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6 EXEMPT FROM FILING FEES  
7 PER CAL. GOV. CODE § 6103

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SAN BERNARDINO

10  
11 CHINO BASIN MUNICIPAL WATER  
DISTRICT,

12 Petitioner,

13 v.

14 CITY OF CHINO, et al.,

15 Defendants.  
16  
17

Case No. RCVRS 51010

Judge: Stanford E. Reichert

APPROPRIATIVE POOL'S  
SURREBUTTAL BRIEF TO REBUTTAL  
AND OBJECTIONS RE SETTLEMENT

[Filed With:

- 1. Declaration of John Bosler;
- 2. Declaration of Chris Diggs;
- 3. Declaration of John Schatz]

Date: April 22, 2022  
Time: 1:30 p.m.  
Dept: S35

TABLE OF CONTENTS

	<u>Page</u>
1	
2 1. SUMMARY OF ARGUMENT .....	4
3 2. BACKGROUND .....	5
4 A. THE JUDGMENT CREATED THE AP WITH POWERS AND	
5 RESPONSIBILITIES SEPARATE FROM ITS MEMBERS .....	5
6 B. PEACE I IS PART AND PARCEL TO THE JUDGMENT .....	6
7 C. THE DISPUTE REGARDING THE AG POOL’S FEES .....	7
8 3. ARGUMENT.....	8
9 A. THE SETTLEMENT DOES NOT MODIFY THE COURT ORDERS .....	8
10 B. THE SETTLEMENT DOES NOT VIOLATE PEACE I.....	9
11 C. THE AP IS RESPONSIBLE FOR AG POOL’S ATTORNEY’S FEES UNDER	
12 THE JUDGMENT AND PEACE I.....	10
13 D. THE SETTLEMENT DOES NOT VIOLATE PUBLIC POLICY.....	11
14 4. CONCLUSION.....	12
15	
16	
17	
18	
19	
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21	
22	
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24	
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26	
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TABLE OF AUTHORITIES

1  
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22  
23  
24  
25  
26  
27  
28

Page(s)

Cases

*Cal. Housing Finance Agency v. Elliott*,  
17 Cal.3d 575 (1976) ..... 11

*Ecco-Phoenix Electric Corp. v. Howard J. White, Inc.*,  
1 Cal.3d 266 (1969) ..... 11

*Jordan v. California Dept. of Motor Vehicles*,  
100 Cal.App.4th 431 (2002)..... 12

*Kaufman v. Gold*,  
195 Cal.App.4th 734 (2011)..... 12

*Page v. MiraCosta Comm. College Dist.*,  
180 Cal.App.4th 471 (2009)..... 12

1 SURREBUTTAL BRIEF

2

3 1. SUMMARY OF ARGUMENT

4

5 The Terms of Agreement, effective March 22, 2022 (“Terms of Agreement”), put to rest a  
6 long simmering, hard-fought and costly battle between the Appropriative Pool (“AP”) and the  
7 Overlying (Agricultural) Pool (“Ag Pool”) about the AP’s payments of the Ag Pool’s attorney’s  
8 fees and costs under the Peace Agreement, dated June 29, 2000 (“Peace I”).

9 Pursuant to the Court’s ruling on April 8, 2022, the AP submits this Surrebuttal in support  
10 of the Terms of Agreement<sup>1</sup> and in opposition to the Rebuttal Brief and Objections Re: Joint  
11 Statement Regarding Settlement, etc., dated April 1, 2022 (“Rebuttal”), filed by dissenting  
12 appropriators City of Ontario (“Ontario”), City of Chino (“Chino”), Monte Vista Water District  
13 (“Monte Vista”), and Monte Vista Irrigation Company (collectively “Dissenters”). The Rebuttal  
14 filed by a minority of the AP asserts that the Terms of Agreement violates the law, and the AP  
15 members cannot be bound by its terms.

16 However, both assertions are demonstrably false. The Terms of Agreement is valid  
17 because the AP had the authority to enter into the Agreement pursuant to Peace Agreement 5.4(a)  
18 that expressly provides the AP is the sole obligor for the payment of the Ag Pool’s attorney’s fees  
19 and costs. The Judgment AP Pooling Plan enables the AP to act collectively and thereby  
20 empowers its members by majority vote to exercise the AP’s authority to enter into the Terms of  
21 Agreement. Accordingly, each of Dissenters arguments can be swiftly rejected.

22 First, Dissenters claim that the Terms of Agreement unlawfully modifies the Court’s May  
23 28, 2021 Order<sup>2</sup> and December 3, 2021 Order.<sup>3</sup> However, these Orders decided motions  
24 regarding the Ag Pool’s claim for attorney’s fees. They did not consider backup for settlement  
25 payments, limits on settlement payments, sources of settlement payments or the rights of

26 \_\_\_\_\_  
27 <sup>1</sup> Joint Statement Regarding Settlement Agreement, etc., filed Mar. 24, 2022, and refiled pursuant  
to Court Order on April 11, 2022.

28 <sup>2</sup> Order on Motion of Appropriative Pool Member Agencies re: Agricultural Pool Legal and Other  
Expenses, filed May 28, 2021.

<sup>3</sup> Order re Overlying (Agricultural) Pool’s Motion for Attorney’s Fees, filed Dec. 3, 2021.

1 individual AP members. In other words, the Orders did not address the permissible scope of  
2 settlement or an administrative process for considering and processing Ag Pool expenses that is  
3 addressed by the Terms of Agreement.

4 Second, Dissenters assert that the Terms of Agreement also unlawfully modifies the Peace  
5 I Agreement as interpreted by the May 28, 2021 Order. As just explained, that Order interpreted  
6 Peace I for an attorney's fees motion, not a settlement agreement. In addition, the Terms of  
7 Agreement expressly provides that "it is in furtherance of and not abrogation of" the May 28,  
8 2021 Order, and should be "construed together" with the Order.

9 Third, Dissenters challenge the AP's right to settle on behalf of its members since the  
10 members ultimately pay the assessments for the Ag Pool's attorney's fees and costs. Under this  
11 flawed analysis, each member exercises veto power or at least cannot be bound by the actions of  
12 the majority. But this view would nullify all or portions of the Judgment which created the AP  
13 and sets forth its role (§§ 15, 31, 38, 41, 43-46, ex. H), and defeat the function and ability of the  
14 AP to carry out its duties under the Judgment. Consequently, the Judgment and Peace I make the  
15 AP responsible for Ag Pool's attorney's fees. Of course, the AP members pay the assessments,  
16 but that is based upon their required membership in the AP under the Judgment.

17 Fourth, Dissenters make various public policy arguments, none of which have any basis in  
18 law. As parties to the Judgment, AP members are bound by settlements and other actions by the  
19 AP that conform to the Judgment and Pool procedures. In essence, Dissenters really seek the  
20 ability to ignore any AP actions under the Judgment to which they do not agree.

21  
22 2. BACKGROUND

23  
24 A. THE JUDGMENT CREATED THE AP WITH POWERS AND  
25 RESPONSIBILITIES SEPARATE FROM ITS MEMBERS  
26

27 In 1978, groundwater rights holders in the Chino Basin entered into a stipulated Judgment  
28 governing the exercise of their rights. Each party to the Judgment was assigned to the Overlying

1 (Non-Agricultural) Pool, Overlying (Agricultural) Pool or Appropriative Pool based on the type  
2 or characterization of their water right. Judgment §§ 8-10, 43, exs. C, D, E. Under the Judgment,  
3 the AP exercises rights and obligations separate and apart from its members to: develop policy  
4 recommendations (§§ 38(a), 46, ex. H); advise the Watermaster to develop an optimum basin  
5 management program (“OBMP”) (§ 41); pay costs of replenishment water and other aspects of  
6 the physical solution (§ 43); pay assessments (§ 45); review Watermaster actions (§ 31); and  
7 exercise the continuing jurisdiction of this Court to interpret the Judgment (§ 15). *Also see*  
8 Declaration of Peter Kavounas In Support Of Watermaster Response To Rebuttal Brief, etc.,  
9 dated April 7, 2022 (“Kavounas Decl.”).

10 Similarly, the AP is not governed on the proposition that it is merely the sum of its  
11 members each exercising equal rights. Rather the Pooling Plan: assigns voting power to each  
12 member according to its share in Operating Safe Yield (“OSY”) and assessments paid to  
13 Watermaster (ex. H, § 3);<sup>4</sup> appoints an Advisory Committee representative for each major  
14 appropriator and two representatives for the remaining appropriators (ex. H, § 4); apportions  
15 assessments according to different formulas for each member’s water production (ex. H, §§ 6-7,  
16 9(d)); and reallocates unallocated OSY water to the members based on their different operations  
17 (ex. H, § 10). As parties, the AP members are bound by the Judgment, including its voting  
18 provisions.

19 B. PEACE I IS PART AND PARCEL TO THE JUDGMENT  
20

21 In 2000, the parties to the Judgment entered into Peace I. Its purpose was clearly stated:  
22 “the Parties intend that this Agreement shall enable the adoption and implementation of the  
23 OBMP [Optimum Basin Management Plan] consistent herewith. . . .” Declaration of John  
24 Schatz, filed concurrently (“Schatz Decl.”), ¶ 3, ex. A (Peace I p. 3, recitals) (brackets  
25

26 <sup>4</sup> Specifically, Section 3 states in relevant part: “The total voting power of the Pool Committee  
27 shall be 1,000 votes. Of these, 500 votes shall be allocated in proportion to decreed percentage  
28 shares in Operating Safe Yield. The remaining 500 votes shall be allocated proportionally on the  
basis of assessments paid to Watermaster during the preceding year . . . Affirmative action of the  
Committee shall require a majority of the voting power of members in attendance, provided that it  
includes concurrence by at least one-third of its total members.”

1 added). The OBMP is the physical solution contemplated by the Judgment to maximize the  
2 reasonable beneficial use of the waters of Chino Basin. Judgment §§ 39-57. Therefore, Peace I  
3 was a major step in implementing the Judgment.

4 Section 5.4(a) requires the AP to pay assessments and expenses of the Ag Pool: “During  
5 the term of this Agreement, all assessments and expenses of the Agricultural Pool including those  
6 of the Agricultural Pool Committee shall be paid by the Appropriative Pool.” Schatz Decl., ¶ 3,  
7 ex. A (Peace I p. 36, § 5.4(a)). This section is the basis for the present litigation.

8  
9 C. THE DISPUTE REGARDING THE AG POOL’S FEES

10 As far back as 2009, the two Pools disputed the scope of expenses to be paid under  
11 Section 5.4(a). May 28, 2021 Order pp. 2-3, § 2(a). More recently, in 2020, the two Pools  
12 disagreed over outstanding Ag Pool legal and expert fees. As the Court knows, this dispute has  
13 been hotly contested and led to three separate motions with many briefs filed for each motion:

- 14 • On September 18, 2020, the AP filed its Motion re Attorney’s Fees.<sup>5</sup> After several  
15 rounds of briefing, the Court issued its May 28, 2021 Order.
- 16 • Based on the May 28, 2021 Order, the Ag Pool filed its Motion re Attorney’s  
17 Fees.<sup>6</sup> The Court denied this Motion. December 3, 2021 Order.<sup>7</sup>
- 18 • Pursuant to the December 3, 2021 Order, Chino filed its Motion for  
19 Reimbursement.<sup>8</sup> Ontario, Monte Vista, and Monte Vista Irrigation Company  
20 joined Chino’s Motion.

21 Beginning in May 10, 2021, principals of the Ag Pool and principals of certain AP  
22 members conducted five settlement meetings. Ontario was represented in each of the meetings,  
23 and Monte Vista’s representative helped draft substantive provisions of the Terms of Agreement.

24  
25 <sup>5</sup> Motion of AP Member Agencies re: Ag Pool Legal and Other Expenses, dated Sept. 18, 2020  
26 (“AP Motion re Attorney’s Fees”).

27 <sup>6</sup> Ag Pool Notice of Motion and Motion for Attorney's Fees, dated July 26, 2021 (“Ag Pool  
28 Motion re Attorney’s Fees”).

<sup>7</sup> The Ag Pool appealed the December 3, 2021 Order, but abandoned its appeal. Ag Pool’s Notice  
of Appeal, dated Jan. 4, 2022; Ag Pool’s Abandonment of Appeal, dated Mar. 28, 2022.

<sup>8</sup> Chino Motion for Reimbursement of Attorney's Fees and Expenses Paid to the Agricultural Pool  
dated Dec. 31, 2022 (“Chino Motion for Reimbursement”).

1 Declaration of John Bosler, filed concurrently, ¶¶ 4-5. In the late stages of the negotiations, each  
2 Pool appointed negotiators, but the AP gave instructions to its negotiators in confidential  
3 meetings in which all AP members and their counsel were given a chance to participate.

4 Declaration of Chris Diggs, filed concurrently, ¶ 4.

5 Ultimately, the Ag Pool and AP resolved their dispute regarding the Ag Pool's attorney's  
6 fees and other expenses which underpinned the AP, Ag Pool, and Chino Motions. On March 18,  
7 2022, the Ag Pool approved the Terms of Agreement. On March 22, 2022, the AP approved the  
8 Terms of Agreement by 59.363% of the weighted votes of thirteen AP members, which is  
9 substantially more than the required concurrence by 33% of the AP members. Schatz Decl. ¶ 5.  
10 Nevertheless, Dissenters' Rebuttal challenges the legality of the Terms of Agreement.

11  
12 3. ARGUMENT

13  
14 A. THE SETTLEMENT DOES NOT MODIFY THE COURT ORDERS

15  
16 The Dissenters incorrectly claim the Terms of Agreement violates the May 28, 2021 and  
17 December 3, 2021 Orders because: (i) the AP will pay Ag Pool legal expenses without  
18 documentation required by the May 28, 2021 Order; (ii) the AP will pay Ag Pool legal expenses  
19 incurred in prior fiscal years contrary to the December 3, 2021 Order; (iii) the Ag Pool will  
20 restore funds advanced from Watermaster administrative reserves to cover Ag Pool legal  
21 expenses prohibited by the December 3, 2021 Order; and (iv) the settlement does not protect the  
22 members' right to challenge Ag Pool fees, and it adds a 30-day limit to seek review in violation of  
23 the May 28, 2021 Order. Rebuttal pp. 9:8-10:8, 12:23-13:6.

24 Dissenters take unwarranted liberties in reading the Court Orders: (i) the May 28, 2021  
25 Order instructed the Ag Pool to submit redacted bills to support a motion for attorney's fees, but  
26 it did not prohibit the AP from paying those fees without backup in a settlement; (ii) the  
27 December 3, 2021 Order denied Ag Pool's Motion re Attorney's Fees, but did not state the AP  
28 could not pay attorney's fees from prior fiscal years; (iii) the Ag Pool repaying money it received



1 from Watermaster does not harm the AP or its members; and (iv) nothing in the Court Orders  
2 addresses protecting the individual AP member's right to challenge the Ag Pool's attorney's fees or  
3 a 30-day challenge period.

4 In short, the May 28, 2021 and December 3, 2021 Orders only ruled on the AP Motion re  
5 Attorney's Fees and the Ag Pool Motion re Attorney's Fees. May 28, 2021 Order p. 1; December  
6 3, 2021 Order p. 2. They did not rule on or rule out any settlement terms. Instead, the Court  
7 acknowledged the ability of the parties to settle on different terms than the May 28, 2021 Order:  
8 "the Ag Pool and the Appropriative Pool can agree to a determination to [sic] about payment of  
9 'litigation expense.'" May 28, 2021 Order p. 6, § 7. Therefore, Dissenters assertion that the Terms  
10 of Agreement violates the Court Orders is completely unfounded.

11 B. THE SETTLEMENT DOES NOT VIOLATE PEACE I

12  
13 Dissenters also claim that the Terms of Agreement violates Peace I because it: (i)  
14 contains an attorney's fees provision which is not in Peace I; and (ii) violates the Court's  
15 interpretation in the May 28, 2021 Order of Section 5.4(a) of Peace I. Rebuttal pp. 10:9-14; 13:7-  
16 25. Not true. The Terms of Agreement contains an attorney's fee provision for disputes over its  
17 terms, not for disputes over Peace I's terms. Joint Statement re Settlement, etc., dated Mar. 24,  
18 2022, ex. A (Terms of Agreement § 6(c)). And while the May 28, 2021 Order interpreted Section  
19 5.4(a) of Peace I for purposes of the AP Motion re Attorney's Fees, the Terms of Agreement is "a  
20 compromise and settlement of disputed issues. . . ." Joint Statement, ex. A  
21 (Terms of Agreement p. 1, 4th ¶).

22 Rather than contradict the May 28, 2021 Order, the Terms of Agreement expressly states  
23 that it is "in furtherance of and without abrogation of the provisions of the May 28, 2021, San  
24 Bernardino Court Order (the Order)." *Id.* at p. 1, 2nd ¶. The Terms of Agreement further notes:  
25 "These Terms of Agreement and the Order shall be construed together." *Id.* at p. 1, 3rd ¶. Thus,  
26 the Terms of Agreement is consistent with Peace I, Section 5.4(a), as interpreted by the May 28,  
27 2021 Order, and thus does not amount to an amendment requiring unanimous consent.

1 C. THE AP IS RESPONSIBLE FOR AG POOL'S ATTORNEY'S FEES  
2 UNDER THE JUDGMENT AND PEACE I

3  
4 Despite all evidence to the contrary, Dissenters say that the AP members are the interested  
5 parties since the members hold the water rights and pay the assessments, not the AP itself.  
6 Rebuttal pp. 14:1-15:2. In a related argument, Dissenters argue that the AP lacks the authority to  
7 bind its members to the Terms of Agreement. Rebuttal pp. 16:24-18:3. The Judgment and Peace  
8 I compel the opposite conclusion.

9 The Judgment: (i) establishes the AP (§§ 43, 43(c)); (ii) authorizes the AP to invoke the  
10 jurisdiction of this Court (§ 15); (iii) describes the AP's powers and functions (§ 38(a)); (iv)  
11 entitles the AP to seek court review of Watermaster actions (§ 38(c)); (v) contemplates all Pools  
12 will advise Watermaster on the OBMP (§ 41); and (vi) creates a Pooling Plan to govern the AP  
13 (ex. H). Dissenters' citation to only Section 38(a) is misleading because it ignores the other  
14 provisions. See Watermaster Limited Response to Rebuttal Brief, etc., dated April 6, 2022.

15 Peace I: (i) defines the AP according to "the meaning as used in the Judgment" (§ 1.1(b));  
16 (ii) obligates the AP, not its members, to pay for certain Ag Pool assessments and expenses (§  
17 5.4(a)); (iii) provides remedies for any Party upon default under the Peace Agreement (§ 9.2); (iv)  
18 states "the prevailing Party shall be entitled to recover their costs, including reasonable attorneys'  
19 fees" (§ 9.2(d)); and (v) makes the AP a "Party" and signatory (pp. 62. 64). Further, Peace I does  
20 not include any joint or several obligation provisions, including for the Section 5.4(a) provision.

21 The Terms of Agreement is valid because the AP had the authority to enter into the  
22 Agreement pursuant to Peace Agreement Section 5.4(a) that expressly provides the AP is the sole  
23 obligor for the payment of the Ag Pool's attorney's fees and costs. The Judgment AP Pooling  
24 Plan enables the AP to act collectively and thereby empowers its members by majority vote to  
25 exercise the AP's authority to enter into the Terms of Agreement. Kavounas Decl. ¶ 5 ("Pools  
26 enter into agreements with other Pools and Parties").

27 Consistent with this role, all Ag Pool expenses dispute proceedings have involved  
28 interpreting the AP's obligation regarding Peace 1 Section 5.4(a) and not individual AP members,

1 Schatz Decl. ¶ 4. Similarly, this Court recognized the AP is a party able to settle the present  
2 attorney's fee dispute: “Judgment ¶ 54 and Peace I § 5.4(a) mean that, of course, the Ag Pool and  
3 the Appropriative Pool can agree to a determination to [sic] about payments of ‘litigation  
4 expense.’” May 24, 2021 Order p. 6, § 7.

5 In summary, the language of the Judgment created the AP as an entity before this Court,  
6 Peace I made the AP a party and signatory to its terms, and this Court noted the AP’s role in this  
7 dispute. Therefore, the AP’s status as a separate entity responsible for Ag Pools’ attorney’s fees  
8 and authorized to resolve this matter is beyond dispute.

9  
10 D. THE SETTLEMENT DOES NOT VIOLATE PUBLIC POLICY

11 Finally, Dissenters present a smorgasbord of public policy arguments, none of which have  
12 a legal basis. First, Dissenters state that the Terms of Agreement unlawfully delegates their  
13 governmental settlement authority. Rebuttal p. 15:8-13. However, unlike in an ordinary contract,  
14 the AP members are bound by the Judgment. Therefore, since the AP settled an issue regarding  
15 the assessments for which it is responsible and approved that settlement pursuant to the  
16 Judgment’s voting provisions, the AP members must honor this process.

17 Second, without citing any applicable law,<sup>9</sup> Dissenters say they have a duty as public  
18 agencies to ensure any expenses are properly documented. Rebuttal p. 15:14-23. If Dissenters  
19 believe the Terms of Agreement somehow violates the law, there is a process to follow under the  
20 Judgment to raise those issues. That process does not include rejecting an AP agreement and  
21 refusing to respect its terms.

22 Third, Dissenters say that the Terms of Agreement amounts to a gift of public funds.  
23 Rebuttal p. 16:1-14. However, case law explains that a settlement of a disputed claim is not a gift  
24 of public funds. In *Cal. Housing Finance Agency v. Elliott*, 17 Cal.3d 575, 583 (1976), the  
25 Supreme Court explained the well-recognized exception to this constitutional principle: “Under  
26 the public purpose doctrine, public credit may be extended and public funds disbursed if a direct

27 \_\_\_\_\_  
28 <sup>9</sup> *Ecco-Phoenix Electric Corp. v. Howard J. White, Inc.*, 1 Cal.3d 266, 272 (1969), the only case  
cited by Dissenters is inapplicable. It involved a lawsuit between two private parties, and  
discussed an award of attorney’s fees and costs under a subcontract.

1 and substantial public purpose is served and nonstate entities are benefited only as an incident to  
2 the public purpose.” *Page v. MiraCosta Comm. College Dist.*, 180 Cal.App.4th 471 (2009),  
3 applied this exception to settlements: “The settlement of a good faith dispute between the state  
4 and a private party is an appropriate use of public funds and not a gift because the relinquishment  
5 of a colorable legal claim in return for settlement funds is good consideration and establishes a  
6 valid public purpose.” *Id.* at 495 (citing *Jordan v. California Dept. of Motor Vehicles*, 100  
7 Cal.App.4th 431, 450 (2002)).

8 Dissenters public policy arguments run counter to well established law that settlement of  
9 disputed claims furthers public policy. *E.g.*, *Kaufman v. Gold*, 195 Cal.App.4th 734, 745 (2011)  
10 (“It is important to recognize there is a strong public policy favoring settling of disputes”). The  
11 Terms of Agreement amply illustrates the public policy benefits of settlement. The Terms of  
12 Agreement has already caused the dismissal of the Ag Pool appeal, withdrawal of the storage  
13 contests, and established a process for the Ag Pool and AP to constructively engage to resolve  
14 any differences that may arise under Peace Agreement Section 5.4(a). By avoiding the prior  
15 practice of first seeking judicial relief, the Pools are conserving public and ratepayer funds  
16 otherwise devoured by protracted litigation.


17  
18 4. CONCLUSION  
19

20 The AP’s ability to enter into the Terms of Agreement and bind its members by majority  
21 vote follow from the express terms of the Judgment and Peace I. Accordingly, the AP  
22 respectfully requests that the Court decide that the Terms of Agreement is a valid exercise of the  
23 AP’s authority under the Judgment. Since the Terms of Agreement settle the claims on which  
24 Chino’s Motion for Reimbursement are based, the Motion should be dismissed as moot.  
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Dated: April 14, 2022

JOHN J. SCHATZ

By: 

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JOHN J. SCHATZ  
Attorney for APPROPRIATIVE POOL

CHINO BASIN WATERMASTER

Case No. RCVRS 51010

Chino Basin Municipal Water District v. City of Chino, et al.

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 14, 2022 I served the following:

1. APPROPRIATIVE POOL'S SURREBUTTAL BRIEF TO REBUTTAL AND OBJECTIONS RE SETTLEMENT

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:** Master Email Distribution List

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 14, 2022 in Rancho Cucamonga, California.



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