

11/14/2016 at 02:57:00 PM

Clerk of the Superior Court
By Rhonda Babers, Deputy Clerk

SILLDORF & LEVINE, LLP
Scott D. Levine, Esq. (SBN: 153140)
Shani O. Zakay, Esq. (SBN: 277924)
5060 Shoreham Place, Suite 115,
San Diego, CA 92112
Telephone: (858) 625-3900; Fax: (858) 625-3901
slevine@Sillardorf-Levine.com

GIBBS LAW GROUP, LLP
Eric H. Gibbs, Esq. (SBN: 178658)
Andre M. Mura, Esq. (SBN: 298541)
1 Kaiser Plaza, Suite 1125,
Oakland, CA 94612
Telephone: (510) 350-9710; Fax: (510) 350-9701
ehg@classlawgroup.com
amm@classlawgroup.com

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

MARK COZIAHR, on behalf of himself and all
others similarly situated,

Plaintiff,

vs.

OTAY WATER DISTRICT; SAN DIEGO
COUNTY WATER AUTHORITY; THE
METROPOLITAN WATER DISTRICT OF
SOUTHERN CALIFORNIA; CITY OF SAN
DIEGO; and DOES 1 through 200, inclusive,

Defendants.

Case No.37-2015-00023413-CU-MC-CTL

CLASS ACTION

**[PROPOSED] SECOND AMENDED
COMPLAINT FOR PETITION FOR
WRIT OF MANDATE, DECLARATORY
AND INJUNCTIVE RELIEF, DAMAGES,
RESTITUTION, AND REFUND BASED
ON VIOLATIONS OF ARTICLE XIII D
OF THE CALIFORNIA CONSTITUTION**

JURY TRIAL DEMANDED

Plaintiffs Mark Coziahr and Daniel Patz, on behalf of themselves and all others similarly
situated, allege as follows:

NATURE OF THE CASE

1. Defendant Otay Water District (“Otay Water”) is a public water agency serving
residents and businesses throughout California, including in San Diego County. Defendant City of
San Diego is a public water agency serving residents and businesses throughout California,

SILLDORF & LEVINE, LLP
ATTORNEYS AT LAW
5060 SHOREHAM PLACE, SUITE 115
SAN DIEGO, CALIFORNIA 92122
TELEPHONE (858) 625-3900 FACSIMILE (858) 625-3901

1 including in San Diego County. Their fees for water service exceed the proportional cost of
2 service attributable to a given parcel.

3 2. The California Constitution, however, requires Defendants to anchor rates to the
4 actual cost of water service. Article XIII D in particular forbids Defendants from unilaterally
5 imposing disproportionate fees for water service.

6 3. Defendants' pricing violates this clear constitutional command. Its fees constitute
7 an unconstitutional and excessive fee, charge, or tax on water in violation of the California
8 Constitution.

9 4. Plaintiffs bring this proposed class action to recover unconstitutional and excessive
10 fees, charges, or taxes paid, to stop these public water agencies from violating their constitutional
11 rights, and to vindicate the constitutional policy that water conservation is achieved by pricing
12 that reflects the actual cost of service for incremental levels of water usage to a given parcel.

13 **JURISDICTION AND VENUE**

14 5. The conduct alleged herein took place in and was directed at residents of this state.
15 The jurisdiction of this Court arises under article 6, section 10 of the California Constitution and
16 section 410.10 of the Code of Civil Procedure.

17 6. Venue is proper in this Court because Defendants are headquartered in San Diego
18 County, and a substantial part of the events and conduct giving rise to the violations of law
19 complained of herein occurred in or emanated from this county.

20 **THE PARTIES**

21 7. Plaintiff Mark Coziahr is a resident of San Diego, California.

22 8. Plaintiff Daniel Patz is a resident of San Diego, California.

23 9. Defendant Otay Water is an agency that provides water, recycled water, and sewer
24 service in San Diego County. Its headquarters are in San Diego County.

25 10. Defendant Otay Water provides water service to Plaintiff Coziahr. (See attached as
26 Exhibit "A" and incorporated by reference herein a sample of Defendant Otay Water's water bills
27 to Plaintiff Coziahr).

28

1 11. Defendant City of San Diego, Public Utilities Department, is an agency that
2 provides water, recycled water, and sewer service in San Diego County. Its headquarters are in
3 San Diego County.

4 12. Defendant City of San Diego provides water service to Plaintiff Patz. (See attached
5 Exhibit "B" and incorporated herein a sample of Defendant City of San Diego's water bills to
6 Plaintiff Patz.)

7 13. Plaintiffs are currently unaware of the true names and capacities of the persons
8 sued herein as Does 1-200, inclusive, and therefore sues these defendants by such fictitious
9 names. Plaintiff will amend this Complaint to allege these defendants' true names and capacities
10 when ascertained.

11 14. Unless otherwise alleged, at all relevant times, each Defendant was the agent,
12 servant, employee, partner, joint venture, franchisee, parent, subsidiary, and/or alter ego of the
13 other, and at all times acted within the course and scope of such agency, service, employment,
14 partnership, joint venture, franchise and/or relationship. In addition, each fictitiously-named
15 Defendant is an aider and abettor, joint tortfeasor, agent, employee, or affiliate of Defendant Otay
16 Water or Defendant City of San Diego; each is legally responsible for the unlawful conduct herein
17 alleged; and each may be served with process within the state of California.

18 15. The acts or omissions of Defendants, as herein described, were performed by
19 officers, managing agents, directors, employees, and/or agents who were responsible for all
20 actions alleged herein and who were acting on behalf of Defendants. These individuals had
21 advance knowledge and notice of the action and conduct of such persons and their actions and
22 conduct were ratified, authorized, and approved by the managing agents, officers, attorneys,
23 employees, agents and/or directors of Defendants.

24 16. Plaintiff Mark Coziahr presented a government tort claim to Defendant Otay Water
25 on July 14, 2015, which rejected Plaintiff Mark Coziahr's claim expressly and/or by their failure
26 to timely respond.

27
28

1 17. Plaintiff Daniel Patz presented a government tort claim to Defendant City of San
2 Diego, Public Utilities Department, on August 21, 2015. Defendant rejected Plaintiff Daniel
3 Patz's claim expressly and/or by their failure to timely respond.

4 18. Plaintiffs are serving a copy of this Second Amended Complaint on the Attorney
5 General because this suit questions the constitutionality of Defendants' water rates and/or fees
6 (See California Rules of Court 8.29(c)).

7 19. This action is timely commenced. Defendants' continued imposition and collection
8 of water delivery "charges" or "fees" is an ongoing violation, upon which the statutory limitations
9 period begins anew with each monthly collection. (*Howard Jarvis Taxpayers Ass'n v. City of La*
10 *Habra* (2001) 25 Cal.4th 809, 821.)

11 **SUBSTANTIVE ALLEGATIONS**

12 **A. The California Constitution Forbids Fees And Charges That Exceed The**
13 **Proportional Cost of Water Service Attributable To A Given Parcel.**

14 20. In November 1996, the California electorate adopted Proposition 218, which added
15 articles XIII C and XIII D to the California Constitution. Proposition 218 "protects taxpayers by
16 limiting the methods by which local governments' exact revenue from taxpayers without their
17 consent." (*Howard Jarvis Taxpayers Ass'n v. City of Riverside* (1999) 73 Cal.App.4th 679, 683
18 (citation omitted).) To this end, article XIII C requires voter approval for certain local tax levies,
19 and article XIII D forbids certain assessments and property-related fees and charges.

20 21. Relevant here, article XIII D, section 6, subdivision (b)(3) provides: "The amount
21 of a fee or charge imposed upon any parcel or person as an incident of property ownership shall
22 not exceed the proportional cost of the service attributable to the parcel." Relatedly, section 6,
23 subdivision (b)(1) provides: "Revenues derived from the fee or charge shall not exceed the funds
24 required to provide the property related service."

25 22. Water service is a property-related service for purposes of article XIII D. In fact,
26 "all charges for water delivery' incurred after a water connection is made 'are charges for a
27 property-related service, whether the charge is calculated on the basis of consumption or is
28 imposed as a fixed monthly fee.'" (*City of Palmdale v. Palmdale Water Dist.* (2011) 198

1 Cal.App.4th 926, 934 (*Palmdale*) (quoting *Bighorn-Desert View Water Agency v. Verjil* (2006) 39
2 Cal.4th 205, 217).)

3 23. This means that, under article XIII D, fees or charges for water service cannot
4 exceed the proportional cost of service attributable to a given parcel. (See Art. XIII D, § 6, subd.
5 (b)(3).) To comply with this constitutional mandate, public water agencies must correlate “prices
6 with the actual cost of providing water.” (*Capistrano Taxpayers Assn., Inc. v. City of San Juan*
7 *Capistrano* (2015) 235 Cal.App.4th 1493, 1506.) “[W]ater rates that exceed the cost of service
8 operate as a tax[.]” (*Id.* at p. 515.) Public water agencies are constitutionally barred from imposing
9 such taxes unilaterally, meaning, without voter approval. (*Id.*)

10 24. “In any legal action contesting the validity of a fee or charge, the burden shall be
11 on the agency to demonstrate compliance with this article.” (Art. XIII D, § 6, subd. (b)(5).)
12 Therefore, in order to establish that their rate structure complies with article XIII D, Defendants
13 must present substantial evidence that withstands independent court review. (*Silicon Valley*
14 *Taxpayers’ Assn., Inc. v. Santa Clara County Open Space Auth.* (2008) 44 Cal.4th 431, 448.)

15 **B. Defendants Impose Disproportionate Fees For Water Service.**

16 25. Defendants are public water agency subject to Proposition 218, and thus are
17 prohibited from imposing above-cost rates unilaterally.

18 26. Defendants’ water rates are not anchored to the actual cost of water service to a
19 given parcel, as required by California law.

20 Defendant Otay

21 27. Defendant Otay Water uses a tiered water-rate structure, with different tiers for
22 different classes of customers. These rates include both a fixed service charge and a per-unit
23 charge. The fixed service charge is based on the meter size. In turn, the per-unit charge is loosely
24 based on units of water used but does not track the proportionate cost of water service attributable
25 to each parcel. For the per-unit charge, in each tier, the customer class pays a progressively higher
26 charge per unit of water used.

27
28

1 28. Defendant Otay Water employs a system of four billing tiers to charge for units of
2 water used by residential customers, and a system of three billing tiers to charge for the units of
3 water used by commercial, institutional, irrigation, raw water, and recycled water customers.

4 29. For all customers, Defendant Otay Water allocates a set number of units of water
5 is for each tier. Customers pay a higher per-unit rate for each additional unit if the water usage
6 increases into the next higher tier.

7 30. For example, in 2015, residential rates vary as follows: Tier 1 is increased by
8 approximately 56% to calculate Tier 2; Tier 2 is increased by approximately 30% to calculate Tier
9 3; and Tier 3 is increased by approximately 54% to calculate Tier 4. The differences in tier rates
10 are arbitrary, meaning, they do not correspond to the actual cost of water service.

11 31. In 2015, rates for commercial and irrigation customers vary as follows: Tier 1 is
12 increased by approximately 1.5% to calculate Tier 2; and Tier 2 is increased by approximately
13 1.5% to calculate Tier 3. These differences, too, are arbitrary.

14 32. For Defendant Otay Water’s raw water and recycled water customers, the cost of
15 service increases as follows: Tier 1 is increased by approximately 1.6% to calculate Tier 2; and
16 Tier 2 is increased by approximately 1.3% to calculate Tier 3. These differences are also arbitrary.

17 33. Before 2015, Defendant Otay Water maintained similar tiered rates for residential,
18 commercial, institutional, irrigation, raw water, and recycled water customers. These include the
19 five-year schedule of rates adopted on August 4, 2009, the five-year schedule of rates adopted on
20 September 4, 2013, and any incremental increases applicable to specific categories of water
21 service which the Defendant adopted during these periods. The rates applicable during these
22 periods were not anchored to the actual cost of service to each parcel, and thus are in violation of
23 California law, as discussed herein.

24 ///
25 ///
26 ///
27 ///
28 ///

Defendant City of San Diego

1
2 34. Defendant City of San Diego owns and operates two self-supporting enterprises for
3 water and wastewater. These utility systems provide service to 1.4 million residential,
4 commercial, industrial, and wholesale customers. Because Defendant operates as a public water
5 agency subject to Proposition 218, it is prohibited from imposing above-cost rates unilaterally.

6 35. Defendant adopted new water rate structures for water and wastewater in or around
7 2007, 2013, and 2016 in accordance with recommendations made by consulting firms hired to
8 provide cost-of-service analyses. Defendant adopted rate structures using tiered rates which are
9 not anchored to the actual cost of water service to a particular parcel, as required by California
10 law.

11 36. The rate structure Defendant adopted pursuant to the 2007, 2013, and 2016 cost-of-
12 service studies utilize a tiered water-rate structure with different tiers for different classes of
13 customers. These rates include both a fixed service charge and a per-unit charge. The per-unit
14 charge is loosely based on units of water used but does not track the proportionate cost of water
15 service attributable to each parcel. For the per-unit charge, in each tier, the customer class pays a
16 progressively higher charge per unit of water used.

17 37. The rate structures Defendant employed during these years and continues to
18 employ to date, based on the 2007, 2013, and 2016 cost-of-service studies, respectively, do not
19 reflect the true costs of supplying water or wastewater to various tiers of usage for any given
20 parcel. Instead, the above-cost-of-service pricing for tiers of water service imposed by Defendant
21 City of San Diego violates the California Constitution, specifically, Proposition 218.

22 38. Halla Razak, director of Public Utilities at City of San Diego, in an interview with
23 The San Diego Union Tribune described the 2016 ratemaking as “bringing [] back to
24 compliance” water rates that were *not* anchored to the actual cost of service to a given parcel, as
25 required by the Constitution: “The fear is that the rate that we’ve had is really not connected to the
26 cost of service study”; “[s]o we are vulnerable there, . . .” Morgan Cook, “City proposes water
27 rate hikes,” The San Diego Tribune, July 20, 2015, *available at*

1 <http://www.sandiegouniontribune.com/news/2015/jul/20/rate-hikes/>. None of these water and
2 wastewater ratemakings, however, are in compliance with the Constitution.

3 39. By way of example, in 2015, residential rates varied as follows: Tier 1 is increased
4 by approximately 12% to calculate Tier 2; Tier 2 is increased by approximately 43% to calculate
5 Tier 3; and Tier 3 is increased by approximately 40% to calculate Tier 4. The differences in tier
6 rates are arbitrary, meaning, they do not correspond to the actual cost of water service. That same
7 year, the rate for commercial customers was \$4.47 per hundred cubic feet of water; the rate for
8 multi-family domestic customers was \$4.65 per hundred cubic feet of water; and the rate for
9 temporary construction and irrigation customers was \$4.947 per hundred cubic feet of water.
10 These differences, too, are arbitrary.

11 40. Both Defendants may have instituted these disproportionate rate structures to
12 reward conservation and penalize consumption. For example, Defendant Otay Water calls its
13 lowest tier for residences its “conservation” tier, and its highest its “penalty” tier. Defendants,
14 however, lack the constitutional authority to adopt conservation policies that depart from article
15 XIII D’s clear mandate that water conservation is achieved by pricing that reflects the actual cost
16 of service for incremental levels of water usage to a given parcel. (*See Palmdale, supra*, 198
17 Cal.App.4th at pp. 936–937.)

18 **CLASS ACTION ALLEGATIONS**

19 41. Plaintiffs bring this action on behalf of themselves and all others similarly situated
20 as members of a proposed class (“Class”) initially defined as:

21 All customers of Otay Water District or City of San Diego who
22 received water service after July 1, 1997.

23 42. Excluded from the Class are Defendants’ employees, officers, directors, legal
24 representatives, successors, assigns; any entities in which Defendant may have a controlling
25 interest; and any person who may timely and validly request exclusion from the Class, as
26 authorized by law.

27 43. This action has been brought as a class action, and may properly be maintained,
28 pursuant to the provisions of the Code of Civil Procedure section 382, Civil Code section 1781,

1 and Rule 23 of the Federal Rules of Civil Procedure and case law thereunder, to which trial courts
2 have been directed by the California Supreme Court to look for guidance.

3 44. **Numerosity**: While the precise number of Class members is not yet known, the
4 number of customers Defendant services demonstrates that the Class is so numerous that
5 individual joinder of all members would be impractical, as Defendants service thousands of
6 residents in the San Diego area. Although the precise number of Class members, their identities,
7 and addresses are unknown to Plaintiff, they can be readily ascertained from Defendants' records.
8 Class members may be notified of the pendency of this action by mail, supplemented (if
9 appropriate) by published notice.

10 45. **Existence and Predominance of Common Questions of Fact and Law**: There is
11 a well-defined community of interest in common questions of law and fact which exists as to all
12 members of the Class. These questions predominate over questions affecting individual Class
13 members. These common legal and factual questions include whether:

- 14 a. Defendants' fees or charges for water exceed the proportional cost of the service
15 attributable to the Plaintiff Class's individual parcels;
- 16 b. Defendants calculate the actual costs of water service at various levels of usage;
- 17 c. Defendants learned that their fees or charges for water are not proportional to the
18 cost of service attributable to the Plaintiff Class's individual parcels;
- 19 d. Defendants water rates, which exceed the cost of service, operate as a tax;
- 20 e. Defendants' above-cost-of-service pricing violates article XIII D of the California
21 Constitution.
- 22 f. Defendants have breached mandatory duties imposed upon them by the California
23 Constitution.
- 24 g. Plaintiffs and Class members are entitled to damages, restitution, or disgorgement.
- 25 h. Plaintiffs and Class members are entitled to declaratory and injunctive relief.
- 26 i. Plaintiffs and Class Members are entitled to a writ of mandate.

27 ///

28 ///

1 46. **Typicality of Claims:** Plaintiffs' claims are typical of the claims of the Class.
2 Plaintiff Coziahr and Patz, like other Class members, have been assessed water rates that exceed
3 the cost of service due to Defendants' disproportionate pricing scheme. Plaintiffs' and Class
4 members' claims therefore arise from a common course of conduct by Defendants and are based
5 on the same legal theories.

6 47. **Adequacy of Representation:** Plaintiffs are adequate representatives of the Class,
7 because his interests do not conflict with the interests of the Class. Also, Plaintiffs have retained
8 counsel competent and experienced in complex class action litigation. The interests of the Class
9 will thus be fairly and adequately protected by Plaintiffs and their counsel.

10 48. **Superiority:** A class action is superior to other available means for the fair and
11 efficient adjudication of this dispute. The constitutional violations suffered by Class members are
12 significant and widespread, yet it is economically impractical for members of the Class to
13 prosecute individual actions raising identical constitutional violations. Without the class action
14 device, it would be virtually impossible for Class members individually to obtain effective redress
15 for these constitutional violations.

16 49. Furthermore, even if the Class members themselves could afford to individually
17 litigate their claims, the court system could not. Individualized litigation would present a risk of
18 inconsistent or contradictory judgments and involve thousands of separate actions, which would
19 increase the delay and expense to all parties and to the court system. By contrast, the class action
20 device presents fewer management difficulties, requiring only a single adjudication of the
21 complex legal and factual issues in this dispute, thereby providing the benefits of economy of
22 scale, and comprehensive supervision by a single court.

23 50. Plaintiffs and their counsel know of no difficulties they will encounter in the
24 management of this case which would preclude it from being maintained as a class action.

25 ///
26 ///
27 ///
28 ///
29

COUNT ONE

(Declaratory Relief for Violation of Article XIII D of the California Constitution)

1
2
3 51. Plaintiffs incorporate by reference and reallege all paragraphs previously alleged
4 herein.

5 52. Plaintiffs seek a declaration as to the respective rights and obligations of the
6 parties. An actual controversy has arisen between Plaintiffs (and the Class) and Defendants,
7 because Defendants' pricing for water service exceeds the proportional cost of the service
8 attributable to their respective parcels. Plaintiffs thus seek a declaration for themselves and the
9 Class that Defendants' overall water rate structure operates as an illegal tax, fee, or charge in
10 violation of article XIII D of the California Constitution.

11 53. Specifically, Plaintiffs seek a declaration that the revenues Defendants derive from
12 its water rates exceed the funds required to provide the property related service, in violation of
13 article XIII D, section 6, subdivision (b)(1). Defendants' above-cost pricing scheme "all but
14 assures the revenues [Defendants] received from customers in the higher tiers is more than is
15 required to cover [Defendants'] costs of service." (*Palmdale, supra*, 198 Cal.App.4th at p. 934.)

16 54. In addition, Plaintiffs seek a declaration that Defendants' water rate structure is
17 used for purposes other than that for which the fee or charge was imposed and therefore violates
18 article XIII D, section 6, subdivision (b)(2).

19 55. Lastly, Plaintiffs seek a declaration that Defendants' water rates exceed "the
20 proportional cost of the service attributable to the parcel," and therefore violates article XIII D,
21 section 6, subdivision (b)(3).

22 56. These constitutional violations are a direct result of Defendants' actions and may
23 be redressed by a declaration of Plaintiffs' and the Class's rights.

24 ///
25 ///
26 ///
27 ///
28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COUNT TWO

(Injunctive Relief for Violation of Article XIII D of the California Constitution)

57. Plaintiffs incorporate by reference and reallege all paragraphs previously alleged herein.

58. Defendants have violated and continue to violate Plaintiffs' constitutional rights, as described herein.

59. Unless enjoined by this Court, Defendants will continue to impose water rates that exceed the cost of service and operate as an illegal tax. Plaintiffs will suffer irreparable harm as a result.

60. Plaintiffs do not have a plain, speedy, and adequate remedy for Defendants' illegal conduct in the ordinary course of law.

COUNT THREE

(Restitution Damages for Violation of Article XIII D of the California Constitution)

61. Plaintiffs incorporate by reference and reallege all paragraphs previously alleged herein.

62. Defendants have violated and continues to violate Plaintiffs' constitutional rights, as described herein.

63. As a direct and proximate result of these violations, Plaintiffs and the Class members have sustained damages in the form of excessive and unconstitutional fees, charges or taxes paid to Defendants.

COUNT FOUR

(Writ of Mandate, Code of Civil Procedure sections 1085, 1094.5 (Proposition 218))

64. Plaintiffs incorporate by reference and reallege all paragraphs previously alleged herein.

65. Defendants' above-cost water rates, and their maintenance of policies and practices which violate article XIII D of the California Constitution, as alleged above, are unlawful abuses of discretion which exceed Defendant's legal authority.

PRAAYER

WHEREFORE, Plaintiffs request of this Court the following relief, on behalf of themselves and all others similarly situated in California:

A. An order certifying the proposed Class pursuant to 382 of the Civil Procedure Code and section 1781 of the Civil Code, and appointing Plaintiffs and their counsel of record to represent the Class;

B. An order declaring that Defendants have violated Plaintiffs' and the Class's legal rights, as described herein;

C. An order permanently enjoining Defendants from engaging in improper activities and practices, as described herein;

D. Actual and compensatory damages pursuant to all applicable laws;

E. Restitution, disgorgement, or reimbursement to the extent permitted by all applicable laws;

F. A judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that Defendants' water rate structure violates article XIII D of the California Constitution, and that Defendants have failed to comply with sections 6(b)(1), 6(b)(2), and 6(b)(3) of article XIII D of the California Constitution;

G. A writ of mandate ordering Defendants to comply with all mandatory duties imposed by article XIII D of the California Constitution, as described above, including the duty to anchor rates to the actual cost of water service to a given parcel;

H. Pre-judgment and post-judgment interest;

I. Attorneys' fees and costs of suit, including expert witness fees; and

J. Such other and further legal and equitable relief as this Court may deem proper.

///

///

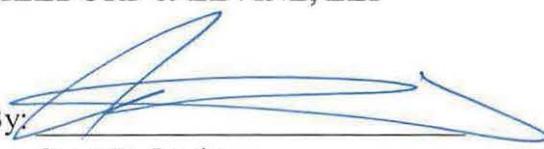
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DEMAND FOR JURY TRIAL

Plaintiffs and the Class hereby demand a trial by jury in this action.

DATED: June 23, 2016

SILLDORF & LEVINE, LLP

By: 

Scott D. Levine
Shani O. Zakay
Andre M. Mura
Attorneys for Plaintiffs

SILLDORF & LEVINE, LLP
ATTORNEYS AT LAW
5060 SHOREHAM PLACE, SUITE 115
SAN DIEGO, CALIFORNIA 92122
TELEPHONE: (858) 625-3900 FACSIMILE: (858) 625-3901