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,

vs.

CHINO BASIN WATERMASTER et al.,

Respondents.

Appeal from the Judgment of the Superior Court
State of California, County of San Bernardino
Superior Court Case No. RCVRS 51010

THE HONORABLE STANFORD E. REICHERT, JUDGE PRESIDING

RESPONDENT APPROPRIATIVE POOL'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*): John J. Schatz (SBN 141029) P.O. Box 7775 Laguna Niguel, CA 92607-7775 TELEPHONE NO.: 949-683-0398 FAX NO. (*Optional*): 949-305-6865 E-MAIL ADDRESS (*Optional*): ATTORNEY FOR (*Name*): Attorneys for Respondent Appropriative Pool	Superior Court Case Number: RCVRS 51010 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: NON-AGRICULTURAL (OVERLYING) POOL COMMITTEE and CALIFORNIA STEEL INDUSTRIES, INC., et al. RESPONDENT/REAL PARTY IN INTEREST: CHINO BASIN WATERMASTER, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Respondent Approprative Pool

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) City of Chino	Member of Appropriative Pool Committee
(2) City of Chino Hills	Member of Appropriative Pool Committee
(3) City of Norco	Member of Appropriative Pool Committee
(4) City of Ontario	Member of Appropriative Pool Committee
(5) City of Pomona	Member of Appropriative 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: July 25, 2011

John J. Schatz
(TYPE OR PRINT NAME)

▶ John J. Schatz
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
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ATTACHMENT 2

Full Name of Interested Entity or Person	**Nature of Interest**
(6) City of Upland	Member of Appropriative Pool Committee
(7) Cucamonga County Water District	Member of Appropriative Pool Committee
(8) Jurupa Community Services District	Member of Appropriative Pool Committee
(9) Monte Vista County Water District	Member of Appropriative Pool Committee
(10) West San Bernardino County Water District	Member of Appropriative Pool Committee
(11) Etiwanda Water Company	Member of Appropriative Pool Committee
(12) Feldspar Gardens Mutual Water Company	Member of Appropriative Pool Committee
(13) Fontana Union Water Company	Member of Appropriative Pool Committee
(14) Marygold Mutual Water Company	Member of Appropriative Pool Committee
(15) San Antonio Water Company	Member of Appropriative Pool Committee
(16) Monte Vista Irrigation Company	Member of Appropriative Pool Committee
(17) Los Serranos Country Club	Member of Appropriative Pool Committee
(18) Park Water Company	Member of Appropriative Pool Committee
(19) Pomona Valley Water Company	Member of Appropriative Pool Committee

(20) Santa Ana River Water Company	Member of Appropriative Pool Committee
(21) Southern California Water Company/Golden State Water Company	Member of Appropriative Pool Committee
(22) San Bernardino County (Shooting Park)	Member of Appropriative Pool Committee
(23) West End Consolidated Water Company	Member of Appropriative Pool Committee
(24) Fontana Water Company	Member of Appropriative Pool Committee
(25) City of Fontana	Member of Appropriative Pool Committee
(26) Arrowhead Mountain Springs Water Company	Member of Appropriative Pool Committee
(27) Department of Toxic Substances Control	Member of Appropriative Pool Committee

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I. INTRODUCTION

Appellants[1] in this case are duplicitously asking this Court to let them argue both ways under an expansively negotiated agreement. (VI:93 AA1430.) They do this for the purpose of extracting another $4.3 million from cash-strapped public agencies for the sale of water. (I:1 AA14:1; see also, I:2 AA:26, 29.)

Appellants argue the 2007 *Purchase and Sale Agreement for the Purchase of Water by Watermaster From Overlying (Non-Agricultural) Pool* ("Agreement") is an option agreement. (NAP Brief, p. 15; CSI Brief 5; I:7 AA38-41; IV:51 AA842-845.) But they ask the Court to recognize only part of the Agreement as an option while enforcing other provisions as a bilateral contract. Doing so allows them to gain another $4.3 million dollars[2], to which they would not have been entitled but for the existence of the bilateral contract.

Appellants disavow their NAP representative who signed the Agreement upon which their argument for more money is precariously perched. (NAP Brief, pp. 34 & 36.) They argue he is of no subsequent representative consequence. This raises the issue of fraud in the inducement for Watermaster to enter into the Agreement in the first place. Nonetheless, Appellants want part of the Agreement enforced anyway.

Appellants must have recognized and understood that Watermaster unambiguously notified them they intended to purchase the water. The parties negotiated and executed the Agreement in the

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[1] Appellants include i) the Non-Agricultural (Overlying) Pool and ii) California Steel Industries, Inc., and are collectively referred to herein as "Appellants" or "the NAP", but separately referenced for purposes of citation to their respective Respondents' Briefs.

[2] 38,652 AF X $112 incremental benefit (VI:93 AA1417:23.) = $4,329,024.

context of a long history of familiar dealings with each other. Appellants simply cannot plausibly claim ignorance or surprise –this is a money grab.

Appellants assert the Judgment does not afford deference to Watermaster's actions. (NAP Brief, p. 2.) Yet they selectively and conveniently cite Watermaster as authority in an attempt to lead this Court down a path strewn with tortuous contract and legal interpretations. They liberally cite Watermaster's shorthand reference to the Agreement as substantive proof of an option agreement. (NAP Brief, pp. 11-15.) Yet ironically and duplicitously, Appellants criticize the trial court for using shorthand labels such as "condition subsequent" for definitional purposes. (NAP Brief, p. 2.)

As the overarching entity that includes the Overlying (Non-Agricultural) Pool, Appropriative Pool and Agricultural Pool, Chino Basin Watermaster is required by the Judgment to administer the Judgment. This includes orders of the trial court such as Peace II Measures from which the Agreement stems. (III:47 AA482:9-12.)

Watermaster has filed its comprehensive Respondent's Brief. As a member entity of Watermaster, the Appropriative Pool joins in and adopts by reference Respondent Chino Basin Watermaster's Brief pursuant to California Rules of Court, Rule 8.200, subdivision (a)(5). The Appropriative Pool also makes the following arguments.

II. STATEMENT OF APPEALABILITY

In compliance with the Appeal Court's directive to explain why as required by Rule 8.204(a)(2) the trial court's order is appealable, the Appropriative Pool joins in and adopts by reference Section II of Respondent Chino Basin Watermaster's Brief.

III. STANDARD OF REVIEW

Appropriative Pool agrees with Watermaster that this Court should defer to trial court's factual findings as they are supported by substantial evidence, and hereby joins in and adopts by reference Section III of Respondent Chino Basin Watermaster's Brief. This Court may review the Agreement *de novo*, but should not decide factual issues determined by the trial court.

IV. ARGUMENT

Appellants are asking this Court to after-the-fact define and characterize the Agreement and actions of the parties. This is in contravention to the common sense conclusion supported by the record that there is no reason why Watermaster or the Appropriative Pool would have desired to pay $4.3 million more for the water by not providing notice in a manner consistent with the Agreement. Appellants are hoping this Court will ignore the facts of what happened involving familiar parties with unique and complex relationships that developed over more than 30 years. (VI:93 AA1430:13-14; 1436:17.) As indicated in the record, over the course of several months, these parties met, conferred and discussed Watermaster's obvious intent and actions, including the provision of notice. (I:2 AA23:6 -31:3.)

Appellants are asking this Court to assist in the post-hoc construction of a legal edifice as a bar to the facts and circumstances in 2009. These facts are integral to the trial court's finding that notice was provided consistent with the Agreement. The record indicates that to the NAP's full knowledge and understanding notice was provided and they were to be paid accordingly for the water. (VI:93 AA1434:9-

1435:14.)

A. The Agreement Is In All Respects A Bilateral Contract

Appellants ignore the trial court's strong factual findings to obscure the court's determination that Watermaster strictly complied with the Agreement irrespective of whether it is characterized as an option or bilateral agreement. Consequently, on the basis of the extensive factual record, the trial court did not need to go further. Under any characterization of the Agreement, notice was provided. (VI:93 AA1429:8-1435:14.)

Appellants make much of distinguishing between a condition subsequent and an option. (NAP Brief, pp. 20-37; CSI Brief, pp. 5-6.) This is done for the purpose of plowing an option agreement road of their own making months after they knew full well that notice had been provided. As a factual matter under any characterization of the Agreement, the trial court found that Watermaster satisfied the Agreement's notice requirements. (VI:93 AA1429:8-1435:14.)

Even if the Agreement is reviewed with respect to Appellants' option argument, Appellants' reliance on *Palo Alto Town & Country Village, Inc. v. BBTC Co.* (1974) 11 Cal.3d 494 (*Palo Alto*) and *Dawson v. Goff* (1954) 43 Cal. 2d 310 is misplaced. (NAP Brief, pp. 18-19; CSI Brief, p. 5.) Appellants are merely attempting to blur the distinction between an option agreement and condition subsequent in a bilateral contract. This is for the purpose of diverting attention from the trial court's determination that regardless of the Agreement's characterization, the factual record clearly indicates notice was provided in accordance with the Agreement and consistent with informed, familiar parties. (VI:93 AA1429:8-1433:19.)

In contradiction to what Appellants imply, the *Palo Alto* court

was not suggesting and did not find conditions subsequent and option agreements are the same. *Palo Alto* and *Dawson* only make reference to an option as a binding contract subject to performance of a condition precedent by the optionee, without any reference to a condition subsequent. (*Palo Alto Town & Country Village, Inc.*, 11 Cal.3d at 502-503.) Neither *Palo Alto* or *Dawson*, includes or ever uses the term "condition subsequent". Further, these cases do not address the effect of this term within an agreement of any type, including an option agreement. Citing inapposite authority, Appellants make the unsupported logical leap that the presence of a condition subsequent in a bilateral agreement means it is really an option agreement. (NAP Brief, p. 19; CSI Brief, p. 5.) If otherwise, there would be no difference for purposes of notice between a condition subsequent and an option agreement.

Even in the case of an option contract, *Palo Alto* says (in citing *Estate of Crossman* (1964), 231 Cal.App.2d 370) "when the option contract merely suggests, but does not positively require, a particular manner of communicating the exercise of the option, another means of communication is not precluded." (*Palo Alto Town & Country Village, Inc.*, 11 Cal.3d at 498.) (emphasis added) If this Court is to infer anything from *Palo Alto*, it would be that even if the Agreement at hand is an option, since the delivery method of written notice was not specified, the manner used by Watermaster was consistent with the Agreement.

The trial court agreed with this and, consistent with *Palo Alto*, found no need to make further findings with respect to any qualitative differences between the Agreement with the condition subsequent and an option agreement. (VI:93 AA1436:19-21.) This is because a particular manner of the qualitative notice was not specified in the

Agreement.

With respect to the trial court's extensive factual findings, the court recognized in the milieu of familiar parties and the complex relationships that have developed over the course of more than 30 years, this is a family fight. (VI:93 AA 1430:10-14,1433:9-11.) This dispute is not among uninformed or unfamiliar deal-making strangers that otherwise may have included a particular means of proving notice. In fact, the trial court recognized that given the familiarity of represented parties and the expansion negotiations involving the Agreement, "the court must conclude that specific words of the purchase and sale agreement were carefully considered, negotiated, and agreed upon". (VI:93 AA1430:3-6.)

In conclusion, with respect to the characterization of the Agreement, the extensive trial court factual record clearly indicates reliance on lofty legal arguments is not necessary. This is so because under any characterization, the outcome is the same – notice was provided in a manner consistent with the Agreement.

B. Appellants Cannot Have It Both Ways By Disavowing Their Agreement Signatory Representative

Appellants disavow Mr. Bob Bowcock and Mr. Kevin Sage as NAP representatives. To wit: "The power of the (NAP) 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." (NAP Brief, p. 36.) Appellants provide no citations for this assertion. Moreover, the statement is false on its face, since Mr. Bowcock executed the Agreement on behalf of the NAP, which includes all of its members.

If it is true only a member can sell, or contract to sell its water rights, the Agreement would have been entered into with individual members of the NAP. Instead, the Agreement at issue, which Appellants are not asserting is invalid, is the basis upon which Appellants are seeking an additional $4.3 million in payment for the water. The trial court correctly came to the opposite conclusion: "[a]lthough the non-agricultural pool contends there was never any delegated authority to individual members, their actions refute that contention" (VI:93 AA1432:28-1433:1-2); "[t]herefore the court must conclude that the delegation of authority exists by either informal agreement or custom and practice." (VI:93 AA 1433:9-11.) The trial court recognized the familiarity of the parties and practice of doing business.

Appellants are asking this Court to enforce the very Agreement Mr. Bowcock signed on behalf of and as the representative of the NAP (VI:93 AA1432:20-21; CSI Brief, p. 14.) However, Appellants deny they were noticed even though Mr. Bowcock executed the Agreement on behalf of the NAP. (NAP Brief, p. 34; VI:93 AA1436:11-12.) Appellants cannot have it both ways: if Mr. Bowcock was the NAP's negotiator and the only NAP representative to sign the Agreement, whom better to receive notice?

Appellants cannot now say Mr. Bowcock was not an authorized representative to make the argument that all NAP members were to be provided with a particularized form of notice not referenced in the Agreement. If otherwise, Watermaster must have been fraudulently induced to enter into and sign an agreement upon which the NAP now stands behind, at least for the purpose of enforcing payment of an additional $4.3 million for the water. (I:1 AA14:1; see also, I:2 AA:26, 29.)

To follow Appellants' argument, one can only conclude that Mr. Bowcock either was or was not for all purposes the NAP's representative. (NAP Brief, pp. 34 & 36.) Appellants cannot use Mr. Bowcock as their representative to sign the Agreement and then ask this Court to disregard him and his representative role after that. (NAP Brief, pp. 34 & 36.)

Indeed, Appellants argue:

> Nothing in the Judgment, for example, suggests that the Chair (Mr. Bowcock; (I:2 AA22.)) or Vice Chair, or the representatives designated for the Advisory Committee or the Watermaster Board (Mr. Bowcock; (I:2 AA22.)), 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.

(NAP Brief, p. 34.) The NAP cannot bring an action on the Agreement signed by Mr. Bowcock if he was not the NAP's representative. If otherwise, the Agreement is void and Watermaster was induced under fraudulent circumstances to enter into it in the first place.

The NAP is not disclaiming the Agreement, only its characterization. (NAP Brief, pp. 18-20; VI:93 AA 1429:8-11.) As a consequence, no other conclusion can be reached except that Mr. Bowcock and Mr. Sage were acting in a representative capacity. This capacity applies for the purpose of executing the Agreement (regarding Mr. Bowcock). It also subsequently applies regarding notice and the direct involvement of the NAP in the significant and relevant actions and activities found by the trial court to have occurred in 2009. (VI:93 AA1424:21-1427:14.)

Appellants state that Vulcan Materials Company ("Vulcan"), which is a client of Mr. Bowcock, who in turn employs Mr. Sage, was

not affected by the Agreement. (NAP Brief, pp. 2, 34 & 36.) In fact, Vulcan was the beneficiary of a "Special Transfer Quantity" under the Agreement, which was negotiated by Mr. Bowcock on behalf of his client, Vulcan. (II:45 AA454.) Consequently, since Mr. Bowcock negotiated a different transaction, with different price terms for his client than the other NAP members, it is clear he was acting as the NAP's representative. If otherwise, he would not have negotiated different terms for Vulcan than for the other NAP members.

If Mr. Bowcock and Mr. Sage did not represent a party not impacted by the Agreement and did not represent the NAP, who did they represent? If Appellants are disavowing Mr. Bowcock as the NAP's representative and his pivotal role in these proceedings, why does he currently remain as the NAP's Chairman? (I:2 AA21:21-22.)

C. Watermaster's Shorthand Reference To The Agreement Is Not Dispositive With Respect To Its Character

Appellants devote considerable time arguing numerous instances of Watermaster's shorthand reference to the Agreement as *ipso facto* proof it is an option. (NAP Brief, pp. 11-15.) In contradiction to the importance of what Watermaster said, Appellants state Paragraph 31 of the Judgment, under which this action was brought, does not afford deference to Watermaster's actions, findings, or decisions. (NAP Brief, pp. 2, 10.) If so, why do Appellants contradict themselves by citing Watermaster's shorthand reference to the Agreement as definitional proof? This is done solely for the purpose of catapulting what constitutes notice beyond the parties' intent under the Agreement.

Indeed, the trial court found the Agreement calls the written notice of intent a condition subsequent. (VI:93 AA1429:12-14.) The

trial court further found the contract language itself must govern its interpretation even though there are many characterizations as an option. (VI:93 AA1429:15-18.)

Appellants cite *Universal Sales Corp.* v. *California Press Mfg. Co.* (1942) 20 Cal.2d 751 in noting that the correct interpretation of the terms of a contract is the practical construction placed by the parties upon the instrument. (NAP Brief, p. 12.) The Appropriative Pool agrees. The trial court also agreed by finding Watermaster's actions, not its words, were consistent with the notice provision concerning the condition subsequent. (VI:93 AA1429:12-1430:9.)

V. CONCLUSION

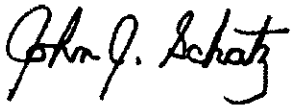
As strongly supported by the record in this case, the trial court found there was a bilateral agreement with a condition subsequent and that notice was provided in a manner consistent with the Agreement.

The Non-Agricultural (Overlying) Pool will be paid for the water regardless of whether this Court upholds the trial court's decision. It will receive more than $8 million, but just not an additional $4.3 million, for a total of over $12 million.[3]

Respondent Appropriative Pool respectfully requests the Court of Appeal to uphold the trial court's findings and decision in this case.

Dated: July 25, 2011

JOHN J. SCHATZ

By: 

John J. Schatz
Attorneys for Appropriative Pool

[3] 36,000 AF (I:10 AA55) times the amount to be paid each year (I:7 AA39) = $8,010,000.

Certificate of Word Count

(California Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of approximately 2727 words as counted by Microsoft Office Word 2002 used to generate this brief.

Dated: July 25, 2011

JOHN J. SCHATZ

By: John J. Schatz

John J. Schatz
Attorneys for Appropriative Pool

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PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 300 South Grand Avenue, 25th Floor, Los Angeles, California 90071. On July 25, 2011, I served the following document(s):

RESPONDENT APPROPRIATIVE POOL'S BRIEF

☒ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed below (specify one):

☒ Placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

☒ **Electronic Service of Civil Appellate Briefs to Supreme Court.**** I caused a single electronic copy of a civil appellate brief to be served on the California Supreme Court via Electronic Notification Address (the "Service") pursuant to California Rules of Court, rule 8.212. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

SEE ATTACHED SERVICE LIST.

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

Executed on July 25, 2011, at Los Angeles, California.

Faith Kristiansen

PROOF OF SERVICE MAILING LIST

NON-AGRICULTURAL (OVERLYING) POOL COMMITTEE and CALIFORNIA STEEL INDUSTRIES, INC. et al. ,
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vs.
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Respondents.
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Con
CHINO BASIN WATERMASTER
Case No. RCV 51010
Chino Basin Municipal Water District v. The City of Chino

PROOF OF SERVICE

I declare that:

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

On July 26, 2011 I served the following:

1. RESPONDENT APPROPRIATIVE POOL'S BRIEF

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

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

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

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

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

Executed on July 26, 2011 in Rancho Cucamonga, California.

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