

4TH CIVIL No.

E051653

In the Court of Appeal
OF THE
State of California

FOURTH APPELLATE DISTRICT
DIVISION TWO

NON-AGRICULTURAL (OVERLYING) POOL COMMITTEE
and CALIFORNIA STEEL INDUSTRIES, INC.
Defendants and Appellants,

v.

CHINO BASIN MUNICIPAL WATER DISTRICT, et al.
Plaintiffs and Respondents.

APPEAL FROM THE SAN BERNARDINO SUPERIOR COURT
HONORABLE STANFORD E. REICHERT, JUDGE
Case No. RCVRS 51010

APPELLANT'S OPENING BRIEF

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APPELLANT/PETITIONER: Non-Agricultural (Overlying) Pool Committee and California Steel Industries, Inc. RESPONDENT/REAL PARTY IN INTEREST: CITY OF CHINO, ET AL.,	<p>FOR COURT USE ONLY</p> <div style="border: 2px solid black; padding: 10px; display: inline-block;"> <p style="font-size: 2em; margin: 0;">FILED</p> <p style="font-size: 1.5em; margin: 0;">SEP 7 2010</p> </div> <p style="margin-top: 5px;">COURT OF APPEAL FOURTH DISTRICT</p>
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS	
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This form is being submitted on behalf of the following party (name): Non-Agricultural (Overlying) Pool Com

- a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b. interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) Aqua Capital Management LP	Member of Pool Committee
(2) Auto Club Speedway	Member of Pool Committee
(3) California Steel Industries	Member of Pool Committee
(4) City of Ontario	Member of Pool Committee
(5) RRI Energy Etiwanda, Inc.	Member of Pool Committee

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: September 1, 2010

Allen W. Hubsch
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to this action. My business address is Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, CA 90067.

On September 7, 2010, I caused the foregoing document described as:

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

to be served on the interested parties in this action as follows:

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[X] (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 7, 2010, at Los Angeles, California.

Kristen Echols
Print Name

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I. INTRODUCTION

This appeal concerns whether a written contract (referred to herein as the "Peace II Option") is a purchase contract or an option, whether the notice of exercise required to be given under the Peace II Option was given and, if so, whether the notice was given in the manner required by the Peace II Option.

The underlying action is an adjudication of water rights in the Chino Basin. The judgment entered in 1978 (the "Judgment") established a Watermaster, an Advisory Committee, three Pools and three Pool Committees. The three Pools established by the Judgment are the Agricultural Pool, the Non-Agricultural Pool and the Appropriative Pool. Each Pool has its own Committee.

Under the Peace II Option, Watermaster, as agent for all members of the Appropriative Pool, held an option to purchase certain storage water (the "Pre-2007 Storage Water") from certain members of the Non-Agricultural Pool. Under the Peace II Option and the Judgment, Watermaster could only exercise the option by providing a written notice of intent to purchase by U.S. mail on or prior to December 21, 2009. Watermaster failed to provide such notice. When Watermaster's failure to provide notice was raised in January 2010, Watermaster retrospectively created a story about having given notice by alternative means in August 2009.

Because the Peace II Option was an option, Watermaster was required to strictly comply with the applicable notice requirements, and alternative means were not legally sufficient. Moreover, as a legal matter, notice, if any, provided by Watermaster was legally insufficient because it was (a) not final, (b) not clear and unambiguous; and (c) not actually

communicated to the persons entitled to receive it.

II. RELIEF SOUGHT IN THE TRIAL COURT

On March 16, 2010, the Non-Agricultural Pool filed a motion (the "Motion") in the trial court for a declaration that Watermaster did not provide the required written notice of intent to purchase. (I:1 AA 1-19.)

The Motion was made pursuant to Paragraph 31 of the Judgment, which provides that any party or any Pool Committee may, by a regularly noticed motion, apply to the trial court for review of any action taken by Watermaster. (Judgment, III:47 AA487:8-488:18.) Paragraph 31 further provides that the "question at issue" shall be reviewed de novo by the trial court, and that any findings or decision by Watermaster "shall not constitute presumptive or prima facie proof of any fact in issue". (Judgment, III:47 AA488:13-14.) In other words, in any action pursuant to Paragraph 31, no deference is afforded to Watermaster's actions, findings or decisions.

On June 18, 2010, the trial court denied the Motion in a 30-page ruling. (VI:93 AA1413-1449.) The court first found that the Peace II Option was not an option. (VI:93 AA1429:8-1431:3.) The trial court based its determination largely on use of the term "condition subsequent", in Paragraph H of the Peace II Option. Otherwise, the trial court did not appear to consider the Peace II Option substantively, but rather relied largely on the title of the contract.

The trial court found that legally sufficient notice was provided by virtue of participation in the August 27 meeting by an alternate member of

the Watermaster Board (Mr. Kevin Sage),¹ who was also an alternate representative of a single member of the Non-Agricultural Pool Committee that owned none of the Pre-2007 Storage Water, and had no economic interest in the matter. (VI:93 AA 1431:18-1433:35).²

The trial court also found that legally sufficient notice was provided pursuant to an e-mail that was circulated on August 21, 2009 that contained no reference to the Peace II Option, included no attachment, and merely stated that the agenda for the then-upcoming August 27 meeting of the Watermaster Board had been posted to Watermaster's website. (VI:93 AA1433:28-1435:14.)

In the trial court, Watermaster argued that the members of the Non-Agricultural Pool had an obligation to remind Watermaster to give the notice, and failed to do so. The trial court found the Non-Agricultural Pool's silence was not estoppel because (1) "there is no foundation for the court to conclude that all the members of the nonagricultural pool knew there was a notice of intent document in the agenda package for the August 27, 2009 board meeting" (VI:93 AA1438:25-28); and (2) other than Mr. Sage, "there is no basis to conclude any of the other nonagricultural pool members actually received the notice of intent." (VI:93 AA1439:4-7.) In

¹ The trial court erroneously found that Mr. Bob Bowcock also attended the August 27 meeting, and voted in favor of approving the notice of intent to purchase. (VI:93 AA 1431:22-23). No party contended in the trial court that Mr. Bowcock attended the meeting, and the basis for the Court' finding on this subject is unknown.

² The trial court also erroneously found that the minutes of the August 27 "were electronically distributed to interested parties" in addition to being maintained on the watermaster website. (VI:93 AA1431:24-1432:1.) None of the declarations or documents submitted into evidence support the

other words, the trial court found that notice was provided while simultaneously finding that not even one of the affected members of the Non-Agricultural Pool actually received it, and none even know it existed.

The Motion was decided entirely on the basis of the moving, opposition and reply papers. There was no evidentiary hearing. The testimony submitted consisted entirely of written declarations.

The Non-Agricultural Pool Committee timely appealed.

III. ORDER APPEALED FROM

A. The Trial Court Order Is Appealable

The Trial Court Order is appealable as an order made after entry of an appealable judgment. (Code of Civil Procedure § 904.1(a)(2).) The Judgment expressly provides that any decision of the trial court in connection with a motion made pursuant to Paragraph 31 is “an appealable supplemental order.” (Judgment, III:47 AA488:15-18.)

B. De Novo Standard of Review

All issues raised in this appeal are subject to de novo review. The appeal concerns the interpretation of a written contract, namely (a) whether the Peace II Option is a purchase contract or an option and (b) whether the notice given, if any, was legally sufficient.

“The interpretation of a written document is a question of law, not of fact,” and thus is subject to de novo review.” (*Edmond’s of Fresno v. MacDonald Group, Ltd.* (1985) 171 Cal.App.3d 598, 603; *Welk v. Fainburg* (1967) 255 Cal.App.2d 269, 272.) “The de novo standard of review also applies to mixed questions of law and fact when legal issues

finding that the minutes were “electronically distributed” to the affected members of the Non-Agricultural Pool.

predominate.” (*Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 212 (and cases cited therein).)

Moreover, when extrinsic evidence relating to interpretation of a contract consists entirely of written declarations, appellate review of law and fact involving the contract is de novo, even where the evidence conflicts. (*Id.* at 213; *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 89; *Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1369; *Patterson v. IIT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1663.) In the trial court, all extrinsic evidence was submitted by written declaration, and is subject to de novo review.

IV. BACKGROUND FACTS

A. The Watermaster Parties

The real parties in interest in this appeal are the Non-Agricultural Pool and the Appropriative Pool.

The Non-Agricultural Pool was established for industrial and commercial users. (Judgment, III:47 AA495:24-27.) The water rights of the members of the Non-Agricultural Pool were “individually decreed” by the Judgment. (III:47 AA477:28-478:2.) The respective members of the Non-Agricultural Pool have “specific quantitative rights and shares in the declared Safe Yield.” (III:47 AA482:1-3: AA531.) The Non-Agricultural Pool has its own pool committee (the “NAP Committee”). (III:47 AA488:20-25.) The NAP Committee consists of one representative for each member of the Non-Agricultural Pool. (III:47 AA536:9-11) There is no “at large” representation. (*Id.*)

The Appropriative Pool was established for appropriative users, principally municipal water districts. (III:47 AA495:28-496:2.) The

members of the Appropriative Pool also have specific quantitative water rights. (III:47 AA482:1-3; AA532.) The Appropriative Pool Committee also consists of one representative of each member of the Appropriative Pool. (III:47 AA539:12-13.)

In contrast to the Non-Agricultural Pool and the Appropriative Pool, the members of the Agricultural Pool own their water rights collectively, not individually. (III:47 AA480:13-20.) The Agricultural Pool has hundreds of members, and the Agricultural Pool Committee is a representative committee, elected "at large" by the members of the Agricultural Pool. (III:47 AA533:17-27.)

Since 1978, several trial judges have presided over the underlying action. In September 2009, the underlying action was re-assigned to the Honorable Stanford Reichert. The motion appealed from was the first motion heard by Judge Reichert following the re-assignment of the case to him.

B. The NAP Committee

Under the Judgment, the role of the pool committees is limited. The sole authority granted to the pool committees by the Judgment is "the power and responsibility for developing policy recommendations for administration of its particular pool." (III:47 AA492:4-10.) Rarely do the members of the NAP Committee have a need or desire to develop new "policy recommendations" for the Non-Agricultural Pool. As a result, although Watermaster staff scheduled monthly meetings of the NAP Committee for many years prior to the occurrence of this dispute, the representatives did not attend the scheduled meetings. (VI:78 AA1360:4-

16.) Under the Judgment, the pool committees are not obligated to meet.³

Between December 21, 2007 and December 21, 2009, Watermaster staff scheduled 24 monthly meetings of the NAP Committee. (VI:78 AA1360:6-8.) At 13 of those 24 meetings, the representative of only 1 of 19 members attended. (VI:78 AA1360:6-10.) At the remaining 11 meetings, the representatives of only 2 of the 19 members attended. (*Id.*) In fact, the Chair himself attended only 1 of the 24 meetings during this two-year period. (VI:78 AA1360:10-11.)

Because only 10 of the 19 pool members owned Pre-2007 Storage Water, the Peace II Option only affects 10 of the 19 pool members. (VI:78 AA1360:12-13.) Those 10 members were even less active, for an even longer period than the Non-Agricultural Pool as a whole. Of the 10, nine had not attended a single meeting of the NAP Committee in the 6-year period between February 2004 and January 2010. (VI:78 AA1360:13-15.)

Monthly meetings of the NAP Committee were scheduled for the same dates, times, and location (Watermaster's offices) as the meetings of the Appropriative Pool Committee. Watermaster staff and counsel attended

³ The members of the Non-Agricultural Pool are generally operating companies, such as a company that owns and operates an automobile racetrack, a company that owns and operates a mobile home park and a company that manufactures steel. (Bowcock Decl. AA1359:25-26.) They are not water companies, but rather the water they use is a component of their business, similar to other utility services – be it water or natural gas, electricity or phone service. Each of the member companies of the Non-Agricultural Pool has appointed a single natural person as its representative to serve on the NAP Committee. (AA1359:15-18.) Those representatives are typically operating personnel for their respective companies (i.e., director of race track administration, general manager of mobile home park, environmental engineer). (AA1359:26-1360:3.) For these individuals, oversight of the water rights that their respective companies own and use is a component of their job responsibilities.

the meetings. The fact that the Non-Agricultural Pool had little or no business to conduct, and that its members generally did not attend Watermaster meetings, was obvious and well-known to Watermaster staff, Watermaster counsel and the members of the Appropriative Pool.

C. The Peace II Option

In the fall of 2007, the Watermaster Board adopted Watermaster Resolution No. 07-05 (the "Peace II Resolution"). (IV:51 AA749-878.) Attachment G to the Peace II Resolution is the Purchase and Sale Agreement for the Purchase of Water by Watermaster from Overlying (Non-Agricultural) Pool that is referred to herein as the "Peace II Option". (IV:51 AA842-845 & AA38-41.) Attachment K to the Peace II Resolution is the Peace II Agreement. (IV:51 AA856-875.)

The Peace II Option provided a method by which storage water owned by certain members of the Non-Agricultural Pool might be transferred to Watermaster, as agent for all members of the Appropriative Pool, at a set price.⁴ The Peace II Option defines the water subject to such transfer as the unused storage water owned by some of the individual members of the Non-Agricultural Pool on June 30, 2007, referred to herein as the "Pre-2007 Storage Water". (Peace II Option, I:7 AA38, §B.) Section C of the Peace II Option provided the mechanism pursuant to which Watermaster, as agent for the members of the Appropriative Pool, could acquire the Pre-2007 Storage Water:

⁴ Watermaster was not a real party in interest under the Peace II Option. Watermaster characterized its own role under the Peace II Option as being merely an "intermediary" or an "escrow holder" for the possible transfer. (Watermaster Brief, V:61 AA1013:10 & 13.)

C. **Notice.** Within twenty-four months of the final Court approval of this Agreement (“Effective Date”), and only with the prior approval of the Appropriative Pool, Watermaster will provide written **Notice of Intent to Purchase** the Non-Agricultural (Overlying) Pool water pursuant to § 5.3(a) of the Peace Agreement, which therein identifies whether such payment will be in connection with Desalter Replenishment or a Storage and Recovery Program.

(I:7 AA39, § C (emphasis in original).) Section C makes clear that the Notice of Intent to Purchase was required to (a) be written; (b) be delivered no later than December 21, 2009 (i.e., the second anniversary of the court’s approval of the Peace II Option); and (c) specifically identify whether the use of the Pre-2007 Storage Water was for Desalter Replenishment or a Storage and Recovery Program, both of which provided basin-wide benefits. The next section, Section D, of the Peace II Option provided that a portion of the purchase price for the Pre-2007 Storage Water would be payable within 30 days after the written Notice of Intent to Purchase was provided. (I:7 AA39§ D.)

Watermaster had no obligation to provide the written Notice of Intent to Purchase, or to purchase the Pre-2007 Storage Water, as the Peace II Option makes clear in Section H: “This Agreement will expire and be of no further force and effect if Watermaster does not issue its **Notice of Intent to Purchase** in accordance with Paragraph D above [sic] within twenty-four months of Court approval.” (I:7 AA39, § H (emphasis in original).) The 10 affected members of the Non-Agricultural Pool could not legally compel Watermaster to deliver the written Notice of Intent to Purchase, and therefore could not compel Watermaster to purchase the Pre-2007 Storage Water. Indeed, Watermaster, as agent for the Appropriative Pool, could decline to provide the written Notice of Intent to Purchase, and

therefore could choose not to purchase the Pre-2007 Storage Water for any reason or for no reason at all. For example, if the value of the Pre-2007 Storage Water were less than the pre-determined purchase price, Watermaster could choose not to purchase the Pre-2007 Storage Water without obligation or liability.

The fact that the Peace II Option is a one-sided, unilateral contract is evident from the signature block on its final page. (I:7 AA40.) Only members of the Non-Agricultural Pool were anticipated to sign the Peace II Option. Only members of the Non-Agricultural Pool were understood to have any obligation under the Peace II Option unless and until the option was exercised. By its terms, and by its omission of any signature block for any party other than members of the Non-Agricultural Pool, neither Watermaster nor any member of the Appropriative Pool had any obligation under the Peace II Option to exercise the option, or to purchase the Pre-2007 Storage Water.

D. The Peace II Agreement

Watermaster was established by the Judgment and Watermaster's powers are limited and controlled by the Judgment. (Judgment, III:47 AA483:23-27.) As a creature of the Judgment, Watermaster has no authority to act in a manner inconsistent with the Judgment. (*Id.*)

In Section 4.1 of the Peace II Agreement, the parties agreed that all actions taken by Watermaster pursuant to the Peace II Resolution and the attachments thereto (including the Peace II Option) would be taken "in accordance with the grant and limitations on its discretionary authority set forth under paragraph 41 of the Judgment". (Peace II Agreement, IV:51 AA860, § 4.1.) Both because of the general nature of Watermaster, and the express agreement of the parties, all actions taken by Watermaster in

connection with the Peace II Option were governed by the Judgment, including the notice provisions thereof.

Under the Judgment, all notices from Watermaster are required to be provided personally or by U.S. mail. "Delivery to or service upon any party or active party by the Watermaster, by any other party, or by the Court, of any item required to be served upon or delivered to such party under or pursuant to the Judgment shall be made personally or by deposit in the United States mail, first class, postage prepaid, addressed to the designee at the address in the latest designation filed by such party or active party." (Judgment, III:47 AA502:24-503:3.) In fact, the Judgment makes clear in Paragraph 31 that no action by Watermaster of any kind is effective unless notice thereof is in writing, and delivered by U.S. mail. "Any action, decision or rule of Watermaster shall be deemed to have occurred or been enacted on the date on which written notice thereof is mailed." (Judgment, III:47 AA487:13-18.) Persons desiring to be relieved of receiving written notice by U.S. mail may file a waiver of notice with Watermaster, but the effect of filing such a waiver is removal from the notice list entirely. (Judgment, III:47 AA502:13-17.)

E. **Watermaster's Repeated Characterization of the Contract As An Option**

On December 21, 2007, the trial court entered an order (the "Peace II Court Order") approving the Peace II Resolution. (Order, III:50 AA719:15-17.) In the Peace II Court Order, Judge Gunn ordered Watermaster to explain the Peace II Option in a brief to be submitted no later than February 1, 2008. (III:50 AA719:24-25.) In the brief thereafter filed, Watermaster acknowledged that Judge Gunn's order "arises out of

concerns expressed by the Special Referee⁵ regarding interpretation of the amendments in the event of future conflicts regarding their intended meaning.” (Brief, V:61 AA997:24-25 (emphasis added).)

In the brief, Watermaster repeatedly and consistently referred to the Peace II Option as an option:

- “the members of the Non-Agricultural Pool have exercised their discretion to option the water to Watermaster under the defined terms of the Purchase and Sale Agreement for the Purchase and Sale of Water by Watermaster from the Overlying (Non-Agricultural) Pool.”
- “Watermaster now has discretion under the defined terms of the option to obtain the water for use either in connection with a storage and recovery project or for desalter replenishment.”
- “The option gives Watermaster two years from the date of Court approval of the Peace II Measures (December 21, 2009) to evaluate whether it requires the water for the potential purposes.”
- “In the event the Watermaster does not exercise its option to purchase the water held in storage and Watermaster and members of the Non-Agricultural Pool do not mutually agree to otherwise extend the date of the option, then the stored water will be made available for purchase by the members of the Appropriative Pool”
- “The special transfer . . . is expressly deducted from the quantity available for Watermaster, or in the event Watermaster does not exercise the option to the members of the Appropriative Pool.”
- “The earmark helped to address concerns expressed over the delays between the time the original financial terms were negotiated for the Purchase and Sale Agreement and

⁵ For many years, the trial court retained the services of a special referee, as a disinterested neutral, to advise the trial court in connection with actions taken and proposed by Watermaster, and in connection with controversies to which Watermaster was a party. In 2008, the trial court (Judge Wade presiding) issued an order directing the referee to take no further action.

the time at which the option may be finally exercised by Watermaster”

- “it should be noted that there is no requirement that Watermaster purchase the water made available”

(V:61 AA1003:19-20, 24-25, 27-28; 1004:4-5, 13-16, 22-25; 1005:8-10 (emphasis added).)

In January 2009, at a Watermaster Board meeting, Watermaster counsel conceded that Section C of the Peace II Option was an option. According to the official minutes of the January 22, 2009 Watermaster Board meeting, Watermaster counsel stated the following:

Watermaster can exercise the option and buy the water and use it for a Storage & Recovery Agreement or, 2) Watermaster can use it in connection with Desalter replenishment. The agreement has a two year shelf life; and that agreement would expire at the end of 2009. If Watermaster fails to exercise its option rights to purchase the water in this calendar year, that water would then default back and be made available to the Appropriators under another provision of the Peace II Agreement.

(VI:81 AA1370, §3 (emphasis added).)

After belatedly claiming to have provided notice of exercise of the Peace II Option, Watermaster tendered payment under the Peace II Option in mid-January 2010. In a letter dated January 14, 2010 from the Watermaster CEO to the Chair of the NAP Committee, the Watermaster CEO conceded that the Section C of the Peace II Option was an option:

As you may recall, Watermaster entered into discussions and negotiations with parties in the Basin, and these conversations resulted in our Peace II settlement agreement. Part of that document allows for the sale of water in storage from the Non-Agricultural Pool to the Appropriators. In accordance with this provision, the Appropriators have exercised their option to purchase the stored water.

(VI:82 AA1372 (emphasis added).) On January 17, the Watermaster CEO sent 10 additional letters to the 10 affected members of the Non-Agricultural Pool, purporting to tender payment to each of them. These 10 additional letters contained identical language regarding the character of the Peace II Option: “In accordance with this provision, the Appropriators have exercised their option to purchase the stored water.” (VI:83 AA1373 (emphasis added).)

Finally, in a telephonic meeting with members of the Non-Agricultural Pool on January 18, 2010, Watermaster counsel referred to the Peace II Option nearly a dozen times as an option agreement. (I:20 AA96-110, passim.)

Watermaster parties, including Watermaster counsel, have repeatedly and consistently characterized the Peace II Option as an option. They have used the term “option” to describe the Peace II Option because it is, both in common parlance and legally, an option.

V. ARGUMENT

A. The Peace II Option Is An Option

The Peace II Option satisfies the various judicial definitions of an option contract. The Peace II Option constituted a unilateral offer that was never accepted.

1. **The Peace II Option Satisfies All Judicial Definitions of An Option**

Under California law, an option is “a contract by which an owner gives another the exclusive right to purchase his property for a stipulated price within a specified time.” (*County of San Diego v. Miller* (1975) 13 Cal.3d 684, 688.) The Peace II Option satisfies this simple definition. Watermaster had the exclusive right to purchase the Pre-2007 Storage

Water for a fixed price and within a fixed time. (I:7 AA38-39, §§ B-D.)

The California Supreme Court recently expounded specifically upon the distinction between an option and a purchase contract, holding that whether a contract is an option or a purchase contract must be determined from its substance, not its title. (*Steiner v. Thexton* (2010) 48 Cal.4th 411, 418.) “[T]he label of an agreement is not dispositive. Rather, we look through the agreement’s form to its substance. (*Id.*) Consistent with that principle, the Court enumerated the two “classic features” that define an option, and that distinguish it from a purchase contract. (*Id.*) First, an option requires the seller to hold open an offer to sell property at a pre-determined price for a fixed period of time. (*Id.*) Second, the buyer has the power to accept the offer, but is not obligated to do so. (*Id.*) On the basis of these two factors, the Supreme Court found that the contract in question was an option, not a purchase contract. (*Id.*) The fact that another provision of the contract in question made clear that the buyer had no liability for failing to buy was an additional but not necessary factor in the Supreme Court’s consideration. (*Id.* at pp. 418-419.)

The Peace II Option contains the two “classic features” enumerated by *Steiner v. Thexton*: (1) the Peace II Option required the affected members of the Non-Agricultural Pool to hold open an offer to sell the Pre-2007 Storage Water for a pre-determined price until December 21, 2009; and (2) Watermaster had the power to accept the offer, but had no obligation to do so. Section H of the Peace II Option made clear that if Watermaster did not exercise the option, the Peace II Option would expire, and Watermaster would have no further liability or obligation. (I:7 AA39, §H.)

A long line of California appellate decisions are consistent with the

California Supreme Court's holdings in *County of San Diego v. Miller* and *Steiner v. Thexton*. "The distinction between a contract to purchase or sell real estate and an option to purchase is, that the contract to purchase or sell creates a mutual obligation on the one party to sell and on the other to purchase, while an option merely gives the right to purchase within a limited time without imposing any obligation to purchase." (*Menzel v. Primm* (1907) 6 Cal.App. 204, 209; *quoted with approval* in *Jonas v. Leland* (1947) 77 Cal.App.2d 770, 776; *Caras v. Parker* (1957) 149 Cal.App.2d 621, 626; and *Schmidt v. Beckelman* (1961) 187 Cal.App.2d 462, 469-470.) The Peace II Option satisfies this test for an option, because Section C gave Watermaster the right to purchase the Pre-2007 Storage Water, without imposing any obligation upon Watermaster to do so.

Another line of cases has further simplified the distinction between an option and a purchase contract. "[T]he test of whether an instrument is an option or a contract of sale is whether there is such an obligation on the part of the optionee to buy that it can be enforced by specific performance". (*Scarbery v. Bill Patch Land & Water Co.* (1960) 184 Cal.App.2d 87, 100; *Welk v. Fainbarg* (1967) 255 Cal.App.2d 269, 276; *People v. Ocean Shore R. Co.* (1949) 90 Cal.App.2d 464, 474.) Again, the Peace II Option satisfies this description of the test for an option, because Section H demonstrates that there was no obligation by Watermaster to deliver the written Notice of Intent to Purchase, and the 10 affected members of the Non-Agricultural Pool could therefor neither compel Watermaster to deliver the written notice nor compel Watermaster to purchase the Pre-2007 Storage Water. (I:7 AA39, §H.)

Myriad characteristics of that agreement demonstrate that Section C of the Peace II Option was an option. The Peace II Option was a unilateral

offer. Consistent with this fact, it contains only a signature block for the Non-Agricultural Pool. (I:7 AA40.) At the time it became effective, Section C of the Peace II Option was intended to be binding only upon the affected members of the Non-Agricultural Pool. Watermaster, on the other hand, had no obligation to deliver a written Notice of Intent to Purchase pursuant to Section C. In fact, Section H of the Peace II Option expressly provided that if Watermaster did not deliver a written Notice of Intent to Purchase, then the Peace II Option would “expire and be of no further force and effect.” (I:7 AA39, §H.) Watermaster could allow the Peace II Option to terminate for any reason, including the possibility that a lower price or better deal existed elsewhere. Neither Watermaster nor the Appropriative Pool had any liability or obligation to the Non-Agricultural Pool under the Peace II Option if the Peace II Option expired.

Looking outside the plain language of the Peace II Option, on numerous occasions Watermaster staff and counsel publicly affirmed that Section C of the Peace II Option was an option. Those occasions included a legal brief filed by Watermaster counsel on behalf of Watermaster in the trial court expressly for the purpose of resolving, definitively, issues regarding interpretation of the provisions of the Peace II Option “in the event of future conflicts regarding their intended meaning.” (Brief, V:61 AA997:24-25.) The trial judge required Watermaster, as a creature of the court, to provide a definitive interpretation of the Peace II Option for the precise circumstances that the parties now find themselves in. The Non-Agricultural Pool is entitled to rely upon that interpretation, and Watermaster should be estopped from now asserting a diametrically opposite interpretation.

2. The Character of the Peace II Option Was Not Affected By Other Peace II Measures

The fact that the Peace II measures included other agreements and covenants, some of which may have been mutual or bilateral, does not affect the option character of the Peace II Option. In many reported decisions that bear upon this appeal, the option at issue was included within a contract that contained other covenants that were mutual or bilateral, some or all of which had been performed. For example, in *Bekins Moving & Storage Co. v. Prudential Insurance Co. of America* (1986) 176 Cal.App.3d 245, the option at issue was contained in an office lease with a 10-year term. (*Id.* at 248.) The option was not exercisable, and the dispute did not arise, until the end of the term, after nearly ten years of mutual or bilateral performance of the other covenants in the lease. (*Id.* at 248-249.) In *Simons v. Young* (1979) 93 Cal.App.3d 170, the option at issue was contained in a residential lease with a two-year term, and again the option at issue was not exercisable, and the dispute did not arise, until the end of the term. (*Id.* at 174-175.) In *Hayward Lumber & Inv. Co. v. Construction Products Corp.* (1953) 117 Cal.App.2d 221, the option at issue was contained in an industrial lease with a 1-year term, and again the option was not exercisable, and the dispute did not arise until the end of the term. (*Id.* at 223-225.) In each of these cases the option was recognized as an option by the courts, and enforced as an option. In none of these cases was the option disregarded because other elements of the contract were bilateral or mutual.

The Peace II Option is on its face a unilateral agreement, to be signed only by members of the Non-Agricultural Pool, and binding only upon the affected members of the Non-Agricultural Pool. The Peace II

Option has the “classic features” of an option and satisfies the judicial definitions for an option. The fact that the Peace II measures of which the Peace II Option was a part included other instruments or covenants does not prevent the Peace II Option from being an option.

B. Watermaster Failed to Exercise the Option in Accordance With Its Terms

The Peace II Option, the Peace II Agreement and the Judgment obligated Watermaster to deliver the Notice of Intent to Purchase in writing by U.S. mail. Not only did Watermaster fail to provide the Notice of Intent to Purchase in writing by U.S. mail, no notice was given to the affected members of the Non-Agricultural Pool. (I:2 AA30:3-7; II:28-35 (Bowcock Decl. ¶26; Penrice Decl. ¶4; Stubbings Decl. ¶3; Arbelbide Decl. ¶3; Geye Decl. ¶3.; Lawhn Decl. ¶3; Starnes Decl. ¶3; Ward Decl. ¶3.))

1. A Party Must Strictly Perform Any Notice Requirements Necessary to Exercise an Option

Because the Peace II Option was an option, Watermaster was required to strictly comply with the requirements for exercising the option. “An option is an offer by which a promisor binds himself in advance to make a contract if the optionee accepts the terms and within the time designated in the option. Since the optionor is bound while the optionee is free to accept or not as he chooses, courts are strict in holding an optionee to exact compliance with the terms of the option.” (*Hayward Lumber & Inv. Co. v. Construction Prod. Corp.* (1953) 117 Cal.App.2d 221, 229 (emphasis added); *Simons v. Young* (1979) 93 Cal.App.3d 170, 182; *Bekins Moving & Storage Co. v. Prudential Insurance Co.* (1985) 176 Cal.App.3d 245.) “[W]here, as here, the acceptance or the ‘election’ or the ‘exercise’ of the option is by the terms of the contract to be made in a particular

manner, it must be strictly so made in order to constitute a valid acceptance.” (*Callisch v. Franham* (1948) 83 Cal.App.2d 427 (option to purchase real estate).)

The Ninth Circuit Court of Appeals, applying California law, has held that “where the option is to be exercised within a stated time and in a particular manner, that must be done exactly as prescribed.” *Cummings v. Bullock* (9th Cir. 1966) 367 F.2d 182, 183 (emphasis added). The Ninth Circuit further stated:

The result may seem harsh, and the rules applied are technical. But the decisions cited make the reason clear. An option, given for consideration, binds the optionor, and but it does not bind the optionee. He may, if he chooses, walk away from the deal. That is why the language of the option agreement is construed in favor of the optionor and why the courts require that the optionee comply strictly with whatever conditions the agreement imposes upon his right to exercise the option if he chooses to do so.

(*Cummings v. Bullock*, 367 F.2d at p. 186.) The California Supreme Court has specifically cited this portion of *Cummings* with approval. (*Holiday Inns of America, Inc. v. Knight* (1969) 70 Cal.2d 327, 330.)

The courts have expressly rejected substitutes for strict compliance, such as constructive notice or inquiry notice. In *Hayward*, thirty days before the expiration of the lease (which was also the deadline for the tenant to exercise an option to renew), the tenant (represented by Mr. Wells) cured monetary defaults under the lease by payments to the landlord (represented by Mr. Hubbard) in order to avoid default. (*Hayward*, 117 Cal.App.2d at p. 224.) If the lease were in default, the option could not be exercised, and both landlord and tenant knew that tenant’s curative payment was made solely for the purpose of preserving the option. (*Id.*) In fact, at the time the curative payment was made, landlord and tenant had the following conversation: “Mr. Hubbard said to me ‘Obviously, after going

to all the trouble to wire that money to me last night, you must be intending to stay” and I said ‘Yes, obviously’.” (*Id.*) The Court held that neither the verbal assurance nor the curative payment were proper substitutes for written notice. (*Id.* at p. 228.)

In another leading case, *Bekins*, as tenant under a 10-year office lease, had an option to renew the lease. (*Bekins*, 176 Cal.App.3d at p. 248.) The deadline to exercise the option was June 30, 1981. (*Id.*) In anticipation of renewal, *Bekins* elected to install new air conditioning units, at very considerable expense, to serve the premises. (*Id.*) During the period February through June 1981, *Bekins*, as tenant, and Prudential, as landlord, communicated frequently about the air conditioning work which *Bekins* was then performing. (*Id.*) Under the lease, the new air conditioning equipment would become landlord’s property if the option were not exercised, so installation of the air conditioning equipment only made sense if tenant intended to exercise the option. *Bekins* claimed that its actions and communications constituted constructive notice and/or substantial compliance. (*Id.* at p. 251.) The Court held that performance of the air conditioning work by *Bekins* was not a substitute for written notice. (*Id.*) The extensive written and oral communications between Prudential and *Bekins* about the air conditioning did not constitute written notice, and did not constitute a waiver by Prudential of the requirement for written notice. (*Id.*)

Here, the form and method of delivery of the written Notice of Intent to Purchase were set forth in the Peace II Option, the Peace II Agreement and the Judgment. In the Peace II Option, the form of delivery of the Notice of Intent to Purchase was specified as written notice (I:7 AA39, § C), and in the Peace II Agreement, Watermaster further agreed that all of

Watermaster's actions in connection with the Peace II Option would be taken in accordance with its authority under the Judgment. (Peace II Agreement, IV:51 AA860, § 4.1.) Even if the parties had not so agreed, Watermaster, as a creature of the Judgment, was bound to act in accordance with the Judgment, including the notice provisions thereof. The notice provisions of the Judgment required written notice by U.S. mail. (III:47 AA502:24-503:3). The law requires strict compliance with these provisions regarding notice.

**(a) Written Notice of Intent Was Not Provided
in August 2009**

The trial court erred in finding that Watermaster satisfied the notice requirements of the Peace II Option by circulating an email on or about August 21. The August 21 email stated only that agendas and packages for August 27 meetings of the Advisory Committee and Watermaster Board were available for download on the ftp section of Watermaster's website. (I:21 AA111.) The email contained no other information, and provided no other notice. (*Id.*) It also contained no attachments. (*Id.*) In fact, the August 21 email was in the same generic form as emails on the same subject circulated by Watermaster staff for years previously. (VI:78 AA1361:8-12.) The email made no mention of the Peace II Resolutions, the Peace II Agreement, the Peace II Option or the written Notice of Intent to Purchase. (I:21 AA111.) Nor did the email reflect any action actually taken by Watermaster – it was simply an email regarding a future meeting of the Watermaster Board. (*Id.*) The e-mail was not a written Notice of Intent to Purchase.

The ftp portion of Watermaster's website contains numerous folders and hundreds of documents. A person who received the August 21 email

and wanted to find the agenda or agenda package for the then-upcoming August 27 meeting of the Watermaster Board would have had to navigate to Watermaster's ftp website (I:2 AA30:15-31:3 & I:22), then find the correct folder within the ftp website among numerous folders (I:2 AA30:15-31:3 & I:23), then find the correct agenda package among numerous files. (I:2 AA30:15-31:3 & I:24.) If the agenda package were located, the person could have attempted to open up the agenda package. However, the agenda package was a 39.50MB pdf file, consisting of 144 pages. (I:2 AA30:15-31:3 & I:25.) Buried in the middle of the agenda package was a two-page staff report which described its one-page attachment as a "form of notice" being submitted to the Watermaster Board for possible approval. (I:2 AA30:15-31:3 & I:25 AA165-167) The "form of notice" was for consideration only, had not been approved, and was not final. If the August 21 email was notice of anything, it was only notice that one of many regular meetings of the Watermaster Board would occur in the future.

The trial court also erred in finding that sufficient notice was provided by virtue of participation by the alternative representative of the NAP Committee at the August 27 meeting of the Watermaster Board. First, the written Notice of Intent to Purchase was not even final on August 27. The meeting minutes show that there was substantial discussion regarding the substance of the proposed notice, and lingering uncertainty about the Appropriative Pool's intended use of the Pre-2007 Storage Water. (I:13 AA68-69.) The "form of notice" presented by Watermaster staff to the Watermaster Board stated on its face that 36,000 acre feet of the Pre-2007 Storage Water would be used in a Storage and Recovery Program, and the remaining 2,652 acre feet would be used for Desalter replenishment. (I:25

AA167.) But the August 27 minutes also show that the Fontana Water Company requested additional time to consider the allocation between Storage and Recovery and Desalter replenishment. (I:13 AA68.) In addition, at the August 27 meeting the Watermaster CEO informed the Watermaster Board that the Appropriative Pool was considering an entirely different allocation, referred to as "Plan B". (*Id.*) Pursuant to Plan B, the Appropriative Pool might not use the Pre-2007 Storage Water for either Storage and Recovery Program or Desalter replenishment, but might instead hold the Pre-2007 Storage Water "in reserve". (*Id.*)

In the end the substance of the written Notice of Intent to Purchase was not approved by the Watermaster Board on August 27. As requested by the Fontana Water Company, and as recommended by the Advisory Committee, the substance of the notice was referred back to the Appropriative Pool for consideration by the Appropriative Pool at its next monthly meeting. (I:13 AA69.) The official minutes of the August 27 meeting state that the Board "Moved to approve the Intent to Purchase to 36,000 acre feet for use in a Storage and Recovery Agreement, and refer the 2,652 acre-feet back to the Appropriative Pool for further consideration and a separate motion". (*Id.* (emphasis added).)

The Peace II Option mandated that the intended use of the Pre-2007 Storage Water be stated in the written Notice of Intent to Purchase. The Board's action demonstrates that on August 27, 2009, the intended use was not final and the written Notice of Intent to Purchase was not final. The notice of exercise of the Peace II Option could not have been provided on or before August 27.

**(b) Written Notice of Intent to Exercise the
Peace II Option Was Not Provided After
August 2009**

At the next meeting of the Appropriative Pool Committee, on October 1, 2009, the Appropriative Pool re-considered the intended uses of the Pre-2007 Storage Water. (I:14 AA74-75.) According to the official minutes of that meeting, there remained disagreement among members of the Appropriative Pool about how the Pre-2007 Storage Water should be used. (I:15 AA77, § II.A.) Watermaster staff recommended that a portion be used for desalter replenishment, but the Fontana Water Company wanted to use the water for a different purpose. (*Id.*) The official meeting minutes show the Appropriative Pool Committee voted to “table the item for 30 days for further discussion and possible Watermaster staff recommendations”. (*Id.*) Thus, as of October 2009, the intended use was still not final and as a result, the written Notice of Intent to Purchase was not final. Because the written Notice of Intent to Purchase was not final, it could not be given.

At the next meeting of the Appropriative Pool, on November 5, 2009, Watermaster staff submitted a report to the Appropriative Pool reminding it of the need to deliver the written Notice of Intent to Purchase. The staff report read, in part, as follows:

Under the Purchase and Sale Agreement, Watermaster, at the direction of the Appropriative Pool, is to issue a Notice of Intent to Purchase to the Non-Agricultural Pool within 24 months after Court approval of the Peace II Documents. Thus the Notice of Intent to Purchase must be issued by December 21, 2009.

(I:16 AA80.) Furthermore, the November 5 staff report confirmed unequivocally that Watermaster had still not provided the written Notice of

Intent to Purchase:

Staff recommends that the Appropriative Pool direct Watermaster to issue the Notice of Intent to Purchase prior to December 21, 2009 and place the water purchased in storage pursuant to the proposed Plan.

(I:16 AA81.)

However, at the same November 5, 2009 meeting, the Appropriative Pool considered the so-called "Plan B". (I:17 AA84, § VII.1.) Plan B was described in bullet-point form on a single page, and provided as follows:

(1) By December 21, 2009, Watermaster, under the direction of the Appropriative Pool, will send the Notice of Intent to Purchase pursuant to the Purchase and Sale Agreement.

* * *

(4) Watermaster shall hold the Purchased Water Account in trust for the members of the Appropriative Pool, and shall allocate the water held in the Purchased Water Account according to direction from the Appropriative Pool.

* * *

(8) If the water in the Purchased Water Account has not been utilized in a Storage and Recovery Program or Desalter Replenishment within 3 years from the date it is placed into the storage account, then the Appropriative Pool may elect to distribute the water according to the same formula used to allocate the cost of purchasing the water from the Non-Agricultural Pool.

(I:16 AA82.)

Watermaster could not possibly have prepared or provided a valid written Notice of Intent to Purchase consistent with Plan B. First, the Peace II Option required that the written Notice of Intent to Purchase state the intended uses of the Pre-2007 Storage Water. (I:7 AA39, §C.) Yet Plan B provided that its intended use would be "according to direction from the Appropriative Pool". (I:16 AA82.) As of November 5, the Appropriative Pool had still not finalized the intended use of the Pre-2007 Storage Water.

The written Notice of Intent to Purchase could still not be finalized, and could not be provided.

Moreover, the Peace II Option unequivocally allowed only two uses – a Storage and Recovery Program and Desalter replenishment. (I:7 AA39, §C.) Both of these uses had basin-wide benefits. But paragraph 8 of Plan B purported to allow the Appropriative Pool the discretion to store the Pre-2007 Storage Water for three years, and then distribute the storage water directly to themselves, for their own consumptive use. (I:16 AA82.) Instead of using the Pre-2007 Storage Water for the two allowed uses, under Plan B the members of the Appropriative Pool could simply pocket the water, to benefit themselves alone.

At the November 19, 2009 meeting of the Advisory Committee, and at the November 19, 2009 meeting of the Watermaster Board, Watermaster staff submitted to both the Advisory Committee and the Watermaster Board the Appropriative Pool's Plan B, but only as a report and not as an action item. (I:19 AA88 & AA92.) Watermaster staff did not request that the Advisory Committee or the Watermaster Board approve Plan B, and for good reason. Plan B violated the terms of the Peace II Option, and could not validly have been approved or implemented.

By November 5, 2009, Watermaster counsel and staff had publicly acknowledged, and reminded the Appropriative Pool and the Watermaster Board multiple times that the written Notice of Intent to Purchase had not been provided. On November 5, Watermaster staff requested authority to issue the written Notice of Intent to Purchase: "Staff recommends that the Appropriative Pool direct Watermaster to issue the Notice of Intent to Purchase prior to December 21, 2009". (I:16 AA81.) By November 19, 2009, the Appropriative Pool had deviated so far from the terms of the

Peace II Option that no valid notice could be given.

**(c) Announcement and Payment Were
Inconsistent With the Peace II Option**

On January 7, 2010, during a public meeting of the Appropriative Pool at which Watermaster staff was present, a representative of one of the members of the Non-Agricultural Pool asked Watermaster staff whether, and when the written Notice of Intent to Purchase had been provided.

(I:29 AA268, ¶5 & I:2 AA28, ¶22.) Following the question, the Watermaster CEO and the Watermaster counsel looked at each other, then conferred privately with one another for an extended period of time, and then the Watermaster CEO stated “We will have to get back to you”. (I:29 AA268, ¶5 & I:2 AA28 ¶22.)

Section D of the agreement required Watermaster to pay the first installment of the purchase price for the Pre-2007 Storage Water within 30 days. (I:7, AA39, § D.) If the written Notice of Intent to Purchase in fact had been provided in August 2009, then payment would have been made in September 2009. But Watermaster did not tender payment until mid-January 2010, just a few days after a Non-Agricultural Pool member first questioned whether and when the written Notice of Intent to Purchase was provided. (I:2 AA29, ¶24; I:29 AA269 ¶8; VI:82 & VI:83.) Tender of payment in January 2010 demonstrates that the written Notice of Intent to Purchase was not provided in August 2009, and neither Watermaster nor the Appropriative Pool believed it had been provided in August 2009.

**2. Notice of Exercise of An Option Must Be Clear and
Unambiguous**

The party exercising an option must inform the optionor “in unequivocal terms of his unqualified intention to exercise his option”.

(Hayward, 117 Cal.App.2d at pp. 227-228; Bekins, 176 Cal.App.3d at p. 251.) “A clear and unambiguous notice, timely given, and in the form prescribed by the contract, is essential to the exercise of an option.” (17B Corpus Juris Secundum (June 2009), Contracts, §446.)

The actions of Watermaster and the Appropriative Pool, which they now argue were sufficient to exercise the Peace II Option, were not notice of anything, and were filled with ambiguity, qualifications and equivocation. At the August 27 Board Meeting, the Watermaster Board referred the required contents of the written Notice of Intent to Purchase back to the Appropriative Pool Committee for “further consideration and a separate motion.” (I:13 AA69.) The Appropriative Pool Committee, at its next meeting on October 1, voted to “table the item for 30 days for further discussion and possible Watermaster staff recommendations”. (I:15 AA77, § II.A.) Then, the Appropriative Pool Committee, at its next meeting on November 5, voted to adopt a Plan B that was facially invalid under the terms of the Peace II Option, and that was inconsistent with the August form of notice. (I:17 AA84, § VII.1.) The very fact that the Appropriative Pool Committee adopted Plan B on November 5 demonstrates that the Appropriative Pool did not consider the August form of notice to have been final, or given, on or prior to August 27.

All along, and as late as November 5, Watermaster staff was reminding the Watermaster Board and the Appropriative Pool that the written Notice of Intent to Purchase had still not yet been provided. (I:16 AA81.) Watermaster staff was responsible for giving the notice, and Watermaster staff was in a position to know whether or not the notice had been given. As late as November 5, Watermaster staff was still requesting authority to provide the written notice. (*Id.*)

The record amply demonstrates that no such notice was provided. If provided, it cannot reasonably be argued that such notice was “clear and unambiguous” or given in “unequivocal terms” or expressed an “unqualified intention”.

C. Actual Communication Was Required

Section C of the Peace II Option required Watermaster to “provide” written Notice of Intent to Purchase. The Merriam-Webster Dictionary defines the term “provide” as follows: “to put (something) into the possession of someone for use or consumption.” (*Merriam-Webster Online Dictionary*, www.merriam-webster.com.) The synonyms of “provide” are “deliver, feed, give, hand, hand over, supply”. (*Id.*) A person cannot put something into the possession of another, or deliver, feed, give, hand over or supply something to another, without actually giving it to the other person. The August 21 e-mail did not “provide” the written Notice of Intent to Purchase to the 10 members of the Non-Agricultural Pool whose Pre-2007 Storage Water was the subject of the Peace II Option.

Notice of exercise of an option is acceptance of an offer, and California law requires at the very least that acceptance of an offer be communicated to the offeror. (*Commercial Casualty Ins. Co. v. Industrial Acc. Comm.* (1953) 116 Cal.App.2d 901, 907; see also Miller & Starr California Real Estate 3d (2010), Contract Law, § 1:38 (“The acceptance of an offer to enter into a bilateral contract must be communicated to the offeror.”); Cal.Jur.3d, Contracts (2011), § 81 (“To create a contract, acceptance of any offer must be communicated to the offeror.”).) In *Erlich v. Granoff* (1980) 109 Cal.App.3d 920, the court held that an option could only be validly exercised by communicating exercise of the option to the optionor. “In the instant case the Erlichs exercised their option by

communicating to Granoff in writing their election to accept his offer.” (*Id.* at 929 (emphasis added).)

In *Bourdieu v. Baker* (1935) 6 Cal.App.2d 150, a case involving an option to purchase real property, the terms of the option provided that the option holder could exercise the option by paying or depositing the sum of \$3,000 on or before November 1, 1928. (*Id.* at 153.) The option did not specify to whom the \$3,000 was to be paid. (*Id.*) Prior to the deadline, the option holder deposited \$3,000 with a bank, with instructions to deliver the sum to the seller upon demand. (*Id.* at 154.) The option holder also sent a letter to the seller informing him that the money had been deposited with the bank. (*Id.* at 154-155.) Even though the contract did not specify to whom the money was deposited, simply making the money “available” was insufficient. “[N]o duty rested upon [the seller] to go to that bank or to make demand for the money.” (*Id.* at 160-161.) The tender had to be made directly to the seller.

Likewise, in this case, the written Notice of Intent to Purchase was required, at the very least, to be communicated directly to the 10 affected members of the Non-Agricultural Pool. Making a written Notice of Intent “available” to them in a 39.50MB pdf file on a website that included many folders and many documents is not actual or direct communication. The 10 affected members of the Non-Agricultural Pool had no duty to sift through Watermaster’s website each month to see whether they might happen to find a written Notice of Intent to Purchase. Sending an e-mail on August 21 that gave the members of the Non-Agricultural Pool no specific reason to search through those folders and documents is not actual or direct communication of acceptance of an offer.

D. The Participation by the Pool's Board Representative at the August 27 Meeting of the Watermaster Board Was Not Notice

Notice to the 10 affected members of the Non-Agricultural Pool could not legally be accomplished by participation of an alternate board member in the August 27 meeting of the Watermaster Board. Principally, as stated previously, the written Notice of Intent to Purchase was not even final on August 27.

Moreover, the alternate, Kevin Sage, was the representative of only one of the 19 members of the Non-Agricultural Pool – Vulcan. (VI:79 AA1364:12-13.) No member of the Non-Agricultural Pool other than Vulcan ever appointed Mr. Sage as its agent or representative. (*Id.*) In particular, no member of the Non-Agricultural Pool other than Vulcan ever authorized Mr. Sage to act as its agent for giving or receiving notice. (*Id.*) In fact, Vulcan was not one of the 10 members of the Non-Agricultural Pool who was affected by the Peace II Option. (VI:83 AA1372-1373 & VI:84 AA1375-1376.) Vulcan had no Pre-2007 Storage Water, and had no economic interest in the Peace II Option. (*Id.*) Vulcan's interest was quite different than that of the 10 affected members. Even if the written Notice of Intent to Purchase had been final on August 27, its provision to Mr. Sage would have been ineffective.

Mr. Sage attended the August 27 board meeting as an alternate Watermaster Board member. (VI:79 AA1364:10-11.) Over the years, representatives of members of the Non-Agricultural Pool have been designated as Chair of the NAP Committee. Others have been designated as Vice Chair and Secretary. Still others have been designated as the representatives of the NAP Committee on the Advisory Committee and/or the Watermaster Board. Various other persons have been designated as

alternates for some or all of these positions. Nothing in the Judgment makes any of these persons agents for the other members of the Non-Agricultural Pool. Nothing in the Judgment, for example, suggests that the Chair or the Vice Chair, or the representatives designated for the Advisory Committee or the Watermaster Board; or any of their alternates, could sell, or contract to sell or to option, another member's water rights, or otherwise act as agent with respect to the other member's individually decreed water rights.

In *O'Connor v. Chiascone* (1943) 130 Conn. 304, the Connecticut Supreme Court addressed a similar situation. In that case, the lease in question required that written notice of exercise of a five-year option to renew be given to the landlord. At the time the lease was executed, the landlord was an individual. (*Id.* at 305.) At the time of exercise, the landlord was dead, and the tenant gave notice to the administrator of the landlord's estate. (*Id.*) The Connecticut Supreme Court held that the notice to the administrator was legally insufficient. (*Id.* at pp. 306-309.) Instead, the Supreme Court found that notice could only be given effectively to the heirs, because the heirs were the legal owners of the property in question. (*Id.*) The administrator was a fiduciary, but was also merely a fiduciary, and had duties to others besides the heirs. He was not the legal owner, and he was not the authorized agent of the heirs. (*Id.* at 307-308.) The administrator could not lease the property for a five-year term. Delivery of a notice to him purporting to renew the term for 5 years could not be effective. (*Id.*)

In *Kurek v. State Oil Company* (1981) 98 Ill.App.3d 6, the Illinois Court of Appeals came to the same conclusion on different facts. The landlord was a business trust. (*Id.* at 7.) A tenant gave notice of exercise of

a renewal option to the beneficiary, rather than the trustee. (*Id.* at 8.) The tenant relied in part upon the fact that the beneficiary was the established point of contact for communications about the lease and that all rent payments were made by tenant directly to the beneficiary. (*Id.* at 7-8.) The Illinois Court held that notice to the beneficiary was legally ineffective. (*Id.* at 8-9.) While the beneficiary held the power of management, the trustee was the legal owner of the property. (*Id.*) The beneficiary was not the agent of the trustee. (*Id.* at 7.) They held different interests. Notice of exercise could not effectively be given to any person other than the legal owner. (*Id.* at 8-9.)

The sole purpose of the NAP Committee is “the power and responsibility for developing policy recommendations for administration of its particular pool.” (III:47 AA492:4-10.) The NAP Committee’s powers are extremely limited by the Judgment. The water rights of the members of the Non-Agricultural Pool are individually decreed (III:47 AA495:28-496:2) and separately, not collectively, owned. (III:47 AA482:1-3; AA531. The members’ water rights are not owned by the NAP Committee. The power of the committee’s officers cannot be broader than that of the NAP Committee itself. Only a member may sell, or contract to sell or option, its water rights. Those decisions are made individually, not by action of the NAP Committee, or by its officers. Under the Judgment, the members appoint their own separate representatives to the NAP Committee, and Mr. Sage was the representative only of Vulcan.

Moreover, Mr. Sage’s uncontrovered testimony, submitted by declaration to the trial court, was that at the Watermaster Board and other meetings he attended in August, September, October and November 2009, members of the Appropriative Pool specifically asked Watermaster counsel

when the written Notice of Intent to Purchase would be provided. (I:28 AA266:10-19.) Watermaster counsel replied that the written Notice of Intent to Purchase would be provided, if at all, to the Non-Agricultural Pool on the “last possible date”, i.e., on or about December 21, 2009. (*Id.*) The reference was to the future. Mr. Sage had no reason to believe on August 27 that the written Notice of Intent to Purchase had yet been provided to him, or to any member of the Non-Agricultural Pool. Even if Mr. Sage had been the agent of the other members of the Non-Agricultural Pool on August 27, and he was not, he was not provided with written notice of exercise of an option. To the contrary, he was plainly informed that the notice would be given, if at all, in the future.

The trial court found that not even one of the 10 affected members of the Non-Agricultural Pool received the written Notice of Intent (VI:93 AA1439:4-7), and none even knew it existed. (VI:93 AA1438:25-28.) The trial court’s finding on this subject demonstrates that the notice was not communicated in any manner reasonably designed to apprise any or all of the 10 affected members of the Non-Agricultural Pool. The method of providing notice - if any notice was provided at all - was not even reasonable, let alone legally sufficient.

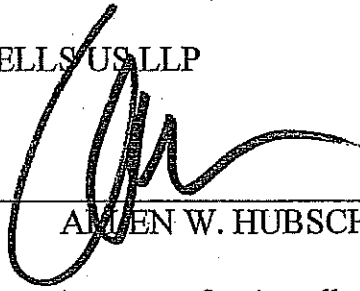
VI. CONCLUSION

For the foregoing reasons, the order of the trial court should be reversed. The Non-Agricultural Pool respectfully requests that the Court of Appeal issue a declaration that Watermaster did not provide the written Notice of Intent to Purchase in the manner required by the Peace II Option, the Peace II Agreement and the Judgment.

Dated: March 8, 2011

HOGAN LOVELLS US LLP

By



AMEN W. HUBSCH

Attorneys for Appellant
Non-Agricultural (Overlying) Pool Committee

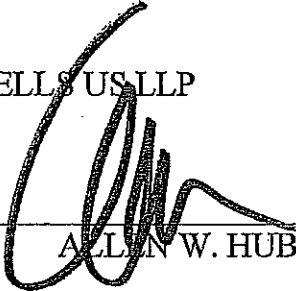
CERTIFICATE OF COMPLIANCE

I certify that, pursuant to California Rule of Court 8.204(c), the Opening Brief to which this certification is attached is proportionately spaced, has a typeface of 13 points, and contains 9,804 words, according to the counter of the word processing software with which it was prepared.

Dated: March 8, 2011

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4 COUNTY OF LOS ANGELES) ss.

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18 [] BY OVERNIGHT SERVICE. I caused such document to be delivered by overnight mail
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UPS/Federal Express office.

21 [X] (State) I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct. Executed on March 8, 2011, at Los Angeles, California.

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24 Kristen Echols
Print Name

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19 to the offices of the addressee(s) by placing it for collection by UPS/Federal Express
20 following ordinary business practices by my firm, to wit, that packages will either be
picked up from my firm by UPS/Federal Express and/or delivered by my firm to the
UPS/Federal Express office.

21 [X] (State) I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct. Executed on March 8, 2011, at Los Angeles, California.

23
24 Kristen Echols
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CHINO BASIN WATERMASTER

Case No. RCV 51010

Chino Basin Municipal Water District v. The City of Chino

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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 March 11, 2011 I served the following:

1. PARAGRAPH 31 MOTION APPEAL NON-AGRICULTURAL POOL OPENING BRIEF

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

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

Executed on March 11, 2011 in Rancho Cucamonga, California.



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