Civ. No. E051653

IN THE COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

NON-AGRICULTURAL (OVERLYING) POOL COMMITTEE and CALIFORNIA STEEL INDUSTRIES, INC. et al. ,

Appellants,

v.

CHINO BASIN WATERMASTER et al.,

Respondents.

Appeal from the Judgment of the Superior Court
State of California, County of San Bernardino

The Honorable Stanford E. Reichert, Judge Presiding
County Superior Court Case No. RCVRS 51010

RESPONDENT CHINO BASIN WATERMASTER'S BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, Fourth APPELLATE DISTRICT, DIVISION Two	Court of Appeal Case Number: E051653
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Scott S. Slater (State Bar No. 117317) Michael T. Fife (State Bar No. 203025) Brownstein Hyatt Farber Schreck LLP 21 East Carrillo St. Santa Barbara, CA 93101 TELEPHONE NO.: (805) 963-7000 FAX NO. *(Optional):* (805) 965-4333 E-MAIL ADDRESS *(Optional):* sslater@bhfs.com; mfife@bhfs.com ATTORNEY FOR *(Name):* Chino Basin Watermaster	Superior Court Case Number: RCVRS 51010 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: Non Agricultural (Overlying) Pool; CA Steel Ind. RESPONDENT/REAL PARTY IN INTEREST: Chino Basin Watermaster	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Chino Basin Watermaster

2. 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 Non-Agricultural Pool Committee
(2) Auto Club Speedway	Member of Non-Agricultural Pool Committee
(3) California Steel Industries, Inc.	Member of Non-Agricultural Pool Committee
(4) City of Ontario	Member of Non-Agricultural Pool Committee
(5) RRI Energy Etiwanda, Inc.	Member of Non-Agricultural 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: June 3, 2011

Ryan C. Drake (SBN 262580)
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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ATTACHMENT TO CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(continued from section 2 of Chino Basin Watermaster's Certificate of Interested Entities or Persons)

The following lists additional interested entities or persons required to be listed under Rule 8.208:

6. JFE Steel Corporation, Ownership Interest in California Steel Industries, Inc.

7. Vale Limited, Ownership Interest in California Steel Industries, Inc.

8. Ameron Steel Producers, Inc., Member of Non-Agricultural Pool Committee

9. County of San Bernardino (Airport), Member of Non-Agricultural Pool Committee

10. Vulcan Materials Company, Member of Non-Agricultural Pool Committee

11. CCG Ontario LLC, Member of Non-Agricultural Pool Committee

12. West Venture Development COD, Member of Non-Agricultural Pool Committee

13. Southern California Edison Co., Member of Non-Agricultural Pool Committee

14. Reliant Energy, Etiwanda, Member of Non-Agricultural Pool Committee

15. Space Center, Mira Lorna, Member of Non-Agricultural Pool Committee

16. Angelica Rental Service, Member of Non-Agricultural Pool Committee

17. Sunkist Growers, Inc., Member of Non-Agricultural Pool Committee

18. Swan Lake Mobile Home Park, Member of Non-Agricultural Pool Committee

19. Praxair, Member of Non-Agricultural Pool Committee

20. General Electric Corporation, Member of Non-Agricultural Pool Committee

21. California Speedway, Member of Non-Agricultural Pool Committee

22. Loving Savior of the Hills Lutheran Church, Member of Non-Agricultural Pool Committee

23. City of Chino, Member of Appropriative Pool Committee

24. City of Chino Hills, Member of Appropriative Pool Committee

25. City of Norco, Member of Appropriative Pool Committee

26. City of Ontario, Member of Appropriative Pool Committee

27. City of Pomona, Member of Appropriative Pool Committee

28. City of Upland, Member of Appropriative Pool Committee

29. Cucamonga County Water District, Member of Appropriative Pool Committee

30. Jurupa Community Services District, Member of Appropriative Pool Committee

31. Monte Vista County Water District, Member of Appropriative Pool Committee

32. West San Bernardino County Water District, Member of Appropriative Pool Committee

33. Etiwanda Water Company, Member of Appropriative Pool Committee

34. Feldspar Gardens Mutual Water Company, Member of Appropriative Pool Committee

35. Fontana Union Water Company, Member of Appropriative Pool Committee

36. Marygold Mutual Water Company, Member of Appropriative Pool Committee

37. San Antonio Water Company, Member of Appropriative Pool Committee

38. Monte Vista Irrigation Company, Member of Appropriative Pool Committee

39. Los Serranos Country Club, Member of Appropriative Pool Committee

40. Park Water Company, Member of Appropriative Pool Committee

41. Pomona Valley Water Company, Member of Appropriative Pool Committee

43. Santa Ana River Water Company, Member of Appropriative Pool Committee

44. Southern California Water Company/Golden State Water Company, Member of Appropriative Pool Committee

45. San Bernardino County (Shooting Park), Member of Appropriative Pool Committee

46. West End Consolidated Water Company, Member of Appropriative Pool Committee

47. Fontana Water Company, Member of Appropriative Pool Committee

48. City of Fontana, Member of Appropriative Pool Committee

49. Arrowhead Mountain Springs Water Company, Member of Appropriative Pool Committee

50. Department of Toxic Substances Control, Member of Appropriative Pool Committee

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I. INTRODUCTION

The question in this case is whether the Chino Basin Watermaster ("Watermaster") adequately complied with the notice requirement contained in a contract titled, *Purchase and Sale Agreement for the Purchase of Water by Watermaster From Overlying (Non-Agricultural) Pool* ("Purchase and Sale Agreement" or "Agreement").[1] (I:7 AA38-41; IV:51 AA842-845.)

Appellants[2] allege that the written "Notice Of Intent To Purchase" (I:25 AA167) (also referred to herein as "Notice") approved at a regular, noticed and open public meeting, where Appellants themselves voted in favor of approval, and that was published continuously and actually delivered to Appellants, did not meet the requirements of the Agreement. In order to make this argument, Appellants ask this Court to alter the text of the Purchase and Sale Agreement and to disregard months of public process surrounding performance under the Agreement.

After a lengthy and detailed review of the record and its recitation of the material facts, the trial court found that the written Notice was an affirmative, clear and final written notice of Watermaster's intent that fully complied with the Purchase and Sale Agreement, and that the representative of the Non-Agricultural Pool actually received the Notice in a timely manner. (VI:93, AA1430:15-17; 1432:1-2; 1433:22-25; 1439:13-14.) Watermaster respectfully requests this Court to affirm the same.

Appellants' opening briefs focus almost exclusively on the question

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[1] Appellants call the Purchase and Sale Agreement by the name "Peace II Option," even though that title occurs nowhere in the document and has never been used in any of the process associated with the document.

[2] Because the opening briefs of both Appellants Non-Agricultural Pool and California Steel Industry, Inc. ("CSI") make substantially similar arguments and CSI has joined in all of the Non-Agricultural Pool's brief, both will be addressed together.

of whether or not the Purchase and Sale Agreement is an option or a bilateral agreement. However, the determination by the trial court that the Agreement is not an option agreement had no bearing on the court's ultimate decision that notice was properly provided under the terms of the Agreement. The court found that Appellants actually received the notice required by the Agreement within the time period specified in the Agreement and, on this basis, denied Appellants' motion. This decision should be affirmed whether the Agreement is construed as a bilateral contract or an option, because the Non-Agricultural Pool received proper notice in accordance with the terms of the Agreement.

II. STATEMENT OF APPEALABILITY

Watermaster was created by the 1978 stipulated Judgment in the case *Chino Basin Municipal Water District v. City of Chino, et al.*, San Bernardino Superior Court Case No. RCV 51010 ("1978 Judgment"). (III:47 AA 467 et seq.)[3] Watermaster is considered an arm of and serves at the pleasure of the superior court. Under Paragraphs 15 and 31 of the 1978 Judgment, the court reserved broad continuing jurisdiction to hear motions brought by any party, and designated supplemental orders as appealable pursuant to Paragraph 31(e). Paragraph 31(e) states in relevant part: "The decision of the [Superior] Court in such proceeding shall be an appealable supplemental order in this case." (III:47 AA488:15-18.)

The 1978 Judgment sets forth a perpetual management plan for the Chino Basin pursuant to the court's ongoing oversight, and expressly includes a provision for future modification of that plan as necessary to adapt to technical changes in the Basin and evolving water supply needs

[3] The 1978 Judgment has been amended several times over the last 30 years. The Purchase and Sale Agreement is itself connected to the 2007 amendments. (See III:50 AA713-19; VI:93 AA1416.)

and operational considerations. (III:47 AA481-83.) The 1978 Judgment's capacity for adaptive basin management pursuant to the trial court's reserved jurisdiction is necessary not only to realize the intent of the stipulating parties, but also to ensure continuing compliance with Article X, Section 2 of the California Constitution, which requires that "the water resources of the State be put to beneficial use to the fullest extent of which they are capable." (Cal Const. Art. X, § 2; *Central and West Basin Water Replenishment District, etc. v. Southern California Water Company, et al.* (2003) 109 Cal.App.4th 891, 904-905.) Such continuing jurisdiction requires an ability of the parties to appeal the court's post-judgment orders in the event that such orders alter the terms of the original stipulation.

This Court previously reviewed and adjudicated an appeal from a post-judgment order arising from a stipulated judgment adjudicating groundwater rights in *Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723, 1725-27, 1730 [appeal of a trial court order amending a declaration of safe yield contained in the stipulated judgment delineating rights in the Warren Valley Basin].) Indeed, there are numerous examples of post-judgment orders previously appealed in the context of groundwater adjudications. (See *Cal. American Water v. City of Seaside* (2010) 183 Cal.App.4th 471 [appeal of a post-judgment order in the Seaside Basin adjudication]; *Central and West Basin Water Replenishment District, supra,* 109 Cal.App.4th 891 [appeal from a stipulated groundwater adjudication where the court reviewed the trial court's post-judgment order denying a motion to allocate unused storage space in the Central Basin].) Similarly here, the post-judgment order that is the subject of this appeal is reviewable in this Court as a special form of a post-judgment order.

III. STANDARD OF REVIEW

Where the trial court based its decision on a resolution of disputed facts, the trial court's decision will be affirmed so long as supported by substantial evidence. (*County of Riverside v. City of Murrieta* (1998) 65 Cal.App.4th 616, 620.) No modification of or addition to findings will be attempted where the trial court's findings are based on substantial evidence. (*Spaulding v. Cameron* (1952) 38 Cal.2d 265, 270; *Hicks v. Barnes* (1952) 109 Cal.App.2d 859, 863.)

The presumption being in favor of the trial court's judgment, the appellate court must also consider the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the trial court's judgment. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925; see also *Bandle v. Commercial Bank of Los Angeles* (1918) 178 Cal. 546, 547.)

The means by and circumstances under which Watermaster provided Notice to the Non-Agricultural Pool is a question of fact, subject to the substantial evidence standard. The trial court based its decision not just on the declarations filed with the pleadings, but also upon the unique and complex relationships that have developed over more than 30 years under the 1978 Judgment. (VI:93 AA1430:13-14; 1436:17.) The trial court made the factual determination that Mr. Sage, as representative of the Non-Agricultural Pool, timely received Watermaster's Notice, and that this written Notice complied with the requirements of the Purchase and Sale Agreement. On this basis, the court made the factual conclusion that written notice was provided as required under the Agreement. (VI:93 AA1434:9-11.)

The cases cited by Appellants do not support the proposition that the Court should review all matters in this case de novo. *Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, cited by the Non-Agricultural Pool, was

primarily a question of law that involved no evidentiary conflict, and the court applied statutory factors to interpret a document, not make a factual finding about a party's conduct. (*Id.*, at 215.) *Edmond's of Fresno v. MacDonald Group, Ltd.* (1985) 171 Cal.App.3d 598, 603, cited by Appellant CSI, solely involved interpretation of a lease agreement, and did not consider or resolve factual issues of notice, performance, or action by any party.

Additional cases cited by the Non-Agricultural Pool also involved pure questions of law involving interpretations of arbitration clauses. The courts were not called upon to make any factual determinations regarding performance or notice in any of the cases cited. (*Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1663; *Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1369 (de novo review of decision not to compel arbitration based on interpretation of arbitration clause); *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Hock Inv. Co.* (1998) 68 Cal.App.4th 83, 89 [de novo review of whether the parties formed a valid agreement to arbitrate].)

In an analogous case heard in this Court, *Riverside Fence Co. Inc. v. Novak* (1969) 273 Cal.App.2d 656, the trial court held that an option had been properly exercised in light of all of the evidence in the record. (*Id.*, at 660.) This Court interpreted the writing at issue de novo, but upheld the trial court's factual determination that there had been a timely communication of notice of intent to exercise the option, applying the substantial evidence standard. (*Id.*, at 661 ["There is substantial evidence that Mrs. Moore, as agent for plaintiff, made known to defendants the fact that plaintiff was accepting the option and tendering performance."].) Similarly here, although this Court will interpret the Purchase and Sale Agreement itself de novo, it should defer to the trial court's findings of fact that the Non-Agricultural Pool timely received Watermaster's Notice of

Intent to Purchase.

IV. STATEMENT OF FACTS

The central fact in this case is the final Notice completed by the Appropriative Pool and approved by the Watermaster Board. (IV:56 AA949). This Notice reads:

> Pursuant to Section C of the *Purchase and Sale Agreement for the Purchase of Water by Watermaster from Overlying (Non-Agricultural) Pool,* Watermaster hereby provides notice to the Overlying (Non-Agricultural) Pool that Watermaster intends to tender purchase of the Storage Transfer Quantity pursuant to the terms of the Purchase and Sale Agreement for the following uses: 36,000 acre-feet for use in a Storage and Recovery Agreement, and 2,652 acre-feet for use as Desalter replenishment.
>
> On August 13, 2009 the Appropriative Pool provided approval for issuance of this notice. The date of issuance of this notice is December 18, 2009.

This is a clear and unambiguous notice that was provided to the Non-Agricultural Pool through a variety of methods. To the extent that a controversy has arisen it is due to seller's remorse, rather than because of the adequacy of the Notice. As more fully explained below, in the two years between the time of approval of the Purchase and Sale Agreement and the time the Notice was provided, the value of the water at issue rose considerably. Appellants wish to receive the benefit of the current price of the water, rather than the price agreed upon in the Purchase and Sale Agreement.

The totality of the detailed facts of this case take place within the context of the 33-year life of the 1978 Judgment and the customs and

practices that have developed over that period of time. As evidenced by the numerous court orders and transcripts contained within the Appellant's Appendix, the trial court has been consistently involved with Watermaster and Appellants over this entire time span. (III:50, AA712, IV:55 AA938, IV:60-V62 AA970-1026, V:64-V:70 AA1116-1251.) The current dispute cannot be separated from this history. Indeed, the court was clear that one of the factual bases for its decision is the unique and complex relationships that have developed over the more than 30 years under the Judgment. (VI:93 AA1430:13-14; 1436:17.)

The manner in which the Non-Agricultural Pool has been administered for at least the last ten years is particularly significant to this case. As Appellants emphasize, the business of the Non-Agricultural Pool has been conducted by a single representative for many years. (NAP Brief, p. 7, citing to VI:78 AA1360:6-11.)[4] In fact, the quorum rules of the Non-Agricultural Pool are specifically designed to allow administration by a single individual. (II:42 AA431:1-6.) The historical fact that for many years a single individual has acted as the representative and agent of the Non-Agricultural Pool was a significant component of the trial court's factual analysis.

In June 2000, the trial court approved an agreement among all of the parties to the 1978 Judgment that was known as the "Peace Agreement."

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[4] No more than two members attended the 24 Non-Agricultural Pool meetings held between December 2007 and December 2009. (NAP Brief, p. 7, citing VI:78 AA1360.) At 13 of those meetings only one member attended. The record contains the meeting minutes from six of these 24 meetings. (I:11 AA57; I:15 AA76; I:17 AA83; IV:53 AA892, AA909, AA923.) The only individual that consistently attended all of these meetings was Mr. Sage. Where a second member of the Pool was also present, it was because Mr. Sage was joined at the meeting by Mr. El Amamy, the representative for the City of Ontario. The City of Ontario filed a separate brief in the superior court proceeding, claiming that notice had been properly provided. (VI:74, 75.)

(III:49 AA563.) The Peace Agreement addressed a number of issues, including the ability of members of the Non-Agricultural Pool to transfer their rights between themselves or to Watermaster for certain specified uses. (VI:93 AA1416:15-17.) The Peace Agreement was executed by Mr. Steven Arbelbide, on behalf of the entire Non-Agricultural Pool. (III:49 AA635; VI:93 AA1432:19-20.) Mr. Arbelbide was the representative for California Steel and was, at the time of execution of the Peace Agreement, the Chairman of the Non-Agricultural Pool. (II:32 AA284.)

On December 21, 2007, the court approved a further collection of agreements between the parties known as the "Peace II Measures." (III:50 AA719:15-17.) The Peace II Measures updated the set of agreements reached in the Peace Agreement. The Watermaster Board, of which the Non-Agricultural Pool is a member, unanimously approved the Peace II Measures as a whole. (I:2 AA21, 23.) Mr. Bowcock is presently the Chairman of the Non-Agricultural Pool and serves as the Non-Agricultural Pool representative on the Watermaster Board. (I:2 AA22.) No individual member of the Non-Agricultural Pool approved the Peace II Measures. (See generally, IV:51 [Peace II Measures lack signature blocks for individual Non-Agricultural Pool members].)

One of the Peace II Measures was the Purchase and Sale Agreement. (IV:51 AA843-45.) The court found that the idea behind the Purchase and Sale Agreement was Mr. Bowcock's, and that Mr. Bowcock negotiated the Purchase and Sale Agreement on behalf of the members of the Non-Agricultural Pool. (VI:93 AA1424:2-8.) The Purchase and Sale Agreement was executed by Mr. Bowcock on behalf of the entire Non-Agricultural Pool. (VI:93 AA1432:20-21.)[5] No other Non-Agricultural

[5] The copy of the Purchase and Sale Agreement filed by Appellants does not include a signature. However, no party contests that the Agreement was

Pool member signed the Purchase and Sale Agreement. (VI:93 AA1432:17-18.)[6]

In order to give the public entities in the Appropriative Pool sufficient time to raise the funds to make the purchase, the Purchase and Sale Agreement allowed for a two-year period between the court approval of the Agreement and the first payment date. (II:45 AA453; see also, VI:93 AA1417:13-17.) The Purchase and Sale Agreement contained an explicit condition subsequent requiring Watermaster to provide a Notice of Intent to Purchase by December 21, 2009. (II:45 AA453, ¶ H.)

Between 2007 and 2009, drought conditions in the State resulted in a rapid increase in the cost of water in Southern California. (VI:93 AA1422:8-12.) By the end of 2009, the price of water had risen such that if the water at issue had been sold at 2009 prices, the Non-Agricultural Pool members collectively would have received an additional $4.3 million for their water. (I:1 AA14:1; see also, I:2 AA:26, 29.)[7]

On August 11, 2009, Watermaster received court approval to conduct an auction of the purchased water. (IV:55 AA941.) For most of 2009, Watermaster had been preparing an auction of the purchased water, organized around an assumed purchase amount of 36,000 acre-feet ("AF"). (See II:42 AA432; IV:54 AA936-7.) However, the Non-Agricultural Pool storage accounts to be transferred totaled 38,652 AF, leaving a remainder of 2,652 AF. (See II:20 AA100.)

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signed by Mr. Bowcock and that he is the only individual to have signed the Agreement, and the court so found. (VI:93 AA1432:17-21.)

[6] The NAP Brief incorrectly states that, "The Peace II Option is on its face a unilateral agreement, to be signed only by **members** of the Non-Agricultural Pool . . . ." (NAP Brief, p. 20 [emphasis added].) The plural reference to "members" of the Non-Agricultural Pool is misleading as the Purchase and Sale Agreement contains only one signature block and was only signed by Mr. Bowcock.

[7] 38,652 AF x $112 incremental benefit (VI:93 AA 1417:23) = $4,329,024.

The first step in the implementation of the auction was for Watermaster to obtain title to the water by providing the Notice of Intent to Purchase. On August 27, 2009, the Watermaster Board approved the Notice of Intent to Purchase in compliance with the terms of the Purchase and Sale Agreement. (IV:56 AA949.) The trial court specifically considered and rejected Appellants contention that the Notice was not approved. (VI:93 AA1426:14-19.)

The Non-Agricultural Pool is a member of the Watermaster Board and voted to approve the Notice. (VI:93 AA1426:9-13; 1431:22-23; 1432:11-12.)[8] As part of this approval, the Watermaster Board requested the Appropriative Pool to further consider the identified use of the 2,652 AF remainder. As discussed below (see section V.A.1.c.), the Appropriative Pool was responsive to this request, but made no change to the Notice, and the matter was concluded.

Under the assumption that the condition subsequent had been satisfied, between September 2009 and November 2009 Watermaster proceeded to plan the auction of the 36,000 AF. (See IV:57 AA953; IV:58 AA958.) The tender of payment under the Purchase and Sale Agreement was originally planned to occur through the proceeds from the auction, which was to occur in November 2009. (I:2 AA24; II:42 AA432-33.) The Non-Agricultural Pool was an active participant in the auction process and

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[8] Appellants make much of a typographical error in the trial court's order whereby the court identified Mr. Bowcock as having been present at the August 27, 2009 meeting rather than Mr. Bowcock's employee Mr. Sage. (NAP Brief, p.3 n. 1.) The trial court's order discusses the August 27, 2009 meeting at length, and each time correctly identifies Mr. Sage as the individual who attended the meeting. In one place, the court misidentifies Mr. Bowcock as the individual who attended the meeting. (VI:93 AA1431:23.) On the very next page the court states three times that it was Mr. Sage that attended the meeting. (VI:93 AA1432:11-14.) The error emphasized by the Non-Agricultural Pool is clearly a harmless typographical error.

entered into a stipulation with the Appropriative Pool concerning the distribution of proceeds from the auction. (IV:54 AA936.) This stipulation was signed by Mr. Bowcock on behalf of the Non-Agricultural Pool. (I:54 AA937). No individual member of the Non-Agricultural Pool signed this stipulation. (IV:54 AA937.)[9] There is no evidence in the record that at any time throughout the process, any member of the Non-Agricultural Pool questioned whether the water had been properly acquired through satisfaction of the condition subsequent. No party alleged that Watermaster was attempting to sell water to which it did not have title.

The court found that throughout this process writings were produced and provided that could themselves be found to satisfy the notice requirement of the Agreement. (VI:93 AA1439.)

In early November 2009, the auction was postponed for reasons unrelated to this matter. (II:42 AA432-33; VI:93 AA1418:14-15.) When the auction was postponed, the Appropriative Pool approved a "Plan B" financing mechanism. (I:17 AA84.) On January 17, 2010, Watermaster tendered payment in accordance with the terms of the Notice. (II:42 AA433:25-27.)

On January 7, 2010, at the first meeting after the expiration of the December 21, 2009 deadline, the representative for Aqua Capital Management for the first time suggested that the Notice was defective. (II:29 AA268; see also I:20 AA96.) The Non-Agricultural Pool then filed a Paragraph 31 Motion challenging Watermaster's implementation of the Agreement. (I:1 AA1.) The court denied the Motion in total, finding that the August 27, 2009 Notice satisfied the condition subsequent under the

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[9] One member of the Non-Agricultural Pool (Aqua Capital Management) even sought to assume a central role in the auction as the price-floor bidder. (II:42, AA432:8-11.) At the time, Mr. Bowcock was a principal with Aqua Capital Management. (II:42, AA432, ¶ 10.)

Agreement. (VI:93 AA1413, AA1429-31.)

V. ARGUMENT

A. Watermaster Strictly Performed in Accordance with the Terms of the Purchase and Sale Agreement

As a factual matter, the trial court found that Watermaster satisfied the notice requirements of the Purchase and Sale Agreement. (VI:93 AA1429-31.) There is substantial evidence in the record to support the court's ruling that: (1) written Notice of Intent was provided in August 2009; (2) additional written Notice of Intent was provided after August 2009; and (3) announcement and payment were consistent with the Purchase and Sale Agreement and the approved Notice. The determination that Watermaster strictly complied with the Agreement is unaffected by the characterization of the Purchase and Sale Agreement as an option or as a bilateral contract because Notice was provided in strict conformity with the terms of the Purchase and Sale Agreement.

1. Written Notice of Intent Was Provided in August 2009

a. The Non-Agricultural Pool was Present at the August 27, 2009 Meeting Through its Representative Mr. Sage who Thereby Received Direct Notice of the Intent to Purchase the Water

The Purchase and Sale Agreement does not specify to whom the Notice is to be provided, does not specify the form of the Notice except to the extent that the Notice must be "written," and says that the Notice is to be "provided" rather than "delivered." (VI:93 AA1435:17-20.) Where an agreement does not prescribe any particular manner in which notice of intent to purchase is to be provided, any reasonable method of communicating such notice is proper. (*Lawrence v. Settle* (1960) 182

Cal.App.2d 386, 388-89.)

Appellants argue that the only acceptable form of "delivery" of the notice was through the U.S. Mail, citing to the notice requirements under the 1978 Judgment, but the trial court rejected this argument because the notice requirement under the Agreement was, ". . . a specific provision in a specific contract with a specific deadline..." that does not require delivery through the U.S. Mail. (VI:93 AA1436:22-23; see also, VI:93 AA1441:1-8 ["This provision of the judgment does not govern this type of post-judgment contractual relationship between the parties."].) Although not discussed by the trial court in its Order, Watermaster provided evidence that the notice was in fact delivered via regular mail to Mr. Bowcock. (II:41 AA417:5-10; II:43 AA438, ¶¶ 10-13.)

Instead, the court found that direct delivery to the Non-Agricultural Pool through its representative Mr. Sage at the August 27, 2009 Board meeting was a reasonable method of delivery. (VI:93 AA1436:4; 1426:9-11.) Mr. Sage is an employee of Mr. Bowcock and serves as Mr. Bowcock's alternate at Watermaster meetings. (II:2 AA21, ¶¶ 3-4.) At the time, Mr. Sage was the Vice-Chairman of the Non-Agricultural Pool. (II:2 AA21, ¶ 4.) There is no dispute that Mr. Sage was at the August 27, 2009 Board meeting and voted to approve the Notice as the Non-Agricultural Pool representative on the Watermaster Board.

b. Actual Written Notice Provided to the Pool Representative on Behalf of the Non-Agricultural Pool Complies with the Agreement

As they did at the trial court, Appellants incorrectly assume that notice under the Purchase and Sale Agreement was required to be provided to the individual members of the Pool. (NAP Brief, p. 21 (". . . no notice was given to the affected members of the Non-Agricultural Pool."); *id.*, p. 33 ("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"); see also *id.*, p. 37.) This assumption is a fundamental predicate to Appellants' entire argument, but it is inconsistent with the plain language of the Purchase and Sale Agreement.

As the trial court found, the specific words of the Purchase and Sale Agreement were carefully considered, negotiated and agreed upon. (VI:93 AA1430:4-6.) Furthermore, "[t]here is no specification as to how or to whom the notice of intent be provided." (VI:93 AA1432:6-7; see also I:7 AA39.)

Elsewhere in the Purchase and Sale Agreement, provisions make specific reference to the "Overlying (Non-Agricultural) Pool" or to the "Overlying (Non-Agricultural) Pool members," but when it comes to the Notice of Intent to Purchase, section C of the Agreement only says in relevant part, ". . . Watermaster will provide written Notice of Intent to Purchase the Non-Agricultural (Overlying) Pool water . . . ." (I:7 AA38-39.) The Purchase and Sale Agreement is silent on the issue of how or to whom notice is to be provided. Appellants' assumption that the Agreement requires that Notice be provided specifically to the Non-Agricultural Pool members assumes without argument that words exist in the Agreement that simply are not there.

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

Civil Code section 1582 governs transmittal of acceptances of offers:

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

Thus, where no specific method of "providing written notice" is

specified, any reasonable and usual method may be adopted. Where a contract merely suggests and does not require a particular manner of communicating acceptance, another means is not precluded. (*In re Crossman's Estate, supra*, 231 Cal.App.2d at 375 [rule applies in the context of contracts and option agreements].)

Based on the factual history of the Purchase and Sale Agreement, the most reasonable recipient of the Notice is the Non-Agricultural Pool, rather than the specific Non-Agricultural Pool members.[10] (VI:93 AA1436:4-12.) In point of fact, when Watermaster drafted the Notice of Intent, it directed it to the Non-Agricultural Pool, rather than to the specific members, and this form of the Notice was approved by the Watermaster Board, which included an affirmative vote from the Non-Agricultural Pool. (I:25 AA164-67.)

The Purchase and Sale Agreement was negotiated by the Non-Agricultural Pool representative, Mr. Bowcock, and the sole individual that executed the Agreement was Mr. Bowcock on behalf of the Pool. (VI:93 AA1432.) When a dispute arose about the disposition of the acquired water, it was Mr. Bowcock who signed the stipulation resolving the dispute on behalf of the Non-Agricultural Pool. (IV:54 AA936.) Similarly, the Peace Agreement was executed by then Pool representative Mr. Arbelbide on behalf of the entire Pool. (III:49 AA635.) Neither the Non-Agricultural Pool, nor any of its members, has ever alleged that any of these agreements are not valid and binding on every member of the Pool. As acknowledged

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[10] Even this interpretation assumes greater specificity than the Agreement contains. The Agreement is an interlocking piece of a package that affects all parties to the Judgment. Another reasonable interpretation of the Agreement is that the purpose of the Notice is to inform *all* parties of implementation of this part of the Peace II Measures. Under such an interpretation the Notice has the same function and legal consequence as, for example, a notice of a Watermaster Board meeting or a Court hearing.

by Appellants in their opening briefs, (NAP Brief, pp. 7-8; CSI Brief, p. 13), for many years the business of the Non-Agricultural Pool has been conducted by a single individual, and the Pool rules are constructed in order to make such administration possible. If words are to be inserted into the Agreement that imply a specific recipient of the Notice, then these words should be consistent with the past practices of the parties and should mirror the way that the Agreement was negotiated and executed.

The trial court properly recognized this context:

> In all of the many exhibits, declarations, and pages of argument submitted to the court, there is no express delegation of authority by any individual member of the non-agricultural pool to sign any agreement. Therefore the court must conclude that the delegation of authority exists by either informal agreement or custom and practice. Part of that informal agreement or custom and practice must include allowing watermaster and the appropriative pool to provide written notice to a single individual of the nonagricultural pool.

(VI:93 AA1433:6-14.)

An agent has a duty to disclose material matters to the principal, and the actual knowledge of the agent is imputed to the principal. (Civ. Code, § 2332.) "It is ... well-settled law in this state that notice given to or possessed by an agent within the scope of his employment and in connection with and during his agency, is notice to the principal. [Citations]." (*Early v. Owens* (1930) 109 Cal.App. 489, 494.) This rule rests on the assumption that the agent "...will communicate to his [or her] principal all information acquired in the course of his [or her] agency, and when the knowledge of the agent is ascertained the constructive notice to the principal is conclusive. [Citation]." (*Id.*; see also *Triple A Management Co. v. Frisone* (1999) 69 Cal.App.4th 520, 534–535.)

It is undisputed that Mr. Bowcock, as the Non-Agricultural Pool Representative, is an agent of the Pool.[11] (I:2 AA21, ¶ 4.) The creation of an agency relationship is not dependent upon the existence of a written agency agreement, but rather may be, and frequently is, implied based on conduct and circumstances. (*Flores v. Evergreen At San Diego, LLC* (2007) 148 Cal.App.4th 581 [even when there is no written agency authorization, an agency relationship may arise by oral consent or by implication from the conduct of the parties]; see also, *Ferroni v. Pacific Finance Corp. of Cal.* (1943) 21 Cal.2d 773.) Conduct by each party manifesting acceptance of a relationship, where one is to perform service for the other under the latter's direction, creates an agency relationship. (*Malloy v. Fong* (1951) 37 Cal.2d 356.)

It is also undisputed that Mr. Sage was at the time of receiving the Notice of Intent to Purchase at the August 27, 2009 Board meeting, an employee and agent of Mr. Bowcock. (I:2 AA21, ¶¶ 3-4.) Notice to Mr. Sage is imputable to and the equivalent of notice to the Non-Agricultural Pool. Because the subagent owes the same duties to the principal as does the agent, it follows that the relationship between subagent and principal is a fiduciary one. (*Mendoza v. Rast Produce Co., Inc.* (2006) 140 Cal. App. 4th 1395.) There is substantial evidence supporting the trial court's determination that at the time of receiving the Notice, Mr. Sage was acting as an agent of Mr. Bowcock, and thus acting as a subagent of the Non-Agricultural Pool to receive notice. When Mr. Sage, acting in place of Mr. Bowcock as his agent at the August 27, 2009 Board meeting received notice, the Pool received notice.

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[11] Indeed, at the superior court hearing in this matter, it was Mr. Bowcock that the Pool's attorney called seeking direction when faced with the Court's tentative order. (Reporter's Transcript of Proceedings, June 18, 2010, p. 31:10-17.)

The Non-Agricultural Pool does not cite any California case law in support of its argument that notice to Mr. Sage as representative of the Pool was insufficient. It cites two cases from other jurisdictions, Connecticut and Illinois, that are non-controlling. (*Schneider v. Schneider* (1947) 82 Cal.App.2d 860, 862 [a clearly established California rule of law may not be overruled by decision in another state].) Both cases are distinguishable.

O'Connor v. Chiascone (1943) 130 Conn. 304, involved a tenant providing notice to an administrator of a deceased landlord's estate, where the court held that notice had to be given to the dead landlord's heirs, not the administrator of the estate. (*Id.*, at 306-309.) In *O'Connor*, the court explained that an administrator is not an "agent" of the heirs, and is not subject to their control. (*O'Connor*, *supra*, 130 Conn. at 307-08.) "...[H]is possession and control are only for the purpose of making [the estate] or the income from it available to meet charges against the estate; and his rights are in derogation of those of the heirs." (*Id.*, at 308.) Thus, the court concluded that notice to the administrator would not be notice to the heirs. (*Id.*)

In contrast here, Mr. Sage was a representative of the Non-Agricultural Pool with powers to act on behalf of the Pool. Furthermore, under an administrator's relationship to heirs of an estate, "...his possession is in a sense hostile to their interests." (*Id.*) No such hostility exists here between the Pool representative and the Non-Agricultural Pool; by nature, the Pool representative serves the best interests of the Pool.

Kurek v. State Oil Company (1981) 98 Ill.App.3d 6, also cited by the Non-Agricultural Pool, was a forcible detainer action where a tenant provided notice to renew an option to a beneficiary of a land trust rather than the trustee, where the beneficiary was not an agent of the trustee. (*Id.*, at 7-9.) The court held that a lessee of property held in a land trust failed to properly exercise an option to renew the lease term when the lessee gave

notice to the land trust beneficiary, rather than the trustee who had executed the lease as the lessor. (*Kurek*, *supra*, 98 Ill.App.3d at 9-10.) Title to the leased premises was vested with the trustee and the trustee was the lessor of the premises. (*Id.*)

Similar to the administrator in *O'Connor*, *supra*, "the beneficiaries [were] not the agents of the trustee for any purpose and [did] not have any authority to contract or to execute leases or do any other act for or in the name of the trustee or to obligate the trustee personally or as trustee." (*Kurek*, *supra*, 98 Ill.App.3d at 7.) The court in *Kurek* found that since there was no agency relationship between the beneficiary and the trustee, the notice should have gone to the party who signed the document, the trustee as lessor. (*Id.*) Unlike in *Kurek*, here Watermaster provided its Notice to the agent of the party who executed the Agreement on behalf of the Pool — Mr. Sage at the August 27, 2009 Board meeting.

c. The Notice Provided Was Final and Complete

Much of Appellants' arguments, both before the trial court and in the opening briefs, is an attempt to characterize the multi-month sequence of events that took place within the Watermaster process as evidence that the Notice was not complete. (See, e.g., NAP Brief, pp. 25-31.)

However, the court specifically considered and rejected this factual argument. The court considered the declarations that were submitted, as well as the unique and complex relationships that have developed over more than 30 years under the Judgment, and concluded that: "There is no question that there was a written notice of intent, and the written notice of intent for the August 27, 2009 watermaster board meeting was complete." (VI:93 AA1432:8-10.) Appellants present no compelling argument as to why the trial court's determination is not supported by substantial evidence.

Appellants allege that the Notice was incomplete because of

discussions about the ultimate use of a portion of the water purchased. The sole condition on the action at the August 27, 2009 Board meeting was the referral to the Appropriative Pool of the specific question of the allocation of 2,652 acre-feet of the acquired water. (See I:13 AA68-69.) Following the Board action of August 27, 2009, the Appropriative Pool was responsive to the Board's request and reconsidered the use designation for the 2,652 acre-feet. (I:13 AA68-69; I;15 AA77.) No party has alleged that the Appropriative Pool ever indicated any other intention than to purchase the entire amount of water in storage.

An identical staff report on this subject was included in the agenda packages for the October and November Joint Appropriative and Non-Agricultural Pool meetings, and this staff report recommended no change to the Notice. (I:14 AA74-75; I:16 AA80-82.) At the October meeting, the minutes reflect that the issue was tabled, and there is no record of any further discussion. (I:15 AA77.) In other words, the Appropriative Pool never decided to make any change to the Notice that it had approved on August 13, 2009. No further action of the Board was necessary, because the Appropriative Pool made no change to the final Notice.

The trial court correctly found that the additional discussion regarding the allocation of the 2,652 AF did not invalidate the Board's approval of the Notice of Intent to Purchase. (VI:93 AA1433.) Having received notice of the Appropriative Pool's intent to purchase all of the stored water, and payment having been timely tendered for the entire 38,652 AF at the specified price, the Non-Agricultural Pool cannot now claim that any ambiguity existed because of the subsequent discussions about the allocation of the 2,652 AF between the two permissible purposes, and that this ambiguity somehow nullified the entirety of the Notice.

The approved Notice was an affirmative, clear written notice of intent to purchase which the court found to be sufficient compliance with

the Purchase and Sale Agreement. (VI:93 AA1430:15-17; 1432:1-2; 1433:22-25; 1439:13-14.)

2. Additional Forms of Written Notice Were Provided After August 2009

While the trial court found that the actual delivery of the Notice to Mr. Sage at the August 27, 2009 Watermaster Board meeting was sufficient in itself to comply with the notice requirement of the Purchase and Sale Agreement, during the months of process between August 27, 2009 and the notice deadline of December 21, 2009 the court found other factual circumstances that constituted satisfactory notice.

a. Electronic Distribution of the Written Minutes of the August 27, 2009 Meeting, and Posting on the Watermaster Website was an Additional Reasonable Means of Providing Written Notice

Watermaster provided evidence to the court of the history of notice provided under the 1978 Judgment and the progression, at the direction of the court, toward electronic service. (II:41 AA417:11- AA419:23.) Evidence was presented to the court of Watermaster's current notice practices under the court-approved Watermaster Rules and Regulations. (II:43 AA436-438.) The court properly concluded that providing notice of the Board's August 27, 2009 action in compliance with these procedures was itself sufficient compliance with the Purchase and Sale Agreement. (VI:93 AA1431:24-1432:2; 1434:6-8; 1436:13-14.)

As early as 1998, the court noted that the internet would be an efficient alternative to paper notice which is expensive and, ". . . a lot of people are probably throwing this stuff away." (VI:65 AA1127:3-5.) Ultimately this has become the process that is in use by Watermaster today. Since at least 2002, Watermaster practice has been to provide an email

notice to the service list with a link to the Watermaster website. Parties navigate to the appropriate place and can view or print a copy of the documents that have been noticed. (II:43 AA437.) No party, in particular no Non-Agricultural Pool party, has ever complained that this process is unduly burdensome.

As required by the court, Watermaster performed a comprehensive revision of its Rules and Regulations in 2001. Specifically, section 2.7 of the revised Rules and Regulations permits notice by electronic mail: "Notice may be provided by either facsimile or electronic mail delivery if the party so consents to such delivery." (V:63 AA1046.) At the March 8, 2001 Special Referee Workshop concerning the Rules and Regulations, the sole explication given for section 2.7 was that: "we can give notice by fax, email, and then copies of all notices are also to be posted to the Watermaster website." (V:66 AA1186.) By Order dated July 19, 2001, the court approved these Rules and Regulations. (V:67 AA1191.)

Thus, there is ample evidence in the record supporting the trial court's determination that electronic distribution and posting on the Watermaster website of the written minutes of the August 27, 2009 Board meeting was an additional means of providing written notice, reasonable in light of Watermaster's current and past practices.

b. Subsequent Watermaster Meetings in November 2009 Provide Further Evidence of the Non-Agricultural Pool Being Provided with Written Notice of an Intent to Purchase the Water

Both at the trial court and in their opening briefs, Appellants argue extensively about the factual interpretation to be given to the process concerning the purchased water following the August notice. In particular, an extensive process occurred to plan the auction of the purchased water in order to use the funds to finance the purchase, with the remainder to be

used to fund facilities improvements necessary for the ongoing management of the Basin. The court made specific findings regarding interpretation of the document known as "Plan B" which was an alternative funding mechanism by the Appropriative Pool in order to generate the funds necessary to tender payment under the Purchase and Sale Agreement when the auction was postponed. (I:17 AA84-5; VI:93 AA1438-39.)

First, the court concluded that "Plan B" did not evidence that notice had not been provided, as argued by Appellants. (VI:93 AA1437:12-14.) Appellants argue that the phrasing of the first item on the Plan B list should be interpreted to mean that as of the time of consideration of Plan B, the Notice had not been provided. The trial court considered the detailed facts surrounding Plan B, the timing of its drafting, and its purpose, and rejected Appellants' arguments, finding that the totality of the circumstances surrounding Plan B did not support a conclusion that notice had not been provided. (VI:93 AA1439-40.)

Second, the court found that written materials associated with the Plan B alternative financing plan, in particular cost allocation handouts at the November 19, 2009 meetings showing the cost to each Appropriative Pool member to tender the first payment to the Non-Agricultural Pool for the full 38,652 AF, are further written evidence of notice having been provided to the Non-Agricultural Pool of the intention to complete the purchase. (VI:93 AA1439:25-28.)

Appellants cite a number of cases that state the basic rule that where the acceptance of an option is by the terms of the contract to be made in a particular manner, the optionee must strictly follow that manner of acceptance. (NAP Brief, pp. 19-21; CSI Brief, pp. 7-8.) The cases cited, such as *Hayward Lumber & Ins. Co. v. Construction Prod. Corp.* (1953) 117 Cal.App.2d 221, involve situations where a party simply failed to provide written notice at all. (*Hayward Lumber*, *supra*, 117 Cal.App.2d at

228; see also *Bekins Moving & Storage Co. v. Prudential Insurance Co.* (1985) 176 Cal.App.3d at 248 [air conditioning work performed was not a substitute for written notice].) These cases are distinguishable from the present situation, where Watermaster provided a written notice within the terms of the Purchase and Sale Agreement. However where, as here, the agreement in question is non-specific as to the form of the written notice, and writings are produced and provided that unambiguously demonstrate an intent to make the purchase, those writings may suffice to satisfy the notice requirement.

3. Announcement and Payment Were Consistent with the Purchase and Sale Agreement

Appellant Non-Agricultural Pool argues that, "Tender of payment in January 2010 demonstrates that the written Notice of Intent to Purchase was not provided in August 2009 . . . ." (NAP Brief, p. 30.)[12]

The Notice as approved in August reflects Watermaster's intention to demonstrate clear title to the water prior to conducting the auction, while at the same time deferring payment to the Non-Agricultural Pool until the auction could be concluded in November 2009.

The Notice reads:

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

The Notice recites that it was approved by the Appropriative Pool on

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[12] This quotation goes on to assert that: "[. . .] neither Watermaster nor the Appropriative Pool believed [the Notice] had been provided in August 2009." The Non-Agricultural Pool's account of the facts in this case appears to depend on the idea that Watermaster and the Appropriative Pool believed that Notice had not been provided. However, if this were true, it is unclear why neither the Appropriative Pool nor Watermaster seemed concerned that notice had not been provided given the clear intention to acquire the water. Appellants offer no explanation for this inconsistency.

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

So that it could demonstrate that written notice had been provided but still defer the payment obligation until the auction could be completed, the Appropriative Pool adopted a written notice that post dated the issuance date until December 18, 2009. This would defer the payment under the Agreement until Watermaster could complete the auction and acquire the several million dollars necessary to fund the purchase. The Non-Agricultural Pool was present for the discussion of this approach, and raised no objection. (I:11 AA57-58, 60-61.) The Non-Agricultural Pool voted to approve this form of notice at the August 27, 2009 meeting. (I:13 AA68-69.)

Callisch v. Franham (1948) 83 Cal.App.2d 427, cited by Appellant CSI, has no application here. That case held that where an option for the sale of real property required the optionee to pay a designated sum upon "exercise" of the option, a letter in which the optionee informed the optionor that he had "elected to go through with and complete their deal," without tender of the sum mentioned in the agreement, did not constitute strict compliance with the option by the optionee. (*Id.*, at 430-31.) Therefore, there was no valid exercise of the option. (*Id.*) Here,

Watermaster provided written notice of intent to the Non-Agricultural Pool representative. No tender of a designated sum was required in order to provide adequate written notice of intent to purchase the water. Watermaster subsequently tendered payment to the Non-Agricultural Pool pursuant to the terms of the Purchase and Sale Agreement and consistent with the Notice. (I:2 AA29, ¶ 24.)

B. The Court Properly Found that the Purchase and Sale Agreement was Not an Option Agreement, However, This Finding Played No Part in the Court's Decision

1. The Purchase and Sale Agreement Does not Satisfy the Judicial Definitions of an Option

In the event of ambiguity, California law presumes a contract to be bilateral contract rather than a unilateral option. (*Patty v. Berryman* (1949) 95 Cal.App.2d 159, 167.)

The Non-Agricultural Pool, pointing to a line of cases it claims "further simplified the distinction between an option and a purchase contract," simplifies too much under the present facts. (NAP Brief, p.17.) Citing to *Scarbery v. Bill Patch Land & Water Co.* (1960) 184 Cal.App.2d 87, 100, the Non-Agricultural Pool states that the test for whether a contract is an option or a purchase contract is "whether there is such an obligation on the part of the optionee to buy that it can be enforced by specific performance." (*Id.*) In *Scarbery*, the court held that an agreement originally intended to be a contract for sale of a ranch property but which, as finally drawn, imposed no express obligation to buy on the purchaser was nevertheless a contract of sale rather than a lease and option, where there was no provision that relieved the purchaser of any further liability. (*Scarbery*, 184 Cal.App.2d at 99-100.)

There, the court explained:

> [U]nless the instrument provides that the optionee shall be relieved from any further liability other than forfeiting

> liquidated damages, it may be construed as a contract of purchase and sale if it is shown that such was the intention of the parties.

(*Id.*, at 100.)

The Non-Agricultural Pool claims Section H, "...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." (NAP Brief, p. 16.) But the notion that the Purchase and Sale Agreement is an option because Watermaster had no obligation to purchase any water under Section H, is unpersuasive at best from the language of Section H itself.

The Purchase and Sale Agreement includes express contractual provisions governing what occurs if the Notice was not provided. Section H of the Purchase and Sale Agreement expressly states that the failure to provide notice results in an "Early Termination" of the transfer and an ability by Watermaster to purchase the water at a higher price for distribution to the members of the Appropriative Pool rather than for the limited purposes as described in Section A. If the Purchase and Sale Agreement were an option contract, then there could be no "Early Termination," because failure to issue the Notice would result in a failure of contract formation in the first place. In addition, the Appropriative Pool consented to the alienability of the surplus Non-Agricultural Pool water through Section H, and this element of consideration became binding on the Appropriative Pool upon court approval of the Purchase and Sale Agreement.

Appellants cite *Steiner v. Thexton* (2010) 48 Cal.4th 411 as further support for their claim that the Purchase and Sale Agreement is an option. The *Steiner* case is distinguishable because the agreement in that case obliged Thexton, the seller, to hold open an offer to sell the parcel at a fixed price for three years. (*Id.*, at 418.) Steiner had the power to accept the

offer by satisfying or waiving the contingencies and paying the balance of the purchase price; however, because of the escape clause, Steiner was not legally obligated to do anything. The relevant term provided, "It is expressly understood that [Steiner] may, at [his] absolute and sole discretion during this period, elect not to continue in this transaction and this purchase contract will become null and void." (*Id.*, at 418-19.)

Moreover, the court noted that the term's express language permitted Steiner to terminate the agreement even if all contingencies had been satisfied—Steiner testified at trial that the term gave him the power to terminate the agreement at any time for any reason, including if he had found a better deal. (*Id.*) For that reason, the court rejected the notion that the agreement should be construed as a bilateral contract subject to a contingency, rather than an option.

In contrast to the agreement in *Steiner*, here the sole condition precedent to the formation of the contract is identified in Section G as court approval. (I:7 AA39.) The Notice to be provided is specifically identified as a condition subsequent in Section H, and not a condition precedent to contract formation. (I:7 AA39.) Also of key import, in contrast to the facts in *Steiner*, once the court approved the Purchase and Sale Agreement in December 2007, Watermaster could not simply walk away and terminate the Agreement; under the express terms of the Purchase and Sale Agreement a contract was formed.

The court in *Steiner* stated, "It is true...that a common form of real estate contract binds both parties at the outset (rendering the transaction a bilateral contract) while including a contingency, such as a loan or inspection contingency, that allows one or both parties to withdraw should the contingency fail. However, withdrawal from such a contract is permitted only if the contingency fails." (*Steiner*, *supra*, 48 Cal.4th at 419.) Here, as is clear from the face of the Agreement, Section H of the Purchase

and Sale Agreement states that providing the Notice is a condition subsequent. (VI:93 AA1429.) The Purchase and Sale Agreement is thus a bilateral contract with a contingency that Watermaster provide written notice of intent to the Non-Agricultural Pool, which Watermaster did at the August 27, 2009 Board meeting and by distributing its agenda packet for that meeting, as discussed above.

Finally, nowhere in the Purchase and Sale Agreement does it state that Watermaster is providing the Non-Agricultural Pool consideration for holding the offer to sell the water open for a specified period of time, a key feature of an option. An option contract relating to the sale of real property is not a sale of the property, but is a sale of the right to purchase. (*Beran v. Harris* (1949) 91 Cal.App.2d 562, 564.) Sections H and G of the Purchase and Sale Agreement make it clear that this was not a sale by the Non-Agricultural Pool of a right to purchase the water as part of Peace II with separate consideration; rather, it was a bilateral contract with a condition subsequent for Watermaster to notify the Non-Agricultural Pool it was purchasing the water and how it intended to use it.

2. The Court Properly Found that Prior Remarks Characterizing the Purchase and Sale Agreement Were not Controlling

The trial court correctly found that past references to the Purchase and Sale Agreement as an "option" cannot transform the Agreement into an option, despite Appellants' claims. The Non-Agricultural Pool claims that looking outside of the plain language, the Purchase and Sale Agreement is an option because Watermaster staff and counsel previously referred to the Purchase and Sale Agreement as an "option," arguing estoppel. (NAP Brief, pp. 12-14, 17.)

The trial court correctly found that Watermaster's prior "short-hand" referral to the Purchase and Sale Agreement as the "option" was

unpersuasive and in any event, not controlling. (VI:93 AA1429-30.) The court held that even though Watermaster may have referred to the rights under the contract as an option, reviewing the instances cited by the Non-Agricultural Pool in their opening brief, the court properly concluded that the contract language itself must govern the interpretation of the contract. (VI:93 AA1429-30.)

As this Court previously stated in a case cited by the Non-Agricultural Pool in its opening brief, *Welk v. Fainbarg* (Cal.App.4.Dist. 1967) 255 Cal.App.2d 269, "...[T]he law looks through the form to substance and gives effect to the intention of the parties....Thus, the express terms, such as "option"...as used by the parties are not solely controlling of the interpretation of the agreement as executed." (*Id.*, at 272-73; see also *Steiner, supra,* 48 Cal.4th at 418.)

Similarly here, the fact that Watermaster counsel or staff may have at some points referred to the Purchase and Sale Agreement as an option does not mean that this Court must construe it as an option. Applying this established rule, the trial court found that based on the evidence presented, reference to a portion of the Purchase and Sale Agreement as an option "was only a short-hand description of the rights and obligations under the purchase and sale agreement, and cannot vary actual wording of the contract." (VI:93 AA1430:7-9.)

3. The Court Did Not Reach the Equitable Questions of Substantial Performance and Estoppel, Because it Found that Notice was Actually Received

The question of whether or not the Agreement is an option is relevant only to the question of whether equitable doctrines such as substantial performance and estoppel are relevant to the analysis. If the Agreement is not an option, but a bilateral agreement with a condition subsequent, Watermaster's compliance would be analyzed in light of

equitable doctrines such as substantial performance. Whether performance is substantial is a question of fact. If a party in effect performs as promised, that is sufficient; if the failure to make full performance can be compensated in damages, and if the deviations were not willful and do not substantially affect the usefulness of the purposes of the agreement, the contract will not be rescinded. (*Zalk v. General Exploration Co.* (1980) 105 Cal.App. 3d 786, 794-95.)

Watermaster argued in the trial court that even if Watermaster somehow deviated from the terms of the Purchase and Sale Agreement in providing its Notice, Watermaster substantially performed because any deviation was minor and would not affect the usefulness of the purpose of the agreement. (See II:41 AA411-415.) There is no doubt that the Non-Agricultural Pool knew that Watermaster and the Appropriative Pool intended to perform under the Agreement and to timely tender payment. In December 2009, Watermaster collected funds to tender payment and in fact did so on the appropriate date. A Watermaster Board meeting occurred days before the notice deadline was to expire, and the Non-Agricultural Pool was present at this meeting. As a member of the Board, the Non-Agricultural Pool has a fiduciary duty to Watermaster. In this fiduciary capacity, the Non-Agricultural Pool should have notified Watermaster that it believed the condition subsequent had not been satisfied in order to allow Watermaster the opportunity to cure any perceived defects. Instead, the Pool lay in wait and sprang their trap just days after the expiration of the deadline. At that time, the Notice was again immediately provided and no harm has been articulated to Appellants from the delay of two weeks over the holidays.

The court specifically concluded that it need not reach these issues because of its factual finding that there had been strict compliance with the terms of the Agreement when Watermaster provided notice to the Non-

Agricultural Pool. (VI:93 AA1441:11-14.)

VI. CONCLUSION

The superior court rendered an intensively fact-based opinion that comprehensively addressed the contentions raised by the parties. The factual finding that Notice was properly provided has ample evidence in the record to support it and should be affirmed.

Dated: June 3, 2011

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: _____

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CHINO BASIN WATERMASTER

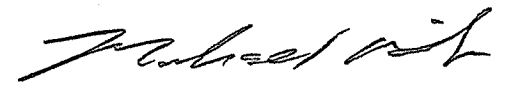
CERTIFICATED OF COMPLIANCE

(Cal. Rules of Court, Rule 8.204(c)(1))

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 9,551 words, according to the counter of the word processing software with which it was prepared.

DATED: June 3, 2011

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By 

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PROOF OF SERVICE

I am over the age of eighteen years and not a party to the within-entitled action. My business address is Brownstein Hyatt Farber Schreck, LLP, 21 East Carrillo Street, Santa Barbara, CA 93101. On June 3, 2011, I served a true and correct copy of the within document(s):

RESPONDENT CHINO BASIN WATERMASTER'S BRIEF

in a sealed envelope, postage fully paid, addressed as follows:

See attached Service List

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

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

Executed on June 3, 2011, at Santa Barbara, California.

Maria Klachko-Blair

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FOURTH APPELLATE DISTRICT

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