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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

CHINO BASIN MUNICIPAL WATER
DISTRICT

Plaintiff,

vs.

CITY OF CHINO, ET AL.

Defendant.

Case No. RCV 51010

[Assigned for All Purposes to the
Honorable STANFORD E. REICHERT]

WATERMASTER OPPOSITION TO
PARAGRAPH 31 MOTION

Hearing Date: May 14, 2010
Time: 10:30 a.m.
Dept: C-1 (Chino)

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1
2 **I. INTRODUCTION**

3 Watermaster opposes the Paragraph 31 Motion of the Overlying (Non-Agricultural) Pool
4 (hereinafter “Non-Agricultural Pool”) to set aside a unanimous decision of the Watermaster Board
5 to acquire and use stored water for critical Basin management purposes pursuant to the *Purchase*
6 *and Sale Agreement For The Purchase Of Water By Watermaster From Overlying (Non-*
7 *Agricultural) Pool* (hereinafter “Agreement”).¹

8 Watermaster opposes the Motion because: (1) the factual allegations do not support the
9 requested relief; (2) Watermaster provided written notice in accordance with the plain meaning of
10 the Agreement; (3) the Agreement is not an option contract and any alleged deficiencies are trivial;
11 (4) even if the Agreement was an option contract, Watermaster provided reasonable notice by
12 personal delivery, by U.S. mail, by electronic mail and by publication; (5) this Motion is barred by
13 the equitable principles of waiver and estoppel; and (6) the Motion is untimely.

14 **II. BACKGROUND**

15 The following is a focused description of the context surrounding the Purchase and Sale
16 Agreement.

17 **A. Pool Committee Structure**

18 The Agreement came about as a response to an accumulation of surplus water in the storage
19 accounts of Non-Agricultural Pool members. This accumulation resulted from the manner in which
20 the Pool was structured under the Judgment, and it is useful to understand this structure in
21 comparison to the structure of the other two Pools.² Each of the three Pools is described in
22 Paragraph 43 of the Judgment, and the Judgment includes a specific “Pooling Plan” for each Pool
23 (Judgment, Exhibits “F,” “G” and “H.”)³

24
25 ¹ A true and correct copy of the Agreement is attached hereto as Exhibit “1.”

26 ² For a more detailed description of the Watermaster structure as established in 1978, see
27 Plaintiff’s Post Trial Memorandum, filed July 12, 1978, and attached hereto as Exhibit “2.”

28 ³ A copy of the 1978 Judgment is attached hereto as Exhibit “3.” The Judgment has been
amended multiple times since 1978 and there does not currently exist an official restatement of the
Judgment that includes all amendments. This brief will describe such amendments where relevant.

1 **1. Agricultural Pool**

2 Water is allocated to the Agricultural Pool in gross rather than to any individual member of
3 the Pool. Individual Agricultural Pool members have no limitation on the amount of water they can
4 produce, but if pumping by the Pool as a whole exceeds the amount of water allocated to it, then the
5 Pool will be assessed for replenishment. (Judgment, ¶ 45.) At the time of the Judgment, it was
6 anticipated that Agricultural Pool production would diminish as agricultural land was converted to
7 municipal use, and the Judgment therefore includes detailed procedures to transfer unproduced
8 Agricultural Pool water to the Appropriative Pool. (Judgment, Exhibit “H” ¶ 10.)⁴ The Agricultural
9 Pool does not receive compensation for such transfers to the Appropriative Pool.

10 **2. Appropriative Pool**

11 The members of the Appropriative Pool, on the other hand, are allocated specific quantities
12 of water per party. Under the Judgment, Appropriative Pool members are given flexibility to
13 manage their water rights. For example, any appropriator who produces less than its assigned right,
14 may carry such unpumped water forward for use in subsequent years. (Judgment, Exhibit “H” ¶ 12.)
15 This allows appropriators to accumulate water in wet years and to produce more water in dry years
16 without incurring a replenishment obligation. In addition, appropriative rights may be assigned,
17 leased or licensed to another appropriator for exercise in a given year. (Judgment, Exhibit “H” ¶
18 13.) The primary limitation on the Appropriative Pool is that if the Safe Yield is reduced, any
19 shortfall is debited from the Appropriative Pool. (Judgment, ¶ 44.) In the event of such a reduction,
20 the Appropriative Pool would have to be reduced to zero before either of the other two overlying
21 pools would be affected.

22 **3. Non-Agricultural Pool**

23 There are similarities between the Non-Agricultural Pool and each of the other two Pools.
24 Like appropriators, Non-Agricultural Pool members have individually quantified rights.
25 (Judgment, Exhibit “D.”)⁵ They also have the right to “carry over” any unproduced water and to

26 ⁴ Exhibit “H” ¶ 10 has been amended, but these changes are not relevant to the current
27 dispute.

28 ⁵ Since 1978, the members of the Non-Agricultural Pool have changed. A current list of the
Pool members is attached hereto as Exhibit “4.”

1 hold the water in storage for use in future years. (Judgment, Exhibit “G” ¶ 7.)⁶ On the other hand,
2 like the Agricultural Pool, the Non-Agricultural Pool shares in the priority of overlying landowners.
3 The primary limitation on use of water by the members of the Non-Agricultural Pool arising from
4 the initial form of the Judgment was that the decreed rights were appurtenant to the land and not
5 transferable separate from that land. (Judgment, Exhibit “G” ¶ 6.)

6 **B. Peace Agreement Judgment Amendment**

7 Since 1978, changes in the Non-Agricultural Pool have resulted in lower water demands. As
8 the surplus in the Pool grew, the Judgment’s appurtenance requirement led to the accumulation of a
9 large amount of unused Non-Agricultural Pool water in storage. Because there was little likelihood
10 that the stored water could ever be used, this accumulation was at odds with Article X, section 2 of
11 the California Constitution, which requires that all water resources of the State be put to maximum
12 beneficial use. (Cal. Const., Art. X, sec. 2.)

13 In response, the 2000 Peace Agreement amended Judgment Paragraph 8 and Judgment
14 Exhibit “G” paragraph 6, to allow the transfer of Non-Agricultural Pool water outside the Pool.
15 (Peace Agreement sections 4.4(a) and (b).)⁷ However, such transfers were limited to two purposes:
16 Watermaster’s acquisition of the water for Desalter Replenishment or for use in a Storage and
17 Recovery Program. (Peace Agreement section 5.3(e).) This allowed the water to be put to
18 beneficial use while, at the same time, preserving Watermaster’s ability to promote the public
19 interest in assuring the expanded use would provide a broad benefit.⁸

20 **C. Peace II Measures**

21 **1. In General**

22 On December 21, 2007, the Court approved a suite of agreements and best management

23 _____
24 ⁶ Judgment Exhibit “G” has been extensively amended. These amendments are described in
25 detail below.

26 ⁷ A true and correct copy of the Peace Agreement is attached hereto as Exhibit “5.”

27 ⁸ The Desalters are a key element to Watermaster’s Optimum Basin Management Program,
28 but they were not assigned a new production right prior to their construction. Procuring water for
Desalter Replenishment has a broad benefit across the Basin because the Desalters provide direct
and indirect benefits to all parties to the Judgment through improved groundwater production, Basin
clean-up, expanded use of recycled water and reduced losses from storage. In addition, under the
Peace Agreement, Storage and Recovery Programs are prioritized according to their ability to
provide broad benefits. (See Peace Agreement, § 5.2(c)(iv)(b).)

1 practices collectively referred to as the Peace II Measures.⁹ Collectively, these measures created a
2 legal structure that facilitates the use of recycled water, expands desalting of groundwater, and
3 complies with the directives of the Regional Water Quality Control Board regarding the Basin Plan
4 for the Santa Ana River. To meet their collective obligations under Peace II, the parties assumed
5 tens of millions of dollars in new financial obligations.

6 2. Addressing Stranded Water Stored By The Non-Agricultural Pool

7 While the Peace Agreement attempted to facilitate greater use of the Non-Agricultural Pool
8 water, the modest amendment to Exhibit "G" had no meaningful impact on the accumulation of
9 groundwater in storage. As of July 2007, more than 52,000 acre-feet had accumulated in Non-
10 Agricultural Pool members' storage accounts. (Declaration of Kenneth Manning ("Manning
11 Decl."), attached hereto, ¶ 19.) Consequently, the Court approved a further amendment to
12 Judgment Exhibit "G" paragraph 6 authorizing certain "Physical Solution Transfers," and approved
13 the Purchase and Sale Agreement through which the Non-Agricultural Pool was permitted to sell *all*
14 of its water in storage at a defined price generally equivalent to the then prevailing market price.¹⁰
15 Under both of these measures, the Non-Agricultural Pool must dedicate 10% of any transferred
16 quantity to Watermaster for the purpose of Desalter Replenishment. (Agreement, Sections B and
17 H.)

18 As amended, Exhibit "G" for the first time allowed the Non-Agricultural Pool members to
19 elect to transfer their surplus water on a yearly basis to Watermaster and thence to the members of
20 the Appropriative Pool *for their individual use*. (Amended Exhibit "G," § 9(d).)¹¹

21 3. The Purchase And Sale Agreement

22 As consideration for the right to sell their water on an annual basis at market rate, the Non-

23
24 ⁹ A true and correct copy of the December 21, 2007 Court Order is attached hereto as
25 Exhibit "6." A true and correct copy of the Peace II Agreement, including all Exhibits thereto, is
26 included here as Exhibit "7." The Peace II Agreement includes three Exhibits. Exhibit 1 is
27 Watermaster Resolution 07-05 which includes the remainder of the Peace II Measures as
28 attachments. For example, the Purchase and Sale Agreement is Attachment "G" to Resolution 07-
05.

¹⁰ The prevailing price for leased groundwater at the time of the Agreement was 92% of the
Metropolitan Water District's ("MWD") rate for replenishment water. (Manning Decl., ¶ 6.)

¹¹ A true and correct copy of the amendments to Exhibit "G" are attached hereto as Exhibit
"8." This document can also be found as Attachment "I" to Watermaster Resolution 07-05.

1 Agricultural Pool members agreed in the Purchase and Sale Agreement to sell all of their water in
2 storage to Watermaster in a manner consistent with Peace Agreement section 5.3(e) – for use as
3 either Desalter Replenishment or for use in a Storage and Recovery Agreement.

4 The purchase price for the stored water was fixed and an escalating installment payment
5 schedule was established. (Agreement, Section D.) A condition, subsequently identified in the
6 Agreement, required Watermaster to provide written notice of its intent to use the water for the
7 permitted purposes within two years of the December 21, 2007 Court Order. (Agreement, Section
8 C.) If Watermaster did not elect to use the stored water, the Non-Agricultural Pool members could
9 then determine whether they wished to make the water available to *individual appropriators* under
10 the amended Exhibit “G,” but Watermaster’s ability to use the water for Desalter Replenishment or
11 in a Storage and Recovery Program would be lost. (Agreement, Section H.)

12 In addition, 8,350 acre-feet of the stored water (roughly 16% of the total) was immediately
13 transferred from Vulcan Materials to San Antonio Water Company, with 10% of the stored supply
14 being dedicated to Desalter replenishment. (Agreement, Section I.)

15 Thus, taken together, the amendment to Judgment Exhibit “G” and the Purchase and Sale
16 Agreement removed the limitation placed on the Non-Agricultural Pool under the initial form of the
17 Judgment and made the water held by the Non-Agricultural Pool transferable.

18 **D. Disposition Of The Purchased Water By Auction**

19 Throughout 2008 and in to 2009, Watermaster Staff met with the Appropriative Pool to
20 discuss how to utilize the purchased water. (Manning Decl., ¶ 7.) The completion of the updated
21 Recharge Master Plan was of paramount importance to the Court in 2007 when it approved the
22 Peace II Measures, and the completion of the Recharge Master Plan update is the final Condition
23 Subsequent that must be satisfied under the December 21, 2007 Court Order. (December 21, 2007
24 Order, at 8:21-23.)¹² Watermaster developed a strategy to raise money for the Recharge Master
25 Plan improvements by offering third parties the opportunity to participate in a Storage and
26

27 ¹² A hearing is currently scheduled for September 24, 2010 to consider approval of the
28 updated Recharge Master Plan which must be submitted to the Court by Watermaster by July 1,
2010.

1 Recovery Program utilizing the purchased water.¹³ Ultimately, after considering various
2 approaches, the Board selected an auction of the stored water and associated storage capacity as a
3 fair and transparent method to obtain the highest possible return. (See Board Meeting Minutes,
4 February 26, 2009 (Item III.A.3.); March 26, 2009 (Item III.A.2.); May 28, 2009 (Item III.A.2.);
5 June 25, 2009 (Item II.A.)¹⁴

6 As required by the Peace Agreement, the Board approved the Storage and Recovery
7 Agreement for the auction but attached conditions to ensure a “broad benefit” and avoid any
8 Material Physical Injury. (Board Minutes, June 25, 2009 (Item II.A.)) The Board required that all
9 auction proceeds must be used for qualifying Recharge Master Plan improvements.¹⁵ (*Id.*)

10 Following its approval, the Board’s condition ensuring a “broad benefit” was modified to
11 account for a *Stipulation Between Appropriative Pool and Non-Agricultural Pool Regarding*
12 *Financial Benefits Derived from Auction* (“Stipulation”).¹⁶ While the Non-Agricultural Pool was
13 already being compensated for the sale of the stored water, it sought *additional compensation* for
14 the third party use of the Basin storage capacity. As a result of the Stipulation, the Non-Agricultural
15 Pool will not be assessed for any portion of the Recharge Master Plan capital costs so long as
16 auction proceeds from the sale of the stored water and storage capacity remain to fund such costs.
17 (Stipulation, ¶ 2.)

18 On August 11, 2009, the Court approved Watermaster’s proposal to auction the water
19 purchased from the Non-Agricultural Pool and a corresponding quantity of storage capacity and to
20

21 ¹³ A similar strategy was used in Watermaster’s Dry-Year Yield Storage Agreement with
22 MWD to store up to 100,000 acre-feet in exchange for in-Basin capital improvements.

23 ¹⁴ See also, Joint Appropriative and Non-Agricultural Pool Meeting Minutes, February 12,
24 2009 (Item II.B.); May 14, 2009 (Item II.A.); June 11, 2009 (Item II.A.). True and correct copies of
25 all of these meeting minutes are attached hereto in chronological order as Exhibit “9.”

26 ¹⁵ The Motion contains a lengthy discussion of the consequences that will ensue if the
27 Motion is granted, and assumes that the sole consequence will be a larger monetary benefit to the
28 Pool. (Motion 9:9 – 10:5.) However, this larger benefit will be obtained by selling the water
through the amended Exhibit “G” to the individual appropriators for their individual use. Under this
approach, the water may not be available for use by Watermaster in a Storage and Recovery
Program, and the ability to use this water as the financing mechanism for the Recharge Master Plan
will consequently be lost.

¹⁶ A true and correct copy of this Stipulation is attached hereto as Exhibit “10.”

1 use the revenue from the auction to fund the Recharge Master Plan. (Court’s August 11, 2009
2 Order, at 2:3-24.)¹⁷

3 **E. Issuance Of The Notice Of Intent To Purchase And “Plan B”**

4 The official marketing of the auction was calendared to begin in early September 2009.
5 (Manning Decl., ¶ 11.) In order to represent to potential bidders that Watermaster had clear rights
6 to auction the stored water, before marketing of the auction began, Watermaster provided written
7 notice of its intent to purchase the stored water.

8 Section C of the Purchase and Sale Agreement states that only with the prior approval of the
9 Appropriative Pool will Watermaster provide written notice. This limitation was essential because
10 the Appropriative Pool is the ultimate funding source for the acquisition. On August 13, 2009, the
11 Appropriative Pool unanimously approved a Notice of Intent to Purchase. (See Joint Appropriative
12 and Non-Agricultural Pool Meeting Minutes, Aug. 13, 2009, at II.A.)¹⁸ The Non-Agricultural Pool
13 was present at this joint meeting.¹⁹

14 On the same date that the Appropriative Pool approved the Notice for transmittal to the
15 Board, the Pool requested Watermaster staff and counsel to develop an alternative financing plan,
16 commonly referred to as “Plan B.” (Joint Appropriative Pool and Non-Agricultural Pool Meeting
17 Minutes, August 13, 2009, at II.B.)²⁰

18 The Notice of Intent as approved by the Appropriative Pool was transmitted to the Advisory
19 Committee and to the Watermaster Board for action on August 27, 2009.²¹ The Notice of Intent to
20

21 ¹⁷ A true and correct copy of this Order is attached hereto as Exhibit “11.”

22 ¹⁸ Attached to the Declaration of Robert W. Bowcock as Exhibit “I.”

23 ¹⁹ If the Court finds that further investigation is warranted, Watermaster would intend to
24 depose the Non-Agricultural Pool representative and the individual members of the Pool in order to
understand whether and to what extent this action was communicated to the other members of the
Non-Agricultural Pool by the Pool representative.

25 ²⁰ Discussion of a Plan B actually began much earlier. The May 28, 2009 Board minutes
reflect that Counsel Slater reported: “There is some interest in developing an alternative to the
26 straight auction process so that in the event the auction process does not yield the results that the
parties are looking for. This possible alternative will assist the parties in not losing the opportunity
27 negotiated under Peace II documents.” (Board Meeting Minutes, May 28, 2009 at III.A.2.)

28 ²¹ A true and correct copy of the final Notice of Intent to Purchase is attached hereto as
Exhibit “12.”

1 Purchase was prominently displayed on the Board Agenda for the August 27, 2009 meeting as item
2 II.A., and the agenda item was titled, “Consider Approval of Notice of Intent to Purchase as
3 Directed by the Appropriative Pool.”²² The minutes reflect that the Board approved the Notice of
4 Intent transmitted by the Appropriative Pool and contained in the agenda package, with the Non-
5 Agricultural Pool voting in favor of approval. (Board Meeting Minutes, August 27, 2009.)²³

6 The minutes further reflect that the Board referred the question as to whether the amount of
7 2,652 acre-feet should be apportioned for some other purpose than Desalter Replenishment for a
8 “separate motion.” (Board Meeting Minutes, August 27, 2009.) However, there was no specific
9 direction to modify the Notice of Intent and staff did not so modify it.

10 Given the limitations on the Board’s authority to act on this matter only following direction
11 by the Appropriative Pool, the Board could only *request* the Appropriative Pool to consider whether
12 2,652 acre-feet were more appropriately dedicated to some other purpose than Desalter
13 Replenishment. Ultimately, the Appropriative Pool did not decide to make a change to the Notice
14 of Intent, and no further action was ever brought to the Watermaster Board.

15 The minutes for the August 27, 2009 Board Meeting were electronically distributed to
16 interested parties on September 18, 2009 in anticipation of approval at the September 24, 2009
17 Board meeting. (Declaration of Sherri Lynne Molino (“Molino Decl.”), attached hereto, ¶ 11.) The
18 agenda packet for the Board meeting was mailed via regular mail to Mr. Bowcock, the Board
19 representative of the Non-Agricultural Pool. (Molino Decl, ¶ 10.) Mr. Bowcock was in attendance
20 at the Board meeting when the minutes for the August 27, 2009 Board meeting were approved. (*See*
21 Board Meeting Minutes, September 24, 2009.)²⁴ The minutes of the August 27, 2009 Board
22 meeting have been maintained on the Watermaster website continuously since they were approved
23

24 ²² A copy of the full agenda package for the August 27 Meeting is attached as Exhibit “X”
to the Declaration of Robert W. Bowcock. See also Declaration of Robert W. Bowcock, Exhibit “J.”

25 ²³ A copy of the August 27, 2009 Board Meeting minutes is attached as Exhibit “K” to the
26 Declaration of Robert W. Bowcock. Whether and to what extent the Pool representative
27 communicated this action to the other members of the Pool is a relevant subject for further
discovery.

28 ²⁴ A true and correct copy of the September 24, 2009 Board meeting minutes are attached
hereto as Exhibit “13.”

1 on September 24, 2009. (Molino Decl., ¶ 12.)

2 On October 30, 2009, with direction from the Board, staff officially announced that the
3 auction would be postponed until uncertainties associated with potential buyers' ability to recover
4 and use the purchased water could be resolved. (Manning Decl., ¶¶ 12 & 13.) At its next regularly
5 scheduled meeting on November 5, 2009, the Appropriative Pool adopted the Plan B, which
6 directed Watermaster to levy a special assessment on the members of the Pool in order to tender the
7 first payment to the Non-Agricultural Pool as required under the Purchase and Sale Agreement.²⁵
8 (Joint Appropriative Pool and Non-Agricultural Pool Meeting Minutes, November 5, 2009, at
9 VII.)²⁶

10 At the November 19, 2009 Advisory Committee and Board meetings, the Watermaster CFO
11 gave a presentation concerning the special assessment to be levied under Plan B and distributed a
12 spreadsheet showing the specific allocation of this assessment to each individual appropriator.
13 (Advisory Committee and Board Meeting Minutes, November 19, 2009, at II.B.3.)²⁷ This
14 assessment was based on an assumed purchase of the entire 38,652 acre-feet. The Non-Agricultural
15 Pool was present at both of these presentations.²⁸ Watermaster levied this assessment the week
16 following the November 19, 2009 meetings, and on January 17, 2010, tendered the first payment to
17 the members of the Non-Agricultural Pool. (Manning Decl., ¶ 18.)

18 At no time during this entire process did any member of the Non-Agricultural Pool raise any
19 contention regarding the insufficiency of the Notice.

20
21
22
23 ²⁵ The manner in which the Pool representative communicated this action to the other
24 members of the Pool is a relevant subject for further discovery.

25 ²⁶ A copy of the November 5, 2009 meeting minutes is attached as Exhibit "O" to the
26 Declaration of Robert W. Bowcock.

27 ²⁷ True and correct copies of the November 19, 2009 meeting minutes are attached hereto as
28 Exhibit "14." A true and correct copy of this spreadsheet as distributed to the Advisory Committee
and the Board is attached hereto as Exhibit "15."

²⁸ The manner in which the Pool representative communicated this report to the other
members of the Pool is a relevant subject for further discovery.

1 **III. THE PLAIN LANGUAGE OF THE PURCHASE AND SALE AGREEMENT, THE**
2 **NOTICE OF INTENT TO PURCHASE, “PLAN B,” AND THE RELEVANT STAFF**
3 **REPORTS ARE CONTRARY TO THE ASSERTIONS MADE BY THE NON-**
4 **AGRICULTURAL POOL**

5 Contracts shall be interpreted according to their plain meaning. (Civil Code §1644; *Coast*
6 *Plaza Doctors Hosp. v. Blue Cross* (2000) 83 Cal.App.4th 677, 684.) To determine the ordinary
7 and plain meaning of a word, the court will typically consult a dictionary. (*People ex rel Lockyer v*
8 *R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253, 1263.)

9 **A. The Purchase And Sale Agreement Does Not Require That Notice Be**
10 **“Delivered” To The Individual “Members” Of The Non-Agricultural Pool And**
11 **Such Delivery Would Be Contrary To The Custom And Practice Of**
12 **Watermaster**

13 The Non-Agricultural Pool seeks a declaration that, “. . . Watermaster, on behalf of the
14 Appropriative Pool did not deliver to the members of the Non-Agricultural Pool a Notice of Intent
15 to Purchase” (Notice of Motion, at 1:6-7 (emphasis added).) The Motion attaches declarations
16 from some, but not all, of the Non-Agricultural Pool members as the primary factual support to
17 substantiate the claim that Notice was not delivered to individual members of the Pool. (Motion, at
18 10:9-13.)²⁹

19 Section C of the Purchase and Sale Agreement says that, “. . . Watermaster will provide

20 ²⁹ The Motion states that “none” of the members of the Pool received written notice, as
21 substantiated by the declarations. (Motion, at 10:10.) However, the Motion does not include a
22 declaration from the City of Ontario which is a member of both the Non-Agricultural and
23 Appropriative Pools, and, in fact, during 2009 was the Chair of the Appropriative Pool and the
24 largest member of the Non-Agricultural Pool. The Motion also does not include a declaration from
25 the County of San Bernardino, another member of the Pool.

26 In addition, while the attached declarations each make reference to the lack of receipt of the
27 Notice, each does so in very careful and varying language. For example, while most of the
28 declarants (Mr. Lawhn, Mr. Arbelbide, Mr. Geye, Mr. Starnes, and Mr. Ward) reported that they
conducted reasonably diligent internal reviews and on the basis of such reviews concluded that they
did not receive Notice, Mr. Stubbings declaration, while otherwise nearly identical to the others,
omits reference to an internal review. Mr. Penrice and Mr. Bowcock’s declarations also do not
make reference to internal reviews, except to the extent that each, “reviewed my saved emails” and
did not find a copy of the August 21, 2009 notice. (Penrice Declaration, at 1:13-14; Bowcock
Declaration, at 10:10-11.) Neither claims to have not received the Notice, only that they did not
save it.

The circumstances associated with these varying accounts and the basis for providing
declarations from some but not other Non-Agricultural Pool members is a relevant subject for
further discovery.

1 written Notice of Intent to Purchase the Non-Agricultural (Overlying) Pool water . . .” (emphasis
2 added). In two subsequent sections (E and H) the Notice is described as being “issued.” Nowhere
3 does the Purchase and Sale Agreement use the word “deliver.”

4 The Webster’s definition of “provide” is “to furnish or supply” or “to make available,
5 afford.” Consistent with this, California case law holds that “provide” means “to supply or make
6 available.” (*Stuart v. RadioShack Corp.* (N.D.Cal. 2009) 641 F.Supp.2d 901, 904, fn. 1.)³⁰ The
7 relevant Webster’s definition of “issue” is, “the act of publishing or officially giving out or making
8 available.” (Merriam-Webster’s Dictionary of Law (1996 ed.) Neither of these words conveys a
9 delivery, which Webster defines as “handing over” or “sending to an intended target or destination.”
10 (Merriam-Webster’s Online Dictionary (2010 ed.); see also *Benson v. Superior Court In and For*
11 *Napa County* (Cal.App. 1 Dist. 1963) 214 Cal.App.2d 551, 558.) The fact that the Agreement uses
12 the words “provide” and “issue” rather than “deliver” is consistent with the fact that the Agreement
13 also does not identify a specific recipient of the Notice.

14 The Agreement does not provide that the Pool “members” must receive unique or distinct
15 notice. While the Purchase and Sale Agreement elsewhere makes specific reference to the
16 “members” of the Pool, in Section C it is silent as to who should receive the Notice. If notice to a
17 specific recipient is to be inferred into the Agreement, then that recipient should be the Pool through
18 the Pool representative, not the individual members of the Pool.

19 By custom and practice, the Non-Agricultural Pool participates in the Watermaster process
20 through a single representative. The 1998 Order creating the nine-member Board specifically
21 excepted the Non-Agricultural Pool from the rule that no individual will be allowed to serve
22 concurrently on the Watermaster Board while serving as a member of the Advisory Committee
23 and/or the respective Pool Committee. (Court’s February 18, 1998 Order, at 5:7-10.)³¹ In addition,

24 _____
25 ³⁰ *Stuart v. RadioShack Corp.* cites approvingly to the Court of Appeal’s discussion of the
26 definition of “provides” in the employment context in *Brinker Restaurant Corp. v. Superior Court*
27 (2008) 165 Cal.App.4th 25, 55, review granted and opn. superseded by *Brinker Restaurant Corp. v.*
28 *S.C.* (Cal. Oct 22, 2008) (NO. S166350) 196 P.3d 216 [85 Cal.Rptr.3d 688]. Since under review by
the California Supreme Court, *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th
25 has been de-published.

³¹ A true and correct copy of this Order is attached hereto as Exhibit “16.”

1 the Non-Agricultural Pool rules provide that a single person constitutes a quorum for Non-
2 Agricultural Pool meetings. (Manning Decl., ¶ 3.)

3 Furthermore, matters arising under the Peace Agreement and the Peace II Agreement have
4 been managed with the Non-Agricultural Pool as a unified group by and through the designated
5 Pool representative. For example, the Peace Agreement was executed by the then Pool
6 representative Mr. Arbelbide on behalf of the entire Pool, rather than by the individual members.
7 Similarly, the Purchase and Sale Agreement was negotiated by the Pool representative, Mr.
8 Bowcock, and the sole individual that executed the Purchase and Sale Agreement was Mr. Bowcock
9 on behalf of the Pool.³²

10 If new words are to be inserted into the Agreement that imply a specific recipient of the
11 Notice, then these words should be consistent with the custom and past practices of the parties and
12 should mirror the manner the Agreement was negotiated and executed. In fact, the Notice as
13 approved is directed to the “Overlying (Non-Agricultural) Pool” and not to the individual members
14 of the Pool.

15 The plain language of the Agreement does not support the contention that special notice was
16 required to be delivered to the individual members of the Pool. The Purchase and Sale Agreement
17 only requires that the Notice be published and made generally available to all parties in the same
18 customary manner as the other notices that Watermaster routinely provides for meetings, Court
19 filings, water transactions and the like. (Manning Decl., ¶ 20.)³³

20 **B. The Plain Language Of The Notice Explains The Sequence Between Approval**
21 **Of The Notice, Issuance Of The Notice, And Tender Of Payment**

22 The Motion emphasizes the sequencing of the approval and issuance of the Notice and the
23 tender of payment to argue that the August Board approval did not constitute issuance of the Notice
24 because it was the intent of Watermaster to wait to issue the Notice until December. (See Motion,
25 at 4:26, 7:24.) The plain language of the Notice contradicts this theory.

26 ³² Since 2003 the Non-Agricultural Pool representative has been Mr. Robert Bowcock or his
27 employee, Mr. Kevin Sage. (Bowcock Declaration, ¶ 4.)

28 ³³ A cursory review of the Watermaster website, <http://www.cbwm.org>, corroborates Mr. Manning’s declaration.

1 The Notice as approved in August reflects Watermaster's intention to demonstrate clear title
2 to the water prior to conducting the auction and incurring expenses in support thereof, while at the
3 same time deferring payment to the Non-Agricultural Pool until the auction could be conducted.

4 The Notice reads:

5 On August 13, 2009 the Appropriative Pool provided approval for the
6 issuance of this notice. The date of issuance of this notice is
December 18, 2009.

7 The Notice recites that it was approved by the Appropriative Pool on August 13, 2009, but
8 says *in the present tense* that the issuance date of the Notice "is" December 18, 2009. It does not
9 state that the issuance date "will be" December 18, 2009, or that the Notice "will be provided" on
10 December 18, 2009, or reference any other further action to make the Notice effective. For
11 example, although it was initially expected that the auction proceeds would provide the funds for
12 the acquisition, the effectiveness of the Notice was not conditioned or restricted in any way on the
13 success of the auction. With its August 13, 2009 approval of the Notice, the Appropriative Pool
14 obligated itself to provide the necessary funds to tender payment to the Non-Agricultural Pool by
15 January 18, 2010.

16 So that it could demonstrate that written notice had been provided but still defer the payment
17 obligation until the auction could be completed, the Appropriative Pool adopted a written notice that
18 post dated the issuance date until December 18, 2009. This would defer the payment under the
19 Agreement until Watermaster could complete the auction and acquire the several million dollars
20 necessary to fund the purchase. The Non-Agricultural Pool was present for the discussion of this
21 approach, and raised no objection. (Joint Appropriative Pool and Non-Agricultural Pool Meeting
22 Minutes, August 13, 2009.)

23 C. **The Plain Language Of "Plan B" And Watermaster And The Appropriative**
24 **Pool's Conduct Evidences An Unwavering Commitment To Tender The First**
25 **Payment In Accordance With The August Notice**

26 The Non-Agricultural Pool relies upon staff statements made in association with the
27 November 5, 2009 adoption by the Appropriative Pool of the *Plan Regarding Disposition of Water*
28 *Purchased from the Non-Agricultural Pool Pursuant to the Peace II Purchase and Sale Agreement,*

1 also known as “Plan B”³⁴ to support its contention that notice had not been issued.

2 Three separate times in block quote format the Motion quotes item (1) from Plan B as
3 evidence for the proposition that the Notice had not been issued as of November 5, 2009. (Motion,
4 at 6:23-24, 7:15-16, 13:23-24.)³⁵ The argument overstates the relevance and the importance of the
5 item and ignores the context for its adoption and the remainder of Plan B.

6 Contextually, Plan B is the articulation of a financing plan *for the Appropriative Pool* in
7 order to initiate the levy of a special assessment to tender the first payment for the stored water.
8 Item (1) lists an action that was required to occur prior to payment to the Non-Agricultural Pool. It
9 does not say that Notice had not been provided. It does not even hint at a modification or a
10 rescission of the Notice. Moreover, the significance of item (1) is overshadowed by the plain
11 language of the remainder of Plan B which established the financing plan to acquire *all* of the stored
12 water. Item (2) of Plan B states that: “A Special Assessment will be levied by Watermaster on the
13 Appropriative Pool in an amount necessary to fund the purchase of the water.”

14 Following the November 5, 2009 Appropriative Pool meeting, the Watermaster CFO gave a
15 presentation to the Advisory Committee and Board on November 19, 2009 concerning
16 implementation of Plan B. The agenda item for this report read: “Disposition of Water Purchased
17 from the Non-Agricultural Pool.”³⁶ (Advisory Committee and Board Agendas, November 19,
18 2009, at II.B.3.)³⁷ The Non-Agricultural Pool was present at both the Advisory Committee and
19 Board meetings.³⁸ A fair reading of Plan B in light of the surrounding circumstances combined
20 with the conduct by the Appropriative Pool and Watermaster demonstrates a clear commitment to
21

22 ³⁴ The final copy of Plan B is attached as Exhibit “Q” to the Declaration of Robert W.
Bowcock.

23 ³⁵ In each of these three instances the Motion changes the format of the quotation slightly
24 and changes the citation for the quotation, thus making it appear that the statement occurs as three
separate occurrences, rather than a repetition of the same quotation three times.

25 ³⁶ Note the past tense use of the word “purchased” by staff with reference to the Non-
Agricultural Pool water.

26 ³⁷ A copy of both agendas is attached as Exhibit “Q” to the Declaration of Robert W.
Bowcock.

27 ³⁸ An issue for further discovery includes whether and to what extent this discussion was
28 reported by the Pool representative to the other members of the Non-Agricultural Pool.

1 tender the first payment to the Non-Agricultural Pool pursuant to the August Notice.

2 **D. The Use Of The Word “Form” With Reference To The Notice Was Not Present**
3 **In The Final Staff Recommendation**

4 A primary argument in the Motion is that the August staff reports identified the Notice as a
5 mere “form” of Notice and that something more was required. (Motion, at 4:17 – 6:4.) While the
6 staff recommendation in the August 13, 2009 staff report to the *Appropriative Pool* referenced the
7 “form” of notice, the Staff recommendation to the *Board* in the August 27, 2009 staff report did not.
8 The staff recommendation read: “Staff recommends approval of the Notice of Intent to Purchase as
9 directed by the *Appropriative Pool*.” The Non-Agricultural Pool overlooks the specific deletion of
10 the word “form” in the staff recommendation to the Board.³⁹

11 **IV. THE PURCHASE AND SALE AGREEMENT IS NOT AN OPTION CONTRACT**
12 **AND WATERMASTER’S NOTICE NEED ONLY BE REASONABLE AND ITS**
13 **PERFORMANCE SUBSTANTIAL**

14 Seeking the benefit of strict notice requirements traditionally applicable to real estate option
15 contracts, the Non-Agricultural Pool contends the Agreement is an option contract.⁴⁰ This
16 contention is inaccurate. The Agreement is not an option contract, and compliance with the
17 Agreement should therefore be analyzed pursuant to the doctrine of substantial performance. Even
18 according to the Non-Agricultural Pool’s characterization, any defect in performance here is trivial.

19 Option agreements are unilateral agreements under which only one party is bound until the
20 time that the option is exercised. (See *Keller v. Pacific Turf Club* (1961) 192 Cal.App.2d 189, 196-
21 97.) The exercise of the option is a condition precedent to the formation of a bilateral contract.

22 ³⁹ The August 13, 2009 staff report is attached as Exhibit “H” to the Declaration of Robert
23 W. Bowcock, and the August 27, 2009 staff report is attached as Exhibit “J” to the Declaration of
24 Robert W. Bowcock.

25 ⁴⁰ The Pool even renames the Purchase and Sale Agreement as the “Peace II Option
26 Agreement.” (Motion, at 2:19.) Watermaster counsel acknowledges that the Purchase and Sale
27 Agreement has for ease of reference been characterized as an “option.” Watermaster’s filing in
28 satisfaction of Condition Subsequent Number One, did make reference to the Purchase and Sale
Agreement as an “option.” (Watermaster Compliance with December 21, 2007 Order Conditions
One and Two, dated January 31, 2008, at 7:15 – 8:25, attached hereto as Exhibit “17.”) This
reference was not made in the context of a discussion of whether the Purchase and Sale Agreement
is an option agreement versus a bilateral agreement, and no such issue was before the Court at that
time. It was intended to distinguish among the forms of transferability arising under the Peace II
measures.

1 (*Palo Alto Town & Country* (1974) 11 Cal.3d 494, 502; *Riverside Fence Co. v. Novak* (1969) 273
2 Cal.App.2d 656, 662-63.) The unilateral nature of an option agreement is the justification for strict
3 compliance with the terms of the agreement. (*Keller, supra*, 192 Cal.App.2d at 196-97; 15
4 Williston on Contracts § 46:12 (4th ed.)) In the event of ambiguity, California law presumes a
5 contract to be bilateral rather than a unilateral option. (*Patty v. Berryman* (1949) 95 Cal.App.2d
6 159, 167.)

7 In the case of the Agreement, the sole condition precedent to the formation of the contract is
8 specifically identified as Court approval. (Agreement, Section G.) The Notice to be provided is not
9 a condition precedent, and is in fact specifically identified as a condition subsequent. (Agreement,
10 Section H.) Issuance of the Notice can only be a condition subsequent if a bilateral contract had
11 already been formed prior to the issuance of the Notice.

12 In addition, prior to issuance of the Notice partial performance had already occurred under
13 the Agreement. Under Section I of the Agreement, 8,530 acre-feet of water valued in excess of \$2
14 million dollars was transferred to San Antonio Water Company from Vulcan Materials upon Court
15 approval of the Agreement. (Manning Decl., ¶ 23.)

16 Furthermore, the Agreement includes contractual provisions governing what occurs if the
17 Notice was not provided. Indeed, rather than claiming that the failure to provide the Notice results
18 in a failure of contract formation, the Non-Agricultural Pool desires the financial benefit of the re-
19 pricing of the stored water pursuant to Section H of the Agreement. Section H of the Agreement
20 expressly states that the failure to provide notice results in an “Early Termination” of the transfer
21 and a substitution of the members of the Appropriative Pool for Watermaster as the acquiring party
22 at a higher price. If the Agreement were an option contract, then there could be no “Early
23 Termination” as failure to issue the Notice would result in a failure of contract formation in the first
24 place. Furthermore, the Non-Agricultural Pool is not unilaterally bound by the Agreement as the
25 Appropriative Pool consented to the alienability of the surplus Non-Agricultural Pool water through
26 Section H, and this element of consideration became binding on the Appropriative Pool upon Court
27
28

1 approval of the Agreement.⁴¹

2 As a bilateral Agreement, Watermaster's compliance with the notice requirement under
3 Section C should be analyzed pursuant to the doctrine of substantial performance, rather than
4 through the stricter standard of an option contract. Whether performance is substantial is a question
5 of fact. An important consideration is whether an omission was made by one who was honestly
6 endeavoring to comply with the contract. (*Perry v. Quackenbush* (1894) 105 Cal. 299, 309-10.) In
7 the instant case, it cannot be contested that Watermaster intended to provide the Notice and acquire
8 the stored water.⁴² Assuming arguendo that prior to January 2010 Watermaster had not yet
9 provided clear unequivocal notice of its intent, the Pool has not demonstrated reliance, prejudice or
10 any other equitable consideration that would override Watermaster's substantial performance.
11 (*Bekins Moving & Storage Co. v. Prudential Ins. Co.* (1985) 176 Cal.App.3d 245, 251.)

12 The Declaration of David Penrice includes his admission that following the January 7, 2010
13 Joint Appropriative Pool and Non-Agricultural Pool meeting, he was personally handed a copy of
14 the Notice and told that it was the Notice of Intent to Purchase. (Penrice Declaration, ¶ 6.)⁴³ While
15 Mr. Bowcock's Declaration omits this fact, after the January 7, 2010 meeting he too was personally
16 handed a copy of the Notice while acting in his capacity as Pool Chairman. (Manning Decl., ¶
17 17.)⁴⁴

18
19 ⁴¹ The Non-Agricultural Pool attempts to characterize Section H of the Purchase and Sale
20 Agreement as a "secondary option." (Motion, at 9:10.) This characterization is similarly inaccurate.
21 Under Section H, transfer of the stored water would occur pursuant to the amended Judgment
22 Exhibit "G." Such transfer occurs pursuant to the discretion of each side in the transfer. (See
23 Watermaster Resolution 07-05, Attachment "I" describing the amendments to Judgment Exhibit
24 "G," paragraph 9(a) and 9(b).)

22 ⁴² This point highlights a significant omission from the Paragraph 31 Motion: the Non-
23 Agricultural Pool acknowledges Watermaster was instructed by the Appropriative Pool to issue the
24 Notice, and that it did so intend to issue the Notice, and while the Non-Agricultural Pool argues at
25 length that the Notice was not so issued, it never proposes any explanation of *why* the Notice was
26 not issued. The answer of course is that Watermaster, and everyone else, thought the Notice *had*
27 been issued.

25 ⁴³ The August Notice was specifically identified as the operative Notice to all members of
26 the Pool at the special Non-Agricultural Pool meeting held January 18, 2010. (*See verbatim*
27 minutes of January 18, 2010 Special Non-Agricultural Pool meeting a copy of which is attached to
28 the Declaration of Robert W. Bowcock as Exhibit "R.")

27 ⁴⁴ The Non-Agricultural Pool finds it very significant that Mr. Manning and Mr. Fife
28 conferred at length when asked the date that Notice was provided at the January 7, 2010 meeting.
The Motion in fact concludes that this private conversation is itself evidence that, ". . . it had not

1 Assuming that all of the facts as stated by the Non-Agricultural Pool are true, the sole
2 deviation in performance is the receipt of the actual piece of paper on January 7, 2010, rather than
3 December 21, 2009 – a 17-day period that included both the Christmas and New Year holidays.⁴⁵
4 This Notice is identical to the Notice as provided in August. Payment was tendered on time on the
5 date expected by the individual members of the Pool and in the full amount expected. The Motion
6 makes no attempt to articulate the harm that was caused to the Pool members by this alleged
7 deviation in performance for the simple reason that there is no harm that can be articulated. Any
8 alleged deviation in performance was trivial.

9 Any alleged deviation in performance is immaterial as a matter of law because time was not
10 made of the essence in the Agreement. (*Katemis v. Westerlind* (1953) 120 Cal.App.2d 537, 543-
11 544 (time is not of the essence in a contract unless it has been made so by the express terms of the
12 contract).) Where time is not of the essence, a court may grant a reasonable period of time for a
13 defaulting party to make a payment or tender performance. (*Conforti v. Dunmeyer* (1962) 209
14 Cal.App.2d 41, 43.) “Delay in performance is a material failure only if time is of the essence, i.e., if
15 prompt performance is, by the express language of the contract or by its very nature, a vital matter.”
16 (*Johnson v. Alexander* (1976) 63 Cal.App.3d 806, 813.) Moreover, Civil Code section 1492
17 enables a party to cure a default and avoid a forfeiture if the party makes an offer of performance
18 accompanied by an offer of full compensation for the delay. (See *Henck v. Lake Hemet Water Co.*
19 (1937) 9 Cal.2d 136, 143-44.)

20 The only deviation in performance alleged here is a slight delay in the receipt of a
21 physical piece of paper, the exact content of which was already known in a context in which
22 time was not of the essence. Under any description, this deviation is immaterial, no

23
24

been delivered at all.” (Motion, at 8:8-10.) In fact, this conversation was quite the opposite. As Mr.
25 Manning explains, this conversation consisted of a discussion of the official “issue date” of the
26 Notice, and concluded with staff and legal counsel determining that they needed to look at the
27 actual Notice before answering. (Manning Decl., ¶ 16.) As acknowledged by Mr. Penrice,
28 *immediately* after the meeting, an actual copy of the Notice was produced and a definitive answer
was provided. (Penrice Declaration, ¶ 6.) The Non-Agricultural Pool attempt to twist the meaning
of this event is unsupported by any facts.

⁴⁵ The Watermaster offices closed on December 18, 2009 for the holidays and did not
reopen again until January 4, 2010.

1 additional compensation is warranted, and the Paragraph 31 Motion should be summarily
2 denied.⁴⁶

3 **V. EVEN IF IT WAS AN OPTION CONTRACT, THE PURCHASE AND SALE**
4 **AGREEMENT CONDITION SUBSEQUENT WAS SATISFIED**

5 Even assuming that the Agreement was an option contract, the requirements of Section C
6 were met. A final copy of the Notice was provided on August 21, 2009 as part of the August 27,
7 2009 Advisory Committee and Board agenda packages. The August 27, 2009 Notice was approved.
8 The minutes of the Board action were approved on September 24, 2009 and posted on the
9 Watermaster website. Thus, pursuant to Section C of the Agreement, the Notice was: (1) provided
10 by Watermaster within 24 months of final Court approval of the Agreement, (2) in a writing that
11 specified whether the payment tendered would be in connection with Desalter Replenishment or a
12 Storage and Recovery Program with prior approval of the Appropiative Pool.

13 **A. Notice was Provided Within 24 Months of Final Court Approval of the**
14 **Agreement**

15 Watermaster provided reasonable notice that comports with the Court approved Watermaster
16 Rules and Regulations and the custom and practice of Watermaster. While the economic
17 motivation for the Pool to advocate for a burdensome standard of delivery by regular mail to every
18 member of the Pool is obvious, the words of the Agreement only require Watermaster to “. . .
19 provide written Notice of Intent to Purchase the Non-Agricultural (Overlying) Pool water” –
20 nothing more.

21 In absence of a specific description of how notice is to be provided, the question is what is
22 reasonable under the circumstances. (*In re Crossman's Estate* (1964) 231 Cal.App.2d 370, 375.)

23 Civil Code section 1582 governs transmittal of acceptances of offers:

24 If a proposal prescribes any conditions concerning the communication
25 of its acceptance, the proposer is not bound unless they are conformed
26 to; but in other cases any reasonable and usual mode may be adopted.

27 Thus, even in the context of option contracts, where no specific method of “providing
28 written notice” is specified, any reasonable and usual method may be adopted. Where an option

⁴⁶ Substantial compliance is actually a complete defense to all of the alleged deficiencies with the Notice, not just timeliness.

1 merely suggests and does not require a particular manner of communicating exercise of the option,
2 another means is not precluded. (*In re Crossman's Estate, supra*, 231 Cal.App.2d at 375.)

3 The Agreement does not specify the manner in which Notice is to be provided. The Non-
4 Agricultural Pool asserts without discussion that the notice provision of Paragraph 59 of the
5 Judgment should apply here. That provision requires notice to be served either personally or by
6 first class mail. However, that provision only applies to notices required to be served “. . . under or
7 pursuant to the Judgment”⁴⁷ The Purchase and Sale Agreement, and the Peace II Agreement
8 generally, are silent as to the manner in which notice should be provided.

9 As is the usual and customary practice of Watermaster, the Notice of Intent to Purchase was
10 provided by inclusion in the Watermaster agenda packages and by actions at the regular
11 Watermaster meetings. This is the manner in which Watermaster provides notice of all water
12 transactions and other business of Watermaster. (Manning Decl., ¶¶ 20 & 21; Molino Decl., ¶ 4.) In
13 2009, Judge Wade held a series of hearings in order to review Watermaster practice and procedures.
14 During this series of hearings, Watermaster provided testimony on Watermaster administration,
15 including the manner in which Watermaster provides notice to the parties. (Reporter's Transcript of
16 Proceedings, February 2, 2009, at 69:4 – 70:17.)⁴⁸ No party, in particular no Non-Agricultural Pool
17 party, objected to these procedures.

18 The Notice was provided in the agenda package to the Pool both through personal delivery
19 and through first class mail. Notice was also provided to individual members of the Pool through
20 email delivery and constructively by posting on the Watermaster website.

21 **1. Actual Personal Notice Was Provided To The Pool Through Its**
22 **Representative**

23 Watermaster operates in public. Its meetings are publicly noticed. Agenda packets are
24 distributed at least 72 hours in advance of its meetings. (Molino Decl., ¶ 5.) The representative of
25 the Non-Agricultural Pool was in attendance at the Joint Appropriative Pool and Non-Agricultural
26 Pool meeting of August 13, 2009 at which the Notice of Intent was approved. (See Joint

27 ⁴⁷ As explained below, under Court approved Rules and Regulations and Order of the
28 Court, all notices are now provided electronically.

⁴⁸ A true and correct copy of this portion of the transcript is attached hereto as Exhibit “18.”

1 Appropriate and Non-Agricultural Pool Meeting Minutes, August 13, 2009 (noting attendance of
2 Mr. Kevin Sage.) He was again in attendance at the Advisory Committee and Board meetings of
3 August 27, 2009.⁴⁹ The Non-Agricultural Pool was thus provided actual personal notice at the
4 moment the Notice was approved.⁵⁰

5 **2. Written Notice Was Personally Delivered To The Pool Representative**
6 **Via Regular Mail**

7 All Board members receive their agenda packages, including the package for the August 27,
8 2009 Board meeting, in hard copy format via regular mail. (Molino Decl., ¶ 6.) Mr. Bowcock, as
9 the Pool representative on the Board, did in fact receive his Board agenda package in this manner.
10 (Molino Decl., ¶¶ 10, 13.)

11 **3. Personal Notice Was Provided To The Pool And To The Members Of**
12 **The Pool Through Email Delivery**

13 The Pool and the members of the Pool were provided the Notice through email delivery of
14 the August agenda packages, and were similarly notified of all subsequent Watermaster actions that
15 confirmed the intent of Watermaster to acquire the stored water through the Agreement. Email
16 notice is an authorized form of notice under section 2.7 of the Watermaster Rules and Regulations,
17 and is consistent with the notice practices and procedures under the Judgment since 1978.⁵¹

18 From the entry of the Judgment in 1978, this Court has continuously promoted improved
19 efficiency in the service of notice. Less than a year after entry of the Judgment, on December 13,
20 1978, the Court entered an Order directing that notices should be provided on 4"x 6" computer
21 cards. (December 13, 1978 Order re Ex Parte Application re Notice Procedure.)⁵²

22 ⁴⁹ If necessary, Watermaster will seek information through the discovery process
23 concerning the procedures that the Pool representative uses to communicate matters concerning the
24 Pool to the other members of the Pool, and whether he communicated the result of the
25 Appropriate Pool action and the actual receipt of the written Notice to the other members of the
26 Pool.

27 ⁵⁰ The extent to which Mr. Bowcock may have verbally acknowledged receipt of Notice to
28 other Watermaster parties over the past several months is a relevant subject for further discovery
and would be admissible as an exception to the hearsay rule. *See e.g.*, Exhibit "R" to Declaration of
Robert W. Bowcock, pp.3-4.

⁵¹ A true and correct copy of the 2001 Rules and Regulations is attached hereto as Exhibit
"19." These Rules and Regulations have been revised since 2001, but an official revised version has
never been produced. Where the revisions are relevant, they will be noted.

⁵² A true and correct copy of this Order is attached hereto as Exhibit "20." The Court

1 With the advent of the internet, the Court pushed Watermaster toward electronic service. As
2 early as 1998, the Court noted that the internet would be an efficient alternative to paper which is
3 expensive and, “. . . a lot of people are probably throwing this stuff away” (Reporter’s
4 Transcript of Proceedings, September 9, 1998, at 5:3-7, *see also* 4:24-5:2 and 33:18-35:7.)⁵³

5 Ultimately, electronic delivery became the preferred and Court-approved method of
6 providing notice in 2001.⁵⁴ At a subsequent hearing in 2002, Watermaster reported that it was
7 gradually working on transitioning parties to email service. The Court noted this process and
8 indicated that it was, “very pleased that you were making headway in that area.” (Reporter’s
9 Transcript of Proceedings, October 17, 2002, at 13:15-16.)⁵⁵ Subsequently, Watermaster continued
10 to gradually transition parties from paper service to e-mail service as originally described by Judge
11 Gunn in 1998.

12 Watermaster now routinely provides an email notice to the service list with a link to the
13 Watermaster website. Interested parties can navigate to the website where they can view or print a
14 copy of the documents that have been noticed. Today all parties who wish to receive notices
15 receive email notice of all Watermaster matters except for those who have specifically requested
16 paper notice, with the exception of Board members who receive a paper copy of the Board agenda
17 package every month by regular mail, as well as email notification. (Molino Decl., ¶ 6.) This
18 system has been in place for nearly a decade, and no party, in particular no Non-Agricultural Pool
19 party, has ever raised a concern with it before the filing of the Motion.

20 **4. Constructive Notice Of All Watermaster Actions Is Provided In The**
21 **Adopted Minutes Maintained On The Watermaster Website.**

22 stated: “It is believed that these proceedings are of a unique nature and that due to the extraordinary
23 magnitude of the case and the number of active parties effective notice can be given in a more
economically feasible and expeditious manner.” (December 13, 1978 Order, at 1:24-27.)

24 ⁵³ A true and correct copy of this transcript is attached hereto as Exhibit “21.”

25 ⁵⁴ At the March 8, 2001 Special Referee Workshop concerning the Rules and Regulations,
26 the sole explication given for section 2.7 was that: “we can give notice by fax, email, and then
27 copies of all notices are also to be posted to the Watermaster website.” (Reporter’s Transcript of
Proceedings, March 8, 2001, at 11:25 – 12:2.) A true and correct copy of this portion of the
transcript is attached hereto as Exhibit “22.” By Order dated July 19, 2001, the Court approved
these Rules and Regulations. A true and correct copy of this Order is attached hereto as Exhibit
“23.”

28 ⁵⁵ A true and correct copy of this transcript is attached hereto as Exhibit “24.”

1 The Board minutes have always provided notice of Watermaster actions under the Judgment.
2 (Judgment, ¶ 31.) For the purpose of review of Watermaster actions, Judgment Paragraph 31(a)
3 provides that the mailing of approved minutes shall “constitute” notice of such actions. Similarly,
4 section 2.11 of the Rules and Regulations provides that “the minutes shall constitute notice of all
5 actions therein reported.” The Rules and Regulations also require Watermaster to maintain the
6 minutes on the Watermaster website, thus providing constructive notice of the actions taken by the
7 Watermaster Board. (Watermaster Rules and Regulations Section 2.11.)

8 Watermaster has complied with Section 2.11 and the minutes for the August 27, 2009 Board
9 meeting have been continuously maintained on its website since they were approved on September
10 24, 2009. (Molino Decl., ¶ 12.) Accordingly, constructive notice was provided to all members of
11 the Non-Agricultural Pool when the minutes were approved and posted.

12 While Section C does not require that the Notice be provided to any specific party or parties,
13 the Notice was in fact provided to the Non-Agricultural Pool. When the final form of the Notice
14 was approved by the Appropriative Pool at the Joint Appropriative Pool and Non-Agricultural Pool
15 meeting on August 13, 2009, the Non-Agricultural Pool was present and acknowledged the
16 approval by the Appropriative Pool of the final form of the written Notice. Subsequent to this, the
17 Notice was provided in the usual and customary fashion to all members of the service list, including
18 the Pool representative Mr. Bowcock, who actually received such Notice. In addition, because Mr.
19 Bowcock is a Board member, the Pool representative was provided with a copy of the Notice via
20 regular mail. As required under Rules and Regulations section 2.11, the minutes were then
21 maintained on the Watermaster website, and such minutes “constitute notice.”

22 Watermaster reasonably provided the Notice in its usual and customary fashion, thereby
23 satisfying this requirement of Section C.

24 **B. The Notice Was Provided In A Writing That Specified Whether The Payment**
25 **Tendered Would Be In Connection With Desalter Replenishment Or A Storage**
26 **And Recovery Program With Prior Approval Of The Appropriative Pool**

27 There can be no argument that the writing entitled “Notice of Intent to Purchase” is, in fact,
28 written and approved. However, the Non-Agricultural Pool argues that the approval was really an

1 incomplete action, and not “the” notice required under the Agreement.

2 The Motion focuses almost exclusively on the August 27, 2009 Board action and claims that
3 the Board rejected the Notice. This claim is incorrect. The Notice was approved. The August 27,
4 2009 Board meeting minutes correctly reflect that the action taken was:

5 Moved to approve the Intent to Purchase to 36,000 acre-feet for use in
6 a Storage and Recovery Agreement, and refer the 2,652 acre-feet back
7 to the Appropriative Pool for further consideration and a separate
8 motion, as presented.

9 This action was approved unanimously by the Board, and mirrors the action that had been
10 approved unanimously by the Advisory Committee. The approval did not instruct staff to modify
11 the Notice. The Notice was approved, with the Non-Agricultural Pool representative voting in
12 favor of approval.

13 The sole condition on the action was the referral to the Appropriative Pool of the specific
14 question of the inter-se allocation of the acquired water between two permissible purposes: Storage
15 and Recovery and Desalter Replenishment. Following the Board action of August 27, 2009, the
16 Appropriative Pool was responsive to the Board’s request and reconsidered the use designation for
17 the 2,652 acre-feet.

18 An identical staff report on this subject was included in the agenda packages for the October
19 and November Joint Appropriative and Non-Agricultural Pool meetings, and this staff report
20 recommended no change to the Notice.⁵⁶ At the October meeting, the minutes reflect that the issue
21 was tabled, and there is no record of any further discussion.⁵⁷ In other words, the Appropriative
22 Pool never decided to make any change to the Notice that it had approved on August 13, 2009. No
23 further action of the Board was necessary, because the Appropriative Pool made no change.

24 Having received the Appropriative Pool’s Notice of the intent to purchase all of the stored
25 water, and payment having been timely tendered for the entire 38,652 acre-feet at the specified
26 price, the Non-Agricultural Pool can not now claim that any ambiguity existed because of the

26 ⁵⁶ See Declaration of Robert W. Bowcock, Exhibit L. It is notable that this staff report also
27 does not recommend that any further action be submitted to the Board.

28 ⁵⁷ See Declaration of Robert W. Bowcock, Exhibit M. The Non-Agricultural Pool
concluded in the action to table the discussion.

1 subsequent discussions of the allocation of the 2,652 acre-feet between the two permissible
2 purposes, and that this ambiguity somehow nullified the Notice.

3 Furthermore, although conspicuously left out of any discussion in the Motion, the largest
4 holder of Non-Agricultural Pool rights, the City of Ontario, is also the largest appropriator in the
5 Basin. It is incomprehensible that the same entity that Chaired the Appropriative Pool, voted in
6 favor of issuing the Notice by the Appropriative Pool, voted to table discussion of further
7 modification to the Notice, and voted to adopt a financing plan to levy assessments to acquire the
8 entire quantity of the stored water - was somehow confused or uncertain as to the intention,
9 meaning and effect of the Notice.

10 The Motion cites to a single case from 1928 to support its theory that the written Notice of
11 Intent to Purchase was not sufficient. (*Braun v. MacLaughlin Company* (1928) 93 Cal.App. 116.)
12 The question before the Court in the *Braun* case was whether the words “has decided to exercise the
13 option” were sufficiently clear to constitute a clear and unequivocal exercise of the option.
14 (Motion, at 13:3.) The Motion implies that they were not. However, the Court held that while the
15 language used was somewhat ambiguous, notice had been effectively provided and the option was
16 therefore exercised. The Court’s conclusion in that case is instructive here. The Court said:

17 Appellant sought to have the option declared void solely on technical
18 grounds, none of which has any substantial merit. The equities of the
19 case are all on the side of respondent. Respondent paid a large
20 consideration for the option, acted seasonably in exercising it, and
21 should not be deprived of enjoying the fruits thereof, merely because
22 some of the language used in the negotiations was awkward or
23 ambiguous, when the intent and purpose thereof were clearly
24 understood by all parties to the transaction.

25 (*Braun, supra*, 93 Cal.App. at 124.)

26 While Watermaster contends the record is clear, viewed in its best light the Non-Agricultural
27 Pool seeks to profit by a technicality. The Non-Agricultural Pool claims that it was not “provided”
28 with a writing that it actually received, and that the meaning was not “unequivocal” even though it
knew exactly what the Notice meant. Where the business of managing an important public resource
is involved, such efforts should not be rewarded.

1
2 **VI. EQUITABLE PRINCIPLES BAR THIS PARAGRAPH 31 MOTION**

3 The equitable principles of waiver and estoppel bar this Motion.

4 **A. The Non-Agricultural Pool's Conduct Waived Any Noncompliance by**
5 **Watermaster**

6 An offeror may waive variances in the acceptance of the offer by conduct or by omitting
7 important information that comes to light. (*Riverside Fence Co. v. Novak* (1969) 273 Cal.App.2d
8 656, 662.) Even under the stricter standard for option agreements, where a fair construction of
9 correspondence and course of dealing between two parties shows that an optionee intended to
10 accept the other party's offer, it is incumbent on the optionor to communicate to the optionee any
11 objections that he or she may have to the form of acceptance. Unless this is done, the optionor may
12 be taken to have waived any objections. (*Lodge v. General Acc. Fire & Life Assur. Corp.* (1930)
13 105 Cal.App.160, 165.)

14 Furthermore, if an optionor does not specify the alleged defects in delivery by the optionee at
15 the time of the acceptance of the offer, a waiver results. (*Rollins v. Stokes* (1981) 123 Cal.App.3d
16 701, 712-13.) The reason for this rule is that an optionee should be able to remedy any defects in
17 the tender and prevent the optionor from remaining silent at the time of the tender and later surprise
18 the optionee with hidden objections based on facts unknown to optionee. (*Rollins, supra*, 123
19 Cal.App.3d at 712-13.)

20 In *Riverside Fence Co. v. Novak* (1969) 273 Cal. App. 2d 656, an optionee sued optionors
21 for specific performance of an option to sell realty. The language of the option did not specify the
22 manner of delivery required. The Fourth Appellate District held that where an optionee was
23 attempting in good faith to tender performance and optionors engaged in evasive conduct that could
24 be viewed as calculated to prevent timely exercise of option, the optionors were precluded from
25 asserting that there had not been a timely or proper exercise of the option and the optionee was
26 entitled to specific performance. (*Riverside Fence Co., supra*, 273 Cal.App.2d at 661-662.)

27 The facts here are analogous to those in *Riverside Fence*. Here, the Non-Agricultural Pool
28 representatives acted as if the Notice had been provided. The predicate to the initiation of the

1 auction strategy was Watermaster taking title to the stored water by issuance of the Notice. After
2 issuance, Watermaster implemented the auction strategy which was a large and expensive
3 undertaking. The Non-Agricultural Pool understood this, allowed the process to proceed, and in fact
4 was an active participant in the auction process.

5 For example, the Non-Agricultural Pool entered into a Stipulation with the Appropriative
6 Pool concerning the division of benefits from the auction. In addition, a major Non-Agricultural
7 Pool member, Aqua Capital Management, actually submitted a proposal to Watermaster to act as
8 the price-floor bidder – that is, to assume a central role in the auction process.⁵⁸ (Manning Decl., ¶
9 9.) At no time during any of these activities did the Non-Agricultural Pool mention that there might
10 have been an issue associated with the satisfaction of the condition subsequent.

11 The Pool’s silence persisted even after the auction had been postponed and while
12 Watermaster developed, adopted and levied a special assessment on the Appropriative Pool so that
13 it could make the first payment under the Agreement. There is no indication in the record, and no
14 indication given in the Motion or the attached Declarations, that the Non-Agricultural Pool ever
15 raised any concerns about ambiguity or delivery of the Notice during this process.

16 This silence continued through the December 17, 2009 Advisory Committee and Board
17 meetings. These meetings were the last meetings to occur prior to the expiration of the Notice
18 deadline and occurred 24 hours before the intended effective date of the Notice. The Non-
19 Agricultural Pool was present at both of these meetings through their representative Mr. Bowcock.
20 If the Non-Agricultural Pool actually believed that there was a defect in issuance of the Notice, or if
21 it actually believed that further Board action was required before the Notice would be effective, this
22 would have been the last possible opportunity to notify Watermaster of the defect so that it could be
23 corrected. The Notice of Intent was not agendized as a topic at either meeting, so the Non-
24 Agricultural Pool knew prior to the meetings that no discussion was planned and that neither the
25 Advisory Committee nor the Board would be considering any action regarding the Notice of Intent.

26 _____
27 ⁵⁸ The Non-Agricultural Pool critique of the auction as targeting “speculative investors”
28 (Motion, at 4:1-7) is ironic in light of this proposal. In addition, it was the understanding of staff
that, at least at the time of this proposal, the Pool representative Mr. Bowcock, was a principal with
Aqua Capital Management. (Manning Decl., ¶ 10.)

1 At neither of these meetings did the Non-Agricultural Pool say anything about the Notice or
2 satisfaction of the condition subsequent.

3 The Non-Agricultural Pool's silence is in the instant case tantamount to consent. *Qui tacet,*
4 *consentire videtur.* Where the relationship between the parties is such that there is a justified
5 expectation of a response, then silence will be regarded as consent. Under such circumstances, "one
6 who keeps silent, knowing that his silence will be misinterpreted, should not be allowed to deny the
7 natural interpretation of his conduct." (*Wood v. Gunther* (1949) 89 Cal.App.2d 718, 731) (citing
8 Williston on Contracts, §§ 91, 91a.) As a member of the Board, the Non-Agricultural Pool has a
9 duty to ensure that Watermaster fulfills its obligations. If the Non-Agricultural Pool truly believed
10 that Notice had not been properly provided, then qua its role as Board member, it had a duty to
11 voice that position. It had ample opportunity to do so, and did not.

12 If not consent, then surely the Non-Agricultural Pool has waived its right to now object. If
13 the Non-Agricultural Pool did not believe that the Notice was sufficient, then it should have
14 provided Watermaster with the opportunity to remedy any defects in the tender; the Non-
15 Agricultural Pool cannot remain silent and later surprise Watermaster with hidden objections based
16 on facts unknown to Watermaster. (See *Rollins, supra*, 123 Cal.App.3d at 712-13.)

17 **B. The Non-Agricultural Pool's Conduct Constitutes A Breach Of The Covenant**
18 **Of Good Faith And Fair Dealing, And The Pool Is Thus Estopped From**
19 **Claiming Noncompliance**

20 In addition to waiver, the Non-Agricultural Pool should be estopped from asserting that
21 Watermaster failed to provide Notice, due to its breach of the implied covenant of good faith and
22 fair dealing. In the option context, the option holder has a conditional contract right as well as a
23 power of acceptance; the option giver does not have a privilege of revocation, and thus wrongful
24 prevention of fulfillment of a notice condition will make exact fulfillment unnecessary. (*Wilson v.*
25 *Bailey* (1937) 8 Cal.2d 416, 422-24.) An optionor who has given an irrevocable option to purchase
26 property may not do any act or omit to perform any duty calculated to cause the optionee to delay
27 exercising the option within the specified period. (See *Murfee v. Porter* (1950) 96 Cal.App.2d 9,
28 18.) The optionor's good faith is a relevant consideration; his evasion or prevention of exercise of

1 the option may excuse tender of performance and other conditions precedent to acceptance. (*Citron*
2 *v. Franklin* (1943) 23 Cal.2d 47, 57; *Ray Thomas, Inc. v. Cowan* (1929) 99 Cal.App. 140, 145; 1.)

3 If, in the factual situations described above, the Non-Agricultural Pool in fact believed that
4 the condition subsequent had not been satisfied, then its silence in the face of the process as it
5 occurred, and particularly at the December 17, 2009 Board meeting, is not simply a waiver of an
6 objection, but actually rises to the level of a breach of the covenant of good faith and fair dealing. It
7 is bad public policy to allow an offeror to not reveal important information to the offeree when the
8 offeror knows it may frustrate the offeree's attempt to exercise the option. (See *Riverside Fence*
9 *Co., supra*, 273 Cal.App.2d at 662-64.) In such a scenario, the party breaching the covenant of good
10 faith and fair dealing is estopped from asserting the other party's noncompliance. (*Riverside Fence*
11 *Co., supra*, 273 Cal.App.2d at 662-64.)

12 The true facts here show that while Watermaster has acted with good faith, it is the Non-
13 Agricultural Pool's actions that constitute a breach of the covenant of good faith and fair dealing,
14 such that the Non-Agricultural Pool should be estopped from claiming that Watermaster did not
15 technically comply with the terms of the Agreement.

16 **VII. THE PARAGRAPH 31 MOTION IS UNTIMELY**

17 Paragraph 31 allows that "any party, the Watermaster (as to a mandated action), the
18 Advisory Committee, or any Pool Committee may, by a regularly noticed motion, apply to the
19 Court for review of any Watermaster's [sic] action, decision or rule." (Judgment, ¶ 31(b).) Notice
20 of motion to review any Watermaster action, decision or rule shall be served and filed within ninety
21 (90) days after such Watermaster action, decision or rule" (Judgment, ¶ 31(c).) Any action,
22 decision or rule of Watermaster shall be deemed to have occurred or been enacted on the date on
23 which written notice thereof was mailed. Mailing of copies of approved Watermaster minutes to
24 the active parties shall constitute such notice to all parties. (Judgment, ¶ 31(a).)

25 As the Non-Agricultural Pool has sought relief under Paragraph 31, there must be an action,
26 decision or rule that it is challenging. The only action identified in the Motion is its allegation that
27 the August 27, 2009 Notice of Intent was ambiguous, insufficient or not delivered. Regardless, it
28

1 seeks to challenge the Watermaster action on August 27, 2009.

2 Watermaster took action on the Notice of Intent to Purchase on August 27, 2009. This action
3 was reported in the minutes that were approved by the Board at its meeting on September 24, 2009.
4 This action of approval of the minutes was reported to the parties in the following agenda package
5 which was served on October 16, 2009. Ninety days from this date would have been on or about
6 January 16, 2009.

7 This Motion is untimely. The Non-Agricultural Pool offers no excuse or explanation for the
8 untimely motion and it should be dismissed.

9 **VIII. THE PARAGRAPH 31 MOTION RAISES ISSUES THAT ARE EXTRANEEOUS TO**
10 **THE QUESTION OF WHETHER NOTICE WAS PROVIDED**

11 **A. Governance**

12 The Motion raises issues of governance that are inappropriate here. Governance has no
13 bearing on whether Notice of Intent was properly provided. The Non-Agricultural Pool raises the
14 issue in an attempt to suggest that Watermaster's defense of its issuance of the Notice is a cloak for
15 the Appropriative Pool attempt to "seize" the water in question (Motion, at 15:15). The allegation
16 is disingenuous at best in that the Non-Agricultural Pool has already received valuable
17 consideration in the form of transferability of its surplus water, and will receive many millions of
18 dollars for the stored water. The effort should be seen for what it is: an attempt to receive additional
19 compensation while undertaking no new additional duty or obligation.

20 Nevertheless, the allegation of appropriator dominance of Watermaster impliedly impugns
21 the integrity of the nine-member Watermaster Board which was created by and serves at the
22 discretion of this Court. The subject of governance and the Court's confidence in Watermaster is
23 not a trivial matter.

24 This Court approved the nine-member Board, complete with checks and balances within its
25 composition. The Board is currently composed of three non-producing municipal water districts,
26 three Appropriative Pool members, two Agricultural Pool members, and one Non-Agricultural Pool
27 member. Thus, the Appropriative Pool comprises only 33% of the voting power on the Board, and
28 the Non-Agricultural Pool comprises 11% of the voting power.

1 Maintaining fair and transparent Watermaster governance is of paramount importance to the
2 parties to the Judgment. When Judge Wade assumed jurisdiction over the case in 2008, the first
3 informational hearing he held allowed an opportunity for the parties to present evidence pertinent to
4 the issue of Watermaster governance. (Reporter’s Transcript of Proceedings, February 2, 2009, at
5 21:1 – 39:4.)⁵⁹ The Non-Agricultural Pool presented no argument or evidence on the subject.
6 Following the hearing, the Court offered no new recommendations or actions concerning
7 Watermaster governance.

8 If the Non-Agricultural Pool seeks a modification of the composition of the nine-member
9 Board, there is a process whereby they may provide input in connection with the proposed
10 reappointment of the Board in 2011. Watermaster stands ready to provide any detail the Court may
11 desire regarding its administration of the Judgment, at the Court’s discretion.

12 **B. Storage Issues**

13 The Paragraph 31 Motion argues that Plan B is inconsistent with the Purchase and Sale
14 Agreement because it proposes that an alternate disposition of the water might be for a use other
15 than for Desalter Replenishment or a Storage and Recovery Program. (Motion, at 14:17-28.) The
16 Motion also argues that Watermaster is not permitted to hold water in storage per Plan B without
17 prior Court approval. (Motion, at 15:1-8.) While this latter argument is based on a
18 misunderstanding of the difference between “water” and “water rights,” the point is again to argue
19 the invalidity of Plan B.

20 The Motion appears to argue that the Notice cannot be valid because, “[i]f the Appropriative
21 Pool had approved a written Notice consistent with Plan B . . . ,” then that notice would have been
22 defective because Plan B is invalid, and ipso facto a Notice issued months earlier is retroactively
23 rendered invalid. (Motion, at 14:23-25.) These mental loops offer nothing relevant to the question
24 of whether the condition subsequent of Section C of the Agreement was satisfied. The objections
25 raised by the Non-Agricultural Pool concern the disposition of the water subsequent to the transfer
26 to Watermaster. If the Non-Agricultural Pool objects to the method of disposition of the water now
27

28 ⁵⁹ A true and correct copy of this portion of the transcript is attached hereto as Exhibit “25.”

1 that it has been purchased, then it should so object through the Pool committees, the Advisory
2 Committee and the Board, rather than for the first time through a Paragraph 31 Motion.

3 In 1989 this Court admonished the parties for their failure to use the institution of
4 Watermaster to redress their issues before prevailing upon the Court for resolution. The Court
5 stated:

6 A suggestion – if not a warning – will be made, however, that in the
7 future, before any such motion be made, all reasonable efforts should
8 be made to resolve the issue within the administrative set-up provided
9 by the Judgment. Any motion filed should recite in detail what efforts
10 have been made to achieve the desired results short of filing a motion
11 in court, and such motion should be supported with copies of the
12 agenda for and Minutes of the meetings at which the matter brought
13 before the Court for review has first been calendared for discussion in
14 the appropriate pool committee, before the Advisory Committee and
15 before the Watermaster.

16 (Court’s July 31, 1989 Order, at 15:27 – 17:1.)⁶⁰

17 The appropriate place to raise the extraneous issues such as those raised in the Paragraph 31
18 Motion is first through the established process. There is no record that the Non-Agricultural Pool
19 has ever raised any of these issues with the Advisory Committee or the Board.

20 **IX. CONCLUSION**

21 The business of Watermaster includes the administration of a hugely important public
22 resource that is the lifeblood of the Inland Empire. Hundreds of millions of dollars have been
23 invested in the development of public infrastructure projects to achieve water supply reliability for
24 the benefit of the region.

25 The Non-Agricultural Pool seeks to profit from a purely invented technicality. A careful
26 review of the record demonstrates that the Non-Agricultural Pool’s allegations and request for relief
27 are unsupported in fact and in law. The allegations themselves are disruptive and have caused
28 Watermaster to divert attention from administration of the Judgment. For all the reasons stated
herein, Watermaster respectfully requests this Court to promptly deny the Motion. However, if the
Court concludes something further is still required with regard to the Notice, Watermaster should be

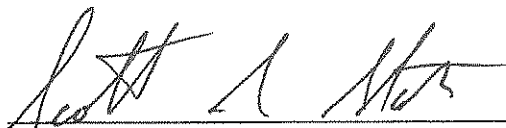
⁶⁰ A true and correct copy of this Order is attached hereto as Exhibit “26.”

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allowed to issue a notice that conforms to the Court's direction as there has been, nor can there be, any allegation of prejudice to the Non-Agricultural Pool that has been caused by the delay in issuance.

Dated: April 12, 2010

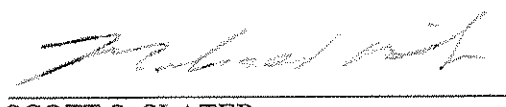
BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: 

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Dated: April 12, 2010

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: 

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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN BERNARDINO

10 CHINO BASIN MUNICIPAL WATER
11 DISTRICT

12 Plaintiff,

13 vs.

14 CITY OF CHINO, ET AL.

15 Defendant.
16
17

Case No. RCV 51010

DECLARATION OF KENNETH
MANNING, WATERMASTER CEO

Hearing Date: May 14, 2010
Time: 10:30 a.m.
Dept: C-1

18 I, KENNETH MANNING, declare:

19 1. I am the current Chief Executive Officer of Chino Basin Watermaster
20 (“Watermaster”) and have served in that capacity as Chief Executive Officer of Watermaster since
21 September 1, 2004. The information contained herein is made based on my own personal
22 knowledge except those statements which I make based on information and belief.
23

24 2. In my role as Chief Executive Officer of Watermaster I am in daily charge of all
25 Watermaster staff and am intimately familiar with the day to day operations of Watermaster. I am
26 also intimately familiar with Watermaster documents, records, rules of the various committees and
27 the Board, and the practices and procedures of the various committees and the Board. Since 2004 I
28 have attended nearly all meetings of the various committees and the Board.

1 3. I am informed and believe that in 2002, the Non-Agricultural Pool rules were
2 amended to allow for a quorum of one person. I am informed and believe that prior to taking my
3 current position the Non-Agricultural Pool has been represented at its meeting by a single
4 representative. Since taking my current position I have observed that the Non-Agricultural Pool has
5 been represented at the joint meetings of the Appropriative Pool and Non-Agricultural Pool by a
6 single representative.

7 4. I am informed and believe that in approximately 2002, the Non-Agricultural Pool
8 changed its meeting time to coincide with the meeting time of the Appropriative Pool. Since taking
9 the position of Chief Executive Officer of Watermaster I have observed the Non-Agricultural Pool
10 hold its meeting times to coincide with the meeting times of the Appropriative Pool.

11 5. Based on my familiarity with the issues brought up for votes during the time I have
12 served as Chief Executive Officer of Watermaster, I have personally observed that the Non-
13 Agricultural Pool has voted in a manner contrary to that of the Appropriative Pool only in rare and
14 isolated instances.

15 6. As part of my job as Chief Executive Officer of Watermaster I have to be familiar
16 with water transactions between the parties to the Judgment. I also have had to and have become
17 familiar with water transactions and rates charged by various suppliers in Southern California
18 including the Metropolitan Water District. Throughout the time I have served as Chief Executive
19 Officer of Watermaster, I have observed that the market price for water transactions between the
20 parties to the Judgment is typically 92% of the Metropolitan Water District untreated replenishment
21 rate. I am informed and believe that for many years, 92% of the Metropolitan Water District
22 untreated replenishment rate has been the market price of water in the Chino Basin.

23 7. Throughout 2008 and into 2009, I was aware of and attended meetings of the
24 Appropriative Pool wherein they met to discuss how to utilize the water purchased through the
25 *Purchase and Sale Agreement for the Purchase of Water by Watermaster From Overlying (Non-*
26 *Agricultural) Pool* (“Purchase and Sale Agreement”). During this time, Watermaster staff proposed
27 using the stored water under the Purchase and Sale Agreement in connection with a potential Storage
28 and Recovery Agreement.

1 8. Based on my personal attendance at the February 26, 2009, March 26, 2009, May 28,
2 2009, and June 25, 2009 Board meetings of Watermaster, I know the Board discussed and
3 considered various approaches for the use of the water purchased through the Purchase and Sale
4 Agreement. Based on my personal attendance, I know that on June 25, 2009, and as reflected in the
5 minutes of the Board's meeting, the Board agreed to use the vehicle of an auction as a transparent
6 method to obtain the highest possible return for the use of the stored water acquired under the
7 Purchase and Sale Agreement and the available storage space.

8 9. In and around July 2009, I became aware of the fact, and I saw documents at that time
9 substantiating the fact, that one member of the Non-Agricultural Pool, Aqua Capital Management,
10 submitted a bid to participate in the auction as the price-floor bidder. As a price-floor bidder, Aqua
11 Capital Management would have assumed a central role in the auction.

12 10. At the time of the submission of the proposal from Aqua Capital Management, I
13 know that the Non-Agricultural Pool representative to the Watermaster Board was Mr. Bob
14 Bowcock. At the said time I was informed and believe that he was also a principal with Aqua
15 Capital Management.

16 11. Following the Court approval of the auction plan, I caused Watermaster staff to begin
17 to develop the steps necessary to implement the auction. The official marketing of the auction was
18 calendared to begin in early September 2009 and was advertised as such in various media that I have
19 read.

20 12. Through September and October of 2009, Watermaster staff, consultants and I
21 worked to implement the proposed auction. However, as the auction date approached, it became
22 apparent to me from discussions and communications I was involved in, or which as Chief Executive
23 Officer of Watermaster were reported to me, that potential bidders were not confident of their ability
24 to recover the stored water either for sale to parties in the Basin or for export out of the Basin.

25 13. It was my belief that these uncertainties would have prevented the attainment of the
26 highest possible bid price for the water, which would not have been a favorable outcome to
27 Watermaster or its individual parties. Because of this, on October 30, 2009, I officially announced
28

1 to the Watermaster Board and others and directed staff that the auction would be postponed until
2 such uncertainties could be resolved.

3 14. I am informed and believe that on and before August 13, 2009 the Appropriative Pool
4 requested that Watermaster staff and counsel assist the Appropriative Pool in preparing an
5 alternative financing plan so that sufficient funds could be generated to tender the required payment
6 to purchase the water under the Purchase and Sale Agreement. This alternative financing plan was
7 commonly referred to as "Plan B."

8 15. Watermaster levied the special assessment under "Plan B" the week following the
9 meetings on November 19, 2009.

10 16. I was present at the January 7, 2010 Joint Appropriative Pool and Non-Agricultural
11 Pool meeting. Mr. Penrice, a member of the Non-Agricultural Pool, asked at what date Watermaster
12 provided the Notice of Intent to Purchase. This question was asked during the "public comments"
13 portion of the meeting which occurs at the end of the agenda. I conferred with Counsel Michael T.
14 Fife and, in our conversation, discussed the official "issue date" of the notice. I could not at that
15 time recall the dates of the August meetings, or the date of distribution of the agenda packages. Mr.
16 Fife reported to me that he could not recall either. Because of this lack of information, I was advised
17 by Mr. Fife and agreed that it was necessary to look at the actual Notice of Intent to Purchase before
18 answering Mr. Penrice, and I so informed Mr. Penrice.

19 17. Immediately upon the conclusion of the January 7, 2009 meeting, I asked Mr. Fife
20 and Mr. Bowcock, the Non-Agricultural Pool representative, to accompany me to my office, which
21 they did. In my office I retrieved a copy of the Notice of Intent to Purchase and a copy of the
22 August 27, 2009 Agenda package. I personally handed a copy of the Notice to Mr. Bowcock and
23 informed him that it is the official Notice. At that time he stated to me that he recalled receiving the
24 Notice.

25 18. In the course of my position as Chief Executive Officer of Watermaster, I was
26 involved with and know that on January 17, 2010, Watermaster tendered the first payment to the
27 members of the Non-Agricultural Pool under the Purchase and Sale Agreement.
28

1 19. As CEO, it is a part of my duties to be aware of the amount of water production by
2 the parties and the amount of water held in storage. Watermaster maintains the official records of the
3 amount of water held in storage by each party. From the Watermaster records I have reviewed
4 during my work as Chief Executive Officer of Watermaster, I had become aware that as of July,
5 2007, there was more than 52,000 acre-feet of unused Non-Agricultural Pool water in the Pool
6 members' storage accounts.

7 20. Since becoming the Chief Executive Officer of Watermaster I am aware that it is the
8 custom and practice of Watermaster to provide notice of its proceedings and actions by providing
9 notice in agenda packets prior to Watermaster meetings, including the meetings of the Board, the
10 Advisory Committee, and the Agricultural Pool, the Non-Agricultural Pool, and the Appropriative
11 Pool. At all times relevant to the issue before this Court, I have seen that this was done. I am not
12 aware of any instances in which notices were specifically delivered to specific parties in some other
13 manner.

14 21. I am aware that pursuant to the Purchase and Sale Agreement, the Watermaster Board
15 adopted a Notice of Intent to purchase the water available under the Agreement on August 27, 2009,
16 in the same, routine and customary manner that it has approved every action administering the
17 Judgment since I have become Chief Executive Officer of Watermaster, including meetings, court
18 filings, and all transfers of water among the parties to the Judgment.

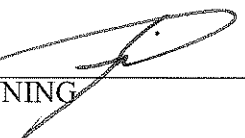
19 22. Because of my position as Chief Executive Officer of Watermaster I am aware that
20 the Appropriative Pool never rescinded said Notice of Intent. If they had, I would have been deeply
21 involved in the discussions relating thereto.

22 23. Based on my knowledge as Chief Executive Officer of Watermaster, I am informed
23 and believe that 8,530 acre-feet of water valued in excess of \$2 million dollars under Section I of the
24 Purchase and Sale Agreement—as calculated by applying the equated water rate of 92% of the
25 Metropolitan Water District untreated replenishment rate—was transferred to San Antonio Water
26 Company from Vulcan Materials upon execution of the Purchase and Sale Agreement.

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

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Executed on April 12, 2010, at Cucamonga, California.


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6

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN BERNARDINO

10 CHINO BASIN MUNICIPAL WATER
11 DISTRICT

12 Plaintiff,

13 vs.

14 CITY OF CHINO, ET AL.

15 Defendant.
16
17

Case No. RCV 51010

DECLARATION OF SHERRI LYNNE
MOLINO

Hearing Date: May 14, 2010
Time: 10:30 a.m.
Dept: C-1

18 I, SHERRI LYNNE MOLINO, declare:
19

20 If called upon as a witness I could testify on my own personal knowledge as follows.

- 21 1. I have worked for Chino Basin Watermaster ("Watermaster") since December 2003.
22 2. I am the current Executive Assistant to Ken Manning, the Chief Executive Officer of

23 Watermaster and have held that position since December 2003.

24 3. I also hold the position of Recording Secretary at all Committee and Board meetings
25 and have held that position since December 2003. From that time to the present all my duties
26 described herein have been the same. In the position of Recording Secretary I am responsible for
27 maintaining calendars for the Chief Executive Officer, the public, as well as the internal calendars of
28 Watermaster. I am also responsible for the preparation of minutes and the maintenance of

1 permanent records, as well as the organization of meetings internally and externally. This job
2 includes the sending of notices and other documents to those that are to receive such items.

3 4. Since my employment with Watermaster, I have observed that Watermaster's usual
4 and customary practice for providing notice of all matters other than Court filings is to include such
5 notices in the agenda packages for the relevant meetings. I have personally prepared such packages
6 numerous times, and have also overseen and been personally responsible for the work done
7 numerous times.

8 5. Since my employment with Watermaster, I have observed that its agenda packages
9 are distributed at least 72 hours in advance of Watermaster meetings. I have personally been
10 involved in the distribution of such packages numerous times, and have also overseen and been
11 personally responsible for the work done numerous times.

12 6. Starting in late October 2002 and up through the present, it has been the custom and
13 practice of Watermaster to provide all parties that are to receive notices about Watermaster matters
14 such notice via email, except for those parties who have specifically requested to continue receiving
15 paper notice, with the exception of Board members, who receive both a paper copy and an email
16 notification of the Board agenda package every month. I have personally been involved with this
17 process, and have also overseen and been personally responsible for the work done numerous times.

18 7. Starting in late October 2002 and up through the present, it has been the custom and
19 practice of Watermaster to provide all Court filings to the parties that are to receive such documents
20 in electronic format, using a link to the Watermaster file transfer protocol ("ftp") website. I have
21 personally been involved with this process, and have also overseen and been personally responsible
22 for the work done numerous times.

23 8. No other forms of official notice are provided in any other manner except through the
24 agenda packages as referenced above, as such would come from me in my position as Recording
25 Secretary or at my direction.

26 9. As part of my job as Recording Secretary I am tasked with assuring that the minutes
27 of Board meetings and the agenda packages for the meetings are posted on the Watermaster website
28 subsequent to approval of such minutes by the Board. This has always been done during my

1 employment as Recording Secretary. If I do not actually post the minutes I have always checked to
2 make sure they are posted.

3 10. I am personally aware, having been involved in performing and overseeing the task,
4 that all Board members were sent the agenda package for the August 27, 2009 Board meeting in hard
5 copy format via regular mail, as well as an email notification. I have never been informed by any
6 Board member they did not receive same nor has any other person provided me with such
7 information.

8 11. I am personally aware, having been involved in performing and overseeing the task,
9 that the minutes for the August 27, 2009 Board Meeting were electronically e-mailed to the service
10 list on September 18, 2009 in anticipation of approval at the September 24, 2009 Board meeting.

11 12. I am personally aware, having checked periodically, that the minutes of the August
12 27, 2009 Board meeting have been continuously maintained on Watermaster's website since they
13 were approved on September 24, 2009. As of the date of this declaration, I accessed the
14 Watermaster's website and can confirm that they are still posted there. I am not personally aware,
15 nor have I been advised by any person that the minutes have not been so posted and available.


16 13. Mr. Bob Bowcock, as the Non-Agricultural Pool representative on the Board, has
17 never informed me, nor did any other person inform me, that he did not receive his Board agenda
18 package for the August 27, 2009 Board meeting in the manner described above. Mr. Bowcock is
19 one of the persons that would be sent such packages as has been the custom and practice of
20 Watermaster as set forth herein.

21 14. I personally retrieved and supervised Watermaster staff retrieval of all exhibits
22 attached to Watermaster's Opposition to Paragraph 31 Motion. Each and all of these exhibits are
23 true and correct copies of authentic records contained in Watermaster records and files, located at
24 9641 San Bernardino Road, Rancho Cucamonga, CA 91730 which were kept in the normal and
25 usual course of business of Watermaster.

26 I declare under penalty of perjury under the laws of the State of California that the foregoing
27 is true and correct.
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Executed on April 12, 2010, at Cucamonga, California.



SHERRYLYNNE MOLINS

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21 East Carrillo Street
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CHINO BASIN WATERMASTER

Case No. RCV 51010

Chino Basin Municipal Water District v. The City of Chino

PROOF OF SERVICE

I declare that:

I am employed in the County of San Bernardino, California. I am over the age of 18 years and not a party to the within action. My business address is Chino Basin Watermaster, 9641 San Bernardino Road, Rancho Cucamonga, California 91730; telephone (909) 484-3888.

On April 12, 2010 I served the following:

- 1) WATERMASTER OPPOSITION TO PARAGRAPH 31 MOTION
- 2) DECLARATION OF KENNETH MANNING, WATERMASTER CEO
- 3) DECLARATION OF SHERRI LYNNE MOLINO

BY MAIL: in said cause, by placing a true copy thereof enclosed with postage thereon fully prepaid, for delivery by United States Postal Service mail at Rancho Cucamonga, California, addresses as follows:
See attached service list: Mailing List 1


BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee.

BY FACSIMILE: I transmitted said document by fax transmission from (909) 484-3890 to the fax number(s) indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting fax machine.

BY ELECTRONIC MAIL: I transmitted notice of availability of electronic documents by electronic transmission to the email address indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting electronic mail device.

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

Executed on April 12, 2010 in Rancho Cucamonga, California.


Alexandra Perez
Chino Basin Watermaster

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