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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

CHINO BASIN MUNICIPAL WATER DISTRICT,

Plaintiff,

v.

CITY OF CHINO, et al.,

Defendants.

CASE NO. RCVRS 51010

ASSIGNED FOR ALL PURPOSES TO HONORABLE STANFORD E. REICHERT

CITY OF ONTARIO'S COMBINED REPLY TO THE OPPOSITIONS OF WATERMASTER, FONTANA WATER COMPANY AND CUCAMONGA VALLEY WATER DISTRICT, AND INLAND EMPIRE UTILITIES AGENCY TO APPLICATION FOR AN ORDER TO EXTEND TIME UNDER PARAGRAPH 31(c) OF THE JUDGMENT, TO CHALLENGE WATERMASTER ACTION/DECISION ON NOVEMBER 18, 2021 TO APPROVE THE FY 2021/2022 ASSESSMENT PACKAGE OR ALTERNATIVELY, CITY OF ONTARIO'S CHALLENGE

Hearing:
Date: June 17, 2022
Time: 1:30 p.m.
Dept. S35

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I. INTRODUCTION

City of Ontario ("Ontario") files this Combined Reply in Support of its Application for an Order to Extend Time Under Paragraph 31(c) of the Judgment ("Application for Extension" or "Application"), to Challenge Watermaster Action/Decision on November 18, 2021 to Approve the FY 2021/2022 Assessment Package ("Watermaster Action") or Alternatively, City of Ontario's Challenge. This Reply is addressed jointly to the oppositions filed by Watermaster and interested parties Fontana Water Company ("FWC") and Cucamonga Valley Water District ("CVWD"), and Inland Empire Utilities Agency ("IEUA") (these interested parties[1] are collectively referred to herein as the "Opposing Parties"). In February 2022, Ontario filed its Application for extension of time to bring its challenge so that the Court would have the benefit of full briefing on issues that fundamentally impact ongoing management of the Chino Basin ("Basin"), including the continued enforcement of procedural safeguards embodied in the Chino Basin Judgment and Orders. That Application for Extension remains pending before the Court. Accordingly, this Reply addresses both Ontario's substantive challenge to the Watermaster Action ("Challenge") as well as Ontario's pending Application for Extension.

Ontario's Challenge stems from Watermaster's unauthorized amendment of the DYY Program in 2019 ("2019 Letter Agreement") and related unlawful cost-shifting applied within the 2021/2022 Assessment Package. While Ontario does not object to the DYY Program or to the development of conjunctive use or other projects that provide substantial benefits to the Basin, Ontario does object to Watermaster's modification and administration of such projects in a manner that does not comply with the Judgment and Orders that govern Basin operations. Specifically, what is at issue is Watermaster's failure to administer the DYY Program in a way that is consistent with the storage agreements approved by Watermaster and ordered by the Court, and Watermaster's decision to bypass the formal Watermaster approval process ("Watermaster Approval Process")[2]

[1] FWC and CVWD are interested parties because Watermaster allowed these agencies to draw unassessed water from the Dry Year Yield Program ("DYY Program") in violation of the Judgment and subsequent Court Orders. IEUA is an interested party as an original party to the DYY Program.

[2] The Watermaster Approval Process is discussed at greater length at Section II.B., below.

in adopting material amendments to the operative agreements. Such disregard for the Judgment, Orders, and agreements that govern Basin operations will cause substantial and material injury to Ontario and, if left unchecked, will set a dangerous precedent for ongoing management of the DYY Program, future proposed storage and recovery programs, and the Basin as a whole.

As a neutral arm of the Court, Watermaster's blatant disregard for the Watermaster Approval Process, and the perpetuation of that violation through Watermaster's adoption of the 2021/2022 Assessment Package, is alarming. Not only does Watermaster take a position that is contrary to the Judgment and Orders that Watermaster is charged with enforcing, Watermaster is openly advocating for a position that financially benefits a few parties at the literal expense of others who, like Ontario, will be required to bear the burden and expense of the cost-shifting impacts contained within the 2021/2022 Assessment Package. As detailed further herein, Watermaster's unauthorized approval of the informal letter agreement, and use of that agreement as the basis to shift more than $2.6 million of production costs from one party to another, should not be allowed to stand.

Just as Watermaster failed to give proper notice of the 2019 Letter Agreement, failed to comply the Court-mandated Watermaster Approval Processes, and actively masked the potential impacts of the 2019 Letter Agreement, Watermaster and Opposing Parties similarly seek now to conceal the actions surrounding the development of the 2019 Letter Agreement and 2021/2022 Assessment Package and resulting damages to other parties. In short, Watermaster has opposed all efforts to ensure that this Court is fully briefed on the merits and has steadfastly opposed Ontario's Application for Extension even though the request was necessitated by the fact that Ontario did not have legal representation by water counsel at the time of the filing. Watermaster's continued refusal to agree to a full briefing schedule on the challenged Watermaster Action is especially notable given Watermaster's position as an arm of the Court and reveals the extent of Watermaster's efforts to avoid judicial review and scrutiny of its actions based on a full record.

Watermaster's lack of impartiality in refusing to agree to full briefing or a reasonable extension of time is also contrary to Watermaster's own prior extension requests, which recognize the Court's past accommodation of such requests to further the overarching objective of ensuring

there is adequate time to fully brief issues on the merits. In Watermaster's own words:

> This Court is well aware from its personal experience that the divergent positions of the individual parties before the Court have almost always been accommodated. At times, nuanced arguments are asserted whereby resolutions of questions regarding implementation of the decree lend themselves to broad participation in oral argument by all parties to the Judgment. *Nowhere is this more true than in the case seeking review of a Watermaster action* in which the Eleven Appropriators invoke a procedure binding on Watermaster arising under the Judgment.
>
> *The Opposition points to no prejudice – other than time – as a result of the requested continuance, and when compared with the interests of justice in a complete and accurate record, the continuance should be granted.*

(See Request for Judicial Notice ("RJN"), Ex. 29 at 3:9-18 (emphasis added).) Similar to the above, the only alleged "prejudice" asserted by Watermaster and the Opposing Parties is time, and that prejudice is both speculative and moot given the Court's continuance of the hearing on the Application, which provided the time and opportunity for full briefing on the merits.[3]

While Ontario has fully briefed the issues in this Reply, any objections or allegations of prejudice raised by Watermaster and Opposing Parties regarding a further extension of time, or to the scope of legal arguments raised in this Reply, are of Watermaster's and Opposing Parties' own making and should be disregarded. Similarly, to the extent Watermaster and the Opposing Parties assert that Ontario's arguments and evidence should be in any way limited, then Ontario requests that the Court grant Ontario's Application for Extension and set a full briefing schedule for the Challenge. Good cause exists to grant such request based on: Ontario's good faith and diligent efforts to resolve this dispute through ongoing negotiations with Watermaster and Opposing Parties into February 2022; Ontario's efforts to obtain an extension of time to secure new water law counsel as soon as Ontario learned from Opposing Party FWC that it would not provide a conflict waiver for Ontario's then-water counsel to file a Challenge; and Watermaster's and the Court's recognition

[3] On April 8, 2022, the Court issued a "de facto" extension when it continued the hearing to June 17, 2022. Because the continuance provided the parties time to fully submit briefing on the underlying Challenge, Ontario asked Watermaster and Opposing Parties to stipulate to a briefing schedule so that these important issues could be fully briefed. Watermaster and Opposing Parties inexplicably refused this request. (Declaration of Elizabeth P. Ewens ("Ewens Decl."), ¶¶ 6-7, Ex. 2.)

that extension requests should be accommodated so that issues affecting the Basin can be fully decided on a complete and accurate record.

In sum, Ontario respectfully requests that the Court grant its Challenge, invalidate the 2019 Letter Agreement, and issue an order directing Watermaster to (1) comply with the Watermaster Approval Process Orders with regard to the DYY Program, (2) implement the DYY Program in a manner that is consistent with the Judgment and Court Orders in this adjudicated Basin, and (3) correct and amend the 2021/2022 Assessment Package to assess water produced from the DYY Program. Alternatively, Ontario requests that the Court grant its Application for Extension to ensure that the Court has a complete record to further inform its decision in this case.

II. FACTUAL BACKGROUND REGARDING THE BASIN ADJUDICATION, WATERMASTER APPROVAL PROCESS, AND DYY PROGRAM

A. The Basin Adjudication and the Court's Continuing Jurisdiction

This action originated with a complaint filed in 1975 seeking an adjudication of water rights and the imposition of a physical solution in the Basin and culminated with the entry of the Judgment in 1978 following a stipulation among the majority of parties and trial. (RJN, Ex. 1 at ¶ 1.) In addition to adjudicating rights to groundwater and storage capacity within the Basin, the Judgment also authorized the appointment of Watermaster to "administer and enforce the provisions of [the] Judgment and any subsequent instructions or orders of the Court hereunder." (*Id.* at ¶ 16.) Notwithstanding the Court's appointment of a Watermaster, "[f]ull jurisdiction, power and authority" were retained and reserved to the Court. (*Id.* at ¶ 15.)

Rounding out the tiered structure for ongoing Basin management, the Judgment also provided for the creation of Pool Committees and an Advisory Committee to assist Watermaster in the performance of its duties under the Judgment. (RJN, Ex. 1 at ¶ 32.) There are three separate Pool Committees consisting of parties with similar water rights within the Basin, namely: (1) the Appropriative Pool, consisting of public entities and public and private companies, (2) the Nonagricultural Pool, consisting of industrial and commercial businesses, and (3) the Agricultural Pool, consisting of agricultural businesses. Pursuant to the Judgment, each Pool Committee has "the power and responsibility for developing policy recommendations for administration of its

particular pool." (*Id.* at ¶ 38(a).) For its part, the Advisory Committee is charged with studying, and has the power to recommend, review, and act upon, discretionary determinations made or to be made by Watermaster. (*Id.* at ¶ 38(b).)

Over time, the Judgment has been further modified by subsequent agreements and Court Orders including, without limitation, the Peace Agreement (RJN, Ex. 30), the First Amendment to the Peace Agreement (*id.*, Ex. 31), the Second Amendment to the Peace Agreement (*id.*, Ex. 32), and the Chino Basin Watermaster Rules and Regulations (*id.*, Ex. 2). Collectively, these decisions and agreements form the backbone for governance of the Basin and dictate required procedural processes for decision-making and financial obligations affecting Basin management.

B. The Watermaster Approval Process

To protect the interests of parties, and to safeguard water resources within this critical Basin, the Judgment and Orders in effect mandate a robust procedural and substantive decision-making process. This structure is perhaps most important for the rules and standards applicable to the storage and withdrawal of groundwater from the Basin.

Watermaster does not have unfettered discretion and its authority is constrained by the terms of the Judgment and subsequent Court Orders, including ongoing oversight by the Court through the exercise of the Court's continuing jurisdiction. "Subject to the continuing supervision and control of the Court, Watermaster shall have and may exercise the express powers, and shall perform the duties, as provided in this Judgment or hereafter ordered or authorized by the Court in the exercise of the Court's continuing jurisdiction." (RJN, Ex. 1 at ¶ 17.) The Judgment and Orders include procedural and substantive requirements relating to proposed Watermaster actions, and include detailed written application, notice, analysis, and approval processes in the Watermaster Rules and Regulations, as well as specific requirements pertaining to approvals of groundwater storage agreements.

As noted previously, Paragraph 38(b) of the Judgment defines the role of the Advisory Committee. Its role is part of an extensive review-and-approval process pertaining to storage and recovery projects, including provisions for written notice of pending applications, circulated summaries and analyses of the proposed actions, and consideration of the proposed actions by the

Pool Committees and the Advisory Committee. (RJN, Ex. 2 at Article X.) There is no authority for Watermaster to bypass these procedures and, indeed, Watermaster can take certain actions only upon the recommendation or advice of the Advisory Committee, including action on an agreement. Specifically, Watermaster must give notice and conduct a meeting prior to executing an agreement not within the scope of an Advisory Committee recommendation. (*Id.*, Ex. 1 at ¶ 38(b)[2].) Further, written groundwater storage agreements are specifically required to go through a prescribed approval process as detailed in the Recommendation of Special Referee to the Court as follows:

> The Judgment enjoins storage or withdrawal of stored water "except pursuant to the terms of a written agreement with Watermaster and [that] is [in] accordance with Watermaster regulations." (Judgment ¶ 14.) The Court must first approve, by written order, the Watermaster's execution of "Ground Water Storage Agreements." (Judgment ¶ 28.) The Advisory Committee's role is limited to giving its approval before the Watermaster can adopt "uniformly applicable rules and a standard form of agreement for storage of supplemental water." (*Id.*) However, groundwater storage rules and the standard form of agreement must be "uniformly applicable", which intrinsically leaves to the Watermaster the decision to execute agreements and, ultimately, to the Court (and notably not the Advisory Committee) the authority to approve those agreements. The Judgment's injunction against unauthorized production (Judgment ¶ 13) and injunction against unauthorized storage or withdrawal of stored water (Judgment ¶ 14) are integral parties of the Judgment's Physical Solution, and the requirement for direct Court approval of Watermaster storage agreements is another manifestation of the Watermaster's and Court's special relationship.

(*Id.*, Ex. 3 at p. 12, fn. 8.) Notably, precedent exists for the implementation of the formal Watermaster Approval Process with respect to the DYY Program. As addressed more fully herein, the Watermaster Approval Process was followed when the DYY Program was first developed, and again in 2015 when an amendment (referred to herein as "Amendment 8") was approved. (*Id*., Ex. 19.) However, the Watermaster Approval Process was completely bypassed when the 2019 Letter Agreement was negotiated and signed.

C. The Court-Approved DYY Program

The DYY Program is based on a set of three agreements approved by the Court: the 2003 Funding Agreement, the 2004 DYY Storage Agreement, and individual Local Agency Agreements

(also referred to as Operating Agreements).[4] Each is detailed below.

1. The 2003 Funding Agreement and Court Order Approving the 2003 Funding Agreement

A Groundwater Storage Program Funding Agreement ("2003 Funding Agreement") was approved through the Watermaster Approval Process (Pool Committees, Advisory Committee, and Watermaster Board) in February 2003, and then was signed by the Metropolitan Water District ("Metropolitan"), IEUA, Three Valleys Municipal Water District ("TVMWD"), and Watermaster. (RJN, Ex. 1; Declaration of Courtney Jones ("Jones Decl."), ¶¶ 19-24, Ex. 3.) This 2003 Funding Agreement described the proposed project and served as the basis for what eventually became the DYY Program.[5] At a basic level, this conjunctive use program allowed Metropolitan to store up to 100,000 acre feet ("AF") of water in the Basin and allowed Metropolitan to request participating agencies to pump up to 33,000 AF during a "call" year. (RJN, Ex. 11 at ¶ IV.A.1.a.) The objective of this groundwater storage and recovery program was to provide greater water supply flexibility and reliability in dry years by storing water in advance of dry periods and pumping stored water in lieu of receiving imported water deliveries during drought years.

The 2003 Order Concerning Groundwater Storage Program Funding ("2003 Order") represented the first step in the development of the DYY Program and also explicitly recognized that actual implementation of the DYY Program would require future storage agreements approved through the formal Watermaster Approval Process:

> As noted, Watermaster indicates that approval of a Storage Agreement will be in "the form of Watermaster approval of the Local Agency Agreements by way of a Storage and Recovery Application filed under Article X of Watermaster's Rules and Regulations." It is not clear to the Court how or in what form this approval process will be conducted. However, it is clear that until Watermaster and this Court approve the Local Agency Agreements and Storage and Recovery Application, or some equivalent

[4] A history of the DYY Program approval process, including the adoption of amendments, additionally are detailed in the Jones Declaration at paragraphs 19-31.

[5] The 2003 Funding Agreement also described the "Chino Basin Conjunctive Use 'Dry Year' Storage Project Performance Criteria." (RJN, Ex. 11 at Ex. G.) However, this represents the performance criteria as dictated by Metropolitan to be performed by IEUA and TVMWD. IEUA and TVMWD are not local water producers and these criteria actually are placed onto their member agencies to perform. (Jones Decl., ¶ 26.)

> approval process is completed, the storage and recovery program cannot be undertaken.

(RJN, Ex. 12 at 3:18-25.) In sum, the proposed DYY Program could not be implemented unless and until the parties complied with this approval process

2. Local Agency Agreements, the Storage and Recovery Application, and the Court's 2004 Approval of the Storage Agreement

Consistent with the terms of the Court's 2003 Order, the DYY Program approval process continued. From March to July 2003, Local Agency Agreements were executed between IEUA, TVMWD, and their member agencies.[6] (RJN, Exs. 13-15; Jones Decl., ¶ 25.) These Local Agency Agreements serve as the foundation of the storage and recovery program and include at their core defined terms governing the parties' performance obligations. Each Local Agency Agreement contains an "Exhibit A" that specifies each agency's facilities to be used as part of the DYY Program, and an "Exhibit B" describing each agency's targets for both the reduction in imported water demand and the corresponding increase in local groundwater pumping. (See RJN, Exs. 13-15 at Exs. A-B; Jones Decl., ¶ 26.)

Also consistent with the 2003 Order and to advance the proposed DYY Program, in April 2003 IEUA submitted an application under Article X of the Watermaster Rules and Regulations for a 100,000 AF storage account in Watermaster's Storage and Recovery Program. (Jones Decl., ¶ 27; see also RJN, Ex. 17 at 13:16-18.) This storage account would be used to implement the terms of the Funding Agreement and Local Agency Agreements. Pursuant to the Watermaster Approval Process, Watermaster provided formal notice of the application, and the application and the Watermaster's analysis were considered in Pool Committee meetings, by the Advisory Committee, and by the Watermaster Board. (RJN, Ex. 16.) Concurrent with this process, and consistent with the Judgment, technical consultants Wildermuth Environmental, Inc. also conducted an analysis to

[6] The member agencies are: CVWD, City of Pomona, City of Chino Hills, City of Chino ("Chino"), Monte Vista Water District, Ontario, City of Upland, and Jurupa Community Services District ("JCSD") via Ontario. (Jones Decl., ¶ 25.) Notably, Opposing Party FWC does not have a Local Agency Agreement. (*Ibid.*)

ensure that the DYY Program would not cause material physical injury to the Basin. (*Id*. at p. 1.) The results of the technical analysis were presented in August 2003, and approved through the Watermaster Approval Process in October 2003, again involving the Pool Committees, the Advisory Committee, and the Watermaster Board. (*Id*. at pp. 1-2; see also *id.*, Ex. 17 at 21:9-22.) At the conclusion of this process, the Pool Committees unanimously recommended that the Advisory Committee and Watermaster Board approve the storage agreement and directed legal counsel to file the storage agreement with the Court for final approval. (*Id.*, Ex. 16 at p. 2.)

Watermaster subsequently filed a Notice of Motion for Approval of Storage and Recovery Program Agreement ("DYY Storage Agreement"), and the Court entered an Order Approving the DYY Storage Agreement ("2004 Order"). (See RJN, Exs. 17-18.) Importantly, the 2004 Order recognized four fundamental principles applicable to the DYY Program moving forward: (1) that the program have broad mutual benefits to the parties to the Judgment (*id*., Ex. 18 at p. 2), (2) that no use shall be made of the storage capacity of the Basin except pursuant to a written agreement (*id.* at p. 3), (3) that approval of storage agreements would be through the formal Watermaster Approval Process (*id.* at p. 4), and (4) that the terms must include provisions to ensure that there will not be adverse impacts to other producers in the Basin (*id.* at p. 3). As held by the Court:

> The Judgment provides that no use shall be made of the storage capacity of Chino Basin except pursuant to written agreement with Watermaster. (Judgment, ¶ 12.) The Judgment further provides that the reservoir capacity of the Basin may be utilized for storage and conjunctive use of supplemental water, if undertaken under Watermaster control and Regulation. (Judgment, ¶ 11.) Finally, the Judgement provides that agreements for storage "shall first be approved by written order of the court" and must include terms that will "preclude operations which will have a substantial adverse impact on other producers." (Judgment, ¶ 28.)

(*Id.*, Ex. 18 at 3:2-9.) Based on the above, and the Court's related finding that the DYY Storage Agreement is unlikely to have any adverse impacts on a party to the Judgment, the Court entered the 2004 Order approving the DYY Storage Agreement.

It also is important to note that the intent of this program was to provide broad benefits to parties in the Basin. The Court stated in its approval of the Peace Agreement that Watermaster must prioritize storage and recovery programs that provide broad mutual benefits. Consistent with this, in both the 2003 and 2004 Orders, the Court made specific findings that the DYY Program will

have broad mutual benefits to the parties to the Judgment. (*Id*., Ex. 12 at pp. 4-6; see also *id*., Ex. 18.)[7]

Fundamentally, the Local Agency Agreements and DYY Storage Agreement ***are*** the DYY Program, and any substantial changes that affect those agreements or the DYY Program must be approved through the Watermaster Approval Process. Pertinent to the present case, "[a]ny modification of facilities that is materially different than those contemplated by the Local Agency Agreements *will require the filing of a new application*." (RJN, Ex. 17 at Ex. A, ¶ III.A.2 (emphasis added).) The 2003 Order also requires that any Local Storage Agreement must be "analyzed by Watermaster under the Material Physical Injury standard of the Peace Agreement and Rules and Regulations." (*Id*., Ex. 12 at 3:4-7.)

3. <u>Amendments to the 2003 Funding Agreement</u>

During the initial project development there were several amendments to the 2003 Funding Agreement that were ministerial and pertained primarily to timing for the completion of facilities and changes to the sources of funding. (Jones Decl., ¶ 7; RJN, Ex. 25 at p. 2.) Because these amendments did not include material changes to the agreement, the first seven amendments to the 2003 Funding Agreement were handled administratively. However, the eighth amendment made material and substantive changes to the DYY Program impacting local agency performance – the formula and criteria to establish a groundwater baseline. Specifically, Amendment 8 included changes to the parties' performance criteria in Exhibit G including measures "to reduce imported water deliveries to the Operating Parties and to replace it with stored Chino Basin groundwater." (RJN, Ex. 19 at Ex. G.) For that reason, Amendment 8 was adopted only after it successfully made its way through the Watermaster Approval Process including unanimous recommendations for approval by the Pool Committees and approval by the Watermaster Advisory Committee and

[7] In contravention of those Orders, the 2019 Letter Agreement benefited only a few at the expense of many. It also negatively impacted the broad-based benefit of the DYY Program, which is to provide greater water supply reliability by storing water in advance of dry periods and pumping the stored water in lieu of receiving imported water during droughts. Considering the current historic drought, a participating agency's ability to access imported water has been greatly impacted by allowing the DYY Program storage account to be drained prematurely.

Watermaster Board. (*Id*., Ex. 25 at p. 1.)

Notably, Amendment 8 did not change the facilities being utilized (e.g., where the groundwater would be pumped) nor the quantities of water being produced, and ***still*** went through the Watermaster Approval Process and resulted in an amendment to the Local Agency Agreements. In contrast, the 2019 Letter Agreement at issue here made substantive, material changes to the DYY Program, including with respect to the facilities being used and the quantity of groundwater being produced from the Basin, and yet was ***not*** approved through the Watermaster Approval Process and was executed only by the Funding Agreement Parties (e.g., no amendments were made to the Local Agency Agreements). (Jones Decl., ¶ 6.)

4. <u>The 2019 Letter Agreement</u>

a. <u>The approval and execution of the 2019 Letter Agreement did not comply with the Watermaster Approval Process.</u>

In 2018, Opposing Party IEUA initiated discussions regarding proposed revisions to the DYY Program. (Jones Decl., ¶ 32.) The modifications would significantly change the DYY Program by allowing voluntary production out of the DYY Program storage account without a corresponding reduction of imported deliveries. (*Ibid*.) These changes represented a departure from the approved performance criteria as set forth in the Local Agency Agreements and, as eventually implemented, led to unprecedented amounts of DYY Program groundwater production by an agency. (*Ibid*.) It also led to an agency (Opposing Party FWC) *that did not have a Local Agency Agreement* participating in the DYY Program and withdrawing groundwater from the DYY Program storage account. In short, the 2019 Letter Agreement, as implemented, resulted in material changes to the DYY Program including foundational changes affecting the amount of water each agency was allowed to produce, and when and how that water was recovered from the Basin. Notwithstanding that fact, and unlike the approval and implementation process associated with Amendment 8, the 2019 Letter Agreement was not approved through the Watermaster Approval Process, was signed only by signatories to the 2003 Funding Agreement, and was executed without a corresponding amendment to the Local Agency Agreements. (*Id*. at ¶¶ 6, 33.) Not only was there a complete failure to comply with required approval processes, presentations by Watermaster at the

time included material misrepresentations that masked the scope of what was being negotiated, including statements by the Watermaster General Manager that the proposed changes in the 2019 Letter Agreement "don't commit Watermaster to anything." (*Id*. at Ex. 4 at 3:5-12.)

As addressed above, the Watermaster Approval Process required notice to all parties of the proposed amendment to the DYY Program. (See, e.g., RJN, Exs. 1 (¶ 59), 2 (§ 2.7), 3 (pp. 18-19, fn. 12).) Under the Judgment, Watermaster must notify the Advisory Committee of "any discretionary action, other than approval or disapproval of a Pool committee action or recommendation properly transmitted." (*Id*., Ex. 1 at ¶ 38(b)[2].) Watermaster also must notify the Advisory Committee if it proposes to execute any agreement not within the scope of an Advisory Committee recommendation "since the Watermaster generally can 'cooperate' with other agencies only upon 'prior recommendation or approval of the Advisory Committee.'" (*Id*., Ex. 3 at p. 19, fn. 12 (citing Judgment, 26).)

In September 2018, the topic of the letter agreement was listed as "Proposed Changes to DYY Program Operation" under the General Manager's Report in the Pool Committees, Advisory Committee, and Watermaster Board meeting packages. (See RJN, Exs. 34-36.) However, it was not accompanied by a staff report and the General Manager's report was only verbal and obfuscated both the scope and the implications of what was under consideration. (Jones Decl., Exs. 4 (3:5-4:7), 5 (3:7-8), 6 (3:5-17).) At the September 13, 2018 Appropriative Pool meeting, the Watermaster General Manager provided an informal report to the Board regarding the proposed amendment as follows:

> [W]e do plan to sign [the letter] on behalf of Watermaster if it's necessary for acknowledgement…. *The changes don't commit Watermaster to… anything. We actually don't think a letter is even required*.

(*Id*., Ex. 4 at 3:9-13 (emphasis added).) Again, at the September 20, 2018 Advisory Committee meeting, the Watermaster General Manager simply reported on the amendment as follows: "My report is the same as last week to the Pools." (*Id*., Ex. 5 at 3:7-8.) One week later, at the September 27, 2018 Watermaster Board meeting, the Watermaster General Manager reported on the amendment as follows:

> [Metropolitan] has proposed some changes that are favorable to the parties. *We don't believe they constitute a change to the agreement, so we don't intend to bring an agreement amendment to the board*. There may be an acknowledgement letter. If there is, I wanted to let you know that I would be signing that acknowledgement letter.

(*Id*., Ex. 6 at 3:10-17 (emphasis added).) Again and again, the full scope and impact of the proposed amendment was kept from parties, including Ontario, that eventually would be affected.

In its Opposition to the Application, IEUA argues through the submitted declaration of Elizabeth Hurst that there were "[n]o objections to the proposed voluntary withdrawal system language from the City of Ontario … after July 30, 2018," but the truth is that Ontario expressly reserved all objections because it was impossible at the time to gauge the full impact of what was being proposed. (Declaration of Elizabeth Hurst ("Hurst Decl.), filed Mar. 24, 2022, ¶ 13.) In correspondence on July 31, 2018 with Opposing Party IEUA, Ontario explained:

> As long as there are parameters that are undecided or unclear, *Ontario cannot take a position of support because we cannot know the full effects of the proposed changes*. Without these details, which would best be explained and memorialized in an amendment, we will take a wait-and-see approach regarding impacts, and we reserve the right to address any harm or detriment that may arise.

(Jones Decl., ¶ 34, Ex. 7 (emphasis added).) In the absence of notice and information that ordinarily would have been, and should have been, provided to parties through the Watermaster Approval Process, Ontario and other parties had no ability to assess potential adverse impacts to their interests.

The Watermaster General Manager subsequently executed the 2019 Letter Agreement between Metropolitan, IEUA, and TVMWD on February 19, 2019 and provided no formal notice of its action as required by the Judgment and Rules and Regulations. (RJN, Ex. 41.)[8]

[8] Because Watermaster failed to provide notice of the 2019 Letter Agreement as required, there was never an "Effective Date" to commence the accrual of the 90-day time period to challenge the approval of said agreement as discussed in Section IV.B., below.

b. <u>The 2019 Letter Agreement fundamentally changed the recovery side of the DYY Program.</u>

The purpose of the DYY Program is for participating agencies to replace imported water supplies with groundwater during dry years. To provide parameters for the operation of the DYY Program, Exhibit G to the DYY Storage Agreement includes specific performance criteria ("Exhibit G Performance Criteria"), which are used to ensure that the groundwater produced out of the DYY Program storage account is produced in lieu of using imported water. (RJN, Ex. 11 at Ex. G.) Put another way, Exhibit G Performance Criteria for the DYY Program provides for a balanced formula – it calls for the reduction of imported water deliveries and the corresponding replacement of that water with stored Basin groundwater. The 2019 Letter Agreement changed the application of the Exhibit G Performance Criteria and, for the first time, allowed for more water to be recovered outside of the Local Agency Agreements without a corresponding change or reduction in imported water supplies. (*Id*., Ex. 41 at p. 2.) Specifically, the 2019 Letter Agreement inserted a term allowing for "voluntary" or discretionary withdrawals, thus bypassing the Exhibit G Performance Criteria. This represented a material change to the DYY Program.

Particularly given the decision to bypass the Watermaster Approval Process, there was nothing at the time of execution of the 2019 Letter Agreement to put other parties, including Ontario, on notice of the extent of the impacts that would stem from that informal agreement. And there certainly was no notice that:

- Parties (including Opposing Party CVWD) would be allowed to unilaterally decide to effectively double their annual participation "take" capacity or withdrawals from the DYY Program. (In the year at issue here, CVWD produced over 20,000 AF of water even though it was only authorized to produce 11,000 AF in any year.)[9]
- Parties without a Local Agency Agreement would be allowed to participate in the

[9] The 2019 Letter Agreement does not state that parties can voluntarily take more than their regular allotment. Moreover, in 2018, in response to an email from Ontario, IEUA suggested that parties' regular allotments or take capacities would not increase: "[A]ttached are the scenarios presented at the May Water Manager's meeting, illustrating how % performance requirement would be allocated during call years and would <u>not</u> result in an increased performance requirement beyond the existing DYY agreement (as outlined in Amendment #8)." (Hurst Decl., Ex. A (emphasis in original).)

DYY Program and make withdrawals from the DYY Program storage account. (Opposing Party FWC does not have a Local Agency Agreement, but last year claimed approximately 2,500 AF in production from the DYY Program.)

- New terms, not included in the 2019 Letter Agreement, would be "written into" the Letter Agreement after the fact regarding assessments, thus financially benefitting Opposing Parties CVWD and FWC, which produced more groundwater from the DYY Program than allowed. (The 2019 Letter Agreement is silent on the handling of assessments, but the 2021/2022 Assessment Package waived Watermaster and Desalter Assessments on this production by CVWD and FWC.)

There was simply no way that Ontario could have been on notice of these potential impacts when the Letter Agreement was executed in 2019. Indeed, nothing in the 2019 Letter Agreement either speaks to or permits such material expansions of the DYY Program.

Not only were the potential financial and other impacts unknown in 2018-2019, even worse, the Watermaster General Manager misrepresented the impact of the 2019 Letter Agreement at the time it was being executed. Indeed, in verbal briefings to the Pool Committees, the General Manager for Watermaster affirmatively represented that there would be no impacts. (Jones Decl., Ex. 5 at 3:20-4:2.) As it turned out, however, there were to be significant impacts on other parties, including improper cost-shifting that only became fully apparent in the 2021/2022 Assessment Package.

5. Assessments and the Injury to Ontario Stemming from the 2021/2022 Assessment Package

a. All water produced from the Basin is assessed.

The cost of implementing the physical solution and managing this Basin is not cheap and it is not free. To pay for it, the Judgment and Court Orders explicitly provide that all water produced from the Basin must be assessed.

The amount that each party is assessed is principally based on the amount of its individual groundwater production. (RJN, Ex. 1 at ¶ 53 ("Watermaster shall have the power to levy assessments against the parties (other than minimal pumpers) based upon production … .").) The governing documents for the Basin define groundwater production that is subject to assessments in the broadest possible terms: "Produce or Produced – To pump or extract ground water from Chino

Basin" and "Production – Annual quantity, stated in acre feet, of water produced." (*Id.* at ¶ 4(q), (s).) Further, the assessments are mandatory and must be uniform. Under the Watermaster's Rules and Regulations, "Watermaster shall levy assessments against the parties … based upon Production during the preceding Production period. The assessments shall be levied by Watermaster pursuant to the pooling plan adopted for the applicable pool." (*Id*., Ex. 2 at art. IV, § 4.1; see also *id.*, Ex. 1 at ¶ 53.) Although the Watermaster Rules and Regulations allow for limited assessment adjustments, the exceptions do not apply to production from the DYY Program. (*Id*., Ex. 2 at § 4.4; Jones Decl., ¶ 44.)

Not only is all production assessed, there have been no distinctions made – neither within the governing documents nor in the actual assessments levied – between native groundwater, stored groundwater, and supplemental water. Indeed, supplemental water, including recharged recycled water, was part of Opposing Party FWC's assessable production. (Jones Decl., ¶60.) Imported water, including imported water purchased for replenishment purposes, also has been assessed.[10] (*Id*. at ¶ 47.) Further, even the first cycle of DYY Program water was assessed for production years 2002/2003 to 2010/2011 under the approved Assessment Packages. (*Id*. at ¶¶ 44-52.) It was only in the second cycle of the DYY Program, including in the fiscal year 2021/2022 Assessment Package at issue here, that DYY Program production was not assessed, resulting in improper cost-shifting to other parties. (RJN, Ex. 53-60.)

b. By excluding DYY Program production for the purpose of calculating parties' individual assessments within the 2021/2022 Assessment Package, Watermaster shifted responsibility for those payments to others, including Ontario

(1) Assessment of Watermaster fixed costs

Watermaster's failure to count DYY Program water as "produced" water for purposes of calculating assessments resulted in a windfall to Opposing Parties CVWD and FWC, and burden-shifting onto Ontario and others that now are being asked to pay substantially more – over $2.6

[10] Water was assessed either on the front end when put into the Basin or on the back end once produced from the Basin.

million more – than their fair share.[11] The expense of operating the Basin is fixed based on an annual budget and must be paid. (RJN, Ex. 1 at ¶ 54; Jones Decl., ¶ 60.) This includes "General Watermaster Administrative Expenses" and "Special Project Expenses" (collectively, "Watermaster Fixed Costs"). (RJN, Ex. 1 at ¶ 54.) The Watermaster Fixed Costs are assessed to the parties based on each party's total groundwater production and exchanges ("production") during the prior year. (*Id*., Ex. 60 at p. 10.1.) To calculate the amount due by each party, the total of Fixed Costs is divided by the annual total production number of all parties in the Basin to obtain a dollar amount per acre foot of water. (Jones Decl., ¶ 62.) This unit cost is then used to assess each party, based on its individual production. Since the costs are fixed, when the annual total production number increases, the unit cost decreases, and, conversely, when the total annual production number decreases, the unit cost increases. (*Ibid*.) Accordingly, in exempting a party's DYY Program production from that party's groundwater production, Watermaster is directly increasing the unit cost for everyone, and reducing the proportional share of these expenses charged to a party claiming DYY Program production credit. (*Ibid*.)

The following table demonstrates how costs are shifted away from one party onto other parties when the total production number is reduced because higher than allowed DYY Program production is claimed and decreases the total production, thus increasing the overall unit cost. This results in the Fixed Costs being shifted from the parties claiming DYY Program production (e.g., CVWD who reduced its assessed annual production by the 20,500 AF of claimed DYY Program production) to Ontario and other parties in the Basin.

Chino Basin Parties	Actual FY Production (AF)	DYY Production Claimed (AF)	Total Production and Exchanges (AF)	Fixed Costs Shifted
CVWD	26,225.70	20,500.00	5,725.70	-$1,084,539
FWC	13,565.30	2,500.00	11,065.30	$8,229
Ontario	17,171.10		17,171.10	$279,078
Other Parties	64,844.10		64,844.10	$797,233
TOTAL	**121,806.20**	**23,000.00**	**98,806.20**	**$0.00**

[11] Importantly, this in not just a one-year injury. Absent intervention by the Court, the improper cost-shifting at issue has the potential to continue, year after year. (Jones Decl., ¶ 62.)

Notes:
The total annual fixed cost is assumed at $6,967,848 and total production and exchanges is 98,806 AF for a unit cost of $70.52/AF.
DYY claims decreased the total production from 121,806 to 98,806 which increased unit cost from $57.20/AF to $70.52/AF = $13.32/AF.

(RJN, Ex. 60.)

This cost-shifting resulted in over a $1 million reduction in the amount CVWD was required to pay, thus shifting this obligation to the other parties. (Jones Decl., ¶¶ 62-63.)

(2) Assessment of remaining desalter replenishment obligations

Other Fixed Costs relating to Basin operations also are calculated based on each party's production for the Basin. This includes the calculation of a party's share of Desalter Replenishment Obligations ("RDRO"). RDRO is an annual fixed obligation that must be replenished by Appropriative Pool Parties – again, including Ontario and Opposing Parties CVWD and FWC. The share of responsibility is divided between the parties based on each party's adjusted physical production and its share of the safe yield. (Jones Decl., ¶ 65.) Just as in the case of the apportionment of Watermaster Fixed Costs, above, when one party has a reduced adjusted physical production (in this case a reduction due to DYY Program production claims), then that party's share of RDRO also is proportionately reduced and shifted to the other parties.[12] This results in a direct and substantial financial injury to other parties, including Ontario. (*Id*. at ¶ 67.)

The table below calculates the cost-shifting of RDRO that occurs when one party is allowed to reduce its physical production by its DYY Program production thus decreasing that party's

[12] There was an amendment to the Peace Agreement in 2019 allowing water produced from "approved" storage and recovery programs to be subtracted from a party's actual physical production for purposes of this calculation. However, the second cycle of the DYY Program at issue here was improperly operated based on Watermaster and Opposing Parties' expanded interpretation of the 2019 Letter Agreement, including new terms written into that letter agreement that were used to justify doubling Opposing Party CVWD's production and Opposing Party FWC's withdrawals. But because the 2019 Letter Agreement was not lawfully approved, the only operative, approved DYY Program agreement was the one in effect as of the 2015 Amendment 8 that was approved through the Watermaster Approval Process. Under the operative 2015 DYY Program agreement, Opposing Parties would not be able to claim or discount their DYY Program production amounts as they did in the 2021/2022 assessment period.

proportional share of RDRO. The "Share of RDRO 16,879.4 AF Shifted" column represents the net increase or decrease in each party's obligation. In this example, CVWD's share of the RDRO obligation was 2,265 AF less than it would have been if it did not claim any DYY production.

Appropriative Pool Parties	Actual FY Production (AF)	DYY Claimed (AF)	Total Adjusted Physical Production (AF)	Share of RDRO 16,879.4 AF Shifted	Financial Impact due to RDRO Shifting
CVWD	26,225.70	20,500.00	5,725.70	-2,264.90	-$1,518,984
FWC	13,565.30	2,500.00	11,065.30	-40.10	-$26,887
Ontario	21,750.80		18,656.80	638.00	$427,890
Other Parties	43,498.20		41,207.40	1,667.00	$1,117,981
TOTAL	**105,040.00**	**23,000.00**	**76,655.20**	**0.00**	**$0.00**

Notes
The value of RDRO water is assumed to equal the cost to purchase replenishment water at $670.65/AF

(RJN, Ex. 60.) Inflated claimed DYY Program production works to shift responsibility for RDRO assessment from the party claiming higher DYY Program production to other parties.

Watermaster allowed Opposing Parties CVWD and FWC to use the 2019 Letter Agreement – that was not approved through the required Watermaster Approval Process and did not contain ***any*** terms modifying responsibility for assessments – to avoid their obligations to pay their required fair share of Watermaster Fixed Costs and RDRO. Under its Local Agency Agreement, Opposing Party CVWD is only entitled to take 11,353 AF of DYY Program production per year, and yet it claimed 20,500 AF of DYY Production and used that higher number to substantially reduce its assessed production and its corresponding financial obligations for the 2021/2022 assessment year. For its part, Opposing Party FWC does not even have a Local Agency Agreement, and yet it still claimed 2,500 AF of DYY Program production and leveraged that deduction to reduce its financial obligations in the 2021/2022 assessment year. In sum, in approving the 2021/2022 Assessment Package, Watermaster sanctioned Opposing Parties' strategy to offload their financial responsibilities to other parties – forcing others, like Ontario, to absorb the impact. (Jones Decl., ¶ 51-67.) In the 2021/2022 year alone, this amounted to $2,622,181.00. (*Id*. at ¶¶ 63, 67.)

III. STANDARD OF REVIEW

"Under paragraph 31 of the Judgment, the Court's review of any Watermaster action or decision is 'de novo.'" (RJN, Ex. 12 at 4:2-3.) While the "Watermaster's findings, if any, may be received as evidence at the hearing or trial," such evidence "shall not constitute presumptive or prima facia [sic] proof of any fact in issue." (*Id.* at 4:3-5.) Under this standard of review, and consistent with the Judgment, the Court is required to look at the evidence anew. (*Id.* at 4:7; see, e.g., *Littoral Dev. Co. v. S.F. Bay Conservation & Dev. Comm'n* (1994) 24 Cal.App.4th 1050, 1058, as modified on denial of reh'g (May 26, 1994).) Similarly, as held by the court in *Littoral* on the issue of statutory interpretation, the courts will exercise de novo review and are not bound by the agency's own interpretation of its jurisdiction as specified by legislation. (*Cal. Ass'n of Psych. Providers v. Rank* (1990) 51 Cal.3d 1, 11.)

IV. LEGAL ANALYSIS PERTAINING TO CHALLENGE OF WATERMASTER ACTION

A. The Court Has Exercised its Jurisdiction to Overturn Watermaster's Actions When Watermaster Exceeds its Authority

For this Basin to continue to function properly, the parties must be able to rely on the integrity and enforceability of the Judgment and Orders, including Watermaster's strict adherence to those governing documents as an arm of this Court. Unfortunately, however, this is not the first time this Court has been called upon to check Watermaster's exercise of its authority and direct Watermaster to follow the Court's Judgment and Orders. Indeed, there is precedent within this adjudication authorizing the Court to intervene when Watermaster exceeds its authority and acts in a manner that is inconsistent with Court Orders. In those instances, this Court has not hesitated, notwithstanding the passage of time, to correct Watermaster's misinterpretation and misapplication of the Judgment and Court Orders. This Court should not hesitate to do the same now.

The Court's continuing jurisdiction and authority under the Judgment is broad and clear. The Court has "[f]ull jurisdiction, power and authority . . . as to all matters contained in the judgment" and the Court is authorized "to make further or supplemental orders or directions as may be necessary or appropriate for interpretation, enforcement or carrying out of this Judgment." (RJN, Ex. 1 at ¶ 15.) Neither the Judgment nor any other source of authority raised by Watermaster

prevents the Court from exercising its continuing jurisdiction to reevaluate its orders and to determine if Watermaster's actions are authorized by the Judgment and court-approved agreements. Indeed, this is the express purpose of exercising continuing jurisdiction. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 937 ["[R]etention of jurisdiction to meet future problems and changing conditions is recognized as an appropriate method of carrying out the policy of the state to utilize all water available."].) Courts also have broad inherent authority to reconsider their rulings and orders when the issues encompassed by those rulings and orders are within their jurisdiction. (See *Brown, Winfield & Canzoneri, Inc. v. Superior Ct.* (2010) 47 Cal.4th 1233, 1247 [trial courts have inherent authority to reconsider their previous interim orders]; *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1096-1097 [same].)

Here, the actions taken by Watermaster with respect to the 2019 Letter Agreement and 2021/2022 Assessment Package are improper because Watermaster failed to comply with the procedures required by the Judgment and governing documents. Consistent with the Court's authority under its continuing jurisdiction, when such unauthorized actions have arisen in the past, this Court has refused to allow the continued implementation of Watermaster's erroneous interpretation, *even when the practice had been carried out for years.*

In 2015, Watermaster filed a Motion Regarding 2015 Safe Yield Reset Agreement, Amendment of Restated Judgment, Paragraph 6 ("SYRA Motion"), which sought to reset the safe yield of the Basin from 140,000 acre feet per year ("AFY") to 135,0000 AFY and to approve the 2015 Safe Yield Reset Agreement. (RJN, Ex. 9 at 12:16-27.) The SYRA Motion was opposed by Chino and JCSD. (*Id*. at 3:8-16.) After extensive briefing over the course of over 15 months, the Court issued its final rulings and orders on the SYRA Motion on April 28, 2017 ("SYRA Ruling"). (RJN, Ex. 9.) In the SYRA Ruling, the Court granted the motion with respect to amending the Judgment to reset the safe yield of the Basin to 135,000 AFY but denied all other parts of the motion including the continued allocation of surplus Agricultural Pool water ("allocation scheme") in the manner Watermaster contended was authorized by prior Court orders.[13] (*Id*. at pp. 1-2, 49-51; see

[13] Watermaster contended that the proposed allocation scheme or surplus Agricultural Pool water was authorized by "Section 6.3(c) of the Watermaster Rules and Regulations, as amended

also *id.*, Ex. 156 at 2:1-11.)

In its briefing, Watermaster argued that the continued allocation of surplus Agricultural Pool water was authorized by the Court's prior October 8, 2010 Order and had been carried out for years, and the consequences of not approving SYRA as challenged by Chino and JCSD, would effectively "unwind accounting, court approvals, and agreements impliedly if not expressly made in reliance thereon." (RJN, Ex. 8 at 3:20-21.) The Court rejected this argument outright and held that "Watermaster is relying on its own interpretation of its own rules and regulations which the court does not accept" and as a result "[t]he court has clarified its October 8, 2010 Order." (RJN, Ex. 156 at 56:14-16.) The Court further issued the following admonishment to Watermaster for its rogue actions:

> Watermaster cannot use its own interpretation of the court's orders to contradict the court's interpretation. The final decision is the court's, not Watermaster's.

(*Id*. at 56:17-19.)

> Watermasters [sic] erroneous interpretation of the order of priorities is not a basis to continue that erroneous interpretation. If Watermaster has to make a reallocation, then it must do so to follow the court's order. A wrong practice can be long-standing, and still be wrong. A wrong practice cannot be the basis of prejudice.

(*Id*. at 57:27-58:3.)

The Court denied the SYRA Motion as to the proposed allocation on the ground that there was no basis in the Judgment or any of the following court orders (i.e., defined Court-Approved Management Agreements) to support it. (*Id.* (see, e.g., *id.*, Ex. 9 at pp. 51-52).) The same result should follow here given Watermaster's failures. Watermaster does not have authority independent from the Court and completely lacked the authority to bypass the Watermaster Approval Process and enter into a "letter agreement" that materially modified existing DYY Program Orders and

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pursuant to the Peace II Measures" and the October 8, 2010 Order Approving Watermaster's Compliance with Condition Subsequent Number Eight and Approving Procedures to be Used to Allocate Surplus Agricultural Pool Water in the Event of a Decline in Safe Yield. (RJN, Ex. 8 at 3:15-19.)

Agreements. This Court should exercise its discretion and continued authority to correct Watermaster's errors.

B. Watermaster Failed to Provide Notice Regarding the 2019 Letter Agreement and Failed to Comply With the Mandatory Watermaster Approval Process

For Watermaster action to be effective, it must follow proper notice procedures, as set forth in the Judgment and Watermaster Rules and Regulations. Watermaster failed to follow these procedures regarding execution of the 2019 Letter Agreement, rendering it defective and unenforceable.

1. Watermaster Failed to Provide the Required Notice of Watermaster's Decision to Approve the 2019 Letter Agreement

Both the Judgment and Watermaster Rules and Regulations contain multiple provisions requiring written notice to parties of Watermaster actions. Paragraph 31(a) of the Judgment provides that a Watermaster action, decision, or rule is only deemed to have occurred upon the date of written notice, and Paragraphs 58 and 59 provide detailed processes for notice and service of notices to parties. (See RJN, Ex. 1.) The implementing Watermaster Rules and Regulations, also detail specific notice requirements, including in Section 2.7. (*Id*., Ex. 2.) In application, Watermaster's regular practice for noticing actions has been to provide interested parties with an email titled "NOTICE," information regarding what the notice related to, and a draft of the proposed action.

Because the execution of the 2019 Letter Agreement was an action and decision by Watermaster, it was required to provide notice relating to the 2019 Letter Agreement to all active parties including Ontario. Watermaster never did this. Instead, in September 2018, the topic of the letter agreement was listed as "Proposed Changes to DYY Program Operation" under the Watermaster General Manager's Report in the Pools, Advisory Committee, and Watermaster Board meeting packages. (RJN, Exs. 34-36.) However, there was no staff report and the General Manager's report was only verbal and did not disclose the potential terms and impacts of the proposed changes to the DYY Program. As addressed more fully herein, the letter agreement also was not approved through the Watermaster Approval Process and the minutes for these September 2018 Board meetings do not reflect any substantive discussion of the 2019 Letter Agreement. (*Id*.,

Exs. 37-39.) Because Watermaster did not provide the required notice of the execution of the 2019 Letter Agreement, said agreement is both defective and void.

2. Watermaster's General Reference That it Might Execute the 2019 Letter Agreement Did Not Constitute Sufficient Notice

Watermaster's actions have been overturned in the past for failing to provide proper notice to the parties. In 2012, the Nonagricultural Pool Committee appealed the trial court's order that found that Watermaster had provided proper notice to the parties to purchase water from the Nonagricultural Pool. The appellate court overturned the trial court decision holding that Watermaster had not provided proper notice by providing an agenda package that contained a copy of a notice that "was not intended to be effective unless and until it was approved by the Board." (RJN, Ex. 5 at p. 17.) Because the agenda package contained language that the decision to provide notice was to be approved by the Board at a *future* meeting, the "only reasonable interpretation was that Watermaster staff was not *giving* notice." (*Ibid*. (emphasis in original).) "[P]ut [] another way, everything that was communicated … about giving notice or purchasing the water came with the caveat that the Watermaster had not definitively decided to do either; thus, these communications did not constitute notice." (*Id.* at p. 4.) As a result, the appellate court found that Watermaster did not provide sufficient notice of its action and overturned the trial court's ruling. (*Id.* at p. 16.)

Like Watermaster's communication at issue in the 2012 Appeal, Ontario could not reasonably have understood that Watermaster's verbal communications in the September 2018 Pool, Advisory, and Board meetings regarding the DYY Program constituted notice of the terms and impacts of the proposed amendment to the DYY Program when the agreement was not even in existence and the impacts of the amendment were neither fully understood nor disclosed until years later. (See *Stevens v. Dep't of Corrs.* (2003) 107 Cal.App.4th 285, 292 [A person entitled to notice "'is not required to be clairvoyant,'" citation omitted].) This is especially so when what was being reported in the meetings was that Watermaster was not sure whether any action regarding the DYY Program would be taken at all. (Jones Decl., Ex. 6 at 3:10-17 ("The Metropolitan Water District has proposed some changes that are favorable to the parties. We don't believe they constitute a change to the agreement, so we don't intend to bring an agreement amendment to the Board. There

may be an acknowledgement letter. If there is, I wanted to let you know I will be signing that acknowledgement letter.").) Having failed to disclose the nature of the proposed action, and having stated that Watermaster had not even definitively decided *whether* action to sign an agreement would be taken, this notice was defective. (See, e.g., RJN, Exs. 1 (¶ 59), 2 (§ 2.7), 3 (pp. 18-19, fn. 12).) As a result, just like in the 2012 appellate opinion, this Court should find that the Watermaster failed to give either timely or effective notice of the 2019 Letter Agreement.

3. Watermaster Failed to Comply With the Watermaster Approval Process and Therefore Lacked the Authority to Execute the 2019 Letter Agreement

Watermaster did not have the authority to approve the 2019 Letter Agreement at a staff level. As detailed in Section II.B., above, the Judgment and Orders of the Court include very specific procedural and substantive requirements relating to proposed Watermaster actions, including detailed written application, notice, analysis, and approval processes in the Watermaster Rules and Regulations, as well as specific requirements pertaining to approvals of groundwater storage agreements. (*See, e.g.*, RJN, Ex. 1 (¶ 59), 2 (§ 2.7), 3 (pp. 18-19, fn. 12).) The Watermaster Approval Processes were followed both in the initial adoption of the DYY Program, and in the adoption of Amendment 8 that changed material agreement terms. (RJN, Exs. 11-25l Jones Decl., ¶¶ 6-8, 19-31.) Watermaster knows how to follow the Watermaster Approval Process, and yet consciously chose to completely bypass this process when it signed the 2019 Letter Agreement. (Jones Decl., ¶¶ 32-35.)[14]

The 2019 Letter Agreement both amended the performance criteria for the DYY Program (by making participation voluntarily and, as applied, allowing Opposing Party CVWD to take more production out of the DYY Program than allowed), and expanded who could participate in the DYY Program by allowing Opposing Party FWC to participate even without the required Local Agency

[14] Demonstrative exhibits are attached to the Declaration of Courtney Jones, depicting flow charts demonstrating the Watermaster Approval Process and the application of the Watermaster Approval Process to the adoption of the DYY Program and Amendment 8. Exhibits 1-3 to the Declaration shows, in contrast, the extreme shortcuts taken with respect to the 2019 Letter Agreement.

Agreement. Watermaster completely lacked the authority to take such actions and to bypass the formal Watermaster Approval Process. (RJN, Ex. 1 at ¶ 26.)

Amazingly, Watermaster has taken the position that the DYY Program, including its implementing Orders and Agreements, can be modified by the Parties to the Funding Agreement – Metropolitan, IEUA, TVMWD and Watermaster – independent from the formal Watermaster Approval Process even if that "agreement" results in material changes to the DYY Program. In a January 2022 Watermaster Board presentation, after Ontario raised the same concerns at issue herein, Watermaster doubled-down on the erroneous proposition that it could bypass the Watermaster Approval Process:

> The DYY program can be formally modified among the four signatories ([Metropolitan], IEUA, TVMWD, and [Watermaster].) Watermaster can consider and propose any modifications the parties can agree on to the Operating Committee.

(RJN, Ex. 43 at p. 17.) However, the Judgment and Orders are clear, as are the terms of the DYY Storage Agreement that specifically provides that "[a]ny modification of facilities that is materially different than those contemplated by the Local Agency Agreements will require the filing of a new application." (*Id*., Ex. 17 at Ex. A, § III.A.2.) Further, in considering the Funding Agreement now being relied upon by Watermaster, the Court specifically held that the DYY Program could ***not*** be implemented unless and until the parties complied with the formal Watermaster Approval Process. (*Id*., Ex. 12 at 3:18-25.) The 2003 Order also requires that any Local Storage Agreement must be "analyzed by Watermaster under the Material Physical Injury standard of the Peace Agreement and Rules and Regulations." (*Id*., Ex. 12 at 3:4-7.) None of this was done with respect to the 2019 Letter Agreement.

C. No Material Injury Analysis Was Performed Prior to the 2019 Letter Agreement

The maxim "first do no harm" is a principle firmly embedded within the governing documents for the Basin. The Peace Agreement defines Material Physical Injury, in part, as "material injury that is attributable to the Recharge, Transfer, storage and recovery, management, movement or Production of water, or implementation of the OBMP (Optimum Basin Management

Program) including, but not limited to, degradation of water quality, liquefaction, land subsidence, increases in pump lift (lower water levels) and adverse impacts associated with rising groundwater." (RJN, Ex. 30 at ¶ 1.1(y).) Specific to storage and recovery projects, like the DYY Program, Watermaster is prohibited from approving projects unless there is a finding that it will not result in a Material Physical Injury or that it can be mitigated:

> 5.2. Storage and Recovery: After the Effective Date and until the termination of this Agreement, the Parties expressly consent to Watermaster's performance of the following actions, programs or procedures regarding the storage and recovery of water:
>
> ….
>
> (a)(iii) Watermaster will ensure that any person, …may make application to Watermaster to store and recover water from the Chino Basin as provided herein in a manner that is consistent with the OBMP and the law. Watermaster shall not approve an application to store and recover water if it is inconsistent with the terms of this Agreement or will cause any Material Physical Injury to any party to the Judgment or the Basin.

(*Id.*, Ex. 30 at ¶ 5.2(a)(iii).) That application, in turn, must contain sufficient information for there to be a meaningful, technical evaluation of whether there is a risk of Material Physical Injury. At a minimum, an application for the approval of an agreement to participate in a storage and recovery program must include information regarding the parties who will participate in the program, the ultimate place of use for the water, the quantity of water to be stored and recovered, the schedule for recovery, and the locations of the recharge and groundwater production facilities. (*Id*., Ex. 2 at ¶ 10.7.) Implicit in these requirements is the recognition that the location of groundwater production facilities, the quantity of water that will be produced, and the schedule for groundwater production each are critical considerations when evaluating a proposed storage and recovery project, or modifications to that project, and potential impacts on the Basin.

As applied to the DYY Program, in its 2003 Order, the Court recognized the necessity of analysis under the Material Physical Injury standard of the Peace Agreement and Rules and Regulations. (RJN, Ex. 12 at 3:1-9.) Further, the eventual DYY Program Storage Agreement adopted by the Court specifically recognized the need for Material Physical Injury Analysis when there is a proposed modification to the DYY Program:

> Any modification of facilities that is *materially different* from those contemplated by the Local Agency Agreements will require the filing of a new application in accordance with the provisions of Article X, Section 10.7 of the (Watermaster) Rules and Regulations.

(*Id.*, Ex. 17 at § III.A.2. (emphasis added).) Here, the 2019 Letter Agreement was used to almost double, without any limitation, the amount of DYY Program water Opposing Party CVWD was permitted to produce as compared to its annual allotment in its Local Agency Agreement, and the 2019 Letter Agreement was used as basis to allow Opposing Party FWC to produce stored DYY Program water even though FWC does not even have a Local Agency Agreement. (Jones Decl., ¶ 25.) No application was filed, and, to Ontario's knowledge, no Material Physical Injury Analysis was performed nor were findings of no Material Physical Injury made. Further, no amendments were approved as to the Local Agency Agreements, and no Local Agency Agreement was approved for Opposing Party FWC. Such failures represent a complete abdication of Watermaster's duty to comply with the Judgment, Court Orders, and Watermaster Rules and Regulations.

D. Opposing Parties' Arguments Regarding Assessment of Stored Water Withdrawal Are Inconsistent With California Law

Opposing Parties FWC and CVWD argue that Watermaster's failure to assess stored water withdrawal is consistent with California law. (FWC and CVWD Opp. at p. 10.) The authorities cited, however, are inapposite and a red herring. Likewise, Opposing Parties FWC and CVWD's emphasis on distinguishing between native water from stored or imported water is inapplicable, as the governing documents for the Basin do not contain such distinctions regarding water produced from the Basin for purposes of assessing production. (RJN, Ex. 1 at 3:16-18.)

Opposing Parties FWC and CVWD primarily rely on two cases for their proposition that regular production assessments may not be imposed: *Los Angeles v. Glendale* (1943) 23 Cal.2d 68 ("*Glendale*"), and *Los Angeles v. San Fernando* (1975) 14 Cal.3d 199 ("*San Fernando*"). Although both *Glendale* and *San Fernando* address rights related to importation and storage of groundwater, neither case supports the contention that stored water cannot be assessed. Rather, the portions of both *Glendale* and *San Fernando* cited to by FWC and CVWD provide that the importer of water into a basin for storage has a prior right to that stored water and to recapture the same. (*Glendale*,

supra, 23 Cal.2d at pp. 76-77; *San Fernando, supra*,14 Cal.3d at pp. 260-261.) Whether or not this is true, it is irrelevant as it does not relate at all to Watermaster's failure to assess the higher DYY Program production amounts claimed by Opposing Parties. In short, a right to pump groundwater does not equal a right to avoid lawfully imposed assessments on groundwater production.[15] As Ontario's Challenge relates to fees that should accompany removal of water rather than whether FWC and CVWD have a right to stored water, *Glendale* and *San Fernando* are distinguishable.

The governing documents for the Basin unambiguously provide that all water produced is assessed; they do not differentiate between native and stored water for purposes of assessments. (Jones Decl., ¶ 40.) For example, "Produce or Produced" is defined in the Restated Judgment as "[t]o pump or extract ground water from Chino Basin," and "Production" is defined as "[a]nnual quantity, stated in acre feet, of water produced." (RJN, Ex. 1 at ¶ 4(q), (s).) Similarly, the Judgment does not limit Watermaster's ability to assess production regardless of the basis. (Jones Decl., ¶ 41; see RJN, Ex. 1 at ¶ 51 ["Production assessments, on whatever bases, may be levied by Watermaster pursuant to the pooling plan adopted for the applicable pool."].) Likewise, Watermaster is empowered to "levy assessments against the parties (other than minimal pumpers) based upon production during the preceding period of assessable production . . . ." (Jones Decl., ¶ 43; see RJN, Ex. 1 at ¶ 53.)

Other Basin governing documents also do not distinguish between native and stored water when assessing produced water. For example, the Appropriative Pool Pooling Plan states that "[c]osts of administration of [the Appropriative] pool and its share of general Watermaster expense shall be recovered by a uniform assessment applicable to ***all*** production during the preceding year." (Jones Decl., ¶ 42 (emphasis added); RJN, Ex. 1 at Ex. H at ¶ 6.) Furthermore, the Watermaster Rules and Regulations provide "Watermaster shall levy assessments against the parties . . . based upon Production during the preceding Production period." (Jones Decl., ¶ 44; RJN, Ex. 1 at art.

[15] As addressed herein, Opposing Parties CVWD did not have a right to produce more than its allotment, and Opposing Party FWC had no right to pump this water at all. The fact that FWC was permitted to remove 2,500 AF of water in the 2021/2022 year is a further example of Watermaster's exceedance of jurisdiction based on an informal letter agreement. (RJN, Ex. 1011 at ¶ 12 ["No use shall be made except pursuant to written agreement with Watermaster."].)

IV, § 4.1.) Finally, while Section 4.4 of the Watermaster's Rules and Regulations address assessment adjustments, neither production from a storage and recovery program nor the DYY Program are mentioned. (Jones Decl., ¶ 44.)

FWC and CVWD also wrongfully conflate pumping assessments with administrative fees. The administrative fees are paid to cover the administrative costs associated with DYY Program operation. In contrast, the pumping assessments cover the cost of operating the Basin as a whole. Accordingly, while Metropolitan pays administrative fees via service rates, this is separate and apart from pumping assessments that Watermaster is exempting for FWC's and CVWD's produced water. By waiving production assessments for the parties that voluntarily produce groundwater from the DYY Program account, Watermaster is creating differential impacts on producing parties and rendering it impossible to certify that production from the account is in lieu of imported water use. (Jones Decl., ¶ 62.) Ontario is not aware of any provision in the Judgment that permits exemption of production from the DYY Program storage account from pumping-based assessments. (*Id.* at ¶ 45.)

E. The Court Can and Should Consider All Information Submitted With the Application for Extension and Challenge and Raised in This Reply

In an apparent last-ditch effort to convince the Court to make its decision without fully considering all of the applicable law and facts involved, in its Opposition Watermaster argues that the scope of Ontario's Challenge should be limited to the face of its February 2022 Application and the Court should not consider arguments raised in a declaration and exhibit attached thereto. (Watermaster Opp. at 14:17-18.) This contention lacks support and is meant to constrain the Court's exercise of its authority to rule on the merits.

First, Watermaster and Opposing Parties' arguments that briefing should be limited because they would be prejudiced are particularly disingenuous since Watermaster and Opposing Parties were given the opportunity to agree to a full briefing schedule in lieu of the requested Application for Extension. (Ewens Decl., ¶ 6-7, Ex. 2.) Because Watermaster and Opposing Parties refused, there is no basis for them to contend they may be prejudiced by any arguments made in the Reply.

Second, at the hearing on April 8, 2022, Watermaster represented to the Court that it had

nothing further to add to its Opposition to the Application. At the same hearing, the Court granted Ontario's ex parte application to exceed page limit so that Ontario could fully brief the substantive matters at issue in this Challenge. (Ewens Decl., ¶ 6.)

Finally, the legal authority cited by Watermaster to argue that the Court's review of the record should be limited to the Application itself does not support this proposition. In its Opposition, Watermaster cites California Rule of Court 3.1112(d)(3), which provides that a motion must "[b]riefly state the basis for the motion and the relief sought." As Watermaster acknowledges, Ontario did that in its original Application and Challenge by stating that it needed an extension because it was searching for new water counsel, and also stating that it was challenging the propriety of Watermaster's actions including Watermaster's failure to administer assessments consistent with the Judgment and Court Orders. (See Watermaster Opp. at p. 15; Application for Extension at p. 1.) The other authority cited by Watermaster also does not require the Court to disregard Ontario's briefing and merely provides support that the declaration and supporting exhibits can be considered as evidence to support the Application. (See Code Civ. Proc., §§ 98, 2015.5, 1878; Cal. Rules of Court, rules 3.1112(b), 3.1115.) In sum, none of the cited authorities support Watermaster's efforts to limit the Court's review of Ontario's Challenge.

Watermaster next contends that the Court cannot consider arguments raised in the Reply that were not specifically raised in the February 2022 Application and Challenge. This contention is also without support, particularly given the fact that the arguments contained within this Reply respond directly to Watermaster's and Opposing Parties' opposition briefs and the over 300 pages of declarations and exhibits they submitted, that explicitly go into the substantive merits of Challenge. (See *Golden Door Props., LLC v. Superior Ct. of San Diego Cnty.* (2020) 53 Cal.App.5th 733, 774. As a result, Ontario's Reply, which addresses the issues raised in the opposition briefs, is proper for the Court's consideration.

Moreover, the Court has discretion to consider new issues in a reply. (See *Alliant Ins. Servs., Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308.) It is not an abuse of discretion for the Court to consider new issues where the party opposing the motion has notice and an opportunity to respond to the new material. (See *Jacobs v. Coldwell Banker Residential Brokerage Co*. (2017) 14

Cal.App.5th 438, 449.) This is because the rule is based on the logic that points raised for the first time in a reply brief will deprive the respondent of an opportunity to counter the argument. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1538.)

Watermaster is an arm of the Court whose purpose is to fairly enforce the provisions of the Judgment. (See RJN, Ex. 1 at ¶¶ 16-17.) Given Watermaster's role it is astounding that Watermaster would oppose full merits briefing so that the Court can make fully informed decisions. (*Id*., Ex. 29 at 3:9-18.)

F. Ontario's Challenge is Timely Both to the 2021/2022 Assessment Package and Watermaster's Application of the 2019 Letter Agreement

Opposing Parties and Watermaster mischaracterize Ontario's Challenge as a collateral challenge on the 2019 Letter Agreement that is barred by the statute of limitations. (Watermaster Opp. at p. 12; FWC and CVWD Opp. at pp. 8-9.) As explained in Ontario's Application, however, Ontario timely filed a challenge to the 2021/2022 Assessment Package within the 90-day period provided by the Judgment. (Application for Extension at p. 4.) That Ontario's Challenge also relates to Watermaster's application of, and implementation of, the 2019 Letter Agreement does not bar Ontario's claim.

Travis v. County of Santa Cruz (2004) 33 Cal.4th 757 ("*Travis*") is instructive to the case at bar. In *Travis*, the California Supreme Court held that the plaintiffs' claims, which challenged both the application of an ordinance and a facial challenge to the ordinance itself, were not barred by the statute of limitations because the plaintiffs raised a timely challenge following the county's application of the ordinance to them. (*Id.* at pp. 768-769.) The Court reasoned that the plaintiffs' challenge was not purely facial in nature, in which an injury arises solely from a law's enactment, but arose from the county's application of the ordinance against the plaintiffs' property. (*Id*. at p. 767.) The Court held that "[h]aving brought his action in a timely way after application of the Ordinance to him, Travis may raise in that action a facial attack on the Ordinance's validity." (*Id*. at p. 769, quoting *Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809, 824 ("*Howard Jarvis*") ["[P]laintiff's attacks . . . 'are not barred merely because similar claims could have been made at earlier times to earlier violations.'"], citation omitted.) Any other holding would

be inequitable, as "a property owner … would be without remedy unless the owner had the foresight to challenge the ordinance when it was enacted, possibly years or even decades before it was used against the property." (*Travis*, *supra*, 33 Cal.4th at pp. 770-771.)

Similarly, here, Ontario's Challenge arises from the 2021/2022 Assessment and, specifically, the fee-shifting that resulted from Watermaster's exemption of 23,000 AF of water produced from the DYY Program from assessment. (Burton Decl., ¶ 4, Ex. 1; see also Christopher Quach's Declaration in Support of Ontario's Application ("Quach Decl."), ¶ 2.) Watermaster's purported authority for this exemption is the 2019 Letter Agreement, which fundamentally changed the recovery side of the DYY Program by permitting water to be recovered outside of the Local Agency Agreements without a corresponding shift of imported water. (Jones Decl., ¶ 9; RJN, Ex. 9.) The 2019 Letter Agreement, however, is silent on the issue of how assessments will be handled under the "voluntary" arrangement permitted by the Letter Agreement. (RJN, Ex. 41.) The 2019 Letter Agreement similarly does not allow for an increase in agencies' take capacity. (*Ibid.*) Watermaster, notwithstanding, permitted much higher takes in the 2021/2022 year: CVWD produced over 20,000 AF despite being permitted approximately 11,000 AF, and FWC produced over 2,000 AF despite the fact that it is not a party to a Local Agency Agreement. (*Id*., Ex. 60.) Thus, it is not the 2019 Letter Agreement in and of itself that gives rise to Ontario's Challenge but the application of the Agreement in the most recent assessment that forms the basis of Ontario's Challenge. Indeed, just as in *Travis*, Ontario is timely challenging both the recent application of the 2019 Letter Agreement via the 2021/2022 assessments and the Letter Agreement itself as the basis for these actions.

Ontario's Challenge to the 2021/2022 assessments also is akin to a challenge on an illegal tax that is continuing to be imposed. Challenges to illegal taxes are not time barred based on the timeframe directly following the enactment of the overarching ordinance's enactment but, rather, a new limitation period begins anew with each unlawful collection as collection is an ongoing violation. (*Howard Jarvis, supra*, 25 Cal.4th at p. 812.) In *Howard Jarvis*, the plaintiffs claimed that the city, by continuing to impose the tax at issue in the case, was failing to perform the legal duties required of it by Proposition 62. (*Id*. at pp. 819-820.) The California Supreme Court held

the city's allegedly illegal actions included not only the ordinance's initial enactment but also the continued collection of an unapproved tax. (*Id*. at p. 824.) As such, the plaintiffs' challenge was not time barred. (*Ibid*.) In so holding, the Court agreed with the plaintiffs who "acknowledge[d] the public policy favoring security of municipal finance, but observe[d] that the policy 'is not a trump card that somehow requires the courts to countenance *ultra vires* or illegal tax practices.'" (*Ibid.*, citation omitted.)

Ontario raises the same type of challenge as in *Howard Jarvis*: Watermaster is failing to perform the legal duties required of it by failing to administer assessments consistent with the Judgment. (Application for Extension at p. 4.) Watermaster is repeatedly creating improper fee-shifting with each assessment that follows the 2019 Letter Agreement. A new statute of limitations period was thus initiated with the 2021/2022 assessment rendering Ontario's Challenge on both the 2021/2022 assessment and the underlying 2019 Letter Agreement timely. As ruled by the Court in *Howard Jarvis*, Watermaster cannot evade judicial review of an improper tax ordinance, here the 2019 Letter Agreement, by arguing the statute of limitations bars Ontario's action.

The General Manager for Watermaster concedes in his declaration that "Watermaster has the ability to retroactively make changes to Assessment Packages if there is a subsequent agreement among parties or a subsequent Court Order that provide for a change in Watermaster's accounting of water transactions." (Peter Kavounas Declaration in Support of Watermaster's Opposition ("Kavounas Decl.") ¶ 9.) Ontario is seeking precisely this type of evaluation and order by the Court on the 2021/2022 assessment that, by Mr. Kavounas' own admission, may be done after the assessment is completed.

The Challenge to the 2019 Letter Agreement also is timely because the 90-day time period to challenge the approval of said agreement never accrued. Pursuant to Paragraph 31(a) of the Judgment, the "Effective Date" for any action or decision of Watermaster shall be deemed to have occurred on the date on which written notice thereof is mailed. The time for any motion to review said Watermaster action or decision shall be served and filed within 90 days of such action or decision. (RJN, Ex. 1 at ¶ 31(c).) Since there was never any formal notice of the approval of the 2019 Letter Agreement, the time to challenge that action never accrued. (See *Util. Audit Co. v.*

City of Los Angeles (2003) 112 Cal.App.4th 950, 962 ["A period of limitations ordinarily commences at the time when the obligation or liability arises."].)

G. Opposing Parties' Equitable Estoppel Argument Misrepresents the Facts and Fails as a Matter of Law

As IEUA notes, equitable estoppel applies when the following elements are satisfied: (1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend his or her conduct shall be acted upon, or must so act such that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely upon the conduct to his or her injury. (*Cotta v. City & County of San Francisco* (2007) 157 Cal.App.4th 1550, 1567 ("*Cotta*").) The burden of proof is on the party asserting estoppel. (See *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd*. (1985) 40 Cal.3d 5, 16.) There can be no estoppel where one of these elements is missing. (*Green v. Travelers Indem. Co.* (1986) 185 Cal.App.3d 544, 556.)

Here, IEUA contends that Ontario should be estopped from challenging the Watermaster Action because Ontario allegedly supported the 2019 Letter Agreement. (See IEUA Opp. at 6.) Such claims are demonstrably false.

Ontario was not apprised of the material facts in 2018-2019 as IEUA contends both because Ontario's Challenge arises from the 2021/2022 assessment and because the 2019 Letter Agreement was not executed through the Watermaster Approval Process. Ontario's Challenge arises from the 2021/2022 assessment and, particularly, the fee-shifting that resulted from Watermaster's exemption of 23,000 AF of water produced from the DYY Program. (Burton Decl., ¶ 4; see also Quach Decl., ¶ 2.) Because this assessment occurred in 2021, Ontario was not (and could not have been) apprised of these facts in 2018-2019, especially since the Letter Agreement was silent as to how assessments would be handled under the "voluntary" arrangement under the Letter Agreement.[16] (RJN, Ex. 41.) Moreover, the 2019 Letter Agreement does not allow for an increase

[16] Notably, even today, Opposing Parties expressly recognize the difficulty in understanding the actual financial impacts of the 2019 Letter Agreement. As noted by FWC, costs and assessment impacts are not easily calculated and "costs are not precisely known, because the Chino Basin

in agencies' take capacity. (*Ibid*.) Moreover, Watermaster actively misrepresented the impacts when the General Manager advised the Pool Committees that the Letter Agreement "changes don't commit Watermaster to anything." (Jones Decl., Ex. 4 at 3:5-12.) Under these circumstances, Ontario was not fully apprised of the full effects of the 2019 Letter Agreement, nor could it have been.

Second, an essential element of equitable estoppel is that the party to be estopped intended by its conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended. (See *Cotta*, *supra*, 157 Cal.App.4th at p. 1567. Moreover, silence and inaction may support estoppel only if the party to be estopped had a duty to speak or act under the particular circumstances. (*Feduniak v. Cal. Coastal Comm'n* (2007) 148 Cal.App.4th 1346, 1362.) Here, IEUA seeks to estop Ontario from arguing the merits of its Challenge based on Ontario's alleged silence. This argument is factually wrong. Ontario was not silent, stating in correspondence to IEUA: "*Ontario cannot take a position of support because [Ontario] cannot know the full effects of the proposed changes* … we will take a wait-and-see approach regarding impacts, and we reserve the right to address any harm or detriment that may arise." (Jones Decl., Ex. 7 (emphasis added).)

Third, IEUA fails to show that Watermaster or any other party detrimentally relied on Ontario. IEUA does not even contend that it or Watermaster relied on Ontario's conduct in executing the 2019 Letter Agreement. (See IEUA Opp. at pp. 6-7.) Accordingly, IEUA fails to establish reliance on Ontario's conduct, or any injury.[17]

Finally, IEUA fails to establish that this is an exceptional case allowing estoppel to be applied against a government entity. (See *Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n* (2020) 9 Cal.5th 1032, 1072, citation omitted.) Estoppel will not apply against a government entity except in unusual instances to avoid grave injustice and when the result will

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Watermaster would have to calculate a new assessment package, which is an intricate process and dependent on may factors, including actions of other parties." (Declaration of Josh Shift, ¶ 4.)

[17] Because Opposing Parties have been unjustly enriched from an unlawful cost-shifting of assessments, their claim that taking that away and restoring the status quo will somehow constitute an "injury" to them is absolutely beyond reason.

not defeat a strong public policy. (*Ibid.*) IEUA has made no such showing, nor could it.

Equitable estoppel also is a remedial judicial doctrine employed to ensure fairness, prevent injustice, and do equity. (*Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, 403.) Here, the equities favor Ontario. IEUA seeks to deny Ontario an opportunity to substantively challenge the Watermaster action. The Judgment provides that Watermaster serves as an arm of the Court and its function is to administer and enforce the provisions of the Judgment and any subsequent instructions or orders of the Court. (RJN, Ex. 1 at ¶¶ 16-17.) As a result, challenges to Watermaster actions should be heard on their merits.

V. LEGAL ANALYSIS PERTAINING TO APPLICATION FOR EXTENSION

A. Precedent Exists for Granting Extension Requests

The Judgment charges Watermaster with administering and enforcing the provisions of the Judgment and any subsequent instructions or orders of the Court. (RJN, Ex. 1 at ¶¶ 15, 17.) However, the Court retains ultimate jurisdiction over all matters and the Judgment gives any party the right to file a motion with the Court to challenge Watermaster's action within 90 days of that decision. (*Id.* at ¶¶ 15, 31(c).)

Given the complexity of the legal and technical issues inherent in this Basin, the Judgment also authorizes the Court to grant extensions of time to challenge Watermaster actions. Indeed, parties to the Judgment and Watermaster have, at various times, requested extensions of time under Paragraph 31(c) of the Judgment that were granted by the Court. By way of example, Chino filed an ex parte application on October 15, 2020 seeking additional time to file its motion. The Court granted Chino's application and extended the time for Chino to file its motion by two months. (RJN, Ex. 26.) Watermaster likewise made similar requests for extensions of time to file a substantive response to a motion by the Appropriative Pool member agencies. (*Id*., Ex. 27.) On or about October 20, 2020, Watermaster filed an ex parte application to continue a hearing on the motion so that it could file an opposition brief based on new arguments presented in the Appropriative Pool member agencies' reply brief. Again, the Court granted this request and continued the hearing to allow for substantive briefing on the issues. (*Id*., Ex. 28.)

B. Good Cause Exists to Grant Request for Extension

1. Ontario Relied on Good Faith Settlement Negotiations With Watermaster and Opposing Parties and Good Cause Exists to Grant the Extension

Watermaster ignores certain critical facts supporting Ontario's reasonable extension request and baldly asserts, incorrectly, that Ontario had adequate time to prepare a challenge and has "shown no reason to extend the deadline to challenge Watermaster's approval of the 2021/22 Assessment Package to allow it to 'further develop' its challenge." (Watermaster Opp. at 10:27-11:2.) This contention is inaccurate and conceals from the Court that: (a) the parties were negotiating in good faith through early February 2022 on the disputed issues; (b) Watermaster provided assurances to Ontario that an extension would likely be given and then waited until February 11, 2022 – six days before the challenge deadline – to notify Ontario that its extension request was denied; (c) also on February 11, Opposing Party FWC notified Ontario that it would not waive conflicts so that Ontario's then-water counsel could file an application to challenge the Watermaster Action by February 17; (d) upon receipt of this information and in less than a week, Ontario timely filed the Application so that it could retain water law counsel to represent it with respect to the challenged Watermaster Action; and (e) when Ontario's new counsel substituted into the case, Watermaster again refused the professional courtesy of an extension request for a full briefing schedule on the Watermaster Action. (See San Bernardino County Bar Association Civility Code, Duties to Other Counsel, ¶ 7 [noting duties to "extend courtesy to other counsel in scheduling dates for depositions, hearings, and trials as well as granting reasonable requests for extensions of time and continuances"].) Watermaster also refused to agree to a full briefing schedule even after the Court continued the hearing to June 17, 2022. Watermaster's refusal to agree to a briefing schedule is a continuation of its tactical efforts to limit Ontario's ability to brief its Challenge. These facts provide good cause to support the Application and extension request.

Due process requires that a party be given notice and an opportunity to defend its interests. (*Antelope Valley Groundwater Cases* (2021) 62 Cal.App.5th 992, 1057-1060.) The primary purpose of procedural due process is to provide affected parties with the right to be heard at a meaningful time and in a meaningful manner. (*Ibid.*) Consequently, due process is a flexible concept, as the

characteristic of elasticity is required in order to tailor the process to the particular need. (*Ibid.*) Under the circumstances that exist here, due process should be applied to allow Ontario a full and meaningful opportunity to brief its challenge.

2. Watermaster Should be Estopped from Denying an Extension

Subject to a showing of the essential elements, equitable estoppel is applicable when the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts. (*L.A. Unified Sch. Dist. v. Torres Constr. Corp.* (2020) 57 Cal.App.5th 480, 505, fn. 10.) Here, Watermaster should be estopped from denying an extension to Ontario to fully brief the issues. Watermaster was apprised of all relevant facts. It knew that Ontario, Watermaster, and other interested parties were negotiating a resolution through early February 2022, and it knew that Ontario would require an extension if the parties could not come to an agreement.

Ontario also reasonably believed that Watermaster intended that its conduct be relied upon. Specifically, following the November 18, 2021 meeting in which the Watermaster Board sought input from interested parties, Ontario raised the issue of whether a tolling agreement or extension request would be beneficial. On December 6, Watermaster's counsel responded that Watermaster hoped to see resolution of Ontario's concerns and that a complete report on the concerns would be provided at the January 27, 2022 Board meeting, and based on this, no extension "is required at this time because it appears we have ample time to address" the issues, and an extension could be revisited at the January 27 Board meeting. Ontario relied on these representations, continued to negotiate in good faith, and, on January 24, sent a letter to Watermaster stating that it was awaiting the legal report from Watermaster's staff concerning the Watermaster Action and further documenting Ontario's concerns with the Watermaster Action. On January 27, 2022, Watermaster presented a staff report to the Watermaster Board in response to Ontario's concerns. (RJN, Ex. 42.) But despite representations by the Watermaster Board that a legal evaluation would be completed to address whether the Watermaster Action complied with the Judgment and other Court Orders, Watermaster's counsel responded at the Board meeting that it was "not prepared to provide a legal opinion in this moment." (Burton Decl., ¶ 10.) It was understood by Ontario that to comply with

the Watermaster Board's direction, a report from Watermaster counsel still would be forthcoming. (*Ibid.*) Ontario reasonably relied on Watermaster's above conduct that Ontario's extension request would be granted to accommodate the ongoing work and discussions.

3. Watermaster Will Suffer No Prejudice by an Extension

As a neutral arm of the Court, Watermaster should welcome the opportunity to have the Court consider full briefing on the issue of whether the 2021/2022 Assessment Package and 2019 Letter Agreement comply with the Judgment and Court Orders. Yet Watermaster has sought to obtain an improper procedural advantage by opposing Ontario's Application. Watermaster's efforts to prevent a full review of the Watermaster Action are also evident from its Opposition where it argues that this Court should not consider the correspondence that is attached as an exhibit to a declaration in support of Ontario's Application and Challenge that identifies the legal defects with the Watermaster Action. Such attempts to exclude argument and evidence also are without factual and legal support and further demonstrate the need for the Court to review the Watermaster Action based on a fully briefed and developed record.

VI. CONCLUSION

Ontario respectfully requests that the Court grant its Challenge and issue an order: (1) invalidating the 2019 Letter Agreement; (2) directing Watermaster to comply with the Watermaster Approval Process; (3) directing Watermaster to implement the DYY Program in a manner consistent with the Judgment and Court Orders; and (4) correcting and amending the 2021/2022 Assessment Package to assess water produced from the DYY Program. Alternatively, Ontario requests that the Court grant its Application for Extension to allow full merits briefing.

Dated: May 26, 2022

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