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 October 1, 2014
The Honorable Arvid Johnson, Judge (Ret.)
Solano Superior Court No. FCS042938

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

INTRODUCTION

This case involves unprecedented levels of municipal discrimination in the provision of water. Indeed, this may be the only 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, after failing to maintain or improve the system for a century, unilaterally divested itself from all financial obligations for the system, leaving the non-residents to pay 100% of the cost of operating a huge, dilapidated municipal water system.

Not content with just absolving itself of any financial responsibility, Respondent also seeks to profit from the Lakes Water System (LWS) through a piecemeal sale of its components. Such a sale will leave 809 non-resident water customers to bear $30-60 million in deferred capital improvements, plus the astronomical cost of maintaining and operating a water system designed for a city of 30,000 or more people.

Respondent so much as admits its complicity in allowing the LWS to deteriorate to its present condition, describing the system as "costly", "old", "inefficient", "obsolete", and suffering from (obvious) "diseconomies of scale" (ROB 3, 23, 37, 62). Straining to rationalize its neglect, Respondent even uses it to justify its discrimination, claiming the decrepit condition of the LWS provided it with "strong incentives to divest itself" of the system (ROB 23-24).

Failing to explain its deviation from a century of constitutional precedent, Respondent relies heavily on the red herring that this lawsuit is about the "wealthy Green Valley" residents[1] seeking a "subsidy" from the "residents of working class Vallejo" (ROB 1) – as though the Class

[1] The LWS serves not only Green Valley, but less affluent Old Cordelia, Willotta Oaks, and Gordon Valley.

constructed and operated the LWS for its sole benefit and allowed it to deteriorate for a century to its present condition.

On the contrary, it is the non-voting, non-resident members of the Class upon whom the full burden of maintaining and operating the LWS has been unilaterally placed. The Class, in effect, is being forced to subsidize and indemnify Respondent for decades of its affirmative and passive dereliction.

This lawsuit is about affordable water, fundamental fairness and the obligation – both contractual and legal – of Respondent to share in the cost of the municipal water system it built and which it allowed to fall into disrepair.

ARGUMENT

A. THE ORDER IS APPEALABLE

Citing *Evans v. Dabney* (1951) 37 Cal.2d 758, Respondent claims the "notice of appeal was premature and from a non-appealable order" (ROB 9).

Evans involved an appeal from an interlocutory minute order denying leave to bring in new parties as cross-defendants which did not become the basis for a judgment.

Here, a final judgment was issued (AA163-64). Further, an order sustaining a demurrer as to all causes of action without leave to amend is appealable (even without a judgment). The court in *Thaler v. Household Finance Corp.* (2000) 80 Cal.App.4th 1093, distinguished *Evans*, reasoning:

> An order sustaining a demurrer is usually not immediately appealable, because it is not on its face a final judgment. However, it may be treated as a judgment for purposes of appeal when, like a formal judgment, it disposes of the action and precludes further proceedings. When a demurrer is sustained as to *all* causes of action, *without* leave to amend,

> the only step left to finally dispose of the action is the formality of an order or judgment of dismissal. In those situations, we may deem the order sustaining the demurrer to incorporate a judgment of dismissal, and review the order. We do so here.

(*Id.* at 1098, citations omitted, italics in original; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699 ["an order of dismissal is to be treated as a judgment for the purposes of taking an appeal when it finally disposes of the particular action and prevents further proceedings as effectually as would any formal judgment"] [quoting, *Herrscher v. Herrscher* (1953) 41 Cal.2d 300, 303-04]; *Hinman v. Department of Personnel Admin.* (1985) 167 Cal.App.3d 516, 520; *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 528, fn. 1 ["when the trial court has sustained a demurrer to all of the complaint's causes of action, appellate courts may deem the order to incorporate a judgment of dismissal"] [quoting, *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1396]; *Moore v. Hill* (2010) 188 Cal.App.4th 1267, 1279, fn.11).

Further, a notice of appeal is to be liberally construed in favor of its sufficiency (*see*, ROB 8, fn. 8). In *Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 202, the notice of appeal said the appellant was appealing from an order sustaining the demurrer without leave to amend. The court held:

> The California Supreme Court has instructed that a notice of appeal shall be liberally construed in favor of its sufficiency. Therefore, where it is reasonably clear that the appellant intended to appeal from the judgment and the respondent would not be misled or prejudiced, the notice of appeal may be interpreted to apply to an existing judgment.
>
> We will interpret Yan's notice of appeal as applying to the judgment of dismissal. It is clear that Yan intended to appeal from the judgment and that no prejudice would result to

> respondent BMW (*id.* at 202-03, citations omitted, internal quotations omitted).

In an abundance of caution, Appellant asks this Court to treat the minute order sustaining Respondent's demurrer as a final judgment.

B. THE IMPLIED CONTRACT CLAIMS

1. Charter Cities Are Not Subject to the General Laws, Even if the Charter Is Silent

Respondent "asserts a charter city is bound by general law until it adopts a contrary ordinance" (ROB 11). Respondent cites no authority for this assertion (other than dicta in *McLeod v. Board of Pension Commissioners* (1971) 14 Cal.App.3d 23, discussed below, B.2), but claims "this common sense rule . . . allows general law to fill gaps in local law using state law" (ROB 11).

This purported "rule" conflicts with the text and history of Article XI, §5(a), a century of precedent, and runs contrary to the very nature of municipal home rule.

Article XI, §5(a), adopted in 1914, was passed to ensure charter cities were completely independent of the general law, *especially* as to municipal affairs upon which the charter is silent. It provides:

> Cities . . . organized under charters . . . are . . . empowered . . . to make and enforce all laws and regulations in respect to municipal affairs, *subject only to restrictions and limitations provided in their several charters* and in respect to other matters they shall be subject to and controlled by general laws (italics added).

The "other matters" language in Article XI, Section 5(a) refers to matters other than municipal affa*irs* (*County of Santa Barbara v. City of Santa Barbara* (1976) 59 Cal.App.3d 364, 374 ["in matters which are not municipal affairs a chartered city is subject to general laws"]; *Wilkes v. City and County of San Francisco* (1941) 44 Cal.App.2d 393, 395 [municipal

home rule "is limited to municipal affairs. In non-municipal matters the general law controls."]).

The effect of the 1914 amendment was explained 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.

Also in accord is *West Coast Advertising Co. v. City and County of San Francisco* (1939) 14 Cal.2d 516, 519:

> It is now established by a line of decisions of the courts of this state that a city which has availed itself of the provisions of the Constitution as amended in 1914 has full control over its municipal affairs unaffected by general laws on the same subject-matters, and that it has such control whether or not its charter specifically provides for the particular power sought to be exercised, so long as the power is exercised within the limitation or restrictions placed in the charter. The question, then, is not whether the charter grants the power to impose the tax, but whether it prohibits the tax. . . .The net result is that, as to municipal affairs, the charter, instead of being a grant of power, is, in effect, a limitation of powers, and . . . the city has the power to [act] unless the power was taken from it by the charter itself.

Under the 1914 amendment, a charter "serves merely to specify the limitations and restrictions upon the exercise of the powers so granted and accepted" (*West Coast Advertising*, 14 Cal.2d at 522). "[A]ny such power not expressly forbidden [by the charter] may be exercised by the municipality, and any limitations upon its exercise are those only which have been specified in the charter" (*id.*). "The charter operates not as a grant of power, but as an instrument of limitation and restriction on the

exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation" (*City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, 598-99).

Accordingly, it is not necessary for a charter city to legislate on a matter of municipal affairs in order to remove it from the general laws. As explained in *City of Pasadena v. Charleville* (1932) 215 Cal. 384, 39:

> [I]t is not necessary that the charter specifically legislate on the subject. In order to remove the city's municipal affairs from the control of general laws it is sufficient if the city has availed itself of the offer extended to it by the Constitution as amended in 1914 . . . .

This rule has been consistently followed for 100 years. (*Bank v. Bell* (1923) 62 Cal.App. 320, 329 ["[T]he law is firmly established as follows: The powers of the cities are not derived from the Legislature but from a freeholders' charter directly provided for by the Constitution. The city in its charter may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by the general laws. The powers of the city are all–embracing, restricted and limited by the charter only, and free from the interference of the state by general laws. The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force. If its charter gives it powers concerning them, it has those powers. If its charter is silent as to any such power, no general law can confer it."]; *City and County of San Francisco v. Boyd* (1941) 17 Cal.2d 606, 618 ["if no restrictions or limitations are found in the charter, the power of the city in municipal affairs is full and complete"]; *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 347 ["The purpose of the

1914 constitutional amendment was to free cities which availed themselves of 'home rule' of the control of general laws in the area of municipal affairs and to give them complete control over such matters whether or not their charter expressly enumerated a power over the municipal affair in question."]; *Sunter v. Fraser* (1924) 194 Cal. 337, 343; *Wiley v. City of Berkeley* (1955) 136 Cal.App.2d 10, 13 ["the municipality is supreme in the field of municipal affairs *even as to matters on which the charter is silent*"] [italics in original]; *Madsen v. Oakland Unified School District* (1975) 45 Cal.App.3d 574, 579 ["A charter city retains complete control of municipal affairs, whether or not its charter expressly enumerates a power over the specific municipal affair in question."]; *Mullins v. Henderson* (1946) 75 Cal.App.2d 117, 129 ["where a city has availed itself of [Art. XI, §5], it has full control over its municipal affairs unaffected by general laws on the same subject matters, and it has such control whether or not its charter specifically provides for the particular power sought to be exercised"]; *Murphy v. City of Piedmont* (1936) 17 Cal.App.2d 569, 572-73).[2]

Reinforcing this clear line of authority, the history and intent of the 1914 amendment was discussed at length in *Johnson v. Bradley* (1992) 4 Cal.4th 389, 394-397:

- Under the 1849 version of the Constitution, charter city legislation was routinely subordinated to general state laws (*id.* at 394-395]), an application of "Dillon's rule," holding cities are subjects of the State and therefore, subject to direct legislative intervention (*Pattison v. Board of Supervisors* (1859) 13 Cal. 175, 184; Stroud, B., *Preserving Home*

[2] Respondent claims these are "preemption" cases – *i.e.*, involving preemption of city ordinances by the general law (ROB 19). But Respondent seeks to do the same by preempting a legitimate municipal function (the entering into of municipal water contracts) with Government Code §40602.

Rule: The Text, Purpose, and Political Theory of California's Municipal Affairs Clause, 41. Pepp. L. Rev. 587, 592-95 (2014)).

- In 1879, the Constitution was amended and liberalized in favor of the exercise of charter city independence (4 Cal.4th at 597-99). The intent was "to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature" (*People v. Hoge* (1880) 55 Cal. 612, 618).

- Despite the intent, the courts held the legislature could regulate charter cities as a class (41. Pepp. L. Rev. 587, 599). The court in *Thompson v. Ashworth* (1887) 73 Cal. 73, 76-78, held the State could "control the charters of all corporations by general laws."

- In 1896, the Constitution was amended a second time, again to liberalize the exercise of charter city independence. It provided: "Cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of the constitution, *except in municipal affairs*, shall be subject to and controlled by general laws" (4 Cal.4th at 395, italics in original).

- Despite the clear language of the 1896 amendment, courts continued to subordinate charter legislation to the general laws, at least where the charter was silent on a matter of municipal affairs (*id.*).

- This began in *Fregley v. Phelan* (1899) 126 Cal. 383, where Justice Harrison wrote a concurring opinion suggesting that "unless a charter expressly provided for municipal control over a particular concern, general state law would prevail" (4 Cal.4th at 396).

- Justice Harrison's construction was followed in *Nicholl v. Koster* (1910) 157 Cal. 416, where the Court held local laws of a charter city "could be given no effect if the city charter was silent on the subject" (4 Cal.4th at 396).

- Because silence was construed as an invitation for control by the general laws, charter cities were forced to adopt lengthy charters covering every conceivable municipal topic. "As the law developed, the necessity of all powers being laid out in the city's charter gave rise to bulky and sometimes complicated charters and frequent amendments" (41 Pepp. L. Rev. 587, 602, internal quotes omitted).

- In 1913, Professor Williams Jones wrote an influential article proposing yet another constitutional amendment (4 Cal.4th at 396). He suggested "the wording of the municipal affairs clause be so altered as to imply in and of itself a grant, to all cities organized under freeholders' charters, of a power to legislate in all municipal affairs whether or not a specific function is listed as a 'municipal affair' in a city charter" (*id.*)

- The following year, 1914, the Constitution was amended at the November general election to do just that. The amendment, originally Article XI, Section 6, today Article XI, Section 5, gave charter cities the power "to *make and enforce all laws and regulations in respect to municipal affairs*, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws" (4 Cal.4th at 396, italics in original).

Until Respondent claimed otherwise, for 100 years, the 1914 amendment successfully served its purpose of ensuring charter city independence, especially with respect to municipal affairs on which the charter is silent.

Respondent's "common sense rule" would turn 100 years of precedent on its head, defying law and common sense. A charter city would be limited and restricted not only by its charter, but by the general laws as well. In order to remove itself from the effect of the general laws,

charter cities would need to adopt lengthy charters specifying, in detail, every single power they were reserving (just as they did prior to 1914).[3]

If adopted, Respondent's "common sense rule" would bring charter cities back to 1913, resulting in unintended ramifications well beyond the scope of this litigation. This is contrary to the text and history of Article XI, Section 5, as well as §200 of Respondent's own Charter which provides, "The City shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs, *subject only to the restrictions and limitations provided in this Charter* and the Constitution of the State of California."

2. *McLeod* Is Inconsistent with the Constitution and 100 Years of Precedent

Against this substantial weight of authority, Respondent asks this Court to rewrite the Constitution and 100 years of precedent based on a single quote from dicta in *McLeod v. Board of Pension Commissioners* (1971) 14 Cal.App.3d 23, 29.

The issue in *McLeod* was whether Government Code §68092.5, relating to payment to expert witnesses, applied to a charter city. The court, without elaboration, stated that "where the charter contains no special procedure concerning a municipal subject, the general law governs."

McLeod has never been cited for the proposition the general laws control when the charter is silent. The court in *McLeod* also ignored all of the above authorities (which hold exactly the opposite). Indeed, the only cases the *McLeod* court cited were cases interpreting the pre-1914 version of the Constitution, namely, *Civic Center Assn. v. Railroad Com.* (1917)

[3] Respondent claims any other rule would "absurdly, force the City to re-enact all provisions of the Government Code" (ROB 15). Not true. Section 201 *allows* (but does not require) Respondent to follow the general laws. Otherwise, it is free to act as its wishes, subject only to the Charter (§200).

175 Cal. 411, *City of Sacramento v. Adams* (1915) 171 Cal. 458, and *Hyde v. Wilde* (1921) 51 Cal.App. 82. Further, it is doubtful the court even relied upon the statement Respondent quotes.[4]

The language in *McLeod* was wrong when it was written and it is wrong today. In its dicta interpreting Article XI, Section 5(a), the court in *McLeod* made the same mistake Respondent made – assuming the "other matters" language in Article XI, §5(a) refers to other matters not specified in the charter. Such a reading is inconsistent with the language and history of Section 5(a) and the authorities cited above.

3. Section 201 of the Charter Does Not Require Respondent to Follow the General Laws

Respondent understandably ignores §200 of its Charter (adopting Article XI, §5(a) to the fullest extent of the law), and instead focuses on §201, which provides, "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 Chapter."

While conceding it could have been "plainer" in expressing its unwritten intent (ROB 15), Respondent claims §201 is a mandatory directive, thus inviting the Court to ignore as surplusage the phrase "have the power to" in §201 – *i.e.*, "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 Chapter."

This Court should pass on Respondent's invitation.

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[4] In the following paragraph, the court recognized, "whether the code section applies to hearings conducted in appellant's tribunal, may be debatable" (14 Cal.App.3d at 30) Later, the court declared it "unnecessary to decide whether the sections of the Government Code previously discussed are directly applicable to witnesses called to appear before the appellant board" (*id.* at 31).

The phrase "shall have the power to" is functionally the same as the word "may." Section 201 simply restates the rule that if the charter is silent, the city *may* rely upon the general law (*City of Oakland v. Williams* (1940) 15 Cal.2d 542, 549 ["where the charter is silent a city may exercise powers conferred upon it by general law"]; *City of Oakland v. Hogan* (1940) 41 Cal.App.2d 333, 357 [where charter is silent "the municipality may rely upon the provisions of state law not inconsistent with other provisions of the charter"]).[5]

Courts have consistently construed the phrase "shall have the power" as permissive, not mandatory. In *Consumer Advocate Div. v. Greer* (Tenn. 1998) 967 S.W.2d 759, the court construed a statute providing the Tennessee Regulatory Authority "shall have the power" to determine whether a public utility rate charge is just and reasonable. The court held:

> In our view, the clear import of the statutory language, "the authority shall have the power," is that the TRA has the power to convene a contested case hearing if it chooses to exercise the authority. In other words, the language used by the General Assembly implies discretion. Importantly, the statute does not say that the TRA "shall hold a hearing" upon the filing of a written complaint. Such language would clearly describe a mandatory duty. Once again, our role is to construe statutes consistently with legislative intent. If the Legislature had intended to mandate a contested hearing upon the filing of a written complaint, it easily could have utilized precise language to accomplish that mandate.

(*Id.* at 763; *see also, Caminetti v. Edward Brown & Sons* (1944) 23 Cal.2d 511, 521, [statute providing the court "shall have the power to set aside and vacate the judgment" under certain circumstances was "not mandatory" but

[5] An interpretation of Section 201 which *requires* Respondent to follow the general law is not "empowering" (as Respondent claims at 16), but restrictive. It would force Respondent to be bound by all general laws unless and until it adopts charter provisions addressing every topic covered by the general laws.

gave the court "wide discretion"]; *Pacific Lighting Serv. Co. v. Fed. Power Comm'n* (9th Cir. 1975) 518 F.2d 718, 720 [statute saying commission "shall have authority" is permissive, not mandatory]; *Village of Perrsburg v. Rigway* (1923) 88 Ohio St. 245 [same]; *Weller v. United States* (1906) 41 Ct. Cl. 324 [same]; *Nimmer v. Strickland* (1978) 242 Ga. 430 [same]; *State v. Beard* (1939) 63 Ohio App. 486 [statute providing court "shall have the power" held to be discretionary, not mandatory]).

Further, in *City of Glendale v. Trondsen* (1957) 48 Cal.2d 93, 100-101 and *Redwood City v. Moore* (1965) 231 Cal.App.2d 563, language virtually identical to §201 was held to be permissive, not mandatory. Respondent admits its charter "allows – but does not require – its ordinances to follow general law," yet in circular fashion claims §201 of its Charter "expresses an intent to follow general law" (OB at 17). Needless to say, if language virtually identical to §201 was held to be permissive, it is no response to say §201 evidences a contrary intent.

Holding §201 is a mandatory directive would also conflict with §200 of the Charter which expressly adopts Article XI, Section 5 to the fullest extent of the law. It is inconceivable and contradictory that Respondent simultaneously intended to both (i) reserve the "right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this Charter" and (ii) nevertheless be bound by and subject to general laws with respect to municipal affairs not addressed in its Charter.

Had Respondent truly intended to be bound by the general law, it needed to unambiguously express that intent (as did the City of San Jose in *City of San Jose v. Lynch* (1935) 4 Cal.2d 760, 762-63[6]). "[R]estrictions on

[6] San Jose's charter provided "where the general laws of the State provide a procedure for the carrying out and enforcement of any rights or powers

a charter city's power may not be implied" (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161,170-71; *City of Grass Valley*, 34 Cal.2d at 598).

4. Other Charter and Code Sections Do Not Express an Unambiguous Intent to Be Bound by the General Law

Perhaps sensing that §201 alone is insufficient to express an intent to be bound by the general law, Respondent asserts such an unstated intent can be gleaned from §§300, 716 and 717 of its Charter and §§3.20.045, 3.20.222 and 3.22.010 of its Municipal Code (ROB 16-17). This argument is equally unavailing.

As pointed out (AOB 23), "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*, 9 Cal.4th at 170-71; *City of Grass Valley*, 34 Cal.2d at 598).

Further, "The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation. *All rules of statutory construction as applied to charter provisions are subordinate to this controlling principle*" (*City of Grass Valley*, 34 Cal.2d at 598-99 [italics added]).

The central purpose of the 1914 amendment was to vest in charter cities all powers over municipal affairs – especially when the charter was

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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."

silent. To achieve this goal, it is not necessary to spell out every single municipal affair in the charter (*Charleville*, 215 Cal. at 391).

Even if one were inclined to glean an unwritten intent to be bound by the general law, §§300 and 716 of the Charter and §§3.20.045 and 3.22.010 of the Code were passed decades after 1992, when Respondent first breached the implied contracts with the Class.

Even if these sections supported the implied intent Respondent claims,[7] they have no effect on the existence or legitimacy of contracts made decades before their passage. Section 102 of the Charter recognizes Respondent "shall be subject to all of its . . . obligations . . . and contracts" which existed prior to the Charter (*see also,* U.S. Const., Art. I, Sec. 10, Cl. 1; Cal. Const. Art. I, §9).

Finally, the Charter and Code sections passed before 1992 do not support an intent to be bound by the general law (or an intent that all

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[7] Section 716 (effective 2000) provides, "No expenditure of City funds shall be made except for the purposes and in the manner specified in an appropriation by the Council." This section does not require a written agreement and only applies to expenditures. To the extent a rate structure is an "expenditure", the Council approved all rate structures.

Section 300 (effective 2000) provides "All powers of the City shall be vested in the Council . . .", but the construction of the LWS, the rate structures and the decision to allow the Class to connect to the LWS were all approved by the Council.

Section 3.22.010 (effective 2005) falls under Chapter 3.22 of the Code entitled "Disqualification of Contractors." It provides the intent of Chapter 3.22 is "to determine in advance of submittal of bids or proposals on city contracts whether a person has the necessary qualifications, fitness, capacity, integrity and trustworthiness to perform city contracts."

Section 3.20.045 (effective 2011) falls under Chapter 3.20 of the Code entitled "Purchase and Disposition of Property," allows the City Manager to enter into contracts to buy or sell property without publication or City Council approval.

contracts be in writing). Section 717 of the Charter (effective 1989) concerns contracts to purchase personal property and contracts for services. It provides, "The City Manager shall purchase or contract for the equipment, materials, supplies and services required by the City, for which expenditures have been authorized in the budget or by other action of the Council." This section does not require a written agreement and only applies to expenditures. To the extent a rate structure is an "expenditure" (it is not), the Council approved all rate structures.

Section 3.20.222 (effective 1976) falls under Chapter 3.20 entitled "Purchase and Disposition of Property." It sets forth requirements for bids to purchase City property: "All bids or offers shall be in writing and shall be accompanied by a bank cashier's check or by a check certified by a responsible bank, payable to the city, in an amount as specified in the notice inviting bids."

If Respondent truly intended all contracts be in writing, it could have so provided (*see*, *Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, below). Because Respondent's Charter does not require a written contract, no such restriction can be implied (*Domar*, 9 Cal.4th at 170-71).

5. Respondent Grossly Misrepresents the Holding in *Katsura*

Respondent cites *Katsura*, 155 Cal.App.4th 104, for the proposition "implied contract claims do not lie against government" (ROB 10, 20).

Katsura held an oral contract with a city is not enforceable under a quantum meruit theory of recovery where the city's charter expressly requires all contracts to be in writing.

In *Katsura*, the plaintiff sought payment for extra work he performed under a written contract with the city. The contract prohibited modifications unless agreed to in writing by both parties, and specified procedures to

obtain authorization for extra work. Katsura sued to recover for the extra work claiming a city employee orally authorized it.

In addition to the contractual requirement that all modifications be in writing, Ventura's charter provided, "The City shall not be bound by any contract except as hereinafter provided unless the contract shall be made in writing, approved by the City Attorney as to form, approved by the City Council and signed on behalf of the City by an officer or officers as shall be designated by the Council" (*id.* at 108).

The court held, "the mode of contracting, as prescribed by the municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable" (*id.* at 109).

The court also refused to enforce the oral agreement under a quantum meruit theory of recovery, concluding, "No implied liability to pay upon a quantum meruit could exist where the prohibition of the statute against contracting in any other manner than as prescribed is disregarded" (*id.* at 109-110).

Katsura is readily distinguishable because the city's charter expressly required all city contracts to be in writing.[8] If Respondent wanted the benefit of the *Katsura* rule, it could have adopted similar charter language.

6. Nothing in Respondent's Charter Requires a Written Contract

Respondent claims "cities cannot act in conflict with their charters" and "a contract made in disregard of the prescribed mode is unenforceable"

[8] As discussed in the opening brief (at 23), *First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 663, cited by Respondent (at 22), likewise involved a charter provision expressly requiring a written contract.

(OB at 20). True, but irrelevant (see above, B.5), since nothing in Respondent's Charter requires a written contract.

This leaves Respondent with the already debunked claim that the "establishment and enforcement of implied contracts against a charter city are prohibited unless the charter ordinances expressly displace Government Code section 40602" (OB at 20). Respondent cites no authority for this (other than *McLeod*).

To reiterate (*see*, AOB 21-24), §40602 is a general law statute which only binds general law cities. No case has ever extended its application to charter cities. (*G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087 [§40602 requires general law city contracts to be in writing]; *South Bay Senior Housing Corporation v. City of Hawthorne* (1997) 56 Cal.App 4th 1231 [same]; *Authority for California Cities Excess Liability v. City of Los Altos* (2006) 136 Cal.App.4th 1207, 1212 ["*as a general law city*,[9] Los Altos may be held liable on a contract only if the contract is in writing"].)

7. The Relationship between Respondent and the Class is By Definition Contractual

Respondent's attempt to distinguish *Hobby v. City of Sonora* (1956) 142 Cal.App.2d 457, *Elliot v. City of Pacific Grove* (1975) 54 Cal.App.3d 53, 56 and *Tronslin v. City of Sonora* (1956) 144 Cal.App.2d 735 is unavailing.

Respondent claims the court in *Hobby* held "no contract arose" (ROB 22). Not true. In *Hobby*, the court correctly observed that the relationship between non-resident utility customers and the city providing such utility services was, by definition, contractual (142 Cal.App.2d at

[9] Respondent omitted this italicized language in its quote from this case (ROB 13).

459). *Elliot* stated the same rule (54 Cal.App.3d at 56), as did *Tronslin* (144 Cal.App.2d at 737).[10]

In *Hobby*, the court ultimately upheld the trial court's determination (following a trial on the matter) that the *terms* of such contract did not provide for the continued provision of sewage disposal without charge, but this factual determination has no bearing on the rule of law stated.

Respondent's construction of *Tronslin* is so wrong, the facts of that case are worth reiterating again (*see,* AOB 14-15). In 1936, 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.

In 1941, Tronslin filed a declaratory relief action. At the conclusion of the hearing, 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 . . ." (144 Cal.App.2d. at 736).

In 1953, the city enacted an ordinance imposing an annual charge of $24 on each non-resident sewer connection. Tronslin sued to enjoin the imposition of the charge.

Although the 1941 judgment found the agreement impliedly included the promise the sewer connection would be "free and clear of costs, charges, taxes or license fees", the city argued the building and

[10] If the relationship between Respondent and the Class is not contractual, what is it, and what rights and protections does the Class have? Respondent refuses to say.

maintenance of a sewer system is an exercise in police power which "cannot be bartered away" (*id.* at 737).

The court of appeal rejected the argument and affirmed the contractual relationship between the parties:

> Paraphrasing what we said in *Hobby v. City of Sonora*, 142 Cal.App.2d 457, neither plaintiffs nor all other residents of Tuolumne County constitute a class amenable to any ordinance passed by the Sonora City Council. The defendant city could no more compel plaintiff here, as a resident of the county, to connect with the sewer than could plaintiff compel the city to extend its lines into county territory and allow county residents to connect therewith. . . . The right-of-way across plaintiff's land could only have been acquired in one of two ways-either by condemnation or by contract. In the present case it may have been that the city, in lieu of condemnation of the property of plaintiff and payment to him of the damages which necessarily would have flowed therefrom, or for one of many other reasons, decided in its discretion to escape what might have been a long and costly proceeding and to accomplish the same purpose by an agreement . . . . Its act in so doing could in no sense be said to have been an invalid exercise of its power to contract. And having entered into a valid contract, it could not, by ordinance, impair the same. (*Id.* at 737-38.)

Respondent is wrong in claiming the court "refused to imply terms into a written contract" (OB at 23). The court in *Tronslin* (i) recognized that the relationship between the non-resident customer and the city was, by definition, contractual (*id.*), and (ii) refused to overturn or limit the prior judgment determining that Tronslin's right to connect to the system was "free and clear" of any fees or charges, holding:

> Necessarily, therefore, since the contract was a valid exercise of the city's right of contract to provide adequate sewage facilities for its residents; and since the city could not impair its valid contract by ordinance; and further since the rights of the parties to that contract were previously adjudicated by a

> judgment long since become final, this court is bound by the determination made therein. (*Id.* at 739.)

Here, as in *Tronslin*, the Class *does* have written agreements with Respondent – both written easement agreements and written "will serve" letters. As in *Tronslin*, those agreements are silent on how the costs of the LWS are to be shared. Whether Respondent impliedly agreed to share in the cost of the LWS pursuant to the Historic Cost Sharing ratio is an issue of fact.

8. The Continuing Accrual Doctrine Applies

Howard Jarvis Taxpayers Ass'n v. City of La Habra (2001) 25 Cal.4th 809, is directly on point as to continuing accrual. In *Howard Johnson*, the Court held the imposition and collection of a "utility user's tax" was subject to the continuing accrual doctrine. As in *Howard Jarvis*, each bi-monthly collection of the water bills is a continuing violation of the Historic Cost Sharing Ratio.

Respondent distinguishes *Howard Johnson* on the basis it involved a utility "tax" as opposed a "charge" or "fee" for water service (ROB 26). To paraphrase Respondent, *Palsgraf* is not limited to train stations (ROB 55).

Respondent offers no explanation as to how or why the result in *Howard Johnson* would be different if it involved a utility "fee" as opposed to a utility "tax." Indeed, Respondent later claims the distinction is irrelevant (ROB 54 where Respondent expressly equates water charges with "taxes").[11]

[11] Respondent incorrectly claims (at 26) Appellant failed to cite any cases applying the doctrine to breach of contract actions. Appellant cited multiple cases (AOB 28, fn. 9).

9. The Implied Agreements Are Outside the Statute of Frauds

An "agreement that by its terms is not to be performed within a year from the making thereof" is invalid unless it is in writing (Civ. Code §1624(a)(1)). The construction of §1624(a)(1) was summarized as follows:

> [A]n oral contract is invalid under [§1624(a)(1)] only where by its *very terms* it cannot be performed within a year from the date it is made. The words of [§1624(a)(1)] have been interpreted literally and narrowly by our courts. Only those contracts which expressly preclude performance within one year are unenforceable. In *White Lightning Co. v. Wolfson* (1968) 68 Cal.2d 336, 66 Cal.Rptr. 697, 438 P.2d 345, our Supreme Court stated:
>
> > "In its actual application ... the courts have been perhaps even less friendly to this provision [the "one year" section] than to the other provisions of the statute. They have observed the exact words of this provision and have interpreted them literally and very narrowly . . . . To fall within the words of the provision, therefore, the agreement must be one of which it can truly be said at the very moment it is made, 'This agreement is not to be performed within one year'; in general, the cases indicate that *there must not be the slightest possibility that it can be fully performed within one year*."
>
> Accordingly, if by its terms performance of a contract is possible within one year, the contract does not fall within the statute even though it is probable that it will extend beyond one year. A contract is invalid only if "by its terms, [it is] *impossible* of performance within a year." (*Plumlee v. Poag* (1984) 150 Cal.App.3d 541, 548-49, italics in original, citations omitted.)

The implied agreements are outside §1624(a)(1) because (i) performance within one year was not "impossible", (ii) either party could terminate the implied agreements, and (iii) Appellant has adequately alleged an estoppel to assert the statute of frauds.

a. Performance within One Year Was Possible

As noted in *Plumlee,* 150 Cal.App.3d at 548-49, when courts say performance is "impossible", they truly mean "impossible."

In *El Rio Oils, Canada, Limited v. Pacific Coast Asphalt Co.* (1949) 95 Cal.App.2d 186, plaintiff orally agreed furnish "for the life of the wells" all defendant's requirements for oil. Several years later, plaintiff refused to deliver any oil to defendant.

Defendant filed a cross-complaint seeking specific performance of the contract and damages for breach. Plaintiff claimed the contract was unenforceable under §1624(a)(1). The court rejected plaintiff's statute of fraud argument reasoning, "In the present case there was nothing in the terms of the contract that prevented it from being performed within a year from the date of the agreement. It was possible that during the year plaintiff's wells might have been pumped dry or for some other reason, due to earth movements or mechanical difficulties, it would be no longer feasible to produce from them" (*id.*).

In *Gaskins v. Security National Bank of Los Angeles* (1939) 30 Cal.App.2d 409, plaintiff alleged a contract with defendant whereby plaintiff would care for the minor children of their father during the children's minority, with payment to be made when the youngest attained majority. The court held the contract was outside §1624(a)(1) because it could be performed within one year, "as, for instance, would be the case should *all* of the minor children have died within the first year" (*id.* at 419, italics added).

In *Leonard v. Rose* (1967) 65 Cal.2d 589, 607, the court held a contract to support a person for "the balance of his life, or some other indefinite period of time, must be regarded as having been made with a

view to the possible death within a year of the person for whose benefit the agreement was made."

In *Sweet v. Bridge Base, Inc.* (E.D. Cal.) 2009 WL 1514443, plaintiff claimed an entitlement to 5% of the revenues from defendant's online bridge tournaments pursuant to an oral agreement. The court rejected defendant's characterization of the agreement as constituting a "perpetual" right to 5% of the revenues, reasoning, "the discontinuance of the sale of bridge tournaments by Defendants within one year, however remote that possibility may have been, would have operated to terminate the contract" (*id.* at *3).

Here, as in *El Rio Oils*, it was possible the agreement to provide water and pay in the costs of the LWS might have been terminated if the reservoirs ran dry, or if an earthquake caused a catastrophic failure in the pipes or the reservoirs (which sit directly under the Green Valley fault, which "is primed for a magnitude-7.1 quake" [12]). The lakes could also have been abandoned (as Respondent did with Lake Curry) due to water shortages, water quality problems, leakage, or Respondent discovering other sources of water (as it did in the 1950's). There could have been design or construction defects causing a complete failure in the system (indeed, almost immediately after the initial construction of the Green Line, it broke and had to be entirely replaced). Moreover, the water system could have been destroyed in an act of war (during World Wars I and II the lakes was guarded by National Guard troops to prevent sabotage and ensure uninterrupted water flow to Mare Island). These events (like the death of

[12] http://news.yahoo.com/4-northern-california-faults-primed-big-quakes-210209678.html?soc_src=mediacontentstory

all the minor children in *Gaskins*, or an earthquake or mechanical failure in *El Rio Oils*), while unlikely, are far from impossible.[13]

In contrast, in *Beach v. Arblaster* (1961) 194 Cal.App.2d 145, plaintiff alleged defendant (a married man) orally promised to marry her. The court held the oral agreement was within the statute because in California (at that time) "at least one year must elapse from the date of the entry of the interlocutory decree before a final decree of divorce can be entered" and therefore, it was not possible to legally marry within one year.

In *Swift v. Swift* (1873) 46 Cal. 266, it was orally agreed plaintiff would be paid once defendant's yet-to-be planted trees "should yield an income sufficient for that purpose." The court held the statute could not be performed within one year because the trees would not bear fruit for multiple years (*id.* at 269).

In *Long v. Cramer Meat & Packing Co.* (1909) 155 Cal. 402, it was orally agreed certain land "should and would always be used for the purposes of grazing, ranging and pasturing" horses and cattle and "for no other purpose." The court held the oral agreement "From its nature was not to be performed within a year" and was unenforceable (*id.* at 406).

In each of these cases, performance within one year was truly impossible, either by operation of law (*Beach*), by virtue of the fact trees cannot bear fruits within one year (*Swift*), or because a covenant "always" running with the land, is just that, forever (land, unlike people, oil wells, business ventures – or even water systems – has a perpetual existence).

[13] At the very least, leave to amend should be granted so Appellant can allege Respondent's obligation to share in the cost of the LWS would continue "so long as the LWS was in existence."

b. Either Side Could Have Terminated the Agreements

In California, *either* party's "election to terminate takes the contract out of the statute [of frauds]" (Witkin, *Summary of California Law* (10th Ed.) Contracts §367; 3 Cal. Affirmative Def. (2d Ed.) §53:20).

In *White Lighting*, *supra*, 68 Cal.2d 336, plaintiff alleged a breach of an oral employment agreement whereby defendant agreed to employ him on a "permanent" basis. The Court held the oral agreement was not within §1624(a)(1) because "the alleged oral contract may be terminated at will be either party, it can, under its terms, be performed within one year" (*id.* at 344).

In *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, plaintiff argued his employer's conduct and policies over the period of seven years gave rise to an "oral contract" not to fire him without good cause (*id*. at 671). The Court held:

> Even if the original oral agreement had expressly promised plaintiff "permanent" employment terminable only on the condition of his subsequent poor performance or other good cause, such an agreement, if for no specified term, *could* possibly be completed within one year. Because the employee can quit or the employer can discharge for cause, even an agreement that strictly defines appropriate grounds for discharge can be completely performed within one year—or within one day for that matter (47 Cal.3d at 672-73, italics in original).

In *Abeyta v. Superior Court* (1993) 17 Cal.App.4th 1037, the court held that an oral contract for a term of three years was not subject to §1624(a)(1) because it could have been terminated by either the employee or the employer within its term. The court explained, "If performance under a contract could be terminated within one year under some contingency it makes no difference whether the contract has a definite

outside term of two years, three years or five years—or whether it is for the employee's lifetime or some other 'indefinite' period" (*id.* at 1044).

Here, Respondent has the unilateral right to terminate water service under §11.12.030 of the Code, providing:

> The water superintendent shall have the right to refuse to furnish water *or may discontinue water service* to any premises for the following reasons:
>
> A. To protect the city and/or the water system from fraud and abuse;
> B. The requested water service demand may be detrimental or injurious to the water service of other customers;
> C. The distribution facilities are inadequate to supply the requested water service demand.

Respondent can also terminate service for nonpayment of a bill (§11.44.060).[14] Once service is terminated, continued service is subject to an application process (§11.12.010), including payment of a fee, as determined by the Council in its sole discretion (*id.*). In addition, the superintendent always has the right to refuse an application for continuance service under §11.12.030.

If there is no water use for one year, the water service connection is "deemed abandoned" (§11.16.028). Thus, if a home was destroyed on the same day the water connection was made the service would be deemed abandoned (without any further action) exactly one year later.

The Class can also terminate service by making a request to the superintended and providing an address "at which the customer will receive closing billing" (§11.12.110). This might be done, for example, if the

[14] Respondent's claim no performance is required of the Class (at 30) is wrong. Each customer undisputedly has to pay its bi-monthly bill (§11.48.040).

customer drilled a well, built a storage reservoir, or if another entity agreed to provide water to the customer – all possible within one year.[15]

Once water service is discontinued, former customers have no right to further service. Persons desiring to reconnect to the system must submit an application for water service (§11.12.010). Water service will not be provided "until the application has been approved by the superintendent" (*id.*). As discussed above, the superintendent also has the right to "refuse to furnish water" under §11.12.030.

c. San Francisco Brewing Only Applies to Agreements Not Terminable by Either Party

San Francisco Brewing Corp. v. Bowman (1959) 52 Cal.2d 607, cited by Respondent (at 29) does not affect the analysis. It stands for the proposition a distribution agreement not terminable by either party during its term is within §1624(a)(1) if the reasonable term (determined by the trier of fact) is more than one year.

In *Bowman*, the parties orally agreed defendant would serve as plaintiff's exclusive distributor. Nineteen years later, plaintiff cancelled the distribution agreement, and defendant filed a cross-complaint for breach.

The case was tried twice. In the first case, defendant alleged two theories: (i) the agreement would continue so long as defendant used his best efforts to distribute the beer, and (ii) the agreement, not terminable by either party, would continue for a "reasonable term".

Only the second theory was before the court in *Bowman*. The court held (i) the determination of what a reasonable time was an issue of fact,

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[15] Respondent's argument that termination is not possible because "no rational beneficiary of ['subsidized water'] would ever surrender it" (ROB 30) is as compelling as arguing *White Lightning*, *Foley*, and *Abeyta* don't apply if the employee has "such a great job" no rational person would ever quit it.

and (ii) if the jury found a reasonable time was more than one year, the contract was subject to the statute of frauds.

On retrial, defendant proceeded with the first theory – *i.e.*, the distribution agreement was terminable only if defendant failed to use his "best efforts" to distribute the beer. The court in *Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274 (*Bowman II*), held the agreement was outside §1624(a)(1):

> The contract we examine is not one which by its terms could not be performed within one year. Had Bowman failed to devote his best efforts or to take care of the territory, the contract would have terminated and this was an event which might have occurred within a year. (*Id.* at 281.)

Bowman is distinguishable from *Bowman II*. In *Bowman,* the court was only considering an agreement which could not be terminated by either party during its term (*Consolidated Theaters, Inc. v. Theatrical Stage Emp. Union, Local 16* (1968) 69 Cal.2d 713, 727-38 [distribution agreement silent as to its term stays in effect for a reasonable term and cannot be terminated during the term]). In *Bowman II*, the agreement was terminable for cause and therefore outside the statute of frauds, as in *White Lighting*, *Foley*, and *Abeyta*.

Bowman is also distinguishable because the court did not discuss or consider whether performance within one year was possible for reasons other than termination by one of the parties. In a contract for services, it is always possible one party to the contract will die or cease doing business within one year, bringing the contract outside the statute of frauds (*Foley*, 47 Cal.3d at 673, citing, *Stauter v. Walnut Grove Products* (Iowa 1971) 188 N.W.2d 305 ["Another improbable yet possible occurrence that [would take the oral contract outside the statute] would be that defendant could go out of business within a year of making of the oral employment contract."];

Sweet, supra, 2009 WL 1514443 [discontinuance of the business make performance within one year possible]). Had this argument been made by the defendant in *Bowman*, the result would likely have been different.

d. The Complaint Adequately Alleges an Estoppel to Assert the Statute of Frauds

It has long been held that "equitable estoppel may preclude the use of a statute of frauds defense" (*Byrne v. Laura* (1997) 52 CA4th 1054, 1068; *Monarco v. Lo Greco* (1950) 35 C2d 621, 623).

Respondent claims estoppel of a public agency is "disfavored" and suggests a different standard applies to governmental agencies than private parties (ROB 32).[16] This is, as best, half the story:

> The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-97).

Regardless, the issue is still one of fact, not law (*Byrne*, 52 CA4t at 1068). For purposes of demurrer, the Complaint alleges a 100 year history of acts which reasonably induced the Class to connect to the LWS on the assumption they would receive reasonable priced water at the Historic Cost Sharing Ratio. Key facts plead in the Complaint are also summarized in Appellant's opening brief (at 16-18). For example:

- Paragraphs 44-47 allege a 100 year history of sharing in the costs of the LWS pursuant to the Historic Cost Sharing Ratio (AA009-010).

[16] *Peterson v. City of Vallejo* (1968) 259 Cal.App.2d 757 and *City of Goleta v. Superior Court* (2006) 40 Cal.4th 270 (ROB 32), do not address an estoppel to assert the statute of frauds.

- Paragraph 62 describes, in detail, the configuration of the LWS and explains how it was unforeseeable that Respondent would have radically altered the system to only serve the Class and to omit Respondent from the rate paying base (AA012-014).
- Paragraph 37 alleges reliance: "[B]ut for Defendant's agreement to allow the non-resident customers to connect to the LWS, most, if not all, of the areas outside of the City of Vallejo currently served with LWS water, would never have been developed due to, amongst other things, the lack of reliable and/or adequate ground water sources and/or the lack of other sources of surface water from surrounding municipalities or otherwise. The non-residents who developed their properties did so in reliance upon the promise of adequate, reasonable priced water from Defendant's LWS."
- The Complaint alleges the grave harm the Class has suffered as a result of Respondent's actions (¶9, AA003 [$24 million cost to replace infrastructure already 30-50 years beyond its useful life, plus an additional $6 million within the next years], ¶10, AA003 [water bills amongst the highest in the State]; ¶50, AA010 [230% increase in bills beginning in 1992]; ¶51, AA010 [625% increase in bills in 1995], ¶52 [2009 rate increase], ¶55, AA011 [$12,241,807 cost of operating the LWS over 5 years to be borne by just 809 connections], ¶56, AA011 [rates within LWS 350% higher than in Vallejo]; ¶62, AA012-014 [highlighting the gross inefficiencies in the LWS and their cost to the Class]).
- The Complaint also alleges grave harm the Class will suffer if Respondent sells the LWS (¶10, AA003 [upwards of 300% increase in water bills if LWS is sold to a private corporation]).

Stretching to turn the estoppel argument into an issue of law, Respondent cites *Torres v. City of Montebello* (2015) 234 Cap.App.4th 382

(and the cases cited therein), for the proposition "estoppel cannot defeat Government Code section 40602's demand for written city contracts" (OB at 33-34).

Torres and *Royal Mobilehome Owners Ass'n v. City of Poway* (2007) 149 Cal.App.4th 1460, cited therein, involved the application of §40602 to general law cities. Both are inapposite because §40602 does not apply to charter cities (*supra*, B.6; AOB 21-26).

The other cases cited in *Torres* are simply a rehash of Respondent's earlier argument that a contract made in violation of the prescribed method is void (ROB 20; *Seymore v. State of California* (1984) 156 Cal.App.3d 200 [lease not in writing as required under Government Code is unenforceable]; *State of California v. Haslett Co.* (1975) 45 Cal.App.3d 252 [same]; *Santa Monica Unified Sch. Dist. v. Persh* (1970) 5 Cal.App.3d 945 [contract not ratified or approved as required by Education Code is unenforceable]).

C. PROPOSITION 218

1. Proposition 218 Is Not At Issue

If the current rate structure is a breach of the implied agreements or a breach of Respondent's duty to charge a reasonable rate, nothing in the Complaint requires Respondent to remedy this situation by means of higher "property related fees" on its residents. Respondent may honor its contractual and legal obligations to the Class through any number of means (AOB 31), none of which trigger Proposition 218 (Cal. Const. Art. XIIID, §6(b)(3)). Respondent so admits (ROB 39).[17]

[17] Respondent claims this problem "highlights the City's concerns about unbounded, perpetual, implied agreements" (ROB 40). This argument, bearing at most on the implied contract claim, has no application to Proposition 218.

Proposition 218 is not triggered unless and until Respondent seeks to honor its contractual and legal obligation by imposing on its own residences higher "property related fees." This Court should pass on the invitation to issue an advisory constitutional ruling as to the hypothetical application of Proposition 218 to a rate structure not even devised.

2. Because the Contract Claims Survive, Proposition 218 Is No Defense

Respondent admits that assuming the contract claims survive, Proposition 218 is no defense (ROB 44, fn. 18; U.S. Const., Art. I, Sec. 10, Cl. 1).

3. As Applied, Proposition 218 Is Unconstitutional

Respondent mistakenly confuses Appellant's as applied challenge with a facial challenge. Appellant maintains (i) if Proposition 218 requires Respondent to breach the Historic Cost Sharing Ratio, as applied, it violates the Contracts Clause, and (ii) to the extent a rate structure is a violation of the Equal Protection Clause, it is no defense to say Proposition 218 compels such a violation.[18]

4. *Griffith* Upheld a "Pooled Rate Structure"

Even if it were triggered, and even if it were not preempted by the Contracts Clause or the Equal Protection Clause, Proposition 218 does not prohibit a hypothetical "pooled" rate structure.

Relying on a hyper-literal and misleading construction of Article XIIID, §6(b)(3) (prohibiting fees which exceed the "proportional cost of

[18] As to the latter, the factual issue is whether Respondent had a rational basis for discriminating against the non-resident Class members by (i) "divest[ing] itself" of an "old" and "costly and inefficient" water system (ROB 23, 37), and (ii) dumping the annual $3 million cost of operation (plus an additional $30-60 million in deferred improvements) on 809 non-resident connections, so that it could construct a "more efficient, modern utility" for itself (ROB 37), all while reducing in-city rates and increasing rates within the LWS.

service attributable to the parcel"), Respondent argued (AA057), and the trial court held (AA156), a "pooled-rate structure" is prohibited by Proposition 218. By a "pooled-rate structure", both the trial court and Respondent meant a rate structure where some customers were charged for the cost of services they did not technically use (AA057 at 19-26).

Respondent is forced to concede, for the first time here on appeal, the language in Proposition 218 is not as literal as one might imagine, and a true "parcel-by-parcel" determination is not required (*Griffith v. Pajaro Valley Water Management District* (2013) 220 Cal.App.4th 586, 601.

Respondent seeks to limit *Griffith* to the rule the proportional cost of service may be "determined on the basis of rationally drawn customer classes" (ROB 37). Thus, if A lived on a hill and B lived a block downhill, it is okay to assess A and B the same amount, even though it costs more to deliver water to A.

But, the court in *Griffith* went much further than this. It upheld a rate structure which imposed upon 1700 inland customers an "augmentation charge" for an entire water system those customers did not even use. The court held the augmentation charge could be levied on similar user groups, even if some of the user groups (like the inland customers) would not use the new water system (*id.* at 601). The court held Proposition 218 allows a city to "tak[e] the total costs of chargeable activities" and "apportion[] the revenue requirement among the users" (*id.*)

Respondent misconstrues this holding, claiming *Griffith* only allows service costs to be determined on the basis of "well-drawn classes of customers who take the same service" (ROB 35). In so doing, Respondent mistakenly equates the "same service" with "actual use." This construction was rejected in *Griffith* (*id.* at 600 [plaintiff "grounds his argument on the erroneous premise that 'The only property owners receiving § 6(b) services

from defendant are the coastal landowners receiving delivered water.'"]). As explained in the opening brief (at 36), "service" means the entire municipal water service. In *Griffith*, since the inland customers received water "service", they could be assessed for a new water system they did not technically use.

Respondent seeks to distinguish *Griffith* on the ground the Class receives water from the "inefficient Lakes System" whereas the City receives water from a "more efficient, modern utility" (ROB 37). However, the coastal customers in *Griffith* were receiving water from a brand new, high-tech water system (which, amongst other things, used recycled wastewater and captured storm runoff), whereas the inland users relied on wells (*id.* at 590-91), so this is no distinction.

The court in *Griffith* also explained how the inland customers would benefit from the new water system, even if they never received water from it. Appellant explained how Respondent presently obtains similar benefits from the LWS (AOB 36-37). Respondent claims these benefits are different because unlike *Griffith* "the Lakes System serves only Green Valley customers" (ROB 40). However, the inland customers in *Griffith* did not use the new water system either. To the extent there are any substantive differences between the benefits in *Griffith* and the benefits to Respondent here, it is an issue of fact.

5. Respondent is Estopped to Assert Proposition 218 as a Defense

For purposes of Article XIIID,§6(b)(3), Respondent claims Proposition 218 prohibits its residents from "subsidizing" the LWS because Respondent's municipal water system is separate from the LWS (AA057-58).

For purposes of Article XIIID, §4(e) – another section of Proposition 218 prohibiting assessments over a majority protest – Respondents treats its municipal system and the LWS as a single system. Thus, in order to pass the 2009 Rate Increase over Class' protest, Respondent joined the votes of the Class with in-city municipal votes, thereby diluting their protests (AA001, ¶53). In essence, Respondent wants it both ways – for purposes of §6(b)(3), the LWS is a separate system, and for purposes of §4(e), the systems are one and the same.

Respondent claims an omnibus protest procedure was sanctioned in *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892 (ROB 38), but that cases involved joining the protest votes of different customer classes served by the same water system. It has no application to the joining together of protest votes with respect water systems Respondent asserts are separate.

D. INJUNCTIVE RELIEF AGAINST SALE OF THE LWS

1. The 6th and 7th Causes of Action Are Ripe for Adjudication

Respondent demurred to the 6th and 7th causes of action based on the "separation of powers doctrine" (AA042), and the trial court sustained the demurrer on that basis (AA156).

Here, Respondent argues the 6th and 7th causes of action for an injunction against a sale of the LWS are unripe "until the City Council actually approves a sale to an identified buyer on known terms" (ROB 48).

Respondent cites no authority for its "ripeness" argument other than Evidence Code §664, an evidentiary presumption affecting the burden of proof, which provides "It is presumed that official duty has been regularly performed." This says nothing about when a claim is ripe, and regardless,

the Complaint alleges numerous facts which rebut the presumption (AA 017-18, ¶¶78-85, AA027-028, ¶132).

Should the Court even consider Respondent's ripeness argument, it is meritless. The undisputed facts are sufficiently definite to permit this court to make a decision.

"A controversy is 'ripe' when it has reached, but not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made" (*California Water & Tel. Co. v. Los Angeles County* (1967) 253 Cal.App.2d 16, 22;*O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1451; *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170).

While every single term and condition of the intended sale is not yet known (*e.g.*, purchase price, closing date, due diligence period), the undisputed material facts are "sufficiently congealed to permit an intelligent and useful decision to be made" (*California Water*, 253 Cal.App.2d at 22). Specifically:

- Respondent intends to sell the LWS, admitting: (i) "it is the intention of staff to draft and publically issue a Request for Qualifications (RFQ) within the next several months [i.e., in early *2014*] to solicit interested buyers," (ii) "potential buyers will have 30-60 days to submit responses," and (iii) the sale of the LWS will then be placed "on the City Council agenda for authorization to then sell the system" (Respondent's RJN, Ex. B).
- Respondent intends such a sale to be "free and clear" of any contractual or legal obligations Respondent now owes to the Class (AA027, ¶¶130, 132.a, b) – *i.e.*, the transferee will not be obligated to share in the cost of the LWS pursuant to the Historic Cost Sharing Ratio (AA0027, ¶130).

- Respondent intends to only sell the "pipes and pumps" within the LWS, reserving for itself all water rights and all watershed and non-watershed land (AA0267-8, ¶¶131, 132.g, h).

These material facts are undisputed. The present dispute relates to the legality of these facts. This is not an "academic or inconsequential controversy" (*O'Grady*, 139 Cal.App.4th at 1451), and the facts are sufficiently definite to permit this court to make an "intelligent and useful decision" (*California Water & Tel. Co. v. Los Angeles County*, 253 Cal.App.2d at 22); namely, (i) can Respondent sell the LWS "free and clear" of any legal or contractual obligation to share in the cost, and (ii) can Respondent dispose of only the "pipes and pumps" while reserving for itself the water rights and land associated with the LWS.

Further, the ripeness "requirement should not prevent courts from resolving concrete disputes if the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question (*Pacific Legal Foundation*, 33 Cal.3d at 170).

Here, the Class lives under the constant threat of a sale. Appellant is forced to monitor the City Council agenda to see whether a sale of the LWS is included. The catastrophic consequences of such an action are detailed in the Complaint (AA027-028, ¶132).

A primary purpose of the 6th and 7th causes of action is to preserve the status quo during this litigation. Without these causes of action, Appellant would be forced to either file a separate complaint, or seek leave to amend this Complaint if Respondent acted on its stated intent of selling the LWS (CCP §527(a)).

Further, a motion for leave to amend or the filing of a new complaint would need to be done "under the gun." If an injunction cannot be obtained

until the Council has approved a sale (ROB 48), Appellant is put in an almost impossible position (*California Water*, 253 Cal.App.2d at 22 [case is ripe if it "has reached, *but not passed*, the point that the facts have sufficiently congealed"] [italics added]).

First, Appellant would have to get a motion for leave to amend and/or a new complaint on file before it could even file a motion for a preliminary injunction.

Second, after a contract is signed and approved, Respondent would be in breach if the sale failed to close. In balancing the equities (as a court must do in ruling on a preliminary injunction motion, *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 749), Respondent would certainly claim this harm warrants denial of injunctive relief.

2. The Proposed Sale of the LWS Violates State Law and Policy

Respondent does not deny the separation of powers doctrine has no application where the action to be enjoined violates state law (*Cooper v. Los Angeles County* (1946) 75 Cal.App.2d 75, 79).

Here, Public Utilities Code (PUC) §10061(b) 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.

As alleged, a sale "free and clear" of Respondent's obligation to share in the cost of the LWS pursuant to the Historic Cost Sharing Ratio would be discriminatory and unreasonable, as would a sale of just the "pipes and pumps" (AA003, 017-018, 027-030 ¶¶10, 78-85,129-133, 143). If the trial court ultimately determines Respondent is obligated to share in the LWS's cost, surely it can issue a permanent injunction prohibiting a sale free and clear of that obligation.

That the purchaser would subsequently be regulated by the Public Utilities Commission (PUC) does not make the *sale* reasonable or non-discriminatory (ROB 47-48). A sale free and clear of Respondent's obligations to share in the cost is discriminatory because any future rate setting would assume the Class is responsible for 100% of the LWS's costs.

Respondent claims (for the first time on appeal) Water Code §106.3 does not apply because it "merely recites state policy to be considered" and only applies to "state agencies" not cities (ROB 49). Respondent's misleading argument blends together two separate subsections of §106.3. Subsection (a) provides, "It is hereby declared to be the established policy of the state that every human being has the right to . . . affordable . . . water . . . ." Subsection (b) provides, "All relevant state agencies . . . shall consider this state policy . . . ."

Subsection (a) recites State policy that every human being has the right to affordable water. This policy is not limited to "state agencies" – it is universal. Respondent does not explain why a sale which would violate a fundamental State policy cannot be enjoined. Nor does Respondent explain why a city would be allowed to violate the right to affordable water, but a "state agency" cannot.

Respondent argues (also for the first time on appeal) Public Utilities Code §789.1(e), requiring the proceeds of excess land sales to be invested in capital improvements within the water system, only applies to private corporations (ROB 48-49). As alleged in the Complaint (AA029, ¶141), this policy applies with equal force to Respondent. If a corporation (which owes fiduciary duties to its shareholders, not its customers) must invest the proceeds of excess land sales into the water system, Respondent (a trustee of the LWS for the benefit of the Class) has the same responsibility as a matter of policy.

E. INJUNCTIVE RELIEF AGAINST UNLAWFUL RATES

1. Remedy or Cause of Action – It Does Not Matter

Respondent demurred to the 6th and 7th causes of action based on the "pay first, litigate later" rule in Article XIII, Section 32 (AA042-43), and the trial court sustained the demurrer on that basis (AA157).

Here, Respondent argues an "injunction is a remedy not a cause of action" (ROB 50).

This characterization makes little practical difference. Respondent cites *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 984-85 for the proposition a court "cannot let [a] 'cause of action' [for injunctive relief] stand," but it omits the court's next sentence – "However, that said, on remand the trial court should permit the appellants to amend their nuisance cause of action to include their request for injunctive relief" (*id.* at 985).

In other words, regardless of whether the injunctive relief causes of action "stand on their own", at the very worst, Appellant must be allowed leave to amend so it can simply cut the facts setting forth the basis for the injunctive relief, and paste them into the substantive causes of action.[19]

In addition, complaints in California routinely assert "causes of action" for injunctive relief. A Westlaw search yielded 413 published and unpublished California decisions using the exact phrase "cause of action for injunctive relief." Secondary authorities speak of a "cause of action for injunctive relief," even stating that such a "cause of action" is *required* in

[19] The basis for the relief sought in the 6th, 7th and 9th causes of action is based on Respondent's breach of the implied agreement to share in the cost of the LWS (1st and 2nd causes of action), and Respondent's breach of the duty to charge a reasonable rate (4th cause of action). The basis for the 8th cause of action is based on Municipal Code §11.48.183 (AA031, ¶149).

order to obtain a preliminary injunction (Rylaarsdam, *et al., California Practice Guide: Civil Procedure Before Trial* (Rutter) §9:559, citing CCP §526(a)(1), (2) ["Generally, the complaint must set forth a cause of action for injunctive relief to support issuance of a [temporary restraining order] or [preliminary injunction]."]; Witkin, *California Procedure* (5th Ed.) Provisional Remedies §376, p. 323, citing, *Cooke v. Superior Court* (1989) 213 Cal.App.3d 407, 407 for the proposition "preliminary injunction is warranted only if there is complaint on file stating sufficient cause of action for injunctive relief"]; *California Jurisprudence* (3d) Injunctions §97 [describing how a "cause of action for injunctive relief" should be pled]).

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

Even if the "pay first, litigate later" rule (Cal. Const. Art. XIII, §32) precluded the issuance of a *preliminary* injunction, the 8th and 9th causes of action must survive because Appellant would be entitled to a *permanent* injunction if (after trial) the court finds in Appellant's favor (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38 ["If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer."]; *Adelman v. Associated Intern. Ins. Co.* (2001) 90 Cal.App.4th 352, 359).

Article XIII, §32 "is intended to ensure the uninterrupted flow of tax revenue" but only "*during the pendency of litigation challenging the tax* (*Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 252, italics in original; *Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1465 [purpose of Article XIII, § 32 is "to allow revenue collection to continue during litigation"]).

Article XIII, §32 does not "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*" (*Ardon*, 52 Cal.4th at 252, italics added). Respondent claims Appellant's reliance on *Ardon* is "misplaced," but conveniently omits the italicized portion of the court's holding in its brief (ROB 50-51).

Further, the Supreme Court in *County of Inyo v. PUC* (1980) 26 Cal.3d 154, 159 and *Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172,1189-90 and the court of appeal in *Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133, 139, all held non-resident customers may sue to enjoin unreasonable water rates.[20]

In the (unlikely) event Appellant later files a motion for a preliminary injunction, Respondent is free to then raise the "pay first, litigate later" rule. Prematurely ruling on this issue now – which involves constitutional questions under Article XIII, Section 32 and the definitional sections of Articles XIII A and C (defining what constitutes a "tax") – would run afoul of the general rule that a court should, where possible, avoid ruling on a constitutional questions if there is some other ground upon which the case can be decided (*Ashwater v. Tennessee Valley Authority* (1936) 297 U.S. 288, 347, Brandeis, concurring).

[20] Respondent argues, in conclusory fashion, any distinction between resident customers and non-resident customers is "without basis" (ROB 55). The basis for the distinction is the "trust relationship" which exists – as a matter of law – between a municipal utility provider and its non-resident customers. That, and the fact non-residents have no say in the rates to which they are subjected.

3. *Cerritos* Is Inapplicable

Article XIII, Section 32 applies to "taxes." Water fees are not taxes (Cal. Const. Art. XIIIC, §1(e)(2), (7); Cal. Const. Art. XIIIA, §3(b)(1)).[21] Appellant is unaware of a single case which applies Article XIII, Section 32 or the common law "pay first, litigate later" rule to anything other than a "tax."

Appellant explained in its opening brief why *Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450 was incorrectly decided (AOB 43-44). In addition, the issue of whether an assessment on groundwater assessment was a "tax" was not even contested by the taxpayer in *Cerritos*, further eroding any precedential value that case might have (*id.* at 1469 ["the city in this appeal does not contend the assessment is not a 'tax' within the meaning of section 32 of article XIII"]).

F. THIRD PARTY BENEFICIARY

Respondent claims the Class cannot be an intended beneficiary of an implied contract (ROB 25), but the Complaint makes no such allegation. The 3rd cause of action alleges the Class is the intended beneficiary of "written agreements entered into between Defendant and the approximately 60 non-resident property owners within the LWS who receive some quantity of 'free water'" (AA023, ¶104). The cause of action alleges Respondent improperly transferred its obligation to subsidize the cost of the "free water" onto the Class members (AA023, ¶127). Respondent's

[21] Respondent raises the *non-sequitur* that water rates exceeding of the cost of service constitutes a tax (ROB 54-55, and fn.20). Here, the Complaint does not allege the water rates charged are in excess of the cost of service. Indeed, if the current rates were in excess of the cost of service, the rates would be subject to their own separate challenge because they were not approved by a two-thirds vote (Cal. Const. Art. XIIIC, §2(d)).

assertion this claim "fails because it never identified the agreements" is simply wrong (AA007, ¶¶33-35, AA023, ¶¶104-107).

G. GOVERNMENT CODE §815

1. Action for Accounting

In a single conclusory sentence, Respondent claims the 12th cause of action is not based on statute, and that Appellant failed to identify the "statute or regulation from which liability arises" (ROB 58). Not true.

The 12th cause of action (for an accounting of the Surcharge and Connection Fees levied upon the LWS customers) is based on Respondent's violation of §§11.48.181, 11.48.183 and 11.16.021 of the Code and §714 of the Charter. The Complaint alleges, in specific detail, the duties imposed by these provisions (AA018-020, 036, ¶¶70-79, 149, 181).

Respondent also claims the 12th cause of action is uncertain because Appellant "does not specify the period for which it seeks an accounting" (ROB 59; *but see*, AOB085, fn. 8). If so, leave to amend should be granted.[22]

2. Breach of Fiduciary Duty

Respondent demurred to the 5th cause of action based on Government Code §815 (AA042), but does not dispute the fiduciary duties of a trustee are prescribed by statute (Prob. Code §§16002-04).[23]

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[22] Respondent claims Appellant failed to request leave to amend at oral argument. Respondent knows this is not true. The June 11 transcript literally omitted 75% of what was said during oral argument. The undersigned spoke for nearly an hour yet the transcript of this argument is just 7 pages. It omits, amongst numerous other things, the undersigned's entire discussion of 5th, 6th, 7th, 8th, and 9th causes of action.

[23] *Inyo* and *Hansen* were decided over a decade *after* the enactment of Government Code §815. Even if §815 precludes a breach of fiduciary duty

Instead, for the first time, Respondent challenges the existence of a trust or fiduciary relationship between Respondent and the Class (ROB 59-61).

Respondent claims Proposition 218 displaces the trustee-beneficiary relationship recognized in *Durant*, *Inyo*, and *Hansen* between a municipal utility provider and its non-resident customers. Respondent cites no authority for this claim, nor is there anything in the text or legislative history of Proposition 218 suggesting any intent to abrogate these decisions.

Respondent's unsupported reasoning is flawed because it presupposes that rates are *per se* "reasonable" as long as they do not exceed the cost of service under Proposition 218 (ROB 60). The facts of this case belie that claim.

If a city constructs a municipal-sized water system for its own use, allows a few non-residents to connect to the system, and then dumps the astronomical cost of the entire system on the non-residents, the rates are not reasonable, even if the astronomical rates equal the astronomical costs.

Under Respondent's logic, nothing would stop it from placing this burden on a *single* customer (AOB 17, bullet point 1), if, for example, Respondent decided that just one person would be served with LWS water and then sent that person a $3 million water bill corresponding to the annual cost of service.

Nor do the non-residents have the benefit of Proposition 218's procedural protections to challenge the water rates. As discussed above, Respondent claims the right to (and does) lump in-city and non-resident

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claim, leave to amend should be granted to allege violations of Probate Code §§16002-04.

protest votes together (AA011, ¶53; AOB 37, fn. 16; ROB 38-39). Thus, even if all 819 Class members protested, their protest would fall well short of the approximately 20,000 protest votes needed. So, if, as in 1992, Respondent increases rates within the LWS and simultaneously decreases rates for city customers, Proposition 218 offers no protection to the Class (hence the rule under *Hansen, Inyo* and *Durant* that non-residents may sue to enjoin unreasonable rates).

This very case is why the trustee-beneficiary relationship (which, as a matter of law gives rise to fiduciary duties under Probate Code §§16002-04) exists, and why Proposition 218 does nothing to protect the non-voting, non-residents from the arbitrary and discriminatory actions of their municipal utility provider.

Finally, Respondent claims *Durant* and *Inyo* are distinguishable because in each, the municipality acquired the water system (as opposed to building it in the first instance) (ROB 60). Respondent fails to identify any meaningful basis for applying this distinction.

Moreover, the absence of factually identical precedents simply underscores that, as discussed above and in Appellant's opening brief (at 17), the level of discrimination at issue here is unprecedented. While the courts in *Durant*, *Inyo* or *Hansen* could not have foreseen this level of discrimination, the trust relationship created by those decisions – and the fiduciary obligations which naturally arise from it – still serves to protect the vulnerable Class members.

CONCLUSION

For the reasons set forth above, the trial court should be reversed and the case remanded.

Respectfully submitted,

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Dated: March 19, 2015 _____/s/_____

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CERTIFICATE OF WORD COUNT

I hereby certify this brief, exclusive of tables, consists of 13,978 words.

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