4TH CIVIL NO.

E051653

In the Court of Appeal

OF THE

State of California

FOURTH APPELLATE DISTRICT
DIVISION TWO

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

v.

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

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

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Respondents do not seriously challenge Appellants' contention that the Peace II Option was an option. As an option, the Appropriative Pool (and Watermaster acting as the Pool's agent)[1] is held to a materially higher legal standard with respect to giving of the required Notice of Intent to Purchase.

The Notice of Intent to Purchase did not exist, in the sense that it was never *finalized and approved*. The staff reports and official meeting minutes in the appellate record establish that the Appropriative Pool never finalized the Notice of Intent to Purchase, and despite reminders from Watermaster staff, the Appropriative Pool never instructed Watermaster staff to give the Notice of Intent to Purchase. Because the notice did not exist in final or approved form, it could not be given.

Even if finalized and approved, the notice was not given by a method that complied with the terms of the Peace II Option and applicable law. The Notice of Intent to Purchase was not (A) given in strict compliance with the Peace II Option; (B) given in an unequivocal manner; or (C) communicated to the legal owners of the Pre-2007 Storage Water. The notice was not even given in a manner reasonably designed to reach the

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[1] Respondent Watermaster asserts that Watermaster is an "arm of the court." It would be more accurate to say that Watermaster is a partisan enterprise under the supervision of the court. The Appropriative Pool consists of municipal water companies, who also hold a majority of seats on the Watermaster Board. (I:2 AA21 ¶¶5-9.) Watermaster Counsel and staff act at the direction of the Board, which requires, in all matters relating to the Peace II Option and this appeal, that they effectively act as agent of the Appropriative Pool. For this reason, the Judgment provides that all actions of Watermaster are subject to de novo review. (III:47 AA488 ¶31.) No deference is requested by Watermaster, or should be afforded.

10 affected members of the Non-Agricultural Pool.

II. ARGUMENT

A. The Peace II Option Is An Option

In their Opposition Briefs, Respondents do not seriously dispute that the Peace II Option was an option. For that reason, the Non-Agricultural Pool does not repeat here the extensive argument and authority contained in its Opening Brief on the subject. The Non-Agricultural Pool refers the Court to the Opening Brief.

Respondents do continue to argue that the use of the term "condition subsequent" in Paragraph H of the Peace II Option is, somehow, inconsistent with the conclusion that Paragraph C of the Peace II Option is an option agreement. A condition subsequent is "a future event, upon the happening of which the obligation of the other party ceases". (Witkin, *Summary of California Law*, 10th Ed., Contracts §793.) California courts have established that conditions necessary to make an option effective are conditions subsequent. (*Hoover Comm. Hotel Corp. v. Thomson* (1985) 167 Cal.App.3d 1130, 1138 (where option contract required third-party approval, the failure by one party to obtain such approval was "simply a condition subsequent"); *City of Vernon v. Southern Cal. Edison* (1961) 191 Cal.App.2d 378, 388 (where option was held by City of Vernon, to be exercised by written notice upon the occurrence of certain facts, the occurrence of such facts were "conditions subsequent"); *Garcia v. Gunn* (1897) 119 Cal. 315, 320-321 (where landlord held an option to terminate a lease as to a portion of the demised land, the exercise of the option was a "condition subsequent").) The use of the term "condition subsequent" in Section H of the Peace II Option is not only consistent with the conclusion that Section C is an option, but supports it.

As will be discussed in more detail in a subsequent Section of this Reply Brief, the determination that the Peace II Option was an option has a significant effect on the legal standard to be applied to the notice that was required to be given by the Appropriative Pool.

B. The Notice of Intent to Purchase Was Not Finalized

1. The August 27 Board Meeting

The Peace II Option specifically stated that the Notice of Intent to Purchase could be given "only with the prior approval of the Appropriative Pool". (I:7 AA39). In addition, the Peace II Option specifically required that Watermaster provide a written notice "which therein identifies" whether the Pre-2007 Storage Water would be used for Desalter Replenishment or a Storage and Recovery Program. (Id.) Desalter Replenishment and Storage and Recovery would have basin-wide benefits for all parties to the Judgment. No other uses were permitted. (Id.) The evidence establishes that the Appropriative Pool never finalized its identification of intended uses. Because Watermaster was required to specifically identify the intended uses in the body of the Notice of Intent to Purchase, the notice could not be given, and was not given.

Interpretation of the Peace II Option is subject to de novo appellate review. "The interpretation of a *written instrument*, even though it involves what might properly be called questions of fact, is essentially a judicial function." (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 (In Bank) (citation omitted) (emphasis added).) In addition to the Peace II Option, this appeal involves a handful of other *written instruments* – namely several Watermaster staff reports and official meeting minutes from 2009. There is no dispute as to the authenticity of these writings. These writings are also themselves subject to de novo review as "written

instruments." (*Parsons,* 62 Cal.2d at 865.)

On August 21, Watermaster staff submitted a report to the Watermaster Board in anticipation of the Board's August 27 meeting. (I:25) The staff report described its attachment as a "form of notice". (I:25 AA165-167.) The official minutes of the August 27 meeting of the Board show that there was substantial discussion at the meeting regarding the substance of the notice, and lingering uncertainty about the Appropriative Pool's intended use of the Pre-2007 Storage Water. (I:13 AA68-69.) The minutes reflect that Fontana Water Company, a member of the Appropriative Pool, requested that the substance of the Notice of Intent be referred back to the Appropriative Pool. (I:13 at AA68). That same day, the Advisory Committee had voted to refer the Notice of Intent to Purchase back to the Appropriative Pool. (Id.) And the Watermaster CEO reported that the Appropriative Pool was considering an entirely new plan for the use of the Pre-2007 Storage Water. (Id. at AA68-69.) The minutes establish that, in the end, the Watermaster Board approved the "form of notice" as presented but referred the substance of the notice "back to the Appropriative Pool for *further consideration and a separate motion*". (Id. AA69 (emphasis added).)

At the next meeting of the Appropriative Pool Committee, on October 1, 2009, the Appropriative Pool re-considered the use of the Pre-2007 Storage Water. According to the official meeting minutes, the members of the Appropriative Pool Committee could still not agree among themselves on the intended use. (I:14 AA74-75.) Among other things, the Fontana Water Company still did not agree with staff's recommendation on the matter. (Id.) The Appropriative Pool Committee voted to "table the item for 30 days for further discussion and possible Watermaster staff

recommendations." (Id.)

2. The November 5 Appropriative Pool Meeting

At the next meeting of the Appropriative Pool Committee, on November 5, 2009, the Appropriative Pool again re-considered identification of the use of the Pre-2007 Storage Water. In the report submitted by Watermaster staff to the Appropriative Pool Committee for that meeting, Watermaster staff reminded the Appropriative Pool that the Notice of Intent to Purchase had still not yet been given: "Staff recommends that the Appropriative Pool direct Watermaster to issue the Notice of Intent to Purchase prior to December 21, 2009". (I:16 AA81.) This was the sole recommendation contained in the staff report. (I:16 AA81-82.) It was not part of a laundry list. It was a very specific and unmistakable reminder to the Appropriative Pool Committee that, as of November 5, 2009, the Notice of Intent to Purchase had still not been given. (I:16 AA81.)

At the November 5 meeting, the Appropriative Pool adopted the so-called "Plan B" in a closed session. (I:16 AA82; I:17 AA84.) Plan B, as shown in the agenda package, provided that the Appropriative Pool would continue to defer identification of the intended uses for up to an additional 3 years. (I:16 AA82 ¶8.) And, per Plan B, the Appropriative Pool could simply distribute the water to themselves, rather than apply the water to the two permitted uses. (I:16 AA82 ¶8.) By adopting Plan B, the Appropriative Pool had, in effect, announced that it would no longer comply with the terms of the Peace II Option. It would not identify the intended uses in the Notice of Intent to Purchase (i.e., on or before December 21, 2009). And it would not confine the uses to the two permitted uses. An option must be accepted strictly in accordance with its

terms. Any alteration in terms is tantamount to a rejection of the option. (*Hayward Lumber & Inv. Co. v. Construction Products Corp.* (1953) 117 Cal.App.2d 221, 227 (and cases cited therein).)

Respondents contend that the affected members of the Non-Agricultural Pool should have reminded the Appropriative Pool to give notice. Respondents cite no legal authority for the proposition that a reminder must be given. Moreover, the record establishes that Watermaster staff had reminded the Appropriative Pool in unequivocal terms, and in a timely manner, that the notice had not been given. (I:16 AA81.)

Respondents contend that the affected members of the Non-Agricultural Pool should have alerted the Appropriative Pool of defects in the process. But there is no evidence that a revised Notice of Intent to Purchase was given after the Appropriative Pool's adoption of Plan B. Moreover, the Appropriative Pool Committee adopted Plan B in closed session, with undisclosed amendments, and with a "revised version to be distributed to the Pool." (I:17 AA84.) There is no evidence that the 10 affected members of the Non-Agricultural Pool received Plan B, or knew its terms. None of Respondents' declarations refer to the November 5 meeting of the Appropriative Pool, or refer to Plan B, or describe how or when it was revised, or to whom any final version was sent, or allege that

any notice regarding the adoption of Plan B was given at all.[2] The 10 affected members of the Non-Agricultural Pool cannot be estopped from asserting defects that they did not know about. There was neither a final Plan B to correct, nor a Notice of Intent given pursuant to it to correct. And, contrary to Respondents' arguments, the weight of legal authority is that an optionor has no obligation to respond to a defective option notice. A non-compliant notice is "nugatory, and it may be ignored". *Hayward*, 117 Cal.App.2d at 227 (quoting *Carney v. Heisch*, (1924) 67 Cal.App. 465, 467); *Landberg v. Landberg* (1972) 24 Cal.App.3d 742, 752 (if the acceptance is non-compliant, the "purported acceptance may be ignored by the optionor").)

Substantively, Plan B contemplated that the allocation to Desalter Replenishment and Storage and Recovery might be 0% and 0%, respectively, in the sole discretion of the Appropriative Pool -- an outcome completely inconsistent with the meaning and intent of the Peace II Option. (I:16 AA82.) Distribution by the Appropriative Pool of the Pre-2007 Storage Water to themselves would deprive the Non-Agricultural Pool of the basin-wide benefits of Desalter Replenishment and Storage and Recovery. Distribution by the Appropriative Pool of the Pre-2007 Storage Water to themselves, rather than application to the two permitted uses, would deprive the Non-Agricultural Pool of a benefit specifically bargained

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[2] When the testimony consists solely of declarations, the appellate court reviews factual matters de novo as well. *Marcus & Millichap v. Hock Inv. Co.* (1998) 68 Cal.App.4th 83, 89; *Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1663; *Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1369; *Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 213; *In re Tobacco Cases I*, 124 Cal.App.4th 1095, 1105; *CPI Builders, Inc. v. IMPCO Technologies, Inc.* (2001) 94 Cal.App.4th 1167, 1171-1172). Respondents have ignored this line of cases entirely in their briefs, and

for in the Peace II Option. If a Notice of Intent to Purchase consistent with Plan B had been given to the Non-Agricultural Pool, it would have been tantamount to a rejection, and ineffective. (*Hayward*, 117 Cal.App.2d at 227; *Landberg*, 24 Cal.App.3d at 752.)

There is no evidence that Plan B was submitted to the Watermaster Board for "a separate motion" after November 5. There is no evidence that the "form of notice" approved by the Watermaster Board was revised after November 5 to "identify therein" the three uses contemplated in Plan B. There is no evidence that any Notice of Intent to Purchase was given after (or before) November 5.

Instead, there is substantial evidence that, as late as November 5, the Appropriative Pool was still debating the intended uses of the Pre-2007 Storage Water. By adopting Plan B, the Appropriative Pool declared that no allocation previously discussed had been "final". Plan B did not identify any allocation between the two permitted uses, but merely continued to defer the identification, if any, for three more years, well beyond December 21, 2009. (I:16 AA82.) By adopting Plan B, the Appropriative Pool effectively declared that it would not comply with the requirement that identification be limited to the two permitted uses, or with the requirement that the identification be made in the Notice of Intent to Purchase. The Appropriative Pool had effectively rejected the Peace II Option. A Notice of Intent to Purchase consistent with Plan B could not be given in accordance with the Peace II Option.

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have cited cases which are inapposite, because they did not involve matters determined solely on declarations.

3. Untimely Tender of the Option Price

Under the Peace II Option, the first installment of the option price was payable within 30 days of giving the Notice of Intent to Purchase. (I:7 AA39 ¶D.) The Appropriative Pool did not tender the first installment of the option price until about January 18, 2010. (VI:83 AA1375; II:29 AA269 ¶8.) If the Notice of Intent to Purchase had been final and given on August 27, 2009, then the first payment was due on or before September 26, 2009. If the Notice of Intent to Purchase had been final and given on November 5, 2009, then the first payment was due on or before December 5, 2009. The fact that the Appropriative Pool did not make the first payment until about January 18, 2010 further establishes that the Appropriative Pool did not believe that the Notice of Intent to Purchase had been given on August 27, 2009, or even on November 5, 2009. In fact, the Appropriative Pool did not make the first payment until several days after the members of the Non-Agricultural questioned whether the notice had been given at all. (I:2 AA28-29 ¶¶22&24; II:29 AA268, ¶¶5&8.) Failure to timely pay the option price is evidence of non-compliance. *Callisch v. Franham* (1948) 83 Cal.App.2d 427, 430 (optionee must "show strict compliance with the terms of the option agreement – including payment or tender of the amount specified within the time stated").)

The evidence establishes that the Notice of Intent to Purchase was never finalized in a manner that complied with the express terms of the Peace II Option. As such, the notice could not be given, and was not given. Respondents arguments to the contrary are not supported by competent evidence in the declarations or otherwise.

C. The Notice of Intent to Purchase, Even If Finalized, Was Not Properly Given

If the Peace II Option was an option, then the Appropriative Pool had the following obligations: (1) provide notice in strict compliance with the Peace II Option; (2) provide notice that was clear and unambiguous; (3) provide notice directly to the legal owners.

1. Strict Compliance Was Required

In their Opposition Briefs, Respondents suggest that the Peace II Option was "silent" on the issue of how notice was to be provided, and that Watermaster was therefore free to give notice in any manner that was reasonable. This argument is contrary to the facts. In addition to the requirement that Watermaster specifically "identify therein" the intended uses of the water, the Peace II Option also required that the notice be "written". (I:7 ¶C.) The meaning of this word, and its application to the facts in this case, is a matter of contract interpretation, and is subject to de novo appellate review.

The requirement for "written" notice excludes oral notice. Oral conversations, whether at meetings or otherwise, and regardless of who participated in them, could not constitute proper notice under the Peace II Option. Respondents argue in the Opposition Briefs about oral statements allegedly made at a meeting on November 19. No declarant testified about such discussions, and there is no competent evidence thereof, only argument. Moreover, oral discussions, even if they had occurred, would not have been an effective substitute for the "written" notice expressly required by the Peace II Option.

Whether "written" notice also excludes "electronic" notice appears to be a matter undecided by California courts. If the Notice of Intent to

Purchase had been final, which it was not, and had been given by facsimile transmission, or as the text of an email, or as an attachment to an email, then this case might involve more difficult issues of novel contract interpretation. However, none of those forms of communication occurred in this case.

In this case, an undetermined number of the 10 members of the Non-Agricultural Pool who held pre-2007 Storage Water may have been sent a generic email on or about August 21, 2009.[3] Making to reference to any notice, the email, if sent, merely stated that agendas and packages for the August 27 meetings of the Advisory Committee and Watermaster Board were available for download on the ftp section of Watermaster's website. (I:21 AA111.) The email contained no other information, and provided no other notice. (*Id.*) It also contained no attachments. (*Id.*) In fact, the August 21 email was in the same generic form as countless emails on the same subject circulated by Watermaster staff on a monthly basis for at least several years previously. (VI:78 AA1361:8-12.) The email made no mention of the Peace II Resolutions, the Peace II Agreement, the Peace II Option or the written Notice of Intent to Purchase. (I:21 AA111.) Nor did the email reflect any action actually taken by Watermaster – it was about a future meeting of the Watermaster Board. (*Id.*)

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

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

If the August 21 email was notice of anything, it was only notice that one of many monthly regular meetings of the Watermaster Board would occur in the future. The August 21 email was in generic form. There was no hint of relevance to the Peace II Option. It was not notice of an intent to exercise the Peace II Option, and certainly was not "written" notice of such

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[3] There is no competent evidence in the record that even this email was sent. None of Respondents' declarants testified to having prepared or sent this particular email, or testified regarding what date it was sent, or to whom, or at what addresses. None of Respondents' witnesses authenticated the email that is attached as Exhibit I:21. In contrast, all of Appellants' declarants testified that they did not receive the Notice of Intent to Purchase. (I:2 AA30 ¶26; I:29 AA268 ¶3&4; I:30 AA283 ¶3 I:31 AA283 ¶3; I:32 AA284 ¶3; I:33 AA285 ¶3; I:34 AA292 ¶3; I:35 AA299 ¶3.)

intent.[4]

2. Unequivocal Notice Was Required

The party exercising an option must inform the optionor "in unequivocal terms of his unqualified intention to exercise his option". (*Hayward*, 117 Cal.App.2d at pp. 227-228; *Bekins Moving & Storage Co. v. Prudential Ins. Co. of America*, (1986) 176 Cal.App.3d 245, 251.) "A clear and unambiguous notice, timely given, and in the form prescribed by the contract, is essential to the exercise of an option." (17B *Corpus Juris Secundum* (June 2009), Contracts, §446.) Unequivocal notice is required so that, when the option period has expired, the property owner knows whether he or she is free to sell, use or lease the property in question, without lingering uncertainty.

Respondents cannot reasonably contend that written Notice of Intent to Purchase, if given, was given in an unequivocal, clear or unambiguous manner. Watermaster staff -- the very persons who Respondents now contend gave the Notice of Intent to Purchase to Mr. Bowcock and/or Mr. Sage on August 27 -- did not believe as late as November 5 that they had given it. As late as November 5, Watermaster staff was seeking authorization from the Appropriative Pool Committee to give the Notice of Intent to Purchase. The sole recommendation contained in the November 5 staff report is: "Staff recommends that the Appropriative Pool direct Watermaster to issue the Notice of Intent to Purchase prior to December 21,

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[4] Respondents argue that the draft minutes of the August 27 meeting were also circulated electronically. Respondents submitted no such email into evidence, nor did any declarant testify what date it was sent, or to whom, or at what addresses. In any event, the minutes merely establish that the Notice of Intent was not finalized at the August 27 meeting, but was referred back to the Appropriative Pool "for further consideration and a separate motion", (I:13 AA69.)

2009". (Id. at AA81.)

Even the Appropriative Pool did not act as if the Notice of Intent to Purchase had been finalized or given. The Peace II Option required that the intended uses be specifically identified in the Notice of Intent to Purchase. At the October 1 and November 5 Appropriative Pool meetings, the Appropriative Pool continued to debate the intended uses. By adopting Plan B, they effectively announced that no prior identification of uses had been final. Moreover, the Appropriative Pool did not pay the first installment of the option price within 30 days of August 27, or even within 30 days of November 5.

Mr. Bowcock and Mr. Sage each testified that they attended meetings at Watermaster's offices in the summer and fall of 2009. At one or more of the meetings Mr. Bowcock attended, Michael Fife (Watermaster Counsel) and Mark Kinsey (then Chair of the Appropriative Pool Committee) both stated that the Notice of Intent to Purchase would be given, if at all, on the last possible date (i.e., on or about December 21, 2009). (I:2 AA28 ¶21.) At a meeting Mr. Sage attended, Michael Fife (Watermaster Counsel), in response to questions from members of the Appropriative Pool, stated that the Notice of Intent to Purchase would be given, if at all, on the last possible date. (II:28 AA266 ¶4.) The question asked by the Appropriative Pool -- "when will notice be given" -- confirmed that the members of the Appropriative Pool did not believe that the notice had yet been given. The answer "the last possible date" confirmed that both the Chair of the Appropriative Pool and Watermaster Counsel did not believe that the notice had yet been given. In each case, the answer pointed to the future – and specifically to December 2009. At no time in the summer or fall of 2009 did Respondents claim that the notice

had already been given, either electronically, in writing, personally, constructively or otherwise. Respondents did not submit any declarations purporting to contradict or challenge the declarations of Messrs. Sage and Bowcock on this subject. The testimony of Messrs. Sage and Bowcock on this subject constitutes uncontroverted evidence.

Watermaster staff did not believe that the notice had been given. The Appropriative Pool – including the Chair of its Pool Committee -- did not believe that the notice had been given. Watermaster Counsel did not believe that the notice had been given. No person who was aware of these facts would have even suspected that notice had been given. But "suspected" is not the applicable legal standard. The applicable legal standard is "unequivocal, clear and unambiguous". The uncontroverted evidence in this case establishes that, even if the Notice of Intent to Purchase had been finalized, which it was not, the affected members of the Non-Agricultural Pool were not informed in "unequivocal terms". They were not given "clear and unambiguous notice". They were not given any kind of reasonable notice at all.

3. Notice to the Legal Owners Was Required

The weight of legal authority in California and elsewhere establishes that notice of exercise of an option must be given directly to the legal owner of the property in question, and not to an intermediary. In the option agreement interpreted in *Bourdieu v. Baker* (1935) 6 Cal.App.2d 150, payment of the option price constituted notice of exercise. (Id. at 152-153.) The option holder deposited the option price with a bank, with instructions to pay the option price to the property owner on demand. (Id. at 156-157.) Concurrently, the option holder sent a letter to the property owner informing him that the money was available at the bank. (Id.) The court

held that proper notice (in this case, the payment) should have been delivered directly to the property owner, not to an intermediary. (Id. at 160-161.) Even though the bank had an obligation to turn over the option price to the property owner, delivery to the bank rendered the notice ineffective. (Id.) "No obligation rested on [the property owner] to go to that bank or to make a demand for the money. . . . The burden rested upon the defendants, if they desired to exercise the option, to pay the money to the plaintiff". (Id.)

In the cases of *O'Connor v. Chiascone* (1943) 130 Conn. 304 and in *Kurek v. State Oil Co.* (1981) 98 Ill.App.3d 6, other appellate courts dealt with option contracts that were also "silent" regarding the identity of the person to whom notice of exercise should be given. In *O'Connor*, the Connecticut Supreme Court determined that delivery of an option notice to the administrator of an estate, rather than to the heirs themselves, was ineffective, because the heirs were the legal owners, and therefore entitled to the notice. (Id. at 307-308.) Even though the administrator was a fiduciary for the heirs, there was "no duty on the part of the administrator to search out the heirs of the estate and inform them that he has received notice of the exercise by the defendant of his option." (Id. at 308.) In *Kurek*, the Illinois Court of Appeals held that, even though all communications from the option holder had previously been through the beneficiary of a trust, delivery of an option notice to the beneficiary, rather than to the trustee, was ineffective because the trustee was the legal owner, and therefore the party entitled to notice. In both *O'Connor* and *Kurek*, the persons to whom the notice was given were agents and fiduciaries of the persons entitled to notice, with authority to act on behalf of their principals. But they were not the legal owners of the optioned property. As in

Bourdieu, delivery to intermediaries (even fiduciaries) was ineffective.

4. Mr. Bowcock and Mr. Sage Were Not Agents for Notice

Respondents argue that Mr. Bowcock and Mr. Sage were agents for the purpose of receiving notice to other members of the Non-Agricultural Pool. The Court need not reach this issue, because the reasons previously discussed in this Reply Brief are each separately dispositive. However, a determination whether Mr. Bowcock and Mr. Sage are agents for notice to other members of the Non-Agricultural Pool is relevant and material to the ongoing administration of the Watermaster case. The Judgment requires, and has always required since 1978, that notices by Watermaster to the parties be given to them personally or by U.S. mail, and that no action by Watermaster is effective unless and until given by U.S. mail. (III:47 AA487 ¶31(a) & AA502-503 ¶59.) Further, Watermaster is obligated by the Judgment to maintain a list of mailing addresses for all parties to the Judgment for this purpose. (III:47 AA502 ¶58.) This is a bright-line rule, easy to understand, follow and enforce. The bright line rule, established in the Judgment itself, should not be discarded in favor of Watermaster's novel contention – that only some parties to the Judgment are entitled to notice, based on Watermaster's determination, made on a case by case basis, regarding which party might be agent for others. Such a rule would be unworkable as a practical matter in this case, or in any other watermaster or multi-party adjudication. For that reason, the Non-Agricultural Pool would like to discuss further in this Reply Brief why notice to Mr. Sage and Mr. Bowcock should not be considered notice to members of the Non-Agricultural Pool (other than Vulcan Materials Company).

Respondents argue that Mr. Sage received the Notice of Intent to purchase by virtue of his attendance at the August 27, 2009 meeting of the

Watermaster Board. Mr. Sage was specifically identified in the official minutes of the meeting as the representative of Vulcan Materials Company alone. (I:13 AA67.) Mr. Sage was not identified as the agent for the Non-Agricultural Pool at such meeting, nor was he. Mr. Sage did not attend the August 27 meeting as agent of any the 10 affected members of the Non-Agricultural Pool, and could not have received notice on behalf of the 10 affected members of the Non-Agricultural Pool.[5]

In support of the contention that Mr. Bowcock is the agent for notice to members other than Vulcan, Respondents argue that Mr. Bowcock signed the Peace II Agreement and/or the Peace II Option on behalf of the Non-Agricultural Pool. There is no evidence that Mr. Bowcock signed the Peace II Agreement on behalf of the Non-Agricultural Pool. In fact, the Peace II Agreement contains no signatures at all -- by anyone. (IV:51 AA747.) Likewise, the Peace II Option contains no signatures at all – by anyone. (I:7 AA40.) The Non-Agricultural Pool Committee disputes the contention that Mr. Bowcock signed these agreements on behalf of other members of the Non-Agricultural Pool. There is no competent evidence at all, either in the declarations or in the documents, to support the contention. There is merely unsubstantiated *argument* in the briefs.

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[5] As is also plain from the minutes, at the August 27 meeting, Mr. Sage voted, with the rest of the Board, to refer the substance of the Notice of Intent to Purchase back to the Appropriative Pool "for further consideration and a separate motion". And his uncontroverted testimony is that Watermaster Counsel advised that the Notice of Intent to Purchase would be given, if at all, on the "last possible date" – in December 2009.

Respondents contend, but cite no authority to support the contention, that Mr. Bowcock was a fiduciary to other members of the Non-Agricultural Pool. The Pools and their committees are not corporations, but creations of the Judgment. They are court-imposed groupings of litigants, who remain litigants in an ongoing case. The water rights of members of the Non-Agricultural Pool are "individually decreed" and separately owned. (III:47 AA477-478 §8.) The sole purpose of the pool committees is the "the power and responsibility for developing policy recommendations for administration of its particular pool". (III:47 AA492 §38(a).) Each Pool is free to adopt its own rules for administration. (III:AA538 §9.) The Non-Agricultural Pool has not adopted any rules making the representative of any party the agent or fiduciary of another party, and Respondent has not cited any such rule, or submitted evidence of the adoption of any such rule.

In their Opposition Brief, Respondents attempt to describe an evolution in the method of giving notice in the case, culminating in the adoption of rules and regulations in 2001. But those rules and regulations allow for electronic communications in certain instances, and for certain purposes, and only where parties have consented in writing to electronic communications. (V:63 AA1046-1047 §2.7.) The trial court properly found that these rules and regulations were inapplicable to the dispute in this appeal, because Watermaster had not provided evidence that any members of the Non-Agricultural Pool had consented to electronic communication. (VI:93 AA1440.)

The Judgment requires that Watermaster give all notice to the parties personally or by U.S. mail. (III:47 AA502-503 ¶59.) The Judgment establishes U.S. mail as the exclusive method for giving notice. (III:47 AA487 ¶31(a).) The notice requirements set forth in the Judgment are easy

to understand, apply and enforce. If Watermaster finds the Judgment to be inconvenient or burdensome, Watermaster should seek an amendment to the Judgment. Watermaster is a creation of the Judgment, and should not ignore it. In this case, there is no evidence that mailing notice to the 10 affected members of the Non-Agricultural Pool would have been unduly burdensome. In fact, payment of the first installment of the purchase price was sent to these representatives, at their respective separate addresses, on about January 18, 2010. (VI:83 AA1375; II:29 AA269 ¶8.)

Each member of the Non-Agricultural Pool has its own separate representative, whose identities and addresses are required to be maintained by Watermaster, and which were well-known to Watermaster. Some representatives of the 10 affected members have served for decades. Mark Ward had been the designated representative of Ameron Inc. continuously since 1989. (II:35 AA299 ¶2.) David Starnes had been the designated representative of Swan Lake Mobile Homes continuously since 1991. (II:34 AA292 ¶2.) Steve Arbelbide had been the designated representative of California Steel Industries continuously since 1996. (II:32 AA284 ¶2.) The members of the Non-Agricultural Pool (including Vulcan Materials Company) object to the contention that Mr. Bowcock or Mr. Sage are agents for the purpose of notice to other members of the Non-Agricultural Pool. Mr. Bowcock and Mr. Sage are not -- and should not be -- obligated to serve on other members notices which Watermaster has neglected to serve, and should not be the gatekeepers for such notices.

The Notice of Intent to Purchase was not given on August 27 or thereafter, because it was never finalized, and could not be given. Even if the notice had been finalized, the notice was not given in strict compliance with the Peace II Option, was not given in an unequivocal, clear and

unambiguous manner, and was not given to the legal owners.

III. CONCLUSION

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

Dated: October 28, 2011

HOGAN LOVELLS US LLP

By _____
ALLEN W. HUBSCH

Attorneys for Appellant
Non-Agricultural (Overlying) Pool Committee

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to California Rule of Court 8.204(c), the Opening Brief to which this certification is attached is proportionately spaced, has a typeface of 13 points, and contains 5,453 words, according to the counter of the word processing software with which it was prepared.

Dated: October 28, 2011

HOGAN LOVELLS US LLP

By _____
ALLEN W. HUBSCH

Attorneys for Appellant
Non-Agricultural (Overlying) Pool Committee

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

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

On **October 28, 2011,** I caused the foregoing document described as:

APPELLANT'S REPLY BRIEF

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

[PLEASE SEE ATTACHMENT]

[X] **BY MAIL.** I sealed said envelope and placed it for collection and mailing following ordinary business practices.

[ ] **BY HAND DELIVERY.** I caused such envelope to be delivered by hand to the offices of the addressee(s) following ordinary business practices.

[ ] **BY FACSIMILE.** I served such document via facsimile to the facsimile number as indicated above.

[ ] **BY E-MAIL.** I caused such document(s) to be served via e-mail.

[ ] **BY OVERNIGHT SERVICE.** I caused such document to be delivered by overnight mail to the offices of the addressee(s) by placing it for collection by UPS/Federal Express following ordinary business practices by my firm, to wit, that packages will either be picked up from my firm by UPS/Federal Express and/or delivered by my firm to the UPS/Federal Express office.

[X] **(State)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. **Executed on October 28, 2011,** at Los Angeles, California.

Kristen Echols
Print Name

Kristen Echols
Signature

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