SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

NATIONAL ASIAN AMERICAN COALITION, et al. **v.** **EDMUND GERALD "JERRY" BROWN, JR., Governor , et al.** **NATIONAL MORTGAGE SPECIAL DEPOSIT FUND**	Case Number: 34-2014-80001784 **RULING ON SUBMITTED MATTER** Date: April 24, 2014 Time: 10:00 a.m. Dept.: 29 Judge: Timothy M. Frawley

I.

Introduction

In this proceeding, Petitioners seek a writ of mandate, along with declaratory and injunctive relief, against the Governor, the Director of the Department of Finance, and the Controller (Respondents[1]) challenging the diversion of approximately $350 million in National Mortgage Settlement proceeds from the National Mortgage Special Deposit Fund to the State's General Fund as part of the 2012 Budget Act. Petitioners contend that under the terms of binding federal consent judgments, and California Government Code § 12531, the settlement proceeds were required to be deposited into the Special Deposit Fund and used to assist California homeowners affected by the mortgage/foreclosure crisis. Petitioners contend that Respondents instead unlawfully diverted the funds to "offset" General Fund expenditures unrelated to the mortgage/foreclosure crisis, in violation of the federal consent judgments and state law. Accordingly, Petitioners seek a declaration that the challenged offsets were unlawful, a writ of mandate directing Respondents to replenish the amounts wrongfully diverted

[1] Although only the Governor and Director of Finance filed an opposition brief, the court shall refer to the Governor, Director of Finance, and Controller collectively as "Respondents."

from the Special Deposit Fund, and an order prohibiting future unlawful diversions. The court finds Petitioners' arguments well taken, but concludes it is unable, under controlling case law, to issue a peremptory writ of mandate compelling Respondents to restore/return the unlawfully diverted funds.

II.
Background Facts and Procedure

A. The National Mortgage Settlement

The "Great Recession" that commenced in 2007 has been referred to as the worst economic downturn since the Great Depression. The economic downturn began when the U.S. housing and credit markets went from boom to bust, and the resulting delinquencies led to a crisis in mortgage-backed securities, credit default swaps, and other credit derivatives, jeopardizing the solvency of banks and financial institutions in the U.S. and abroad.

In the wake of the Great Recession, California Attorney General Kamala Harris, along with other state attorneys general and the U.S. Department of Justice, accused the nation's five largest mortgage loan servicers – Ally Financial, Inc. (fka GMAC, Inc.), Bank of America Corp., Citigroup, Inc., J.P. Morgan Chase & Co., and Wells Fargo & Co. (the "Bank Defendants") – of unlawful mortgage and foreclosure practices. In or about October 2010, the state attorneys general and the U.S. Department of Justice commenced talks with the Bank Defendants about their practices.

By September 2011, the parties had reached the framework of a proposed settlement, but Attorney General Harris was dissatisfied with the terms as they related to California, so she continued to hold out for a "better" resolution. All of the parties eventually agreed to settle their claims by entering into a stipulated consent judgment. The settlement is generally referred to as the "National Mortgage Settlement."

On March 12, 2012, the United States and 49 states filed a complaint in the U.S. District Court for the District of Columbia, which included as attachments, proposed consent judgments executed by each of the Bank Defendants. (Although the parties signed separate consent judgments for each of the five Bank Defendants, the relevant terms of all five consent judgments are substantially the same. For ease of reference, the parties to this action have agreed to cite to a single consent judgment – the J.P. Morgan Consent Judgment, which is attached to the Declaration of L. David Russell ["Decl. 18"] as Exhibit C.) On April 4, 2012, United States District Court Judge Rosemary M. Collyer signed the "Consent Judgments."

In the Consent Judgments, the plaintiffs agreed to release certain claims against the Bank Defendants. In exchange, in addition to principal write-downs, refinancing relief, restitution, and new servicing standards, the Bank Defendants agreed to pay a total of approximately $5 billion as a "Direct Payment Settlement Amount." Of this amount, approximately half, or $2.5 billion, was to be divided and distributed among the states, including $410,575,996 for California.

The Consent Judgments direct the Bank Defendants to place the Direct Payment Settlement Amount into an escrow account, to be distributed "in the manner and for the purposes specified in [attached] Exhibit B." (Decl. 18, Page 165.) Exhibit B provides that, in accordance with written instructions from each State Attorney General, the escrow agent shall distribute cash payments in the total amounts set forth in the attached Exhibit B-1.

Paragraph 1(b) of Exhibit B further provides:

> i. Each State Attorney General shall designate the uses of the funds set forth in the attached Exhibit B-1. To the extent practicable, such funds shall be used for purposes intended to avoid preventable foreclosures, to ameliorate the effects of the foreclosure crisis, to enhance law enforcement efforts to prevent and prosecute financial fraud, or unfair or deceptive acts or practices and to compensate the States for costs resulting from the alleged unlawful conduct of the Defendants. Such permissible purposes for allocation of the funds include, but are not limited to, supplementing the amounts paid to state homeowners under the [Consent Judgment's] Borrower Payment Fund, funding for housing counselors, state and local foreclosure assistance hotlines, state and local foreclosure mediation programs, legal assistance, housing remediation and anti-blight projects, funding for training and staffing of financial fraud or consumer protection enforcement efforts, and civil penalties. Accordingly, each Attorney General has set forth general instructions for the funds in the attached Exhibit B-2.
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> ii. No more than ten percent of the aggregate amount paid to the State Parties under this paragraph 1(b) may be designated as a civil penalty, fine, or similar payment. The remainder of the payments is intended to remediate the harms to the States and their communities resulting from the alleged unlawful conduct of the Defendant and to facilitate the

implementation of the Borrower Payment Fund and consumer relief. (Decl. 18, Page 301.)

In addition, paragraph 4 of Exhibit B provides that, "[n]otwithstanding any implication to the contrary in any of the provisions of Exhibit B-2, all instructions therein shall be subject to the provisions of paragraph 1.b(i) and 1.b(ii) of this Exhibit B." (Decl. 18, Page 305.)

Exhibit B-1 is a table listing the amounts to be distributed to each state. As described above, California's share of the Direct Payment Settlement Amount totaled $410,575,996.

Exhibit B-2 is a listing of the "general instructions" for the funds to be distributed to each participating state, as designated by each state's attorney general. The instructions varied widely by state. Some states broadly instructed that the funds be paid to the state treasury for appropriation by the state legislature, with limited or no specified restrictions on how the funds could be used. (See, e.g., Georgia & Utah, Decl. 18, Pages 313, 326.) Other states instructed that the funds be paid to the state attorney general, to use, in his/her sole discretion, for any purpose consistent with the Consent Judgments. (See, e.g., Arizona, Decl. 18, Page 309.) Other states provided more specific instructions on how funds shall be used. (See, e.g., Colorado, Delaware, & Kentucky, Decl. 18, Pages 311, 312, 316-17.)

California's instructions stated that the payment to the California Attorney General's Office "shall be used" as follows:

a) Ten percent of the payment [$41,057,600] shall be paid as a civil penalty and deposited in the Unfair Competition Law Fund;

b) The remainder [$369,518,396] shall be paid and deposited into a Special Deposit Fund created for the following purposes: for the administration of the terms of this Consent Judgment; monitoring compliance with the terms of this Consent Judgment and enforcing the terms of this Consent Judgment; assisting in the implementation of the relief programs and servicing standards as described in this Consent Judgment; supporting the Attorney General's continuing investigation into misconduct in the origination, servicing, and securitization of residential mortgage loans; to fund consumer fraud education, investigation, enforcement operations, litigation, public protection and/or local consumer aid; to provide borrower relief; to fund grant

programs to assist housing counselors or other legal aid agencies that represent homeowners, former homeowners, or renters in housing-related matters; to fund other matters, including grant programs, for the benefit of California homeowners affected by the mortgage/foreclosure crisis; or to engage and pay for third parties to develop or administer any of the programs or efforts described above. (Decl. 18, Page 311.)

On June 27, 2012, the Legislature passed the Budget Act of 2012, making appropriations for the support of state government for the 2012-13 fiscal year. At the same time, the Legislature also passed S.B. 1006, a budget trailer bill. Among other things, S.B. 1006 added Government Code Section 12531, pertaining to the National Mortgage Settlement. Section 12531 reads in full:

(a) The Legislature finds and declares that California, represented by the California Attorney General, entered a national multistate settlement with the country's five largest loan servicers. This agreement, the National Mortgage Settlement stemmed from successful resolution of federal court action (Consent Judgment, United States v. Bank of America (No. 1:12-cv-00361, Banzr. D.C. Apr. 4, 2012). The National Mortgage Settlement is broad ranging, with California's share of this settlement estimated to be up to eighteen billion dollars ($18,000,000,000). Of this amount, approximately four hundred ten million dollars ($410,000,000) will come directly to the state in costs, fees, and penalty payments.

(b) There is hereby created in the State Treasury the National Mortgage Special Deposit Fund. Notwithstanding Section 13340, all moneys in the fund are hereby continuously appropriated, and shall be allocated by the Department of Finance.

(c) Direct payments made to the State of California as civil penalties pursuant to the National Mortgage Settlement shall be deposited in the Unfair Competition Law Fund as required by the settlement.

(d) Direct payments made to the State of California pursuant to the National Mortgage Settlement, except for those payments made pursuant to subdivision (c), shall be deposited in the National Mortgage Special Deposit Fund.

(e) Notwithstanding any other law, the Director of Finance may allocate or otherwise use the funds in the National Mortgage Special Deposit Fund to offset General Fund expenditures in the 2011-12, 2012-13, and 2013-14 fiscal years. The Department of Finance and the Controller's office shall recognize this fiscal alignment accordingly for the purpose of the state budget process and legal basis of accounting.

(f) Not less than 30 days prior to allocating any moneys pursuant to subdivision (e), the Department of Finance shall submit an expenditure plan to the Joint Legislative Budget Committee detailing the proposed use of the moneys in the National Mortgage Special Deposit Fund.

(g) Notwithstanding any other law, the Controller may use the funds in the National Mortgage Special Deposit Fund for cashflow loans to the General Fund as provided in Sections 16310 and 16381.

The Legislative Counsel's Digest for the portion of S.B. 1006 pertaining to Section 12531 provides, in relevant part:

> This bill would establish the National Mortgage Special Deposit Fund in the State Treasury as a continuously appropriated fund and would require certain direct payments made to the state under the National Mortgage Settlement to be deposited in the fund for allocation by the Director of Finance, as specified. This bill would further authorize the Director of Finance to allocate moneys from the fund to offset General Fund expenditures during the 2011-12, 2012-13, and 2013-14 fiscal years for purposes consistent with the National Mortgage Settlement. (Decl. 18, Page 1844.)

The National Mortgage Special Deposit Fund (the "NMSDF") was added to California's Manual of State Funds on or about July 13, 2012. On a legal basis, the NMSDF is grouped within the "Nongovernmental/Trust and Agency Funds – Non Federal" classification. (Declaration of Madelynn McClain ["Decl. 10"], Page 33.) On an accounting basis, the NMSDF is grouped within the "Fiduciary Funds/Trust and Agency Funds – Other" classification. (*Ibid.*)

In September 2012, approximately two months after the NMSDF was established, the escrow agent wired California's share of the Direct Payment into the State's "Litigation

Deposits Fund." A week later, 10% of that amount was redirected into the Unfair Competition Law Fund, and the remaining 90% was redirected into the NMSDF.

B. The 2012 Budget Act

As described above, S.B. 1006, which was adopted as a trailer bill to the 2012 Budget Act, authorized the Director of Finance to allocate or otherwise use funds in the NMSDF to offset General Fund expenditures in the 2011-12, 2012-13, and 2013-14 fiscal years. It also authorized the Controller to use funds in the NMSDF for cashflow loans to the General Fund. The Legislature and the Governor invoked both of these provisions in the 2012 Budget Act.

The 2012 Budget Act authorized a $100 million "loan" from the NMSDF to the General Fund to be repaid upon the order of the Director of Finance by June 30, 2014. On September 24, 2012, the Department of Finance ("DOF") issued Executive Order No. 12/13-24, directing the transfer of this $100 million loan from the NMSDF. The loan was repaid (with interest) on April 11, 2014, pursuant to Executive Order No. 13/14-83. (Decl. 10, Pages 42, 50.)

The 2012 Budget Act also appropriated a total of $18.4 million from the NMSDF to the State Department of Justice ("DOJ"). Of this amount, $8 million was appropriated to support the Office of the California Monitor, who assists the Attorney General in ensuring the Bank Defendants comply with the National Mortgage Settlement. The remaining $10.4 million was appropriated for "local assistance" grants to assist California homeowners affected by the foreclosure crisis. (Petitioners do not challenge these appropriations.)

The remaining approximately $350 million[2] in the NMSDF was allocated pursuant to the DOF's expenditure plan, to offset General Fund expenditures in the 2011-12, 2012-13, and 2013-14 fiscal years, as follows:

- $292.7 million to offset General Fund debt service payments for Propositions 1C and 46 Housing Bonds in 2011-12 ($106 million), 2012-13 ($92 million), and 2013-14 ($94.4 million).

- $49.15 million to offset DOJ General Fund expenditures for the "Office of the Director" and "Bureau of State Investigations" subdivisions of the "Division of Law

[2] The precise amount is $350,360,084.

Enforcement," and the "Public Rights" subdivision of "Legal Services," in 2011-12 ($14.9 million), 2012-13 ($17.75 million), and 2013-14 ($16.5 million).[3]

- $8.5 million to offset Department of Fair Employment and Housing ("DFEH") General Fund expenditures in 2011-12 (~$3 million), 2012-13 (~$2.7 million), and 2013-14 (~$2.8 million).

The DOF offsets were effectuated through a series of executive orders, some of which applied offsets to prior fiscal years. (Decl. 8, Pages 31, 35, 39, 43, 47, 56, 60, 64, 67, 71.)

C. The Petition and Complaint

Petitioners National Asian American Coalition, COR Community Development Corporation, and National Hispanic Christian Leadership Conference are California-based charitable organizations that provide or stand ready to provide counseling and training to California homeowners affected by the foreclosure crisis.

On March 14, 2014, Petitioners filed a Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief challenging most of the appropriations from the NMSDF. Petitioners do not challenge the $100 million loan, the $8 million appropriated to support the Office of the California Monitor, or the $10.4 million appropriated for "local assistance" grants to assist California homeowners. However, Petitioners allege the remaining approximately $350 million in the NMSDF was unlawfully diverted to the General Fund, in contravention of the National Mortgage Settlement, the Consent Judgments, Government Code Section 12531 and other state law.

Petitioners seek a writ of mandate ordering Respondents to replenish the unlawfully diverted funds,[4] and an order enjoining Respondents from future unlawful diversions of funds from the NMSDF.

Petitioners argue that the challenged appropriations are inconsistent with Government Code Section 12531 because that Section must be construed to require California's share of the Direct Payment to be used in a manner consistent with the Consent

[3] Expenditures of the Office of the Director were offset by $3.9 million in 2011-12. Expenditures of the Bureau of State Investigations were offset by $2.45 million in 2012-13 and by $2.5 million in 2013-14. Expenditures of the Public Rights subdivision were offset by $11 million in 2011-12, $15.3 million in 2012-13, and $14 million in 2013-14.

[4] In the alternative, Petitioners seek a determination that the purported offsets are, in fact, temporary "loans," which must be repaid.

Judgments. However, if Section 12531 is construed as authorizing the challenged appropriations, then Petitioners seek to invalidate Section 12531 on the grounds it was adopted in violation of California's "single-subject rule."

Respondents contend the Petition/Complaint should be dismissed because Petitioners lack standing, and this court lacks jurisdiction, to "enforce" the Consent Judgments. Respondents contend that only the parties to the National Mortgage Settlements have standing to "enforce" the Consent Judgments, and that the Consent Judgments are enforceable only in the U.S. District Court for the District of Columbia.

Respondents also contend that Petitioners lack standing to seek writ relief because they are not "beneficially interested" in the return of the NMSDF funds and they do not fit within the "public interest" exception to the writ standing requirement.

Even if Petitioners have standing and this court has jurisdiction, Respondents contend the Petition/Complaint should be denied because the challenged offsets are consistent with the terms of the Consent Judgments and Government Code Section 12531.

Respondents deny that S.B. 1006 violated the single-subject rule since the subject of the budget trailer bill concerns only one subject: appropriations to support the annual budget. Further, Respondents argue the Legislature ratified Government Code Section 12531 in subsequent legislation. In any event, Respondents contend there is no available remedy because the money already has been spent and the court cannot order the Legislature to appropriate additional funds.

III.
Standard of Review

A traditional writ of mandate will lie to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station, upon the verified petition of the party beneficially interested, in cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. (Cal. Civ. Proc. Code § 1085.)

It is well established that two basic requirements are essential for issuance of a traditional writ of mandate under Code of Civil Procedure Section 1085: (1) the respondent has a clear, present, and usually ministerial duty to act; and (2) the petitioner has a clear, present, and beneficial right to performance of that duty. (Cal. Civ. Proc. Code § 1085; *Taylor v. Board of Trustees* (1984) 36 Cal.3d 500, 507.)

Ordinarily, mandamus does not lie to control an exercise of discretion. Where an officer or agency is vested with discretion, traditional mandate will not lie unless the petitioner shows the action taken is so palpably unreasonable and arbitrary as to constitute an abuse of discretion as a matter of law. (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 235.) A decision is an abuse of discretion only if it is "arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." (*Ibid.*)

IV.
Discussion

A. Standing & Venue

As an initial matter, the court must decide whether Petitioners have standing to bring this proceeding in this court. The court shall conclude that Petitioners have standing.

In this proceeding, Petitioners allege that Respondents breached mandatory duties imposed by federal and state law by using the National Mortgage Settlement proceeds to "offset" General Fund expenditures unrelated to the mortgage/foreclosure crisis. Petitioners seek a declaration that the challenged offsets were unlawful, a writ of mandate directing Respondents to replenish the amounts wrongfully diverted from the Special Deposit Fund, and an order prohibiting future unlawful diversions.

Respondents contend that Petitioners lack standing because they have no legally cognizable interest in how the Settlement proceeds are spent. Respondents contend that Petitioners are, at most, "incidental" third-party beneficiaries to the Consent Judgments, and therefore have no standing under federal law to "enforce" the Consent Judgments in California courts. Respondents contend that any enforcement action must be brought by a party to the Consent Judgments, and that the action must be brought in the U.S. District Court for the District of Columbia.

However, Respondents' reliance on the federal law of standing is misplaced. Federal standing rules do not apply to state courts, even when state courts are addressing issues of federal law. (*ASARCO, Inc. v. Kadish* (1989) 490 U.S. 605, 617.)

The standing requirement for a party petitioning for a writ of mandate in California courts is that the petitioner be "beneficially interested" in issuance of the writ. This means that the petitioner has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361-362.) "Stated differently, the writ must be denied if the petitioner

will gain no direct benefit from its issuance and suffer no direct detriment if it is denied." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232, overruled in part on other grounds in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 160.)

Here, Petitioners have no *direct* interest in the legal duty sought to be compelled and will gain no *direct* benefit from its performance. Thus, they do not have a beneficial interest sufficient to establish standing.

However, there is a well-established "public interest" exception to the beneficial interest requirement. Where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the petitioner need not show some special interest or particular right to be preserved or protected. If the "public duty is sharp and the public need weighty," it is sufficient that the petitioner be interested as a citizen in having the laws properly enforced. (*Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal.App.4th 1561, 1581; see also *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 369-371.)

This matter involves the alleged non-performance of an important public duty and enforcement of a public right. Petitioners have an interest in ensuring that the laws are executed and that the public duty is enforced. Thus, Petitioners have standing to bring this matter under the public interest exception.[5]

The federal Consent Judgments do not require Petitioners to prosecute this action in the U.S. District Court for the District of Columbia. Under the terms of the Consent Judgments, only actions to enforce the "Servicer's obligations" must be brought in the U.S. District Court for the District of Columbia. (Decl. 18, Pages 365-66.) Petitioners are not seeking to enforce the "Servicer's obligations." Therefore, that provision does not apply. Moreover, Respondents admitted in their Answer that venue is proper in this court. (Answer of Governor and DOF, ¶¶ 43-44.)

[5] The court also notes that if Petitioners do not have standing, it is uncertain whether anyone would since the only party to the Consent Judgments who would have any reason to bring this action is the Attorney General, and the law is unsettled on the circumstances, if any, under which the Attorney General, as the chief law officer of the State, may sue the Governor. (See *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150; Cal. Const. Art. V, § 13; see also *State ex rel. Condon v. Hodges* (S.C. 2002) 349 S.C. 232; *People ex rel. Salazar v. Davidson* (Colo. 2003) 79 P.3d 1221.)

B. The Consent Judgments

As described above, Petitioners argue that Respondents unlawfully diverted the National Mortgage Settlement proceeds away from the NMSDF and the specific purposes for which the federal Consent Judgments dictate the funds "shall be used."

Respondents dispute Petitioners' interpretation of the Consent Judgments. Respondents argue that the Consent Judgments do not limit how states may use their share of the Direct Payment. Rather, Respondents contend, Exhibit B to the Consent Judgments allows states to use their share of the Direct Payment to fulfill any lawful state budget purpose.

The "general instructions" in Exhibit B-2 do not restrict use of the Direct Payment; they merely designate how funds would be used by the Attorney General if the Legislature allocates funds to her Office. Further, Respondents argue, paragraph 4 of Exhibit B is clear that if there are inconsistencies between Exhibit B and the general instructions in Exhibit B-2, the provisions of Exhibit B take precedence.

The court rejects Respondents' construction, which misconstrues the plain meaning of the Consent Judgments. As described above, the Consent Judgments direct the Bank Defendants to place the Direct Payment into an escrow account to be distributed "in the manner and for the purposes specified" in Exhibit B. (Decl. 18, Page 165.) Exhibit B, in turn, provides that "[e]ach State Attorney General shall designate the uses of [such] funds . . . ." The state-specific instructions of the attorneys general are set forth in Exhibit B-2, and these instructions apply to the entire amount to be distributed to each state. Thus, it is clear from the language and structure of the Consent Judgments that the "general instructions" set forth in Exhibit B-2 govern and restrict use of the entire Direct Payment to the State.

Although there is language stating that the "general instructions" set forth in Exhibit B-2 are "subject to" the provisions of Exhibit B, this was not intended to render the "general instructions" meaningless. Rather, it was intended to guide, and constrain, the attorneys general in designating how the Direct Payment is used; the "general instructions" must be guided by, and cannot contradict, the general parameters set forth in Exhibit B.

For example, paragraph 1.b(ii) of Exhibit B provides that no more than 10% of the aggregate amount paid to the state may be designated as a civil penalty. It follows that if an attorney general designated more than 10% of the Direct Payment as a civil penalty, the designation would be invalid because it conflicts with Exhibit B. This is not

an issue here, as the California Attorney General's instructions are consistent with the 10% cap, designating 10% of the Direct Payment as a civil penalty to be deposited in the Unfair Competition Law Fund.

Exhibit B provides that the remainder of the Direct Payment – i.e., the portion not designated as a civil penalty – is intended to remediate harms to the States and their communities resulting from the alleged unlawful conduct of the Bank Defendants and to facilitate consumer relief. Paragraph 1.b(i) of Exhibit B provides that "[t]o the extent practicable, such funds shall be used for purposes intended to avoid preventable foreclosures, to ameliorate the effects of the foreclosure crisis, to enhance law enforcement efforts to prevent and prosecute financial fraud, or unfair or deceptive acts or practices and to compensate the States for costs resulting from the alleged unlawful conduct of the Defendants."

Consistent with this language, some states determined it was not "practicable" to impose limits on how the funds could be used, and instructed that the funds could be used for any lawful purpose. Other states, like California, found it "practicable" to limit use of the funds to certain specified purposes. In either case, it is clear that the "general instructions" in Exhibit B-2 were intended to control how states use the Direct Payment.

Respondents argue that their interpretation of the Consent Judgments must prevail because otherwise the Consent Judgments would circumvent the Legislature's power to decide how public funds are spent. Since the Attorney General lawfully could not contract away the Legislature's authority over expenditure of public funds, the Consent Judgments must be construed to avoid this unlawful result. This argument also raises questions about whether the federal court had the power to grant such relief.

The court is not persuaded that the Attorney General lacked authority to enter into the Settlement directing how damages awarded to the State would be used. The Attorney General is the chief law officer of the State and generally has the authority and power to institute, conduct, and maintain civil actions involving the rights and interests of the State or which she deems necessary for the protection of public rights. (Cal. Const. art. V, § 13; Gov. Code § 12511; *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 14-16.) If, as conceded, the Attorney General has the authority and power to file civil actions on behalf of the State and public, the court is persuaded that the Attorney General also has the authority and power to settle such actions.

As a general matter, settlement terms negotiated by government attorneys are limited only by public policy. (*Rich Vision Centers v. Bd. of Medical Examiners* (1983) 144

Cal.App.3d 110, 115-17.) The court does not find the National Mortgage Settlement's terms to be contrary to public policy or an unlawful usurpation of the Legislature's plenary power to appropriate State funds. (See *Coastside Fishing Club v. California Resources Agency* (2008) 158 Cal.App.4th 1183, 1203; Cal. Const. Art. XVI, § 7.) As Petitioners point out, settlements involving the receipt of restricted-use funds are not uncommon. (See Opening Memorandum of Points and Authorities, pp.21-22.) At least one such settlement was negotiated under the authority of Governor Brown, when he was the Attorney General. (*Ibid.*)

Accordingly, the court shall reject the claim that the Attorney General lacked authority to enter into the Settlement.[6] This also disposes of the related argument that the Consent Judgments are void (or voidable) because the federal Court lacked authority to approve that portion of the Settlement.[7] The Consent Judgments did not contravene California law by designating how the Direct Payment would be used.[8]

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[6] This does not mean the Attorney General has unfettered discretion to control all aspects of civil litigation. The Legislature presumably could, for example, mandate that all funds recovered from litigation (or particular litigation) be paid into the General Fund or a special fund. The Legislature also presumably could require the Attorney General to obtain approval (from the Legislature or Governor) before settling certain actions or claims by or against the State, or impose limits on settlement authority. (See, e.g., Cal. Ins. Code § 12921.) In addition, the California Supreme Court has interpreted the California Constitution to mean that if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the "supreme executive power" to determine the public interest, suggesting the Attorney General is subordinate in such matters. (*People ex rel. Deukmejian, supra,* 29 Cal.3d at p.158.) Here, the Governor did not oppose the Settlement, and the Consent Judgments were approved by the Commissioner of California's Department of Corporations, who is appointed by and holds office at the pleasure of the Governor.

[7] The court might, for other reasons, take issue with the federal Consent Judgments to the extent they include terms that were outside the scope of the case framed by the pleadings and were not necessary to further the objectives of the law upon which the complaints were based. The Bank Defendants and the Court had little reason to care how the Direct Payment was used by the states, so that portion of the Settlement likely received little or no scrutiny from them. But even if the Attorney General lacked authority to agree to the Consent Judgments, or the federal District Court lacked authority to issue them, this court is not persuaded that the Consent Judgments may be set aside by this court. Respondents are attempting to collaterally attack a final court judgment, and such attacks are permitted only under limited circumstances, such as where the court entering the judgment lacked jurisdiction. (*In re Bailleaux* (1956) 47 Cal.2d 258, 262, overruled on other grounds by *In re Russell* (1974) 12 Cal.3d 229, 235.) There is even more uncertainty as to whether a final federal court judgment or decree may be collaterally attacked in state court. (See, e.g., *Delaware Valley Citizens' Council for Clean Air v. Pa.* (3d Cir. 1985) 755 F.2d 38, 44; *Burlington Data Processing, Inc. v. Automated Medical Systems, Inc.* (U.S. Dist. D. Vt. 1980) 492 F. Supp. 821, 822.) In any event, as discussed below, the court concludes that the California Legislature, by adopting Government Code § 12531, has implicitly endorsed use of the Settlement funds in the manner required by the Consent Judgments.

[8] Some commenters have claimed that in negotiating a federal consent decree, state attorneys general could infringe on governmental powers constitutionally delegated to a coordinate branch or to other executive officers. For example, commenters have criticized attorneys general for establishing detailed regulatory frameworks through negotiated settlements in litigation against product manufacturers, arguing that such "regulation by litigation" intrudes on functions traditionally handled by the legislative branch and administrative agencies. (See Gifford, *Impersonating the Legislature: State Attorneys General and*

C. Government Code Section 12531

Respondents contend that even if the Consent Judgments place limitations on use of the Direct Payment, the Legislature authorized the Director of Finance to use the funds for any General Fund purpose. Petitioners respond that section 12531 does not allow unbridled offsets for General Fund expenditures. According to Petitioners, by enacting section 12531, the Legislature intended nothing more than to implement the Consent Judgments. The court agrees with Petitioners.

In the statute, the Legislature "finds" that California, acting through the Attorney General, entered into the National Mortgage Settlement with the country's five largest loan servicers. The statute specifically refers to the "approximately four hundred ten million dollars ($410,000,000) [that] will come directly" to the State as California's share of the Settlement.

"[A]s required by the settlement," the statute provides that the portion of the Settlement paid to California as civil penalties "shall be deposited in the Unfair Competition Law Fund." This, of course, is entirely consistent with the Attorney General's general instructions in the Consent Judgments, which state that 10% of the Direct Payment shall be paid as a civil penalty and deposited in the Unfair Competition Law Fund.

The statute provides that the remainder of the Direct Payment funds shall be deposited into a newly-established "National Mortgage Special Deposit Fund." The fact that the Legislature created a "Special Deposit Fund" is significant, because a special deposit fund is a depository for moneys collected for specific purposes and use of the money in the fund is restricted to the purposes for which the moneys were collected. (See Gov. Code § 16372; see also *California Toll Bridge Authority v. Kelly* (1933) 218 Cal. 7, 14.)

Consistent with the establishment of a special deposit fund, the statute provides that all moneys deposited into the NMSDF are "continuously appropriated." By definition, continuous appropriations are for "specific purposes." (Gov. Code §16304(f); *Daugherty v. Riley* (1934) 1 Cal.2d 298, 308-09; cf. *California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1285.) Thus, the creation of the "special deposit fund" and the "continuous appropriation" show the Legislature understood that the moneys in the NMSDF are restricted to specific purposes.

Parens Patriae Product Litigation (2008) 49 B.C. L. Rev 913.) The court expresses no opinion on this issue.

This construction is further supported by the language in subdivision (g) of the statute, providing that the "Controller may use the funds in the National Mortgage Special Deposit Fund for cashflow loans to the General Fund as provided in Sections 16310 and 16381." California Government Code sections 16310 and 16381 authorize loans from special funds (which are legally restricted) to the State's General Fund (which is not), when there is insufficient cash in the General Fund to meet payments authorized by law. All moneys so transferred must be returned to the funds from which they were transferred as soon as there are sufficient moneys in the General Fund to return them. (See Gov. Code § 16310(a).) It would make little sense to authorize a "loan" of the moneys in the NMSDF to the General Fund unless the Legislature understood that the moneys in the NMSDF were restricted and could not be "allocated" to offset General Fund expenditures directly.

Thus, the language of section 12531 supports Petitioners' interpretation that the Legislature intended the statute to effectuate the terms of the Consent Judgments.

The language in subdivision (e) of the statute is not inconsistent with this construction. It permits the Director of Finance to allocate the funds in the NMSDF to "offset General Fund expenditures in the 2011-12, 2012-13, and 2013-14 fiscal years," but it does not relieve the moneys in the NMSDF of the restrictions imposed by the Consent Judgments and the other provisions in the statute.

It is not entirely clear what the Legislature intended by the phrase "[n]otwithstanding any other law," but the court does not construe this language as negating the remainder of the statute. Rather, it appears to be an attempt to delegate to the Director of Finance the power to decide specifically how the funds "appropriated" in the NMSDF shall be allocated to effectuate the terms of the Consent Judgments. The language recognizes that members of the executive branch generally lack authority to appropriate funds or spend funds which were not appropriated by the Legislature. (*Carmel Valley Fire Prot. Dist. v. California* (2001) 25 Cal.4th 287, 299.) Thus, the Legislature "continuously appropriated" for purposes consistent with the Consent Judgments and, "notwithstanding any other law," authorized the Director of Finance to "allocate" the funds in a manner consistent with that appropriation.

This interpretation must prevail because a contrary interpretation would raise serious doubts about the legality of the statute, not only as to whether the Legislature may override a federal judgment, but also as to whether the Legislature constitutionally may delegate to an agency the authority to decide how millions of dollars of state funds shall be spent with virtually no guidance or direction from the Legislature. (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 376-377; *California State Employees' Assn. v. State of California*

(1973) 32 Cal.App.3d 103, 107-108.) It is an established principle of statutory construction that if a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid or free from doubt as to its constitutionality. (*International Assn. of Plumbing etc. Officials v. California Building Stds. Com.* (1997) 55 Cal.App.4th 245, 256.)

It follows that while the Director of Finance may allocate the funds to offset General Fund expenditures, the allocations must comply with the restrictions embedded in the Consent Judgments.

The court does not find section 12531 ambiguous. But if there is any ambiguity, it is resolved by the legislative history of the statute. As described above, the Legislative Counsel's Digest for section 12531 provides, in relevant part:

> This bill would establish the National Mortgage Special Deposit Fund in the State Treasury as a continuously appropriated fund and would require certain direct payments made to the state under the National Mortgage Settlement to be deposited in the fund for allocation by the Director of Finance, as specified. This bill would further authorize the Director of Finance to allocate moneys from the fund to offset General Fund expenditures during the 2011-12, 2012-13, and 2013-14 fiscal years *for purposes consistent with the National Mortgage Settlement.* (Decl. 18, Page 1844 [emphasis added].)

Legislative Counsel clearly construed the language in the same manner as this court, that the moneys are required to be allocated consistent with the terms of the National Mortgage Settlement and Consent Judgments.

The $100 million loan from the NMSDF to the General Fund in the 2012 Budget Act, which was subsequently repaid with interest in 2014, also supports the court's construction.

The fact that the Legislative Budget Committee failed to object to DOF's "expenditure plan" does not prove "ratification" by the Legislature or even by the Budget Committee. It is of no relevance.

Because the court agrees with Petitioners' interpretation of section 12531, the court finds it unnecessary to address Petitioners' alternative argument that if section 12531 purports to override the Consent Judgments it is unconstitutional and invalid.

D. Consistency with the Consent Judgments

Having concluded that the moneys in the NMSDF are special funds legally restricted by the "general instructions" in the Consent Judgments, the court must determine whether the challenged General Fund offsets are consistent with those general instructions.

As described above, the general instructions require that the funds be used for one or more of the following purposes:

- Administering the terms of the Consent Judgment;
- Monitoring compliance with the terms of the Consent Judgment and enforcing the terms of the Consent Judgment;
- Assisting in the implementation of the relief programs and servicing standards as described in the Consent Judgment;
- Supporting the Attorney General's continuing investigation into misconduct in the origination, servicing, and securitization of residential mortgage loans;
- Funding consumer fraud education, investigation, enforcement operations, litigation, public protection and/or local consumer aid;
- Providing borrower relief;
- Funding grant programs to assist housing counselors or other legal aid agencies that represent homeowners, former homeowners, or renters in housing-related matters;
- Funding other matters, including grant programs, for the benefit of California homeowners affected by the mortgage/foreclosure crisis;
- Engaging and paying for third parties to develop or administer any of the programs or efforts described above. (Decl. 18, Page 311.)

The challenged General Fund offsets are:

- $292.7 million to offset General Fund debt service payments for Propositions 1C and 46 Housing Bonds in 2011-12 ($106 million), 2012-13 ($92 million), and 2013-14 ($94.4 million).

- $49.15 million to offset DOJ General Fund expenditures for the "Office of the Director" and "Bureau of State Investigations" subdivisions of the "Division of Law Enforcement," and the "Public Rights" subdivision of "Legal Services," in 2011-12 ($14.9 million), 2012-13 ($17.75 million), and 2013-14 ($16.5 million).[9]

- $8.5 million to offset Department of Fair Employment and Housing ("DFEH") General Fund expenditures in 2011-12 (~$3 million), 2012-13 (~$2.7 million), and 2013-14 (~$2.8 million).

The $292.7 million in offsets for Proposition 1C and 46b debt service payments were effectuated through four executive orders. First, on January 25, 2013, DOF issued Executive Order No. 12/13-49, directing the transfer of $105,858,000 to offset debt service payments in 2011-12. Second, a few days later, DOF issued Executive Order No. 12/13-52, directing the transfer of $92,135,000 to offset debt service payments in 2012-13. Third, on August 23, 2013, DOF issued Executive Order No. 13/14-16, directing the transfer of $40,000,000 to offset debt service payments in 2013-14. Fourth, on June 11, 2014, DOF issued Executive Order No. 13/14-144, directing the transfer of $54,723,000 to offset additional debt service payments in 2013-14.

The $49.15 million in offsets for DOJ expenditures were effectuated through three executive orders. First, on January 25, 2013, DOF issued Executive Order No. 12/13-48, directing the transfer of $14,900,000 to offset expenditures incurred in 2011-12. The funds were used to offset expenditures of the Office of the Director ($3,900,000) and the Public Rights subdivision of the Legal Services program ($11,000,000). Second, on June 5, 2014, DOF issued Executive Order No. 13/14-136, directing the transfer of $16,500,000 to offset expenditures in 2013-14. The funds were used to offset expenditures of the Bureau of State Investigations ($2,500,000) and the Public Rights subdivision of the Legal Services program ($14,000,000). Third, also on June 5, 2014, DOF issued Executive Order No. 13/14-137, directing the transfer of $17,750,000 to offset expenditures in 2012-13. The funds were used to offset expenditures of the Bureau of State Investigations ($2,450,000) and the Public Rights subdivision of the Legal Services program ($15,300,000).

[9] Expenditures of the Office of the Director were offset by $3.9 million in 2011-12. Expenditures of the Bureau of State Investigations were offset by $2.45 million in 2012-13 and by $2.5 million in 2013-14. Expenditures of the Public Rights subdivision were offset by $11 million in 2011-12, $15.3 million in 2012-13, and $14 million in 2013-14.

The $8.5 million in offsets for DFEH expenditures were effectuated through three executive orders. First, on January 25, 2013, DOF issued Executive Order No. 12/13-50, directing the transfer of $2,993,364 to offset expenditures incurred in 2011-12. Second, on June 11, 2014, DOF issued Executive Order No. 13/14-145, directing the transfer of $2,800,000 to offset expenditures in 2013-14. Third, a few days later, DOF issued Executive Order No. 13/14-146, directing the transfer of $2,700,720 to offset expenditures in 2012-13.

1. Petitioners' General Objections to the Offsets

Petitioners first attack the use of any offset, regardless of purpose, to reimburse the General Fund. Petitioners contend that the Consent Judgments demand that the Direct Payment be used for specifically delineated purposes. Because money is fungible, Petitioners contend that once money enters the General Fund, it essentially can be used for any purpose. Petitioners argue that using the Direct Payment to "offset" General Fund expenditures does not serve any discrete purpose, and therefore violates the Consent Judgments.

Further, even if the Direct Payment may be used to offset current year General Fund expenditures, Petitioners argue it may not be used to reimburse the General Fund for moneys spent in prior fiscal years, where no obligation remains to be paid. Petitioners argue that the Direct Payment is required to be used to "fund" programs; it cannot be used to reimburse the General Fund for programs already funded.

Respondents dispute that the language of the Consent Judgments restricts the Direct Payment to funding "additional and forward-looking" programs. Respondents contend the language of the Consent Judgments supports funding either new or existing programs.

Respondents contend it makes no difference whether the expenditures were "already funded," as the Consent Judgments do not prohibit using the funds for such purposes. Respondents also contend the funds were not used to reimburse past expenditures, because all of the expenditures at issue were incurred in the same fiscal year the Consent Judgments were entered or in subsequent fiscal years, in accordance with Government Code section 12531.

The court agrees with Respondents that use of the Direct Payment is not restricted to "additional" programs, but the court agrees with Petitioners that the Consent Judgments do not allow use of the funds to reimburse the General Fund for past expenditures.

As the Court of Appeal explained in *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, there is a "clear distinction" between transferring revenue to the General Fund to pay current obligations, and transferring revenue to reimburse past obligations. In the case of the former, the revenue flows "through" the General Fund but is actually used for the present obligation. In the case of the latter, no obligation remains to be paid, and the money is simply transferred to the General Fund where it can be used for any governmental purpose. (*Id.* at p.610.) "Funding restrictions cannot be ignored through the guise of a theoretical legal 'obligation.'" (*Id.* at p.610 [quoting *Prof'l Eng'rs v. Wilson* (1998) 61 Cal.App.4th 1013, 1021].)

Reimbursing the General Fund for payments made in prior fiscal years does not serve any purpose set forth in the "general instructions" to the Consent Judgments. The only purpose served by such a transfer is to free the funds of the restrictions imposed by the Consent Judgments and allow DOF to use the funds for any purpose whatsoever. This is not allowed. (*Daugherty, supra,* 1 Cal.2d at pp.308-09.)

The separation of powers doctrine limits the authority of one branch of government to arrogate to itself the core functions of another branch. The executive branch, in expending public funds, may not disregard legislatively prescribed directives and limits pertaining to the use of such funds. An administrative agency must utilize appropriated funds in accordance with its legislatively-designated purpose. (*Stevens v. Geduldig* (1986) 42 Cal.3d 24, 42.)

These limits apply to the judicial branch as well. Courts cannot order the executive branch to divert funds specifically appropriated by the Legislature to other purposes. (See *Butt v. State of California* (1992) 4 Cal.4th 668, 698.) Likewise, neither the executive nor the legislative branch may readjudicate controversies that have been litigated in the courts and resolved by a final judicial judgment. (*Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 25; *People v. Bunn* (2002) 27 Cal.4th 1, 22.)

It is true that the judgment at issue in this case was issued by a federal court. However, under the Full Faith and Credit Clause, a final judgment of a federal court has the same effect in the courts of this state as it would have in a federal court. (See *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1453; *Levy v. Cohen* (1977) 19 Cal.3d 165, 172; see also Civ. Proc. Code § 1908.) The respect due the federal judgment is not lessened because the judgment was entered by consent. (See *Stone v. City & County of San Francisco* (9th Cir. 1992) 968 F.2d 850, 861.) The federal system

requires the State to accept the judgments of the federal courts. (See *Cooper v. Aaron* (1958) 358 U.S. 1, 18-19.)

At minimum, DOF lacked authority to use NMSDF funds to reimburse the General Fund for obligations paid in fiscal year 2011-12. The unlawful transfers for fiscal year 2011-12 total $123,751,364, consisting of the $14,900,000 transfer under Executive Order No. 12/13-48; the $105,858,000 transfer under Executive Order No. 12/13-49; and the $2,993,364 transfer under Executive Order No. 12/13-50.

The same principle applies to the $20,450,720 in transfers ordered in 2014 to reimburse the General Fund for expenditures made in fiscal year 2012-13, pursuant to Executive Order Nos. 13/14-146 and 13/14-137.

Petitioners may argue that this reasoning also should apply to offsets of expenditures made in the same current year if the Legislature already had appropriated funds for that expenditure in that year's budget act. However, the relevant inquiry is not simply whether the Legislature has appropriated funds, but whether the relevant obligation already had been paid.

An appropriation is a legislative act setting aside "a certain sum of money for a specified object" in such manner that the executive officers are *authorized* to use that money for such purpose. (*California Assn. for Safety Education, supra*, 30 Cal.App.4th at p.1282.) Money may be appropriated but not yet spent. In the absence of any proof that the same-year offsets were used to reimburse the General Fund for obligations already paid, the court declines to conclude such transfers were unlawful because they were used for prior obligations.

2. Offsets for Proposition 1C and 46 Bond Debt Service Payments

Petitioners argue that even if the Consent Judgments allow reimbursement of obligations already paid, the challenged offsets were unlawful because they were not used for purposes consistent with the Consent Judgments.

Petitioners attack the offsets for Proposition 1C and 46 Housing Bonds on the grounds the programs funded by those bonds do not fit within any of the permissible uses set forth in the general instructions to the Consent Judgments. Further, Petitioners argue, the offsets did not "fund" the programs, the bond proceeds did. The offsets were used to service the bonds.

Respondents do not agree. They argue that the offsets for Proposition 1C and 46 Housing Bond debt service payments are consistent with the general instructions because programs funded by the Proposition 1C and 46 bonds promote affordable housing, provide down-payment and other housing assistance to low-income households, and help the homeless by developing emergency shelters and transitional housing. Respondents contend that these programs "benefit . . . California homeowners affected by the mortgage/foreclosure crisis."

The court agrees with Petitioners. Using the Direct Payment to pay down State bond debt does not serve any purpose delineated in the general instructions to the Consent Judgments. The State cannot rely on the purposes of the bond programs because those programs were (and are) funded by the bond proceeds, not by the Direct Payment. The Direct Payment is merely being used to pay off State bond debt, a purely fiscal purpose unrelated to the programs. In short, Respondents are attempting to evade the funding restrictions of the Consent Judgments through the guise of reimbursing the General Fund for non-existent legal obligations.

Accordingly, the court concludes that the entire $292.7 million allocation to offset General Fund debt service payments for Propositions 1C and 46 Housing Bonds was improper.

2. Offsets for DFEH General Fund Expenditures

Petitioners argue that the offsets for DFEH expenditures are inconsistent with the general instructions. Petitioners do not explain precisely why they believe the DFEH offsets are improper, but it may be inferred that it is because DFEH programs do not help existing homeowners with underwater mortgages.

Respondents argue that the DFEH offsets are consistent with the general instructions because DFEH investigates and resolves housing discrimination complaints and educates the public about the right to be free from discrimination in housing. Thus, Respondents contend these offsets provide funding for programs to assist "legal aid agencies that represent homeowners, former homeowners, or renters in housing-related matters."

It is presumed that an agency has regularly performed its official duty. (*Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347, 354.) The burden falls on the petitioner attacking an administrative decision to demonstrate its invalidity.

In this case, Petitioners have failed to show that the DFEH offsets are inconsistent with the general instructions. Petitioners' general objections to the offsets – discussed above – are simply not sufficient to establish that DFEH activities are inconsistent with the general instructions. Thus, the court rejects the challenge to the DFEH offsets.

3. Offsets for DOJ General Fund Expenditures

Petitioners also challenge the offsets for DOJ expenditures are inconsistent with the general instructions because the activities of the Bureau of State Investigations and Office of the Director have nothing to do with the purposes of the Consent Judgments.

Respondents argue that the DOJ offsets are consistent with the general instructions because the Bureau leads multi-jurisdictional criminal investigations, including cases involving "mortgage and other major frauds," and the Office of the Director serves as the policy-making and oversight body within the Division of Law Enforcement, providing training, technical, intelligence, and administrative support to the Bureau. Respondents contend that these offsets support the Attorney General's "continuing investigation into the misconduct in the origination, servicing, and securitization of residential mortgage loans," and/or fund "consumer fraud education, investigation, enforcement operations, litigation, public protection, and/or local consumer aid."[10]

Again, the court agrees with Respondents. While the DOJ's Division of Law Enforcement is responsible for more than investigating fraud and other misconduct in the origination, servicing, and securitization of residential mortgage loans, it is simply not accurate to say that the Division of Law Enforcement has nothing to do with these activities. The Bureau leads multi-jurisdictional criminal investigations, including cases involving mortgage and other major frauds, and the Office of the Director provides support to the Bureau. Thus, the offsets are consistent with the restrictions imposed by the general instructions.

E. Remedy

The court has concluded that $331,044,084 of the offsets were unlawful because they were inconsistent with the terms of the Consent Judgments and Government Code section 12531. This brings the court to the matter of fashioning an appropriate remedy.

[10] Although Petitioners discussed the Public Rights subdivision in the factual background portion of their brief, they did not discuss it in the argument section. As a result, challenges to the Public Rights subdivision expenditures may be deemed forfeited. Nevertheless, Respondents argue that expenditures for the Public Rights subdivision are consistent with the general instructions because it provides legal services to address corporate fraud and help consumers. Since this contention was not disputed, the court accepts it.

Petitioners argue that the court should issue a writ of mandate compelling Respondents to return the unlawfully diverted funds to the NMSDF. Respondents object that the money cannot be returned because it has been spent and, because the court cannot order the Legislature to appropriate additional funds, the court cannot afford Petitioners any relief.

This is not the first time that this court has struggled with this complex problem, and it is not likely to be the last.

The issue centers around the separation of powers doctrine. In California, the separation of powers doctrine has been construed to prohibit courts from issuing writs of mandate that interfere with powers exclusively committed to the other branches of government. The appropriation of moneys is a legislative function. (Cal. Const. art. IV. §§ 1, 10, 12.) Thus, California courts have held that the separation of powers doctrine generally prohibits a court from compelling the Legislature to appropriate funds or pay funds not yet appropriated. (See *California School Bds. Assn. v. State of California* (2011) 192 Cal.App.4th 770, 801.)

A narrow exception to this rule exists when a court orders expenditures from already appropriated funds that are "reasonably" available for the expenditures in question, meaning that the purposes for which the funds were appropriated are "generally related" to the nature of the costs incurred. (*Ibid.*) However, this exception has been strictly construed and is inapplicable if the existing funds have been appropriated for other purposes. (*Ibid.*)

In her concurring and dissenting opinion in *Butt v. State of California* (1992) 4 Cal.4th 668, Justice Kennard questioned this "formalistic" and "outmoded" view of the separation of powers. She wrote:

> No sound reason exists to hold that although some fundamental rights demand judicial protection when they are endangered because the other branches of government have failed to act, other rights, equally fundamental, do not. Yet that is the consequence of the majority's holding in this case . . . . (*Id.* at p.709.)

Justice Kennard urged a "pragmatic" and "flexible" balancing test, in which the derogation of one branch's powers by another may be warranted to promote overriding objectives within the "constitutional authority" of the latter. (*Id.* at pp.707-14; see also *id.* at p.702 [characterizing her opinion].)

This court endorses Justice Kennard's sound approach. It is a bedrock rule that where there is a legal right, there must also be a legal remedy. (*Marbury v. Madison* (1803) 5 U.S. 137, 163.) The executive and legislative branches should not be permitted to use the separation of powers doctrine as a shield to protect unlawful actions.

The doctrine of separation of powers forbids legislative/executive usurpation of judicial authority just as it forbids judicial usurpation of legislative/executive authority. The legislative and executive branches have no extra-constitutional authority to set themselves above the judiciary by discarding the outcome of judicial proceedings or otherwise preventing the judiciary from passing upon the validity of legislative and executive actions. (*Mandel v. Myers* (1981) 29 Cal.3d 531, 547.) Yet that is the consequence of prohibiting the courts from ordering an appropriation where an appropriation is necessary to afford a legal remedy for a violation of law.

Indeed, if the judicial branch has no power to order appropriations under any circumstances, the very existence of the judicial branch may be endangered. The legislative/executive branches could refuse to appropriate funds and thereby prevent the judiciary from performing its core functions, and the judiciary would be powerless to do anything about it. It is noteworthy that the California Supreme Court has taken a contrary view of this issue in the past, suggesting that the judiciary has at least *some* inherent power to compel appropriations from other branches of government. (See *Millholen v. Riley* (1930) 211 Cal. 29, 33 ["A court set up by the Constitution has within it the power of self-preservation, indeed, the power to remove all obstructions to its successful and convenient operation"]; *Brown v. Superior Court* (1982) 33 Cal.3d 242, 249 n.5 [funding of courts by legislative appropriation cannot be so inadequate as to materially impair the exercise of constitutional judicial functions]; see also *Wilson v. Eu* (1991) 54 Cal.3d 471, 473 [if legislative failure to exercise power jeopardizes constitutional rights, the judiciary may exercise that power].)

Courts in other jurisdictions have upheld the existence of an inherent judicial power to compel appropriations. (See *NOTE: The Courts' Inherent Power To Compel Legislative Funding of Judicial Functions* (1983) 81 Mich. L. Rev. 1687, 1688 n.8; see also *Missouri v. Jenkins* (1990) 495 U.S. 33 [upholding the power of federal courts to order local tax levies to enforce judicial remedies for unconstitutional school segregation]; *Gary W. v. La.* (5th Cir. La. 1980) 622 F.2d 804, 806 [federal courts have power to ensure compliance with money judgments against states].)

Dicta in *Mandel v. Myers* (1981) 29 Cal.3d 531 supports this view. In the context of a legislative refusal to appropriate funds to pay an attorney fee award, the Court stated:

> In sum, individual citizens who litigate claims against the government in our state courts are constitutionally entitled to expect that when the government loses, the Legislature will respect the final outcome of such litigation. The Legislature is not a supercourt that can pick and choose on a case-by-case basis which final judgments it will pay and which it will reject. If that kind of arbitrary conduct by the Legislature were to be the law, our system of justice would be subordinated to the popular vote of legislators, and our constitutional bedrock principle of separation of powers would become a shattered mass of scattered fragments. (*Id.* at p.552; see also Justice Bird's dissent in the same case at pp.559-73.)

Nevertheless, this court is bound by the decisions of the tribunals exercising superior jurisdiction. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.) Regardless how it may view the issue, the court must abide by the rule that the separation of powers doctrine severely restricts judicial authority over appropriations.

In this case, Petitioners have failed to show that there is an appropriation "reasonably" and "generally" available for re-payment of the unlawfully diverted funds. Thus, the court shall not order Respondents to restore/return the unlawfully diverted funds. Neither shall the court order the Legislature to appropriate funds for that purpose.

Rather, the court shall declare that $331,044,084 in offsets were unlawfully diverted from the NMSDF to the General Fund; declare that the State is obligated to restore/return those funds to the NMSDF; and enjoin the State to restore/return those funds to the NMSDF as soon as there is a sufficient appropriation "reasonably" and "generally" available for such purpose.

The court shall assume that the Legislature and Respondents will take whatever steps are necessary and appropriate to meet this obligation.

The court shall reserve jurisdiction to issue a peremptory writ of mandate compelling Respondents to restore/refund the unlawfully diverted funds from any appropriation that is determined to be reasonably and generally available for payment of the obligation.

V.
Disposition

Counsel for Petitioners is directed to prepare a formal judgment, incorporating this ruling as an exhibit; submit it to opposing counsel for approval as to form; and thereafter

submit it to the court for signature and entry of judgment in accordance with Rule of Court 3.1312.[11]

Petitioners shall be entitled to recover their costs upon appropriate application. The court shall reserve jurisdiction to consider a request for an award of attorney fees.

Dated: June 12, 2015

Hon. Timothy M. Frawley
California Superior Court Judge
County of Sacramento

[11] In reaching this decision, the court has granted the requests for judicial notice filed by Respondents, (which were unopposed) and Petitioners (which were opposed).

Case Number: 34-2014-80001784 Department: 29
Case Title: NAAC v. Johnson/NMSDF

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing RULING ON SUBMITTED MATTER by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each of which envelopes was addressed to:

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I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: June 12, 2015

Superior Court of California, County of Sacramento

By: F. Temmerman
Deputy Clerk