has adequately alleged a right to

> recover from the defendants. [78 Ill.2d at 564-65; 402 N.E.2d at 186 (emphasis added; various citations omitted).]

A plaintiff who meets the requirements of Civil Code §§ 2223 or 2224 is entitled to make the defendant "an involuntary trustee," i.e., a constructive trustee, of the thing (res) wrongfully detained or acquired. "The propriety of granting equitable relief of imposition of a constructive trust rests within the sound discretion of the trial court." GHK Associates v. Mayer Group, Inc. 224 Cal.App.3d 856, 878 (1991) (affirming judgment for constructive trust). Lack of an adequate remedy at law is not a defense. Id.

VII. UNJUST ENRICHMENT

"Unjust enrichment . . . is synonymous with restitution." Dinosaur Development, Inc. v. White, 216 Cal.App.3d 1310, 1314 (1989) (citing, inter alia, Rest. of Restitution, § 1).

The elements of a cause of action for unjust enrichment are "receipt of a benefit and unjust retention of the benefit at the expense of another." Lectrodryer v. Seoulbank, 77 Cal.App.4th 723, 726 (2000) "An individual is required to make restitution if he or she is unjustly enriched at the expense of another." First Nationwide Savings v. Perry, 11 Cal.App.4th 1657, 1662 (1992) (citing Rest. of Restitution, § 1). "[T]he public policy of this state does not permit one to 'take advantage of his own wrong,' (Civ. Code § 3517), and the law provides a quasi-contractual remedy to prevent one from being unjustly enriched at the expense of another." Ward v. Taggart 51 Cal.2d 736, 741 (1959).

"For a benefit to be conferred, it is not essential that money be paid directly to the recipient by the party seeking restitution." County of Solano v. Vallejo Redevelopment Agency, 75 Cal.App.4th 1262, 1278 (1999) (citations and quotations omitted). "Benefit means any type of advantage." First Nationwide Savings v. Perry, supra, 11 Cal.App.4th at 1662 (citing Rest. of Restitution, § 1; California Federal Bank v. Matreyek, 8 Cal.App.4th 125, 131 (1992).

The "expense of another" element does not apply, however, when the plaintiff seeks restitution of secret profits generated by the fraud of a faithless agent. A public official is an agent and has an unqualified duty to make restitution of all secret profits:

> A public officer may not make an unauthorized profit out of the particular business which has been entrusted to his care. An agent stands in a fiduciary relationship to his principal, and if he makes a secret profit from the subject matter of the agency, the principal may recover such profit.

Terry v. Bender, supra, 143 Cal.App.2d at 211. "In the absence of special circumstances, moneys received by one in the capacity of agent are not his, and the law implies a promise to pay them to the principal on demand." Savage v. Mayer, supra, 33 Cal.2d at 551. "Where the recovery sought is the return of secret profits or other benefits, the gist of the action is in quasi-contract on the promise implied by law that an agent holds such property or monies for his principal." Haurat v. Superior Court, supra, 241 Cal.App.2d at 335. "A fiduciary who has acquired a benefit by a breach of his duty as a fiduciary is under a duty of restitution to the beneficiary." Rest. of Restitution, § 138(1); see Gray v. Sutherland, supra, 124 Cal.App.2d at 289 (fiduciaries who violated their fiduciary duties to corporation "hold the funds acquired in violation of their fiduciary duty upon a constructive trust") (citing with approval Rest. of Restitution, § 138(1)).

City of Chicago v. Keane, supra, 64 Ill.2d 559, 357 N.E.2d 452, held that common law, including U.S. Supreme Court precedent, requires a public official to make restitution of secret profits even when the public employer does not show that it suffered any loss:

> In the case of a defendant who occupied a fiduciary position in the private sector, these allegations if proved, would establish that he had exploited his fiduciary position for his personal benefit. The fiduciary responsibility of a public officer cannot be less than that of a private individual. In both cases, it is the gain to the agent from the abuse of the relationship that triggers the right to recover, rather than loss to the principal.
>
> The view we take of this case is in accord with that expressed by the Supreme Court of New Jersey in Jersey City v. Hague (1955), 18 N.J. 584, 115 A.2d 8. In that case the city brought suit against a former mayor and other city officials to recover sums of money which the defendants had exacted from city employees as a condition of employment. The court held that the complaint stated a cause of action for restitution arising out the defendants' breach of fiduciary duties. The court rejected the suggestion that restitution was inappropriate because the defendants' profits had not been made at the expense of the city. . .
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> * * * *
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> In United States v. Carter (1910), 217 U.S. 286, 30 S.Ct. 515, 54 L.Ed. 769, an army engineer in charge of a harbor improvement used the extensive power and discretion entrusted to him to award contracts to a particular company with which he had a secret agreement for a share of its profits. Despite the absence of proof that the work performed was inferior or that the cost to the

government had been increased, the Supreme Court held that the plaintiff was entitled to restitution. . . .

* * * *

The limited role which the trial court would assign to the rule forbidding conflict of interest on the part of a governmental officer seems to rest on the theory that the act of an officer can violate that rule only if the conflict produced monetary damage to the governmental entity to which the officer has been elected or appointed. As the cases already discussed make clear, such a limitation cannot be imported into either the statutes or the common law rule. (See also Restatement of Restitution sec. 197 (1937); Restatement (Second) of Agency secs. 388, 395, 404A (1958).) To do so would plainly rob them of their effectiveness. . . . [64 Ill.2d 565-68; 357 N.E.2d at 456-57 (emphasis added).]

Further, "[a] third person who has colluded with a fiduciary in committing a breach of duty, and who obtained a benefit therefrom, is under a duty of restitution to the beneficiary." Rest. of Restitution, § 138(2); see Gray v. Sutherland, supra, 124 Cal.App.2d at 290 (citing with approval Rest. of Restitution, § 138(2)).

VIII. UNFAIR COMPETITION

A. Elements of Cause of Action under Bus. & Prof. Code § 17200

A cause of action under the unfair competition law ("UCL") requires proof that (1) a person (2) has engaged in "unfair competition" as defined in Bus. & Prof. Code § 17200. The UCL provides for restitution, but not damages.

B. First Element -- Person

Bus. & Prof. Code § 17201 states: "the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons." Aiders and abettors are liable under the UCL. People v. Toomey, 157 Cal.App.3d 1, 15 (1984) ("But if the evidence establishes defendant's participation in the unlawful practices, either directly or by aiding and abetting the principal, liability under sections 17200 and 17500 can be imposed").

C. Second Element – Unfair Competition

Bus. & Prof. Code § 17200 states:

> As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

"Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices." Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 2003 WL 662543 at *3 (2003) ("Korea Supply").

The UCL includes "anything that can properly be called a business practice and that at the same time is forbidden by law." Korea Supply, 2003 WL 662543 at *3 (quoting Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 180 (1999).

As stated in People v. Duz-Mor Diagnostic Laboratory, Inc., 68 Cal.App.4th 654 (1999):

> A business practice constitutes unfair competition if it is forbidden by any law, be it civil or criminal, federal, state, or municipal, statutory, regulatory or court-made[,] or if it is unfair, that is, if it offends an established public policy . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. [68 Cal.App.4th at 658 (citations and quotations omitted).]

D. Remedy – Restitution

Bus. & Prof. Code § 17203 states:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined by a court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

Under the UCL, "[p]revailing plaintiffs are generally limited to injunctive relief and restitution." Korea Supply Co., 29 Cal.4th at 1144 (quoting Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra, 20 Cal.4th at 179). "[I]njunctive relief is not a prerequisite to restitution under section 17203." ABC Internat. Traders, Inc. v. Matsushita Electric Corp. 14 Cal.4th 1247, 1251 (1997).

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Restitution under Bus. & Prof. Code § 17203 may take the form of a monetary recovery. For example, in Cortez v. Purolator Air Filtration Products Co. 23 Cal.4th 163, 173-78 (2000) ("Cortez"), the Supreme Court held that § 17203 authorizes a court to require an employer to pay wages wrongfully withheld from employees. See ABC Internat. Traders, Inc. v. Matsushita Electric Corp., supra, 14 Cal.4th at 1271 ("[W]e conclude section 17203 authorizes a trial court to order restitution of money lost through acts of unfair competition, as defined in section 17200, whether or not the court also enjoins future violations").

As construed in Korea Supply, § 17203 permits restitution in the following alternative situations: (1) when the money or property claimed by the plaintiff was obtained from the plaintiff by the defendant by violating § 17200; or (2) when the plaintiff has an "ownership" or "vested" interest in the money or property that the defendant obtained by violating § 17200. Korea Supply, 29 Cal.4th at 1148 ("Under the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent moneys given to the defendant or benefits in which the plaintiff has an ownership interest") (emphasis added). In essence, the second, alternative test articulated in Korea Supply authorizes restitution under § 17203 when the plaintiff can show that some law, other than § 17200, gives the plaintiff an enforceable interest in the property that the defendant obtained by violating § 17200. This rule precludes plaintiffs from using § 17200 to obtain property that rightfully belongs to somebody else.

In deciding whether to grant relief under the UCL, "consideration of the equities between the parties is necessary to ensure an equitable result." Cortez, 23 Cal.4th at 181. "The court's discretion is very broad." Id., at 180. The equities, however, may not be used to wholly defeat a UCL claim when the defendant's conduct is unlawful and not merely unfair. Cortez, at 179 ("We agree that equitable defenses may not be asserted to wholly defeat a UCL claim since such claims arise out of unlawful conduct"). In cases involving bribery or conflicts of interest, the official's conduct is unlawful, not merely unfair. Further, public policy favors strict enforcement of laws prohibiting conflicts-of-interests. Terry v. Bender, supra, 143 Cal.App.2d at 207 ("Statutes prohibiting such 'conflict of interest' by a public officer are strictly enforced").

IX. FALSE CLAIMS ACT, GOVT. CODE §§ 12650-55

A. Govt. Code § 12651

The FCA entitles a political subdivision to recover treble damages and penalties against any person who knowingly presents a false claim, causes a false claim to be presented, conspires

with others to get a false claim paid, or makes or causes a false record to be made to conceal, avoid, or decrease an obligation to pay money or property to a political subdivision. See Govt. Code § 12651. "The False Claims Act must be construed broadly so as to give the widest possible coverage and effect to its prohibitions and remedies." LeVine v. Weis, 90 Cal.App.4th 201, 210 (2001). See Govt. Code § 12655(c) (the FCA "shall be liberally construed to promote the public interest").

B. First Element – Political Subdivision

A "political subdivision" under the FCA includes a city, county, "or other legally authorized local government entity with jurisdictional boundaries." Govt. Code § 12650(b)(3).

C. Second Element – Prohibited Conduct

Govt. Code § 12651(a) imposes liability on any person who does any of the following:

> (1) Knowingly presents or causes to be presented to an officer of employee of the state or any political subdivision thereof, a false claim for payment or approval.
>
> (2) Knowingly makes, uses, or causes to be used a false record or statement to get a false claim paid or approved by the state or by any political subdivision.
>
> (3) Conspires to defraud the state or any political subdivision by getting a false claim allowed or paid by the state or any political subdivision. . . .
>
> (7) Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state or any political subdivision. . . .

"Claim" includes "any request or demand for money, property, or services" made to any "political subdivision." Govt. Code § 12650(b)(1). "Knowingly" includes "in reckless disregard of the truth or falsity" of information. Id., § 12650(b)(2).

D. Treble Damages, Penalties, and Joint and Several Liability

Govt. Code § 12650(a) imposes joint and several liability for treble damages and penalties on a person who commits any of the conduct proscribed by Govt. Code § 12650(a)(1)-(8). Section 12650(a) and (c) provide:

> (a) Any person who commits any of the following acts [proscribed by § 12650(a)(1)-(8)] shall be liable to . . . the political

> subdivision for three times the amount of damages which the state or the political subdivision sustains because of the act of that person. A person who commits any of the following acts shall also be liable to the . . . political subdivision for the costs of a civil action brought to recover any of those penalties or damages, and may be liable to the state or political subdivision for a civil penalty of up to ten thousand dollars ($10,000) for each false claim: . . .
>
> (c) Liability under this section shall be joint and several for any act committed by two or more persons.

Govt. Code § 12651(a) states that treble damages "shall" be awarded while penalties "may" be awarded. See id., § 12651(a). This statutory language shows that treble damages are mandatory while penalties are discretionary. Section 12651 does not condition an award of penalties on proof of damages; thus, penalties may be awarded even when there are no damages.

Trebling of compensatory damages under the FCA takes place before crediting the defendant with any compensatory payment. Interpreting the parallel federal False Claims Act, the U.S. Supreme Court held in United States v. Bornstein, 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976), that, "in computing the double damages authorized by the Act, the Government's actual damages are to be doubled before any subtractions are made for compensatory payments previously received by the Government from any source." Id., 423 U.S. at 316. Bornstein explains:

> First, this method of computation comports with the congressional judgment that double damages are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims. Second, the rule that damages should be doubled prior to any deductions fixes the liability of the defrauder without reference to the adventitious actions of other persons. . . . Third, the reasoning of the Court of Appeals and District Court would enable to subcontractor to avoid the Act's double-damages provision by tendering the amount of the undoubled damages at any time prior to judgment. This possibility would make the double-damages provision meaningless. . . . [423 U.S. at 314-15 (footnotes omitted).]

X. LABOR CODE § 2860

Labor Code § 2860 provides:

> Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from

> his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of employment . . . [Emphasis added.]

Labor Code § 2860 dictates the conclusion that bribery causes damage as a matter of law and that a public entity is entitled to recover any bribe received by a public official. See United States v. Gaytan, 342 F.3d 1010 (9th Cir. 2003). In affirming a trial court's ruling that a public official (Gaytan) damaged his employer (the City of Colton) by accepting a bribe, the Ninth Circuit held:

> Gaytan accepted $61,506.63 in bribe money. So long as Gaytan retains those funds, the City of Colton suffers a loss in that amount. The district court properly ordered Gaytan to pay restitution to the City.

United States v. Gaytan, supra, 342 F.3d at 1012. Citing Labor Code § 2860, the Ninth Circuit ruled:

> Thus, under California law, the bribe money accepted by Gaytan properly belonged to the City of Colton. So long as Gaytan keeps the money, the City suffers an actual loss and ordering disgorgement in the form of restitution is proper.

United States v. Gaytan, supra, 342 F.3d at 1012 fn. 3.

XI. BREACH OF IMPLIED COVENANT OF GOOD FAITH

The elements of a cause of action for breach of contract "are the existence of the contract, performance by the plaintiff or excuse for nonperformance, breach by the defendant and damages." First Commercial Mortgage Co. v. Reece, 89 Cal.App.4th 731, 745 (2001).

Every contract contains an implied covenant of good faith and fair dealing. Jonathan Neil & Associates, Inc. v. Jones, 98 Cal.App. 4th 434, 447 (2002) ("There is an implied covenant of good faith and fair dealing in every contract . . . .").

"It is well-established that a breach of the implied covenant of good faith is a breach of the contract." Schwartz v. State Farm Fire and Casualty Co., 88 Cal.App.4th 1329, 1339 (2001).

The implied covenant of good faith and fair dealing prohibits any party to the contract from doing "anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. . . ." Kendall v. Ernest Pestana, Inc., 40 Cal.3d 488,

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498, 500 (1985) (quoting Universal Sales Corp. v. Cal. etc. Mfg. Co., 20 Cal.2d 751, 771 (1942)).

"The covenant of good faith and fair dealing 'is implied as a supplement to the express contractual convenants, to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement.'" Jonathan Neil & Associates, Inc. v. Jones, supra, 98 Cal.App.4th at 447 (quoting Waller v. Truck Ins. Exchange, Inc., 11 Cal.4th 1, 36 (1995)).

The implied covenant of good faith is violated whenever one party to a contract provides secret financial benefits to an employee of the other contracting party to influence that party's administration of the contract. See e.g. American Assurance Underwriters Group, Inc. v. MetLife General Ins. Agency, 154 A.D.2d 206, 208 (N.Y. 1990) (where AAUG had contractual relationship with MetLife and AAUG made secret stock payments to MetLife employees, "MetLife could properly terminate the agreement" because AAUG violated the implied covenant of good faith and fair dealing); J. Moreria, LDA v. Rio Rio, Inc., 1992 WL 395577 (S.D.N.Y. 1992) (manufacturer of shoes breached the implied covenant of good faith and fair dealing under contract with purchaser of shoes by making undisclosed payment to employee of purchaser). New York and California apply the same standard for the implied covenant of good faith. Compare Kendall v. Ernest Pestana, Inc., supra 40 Cal.3d at 500 with Dalton v. Educational Testing Service, 87 N.Y.2d 384, 663 N.E.2d 289, 291 (1995) ("This [the implied covenant] embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.' [Citation omitted].").

XII. RICO & STATE LAW BRIBERY STATUTE

A. Private Right of Action under RICO

In 18 U.S.C. § 1964(c), RICO grants a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962" of title 18 of the United States Code. Section 1964(c) provides: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of suit, including a reasonable attorney's fee . . . ." "Person" includes "any individual or entity capable of holding a legal or beneficial interest in property."

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B. Elements of RICO Cause of Action under 18 U.S.C. § 1962(c)

Paragraphs (a)-(d) of 18 U.S.C. § 1962 proscribe various kinds of conduct. Section 1962(c) states: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt." Section 1962(d) provides that it is also unlawful to conspire to violate § 1962(a)-(c).

A violation of § 1962(c) "requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima, S.P.R.L. v. Imrex Company, 473 U.S. 479, 496, 87 L.Ed.2d 346, 105 S.Ct. 3275 (1985). In addition, in a civil action under RICO, the plaintiff must show that "the defendant caused injury to the plaintiff's business or property." Chaset v. Fleer/Skybox International, LP, 300 F.3d 1083, 1086 (9th Cir. 2002).

To prove injury to the plaintiff's business or property, the plaintiff must prove two related components. "First, a civil RICO plaintiff must show that his injury was proximately caused by the [prohibited] conduct. Second, the plaintiff must show that he has suffered a concrete financial loss." Chaset v. Fleer/Skybox International, LP, supra, 300 F.3d at 1086 (brackets in original; quoting Fireman's Fund Ins. Co. v. Stites, 258 F.3d 1016, 1021 (9th Cir. 2001)).

The definition of "racketeering activity" appears in 18 U.S.C. § 1961(1). It defines "racketeering activity" to include, in addition to various specified federal crimes, any "act or threat involving . . . bribery . . . which is chargeable under State law and punishable by imprisonment for more than one year."

State law bribery of public officials can meet RICO's requirement of "racketeering activity." See United States v. Frega (9th Cir. 1999) 179 F.3d 793 (affirming criminal convictions under RICO based on a pattern of racketeering involving state law bribery by attorney of state court judges). Cal. Penal Code § 165 provides:

> Every person who gives or offers a bribe to any member of any common council, board of supervisors, or board of trustees of any county, city and county, or public corporation, with intent to corruptly influence such member in his action or any matter or subject pending before, or which is afterward to be considered by, the body of which he is a member, and every member of any of the bodies mentioned in this section who receives, or offers or agrees to receive any bribe upon any understanding that his official vote,

> opinion, judgment or action shall be influenced thereby . . . is punishable by imprisonment in the state prison for two, three or four years, and upon conviction thereof shall, in addition to said punishment, forfeit his office, and forever be disenfranchised and disqualified from holding any public office or trust.

A civil suit under RICO is not limited to defendants who have already been convicted of criminal activity. Sedima, S.P.R.L. v. Imrex Company, supra, 473 U.S. at 492. ("In sum, we can find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble-damages action under § 1964(c) can proceed only against a defendant who has already been convicted").

C. Possible Removal Resulting from Asserting RICO Claim in State Court

Although state and federal courts have concurrent jurisdiction to adjudicate civil RICO claims, the plaintiff's assertion of a RICO claim in state court will make the state court action removable to federal court. See, e.g., Emrich v. Touche Ross & Co., 846 F.2d 1190, 1196 (9th Cir. 1988) ("Because the RICO claim is one 'arising under the laws of the United States' it falls within the original jurisdiction and is thus removable pursuant to section 1441(a)"). "Where removal is properly effected under section 1441(a), the district court may also elect to exercise pendent jurisdiction over state law claims." Id. Before asserting a RICO claim, the plaintiff must carefully address the relative merits of litigating the dispute in state and federal court.

XIII. SPECIAL CONTRACT PROVISIONS

A public entity can enhance its remedies by including broad disclosure and anti-corruption provisions in its contracts. Here are examples of clauses used by at least one county:

(1) "Conflict of Interest. Contractor shall make all reasonable efforts to ensure that no County officer or employee whose position in the County enables him/her to influence any award of this contract or any competing offer, shall have any direct or indirect financial interest resulting from the award of this contract or shall have any business relationship to the Contractor or officer or employee of the Contractor."

(2) "Improper Consideration. Contractor shall not offer (either directly or through an intermediary) any improper consideration such as, but not limited to, cash, discounts, service, the provision of travel or entertainment, or any items of value

to any employee or agent of the County in an attempt to secure favorable treatment regarding this contract."

(3). "The County, by written notice, may immediately terminate this contract if it determines that any improper consideration as described in the preceding paragraph was offered to any officer, employee or agent of the County with respect to the proposal and award process. This prohibition and termination right shall apply to any contract amendment, extension or other process or activity once the contract has been awarded."

(4) "Contractor shall immediately report any attempt by a County officer, employee or agent to solicit (either directly or through an intermediary) improper consideration from Contractor. The report shall be made to the County Administrative Office."

(5) "Employment of Former County Officials. Contractor agrees to provide information on former County administrative officials (as defined below) who are employed by or represent Contractor. The information provided shall include a list of former County administrative who terminated County employment within the last five years and who are now officers, principals, partners, associates, or employees of the business. For purposes of this provision, 'County administrative official' is defined as a member of the Board of Supervisors or such officer's staff, County Administrative Officer, or member of such officer's staff, County department or group head, assistant department or group head, and any employee in the Exempt Group, Management Unit, or Safety Management Unit."

XIV. CONCLUSION

A state or local public entity victimized by bribery of one of its officials is not limited to firing the official and relying on the criminal process to establish the official's guilt. The public entity also has substantial civil remedies against the official and the official's corrupt patrons.

[END OUT OUTLINE]

* * * *