Court of Appeal Case No. A142808

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

First Appellate District – Division One

GREEN VALLEY LANDOWNERS ASSOCIATION,

Appellant,

vs.

CITY OF VALLEJO,

Respondent.

Order filed August 20, 2014
Judgment filed August 20, 2014
The Honorable Arvid Johnson, Judge (Ret.)
Solano Superior Court No. FCS042938

APPELLANT'S OPENING BRIEF

Stephen M. Flynn (No. 245823)

LAW OFFICES OF STEPHEN M. FLYNN
71 Stevenson Street, Suite 400
San Francisco, CA 94105
Telephone: (415) 655-6631
Facsimile: (415) 655-6601
Email: smflynn@smflynn-law.com
Attorney for Appellant

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed in this certificate under Rule 8.208.

LAW OFFICES OF STEPHEN M. FLYNN

Dated: January 6, 2015 _____/s/_____

STEPHEN M. FLYNN
Attorney for Appellant, Green Valley Landowners Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

INTRODUCTION

This class action lawsuit seeks to enforce the right of 809 non-resident customers (the "Class") to receive safe, affordable water at reasonable rates from the City of Vallejo ("Respondent").

At issue is the Lakes Water System ("LWS"), a large municipal water project initially constructed by Respondent in the late 1800's. A century after building the LWS and inducing the Class to connect to the system, Respondent unilaterally implemented a series of ordinances which forced the 809 non-resident, non-voting members of the Class to bear 100% of the LWS' costs. For the previous 99 years, Respondent, by virtue of its considerably larger population and water usage, paid approximately 98% of the LWS's municipal-sized costs.

The Complaint alleges Respondent breached implied agreements with the Class stemming from its longstanding practice to share in the cost of the LWS, and further breached its obligation to charge the non-resident customers a reasonable water rate (the average bi-monthly residential water bill is over $400). The Complaint seeks damages and injunctive relief against further actions which would harm the Class, including a proposed sale of the LWS to a corporate utility (which would result in average water bills well in excess of $1,000).

The Complaint also seeks redress for Respondent's gross mismanagement and willful neglect of the LWS. Today, 75% of the infrastructure within the LWS is 30-50 years beyond its useful life with a replacement cost of $30-60 million. As with all other costs, Respondent expects the 809 members of the Class to pay this enormous bill.

Respondent filed a general demurrer to the Complaint. Retired Judge Arvid Johnson sustained the demurrer as to all twelve causes of

action *without leave to amend*. The trial court's ruling was predicated on clear errors of law and must be reversed.

First, although Respondent's city charter does not require written contracts, the trial court dismissed all implied contract claims on the false premises Respondent (a charter city) is bound by and subject to Government Code §40602, a statute applicable only to general law cities, and that this statute and the city charter impliedly require all city contracts to be in writing. This holding is flatly inconsistent with the California Constitution and a century of clear precedent from the California Supreme Court and Courts of Appeal.

Second, the trial court held Proposition 218 bars claims seeking relief from unreasonable rates. Proposition 218, which prohibits water rates which exceed the proportional cost of service, *is not even triggered* because the lawsuit does not seek to alter or change water rates within Vallejo. Even if it applied to the requested relief, under the Supremacy Clause, Proposition 218 must give way to the Contracts and Equal Protection Clauses of the United States Constitution.

Third, the trial court misapplied the "separation of powers" doctrine – prohibiting the judiciary from interfering with purely legislative action – to preclude the courts from enjoining a sale of the LWS – even if such a sale would violate the laws and policies of the State of California.

Fourth, the trial court erroneously held the "pay first, litigate later" rule – requiring taxpayers to pay a tax before seeking a refund – abrogates subsequent Supreme Court decisions holding non-resident water customers of a municipal water system may sue to enjoin unreasonable water rates.

Fifth, the trial court erred in holding Government Code §815 – prohibiting claims against public entities unless based on statute or contract – precludes the Class from suing to enforce Respondent's affirmative

obligations under its own municipal charter and municipal code. The trial court's improper reliance upon Government Code §815 also abrogates subsequent Supreme Court decisions holding non-resident water customers of a municipal water system may sue the municipality for breach of the trustee-beneficiary relationship which exists between a municipality and its non-resident customers.

The non-resident members of the Class can neither vote to approve the water rates to which they are subjected, nor to remove from office the council members who impose them. They have no say in whether the LWS is sold to a corporate utility, and no input in the maintenance or improvement of the aged water system.

This lawsuit is the *only* vehicle available to the Class to protect its right to safe, affordable water at reasonable rates. The trial court's misguided ruling sustaining the demurrer without leave to amend leaves the Class without a remedy and perpetuates a serious injustice, which will only worsen with time. For the reasons set forth below, the ruling must be reversed.

FACTUAL AND PROCEDURAL HISTORY

A. FACTUAL BACKGROUND

1. The Initial Construction of the LWS

The LWS was created in 1893 when Respondent constructed a diversion dam coupled with a 14-inch transmission pipeline, which brought water from Solano County's Green Valley to Vallejo (the "Green Line"). After completing the dam, Respondent created Lake Frey (1894) and Lake Madigan (1908). At the time, the LWS was one of the first and largest municipal water projects in California. (AA006-007, ¶¶24-28.)

Frey and Madigan were soon insufficient to meet the demands of Respondent's rapidly growing population. Respondent then applied for a

permit to store 37,000 acre feet of water in Napa County's Gordon Valley. (AA007, ¶29.)

In pursuance of its permit, Respondent constructed a dam and reservoir known as Lake Curry (1925) along with a 24-inch transmission line from Lake Curry to Vallejo (the "Gordon Line"). (AA007, ¶¶30-31.)

Once completed, the LWS constituted a municipal-sized waterworks system consisting of three large reservoirs, two dams, two treatment plants, thousands of acres of land, and dozens of miles of municipal-sized pipes which conveyed needed water to Vallejo. (AA006-006, ¶¶24-31.)

2. The Importance of the LWS to Respondent

From the late 1800's through the 1950's, the LWS was Respondent's only source of potable water (AA008, ¶39). *Without the LWS, Vallejo as we know it would not exist.*

Prior to the construction of the LWS, Vallejo relied on cisterns which collected rain water from roofs and roof drains. Lacking a stable supply of water, water carts would literally go door-to-door to deliver water to the City's inhabitants.

This dire situation changed when the LWS was constructed. When the first phase of the LWS was completed in 1894, the papers declared, "If there is one thing Vallejoans can point to with pride, it is the municipally owned water system, one of the first successfully operated in the State, and a criterion of what municipal ownership can accomplish for the people when intelligently managed (Woodward, S., *Solano Historian*, "John Frey and the Valley Water System").

The LWS was also a critical source of water for the United States naval facility at Mare Island. For decades, Respondent profited from the sale of water to the Navy (its largest customer). During World Wars I and

II, National Guard troops were stationed at the lakes to ensure uninterrupted water supply to Vallejo and Mare Island.

Respondent continued to use the LWS until 1992, and still claims the LWS is "critical" to the City's existing and future water supply (AA009, ¶¶42-43).

3. Respondent Encourages Non-Residents to Connect to the LWS

In order to transport water from the LWS to Vallejo, Respondent obtained easements from approximately 60 non-resident owners along the Green and Gordon Lines. In exchange, these owners obtained free water from Respondent. (AA007, ¶¶32-35.)

In addition, over the decades, Respondent agreed to allow several hundred non-resident customers to connect to the LWS. These non-resident customers were easily served from the existing pipes as an easy means of raising additional revenue. These connections were made without a master plan, and were made pursuant to written "will serve" letters. (AA008, ¶36.)

In the 1950's, as Vallejo sought to expand its sphere of influence, additional connections were made on the written condition the new customers agree to annex to the City of Vallejo "on demand" (AA008, ¶38). Today, 809 rural households, churches, schools and small businesses, receive water from the LWS (AA002, ¶5).

4. Respondent Unilaterally Divests Itself of Any Financial Responsibility for the LWS

In the late 1950's, Respondent obtained new water rights which it never shared with the Class (AA008, ¶39). Instead, Respondent installed parallel pipeline infrastructure just meters from the existing Green and Gordon Lines which transported the new water directly to Vallejo. Even

with the new water, Respondent continued to use and rely upon LWS water until 1992 (AA009, ¶42).

By 1992, water quality from Lake Curry could no longer meet state and federal water quality requirements. Rather than fixing the water quality problem, or improving the water treatment facilities, Respondent unilaterally elected to stop using Lake Curry as a water source. Respondent then closed a valve on the Gordon Line, stopping the flow of LWS water to Vallejo (AA008-009, ¶¶41-43).

Respondent then passed an ordinance (No. 1211 N.C. (2d), the "1992 Ordinance") shifting 100% of the cost of operating the LWS onto the Class (AA009, ¶48).

The 1992 Ordinance marked a dramatic shift from 99 years of dealing. From 1893 through 1992, the cost of operating the LWS was paid for predominantly by Respondent. During this time, the Class paid rates which were very similar (and often, the same) as those paid for by Respondent's in-city customers. Because Respondent had a significantly larger customer base[1] and used considerably more water, for 99 years, approximately 98% or more of the cost of the LWS was paid for by Respondent. The remaining 2% or less was paid for by the 809 members of the Class. The Complaint refers to this as the "Historic Cost Sharing Ratio." (AA009-010, ¶¶44-49).

As a result of the 1992 Ordinance, the non-resident customers suffered an immediate 230% increase in their water rates. Vallejo residents enjoyed an immediate decrease in their rates. (AA010, ¶50.)

[1] In 1992, Respondent had approximately 30,000 in-city connections, compared to just 809 non-resident connections (AA010, ¶49). Respondent also uses considerably more water: 20,000 acre feet compared to just 500 acre feet used by the Class.

Even a 230% rate increase was not enough for 809 connections to fund the operation of a municipal-sized water system. To cover the increasingly large costs, Respondent passed additional rate increases in 1995 (No. 1334 N.C. (2d), the "1995 Ordinance") and 2009 (No. 1619 N.C. (2d), the "2009 Ordinance") (AA010, ¶¶51-52).

The 1995 Ordinance increased water consumption charges and fixed water chargers by approximately 625% (¶51). The 2009 Ordinance further increased the water consumption charges and fixed water charges on the LWS customers an additional 100% (¶52). The average bi-monthly water bill for residential members of the Class is now over $400 – approximately 400% more than the average in-city water bill (AA011, ¶56). The 2009 Ordinance is subject to a tolling agreement (AA011, ¶57, the "Tolling Agreement").

5. Respondent Transfers Responsibility for the Obsolete, Deteriorated System to the Class

This litigation also challenges Respondent's gross mismanagement and willful neglect of the LWS. In 1992, Respondent unilaterally transferred to the Class the obligation to fund an obsolete, badly deteriorated, and fully-depreciated water system which Respondent failed to maintain or improve during the 99 years Respondent used it (AA013-014¶¶66-68, 70-71).

By 1992, 75% of the pipe infrastructure was beyond its useful life with a replacement cost of approximately $24 million (AA013, ¶¶66, 68). Today, this same infrastructure is 30-50 years *or more* beyond it useful life.[2] An additional $6 million in improvements will be needed within a

[2] Safe Drinking Water Act violations, prolonged water outages and massive pipe ruptures have all occurred with alarming frequency after the filing of the Complaint.

decade (AA003, ¶9). The 809 members of the Class are expected to pay this bill (in addition to the cost to replace the dams, another $30 million).

Following Respondent's abandonment of Lake Curry as a water source, Respondent radically transformed the LWS from a water *transmission* system (designed to transport large quantities of water to Vallejo) into an *ad hoc* water *distribution* system (haphazardly designed to serve the needs of a scattered rural population) (AA012-014, ¶62). The resulting costs and inefficiencies are staggering.

Today, approximately 60 households in Gordon Valley are reverse fed water uphill through the massive 24" Gordon Line – the same line which once transmitted water directly from its source at Lake Curry to Vallejo. The useful life of the Gordon Line expired in 1970, and the replacement cost is over $7 million, or $115,500 per connection served. (AA014, ¶62.f.)

Approximately 20 households in Spurs Ranch in American Canyon receive water from the 14" Green Line. The useful life of this section of pipe expired in or about 1960, and the replacement cost is almost $5 million, roughly $250,000 per connection served. (AA014, ¶62.h.)

These problems highlight the central issue underlying this action– a small disenfranchised rural population is being forced to pay for the cost of operating a large, obsolete municipal water system which functions in a manner it was never designed to function. Not surprisingly, the per-connection asset cost of the LWS is the highest, or amongst the highest, in the State of California (AA015, ¶69). Rates within the LWS (which average approximately $400 per residential connection per bill) are also among the highest in the State (AA030, ¶10).

6. Respondent Seeks to Profit from Selling the LWS

Respondent also seeks to profit at the expense of the Class by selling the LWS in pieces to corporate interests and private investors (AA017-018, ¶¶79-85).

Respondent first wants to sell the century-old pipes within the LWS to a corporate utility for $9 million (AA017, ¶¶79-80). This grossly inflated figure includes millions of dollars of capital contributed by the Class which must be excluded from the sale price (AA017, ¶78.a). Respondent has considered selling the pipes to the LWS customers, but only if they pay $12 million – a $3 million premium (AA018, ¶85).

After selling the pipes and pumps, Respondent anticipates selling the real property associated with the LWS and placing the proceeds into its general coffers – all in violation of State law, as discussed below (AA018, ¶¶81, 83).

Further, since the sale of the pipes and pumps would not include any water or water rights (even from the LWS reservoirs), Respondent seeks to earn an additional profit from the ongoing sale of water, assuming it does not take the water from the LWS for its own development uses (AA018, ¶84).

All in, Respondent could profit of $40 million *or more* from the piecemeal sale of the LWS. The non-resident customers would not fare as well.

If the pipes and pumps are sold to a private utility, rates within the LWS could rise 300% or more (AA003, ¶10). This translates into an average bi-monthly residential water bill of well over $1,000 (*id.*). Proceeds from the sale of the watershed and non-watershed land will go into Respondent's general fund, in violation of State policy and law, and not into the making of $30-60 million in improvements the LWS needs

immediately (AA029-030, ¶¶140-143). The customers, lacking any water rights, will be forced to purchase scarce water on the open market forever.

B. PROCEDURAL BACKGROUND

On June 9, 2009, Respondent, on behalf of the Class, entered into the Tolling Agreement which tolls "any applicable statutes of limitations regarding a potential challenge to the rate increase [which occurred in 2009]" (AA011, ¶57).

On December 3, 2013, Appellant served Respondent with a claim pursuant to the Government Claims Act (Gov. Code §910) (AA020, ¶80). Respondent did not respond to the claim (*id.*).

On January 23, 2014, Appellant filed a putative class action complaint against Respondent in the Solano County Superior Court (the "Complaint") (AA001-037). The Complaint contains twelve causes of action.

On February 24, 2014, Respondent filed a general demurrer to the Complaint (the "Demurrer") (AA038-065).

Every judge in the Solano County Superior Court recused themselves from the case. As a result, the case was reassigned to Retired Judge Arvid W. Johnson from Yolo County.

On June 10, 2014, the trial court issued a tentative ruling sustaining Respondent's demurrer *without leave to amend* (AA154-158).

On the first, second, and tenth causes of action (the "Implied Contract Claims") the trial court held under a *general law* statute, Government Code §40602, Respondent (a charter city) can only enter into *written* contracts.

On the fourth, fifth and eleventh causes of action (the "Duty to Charge a Reasonable Rate Claims"), the trial court held they were barred by

Proposition 218, the "Right to Vote on Taxes" amendment to the Constitution.

On the sixth and seventh causes of action (the "Injunction against Sale Claims"), the trial court held they were barred by the "separation of powers" doctrine.

On the eighth and ninth causes of action (the "Injunction against Unlawful Rates Claims") the trial court held they were barred by the "pay first, litigate later" rule.

On the fifth cause of action (breach of fiduciary duty) and twelfth cause of action (for an accounting), the trial court held they were barred by Government Code §815.

A hearing on the Demurrer took place on June 11, 2014. On August 20, 2014, the trial court affirmed its tentative ruling, granted the Demurrer without leave to amend, dismissed the lawsuit and entered final judgment for Respondent (AA148-172).

ARGUMENT

A. STANDARD OF REVIEW

"A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law" (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1035). "Thus, the standard of review on appeal is de novo" (*id.*; *Cryolife Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1152). The court of appeal exercises its, "independent judgment as to whether a cause of action has been stated as a matter of law" (*Rutherford*, 223 Cal.App.4th at 227; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125).

"On appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend, the reviewing court must accept as true not only those facts alleged in the complaint but also facts that may be

implied or inferred from those expressly alleged" (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403). The court of appeal is not "limited to plaintiff's theory of recovery in testing the sufficiency of its complaint against a demurrer, but instead must determine if the *factual* allegations of the complaint are adequate to state a cause of action under any legal theory" (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 93, 103).

"Even if a demurrer is sustained, leave to amend the complaint is routinely granted. Courts are very liberal in permitting amendments, not only where a complaint is defective in form, but also where substantive defects are apparent" (Rylaarsdam, *et al*., *California Practice Guide: Civil Procedure Before Trial* (Rutter) §7:129; *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747).

"It is an abuse of discretion for the court to deny leave to amend where there is any *reasonable possibility* that plaintiff can state a good cause of action" (*Civil Procedure Before Trial*, §7:129.1, italics in original; *McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 303-04; *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 245).

Leave to amend should only be denied "where the facts are not in dispute and the nature of the claims is clear, but no liability exists under substantive law" (*Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436; *Okun v. Superior Court* (1981) 29 Cal.3d 442, 460 [leave to amend should only be denied if "there are no circumstances under which an amendment would serve any useful purpose"]).

"Where a demurrer is sustained without leave to amend, the reviewing court must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, it will

conclude that the trial court abused its discretion by denying the plaintiff leave to amend" (*Berg & Berg*, 178 Cal.App.4th at 1035).

"A party may propose amendments on appeal where a demurrer has been sustained, in order to show that the trial court abused its discretion in denying leave to amend" (*People ex rel. Brown v. Powerex Corp.* (2007) 153 Cal.App.4th 93, 112).

B. THE IMPLIED CONTRACT CLAIMS

1. Introduction – The Basis of the Implied Contract Claims

The Implied Contract Claims (the First, Second and Tenth Causes of Action) allege Respondent is contractually obligated to share in the cost of the LWS pursuant to the "Historic Cost Sharing Ratio".[3]

a. The Nature of Implied Contracts and Their Application in Water Systems

The existence and terms of an implied propose are manifested by the acts and conduct of the parties, interpreted in the light of the subject-matter and the surrounding circumstances (Cal. Civ. Code §1621; *Marvin v. Marvin* (1976) 18 Cal.3d 660, 678, fn. 16). An implied propose is binding where a reasonable person would conclude there was an agreement from the surrounding circumstances or the conduct of each party (CACI 302).

Implied agreements in the provision of water are not new in California. In *Riverside Heights Water Co. v. Riverside Trust Co.* (1906) 148 Cal. 457, Gage owned a water supply north of lands he wanted to irrigate in Riverside. To convey water from its source to Riverside, Gage

[3] Appellant does not allege that *any* deviation from the Historic Cost Sharing Ratio is *per se* a breach. This case does not test whether minor deviations, dictated by different facts and circumstances, might not result in a material breach. Here, the dramatic deviation from the lengthy history of paying 98% to paying 0% constitutes a material breach under any reasonable measure.

entered into agreements with certain landowners who, in exchange for water, agreed to "pay the expense of maintaining and repairing the canal" (*id.*at 460).

Two years after completing the canal, Gage extended it to bring water further south. Gage's successor, Riverside Trust, sought to recoup the cost of the canal extension from Riverside Water Company (a mutual water company formed by the landowners).

Riverside Trust argued the owners were bound by the original contracts which expressly obligated them to pay the cost of the canal in proportion to their interests in the water delivered. The Riverside Water Company offered extrinsic evidence that "at the time these several contracts were made" the canal "was proposed to be constructed only from the source of supply" to Riverside, but "at that time no further extension had been made, nor was it then generally known or understood that any extension was to be made, or was in contemplation" (*id.*at 464). The owners also produced evidence that Gage's purpose in building the canal was to irrigate his land in Riverside "and that there was no intimation by him that he expected, intended, or desired to extend the canal" (*id.* at 465).

The Supreme Court affirmed the ruling of the trial court holding the Riverside Water Company was not contractually obligated to contribute to the expense of extending the canal south from Riverside. The Supreme Court recognized the contracts were "more or less indefinite in the description of the canal" and approved the trial court's admission of extrinsic evidence of the parties' intent (*id.*at 465).

In *Tronslin v. City of Sonora* (1956) 144 Cal.App.2d 735, the City of Sonora entered into an agreement with Tronslin whereby Tronslin granted Sonora a sewer line easement, and, in exchange, Sonora agreed to construct

two "Y" branches so Tronslin could connect to the sewer line. The agreement did not mention connection fees or usage fees.

The sewer line was installed in 1941. The City of Sonora did not levy any charges on the property until 1953 when the city enacted an ordinance imposing an annual charge of $24 on each non-resident sewer connection. Tronslin filed suit to enjoin the imposition of the annual sewer charge.

Notwithstanding the absence of any written agreement as to costs, the trial court found based on the facts and circumstances "the right of plaintiff to make such connections and service such number of dwellings through each of said two six-inch 'Y" connections was independent of and free and clear of any costs, charges, taxes or license fees levied by the resolutions, laws or ordinances of said defendant City of Sonora, a Municipal Corporation, for the connection of sewer lines . . ." (144 Cal.App.2d at 736). The court of appeal affirmed the trial court, holding the ordinance violated Tronslin's implied contractual right to use the sewer system free of charge.

b. The Implied Agreement between the Class and Respondent

Although the Class has written agreements with Respondent (both easement agreements and "will serve" agreements[4]), the implied agreement to share in the cost of the LWS was never memorialized in writing. As in *Riverside* and *Tronslin,* the Implied Contract Claims are based on the purpose and configuration of the LWS as well as 100 years of dealing upon which the Class relied for safe and affordable water deliveries. Specifically:

[4] At the time the Complaint was filed, Appellant was unaware of the "will serve" agreements which were produced during the course of discovery.

- The LWS system was built to provide water "for municipal purposes in the city of Vallejo." The decision to provide water to the LWS Customers was incidental and auxiliary to this purpose. (AA006,008, ¶¶24,36.)

- The LWS system was designed solely as a means of transmitting water to Vallejo, and was operated in such manner for 99 years. The resulting inefficiencies in the system today are directly attributable to the fact Respondent radically and unforeseeably transformed it into an *ad hoc distribution* system. (AA008-009,014-016, ¶¶24,28,31,62.)

- The LWS's infrastructure greatly exceeds the needs of the Class. The reservoirs have storage capacity 26 times the Class' needs. The 14-inch and 24-inch transmission pipes are grossly oversized. Small waterworks projects usually rely on ground water; they do not include multi-million dollar water treatment plants. The LWS is *five* times more asset intensive than the second most asset intensive system in California. (AA012-013, ¶¶62.c-e.)

- For 99 years, the costs of operating the LWS were shared by the LWS customers and Respondent pursuant to the Historic Cost Sharing Ratio. This practice is the best evidence of the parties' contemporaneous intent. The 1992, 1995 and 2009 Ordinances were a dramatic shift from a century of dealing (AA009-010, ¶¶44-52.)

- The Class relied on the promise of adequate, reasonably priced water from Respondent's LWS when they developed their properties. Most, if not all, of the rural areas served with LWS water would never have been developed without this commitment. Aside from Respondent, no other entity provides potable water and ground water cannot support reliable water deliveries within the LWS service area. (AA009, ¶37.)

- Respondent contractually obligated *itself* to provide free water to approximately 60 customers within the LWS – almost 10% of the non-resident customers. No one reasonably intended or expected the remaining LWS customers would fund the entire cost of the LWS or that Respondent would shift its initial purchase obligation onto the Class. Certainly the 61st customer – the first paying customer – never anticipated he or she would eventually be 100% responsible for the cost of the LWS (AA014, ¶62.i.)

- In the 1950's, as Respondent expanded its sphere of influence, every non-resident customer, as a condition of obtaining a water service connection, was required to execute a recordable agreement promising to annex to the City "upon demand" (Vallejo Ord. No. 324 N.C.). Remarkably, after insisting the Class annex "upon demand", Respondent suddenly disavowed the Class by divesting itself of any obligation to pay for the LWS. (AA008, ¶38.)

- In 2003, 11 years after the 1992 Ordinance, Respondent represented to the federal government that Lake Curry water was "*critical* to the City in meeting its *existing and future [water] demands*" (Fed. Regis., Vol. 68, No. 157, Aug. 14, 2003, italics added). In 2008, Respondent represented to the State Water Resource Control Board it "continues to attempt to be able to use Lake Curry water for municipal use" within Vallejo. (AA009, ¶43.)

- Appellant is unaware of, and neither Respondent nor the Court identified, a *single* instance in California or elsewhere where a municipality constructed a large scale water infrastructure project for its own benefit, induced non-residents to connect to the system, and then unilaterally decided to divest itself from any financial obligations for the system, leaving the non-residents to pay 100% of the cost. The absence of

such situations leads to the conclusion the parties never contemplated or intended Respondent would embark on such a destructive path.

2. The Trial Court's Misguided Ruling on the Implied Contract Claims

The trial court erroneously dismissed Appellant's Implied Contract Claims on the false premise a written agreement was required, even though the Complaint alleges facts sufficient to state a cause of action for breach of implied contract.

First, the trial court held Government Code §40602 – a *general law* statute not applicable to *charter* cities like Respondent – requires all city contracts to be in writing. Second, the trial court mistakenly "read together" various charter and municipal code provisions to "imply" an obligation that all city contracts must be in writing. Both aspects of the trial court's ruling are deeply flawed.

3. Charter Cities Are Not Subject to the General Laws, Including Government Code §40602 – Even if the Charter is Silent

The trial court correctly determined (1) "the manner in which a city may form a contract is a municipal affair" (AA154)[5], and (2) Vallejo's Charter "does not specifically prescribe how its contracts must be executed" (*id.*). This should have been the beginning and end of the court's analysis.

Under the California Constitution and binding Supreme Court precedent discussed below, if the Charter is silent on the mode of entering

[5] "It was long ago decided . . . the manner in which a city is empowered to form a contract is generally a 'municipal affair' which can be controlled by the terms of its charter" (*First Street Plaza partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 661; *Loop Lumber Co. v. Van Loben Sels* (1916) 173 Cal. 228, 232; *Dairy Belle Farms v. Brock* (1950) 97 Cal.App.2d 146, 155).

into a municipal contract, Respondent's duty to honor its obligations are not limited to those expressed in writing.

Instead, the trial court held Government Code §40602, a general law statute, was binding on Respondent. According to the court, §40602 is binding on a charter city on a matter of municipal affairs whenever the city's charter is "[w]ithout particular guidance" on the issue (AA154).

This premise is contrary to law. Since the California Constitution was amended in 1914, charter cities are independent of the general laws of the State on all matters of municipal affairs. *This is true even as to matters on which the charter is silent*.

California has both charter cities (such as Respondent) and "general law" cities (Cal. Gov. §§34100-34102). Under the 1914 amendments to the California Constitution, a charter city is independent of the general laws with respect to municipal affairs. The 1914 amendment revoked the 1896 version of the California Constitution which (like the trial court) said the general law would control where the charter was silent (*City of Pasadena v. Charleville* (1932) 215 Cal. 384, 388 [Under the 1896 version of the California Constitution, with respect to "municipal affairs upon which the charter was silent, the provisions of any general law thereto would control the subject").

The current iteration of the 1914 constitutional amendment is found in Article 11, §5(a). It provides a charter city "may make and enforce all ordinances and regulations in respect to municipal affairs, *subject only to restrictions and limitations provided in their several charters* and in respect to *other matters* [i.e., matters other than municipal affairs] they shall be subject to the general laws."

The difference between the pre- and post-1914 versions of the Constitution was explained by the Supreme Court in *Butterworth v. Boyd* (1938) 12 Cal.2d 140, 146:

> In the early stages of municipal home rule in California, the charter prevailed only where it expressly covered the particular power exercised. Under the liberalizing constitutional amendment of 1914, the charter is not a grant of power but a restriction only, and the municipality is supreme in the field of municipal affairs *even as to matters on which the charter is silent*" (*Butterworth v. Boyd* (1938) 12 C2d at 146, italics added).

As held in *Butterworth,* under the 1914 amendments, a charter city is not bound by the general law, even as to matters on which the charter is silent. The Supreme Court and the Courts of Appeal have consistently followed this rule for 100 years. (*Wiley v. City of Berkeley* (1955) 136 Cal.App.2d 10, 13 ["*The result* [of the 1914 amendment] *is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force*"] [italics in original, quoting, *Bank v. Bell*, 62 Cal.App. 320, 329]; *Charleville*, 215 Cal. at 388-89 ["The result [of the 1914 amendment] is that the city has become independent of general laws upon municipal affairs."]; *Wiley*, Cal.App.2d at 13 ["Under the liberalizing constitutional amendment of 1914, the charter is not a grant of power but a restriction only, and the municipality is supreme in the field of municipal affairs *even as to matters on which the charter is silent*" [italics in original]; *Simons v. City of Los Angeles* (1976) 63 Cal.App.3d 455, 468 [Pursuant to the 1914 amendment, "the power of a charter city over exclusively municipal affairs is all embracing, restricted and limited *only by the city's charter, and free from any interference by the state through the general laws*."] [italics added]; *Charleville*, 215 Cal. at 388-89]).

4. Respondent's Charter Does Not (and Cannot) Impliedly Require a Written Contract

In further support of its holding that all contracts must be in writing, the court "read together" §40602 along with various municipal code and charter provisions to *imply* a requirement that all contracts be in writing. The court found this implied limitation even though it determined Vallejo's Charter "does not specifically prescribe how its contracts must be executed" (AA154).

In support of this conclusion, the trial court relied upon *G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087 (AA155). In *G.L. Mezzetta*, the court held §40602 implicitly required all contracts made by the City of American Canyon (a general law city) to be in writing.

Section 40602 provides: "The mayor shall sign: . . . (b) All written contracts . . . ." The statute only prescribes how written contracts are to be executed; it does not otherwise require all contracts to be in writing. Nevertheless, the court in *G.L. Mezzetta* found §40602 – when read in conjunction with certain municipal code sections – supported an "implicit" intent that all contracts entered into by the City of American Canyon must be in writing.

G.L. Mezzetta has no bearing on this dispute. The City of American Canyon was a general law city. Nothing in Vallejo's Charter requires a written agreement and nothing impliedly suggests such a requirement. Further, court cannot "imply" or "read together" code sections to impose limitations on the powers of a charter city to contract.

a. Courts Cannot Imply Limitations on a Charter City's Powers

G.L. Mezzetta was based primarily on the *limited* powers of general law cities and the *strict construction* of those powers by the courts. "A general law city has only those powers expressly conferred upon it by the Legislature, together with such powers as are necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation" (*Irwin v. City of Manhattan Beach* (1966) 65 Cal.2d 13, 20). "The powers of such a [general law] city are strictly construed, so that any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation" (*id.* at 20-21).

The court in *G.L. Mezzetta* citied and quoted *Martin v. Superior Court* (1991) 234 Cal.App.3d 1765, 1768, for the proposition the "powers of a general law city are strictly construed, so that any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation" (*id.* at 1093). The court explained further:

> The powers of a general law city include only those powers expressly conferred upon it by the Legislature, together with such powers as are necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation. The powers of such a city are strictly construed, so that any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation. American Canyon is *a general law city* and, as such, it must comply with state statutes that specify requirements for entering into contracts (*id.* at 1092, citing *Martin v. Superior Court* (1991) 234 Cal.App. 3d at 1768, citations and quotations omitted).

In contrast, a charter city "has all powers over municipal affairs, otherwise lawfully exercised, *subject only to the clear and explicit limitations and restrictions contained in the charter*" (*Domar Electric, Inc.*

v. City of Los Angeles (1994) 9 Cal.4th 161,170-71, italics added).[6] Further, "*restrictions on a charter city's power may not be implied*" and their powers are "construed in favor of the exercise of power over municipal affairs and against the existence of any limitation or restriction thereon which is not expressly stated in the charter" (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161,170-71 [italics added]; *City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, 598 ["by accepting the privilege of autonomous rule the city has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter"]).

Thus, even if §40602 could otherwise be applied to charter cities, the *implied limitation* the courts have found on the mode in which general law cities can contract would not apply to charter cities.

Limitations on a charter city's powers must be "expressly stated in the charter (*Domar*, 9 Cal.4th at 171). Thus, the trial court mistakenly relied on *First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650 in support of its "reading together" various ordinances to find an "implied" intent that all contracts be in writing (AA155). In *First Street*, the city contracted in direct violation of its charter (*id.* at 663). Unlike the trial court in this case, and unlike the court in *G.L. Mezzetta*, the court in *First Street* did not "read together" or "imply" language which did not exist in order to find a hidden or implied intent.

---

[6] Vallejo's demurrer relied heavily on *Kastura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104 (AA053-054). In *Kastura*, unlike this action, a contract was made in clear violation of a city charter which *expressly* required all contracts to be in writing. The court held the contract was void and could not be enforced under a quantum meruit theory of recovery. The trial court correctly determined Respondent's Charter has no similar express requirement of a written contract (AA154).

b. Nothing in Respondent's Charter Requires a Writing

In addition to §40602, the court in *G.L. Mezzetta* placed special emphasis on §2.20.030C of American Canyon's municipal code which defined the function of the city attorney to include the preparation and approval of all city contracts. As explained by the court:

> [W]e agree with the City that ***implicit*** in the relevant statutes, ***when read together***, is the requirement that contracts with the City be in writing . . . . (See, §40602, Mun. Code §§2.08.060M, 2.20.030C.) Although the City could have been more explicit about its requirement that all contracts be in writing, nonetheless, the terms of the three statutory provisions in question, particularly Municipal Code section 2.20.030C, make clear the City's intent that all contracts it enters into be in writing (*id.* at 1093, emphasis added).

Misapplying *G.L. Mezzetta*, the trial court "read together" §40602 with §201 of the Charter and §3.20.045 of Vallejo's Municipal Code (the "Code") to find an implied intent that all contracts be in writing (AA155). Even if a court could "imply" limitations on the powers of charter cities (they cannot, *Domar*, 9 Cal.4th at 170-71), nothing in the Charter expressly requires all city contracts to be in writing (as the trial court correctly observed, AA154).

Nor do Section 201 of the Charter or §3.20.045 of the Code support the trial court's holding of an "implied intent." Section 201 of the Charter says the "City shall have the power to act pursuant to procedure established by any law of the State unless a different procedure is required by this Charter." The trial court interpreted this as a mandatory directive – *i.e.*, where the Charter is silent, Respondent is bound by the general law (AA154). However, the language in §201 is permissive, not mandatory.

The Supreme Court addressed virtually identical charter language in *City of Glendale v. Trondsen* (1957) 48 Cal.2d 93, 100-101. In *Glendale*,

defendants sought to invalidate a rubbish disposal fee ordinance. The charter authorized the city council to pass a rubbish ordinance, but also provided nothing "shall prevent the Council from proceeding under general laws." In response to the defendants' assertion this language required the city to follow the general laws, the Supreme Court held this language was "obviously . . . nothing more than a permissive method" (*id.*).

In *Redwood City v. Moore* (1965) 231 Cal.App.2d 563 (disapproved of on other grounds in *Bishon v. San Jose* (1969) 1 Cal.3d 56, 64, fn. 6), the city's charter provided the city "shall have all the powers granted to cities by the constitution and general laws of this state" (*id.*at 573). The court held:

> Accordingly, pursuant to section 74 the City may still invoke the procedure provided by general law. It is apparent from a reading of section 74 that the City may follow the general laws in the making of improvements. However, it is not required to do so because by its very language section 74 is permissive and not mandatory" (*id.*).

There is nothing in Respondent's charter indicating or suggesting it is *bound by* the general law on municipal affairs. In fact, §200 of the Charter provides, "The enumeration in this Charter of any particular power shall not be held to be exclusive of or any limitation upon this general grant of power."[7]

Nor is there support for an implied limitation on Respondent's powers in the Municipal Code. Section 3.20.045 of the Code allows the

[7] In contrast, in *City of San Jose v. Lynch* (1935) 4 Cal.2d 760, 762-63, the San Jose charter provided, "where the general laws of the State provide a procedure for the carrying out and enforcement of any rights or powers belonging to the City, said procedure shall control and be followed unless a different procedure shall have been provided in this charter or by ordinance." This was held to be a mandatory directive.

City Manager and others to enter into certain contracts to buy or sell property without publication or City Council approval. Section 3.20.045 does not require all contracts to be in writing (in fact it makes no mention of a writing), and in any event, it was not even passed until *November 2011* – decades after the implied agreements were made with the Class.[8]

5. The Relationship Between Respondent and the Class Is, By Definition, Contractual

The notion that a written contract is not automatically necessary to establish a binding obligation is supported by extensive case law (which the trial court ignored) holding that the relationship between a municipal water provider, like Respondent, and its non-resident customers is, *by definition*, *contractual*. The court in *Hobby v. City of Sonora* (1956) 142 Cal.App.2d 457, 459, discussing the relationship between a municipal utility and its non-resident customers explained:

> The city of Sonora could no more compel the plaintiffs, as residents of the county, to connect with the city's sewer system than could plaintiffs compel the city to extend its lines into county territory and allow the county residents to connect therewith. The system is owned wholly by the taxpayers of the city of Sonora. The area is not embraced within a sewage district wherein plaintiffs would be placed upon a parity with the residents of the city of Sonora, thereby affording plaintiffs such equality of right as to service and charges as would be available to persons constituting a class within such a district. In other words, since the city owns the system and the plaintiffs do not, nor as noted do they have any interest whatsoever therein, *any right they might acquire to use the system could only arise out of and be predicated upon a contractual relationship with the city* (italics added).

(*See also, Elliot v. City of Pacific Grove* (1975) 54 Cal.App.3d 53, 56 ["since the city could not compel residents outside the city to connect with

[8] A city cannot pass a law which abrogates or impairs existing contracts (U.S. Const., Art. 1, Sec. 10, Cl. 1; Cal. Const. Art. 1, Sec. 9)

the city's system which was wholly owned by the taxpayers of the city any right they might acquire to use the system could only arise out of and be predicted upon a contractual relationship with the city"]; *Tronslin*, 144 CA2d at 738; *Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133, 138).

In none of these cases did the courts require a written contract – rather, the contractual relationship existed *as a matter of law*. In the *Tronslin* case, discussed above (Section B.1.a), the court sustained an implied contract claim *after* the enactment of Government Code §40602.

Since Respondent was not obligated to provide water to the Class, and Class could not compel Respondent to provide them water, the parties' relationship is contractual as a matter of law. Whether Respondent is obligated to share in the cost of the LWS is an issue of fact.

6. Respondents' Other Arguments Lack Merit

Although not relied upon by the trial court, Respondent argued the Implied Contract Claims were barred by the statute of limitation and statute of frauds.

a. The Statute of Limitations Accrues Anew With Each Water Bill

Respondent began breaching the implied contracts in 1992, but as alleged in the Complaint this breach "is a continuing and ongoing violation and occurs and repeats anew with each bi-monthly levy and assessment of the water fees upon the Class" (¶¶91, 100, 108, 117, 168).

Under the theory of continuous accrual "Where the wrong complained of is *continual or recurring*, the cause of action is subject to continuous accrual for statute of limitations purposes; i.e., a cause of action *accrues each time a wrongful ac occurs, triggering a new limitations period*" (Rylaarsdam, *et al*., *Civil Procedure Before Trial Statutes of*

Limitation (Rutter) §3:70.5, italics in original; *Hogar Dulce Hogar v. Community Development Commission* (2003) 110 Cal.App.4th 1299, 1295).[9]

In *Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809, plaintiffs filed a complaint in 1996 challenged the imposition and collection of "utility users tax" enacted in 1992. The city demurred claiming the lawsuit was barred by the statute of limitations. The Supreme Court reversed the Superior Court and Court of Appeal, holding the complaint alleged a continuing violation which accrued with each collection of the tax. The Supreme Court explained, "if, as alleged, the tax is illegal, its continued imposition and collection is an ongoing violation, upon which the limitations period begins anew with each collection" (*id.* at 815).

Each bi-monthly collection of the water rates (which as Respondent alleges are a "tax", as in *Howard Jarvis* (AA061-062)) is a continuing violation of the Historic Cost Sharing Ratio (AA011, ¶¶54, 55). In addition to continuous accrual, the Tolling Agreement extends the period over which Appellant may recover damages back to July 2009 (¶57).

b. The Statute of Frauds Does Not Apply

The Implied Agreements do not fall within the statute of frauds (Civ. Code §1624(a)(1) because: (i) they do not *by their terms* preclude performance within one year, (ii) they may be terminated by the customers making performance within one year *possible*, and (iii) the Complaint alleges facts giving rise to an estoppel.

---

[9] The continual accrual doctrine has consistently be applied to breach of contract claims (*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375, 1388; *Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 439, fn. 7; *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 463).

Civil Code §1624(a)(1) provides that an "agreement that *by its terms* is not to be performed within a year from the making thereof" is invalid (not void), unless it is in writing. "The important words are 'by its terms'; i.e., only those contracts which expressly preclude performance within a year are unenforceable. And these words have been literally and narrowly interpreted" (Witkin, *Summary of California Law* (10th Ed.) Contracts §363; *White Lighting Co. v. Wolfson* (1968) 68 Cal.2d 336, 343, fn. 2 ["In its actual application, however, the courts have been perhaps even less friendly to this provision (the 'one year' section) than to the other provisions of the statute (of frauds). They have observed the exact words of this provision and have interpreted them *literally and very narrowly*. . . . There must not be the slightest possibility that it can be fully performed within one year."] [quoting, *Corbin on Contracts* §444]).

The Complaint does not allege Respondent agreed to pay in the cost of the LWS for 1 year, 2 years, 10 years or 200 years. It alleges that Vallejo's obligation to share in the cost of the LWS is *indefinite* (AA021,033, ¶¶87, 166; Witkin, *Summary of California Law* (10th Ed.) Contracts §365 ["A contract is unenforceable only where *by its terms* it is *impossible* of performance in the period. If it is merely unlikely that it will be so performed, or the period of performance is *indefinite*, the statute does not apply.][italics in original]).

Section 1624(a)(1) also does not apply because the Class could have terminated their performance under the Implied Agreements by, for example, discontinuing their receipt of water (as allowed under §11.12.110 of the Code).[10] Either party's "election to terminate takes the contract out

[10] Respondent may also terminate service for non-payment (Municipal Code §11.44.080). In the course of discovery, Respondent denied an obligation to provide water to the Class indefinitely, making the implied contracts terminable-at-will by Respondent's own admission.

of the statute [of frauds]" (Witkin, *Summary of California Law* (10th Ed.) Contracts §367; *White Lighting, supra*, 68 Cal.2d at 341; *Foley v. Interactive Data Corp.* (1988) 47 C3d 654, 672-73; *Abeyta v. Superior Court* (1993) 17 Cal.App.4th 1037, 1044; 3 *Cal. Affirmative Def.* (2d Ed.) §53:20 ["Oral contracts that may be terminated at will by either party typically escape the bar of the statute of limitations because such contracts can be performed within a year even though they may actually continue for many years. In this respect, California's statute of frauds differs from the rule applied in many other jurisdictions."]).

Finally, the Complaint alleges facts giving rise to an estoppel to assert the statute of frauds (AA008, ¶37; *Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1068; *Monarco v. Lo Greco* (1950) 35 Cal.2d 621, 623), an issue of fact (*Byrne*, 52 Cal.App.4th at 1068).

C . PROPOSITION 218

1. Proposition 218 Is Irrelevant to This Dispute

Respondent claims the Duty to Charge a Reasonable Rate Claims (the 4th, 5th and 11th causes of action for duty to charge a reasonable water rate, breach of fiduciary duty and declaratory relief) are barred by Proposition 218. Proposition 218, the "Right to Vote on Taxes" law, imposes certain inapposite procedural and substantive requirements with respect to "property related fees and charges" (including water fees). *This lawsuit has nothing to do with Proposition 218.*

Proposition 218 prohibits a municipality from imposing a "property related fee or charge" which exceeds the proportional cost of service attributable to the parcel (Cal. Const. Art. 13D, §6(b)(3)). Respondent grossly mischaracterized the Complaint as seeking "to require City residents to subsidize the cost of service for LWS customers" through "property related fees or charges" which would be added the water bills of

Vallejo residents (AA057). The trial court picked up on this mischaracterization and held "Prop. 218 prohibits a rate structure as alleged in Plaintiff's complaint" (AA156).

This is simply false. The Complaint only alleges Respondent has an obligation to share in the cost of the LWS – nothing more (AA021, ¶¶87,89,92). The 4th and 5th causes of action seek only *past monetary damages* equal to the difference between a "reasonable rate" and the rates Respondent actually charged (AA025-026, ¶¶118, 126). The 11th cause of action seeks a declaration that Defendant has an obligation to share in the cost of the LWS pursuant to the Historic Cost Ratio (AA035, ¶175). The Prayer for Relief seeks "compensatory damages" and order compelling Respondent "to share in the cost of . . . the LWS according to the Historic Cost Sharing Ratio" (AA037).

The Complaint does not (i) specify *how* Respondent must satisfy its obligation, (ii) seek to force Respondent to impose "property related fees and charges" in the form of higher water bills, or (iii) require any specific "rate structure."

Indeed, there are numerous ways Respondent can honor its obligations to the Class without triggering Proposition 218 – e.g., money from its general fund, sales taxes, general bonds, a reduction in services, cuts to its payroll, and the sale of assets – to name just a few. None of these methods trigger Proposition 218 – a fact Respondent *never* disputed (June 11, 2014 Transcript at 11:3-5).

2. If the Implied Contract Claims Survive, Respondent Cannot Rely on Proposition 218

Even if Proposition 218 had been triggered by this dispute, it provides no defense. Proposition 218 took effect on July 1, 1997 – five years after Respondent first breached its contractual obligation to share in

the cost of the LWS. To the extent Proposition 218 could be read as allowing (or forcing) Respondent to breach the Implied Contracts or the Historic Cost Sharing Ratio, it is unconstitutional as applied. Article 1, Section 10, Clause 1 of the United States Constitution provides, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Thus, if the Implied Contract Claims survive, Respondent's Proposition 218 argument must be rejected.

3. Proposition 218 Is No Defense to a Federal Equal Protection Claim

Even if Proposition 218 allows Respondent to charge unreasonable and unfair rates, Proposition 218 is no defense to a *federal* equal protection claim. Unreasonable rates imposed upon non-resident customers constitute a violation of the Equal Protection Clause of the United States Constitution if there is no "rational-basis" for the disparity between in-city and non-resident rates (*Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172, 1189-90). Thus, at the very least, Appellant should be granted leave to amend to allege a federal equal protection cause of action.

4. Proposition 218 Does Not Prohibit a "Pooled Rate" Structure

Even if the Complaint had sought a remedy which triggered Proposition 218, the trial court erred in holding Proposition 218 prohibits any "pooled rate" structure.

Article 13D, §6(b)(3) provides, "The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional *cost of the service* attributable to the parcel" (emphasis added). Respondent interpreted §6(b)(3) to mean proportionality must be measured on an individual *parcel-by-parcel basis*, and that a "pooled" rate structure is illegal. (Motion at 8:19-20 ["if the cost

of service attributable to one parcel exceeds the cost of service to another, Prop. 218 prohibits pooling rates, so that one customer class is required to subsidize another"].) The trial court agreed, holding "A 'pooled-rate' structure, like the one proposed by Green Valley, is prohibited as set forth in Article XII D, section 6, subdivision (b)(3) . . . " (AA156).

This holding misconstrues proportionality under §6(b)(3), which is measured collectively rather than individually on a parcel-by-parcel basis. Indeed, the court in *Griffith v. Pajaro Vallejo Water Management Agency* (2013) 220 Cal.App.4th 586 upheld a "pooled-rate" structure.

a. Proposition 218 Does Not Require a Parcel-By-Parcel Proportionality Determination

If the trial court's interpretation of §6(b)(3) were correct, a municipal water supplier would be *required* to bill *each* customer a different amount based on the cost of providing service "to the parcel." Thus, if a city replaced a water line on Main Street, but not on First Street, it would need to devise a rate structure which only assessed the residents of Main Street for that cost of the new water line. A city would also be required to apportion costs based on the source of water, where the water is treated, and how it is delivered to the customers.[11]

Such a requirement would be a logistical nightmare – assuming it were even possible. As a result, §6(b)(3) has not been given the draconian construction advocated by Respondent and adopted by the trial court. As

[11] Appellant explained at oral argument many major municipal water suppliers deliver water which comes from different sources, which are treated at different treatment plans, and are delivered through different transmission and distribution systems. East Bay Municipal Utility District (EBMUD), for example, has different sources, treatment plants and transmission systems, but its customers are charged the same rate. (June 11, 2014 Transcript at 4:27-5:3.)

explained by the Supreme Court in *California Farm Bureau v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 428, "The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payers."

Proposition 218 only requires a municipality to calculate the cost of the water service, and then apportion the costs among all its users (*Griffith*, 220 Cal.App.4th at 600). It does not *require* Respondent to bill the Class for 100% of the LWS's costs.[12]

This collective approach to proportionality is consistent with Vallejo's Municipal Code, which draws no distinction between in-city and non-resident customers. The Code defines "service" to mean "the delivering or receiving of water, a water service connection or an act or duty performed by the water system" (§11.04.120). The term "water service" is defined to mean "the delivery and/or receipt of water or a water service connection" (§11.04.140). The term "water system" means "the water division of the public works department of the city of Vallejo, and the entire physical plant of the water division, including but not limited to real property, reservoirs, treatment plants, pumping stations, transmission and distribution pipelines, and appurtenances thereto" (§11.04.160). As defined, there is a single "service" and a single "system" – not multiple services or systems requiring Respondent to charge LWS customers a different rate than the municipal customers.

[12] There may be other permissible methods of apportioning costs, but this is all Proposition 218 *requires*. Appellant does not content the current rate structure – which divides LWS customers from city customers – violates Proposition 218. Appellants only argue Proposition 218 does not *require* such a separation.

b. A "Pooled Rate" Structure Is Consistent with Proposition 218

The trial court relied on *Griffith*, *supra*, 220 Cal.App.4th 586, to support the notion Proposition 218 prohibits a "pooled rate" structure (AA156)[13] *Griffith* actually *upheld* a pooled rate structure. Counsel for Respondent – who represented the Pajaro Valley Water Management Agency in the *Griffith* case –*admitted* during oral argument that Proposition 218 does not *per-se* prohibit a pooled-rate structure (June 11, 2014 Transcript at 9:6-21).

In *Griffith*, the Pajaro Valley Water Management Agency ("Pajaro Valley") implemented a strategy to prevent saltwater intrusion into its ground water supply. The strategy involved using recycled wastewater, supplemental wells, and storm runoff and to distribute these new water sources through new distribution pipes to certain customers nearest to the coast. The costs of the project were recovered through a three-tiered "augmentation charge" imposed on all parcel owners, *including 1700 customers who did not receive any water from the new water sources or through the new distribution system*.[14]

The plaintiff challenged the rate structure under Article 13D, §6(b)(3). He argued that Proposition 218 "compels a parcel-by-parcel proportionality analysis" and since he received no new water "services," the

---

[13] *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, cited by the trial court, only stands for the undisputed proposition fixed and consumption based water charges are property related fees for purposes of Proposition 218.

[14] The customers who received the new water paid slightly more than the 1700 customers who did not receive the new water. This rate structure mirrors Respondent's rate structure from 1951-1991.

augmentation charge was disproportionate under §6(b)(3). The court rejected the argument saying, "The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payers' (220 Cal.App.4th at 601, quoting *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 438).

The court in *Griffith* also rejected the notion the coastal water customers were receiving a different "service" than the inland customers simply because they received water from a different source and through different distribution pipes (220 Cal.App.4th at 602 [the plaintiff's "complaint stems from his erroneous premise that the only property owners receiving services from defendant are the coastal landowners receiving delivered water"]). Pajaro Valley's water service was considered a single "service" for purposes of Proposition 218, even if there were separate components of the service.[15]

The court also explained that the 1700 non-users of the new water system would benefit from the new water supply because the new water supply would lessen the impact of saltwater intrusion into the existing wells. This benefit was sufficient to assess the 1700 non-users for the cost of the new water system, even if they did not directly use it.

At oral argument here, Appellant explained how Respondent directly benefits from the LWS (even if, as in *Griffith*, its residents do not presently use LWS water) (June 11, 2014 Transcript at 6:8-20). First, Respondent represents the LWS to be an alternative emergency source of water supply for the City of Vallejo. In the event of a water emergency or drought,

[15] Respondent's Municipal Code defines water service as a single service. It was only Respondent's unilateral actions in 1992 which purportedly created two "services" – one for city customers and one for non-resident customers.

Respondent can literally "turn a switch" and water from the LWS would flow directly to the City.

Second, Respondent has used and continues to use the supply from the LWS as a part of its own water supply calculations. Thus, when Respondent applies for a new development, it is able to represent the supply capacity from the LWS as a part of the City's total supply. This allows Respondent to apply for and get approvals for development projects on the assumption it has sufficient reliable water supply – in part because of the LWS source of water.

Third, as alleged in the Complaint, as recently as 2003 – over a decade after it stopped using LWS water – Vallejo represented to the federal government that water from the LWS "was critical to the City in meeting its existing and future [water] demands" (AA009, ¶43). Respondent continues to have plans to use water from Lake Curry to meet the City's own water needs in the future.

Finally, even if Proposition 218 were relevant and precluded the Respondent from increasing City water rates to pay for the cost of the LWS, the Complaint alleges facts which estop Respondent from relying on Proposition 218 as a defense (AA009-011, ¶¶43, 53).[16]

D. INJUNCTIVE RELIEF AGAINST SALE OF THE LWS

The Injunction against Sale Claims (the 6th and 7th causes of action) seek to enjoin Respondent from selling all or parts of the LWS in violation of state law. Respondent argued, and the trial court agreed, that the

[16] Under Prop.218, Respondent cannot raise rates over a majority protest. To pass the 2009 rate increase over the majority protest of the Class, Respondent joined the votes of the Class with Vallejo's votes, thereby diluting their protests. Either the Class is truly separate (and the 2009 Rate Increase was invalid), or the LWS is not a separate system (and Respondent's proportionality argument fails). (AA011,¶53.)

"separation of powers" doctrine prohibits the courts from enjoining the execution of a public statute (AA156). However, the separation of powers doctrine does not prohibit an injunction against a city whose proposed action *violates* state law.

1. A City Can Be Enjoined From Violating California Law

The separation of powers doctrine limits the ability of the courts to "interfere with purely legislative action, in the sense that it may not command or prohibit legislative acts" (*Monarch Cablevision, Inc. v. City Council, City of Pacific Grove* (1966) 239 Cal.App.2d 206, 211).

The "separation of powers" doctrine does not apply to suits which seek to enjoin a city's *violation of state law*. In *Cooper v. Los Angeles County* (1946) 75 Cal.App.2d 75, plaintiffs sued Los Angeles County to prevent it from constructing a prison in an area zoned residential. The court granted the injunction to prevent the county from violating zoning laws prior to a trial on the merits saying it was the court's "plain duty" to do so:

> The Superior Court has the right to maintain the status quo by injunctive relief, and plaintiffs are entitled to a trial upon the merits and an injunction if they prove their allegations. . . . In that regard, the superior court not only has "the right to maintain the status quo" of the property involved but, in the circumstances, it is the court's plain duty to do so. Appellants merely seek to prevent the county of Los Angeles from establishing what is alleged to be a penal institution in a district long established as exclusively residential . . . . Fundamental doctrines of law and equity guarantee this right to plaintiffs. Neither public officials nor political subdivisions possess rights of privileges superior to the individual in the administration of the law (*id.* at 79).

Ignoring this rule, the trial court overlooked multiple statutes which prohibit the very actions Appellant seeks to enjoin.

2. The Trial Court Ignored PUC §10061

The 6th cause of action seeks an injunction "to enjoin and stop Defendant from selling all or any part of the LWS during the pendency of this litigation" (AA029, ¶134). Public Utilities Code (PUC) §10061 (b) is directly on point. It prohibits a transfer of a municipal utility *outside the municipal boundaries* unless the terms of the sale are "just and reasonable" and do not "unreasonably discriminate" against the non-resident customers.

The Complaint alleges numerous facts supporting the conclusion that sale of the LWS while this litigation is pending would be unjust, unreasonable and discriminatory (AA003, 017-018, 027-030 ¶¶10, 78-85,129-133, 143). In *Elliott v. City of Pacific Grove* (1975) 54 Cal.App.3d 53, the court of appeal held a complaint alleging that non-resident users were subject to rates four times more than city users stated a valid cause of action.[17] As explained in *Elliott* (at 59):

> The complaint . . . alleges sufficient facts warranting judicial relief if such facts can be established at trial. It is alleged therein that the ordinance in question sets a sewer service charge for plaintiff, who is a user outside the city limits, at four times the rate set inside the city limits without any proper basis for the differential. This is an allegation that the sewer charge imposed on plaintiff is unreasonable. There exists in plaintiff, as a user of a public utility's sewer service, a primary right that he cannot be charged an unreasonable rate for such service and there rests on the city, as a public utility, the corresponding duty not to charge plaintiff an unreasonable rate for such service.

The trial court ignored §10061(b) and *Elliott*, and instead relied on Article XI, §9 of the California Constitution and PUC §§10051 and 10052. Article XI, §9 gives a city the power to "establish, purchase, and operate public works to furnish *its inhabitants* with . . . water." Article XI, §9 does

[17] Rates for the Class are *already* four times those paid by Respondent's in-city customers (AA011, ¶56).

not address the *sale* of a public water system and it only applies to the provision of water to the city's *inhabitants*.

PUC §10051 provides, "Any municipal corporation incorporated under the laws of this State may *as provided by this article* sell and dispose of any public utility it owns." As discussed above, §10061(b) – part of the same Article, and the section which specifically addresses the issue at hand –prohibits a sale of a public utility outside the municipal boundaries unless the terms of the sale are "just and reasonable" and do not "unreasonably discriminate" against the non-resident customers.

The trial court even held the customers had a remedy in PUC §10052 (AA156). Section 10052 provides "Whenever the legislative body of a municipal corporation . . . determines . . . that any public utility owned by the municipal corporation should be sold, it *may* . . . order the proposition of selling the public utility to be submitted to the *qualified voters of the municipal corporation* at an election held for that purposes." In other words, if Respondent voluntarily decides to put the sale to a vote, only the qualified voters of Vallejo would be entitled to vote (not the Class)!

3. The Trial Court Ignored PUC §789.1(e)

The 7th cause of action seeks a preliminary and permanent injunction prohibiting Respondent from selling parts of the LWS without including in sale the real property associated with the LWS. The 7th cause of action also seeks to enjoin Respondent using the proceeds from a sale of the real property associated with the LWS for purposes other than deferred maintenance and capital improvements within the LWS. (AA030, ¶145.)

State law requires the proceeds of excess land sales to be invested in capital improvements within the water system (AA029, ¶140) and this policy applies to the City as "a trustee and fiduciary of the Class" (¶141)

(PUC §789.1(e)). The City's demurrer does not challenge these allegations. The injunction is needed to ensure the City does not sell the LWS without the real property and that all real property sale proceeds are used for maintenance and improvements within the LWS.

4. The Trial Court Ignored the Human Right to Water Bill

The trial court also ignored the Human Right to Water Bill. It provides, "It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, *affordable*, and accessible water . . ." (Cal. Water Code §106.3). The bill emphasizes "that access to safe and *affordable* water is a fundamental human right essential to our health, the environment and the economy." (Assembly Floor Analysis of AB 685, May 31, 2011.)

There are numerous allegations that a sale of the LWS would deprive the Class of affordable water (AA003, 017-018, 027-030, ¶¶10, 78-85,129-133, 143).

E. INJUNCTIVE RELIEF AGAINST UNLAWFUL RATES

1. Introduction

The 8th cause of action seeks prevent Respondent from continuing the Surcharge Fee after September 30, 2015 in violation of Municipal Code §11.48.183. The 9th cause of action seeks to prevent Respondent from continuing the unlawful rate structure which places 100% of the LWS's costs on the Class.

The trial court held both causes of action were barred under the "pay first, litigate later rule" (Cal. Const., Art. 13, §32). Under the pay first, litigate later rule, the claimant must first pay the subject tax, before seeking a refund from the taxing authority.

The trial court's holding is in error because: (1) the 8th and 9th causes of action both state a cause of action for a *permanent* injunction, (2) the

trial court ignored binding California Supreme Court precedent holding non-residents may sue to enjoin unlawful water rates, and (3) water rates are not a "tax" and therefore are not subject to the "pay first, litigate later" rule.

2. The 8th and 9th Causes of Action State a Cause Action for a Permanent Injunction

Even if the pay-first, litigate-later rule applied, it cannot support a demurrer against the 8th and 9th claims, which state a cause of action for a *permanent* injunction (AA032, 034, ¶¶154, 161). As explained by the Supreme Court in *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 252:

> [A]rticle XIII, section 32 simply prohibits courts from 'preventing or enjoining the collection of any tax "*during the pendency of litigation challenging the tax*." In fact, article XIII, section 32 does not purport to limit a court's authority to fashion a remedy if it determines a tax is illegal, including its authority to issue an injunction against further collection of the challenged tax (italics in original).

3. The Trial Court Ignored Multiple Supreme Court Decisions Holding Non-Resident Water Customers May Sue to Enjoin Unreasonable Water Rates

As discussed in Section F.2, below, the relationship between a municipal water provider and its non-resident customers is that of trustee-beneficiary. The Supreme Court has held numerous times (including twice since the adoption of the pay first, litigate later rule), "It is because of the trust relationship [between city and non-residents] that consumers can 'sue to enjoin rates which are themselves 'unreasonable, unfair, or fraudulently or arbitrarily established', or which discriminate without a reasonable and proper basis" (*Hansen*, 42 Cal.3d at 1189-90, quoting, *Durant*, \39 Cal.App.2d at 139; *Inyo*, 26 Cal.3d at 159 [same]).

The trial court ignored *Inyo*, *Hansen*, and *Durant* – all holding non-resident customers may sue to enjoin unreasonable water rates. As a result

of the ruling, the customers would be forced to pay illegal and unreasonable water rates, and their only remedy – indeed an illusory remedy, as discussed below – would be to file a claim for a refund.

4. Water Charges Are Not a Tax, and Therefore Not Subject to the Pay First, Litigate Later Rule

The "pay first, litigate later" rule prohibits an action "to prevent or enjoin the collection of any *tax*" (Cal. Const. Art. 13, §32). Because water charges are not a tax, the rule is inapplicable.

A tax is "any levy, charge, or exaction of any kind imposed by a local government *except* the following: . . . (7) Assessments and property-related fees imposed in accordance with the provisions of Article 13D" (Cal. Const. Art. 13C, §1(e)(7); *see also,* Art 13A, §3(b)(1)).[18] Water charges are "property related fees" under Article 13D (*Bighorn-Desert, supra,* 39 C4th 205), not a "tax." No court has ever applied to "pay first, litigate later" rule to anything but a *tax.*

Despite the clear Constitutional language exempting water charges from the definition of a tax, the trial court relied on *Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, which held an assessment on groundwater production was a "tax" based on certain "findings and declarations" in the legislative history (but not the text) of Proposition 218.

[18] Article 13C, §1(e)(2) excludes from the definition of a "tax" any "charge imposed for a specific government service or product . . . *which does not exceed the reasonable costs to the local government of providing the service or product*." (*See also,* Art. 13A, §3(b)(1) [same].) Under Proposition 218, property-related fees and charges (including water charges) "shall not exceed the funds required to provide the property related service" (Art. 13D, §6(b)(1)). Therefore, property-related fees and costs are, by definition, not a tax.

Cerritos is inapposite because unlike *Durant*, *Hansen* and *Inyo*, it did not involve the claims of *non-resident* water customers who do have a right to enjoin unreasonable rates. Further, the *Cerritos* court's cursory analysis failed to mention Article 13C, §1(e)(7), Article 13A, §3(b)(1), and Article 13C, §1(e)(2), which all expressly state property related fees are not a tax. "The absence of ambiguity in the statutory language dispenses with the need to review the legislative history" (*McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 623).

5. The Irony of Respondent's Position

The irony of Respondent's position and the trial court's holding must be noted. The trial court held Appellants cannot enjoin illegal water rates, but must rather pay them and seek a refund. However, when Appellants sought a refund of illegal water rates paid between 2009 and 2014, the court held there was no cognizable theory upon which Appellant could proceed (AA154-156). In essence, the customers must "pay first", but when the claim for refund is made, Respondent and the court deny the existence of a legal procedure or theory to obtain a refund.

In this light, it should not be surprising the pay first, litigate later rule has *never* been extended to local governments unless they have either a "pay first" requirement or a refund procedure.[19] Vallejo has "pay first"

[19] In *City of Anaheim v. Superior Court* (2009) 179 Cal.App.4th 825, 831-32, the court held the pay-first, litigate later rule does not apply when the city has "neither a 'pay first' requirement nor a refund procedure." The court in *Cerritos* questioned this holding, but the City of Los Angeles *did* have a tax refund procedure, rendering its assertion dicta. *Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, the only First District case addressing the issue, said, "pay first, litigate later" applies on public policy grounds to local governments, but, as in *Cerritos*, acknowledged San Francisco did have a tax refund procedure. Appellant is unaware of a single case where the rule was applied in favor of a city which had no pay first requirement or no refund procedure.

requirements and/or refund procedures with respect to sales taxes (§3.04.150), transaction taxes (§3.08.100), and real property conveyance taxes (§3.10.220), but has no similar requirements for water rates and charges under Chapter 11.48 of the Code.

F. GOVERNMENT CODE §815

The trial court held the 5th and 12th causes of action were barred by Government Code §815 (AA157). Absent an exception, Section 815 prohibits claims against public entities unless based on statute or contract.

1. The 12th Cause of Action for An Accounting Seeks to Enforce Respondent's Code and Charter

The 12th cause of action seeks an accounting of the Surcharge and Connection Fees levied by the City upon the LWS customers. Under the Code, money received from the Surcharge and Connection Fees must be placed into dedicated accounts and used exclusively for constructing capital improvements to the LWS (AA036, ¶181).

Appellant claims the Surcharge and Connection Fees were not placed in dedicated accounts and were not used exclusively to fund capital improvements in *violation of* §§11.48.181, 11.48.183 and 11.16.021 of the Code (AA018-020, 036, ¶¶70-79, 149, 181) and §714 of the Charter. The claim is therefore based on a violation of Respondent's own Code and Charter.

At oral argument, Appellant requested, and at the very least should have been granted, leave to amend to rephrase the claim as a cause of action for violation of §§11.48.181, 11.48.183 and 11.16.021 of the Code and §714 of the Charter.

2. The Breach of Fiduciary Duty Claim Seeks to Enforce Respondent's Liability as a Trustee, as Recognized by the California Supreme Court

The 5th cause of action is for breach of fiduciary duty. Non-resident customers of a municipal utility are especially vulnerable to discrimination in the setting of water rates. To protect against the possibility of discrimination, the municipal utility has been charged with the duties of a trustee. The Supreme Court first recognized this trust relationship over 100 years ago in *City of South Pasadena v. Pasadena Land and Water Company* (1908) 152 Cal. 379, 394, where the Court said a municipality supplying water to non-residents holds "title as a mere trustee, bound to apply it to the use of those beneficially interested" (*see also*, *B.H. Leavitt v. Lassen Irrigation Co.* (1909) 157 Cal. 82, 87). In *Durant*, *supra*, 39 Cal.App.2d 133, the court said in providing water to non-residents, the municipality "is impressed with a trust" for the benefit of the non-residents (*id.* at 137-38).

The Supreme Court affirmed *South Pasadena* and *Durant* in *Inyo*, 26 Cal.3d 154, and *Hansen*, 42 Cal.3d 1172. The Courts in *Inyo* and *Hansen* both held a city holds title to a water system outside its boundaries "as a mere trustee, bound to apply it to the use of those beneficially interested" and described the relationship as a "trust relationship" (*Inyo*, 26 Cal.3d at 159; *Hansen*, 42 Cal.3d at 1188-89)

Inyo and *Hansen* are especially important because they were decided in 1980 and 1987, respectively – over a decade *after* the enactment of Government Code §815. Nothing in either decision suggests §815 abrogates the trustee-beneficiary relationship between a municipal utility and its non-resident customers. Indeed, in *Hansen*, the Court entertained a merits-based breach of trust claim made by the non-resident customers against the City of Buenaventura (42 Cal.3d at 1188-89).

There is no public policy reason to abrogate the trustee-beneficiary relationship between municipal utility and its non-resident customers – or the fiduciary duties which naturally arise from such a relationship. The ballot box – the ultimate check on the power of the politicians who set the rates – is not available to non-resident customers. If §815 were interpreted to foreclose a breach of trust or a breach of fiduciary duty claim, non-resident customers would be at the mercy of the municipal utility – a relationship more closely resembling subject and king, than citizen and state.

Neither Respondent nor the trial court challenged the existence of a trustee-beneficiary relationship or the existence of a fiduciary duty *per se*; only that a breach of fiduciary duty is not based on statute. However, the law of trusts is statutory and "defines the nature of the fiduciary duties arising out of a particular fiduciary relationship with considerable precision" (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 272). As a trustee, Vallejo's fiduciary duties of care and loyalty are codified in Probate Code §§16002 (loyalty) 16003 (conflicts of interest) and 16040 (care).

At oral argument, Appellant requested, and, at the least, should have been granted, leave to amend to re-characterize the breach of fiduciary duty claim as a "breach of trust" claim (as allowed in *Hansen*) or a breach of Probate Code §§16002, 16003, and 16040 claim.

G. THIRD PARTY BENEFICIARY CLAIM IS VALID

Appellant's third cause of action is for breach of written contract on a third party beneficiary basis (AA023-024, ¶¶103-111).[20] The Complaint

[20] The noticed ground for the demurrer to the 3rd cause of action was "The law does not allow for the City to enter into 'implied contracts' . . . ." The written easement agreements are not implied contracts.

alleges Respondent entered into approximately 60 written agreements whereby 60 non-resident property owners granted to Respondent easements, and in exchange Respondent agreed to provide the servient owners with free water (¶106), (ii) Vallejo breached this obligation by passing onto the Class the financial obligation of providing the free water to the servient property owners (¶107), and (iii) the Class is the intended beneficiary of such agreements (¶105).

The trial court held an "established line of cases do not recognize third party beneficiaries in government contracts," citing *Martinez v. Socoma* (1974) 11 Cal.3d 394 (AA155). *Martinez* and the "established line of cases" only stand for the rule that the public cannot generally[21] sue a *government contractor* on a third party beneficiary basis (*see also*, Restatement (2d) Contracts §313(2) ["a *promisor* who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public"]).

Martinez is inapposite and neither the trial court nor Respondent put forth any other reason why the 3rd cause of action fails to state a cause of action.

---

[21] There are numerous exceptions to this rule (*see, Shell v. Schmidt* (1954) 126 Cal.App.2d 279, 290-91; *Zigas v. Superior Court* (1980) 120 Cal.App.3d 827, 835-40; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1194; *Tippett v. Terich* (1995) 37 Cal.App.4th 1517, 1533).

CONCLUSION

For the reasons set forth above, and in the interests of justice and fairness to the Class who have no other remedy or recourse, the trial court should be reversed and the case remanded.

Respectfully submitted,

LAW OFFICES OF STEPHEN M. FLYNN

Dated: January 6, 2015 _____/s/_____

STEPHEN M. FLYNN
Attorney for Appellant, Green Valley Landowners Association

C:\Users\Stephen Flynn\SkyDrive\Documents\SMF Law Offices\Client Files\GVLA\Appeal\Briefs\Opening Brief\Appellant's Opening Brief (FINAL).doc

CERTIFICATE OF WORD COUNT

I hereby certify this brief, exclusive of tables, consists of 13,999 words.

LAW OFFICES OF STEPHEN M. FLYNN

Dated: January 6, 2015 _____/s/_____

STEPHEN M. FLYNN
Attorney for Appellant, Green Valley Landowners Association