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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SAN BERNARDINO  
11

12 CHINO BASIN MUNICIPAL WATER  
DISTRICT,

13 Plaintiff,

14 v.

15 CITY OF CHINO, et al.,

16 Defendants.  
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Case No. RCV 51010

Assigned for All Purposes to the Honorable  
Stanford E. Reichert

**THE APPROPRIATIVE POOL'S  
OPPOSITION TO THE MOTION BY THE  
OVERLYING (NON-AGRICULTURAL)  
POOL COMMITTEE FOR COURT  
REVIEW OF WATERMASTER ACTIONS  
PURSUANT TO SECTION 31 OF  
JUDGMENT**

[Filed Concurrently With The Declaration of  
Robert A. DeLoach]

Date: May 14, 2010

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1 The Appropriative Pool hereby submits the following Opposition to the Motion by the  
2 Overlying (Non-Agricultural) Pool Committee ("Non-Ag Pool") for Court Review of  
3 Watermaster Actions Pursuant to Section 31 of Judgment (hereinafter, "Paragraph 31 Motion" or  
4 "Motion").<sup>1</sup>

5  
6 **I. INTRODUCTION**

7 The Motion filed by the Non-Ag Pool is without merit. As detailed in the Watermaster  
8 Opposition, Notice of Intent to Purchase ("Notice") was properly provided consistent with the  
9 terms of the Purchase and Sale Agreement ("Agreement") that the Non-Ag Pool entered into as  
10 part of the Peace II Measures ("Peace II"). The Non-Ag Pool seeks to invalidate certain portions  
11 of the Agreement for no reason other than it desires a "do over" for the purpose of reaping  
12 additional substantial pecuniary benefit. The Motion is borne of greed and seeks to force the  
13 Appropriative Pool to purchase otherwise stranded water at a price several million dollars higher  
14 than the amount voluntarily negotiated by the Non-Ag Pool under the terms of the Agreement.

15 The Non-Ag Pool Motion is heavy on rhetoric, but light on the law. The accusatory tone  
16 of the Motion, combined with lack of legal authority, non-contextual and selective use of  
17 irrelevant facts, sweeping generalizations, and numerous inaccuracies, attempts to deflect  
18 attention away from the lack of credible legal or factual support for the Motion. The Non-Ag Pool  
19 is asking the Court to overlook the plain language of the Agreement, the context of the formation  
20 of the Agreement, the course of conduct between the parties, and the equities, all in favor of  
21 defective and unarticulated legal theories.

22 It appears the Non-Ag Pool has filed the Motion out of seller's remorse, and because it has  
23 nothing to lose. If the Non-Ag Pool prevails, it will have the opportunity to sell the water at a  
24 higher price. If it loses, it will have already sold the water for the negotiated price, thereby

25  
26 <sup>1</sup> On April 12, 2010, the Chino Basin Watermaster submitted an Opposition to Paragraph 31 Motion, and  
27 supporting documents ("Watermaster Opposition"). The Appropriative Pool hereby joins in the  
28 Watermaster Opposition and adopts as if fully stated herein all points and authorities in support thereof.  
Joinder is appropriate since the opposition has merit and the Appropriative Pool is affected as a third party  
beneficiary by the Non-Agricultural Pool's claims and allegations against Watermaster.

1 earning a significant profit to which it otherwise would not be entitled. Unfortunately, the Motion  
2 may have long-ranging and unintended ramifications by putting at risk portions of the heavily  
3 negotiated Peace II package, which will have long-term negative consequences for all parties to  
4 the Judgment.

5 While the Non-Ag Pool may be smaller in number than the Appropriative Pool, their self-  
6 characterization as beleaguered and downtrodden, with little or no resources, is inaccurate and  
7 disingenuous. The Non-Ag Pool's Motion can be summed up in one word: greed. Non-Ag Pool  
8 members, which are comprised largely of private companies, stand to gain millions of dollars  
9 from the Agreement, but apparently they believe it is not enough. Now, they seek millions more  
10 for their own private gain – millions that will ultimately be paid by the public. The Motion does  
11 not seek to improve either Basin management or Watermaster administration of the Judgment.  
12 The sole focus of the Motion, and the sole remedy it seeks, is the ability to sell water at a higher  
13 price.

14 Because the Notice was in fact provided by Watermaster consistent with the terms of the  
15 Agreement and in conformity with the Watermaster Rules and Regulations as well as long-  
16 standing practice and standards, the Appropriative Pool requests that the Court summarily deny  
17 the Non-Ag Pool's Motion in full.

## 18 **II. BACKGROUND FACTS**

### 19 **A. UNDER GENERAL WATER LAW PRINCIPLES, THE NON-AG POOL** 20 **WATER CANNOT BE STORED OR TRANSFERRED**

21 California Constitution, Article X, Section 2, specifies that water be put to reasonable and  
22 beneficial use and that waste and unreasonable use be prevented.<sup>2</sup> The right of an overlying water  
23 producer to take water is based on ownership of the land and is appurtenant thereto. (*Pasadena v.*

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24 <sup>2</sup> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the  
25 water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste  
26 or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is  
27 to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public  
28 welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is  
and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right  
does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable  
method of diversion of water. " (Cal. Const., Art. X, sec. 2.)

1 *Alhambra* (1949) 33 Cal. 2d 908, 925.) Water is a usufructuary (use) right. An overlying owner  
2 having a legal right to groundwater “may take only such amount as he reasonably needs for  
3 beneficial purposes.” (*Ibid.*) Under general water law principles, a holder of a riparian or  
4 overlying right may not transfer its water right away from the land or use such water right to  
5 accumulate water in storage. (See *Moore v. California Oregon Power Co.* (1943) 22 Cal. 2d 725,  
6 731; *Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal. App. 3d 992, 1002.)  
7 As detailed below, under these common law principles, the overlying rights that are appurtenant  
8 to the Non-Ag Pool members’ property would not be transferable and could not be used to  
9 accumulate water in storage.

10 **B. THE CHINO BASIN JUDGMENT & GOVERNANCE**

11 The Judgment in this matter was entered in 1978 and created several layers of governance,  
12 including the various pool committees, an advisory committee, and a Watermaster. (Watermaster  
13 Exhibit No. 3 – Judgment, pp. 12-22 & 24-26.) The pool committees include the Appropriative  
14 Pool, the Overlying (Agricultural) Pool (“Agricultural Pool”), and the Non-Ag Pool. Operation  
15 of each Pool and the rights of water producers within each Pool are controlled by each Pool’s own  
16 pooling plan.

17 The Appropriative Pool is made up almost entirely of public agencies and other not-for-  
18 profit entities. (Declaration of Robert A. DeLoach [“DeLoach Decl.”], ¶ 5.) These entities  
19 answer to their ratepayers and exist solely for the purpose of providing a public service. (*Ibid.*)  
20 Other than the City of Ontario and San Bernardino County, the members of the Non-Ag Pool  
21 consist largely of for-profit, private companies. (*Id.* at ¶ 6.) The Advisory Committee contains  
22 representatives from each respective Pool, including the Non-Ag Pool, and was created to oversee  
23 and “advise” the Watermaster. (Watermaster Exhibit No. 3 – Judgment, ¶ 38.)

24 Although Chino Basin Municipal Water District (“CBMWD”) was originally appointed  
25 the Watermaster in 1978, the court replaced CBMWD in 1998 with a stakeholder-driven nine-  
26 member Board. The nine-member Board includes one representative from the Non-Ag Pool, two  
27 representatives from the Agricultural Pool, three representatives from the non-producing  
28



1 municipal water districts, and three representatives from the Appropriative Pool. (Watermaster  
2 Exhibit No. 16 - February 18, 1998 Order, p. 3:16-20.)

3 The current stakeholder-driven structure is a unique system of self-governance that not  
4 only permits, but requires good-faith participation by each of the three Pools and its members. It  
5 is perhaps understandable that the private companies that largely compose the Non-Ag Pool do  
6 not fully appreciate the responsibilities that fall upon them as participants in a process of self-  
7 governance. Indeed, the approach of the entire Paragraph 31 Motion, which characterizes the  
8 Agreement as a simple purchase and sale between parties otherwise unrelated to one another,  
9 betrays an attitude of separateness of the members of the Non-Ag Pool from the process of which  
10 they are actually an integral part. Watermaster is composed of the parties to the Judgment; the  
11 Non-Ag Pool is one leg of a three-legged stool. Unfortunately, the Paragraph 31 Motion  
12 presupposes that the Non-Ag Pool is not an active participant in this process and has no  
13 responsibilities to the successful functioning of the Watermaster. It therefore constitutes a  
14 rejection by the Non-Ag Pool of its place within this process.

15 C. **THE NON-AG POOL'S RIGHT TO TRANSFER WATER OUTSIDE OF**  
16 **ITS POOL AND TO NON-OVERLYING USE ORIGINATES FROM**  
**PEACE II NEGOTIATIONS**

17 1. **The Non-Ag Pool Originally Had No Right to Sell Water Outside Its**  
18 **Pool**

19 Consistent with the California Constitutional principles set forth above, the 1978  
20 Judgment did not allow the Non-Ag Pool to transfer water from the land on which the water was  
21 used. The "overlying" nature of the rights limited its use. (See Watermaster Exhibit No. 3 –  
22 Judgment, Exhibit "G" attached thereto.) The 1978 Judgment, however, allowed the Non-Ag  
23 Pool to store water indefinitely in the Basin. (*Ibid.*) Over time, and as Non-Ag rights became  
24 increasingly under-utilized, its water began to accumulate in local storage accounts of use only to  
25 that Pool. By July 2007, more than 52,000 acre-feet of water had accumulated in storage.  
26 (Watermaster Opposition at p. 4.)

27 Because the Non-Ag Pool's stored water was not put to beneficial use for a number of  
28 years, many parties to the Judgment believed that unused, and thus surplus Non-Ag Pool water,

1 should be re-allocated and placed to beneficial use within the Basin without compensation to the  
2 Non-Ag Pool, consistent with the method utilized for surplus Agricultural Pool water. (DeLoach  
3 Decl., ¶ 7.) During the negotiation of the Peace Agreement in 2000, the parties consented to a  
4 limited “transfer” provision that allowed the Non-Ag Pool to transfer water to Watermaster for  
5 purposes of desalter replenishment, or for use in a storage and recovery program, subject to  
6 demonstration of broad mutual benefit. (Watermaster Exhibit No. 5, Section 5.3(e); DeLoach  
7 Decl., ¶ 8.) Given the limited nature of these transfers, between 2000 and the beginning of the  
8 Peace II negotiations, the Non-Ag Pool did not avail itself of the ability to transfer water pursuant  
9 to these provisions.

10 **2. The Bargained For Exchange of the Agreement and Peace II Conveyed**  
11 **a New Right to The Non-Ag Pool.**

12 The Agreement was negotiated as part of the suite of documents commonly referred to as  
13 the “Peace II” package or the “Peace II Measures.” (See Watermaster Exhibit Nos. 1 & 7.) The  
14 Peace II negotiations took place over a period of years, from roughly 2004 to 2007. (DeLoach  
15 Decl., ¶ 9.)

16 As during the Peace negotiations, the overwhelming opinion of parties during the Peace II  
17 negotiations was that allowing Non-Ag Pool’s water to accumulate, unused, in the Non-Ag Pool  
18 storage accounts was a violation of Article X, Section 2 of the California Constitution, because  
19 the water was not put to maximum reasonable and beneficial use. (*Id.* at ¶ 10.) The argument  
20 was again raised that, consistent with California water law, unused water should revert to the  
21 common pool and be placed to reasonable and beneficial use within the Basin without  
22 compensation to the Non-Ag Pool, consistent with the method utilized for surplus Agricultural  
23 Pool water. (*Id.* at ¶ 11.)

24 The Non-Ag Pool, through its sole representative during the Peace II negotiations, Bob  
25 Bowcock, advanced the idea of selling the Non-Ag Pool’s water and further enhancing the Non-  
26 Ag Pool’s ability to transfer water outside the Pool for compensation. (*Id.* at ¶ 12.) Mr.  
27 Bowcock engineered and advocated a plan by which the Appropriative Pool would be able to  
28 purchase the water in storage at “market price,” that is to say, the same price that Appropriative

1 Pool parties would sell or lease water as between each other. (*Id.* at ¶ 13.) This price was widely  
2 recognized to be 92% of the then-current replenishment rate established by the Metropolitan  
3 Water District of Southern California (“MWD”). (*Id.* at ¶ 14.) Because Watermaster typically  
4 purchases imported water from MWD, the MWD rate is used as the benchmark for purposes of  
5 valuing other purchased or leased water supplies available within or to the Chino Groundwater  
6 Basin. (*Id.* at ¶ 15.)

7 In exchange for the ability to sell the water in storage to the Appropriative Pool at market  
8 price, the Non-Ag Pool agreed to dedicate 10 percent of the water to desalter replenishment. (*Id.*  
9 at ¶ 16; see also, Watermaster Exhibit Nos. 1 & 8.) Consistent with this approach, the parties  
10 executed the Agreement. (See Watermaster Exhibit No. 1.) The parties also negotiated a  
11 mechanism whereby the Non-Ag Pool could elect, on an annual basis, to make unused water  
12 available for purchase by the Appropriative Pool at market price. (DeLoach Decl., ¶ 17; see also,  
13 Watermaster Exhibit No. 8.) The ability to engage in an annual and ongoing transfer required a  
14 Judgment Amendment, which was also included as part of the Peace II package. (Watermaster  
15 Exhibit No. 8.)

#### 16 **D. THE AGREEMENT**

17 Because the Appropriative Pool needed time to consider whether to buy the full amount of  
18 the water in storage, as well as time to consider how best to pay for the water and the uses to  
19 which the water would be placed, Section C of the Agreement contained a condition that required  
20 Watermaster to provide written notice of intent to purchase the water within a specified period of  
21 time. (Watermaster Exhibit No. 1.)

22 Section H of the Agreement provided for “Early Termination” of the contract in the event  
23 the condition was not satisfied. Pursuant to Section H, if Watermaster did not issue the Notice  
24 within the specified time period, the Non-Ag Pool members could then elect to make the stored  
25 water available to individual members of the Appropriative Pool at a different (and higher) price,  
26 consistent with the new Judgment Amendment allowing annual transfers. (*Ibid.*)

27 The Agreement was structured so that the parties would be bound by certain mutual  
28 obligations and benefits at the time the Agreement was executed in 2007: the Non-Ag pool was

1 conferred a benefit insofar as it had the ability to transfer both water in storage and unused water  
2 on an annual basis, for a set price, to members of the Appropriative Pool. Although the Non-Ag  
3 Pool was not obligated to offer water on an ongoing basis, the Non-Ag Pool benefited from the  
4 opportunity to do so, and the Appropriative Pool benefited from the ability to buy water in storage  
5 for a fixed price, including escalating payments, and also to purchase unused water made  
6 available on an ongoing basis by the Non-Ag Pool for a fixed price. (See Watermaster Exhibit  
7 No. 8.)

8 The Agreement also contained a one-time transfer of water between Vulcan Materials,  
9 San Antonio Water Company, and Cucamonga Valley Water District. That portion of the  
10 Agreement was fully performed in 2007 and 2008 without any objection. (DeLoach Decl., ¶ 18.)

11 Effectively, the import of the Agreement as a whole was to convert valueless and  
12 unmarketable water into a valuable asset for the Non-Ag Pool. For this reason, the obvious  
13 profiteering motive of the Non-Ag Pool's Motion is particularly egregious to the Appropriative  
14 Pool. Considering the difficult and protracted debates and negotiations antecedent to the  
15 denouement of Peace II, a different result could have been reached, and the Non-Ag Pool's stored  
16 water could have remained stranded or been permitted to revert to the Basin without  
17 compensation to the Pool. The Non-Ag Pool's motion curiously and perilously ignores the  
18 chilling effect that the Non-Ag Pool's attempt to circumvent the sale under bargained-for terms  
19 could have on the future relationship between the Non-Ag and Appropriative Pools, and the  
20 Pools' willingness to cooperate on future mutually beneficial water transaction opportunities.

21 **E. BACKGROUND AND PURPOSE OF THE AUCTION**

22 In 2008 and 2009, it became clear to the Appropriative Pool that ongoing drought  
23 conditions and regulatory restrictions on water exports from the Sacramento-San Joaquin Bay  
24 Delta, which is a primary MWD supply source, meant that the ability to obtain replenishment  
25 water from MWD would be severely limited. (DeLoach Decl., ¶ 22.) In particular, because  
26 MWD projected that replenishment water would be available in only 3 out of 10 years (as  
27 opposed to 7 out of 10 years, which was the previous projection), Watermaster's engineer  
28

1 explained that significant enhancements to Watermaster's recharge facilities would be required.  
2 (*Id.* at ¶ 23.)

3 One of the conditions of approval of Peace II is for Watermaster to prepare an updated  
4 Recharge Master Plan that describes how recharge will occur, on a long-term basis, within the  
5 Basin. (Watermaster Exhibit No. 6.) The method by which Watermaster funds operation and  
6 maintenance, as well as administrative costs and capital improvements such as the Recharge  
7 Master Plan, is through a system of assessments, or a tax on all groundwater production in the  
8 Appropriative Pool. Under this system of assessments, the Appropriative Pool will be  
9 responsible for virtually all of the costs associated with improving the recharge facilities in  
10 accordance with the Recharge Master Plan, even though such improvements will provide a  
11 benefit to *all* producers in the Chino Basin. (DeLoach Decl., ¶ 24.) When the Appropriative Pool  
12 became aware of the significant costs associated with these improvements, the Appropriative Pool  
13 began to discuss various funding mechanisms. (*Id.* at ¶ 25.)

14 Ultimately, the Appropriative Pool determined that monetizing the purchased Non-Ag  
15 Pool water in storage through an auction of that water could produce a viable source of funding  
16 for the significant costs of recharge enhancements. (*Id.* at ¶ 26.) Absent such a funding  
17 mechanism, the cost of the recharge enhancements would ultimately be borne by the public  
18 ratepayers. (*Id.* at ¶ 27.) Although the Non-Ag Pool motion describes the auction as a "windfall"  
19 for the Appropriators, the Non-Ag Pool knew that the proceeds were to be used to fund recharge  
20 enhancements in the Basin, a benefit to the entire Basin. (*Id.* at ¶ 28.)

21 In June 2009, the Advisory Committee and the Board approved a Template Storage and  
22 Recovery Agreement that would allow for the implementation of the auction. Mr. Bowcock  
23 voted to approve the Agreement and thus voted in favor of proceeding with the auction.<sup>3</sup> (See  
24 Watermaster Exhibit No. 9.) In July 2009, the Appropriative Pool and the Non-Ag Pool entered  
25 into a Stipulation detailing how the proceeds from the auction would be utilized as between the

26 <sup>3</sup> It is ironic that the Non-Ag Pool pleading criticizes the Appropriators for making the water available to "speculative  
27 investors" when one of the largest Non-Ag Pool members – Aqua Capital Management (for whom Mr. Bowcock was  
28 a principal from at least 2007 until at least the beginning of 2009) – is itself one of these "speculative investors," and  
is headquartered in Omaha, Nebraska. (DeLoach Decl., ¶¶ 34-36.)

1 Non-Ag Pool and the Appropriative Pool. Mr. Bowcock signed the Stipulation on behalf of the  
2 Non-Ag Pool. (See Watermaster Exhibit No. 10.) Watermaster reported the Stipulation to the  
3 Court and asked for approval of the Template Storage and Recovery Agreement. No party  
4 objected, and the Template Storage and Recovery Agreement was approved by the Court on  
5 August 11, 2009. (Watermaster Exhibit No. 11.)

6 F. **NOTICE OF INTENT TO PURCHASE WAS APPROVED AND**  
7 **PROVIDED**

8 On August 13, 2009, at the joint meeting between the Appropriative Pool and the Non-Ag  
9 Pool, the Appropriative Pool considered the written Notice of Intent to Purchase the Non-Ag  
10 water so that the Appropriative Pool could move forward with the auction. (Bowcock Decl.,  
11 Exhibits H & I.) A form of the Notice had been provided in the agenda packet for that meeting;  
12 the Pool finalized the Notice and approved it unanimously and without qualification. (*Ibid.*) The  
13 Notice is a written document prominently titled "Notice of Intent to Purchase." (See Watermaster  
14 Exhibit No. 12.)

15 The language of the Notice was written in the present tense to reflect that notice was being  
16 provided as of August 13, 2009, but the Appropriative Pool decided to use an "effective date" of  
17 December 18, 2009, because it intended to use proceeds from the auction to pay the Non-Ag Pool  
18 for the water. (See Watermaster Exhibit No. 12.) The language of the Notice is as follows:

19 Pursuant to Section C of the Purchase and Sale Agreement for the  
20 Purchase of Water by Watermaster from Overlying (Non-  
21 Agricultural) Pool, Watermaster hereby provides notice to the  
22 Overlying (Non-Agricultural) Pool that Watermaster intends to  
23 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.

24 On August 13, 2009 the Appropriative Pool provided approval for  
25 the issuance of this Notice. The date of issuance of this notice is  
December 18, 2009. (Watermaster Exhibit No. 12.)

26 At that meeting, the Appropriative Pool also discussed developing a "Plan B," which  
27 provided an alternate funding mechanism to purchase the water should the auction not proceed as  
28 planned. (See Bowcock Decl., Exhibit I.) Notably, because the Non-Ag Pool meetings were held

1 jointly with the Appropriative Pool meetings, Mr. Sage, an employee of Mr. Bowcock's and  
2 frequent alternate Non-Ag Pool representative, was present for the Appropriative Pool's approval  
3 of the Notice and discussion of Plan B. (*Ibid.*)

4 The written Notice, as approved by the Appropriative Pool, was transmitted as part of the  
5 Agenda Packet for the August 27, 2009 Advisory Committee and Board meeting. (See Bowcock  
6 Decl., Exhibit X.) This packet was sent to the Non-Ag Pool representative via regular mail and  
7 email. (See Molino Decl., ¶¶ 10, 13.) At the August 27, 2009 Advisory Committee meeting, the  
8 Advisory Committee approved the Notice as to 36,000 acre-feet and referred the 2,652 acre-feet  
9 to the Appropriative Pool for further discussion as to the use of the water. The Board, acting on  
10 the Advisory Committee's recommendation, took the same action. Mr. Sage was present at the  
11 Advisory Committee and Board Meeting and voted in favor of approving the Notice. (See  
12 Bowcock Decl., Exhibit K) The Appropriative Pool subsequently decided not to make any  
13 changes as to the use of the 2,652 acre-feet and thus took no further action.

14 Pursuant to Section C of the Agreement, prior approval by the Appropriative Pool is  
15 required in order for the Notice to be operable. That approval was provided, unequivocally, on  
16 August 13, 2009. (See Bowcock Decl., Exhibit I.) Thereafter, a final version of the written  
17 Notice, as approved by the Appropriative Pool, was distributed as part of the August 27, 2009  
18 Advisory Committee and Board Meeting Agenda Packet, which was received by the Non-Ag  
19 Pool representative. (Bowcock Decl., Exhibit X.)

20 **G. THE NON-AG POOL'S REPRESENTATIVE HAD ACTUAL NOTICE OF**  
21 **THE APPROPRIATIVE POOL'S INTENT TO PURCHASE AND WAS**  
22 **PRESENT AND ACTIVELY INVOLVED THROUGHOUT THE ENTIRE**  
**TIME DURING AND FOLLOWING THE NOTICE**

23 From August through October, the Appropriative Pool and Watermaster prepared for the  
24 auction. (DeLoach Decl., ¶ 29.) Numerous meetings and workshops were held to discuss issues  
25 related to the auction. (*Ibid.*) The Non-Ag Pool's Representatives, Mr. Bowcock and/or Mr.  
26 Sage, were present at meetings throughout the auction process. (*Id.* at ¶ 30.) At no time during  
27 that period did Mr. Bowcock, Mr. Sage, or any other member of the Non-Ag Pool state at any  
28 Pool Meeting, Advisory Committee Meeting, or Board Meeting that they felt Notice had not been

1 provided. (*Id.* at ¶ 32.) At no time did Mr. Bowcock, Mr. Sage or any other member of the Non-  
2 Ag Pool express concerns with the auction or object to the Appropriative Pool's activities relating  
3 to the auction of Non-Ag Pool's stored water. (*Id.* at ¶ 33.)

4 On October 30, 2009, the parties decided to postpone the auction based on concerns  
5 expressed by potential bidders regarding the ability to recover and use the water. (Manning  
6 Decl., ¶¶ 12, 13; see also, Bowcock Decl., ¶ 19.) Just six days later, on November 5, 2009, the  
7 Appropriative Pool voted to approve Plan B. (Bowcock Decl., Exhibits O & Q.) Importantly,  
8 Plan B included authorization to assess the Appropriative Pool so that Watermaster could tender  
9 the first payment to the Non-Ag Pool. At the November 19, 2009 Advisory Committee and  
10 Board Meeting, at which a representative for the Non-Ag Pool was present, Watermaster staff  
11 briefed the Advisory Committee and the Board regarding the water **that had already been**  
12 **purchased** from the Non-Ag Pool and provided a hand-out showing the Plan B cost to each  
13 Appropriative Pool member. (Watermaster Exhibit Nos. 14 & 15.) Thus, the Non-Ag Pool knew  
14 that the Appropriative Pool had assessed itself in order to tender payment for the water. (Motion  
15 at p. 10.) On December 17, 2009, Mr. Bowcock attended a Board Meeting on behalf of the Non-  
16 Ag Pool and did not mention any concern that Notice had not been provided.

17 **H. THE NON-AG MOTION SEEKS A SIGNIFICANTLY HIGHER PROFIT**  
18 **FROM THE SALE OF THE STORED WATER**

19 Mr. Bowcock and Mr. Penrice first raised the issue of notice on January 7, 2010, just days  
20 after MWD announced a significant rate increase. (See Manning Decl., ¶ 16.) Under Section H  
21 (Early Termination) of the Agreement, if the Notice is not provided and the condition subsequent  
22 is not satisfied, the Non-Ag Pool can sell the water in storage for 92% of the now-current MWD  
23 replenishment rate. Based on the MWD replenishment rates cited in the Non-Ag Pool Motion  
24 (Bowcock Decl., Exhibit K), the potential selling price under Section H is, at a minimum, \$4.3  
25 million higher than the selling price negotiated in 2007 and described under Sections C and D,  
26 which was based on 92% of the then-current (2007) replenishment rate (along with a CPI  
27 adjustment). Thus, if the Non-Ag Pool succeeds in its Paragraph 31 Motion, the Pool members  
28 (including Aqua Capital Management) stand to earn a significant windfall profit over and above



1 that which was contemplated in 2007. This profit will come at the expense of the citizens of the  
2 Chino Basin during a particularly difficult economic downturn.

### 3 4 **III. ARGUMENT**

5 The Non-Ag Pool argues, without support, that the Agreement is a unilateral "Option  
6 Contract." The Non-Ag Pool makes this argument so it can avail itself of the strict notice  
7 requirements adhering to option contracts. As detailed below, the Agreement is not an option  
8 contract but rather, it is clearly and unambiguously a bi-lateral contract containing an express  
9 condition subsequent. As such, the Notice requirements should be viewed in light of the doctrine  
10 of substantial performance. Nonetheless, even if the Non-Ag Pool is correct (which it is not), its  
11 Motion should be denied because even under the more stringent requirements utilized for option  
12 contracts, the Notice requirements were satisfied.

#### 13 **A. THE AGREEMENT IS AN EXECUTED BILATERAL CONTRACT, NOT** 14 **AN OPTION AGREEMENT**

15 The Agreement cannot be construed as an option contract because (1) by its express terms,  
16 it characterizes the Notice as a condition subsequent, (2) the language of the Agreement indicates  
17 that contract formation occurred upon execution, not delivery of Notice, (3) the Agreement binds  
18 Watermaster to terms prior to the time when Notice is due, and (4) the Agreement confers a  
19 benefit on the Non-Ag Pool even if Notice is not provided within the relevant time period. In the  
20 event of ambiguity, California law presumes a contract to be bilateral rather than an option.  
21 (*Perry v. Berryman* (1949) 95 Cal.App.2d 159.) Here, the language is unambiguous, but even if  
22 it were not, the law would favor construing the Agreement as a bilateral contract.

#### 23 **1. The Notice is a Condition Subsequent, Not a Condition Precedent to** 24 **the Formation of the Agreement**

25 By its terms, the plain language of the Agreement describes the Notice as a "condition  
26 subsequent" that is a condition of performance, not an "option." Section H of the Agreement  
27 provides:  
28

1           **Early Termination.** This Agreement *will expire and be of no*  
2           *further force and effect* if: Watermaster does not issue its Notice of  
3           Intent to Purchase in accordance with Paragraph D above within  
4           twenty-four (24) months of Court approval. Upon Watermaster's  
5           failure to satisfy the *condition subsequent*, the rights of the Non-  
6           Agricultural (Overlying) Pool will remain unaffected and without  
7           prejudice as result of their *having executed this Agreement* except  
8           that in the event of Early Termination, the Storage Transfer  
9           Quantity, will then be made available for purchase by Watermaster  
10          and thence the members of the Appropriative Pool in accordance  
11          with Paragraph 9.(iv) of Amended Exhibit G, the Overlying (Non-  
12          Agricultural) Pool, Pooling Plan. (See Watermaster Exhibit No. 1  
13          [emphasis added].)

14           Notably, the Agreement explicitly describes issuance of notice as a "condition  
15          subsequent" in Section H.

16           A condition subsequent is a term of a contract that the happening or nonoccurrence of a  
17          *future event after the contract becomes binding on the parties* permits the other party to terminate  
18          the contract, if he chooses to avail himself of the condition, without further duties or obligations  
19          on any party. (Civil Code § 1438.) In contrast, an option is a *condition precedent* to the  
20          formation of a bilateral contract, and "the optionee has no duty unless, and until, he accepts the  
21          irrevocable offer proposed to him by the optionor." (*Palo Alto Town & Country Village Inc. v.*  
22          *BBTC Company* (1974) 11 Cal.3d 494, 503.) As noted by the Non-Ag Pool, option contracts are  
23          unique in that, upon execution, only one party, the optionor, is bound while the optionee is  
24          entirely free to accept or not. (*Hayward Lumber & Inv. Co. v. Construction Prod. Corp.* (1953)  
25          117 Cal.App.2d 221, 229; see also, Motion at p.11.)

26           The clear intent that Notice operate as a condition *subsequent* is further demonstrated by  
27          the fact that the Agreement includes a separate section which recites a condition *precedent*. The  
28          ONLY condition precedent to the formation of the Agreement was the Court's approval of Peace  
29          II. Once the Court approved Peace II on December 21, 2007, the bilateral contract was formed.

## 30                           **2.     The Plain Language of the Agreement is Clear Evidence that It Was** 31                           **Not an Option Agreement**

32           Section H, and in particular the terms emphasized above, plainly and unequivocally  
33          indicate that a contract already had been formed and is binding on the parties before Notice is  
34          issued. (See Watermaster Exhibit No. 1) First, it refers to execution of the Agreement in the past

1 tense. Also, “early termination” is both its title and the articulated effect of a failure to provide  
2 Notice. Similarly, it states that the Agreement will “expire and be of no further force and effect.”  
3 For a contract to “terminate,” “expire” or cease to be of force, the terms of the contract must  
4 already be obligatory. For these reasons, the Non-Ag Pool’s characterization of the Agreement as  
5 an “option,” where the contract would not form until after notice is given, is fundamentally  
6 inconsistent with the plain language of Section H.

7 **3. Non-Ag Pool Seeks to Manipulate and Take Advantage of the Benefits**  
8 **Conferred Through the Peace II Process**

9 Not only has the contract already been formed, terms of the contract have already been  
10 performed by Watermaster, conferring substantial benefits to the Non-Ag Pool. In addition, the  
11 contract confers new rights on the Pool separate and apart from the sale of the water pursuant to  
12 Sections C and D. This is distinguishable from a unilateral executory option where the  
13 Watermaster would have *no duty unless, and until* Notice is given. (*Palo Alto Town & Country*,  
14 *supra*, 11 Cal.3d at p. 503; see also, Motion at 11.)

15 Specifically, the Agreement confers a benefit on the Non-Ag Pool even if Notice is not  
16 provided within the relevant time period – specifically, the right to sell the water in storage  
17 pursuant to the Judgment Amendment to Exhibit “G”, which was part of the Peace II  
18 negotiations. The terms of the Non-Ag Pool Pooling Plan were modified to allow the Pool to sell  
19 unused water annually, on a go-forward basis, to the Appropriators for a fixed price. (See  
20 Watermaster Exhibit No. 8.) Indeed, it is this very benefit that motivates the Non-Ag Pool to now  
21 claim that the condition subsequent was not met, particularly because the price of the water made  
22 available if the condition subsequent was not provided is higher than the price pursuant to the  
23 Agreement. The fact that a benefit is conferred on the Non-Ag Pool via Section H and the  
24 related Amendment to Attachment “G,” and the fact that the Appropriative Pool was bound by  
25 the provisions of the Agreement when it executed the Agreement in 2007, means that the  
26 Agreement cannot, by its terms, be an “option.”  
27  
28

1           B.     THE CONDITION SUBSEQUENT WAS SATISFIED

2                     1.     **The Written Notice Provided in the August 27, 2009 Agenda Packet**  
3                             **Met the Notice Requirements of Section C of the Agreement**

4           As detailed above, Section C of the Purchase and Sale Agreement contains a condition  
5 subsequent requiring Watermaster to provide Notice in order to prevent “Early Termination”  
6 (under Section H) of the Agreement to which both parties were already bound. Section C of the  
7 Agreement describes the requirements of the Notice:

8                     Notice. Within twenty-four months of the final Court approval of  
9 this Agreement (“Effective Date”), and only with the prior approval  
10 of the Appropriative Pool, Watermaster will provide written **Notice**  
11 **of Intent to Purchase** the Non-Agricultural (Overlying) Pool water  
12 pursuant to Section 5.3(a) of the Peace Agreement, which therein  
identifies whether such payment will be in connection with the  
Desalter Replenishment or a Storage and Recovery Program.  
(Watermaster Exhibit No. 1.)

13           According to the plain language of Section C, Watermaster satisfied the condition  
14 subsequent because the Notice was (1) provided by Watermaster (2) in writing (3) within 24  
15 months of the final Court approval of the Agreement (4) with prior approval of the Appropriative  
16 Pool, and (5) it specified the quantity of water to be used for a Desalter Replenishment or a  
17 Storage and Recovery Program.

18                     a.     The Notice Was Required To Be “Provided” Or “Issued,” Not  
19                             “Delivered;” Watermaster Provided Notice In A Manner That Was  
20                             Reasonable, Usual And Customary, And Notice Was Actually  
                              Received

21           The Non-Ag Pool erroneously contends that the Agreement requires Notice to be  
22 “delivered.” (Motion at pp. 3, 8, 14.) This is contrary to the express language of the Agreement,  
23 which states in Section C that Watermaster will *provide* written Notice of Intent to Purchase.  
24 Elsewhere in the Agreement, it refers to Watermaster “issuing” Notice (Sections E and H).  
25 Neither the word “provide” nor the word “issue” connotes “delivery” of the Notice.

26           Watermaster has thoroughly addressed this issue in its Opposition to the Motion; thus, it  
27 will not be repeated here. (See Watermaster Opposition at pp. 10-12.) Likewise, Watermaster  
28 has explained that it provided the Notice in a manner that was reasonable, usual and customary,

1 and that Notice was actually received by the Non-Ag Pool representative. (See Watermaster  
2 Opposition at pp. 19-25).

3                   b.       It is Reasonable for the Appropriative Pool to Rely on the Non-Ag  
4                               Pool's Representative to Report Back to Its Pool Members  
5                               Important Issues Concerning Its Pool

6           In addition, the customary practice has been for Mr. Bowcock to represent the entire Pool,  
7 negotiate on behalf of the entire Pool, and sign documents on behalf of the entire Pool that legally  
8 bind the entire Pool. (DeLoach Decl., ¶ 19.) Mr. Bowcock negotiated and executed the Purchase  
9 and Sale Agreement on behalf of the entire Pool; not one individual Pool member signed the  
10 document. (*Id.* at ¶ 20.) It was Mr. Bowcock's responsibility, as the Non-Ag Pool representative,  
11 to keep the individual members of the Pool informed.

12           For the Non-Ag Pool to now claim otherwise is tantamount to an outright rejection of the  
13 process of self-governance upon which the parties have justifiably come to rely. The  
14 Watermaster process is one of openness and transparency, much like that of a public agency. As  
15 the representative of the Non-Ag Pool, a member of the Advisory Committee, and a member of  
16 the Board, Mr. Bowcock has had the opportunity and the duty to participate robustly in this  
17 process. To claim that Mr. Bowcock (or his specified designee) could not accept Notice on  
18 behalf of the Pool, or to claim that the Pool was uninformed of *months* of activities that occurred  
19 as part of this process even though Mr. Bowcock participated in and assented to these activities, is  
20 not only irresponsible, it is an abject rejection of the Pool's duties as a good-faith participant in  
21 the process.

22                   c.       The Appropriative Pool Spent a Substantial Amount of Money  
23                               With the Understanding that a Valid Contract Was Formed and The  
24                               Condition Subsequent Had Been Satisfied

25           In the months following the provision of the Notice, the Appropriative Pool expended  
26 substantial sums of money to develop the plan to auction the water and held numerous public  
27 workshops regarding the auction. (DeLoach Decl., ¶ 29.) After the auction was postponed on  
28 October 30, the Appropriative Pool immediately approved "Plan B," which provided an alternate  
method to fund the purchase of the water. (Bowcock Decl., Exhibit O.) Never once did the  
Appropriative Pool indicate that it would not, or even might not, proceed with the purchase of the

1 water. From the Appropriative Pool's perspective, it was bound by the Agreement and intended  
2 to proceed. (DeLoach Decl., ¶ 31.)

3 Never once did the Non-Ag Pool indicate that it believed Notice had not been given or  
4 was inadequate. If it is true the Non-Ag Pool believed Notice had not been given, how is it the  
5 Non-Ag Pool did not object to the auction? How could the auction proceed unless the  
6 Appropriative Pool had the authority to sell the water to a third party? How could the  
7 Appropriative Pool sell the water to a third party unless Notice had been provided that the  
8 Appropriative Pool would purchase the water? The answers to these questions (along with any  
9 significant legal authority) are conspicuously absent from the Non-Ag Pool's pleading.

10 d. The Notice Properly Identified The Use Of The Water

11 Consistent with Section C of the Agreement, the Notice that was approved by the  
12 Appropriative Pool on August 13, 2009 designates 36,000 acre-feet for use in a Storage and  
13 Recovery Agreement, and 2,652 acre-feet for use as Desalter replenishment. (See Watermaster  
14 Exhibit No. 12.) At the August 27, 2009 Board meeting, the Board approved the Notice and  
15 referred the 2,652 acre-feet to the Appropriative Pool for further discussion as to the use of the  
16 water. (See Bowcock Decl., Exhibit K.)

17 The Non-Ag Pool contends that the Board's reference of a question regarding the intended  
18 use of the water, and its request for a "separate motion" in the event of a change to the Notice,  
19 constitutes a "rejection" of the Notice. (Motion at p. 5.)<sup>4</sup> On its face, the Agreement does not  
20 require action by the Watermaster Board with respect to the Notice. Rather, it is action by the  
21 Appropriative Pool that is required prior to the time the Notice is provided because it is the  
22 Appropriative Pool that is ultimately responsible for providing the funding to tender payment to  
23 the Non-Ag Pool. On August 13, 2009, the Appropriative Pool approved the Notice; the approval

24 \_\_\_\_\_  
25 <sup>4</sup> Based on the way Section C is drafted, it is not clear whether the identification of the use of the water is required to  
26 be included in the Notice, or whether the clause is instead referring to section 5.3 the Peace Agreement itself, "which  
27 therein" identifies authorized uses for the water (i.e., Desalter Replenishment or a Storage and Recovery Program).  
28 There is a colorable argument that the reference to section 5.3 was only for purposes of mentioning the Non-Ag  
Pool's right to transfer water to Watermaster for those purposes. Thus, the Notice itself does not need to contain the  
designation. To the extent this is true, the Non-Ag Pool's arguments are rendered entirely irrelevant (to the extent  
they are not otherwise irrelevant).

1 contained no conditions whatsoever. (See Watermaster Exhibit No. 12.) The final Notice, as  
2 approved by the Appropriative Pool, was provided by email and mail as part of the August 27  
3 agenda package. (Molino Decl., ¶ 10, 13.) At that point, the condition subsequent was satisfied.

4 C. **THE NOTICE PROVISION IN THE AGREEMENT MUST BE**  
5 **LIBERALLY CONSTRUED TO PREVENT FORFEITURE**

6 1. **Strict Compliance With Section C Of The Agreement Is Not Required**

7 The Non-Ag Pool misapplies authority that requires strict compliance with notice  
8 requirements to the instant Agreement. The authority relied upon by the Non-Ag Pool only  
9 applies to option contracts, not bilateral contracts such as the Agreement. (See Motion at p. 11.)  
10 Courts have required strict compliance with respect to option contracts because, by the nature of  
11 an option contract, the optionor has bound himself to make a contract while the optionee is  
12 entirely free from any contractual obligation. (*Hayward Lumber & Inv. Co. v. Construction Prod.*  
13 *Corp.* (1953) 117 Cal.App.2d 221, 229.) However, as discussed above, the Agreement is not an  
14 option contract. The Agreement is a negotiated transaction under which the parties were bound to  
15 perform certain obligations, and no party had the absolute discretion to unilaterally discharge the  
16 obligations. As a policy matter, the Non-Ag Pool has not been disproportionately burdened by  
17 the Agreement and does not require the heightened protection afforded to optionors. Strict  
18 compliance is not required or warranted in this case.

19 What is mind boggling is that the Non-Ag Pool seeks to enforce Section H of the  
20 Agreement even though it claims that the option was not exercised. (Motion at p. 9.) If the Non-  
21 Ag Pool is right (which it is not), and the Agreement is really an option agreement (which it is  
22 not), failure to exercise the option would mean that an Agreement was never formed. It is  
23 fundamentally inconsistent for the Non-Ag Pool seek enforcement of a provision of a contract  
24 that it claims does not exist.

25 2. **California Law Disfavors Forfeiture**

26 Contrary to the Non-Ag Pool's assertion, the Watermaster's compliance with the notice  
27 requirement must be construed *in the light most favorable to Watermaster*. The Non-Ag Pool  
28 asks this Court to find Watermaster and the Appropriative Pool have lost their right to purchase

1 water under the terms of the Agreement due to a contrived hyper-technicality even though, as  
2 explained above, the Non-Ag Pool enjoys rights and benefits granted by the same instrument.  
3 *California law disfavors such forfeitures* and gives courts tools of construction and equity to  
4 avoid this type of injustice. (See, e.g., Civil Code §§ 1442, 3275; see also, *Michaelian v. Elba*  
5 *Land Co.* (1926) 76 Cal.App. 541, 554 [liberally construing terms of purchase contract for real  
6 property to prevent ouster of buyer]; *Atkins v. Anderson* (1956) 139 Cal.App.2d 918, 920  
7 [estopping forfeiture where plaintiff had knowledge of the condition and participated in the  
8 violation]; *Loughan v. Harger-Haldeman* (1960) 184 Cal.App.2d 495, 502 [finding waiver to  
9 avoid forfeiture].) The burden of proving facts creating the forfeiture rests upon the party  
10 claiming the forfeiture. (*Riedman v. Barkwill* (1934) 139 Cal.App. 564, 567.)

11 a. The Court Must Interpret The Terms Of Section C Against The  
12 Non-Agricultural Pool In Order To Prevent Forfeiture

13 Under Civil Code, section 1442, the Court *must* construct the language of the Section C  
14 requirements to prevent early termination. Civil Code section 1442 requires courts to strictly  
15 interpret conditions involving a forfeiture against the party for whose benefit it is created<sup>5</sup>, and  
16 liberally construe them to prevent forfeiture. (*Division of Labor Standards Enforcement v. Dick*  
17 *Bullis, Inc.* (1977) 72 Cal.App.3d Supp. 52, 58.) In this case, the Court cannot adopt the Non-Ag  
18 Pool's stringent and non-literal interpretation the language of Section C. Pursuant to Civil Code  
19 section 1442, and in keeping with the plain and unambiguous meaning of Section C, the Court  
20 must interpret the language to permit compliance with the Notice provision by any reasonable  
21 method.

22 b. Equitable Relief Is Warranted If Required To Avoid Forfeiture

23 If the Court finds that a condition requiring forfeiture is express and cannot be avoided by  
24 construction, the Court may, in a proper case, excuse the condition or give equitable relief against  
25 its enforcement. (Civil Code § 3275; *Atkins v. Anderson, supra*, 139 Cal.App.2d at p. 920;

26 <sup>5</sup> As stated in Section II.A herein, the Non-Ag Pool is the beneficiary of Section C because it allows them to transfer  
27 the water in storage outside the Pool for compensation, even though such benefits would not exist under common law  
28 principles or Article X, Section 2 of the California Constitution; and, the Non-Ag Pool also benefits in the event of  
forfeiture because it will profit by at least an additional \$4.3 million if its Paragraph 31 Motion is successful.



1 *Loughan v. Harger-Haldeman, supra*, 184 Cal.App.2d at p. 502.) Pursuant to Civil Code section  
2 3275, “[w]henever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in  
3 the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be  
4 relieved therefrom, upon making full compensation to the other party, except in case of a grossly  
5 negligent, willful, or fraudulent breach of duty.” Watermaster has tendered payment and would  
6 have already fulfilled the payment obligations of Section D if not refused by the Non-Ag Pool.  
7 (Manning Decl., ¶ 18; Bowcock Decl., ¶ 24.) As discussed below, there is no evidence or  
8 allegation of gross negligence or other willful conduct here. Thus, even if this Court finds that  
9 the Watermaster’s Notice failed to comply with some aspect of Section C, the Court can – and  
10 should – uphold the Agreement.

11 As a general matter, courts have held that “a party should not be divested of valuable  
12 rights by way of forfeiture for default . . . unless it is clearly made to appear that the other party to  
13 the contract has suffered or will suffer serious detriment or damage by reason of such default, or  
14 unless it is made to appear that the default was intentional or willful.” (*Atkins v. Anderson, supra*,  
15 139 Cal.App.2d at p. 920.) The Non-Ag Pool brings this action and raises alleged defaults in the  
16 Notice not to remedy any perceived loss at the hands of the Watermaster – after all, the Non-Ag  
17 Pool actually received Notice of the intent to purchase the otherwise stranded asset at “market  
18 price” – but rather, to seek a “do-over” on more favorable terms. (See Motion at p. 10 [discussing  
19 the potential “incremental benefit” of \$112 per acre-foot]; see also, *Ballard v. MacCallum* (1940)  
20 15 Cal.2d 439, 443 “[t]here is nothing inequitable in a bargain merely because it turns out better  
21 for one party than the other”].)

22 In *Santa Monica v. Jones*, (1951) 104 Cal.App.2d 463, 470, [*“Santa Monica”*] the court  
23 found that where grantors failed to inspect for violations or raise objections to alleged breaches of  
24 conditions in a grant deed “the violations must be regarded as altogether too minor to warrant  
25 forfeiture of a fee property . . . [a]fter all the law does not regard mere trifles as a basis for  
26 forfeiture.” The record demonstrates that representatives of the Non-Ag Pool received the Notice,  
27 were aware of its contents, and, in fact, voted to approve it. (Molino Decl., ¶¶ 10, 13; Manning  
28 Decl., ¶ 17; Bowcock Decl., Exhibits I & K.) Yet, no member of the Non-Ag Pool raised any

1 objection to the form or method of delivery of the Notice at any time before it came due. As the  
2 court reasoned in *Santa Monica*, even if the Notice fell short of the requirements of Section C in  
3 some way, any nonconformity was too minor to capture the attention of members of the Non-Ag  
4 Pool despite their intimate knowledge of the proceedings, and any resulting loss is too minor to  
5 justify a forfeiture.<sup>6</sup>

6 The Non-Ag Pool also cannot claim a grossly negligent or willful default on the part of  
7 the Watermaster. The record demonstrates that all parties, Watermaster, the Appropriative Pool  
8 and the Non-Ag Pool, believed the condition subsequent had been met. (Manning Decl., ¶ 17;  
9 DeLoach Decl., ¶ 31.) Even if the Court finds the Notice technically fails to satisfy a requirement  
10 of Section C, in light of the exhaustive efforts to comply, it cannot be argued Watermaster acted  
11 with gross negligence. For these reasons, the Court must use the available tools to avoid the  
12 forfeiture of Watermaster's right to purchase water under the terms of Section D.

13 **D. EVEN IF THE PURCHASE AND SALE AGREEMENT IS CONSTRUED**  
14 **AS AN OPTION CONTRACT, WATERMASTER'S NOTICE**  
15 **CONSTITUTES VALID EXERCISE OF THE OPTION**

16 Regardless of whether Section C notice is construed as a condition subsequent or a  
17 condition precedent to the exercise of an option contract, Watermaster's Notice satisfies all of the  
18 applicable requirements, including the requirement that it be "provided." As such, even if the  
19 Agreement is viewed as an option contract, the Notice was an unequivocal acceptance of the  
20 Non-Ag Pool's offer and bound both parties to the terms of the Agreement.

21 Even if the Court finds the Agreement specified a particular mode of delivery, the Notice  
22 issued by Watermaster nonetheless formed a binding contract because it was actually received by  
23 the Non-Ag Pool, and the Non-Ag Pool waived any defect in the Notice by failing to raise it  
24 despite ample time and opportunity to do so. In addition, under the precedent cited by the Non-  
25 Ag Pool, the Notice was clear and unequivocal.

---

26 <sup>6</sup> This is true assuming, arguendo, the Non-Ag Pool's reason for failing to raise objection was pure. If, as the  
27 evidence might suggest, the Non-Ag Pool withheld its objections in order to obtain a favorable purchase price via its  
28 Motion, such facts would bolster the argument any forfeiture has been waived because the Non-Ag Pool's conduct  
was knowing, the Non-Ag Pool has not suffered a real loss, and the Appropriative Pool and Watermaster did not act  
with any intent to default. See addition discussion of waiver in Section D.3, below.

1                   **1. Under Section C And California Law, Any Reasonable And Usual**  
2                   **Mode Of Acceptance May Be Adopted.**

3                   As a general rule, "[i]f a proposal prescribes any conditions concerning the  
4                   communication of its acceptance, the proposer is not bound unless they are conformed to; but in  
5                   other cases any reasonable and usual mode may be adopted." (Civil Code § 1582.) Watermaster  
6                   thoroughly addresses this argument in its Opposition. (See Watermaster Opposition at pp. 19-  
7                   25.)

8                   **2. Notice Was Sufficient On the Separate Ground That It Was Actually**  
9                   **Received**

10                  Even if some fault is found with delivery of the Notice as part of the mailed agenda  
11                  packet, the Notice is nonetheless valid because it was actually received. Once an acceptance  
12                  reaches an offeror, the means of transmission becomes immaterial, and improperly dispatched  
13                  acceptance is treated as operative so long as it is received within a reasonable amount of time. (1  
14                  Witkin Sum. Cal. Law Contracts § 190; see also, Rest.2d, Contracts §§66, 67; 2 Williston 4th,  
15                  §6:35 et seq.; *Johnson v. Banta* (1948) 87 Cal.App.2d 907.) Courts uphold contracts where there  
16                  is actual receipt of acceptance despite a technical error in the method of transmission in part  
17                  because the offeror is in no way inconvenienced. (*Johnson v. Banta, supra*, 87 Cal.App.2d at  
18                  909-910.) The Non-Ag Pool's complaints about the complexity of the e-mail delivery system  
19                  (Motion at p.12) are inapposite because the Agreement does not expressly provide any conditions  
20                  upon the method of delivery, email communications are expressly permitted and regularly used  
21                  (Molino Decl., ¶¶ 6, 7), and in any event, Mr. Bowcock was sent a copy of the agenda packet via  
22                  U.S. mail (Molino Decl., ¶¶ 10, 13), and Mr. Bowcock's designee was present at both the August  
23                  13, 2009 Appropriative Pool/Non-Ag Pool Meeting and the August 27, 2009 Board Meeting  
24                  (Bowcock Decl., Exhibits I & K).

25                   **3. The Non-Agricultural Pool Waived All Objections To The Notice By**  
26                   **Failing To Raise Them Prior To The Due Date**

27                  Even if the Notice is found to vary in some respects from the requirements of Section C,  
28                  the Non-Ag Pool waived any objection it might have to the Notice when it failed to raise any

1 defects to the Watermaster or the Appropriative Pool despite ample opportunity to do so.  
2 (*Riverside Fence Co. v. Novak* (1969) 273 Cal.App.2d 656; *Collins v. Marvel Land Co.* (1970) 13  
3 Cal.App.3d 34 [*“Collins”*].) “The reason for this rule is that an optionee should be able to remedy  
4 any defects in his tender and prevent the optionor from remaining silent at the time of the tender  
5 and later surprise the optionee with hidden objections.” (*Rollins v. Stokes* (1981) 123 Cal.App.3d  
6 701, 713 [*“Rollins”*]; *Layton v. West* (1969) 271 Cal.App.2d 508, 512.) Not only did the Non-Ag  
7 Pool fail to raise any defects, evidence demonstrates that it affirmatively acted and spoke as if the  
8 Agreement had been performed.

9 In *Collins, supra*, 13 Cal.App.3d 34, the parties entered into a written option agreement  
10 for the sale of land in which the agreement provided that the option was to be exercised by  
11 “delivering written notice of exercise of this option addressed to [the defendant] and delivered to  
12 its attorneys ... at their offices ... , or by mailing same to said attorneys... postage prepaid, by  
13 certified mail.” (*Id.* at p. 39.) The only notice given by plaintiff was oral notice to defendant’s  
14 attorney six days before the expiration of the option. (*Ibid.*) The parties later failed to come to  
15 terms on the escrow instructions, and, after the period for exercising the option had expired, the  
16 defendant declared the option of no further force and effect for failure to provide written notice.  
17 (*Id.* at pp. 39-40.) The court held “[a]lthough defendants had the power to require a written  
18 exercise of the option, this requirement was for the benefit of the defendant and may be waived  
19 by them. The acceptance of the exercise of the option without objection to the form of the  
20 exercise waives any objection to the form of the exercise.” (*Id.* at p. 40 [citations omitted].)

21 In *Rollins, supra*, 123 Cal.App.3d 701, a lessee had a preemptive right to purchase  
22 property within 15 days of being notified by lessor of an offer from any other person. Arguably,  
23 the lessee was required to “evidence [his] matching ... offer within 15 days by delivering [lessor]  
24 a check and [his] written agreement to purchase on [those] terms.” (*Id.* at pp. 707.) Before the  
25 expiration of 15 days, the lessor received from lessee a letter in which lessee confirmed his intent  
26 to purchase the property on matching terms and a check representing lessee’s down payment.  
27 (*Ibid.*) Lessee did not provide a written agreement until several weeks later. (*Id.* at p. 707-708.)  
28

1 The lessor did not object. The court held, even if the above stated terms applied to lessee's  
2 notice, "he substantially complied and [lessor] waived any defective tender." (*Id.* at p. 713.)

3 Both *Collins* and *Rollins*, involve an optionee's blatant failure to comply with clear and  
4 unambiguous requirements of notice. Yet, in each of those cases, the courts found the optionor's  
5 silence constituted waiver and binding agreements were formed. Here, as discussed above, the  
6 Notice meets each and every requirement in Section C. However, even if the Court finds some  
7 aspect of the Notice varies from the terms of Section C, under the precedent set forth in *Collins*  
8 and *Rollins*, the Agreement must be upheld.

9 Like *Collins* and *Rollins*, the Non-Ag Pool received the Watermaster's Notice well before  
10 the deadline for Notice was due (approximately four months prior to the deadline). (Manning  
11 Decl., ¶ 17; Molino Decl., ¶¶ 5, 10, 13; Bowcock Decl., Exhibit K.) Over the ensuing months, the  
12 members had ample time and opportunity to raise any alleged defect. The Non-Ag Pool must  
13 have been aware that, upon notification of a defect, the Watermaster most certainly would have  
14 fixed and reissued the Notice. Such knowledge can be implied from their presence at meetings in  
15 which the Watermaster and the Appropriative Pool discussed expensive plans for holding an  
16 auction to the sell the Storage Water, and, when the auction was postponed, the Appropriative  
17 Pool quickly approved Plan B to assess itself for the funds to pay for the purchased water.  
18 (Bowcock Decl., Exhibits I, K, M, O; Watermaster Exhibit No. 13.) Even according to the  
19 allegations made in the Non-Ag Pool motion, when Mr. Penrice raised the issue for the first time  
20 at the January 7, 2010 meeting, he and Mr. Bowcock were immediately handed a copy of the  
21 Notice. (Manning Decl. ¶ 17.)

22 The Non-Ag Pool, however, remained silent and laid in wait until after the deadline had  
23 passed to raise objections to the Notice for the first time. (Manning Decl., ¶ 16.) Even more  
24 detrimental than its silence, the Non-Ag Pool made comments that presupposed that the sale was  
25 done, and Mr. Bowcock even indicated that Non-Ag Pool member Aqua Capital contemplated  
26 being a "player" in the deal. (DeLoach Decl., ¶ 32.) Thus, even if the Court finds that the  
27 Watermaster's Notice did not comply with the requirements of Section C, the Non-Ag Pool's  
28 failure to raise an objection constitutes waiver, and the option has been exercised. The Non-Ag

1 Pool should not be rewarded for its failure to utilize the process of self-governance that has been  
2 utilized by the parties for many years.

3 E. **THE PURCHASE AND SALE AGREEMENT MUST BE CONSIDERED IN**  
4 **THE LARGER CONTEXT OF THE PEACE II PACKAGE**

5 It is important to understand the Agreement is just one component of the entire Peace II  
6 package, which was the product of a series of lengthy, good-faith negotiations between the  
7 parties. Judgment Amendment to Exhibit G, which provides a mechanism for the Non-Ag Pool  
8 to transfer water outside the Pool on an annual basis, may not have been part of Peace II separate  
9 and apart from the Agreement. (DeLoach Decl., ¶ 21.) Thus, Peace II is properly viewed as a  
10 series of interdependent covenants. If a portion of the totally bargained-for package is  
11 manipulated, it is possible that other portions of Peace II will need to be renegotiated.

12 In addition, when the Court approved Peace II on December 21, 2007, its approval was  
13 conditioned on the satisfaction of eight conditions subsequent. (Watermaster Exhibit No. 6.) The  
14 last of these is the filing by Watermaster of the updated Recharge Master Plan, which is due no  
15 later than July 2010. (*Ibid.*) The Appropriative Pool had planned on using proceeds from the  
16 auction as the primary funding mechanism for the improvements required by the updated  
17 Recharge Master Plan. (DeLoach Decl., ¶ 26.) Because of the ongoing dispute, the auction has  
18 been put off indefinitely. Thus, the Appropriative Pool may be forced to request that  
19 Watermaster delay the filing and implementation of the updated Plan. If the funding source for  
20 the Recharge Master Plan is lost, the Appropriative Pool may be forced to reconsider altogether  
21 the Basin management approach outlined in Peace II.

22 Lastly, for at least the last ten years, the parties to the Judgment have negotiated in good  
23 faith and have operated from a position of mutual respect. Even in the midst of disagreements  
24 over law, fact and policy, the parties have always maintained a position of trust vis-à-vis one  
25 another. In contrast, this Motion turns “good-faith” on its head. The Non-Ag Pool is motivated  
26 by avarice and personal gain, and its Motion will have far-reaching consequences that,  
27 unfortunately, negatively impact trust, which is fundamental to the ability of the parties to work  
28

1 together in the future as effective Basin managers and stewards of an essential resource that is a  
2 vital and basic public necessity.

3 F. **THE APPROPRIATIVE POOL SHOULD BE AWARDED DAMAGES FOR**  
4 **ANTICIPATORY BREACH**

5 By filing the Motion, the Non-Ag Pool has breached the Agreement and Peace II, and, as  
6 such, the Appropriative Pool is entitled to recover attorneys' fees and costs. If a promisor  
7 expressly repudiates a contract by unequivocal refusal to perform, he or she is guilty of an  
8 anticipatory breach, and the promisee may immediately exercise the available remedies. (1  
9 Witkin Sum. Cal. Law. Contracts §§ 862, 863; *Mayo v. Pacific Project Consultants, Inc.* (1969) 1  
10 Cal.App.3d 1013.) The filing of a legal action questioning the validity of an agreement has been  
11 held to be an express repudiation of that agreement. (*Mayo v. Pacific Project Consultants, Inc.*  
12 (1969) 1 Cal.App.3d 1013 [“Mayo”]; *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712.) In  
13 *Mayo*, a plaintiff brought an action seeking to quiet title to real property against any claim under a  
14 joint venture agreement. (*Mayo, supra*, 1 Cal.App.3d at p. 1017.) The court held that the action  
15 constituted a repudiation of that agreement, and the court allowed defendant's cross claim for  
16 monetary damages under the agreement. (*Ibid.*)

17 Similarly, in *In re Marriage of Burkle*, a wife filed a petition for dissolution of her  
18 marriage in which she stated that a post-marital agreement was void and unenforceable. (*In re*  
19 *Marriage of Burkle* (2006) 139 Cal.App.4th 712.) The court held that the petition constituted  
20 unequivocal repudiation excusing the husband's future performance under the post-marital  
21 agreement. (*Ibid.*) Thus, by filing the Paragraph 31 Motion, the Non-Ag Pool has expressly  
22 repudiated the Agreement and is therefore guilty of anticipatory breach.

23 Section 9.2(d) of the Peace Agreement provides “[i]n any adversarial proceeding between  
24 the Parties other than the dispute resolution procedure set forth [therein] and under the Judgment,  
25 the prevailing Party shall be entitled to recover their costs, including reasonable attorneys' fees. If  
26 there is no clear prevailing Party, the Court shall determine the prevailing Party and provide for  
27 the award of costs and reasonable attorneys' fees.” (Watermaster Exhibit No. 5.)  
28

1 Attorneys' fees and costs should be awarded as a measure of damages for the Non-Ag  
2 Pool's anticipatory breach. Because the Appropriative Pool is responsible for paying  
3 approximately 98 percent of Watermaster's costs, this award of attorneys' fees should include not  
4 only the Appropriative Pool's fees, but also Watermaster's attorneys' fees.


5 **IV. CONCLUSION**

6 The Non-Ag Pool's verisimilitudes concerning governance and Appropriative Pool  
7 hegemony are properly separately addressed rather than serving as an integument for the legal  
8 and factual issues before the Court concerning a basic and straightforward contractual matter.

9 Put simply, there is no basis in law or fact for the Court to provide the relief requested by  
10 the Non-Ag Pool. If the Non-Ag Pool truly believes that issues of governance and the manner in  
11 which Watermaster administers the Judgment require Court review, the Appropriative Pool  
12 encourages the Court to schedule workshop-type hearings as was done by Judge Wade so that the  
13 Court can comprehensively review Watermaster activities. Such a review is warranted in any  
14 instance because prior to February 2011 the Court will be required to determine whether the nine-  
15 member Watermaster Board should be reappointed to continue to serve as Watermaster.

16 Thus, for the reasons set forth herein, the Appropriative Pool respectfully requests that this  
17 Court summarily deny the Non-Ag Pool's Motion.

18  
19 Dated: April 19, 2010

20  
21 By:   
22 JOHN J. SCHATZ  
23 Attorney for Appropriative Pool  
24  
25  
26  
27  
28



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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SAN BERNARDINO  
11

12 CHINO BASIN MUNICIPAL WATER  
DISTRICT,

13 Plaintiff,

14 v.  
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16 CITY OF CHINO, et al.,

17 Defendants.  
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Case No. RCV 51010  
Assigned for All Purposes to the Honorable  
Stanford E. Reichert

**DECLARATION OF ROBERT A.  
DELOACH**

[Filed Concurrently With The Appropriative  
Pool's Opposition To The Motion By The  
Overlying (Non-Agricultural) Pool Committee  
For Court Review Of Watermaster Actions  
Pursuant To Section 31 Of Judgment]

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

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1           8.       Ultimately, the parties consented to a limited "transfer" provision that allowed the  
2 Non-Ag Pool to transfer water to Watermaster for purposes of desalter replenishment, or for use  
3 in a storage and recovery program, subject to demonstration of broad mutual benefit.

4                                   **The Peace II Agreement**

5           9.       The "Peace II" negotiations took place over a period of years, from roughly 2004  
6 to 2007.

7           10.      As during the Peace negotiations, I believed that the overwhelming opinion of  
8 parties during the Peace II negotiations was that allowing Non-Ag Pool's water to accumulate,  
9 unused, in the Non-Ag Pool storage accounts, was impermissible because the water was not being  
10 put to reasonable and beneficial use.

11          11.      During the Peace II negotiations, the argument was again raised that, consistent  
12 with California water law, unused water should revert to the common pool and be placed to  
13 reasonable and beneficial use within the Basin without compensation to the Non-Ag Pool,  
14 consistent with the method utilized for surplus Agricultural Pool water.

15          12.      The Non-Ag Pool, through its sole representative during the Peace II negotiations,  
16 Bob Bowcock, advanced the idea of selling the Non-Ag Pool's water and further enhancing the  
17 Non-Ag Pool's ability to transfer water outside the Pool for compensation.

18          13.      Mr. Bowcock engineered and advocated a plan by which the Appropriative Pool  
19 would be able to purchase the water in storage at "market price," which is the price that  
20 Appropriative Pool parties would sell or lease water as between each other.

21          14.      This price was widely recognized to be 92% of the then-current replenishment rate  
22 established by the Metropolitan Water District of Southern California ("MWD").

23          15.      Because Watermaster typically purchases imported water from MWD, the MWD  
24 rate is used as the benchmark for purposes of valuing other purchased or leased water supplies  
25 available within or to the Chino Groundwater Basin.

26          16.      In exchange for the ability to sell the water in storage to the Appropriative Pool at  
27 market price, the Non-Ag Pool agreed to dedicate 10 percent of the water to desalter  
28 replenishment.

17. The parties also negotiated a mechanism whereby the Non-Ag Pool could elect, on an annual basis, to make unused water available for purchase by the Appropriative Pool at market price.

18. The Agreement also contained a one-time transfer of water between Vulcan Materials, San Antonio Water Company, and CVWD. That portion of the Agreement was fully performed in 2007 and 2008 without any objection.

19. The customary practice has been for Mr. Bowcock to represent the entire Pool, negotiate on behalf of the entire Pool, and sign documents on behalf of the entire Pool.

20. Mr. Bowcock negotiated and executed the Purchase and Sale Agreement ("Agreement") on behalf of the entire Pool.

21. In my view, the Agreement was just one component of the entire Peace II package, which was the product of a series of lengthy, good-faith negotiations between the parties. Judgment Amendment to Exhibit G, which provides a mechanism for the Non-Ag Pool to transfer water outside the Pool on an annual basis, may not have been included as part of Peace II separate and apart from the Agreement.

## The Auction

22. In 2008 and 2009, it became clear to the Appropriative Pool that ongoing drought conditions and regulatory restrictions on water exports from the Sacramento-San Joaquin Bay Delta, which is a primary MWD supply source, meant that the ability to obtain replenishment water from MWD would be severely limited.

23. In particular, because MWD projected that replenishment water would be available in only 3 out of 10 years (as opposed to 7 out of 10 years, which was the previous projection), Watermaster's engineer explained that significant enhancements to Watermaster's recharge facilities would be required.

24. The method by which Watermaster funds operation and maintenance, as well as administrative costs and capital improvements such as the Recharge Master Plan, is through a system of assessments, or a tax on all groundwater production in the Appropriative Pool. Under this system of assessments, the Appropriative Pool will be responsible for virtually all of the costs

1 associated with improving the recharge facilities in accordance with the Recharge Master Plan, a  
2 benefit to all producers in the Chino Basin.

3 25. When the Appropriative Pool became aware of the significant costs associated  
4 with these improvements, the Appropriative Pool began to discuss various funding mechanisms.

5 26. Ultimately, the Appropriative Pool determined that monetizing the purchased Non-  
6 Ag Pool water in storage through an auction of that water could produce a viable source of  
7 funding for the significant costs of recharge enhancements.

8 27. Absent such a funding mechanism, the cost of the recharge enhancements would  
9 ultimately be borne by the public ratepayers.

10 28. The Non-Ag Pool knew that the proceeds were to be used to fund recharge  
11 enhancements in the Basin, a benefit to the entire Basin, because Mr. Bowcock signed a  
12 Stipulation on behalf of the Non-Ag Pool detailing how the proceeds would be used.

13 29. From August through October 2009, the Appropriative Pool and Watermaster  
14 prepared for the auction. During this time, the Appropriative Pool expended substantial sums of  
15 money to develop the plan to auction the water and held numerous public workshops regarding  
16 the auction.

17 30. The Non-Ag Pool's Representatives, Mr. Bowcock and/or Mr. Sage, were present  
18 at meetings throughout the auction process, as was I.

19 31. Never once during this time did the Appropriative Pool indicate that it would not,  
20 or even might not, proceed with the purchase of the water. From the Appropriative Pool's  
21 perspective, it was bound by the Agreement and intended to proceed.

22 32. I am not aware of any statements by Mr. Bowcock, Mr. Sage, or any other member  
23 of the Non-Ag Pool at any Pool Meeting, Advisory Committee Meeting, or Board Meeting that  
24 they felt Notice had not been provided. In fact, Mr. Bowcock made statements indicating that he  
25 thought the sale was a "done deal." Mr. Bowcock also indicated that Aqua Capital Management  
26 contemplated being a "player" in the deal.

27 33. At no time that I am aware did Mr. Bowcock, Mr. Sage or any other member of  
28 the Non-Ag Pool express concerns with the auction or object to the Appropriative Pool's

1 activities relating to the auction of Non-Ag Pool's stored water.

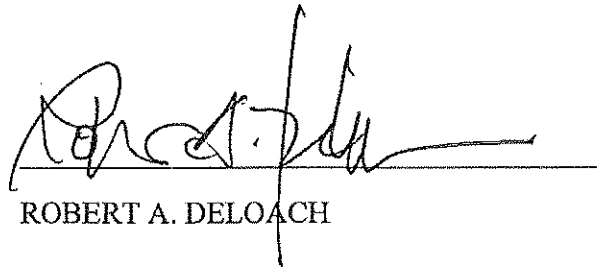
2 Aqua Capital Management

3 34. My understanding is that one of the largest Non-Ag Pool members is Aqua Capital  
4 Management.

5 35. My understanding is that Mr. Bowcock was a principal with Aqua Capital  
6 Management from at least 2007 until at least the beginning of 2009.

7 36. My understanding is that Aqua Capital Management is headquartered in Omaha,  
8 Nebraska.

9  
10 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
11 true and correct, and that this declaration was executed on April 19, 2010, at Rancho Cucamonga,  
12 California.

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15 ROBERT A. DELOACH  
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CHINO BASIN WATERMASTER

Case No. RCV 51010

Chino Basin Municipal Water District v. The City of Chino

PROOF OF SERVICE

I declare that:

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

On April 19, 2010 I served the following:

- 1) **THE APPROPRIATIVE POOL'S OPPOSITION TO THE MOTION BY THE OVERLYING (NON-AGRICULTURAL) POOL COMMITTEE FOR COURT REVIEW OF WATERMASTER ACTIONS PURSUANT TO SECTION 31 OF JUDGMENT**
- 2) **DECLARATION OF ROBERT A. DELOACH**

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

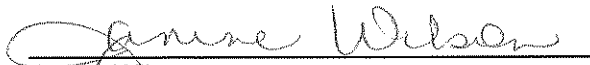
☐ BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee.

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

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

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

Executed on April 19, 2010 in Rancho Cucamonga, California.

  
\_\_\_\_\_  
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Chino Basin Watermaster

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