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3 Fresno, California 93721-3602

4 **BETTS & RUBIN, A Professional Corporation**
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7 James B. Betts (State Bar #110222)
Joseph D. Rubin (State Bar #149920)
8 Attorneys for Defendant City of Fresno
9

E-FILED
11/20/2018 4:32 PM
FRESNO COUNTY SUPERIOR COURT
By: J. Nelson, Deputy

10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF FRESNO

13 PINEDALE COUNTY WATER DISTRICT,)
14 a County Water District,)

15 Plaintiff)

16 v.)

17 CITY OF FRESNO, a Municipal)
18 Corporation, and DOES 1 through 5)
19 inclusive,)

20 Defendant)
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Case No. 18CECG02957

REQUEST FOR JUDICIAL NOTICE
IN OPPOSITION TO MOTION TO
TRANSFER

Date: December 5, 2018
Time: 3:30 p.m.
Courtroom: 502

1 Pursuant to Evidence Code Sections 450, 451, 452 and 453, the City of Fresno
2 requests judicial notice of the following court records:

- 3 1. Petition for Writ of Mandate to Compel Respondent to Pay Judgement
4 (Fresno County Superior Court Case No. 17CECG02055; Kings County
5 Superior Court Case No. 18C-0051), attached hereto as Exhibit A;
- 6 2. Second Amended Judgment (Madera County Superior Court Case No.
7 MCV043413) attached hereto as Exhibit B;
- 8 3. Pinedale's Cross-Complaint for Rescission on Contract, Declaratory Relief
9 (Kings County Superior Court Case No. 18C-0051) attached hereto as
10 Exhibit C;
- 11 4. Order to Sustain Demurrer (Kings County Superior Court Case No. 18C-
12 0051) attached hereto as Exhibit D;
- 13 5. Order Denying Motion to Transfer, Consolidate and Stay Proceedings
14 (Kings County Superior Court Case No. 18C-0051) attached hereto as
15 Exhibit E.

16
17 Dated: November 20, 2018

BETTS & RUBIN

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19 By 
20 James B. Betts
21 Attorneys for Defendant City of Fresno
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PROOF OF SERVICE

I am a citizen of the United States of America, a resident of Fresno County, California, over the age of 18 years and not a party to the within-entitled cause or matter. My business address is 907 Santa Fe Avenue, Suite. 201, Fresno, CA. On November 20, 2018, I served **REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO MOTION TO TRANSFER** on the parties in this action by placing an original/a true copy in an envelope and delivering it as follows:

____ (By Overnight Courier) I caused such envelope with postage fully prepaid, to be sent by _____.

____ (By Mail) I deposited the envelope, with postage fully prepaid, with the United States Postal Service at Fresno, Fresno County, California.

X (By Mail) I placed the envelope for collection and processing for mailing following this business' ordinary practice with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

X (By Electronic Mail) I caused each document to be sent electronically to the address below.

Each envelope was addressed as follows:

Neal E. Costanzo Esq. Costanzo & Associates A Professional Corporation 575 E. Locust Avenue, Suite 115 Fresno, CA 93720 Email: ncostanzo@costanzolaw.com	Attorneys for: PINEDALE COUNTY WATER DISTRICT
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____ (By E-Mail) I caused each document to be sent by e-mail.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 20, 2018, at Fresno, California.


Adriana Garcia

EXHIBIT A

1 **BETTS & RUBIN, A Professional Corporation**
2 Attorneys at Law
3 907 Santa Fe Avenue, Ste. 201
4 Fresno, California 93721
5 Telephone: (559) 438-8500
6 Facsimile: (559) 438-6959

E-FILED
06/16/2017

FRESNO COUNTY SUPERIOR COURT
By: M. Sanchez, Deputy

James B. Betts (State Bar #110222)
Joseph D. Rubin (State Bar #149920)

Attorneys for Petitioner CITY OF FRESNO

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF FRESNO

11 CITY OF FRESNO,

12 Petitioner,

13 v.

14 PINEDALE COUNTY WATER DISTRICT;
15 and DOES 1 through 15, inclusive,

16 Respondent.

Case No. 17CECG02055

PETITION FOR WRIT OF
MANDATE TO COMPEL
RESPONDENT TO PAY
JUDGMENT
[Government Code §970.2]

18
19 Petitioner, City of Fresno, alleges as follows:

20 1. Respondent Pinedale County Water District is a local public entity, as set
21 forth in Government Code §970(c), with its principal place of business located in Fresno
22 County, California.

23 2. On or about June 3, 2008, Petitioner initiated the underlying action against
24 Respondent in a matter styled City of Fresno v Pinedale County Water District, et al.,
25 Fresno County Superior Court Case No. 08CECG01899. That action was subsequently
26 transferred to the Madera County Superior Court pursuant to Code of Civil Procedure
27 §394, and assigned Madera County Superior Court Case No. MCV043413.

28 3. The underlying action arose out of Respondent's breach of a written

1 agreement commonly referred to as the "2007 Agreement", a copy of which is attached
2 hereto as Exhibit 1.

3 4. The underlying action proceeded to trial on April 25, 2011, in Department
4 5 of the Madera County Superior Court, the Hon. James E. Oakley, presiding.

5 5. On or about October 4, 2011, the Madera County Superior Court issued
6 Judgment in the underlying action in favor of Petitioner and against Respondent, a copy
7 of which (including the Court's Statement of Decision) is attached hereto as Exhibit 2.

8 6. Following the rendition of Judgment in Petitioner's favor, Respondent
9 appealed the Court's Judgment to the Fifth District Court of Appeal, and subsequently
10 appealed the Court's post-trial award of Petitioner's attorney's fees and costs.
11 Respondent's appeals were unsuccessful, and the Trial Court's Judgment and award of
12 attorney's fees and costs were affirmed on appeal. (See Appellate Opinions attached
13 as Exhibits 3 and 4, respectively.)

14 7. Pursuant to Petitioner's Judgment, and the Court's ensuing orders, the
15 following sums are due and owing to Petitioner by Respondent:

- 16 • \$86,658.53 in fees and costs (See Amended Judgment attached
17 hereto as Exhibit 5);
- 18 • \$938.91 for costs on appeal, which were not taxed by Respondent
19 (See Memorandum of Costs attached hereto as Exhibit 6); and
- 20 • \$39,918.00 in appellate attorney's fees as ordered by this Court on
21 January 31, 2014. (See Notice of Entry of Order on Motion to Fix
22 Attorney's Fees, attached hereto as Exhibit 7.)

23 8. The amount owed by Respondent to Petitioner totals \$127,515.84, plus
24 interest thereon.

25 9. There are no conditions precedent to Respondent's duty to satisfy
26 Petitioner's Judgment, which remains owing and unpaid.

27 10. On or about February 11, 2014, Petitioner demanded that Respondent
28 pay said Judgment, but Respondent has failed and refused, and continues to fail and

1 refuse, to do so.

2 11. Under the provisions of §970.4 of the Government Code, Respondent is
3 expressly required to pay Petitioner's Judgment with interest thereon. It is apparent
4 that Respondent does not intend to satisfy its lawful obligations to pay Petitioner's
5 Judgment, and Petitioner has no plain, speedy and/or adequate remedy in the ordinary
6 course of law, or any remedy other than this proceeding, which is expressly authorized
7 by the provisions of §970.2 of the Government Code.

8 WHEREFORE, Petitioner prays as follows:

- 9 1. That this Court issue its peremptory writ of mandate compelling
10 Respondent to pay Petitioner's Judgment with interest;
11 2. For an award of attorney's fees incurred in the prosecution of this
12 action, as provided in the 2007 Agreement.
13 3. For costs of suit; and
14 4. For such other and further relief as this Court may deem just and
15 appropriate.

16
17 Dated: June 16, 2017

BETTS & RUBIN

18
19 By James B. Betts
20 James B. Betts
21 Attorneys for Petitioner CITY OF FRESNO
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EXHIBIT 1

**AGREEMENT
TRANSPORTATION AND TREATMENT OF
PINEDALE COUNTY WATER DISTRICT SEWAGE**

THIS AGREEMENT ("Agreement") is made and entered into effective the 1st day of January, 2007 ("Effective Date"), by and between the City of Fresno ("City"), a California municipal corporation, and the Pinedale County Water District ("District"), a public entity created by and under the laws of the State of California.

RECITALS

- A. City was designated by the County of Fresno as the Chief Sewering Agent in 1966. City owns and operates a treatment works ("POTW") used for transportation and treatment of wastewater and sewage. Between 1974 and 1977, City expanded the POTW by the construction of the West Fresno-Herndon Interceptor ("Interceptor") and enlarged its regional wastewater treatment facilities ("RWTF").
- B. District and City entered into an agreement for the transportation and treatment of District sewage, dated June 3, 1976 ("1976 Contract"), following District's determination that disposal of its sewage through the Interceptor and RWTF as contemplated by the 1976 Contract was a more fiscally sound solution to upgrading its existing treatment facilities.
- C. After execution of the 1976 Contract, District was connected to City's POTW via the Interceptor. City has been receiving, transporting, treating and disposing of all sewage received from District pursuant to the terms and conditions of the 1976 Contract.
- D. In the 1990s, City constructed capital improvements to the RWTF to restore and expand its capacity. The costs of restoration were subsequently incorporated into the sewer service charge commencing in 1993, and came to be identified as the "capital component" of the sewer service charge in Article 5, Chapter 9 of the Fresno Municipal Code ("Ordinance") and in the City of Fresno Master Fee Schedule ("MFS") in 1994.
- E. A dispute arose between the parties regarding the amount and sum of monies, if any, District was required to collect and remit to City with regard to the capital component under the 1976 Contract. The dispute eventually resulted in the filing of an action, *City of Fresno v. Pinedale County Water District*, Fresno County Superior Court Case No. 05 CE CG 00782 AMS, filed in the Fresno County Superior Court on March 11, 2005 (hereinafter referred to as the "Action").
- F. The parties now desire to rescind the 1976 Contract and to settle the Action and all claims between them, and to enter into a new agreement for the transportation and treatment of District sewage on the terms and conditions as contained in this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing and of the covenants, conditions, and promises hereinafter contained to be kept and performed by the respective parties, it is mutually agreed as follows:

1. Ownership of District's System. District shall retain ownership of its existing and future expanded sewage collection system. The respective boundaries of District's existing and future expanded sewage collection system are shown on attached **Exhibit A**. In the event any property within such boundaries are, or may be, annexed to City, or if property outside District's boundaries are annexed to District, the parties agree to negotiate an appropriate amendment to this Agreement expressly providing for the ownership, maintenance and control of trunks, mains, facilities, and for sewer charges and the apportionment thereof to be applied to such property. The terms of this Agreement shall apply to all such properties until so amended.
2. Maintenance of District's System. District shall maintain and operate its sewer collection system and provide for billing and collection of sewer charges.
3. Treatment of District Sewage. City shall receive, transport, treat and dispose of all sewage from District's sewage collection system.
4. Collection and Payment of Sewer Service Charges. The parties understand and agree that the Ordinance and any documents incorporated therein by reference including, but not limited to, the MFS (hereinafter, the Ordinance and such incorporated documents are collectively referred to as "Ordinance and Regulations"), establish rates, charges, costs and fees relating to the POTW and such rates, charges, costs and fees (also referred to in this Agreement, collectively, as "sewer charges") may change or be amended or modified by City after the Effective Date of this Agreement. To the extent that the Ordinance and Regulations establish the amount of such rates, charges, costs or fees identified in this Agreement, the Ordinance and Regulations are incorporated into this Agreement. Such current rates, charges, costs and fees (hereinafter, collectively referred to as "Current Rates" and individually as the "Current Rate") are attached as **Exhibit B** (page 116 and pages 127 through 133 of the MFS currently in effect). District's duties and obligations regarding such Ordinance and Regulations are limited to that contained in this Agreement. For purposes of this Agreement, the parties understand and agree that any City changes, amendments or modifications to the Ordinance and Regulations shall only operate to increase or decrease the amount of the rates, charges, costs and fees that District is required to bill and make reasonable efforts to collect from its customers for sewer charges; and, at the time such increases or decreases go into effect, they shall be deemed incorporated into this Agreement and to supersede **Exhibit B** to such extent without attachment hereto. City shall give District 60 calendar days' written notice prior to the effective date of any such increase or decrease. District shall bill and collect from the customer sewer charges for each premise served by District's sewage collection system at the rates set forth in the Ordinance and Regulations and remit payment to City as follows:
 - i. **Sewer Charges.** District shall adopt the same rates for sewer charges as set forth in the Ordinance and Regulations including, but not limited to, sewer service charges, "Oversize Sewer Charges" and others identified in this Agreement.

- ii. **Fee Sharing of O&M and Oversize Sewer Charge.** District shall pay City 70% of the operations and maintenance ("O&M") component of City's sewer service charge collected by District from its customers and 70% of the Oversize Sewer Charge collected by District from its customers, for such charges as are required to be billed by District at the Current Rate. In the event that City increases the O&M component of the sewer service charge or the Oversize Sewer Charge (hereinafter referred to as "Rate Increase") above the respective Current Rate, District shall pay City 70% of the Current Rate plus 87% of the difference between the Current Rate and the Rate Increase collected by District from its customers, for such charges as are required to be billed by District at the rate resulting from the Rate Increase. (Example: The Current Rate for the O&M component of the sewer service charge for residential users is \$11.99. If City adopts a Rate Increase for this O&M component, District shall continue to be entitled to retain 30% of \$11.99, and shall remit the remaining 70% to City as to that Current Rate portion of the O&M component of the sewer service charge. With regard to the Rate Increase, District shall be entitled to retain 13% of any amount above \$11.99, and shall remit 87% on any amount above \$11.99 to City.)
- iii. **Capital Component.** Notwithstanding any other provision in this Agreement and commencing on the Effective Date, District shall pay to City 100% of the capital component of the sewer service charge collected by District from its customers.
- iv. **Pretreatment Surcharge.** Notwithstanding any other provision in this Agreement, District shall pay to City 100% of the pretreatment surcharges collected by District from its customers.
- v. **Costs for Sampling and Testing of Industrial High Strength Users.** Notwithstanding any other provision in this Agreement, District shall pay to City all costs collected by District from its customers associated with sampling and testing by City of industrial high strength users.
- vi. **"District Only" Sewer Charges.** Notwithstanding paragraph (i) of this Section 4, nothing in this Agreement shall prevent or preclude District from adopting additional "District only" sewer charges over and above the rates, charges, costs or fees established by City. Notwithstanding any other provision in this Agreement, District shall be entitled to retain 100% of the difference between the higher amount of the "District only" sewer charge and the respective sewer charge established by City. District shall distinguish the amount of "District only" sewer charges billed the customer from the amount of City's sewer charges billed the customer as part of its accounting process and records when, and for the sole purpose of, submitting payments to City. District is not required to distinguish such amounts when billing its customers; provided, however, District does not represent such total amounts billed as those established by City.
- vii. **Payment Due City.** District shall bill each premise served by District's sewer collection system at least every two consecutive calendar months.

District shall pay City within 30 calendar days of District's receipt of monies from the respective premises served by District's sewage collection system. District shall be responsible for making reasonable efforts to collect on delinquent accounts, but no monies shall be due and payable to City until 30 days after District's receipt of the monies paid on the respective delinquent account.

5. Payment of Sewer Charges Required to be Collected Prior to Effective Date. District shall remain responsible for paying to City 70% of the O&M component of City's sewer service charges and 30% of the Oversize Sewer Charge (referred to in the 1976 Contract as the "oversize charge") as required under the 1976 Contract to be collected from each premise served by the District's sewage collection system at the then applicable rates set forth in the respective MFS prior to the Effective Date. District shall pay City within 30 calendar days of the Effective Date for all such monies received by District before the Effective Date. District shall pay City within 30 calendar days of receipt of such monies for those monies received by District on or after the Effective Date.

6. Interest on Delinquent Payments. All payments due under this Agreement shall be paid by District to City at the following address:

City of Fresno
Department of Finance Enterprise Accounting
2600 Fresno Street
Fresno, California 93721-3621

If District fails to make timely payments to City as required under this Agreement, District shall also pay City interest on the unpaid amount which shall accrue at City's pooled cash rate as of July 1 of each calendar year, plus an additional 2%, not to exceed the maximum interest rate permitted by law.

7. Connection and Discharge Prohibited. District shall not allow any person to, and shall not itself, connect into the City sewer system any storm drains or roof drains. Drainage from roofs, courts or other areas shall not be allowed by District to pass into the City sewer system. District shall adopt and enforce a regulation prohibiting discharges as City imposes on discharges within the City of Fresno pursuant to Section 9-511 (entitled "Discharge Prohibitions") of the Ordinance, as said Ordinance section now reads or as it may hereafter be amended. In the event District fails to adopt and enforce such regulation, the ordinances, rules and regulations of City applicable to discharges may be enforced by City against all persons discharging into District's system, including all provisions thereof relating to disconnection from said system for violations thereof.

8. Cooperation and Inspection. District and City shall at all times cooperate and take such action as required to carry out the terms and spirit of this Agreement. District and City shall each adopt and keep in force, to the extent allowed by law, ordinances and regulations allowing employees of the respective parties to this agreement to enter upon and inspect lands and premises connected to their respective sewer systems. The authorized employees and representatives of each party shall, upon request, accompany and assist the other in making inspections of the respective sewer systems, connections thereto, and discharges therein, and make full disclosure to

the other of all available information necessary to determine if there is compliance with the provisions of this Agreement.

9. Meter Readings. Commencing January 1, 2007, District shall provide City with meter readings for commercial and industrial users, and for residential users in the District when meters are required as a matter of law. Such readings shall be provided (in electronic form, if available) every two consecutive calendar months after the respective meter is in use.

10. Repair/Replace Meters. District shall require its commercial and industrial users (to which it provides water service) to repair or replace damaged meters. District shall also require such users to repair or replace damaged meters at the request of City.

11. Satisfaction of Claims between the Parties. In full and final settlement and satisfaction of the Action, District agrees to pay City the sum of \$150,000 on or before January 1, 2007 and enter into this Agreement. Upon the execution and approval of this Agreement by the last party, City shall dismiss the Action with prejudice. It is expressly understood by the parties, by reason of the consideration hereinabove mentioned, that the parties admit absolutely no liability of any sort and have made no representations as to any liabilities or obligations and have made no agreements or promises to do or omit to do any act or thing not herein set forth.

12. Release and 1542 Waiver. Except to the extent otherwise set forth herein, the parties, for themselves and their successors, legal representatives and assigns, jointly and severally, hereby waive, release, give up and discharge any and all claims arising out of the 1976 Contract or related to the dispute which is the subject matter hereof, now and forever, including all claims, demands, causes of action and damages arising therefrom. The parties hereby waive the benefits of the provisions of Section 1542 of the California Civil Code which reads as follows: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR." The parties understand and acknowledge the significance of the consequences of waiving Section 1542 of the California Civil Code, having discussed said waiver with their respective attorneys. Each party nevertheless agrees that the releases contained herein shall not be subject to termination or rescission.

13. 1976 Contract Extinguished. City and District agree to extinguish the 1976 Contract and relinquish any claim they had or may have had under that 1976 Contract. The 1976 Contract shall terminate upon execution of this Agreement by both parties hereto. Furthermore, the parties herein acknowledge and agree that this Agreement constitutes a settlement of all disputes referenced herein between the parties pertaining to the 1976 Contract.

14. Fees Associated with Litigation. With regard to the Action and the negotiation and execution of this Agreement in settlement of such Action, it is agreed that each party shall bear its respective costs and attorneys' fees. The parties agree to equally divide the cost of the mediator incurred during this litigation.

15. Termination, Remedies and Perpetual Nature. This Agreement shall be perpetual and may not be cancelled or terminated except by mutual written consent of the parties hereto. Upon any default of a party hereto which has not been cured within 30 calendar days of written notice from the other party, such other party may (i) exercise any right, remedy (in contract, law or equity), or privilege which may be available to it under applicable laws of the State of California or any other applicable law; (ii) proceed by appropriate court action to enforce the terms of the Agreement; and/or (iii) recover all direct, indirect, consequential, economic and incidental damages for the breach of the Agreement.

16. Indemnification.

(a) District shall indemnify, hold harmless and defend City and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by City, District or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly from the negligent or intentional acts or omissions of District or any of its officers, officials, employees, agents or volunteers in the performance of this Agreement; provided nothing herein shall constitute a waiver by District of governmental immunities including California Government Code Section 810 et seq.

(b) City shall indemnify, hold harmless and defend District and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by City, District or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly from the negligent or intentional acts or omissions of City or any of its officers, officials, employees, agents or volunteers in the performance of this Agreement; provided nothing herein shall constitute a waiver by City of governmental immunities including California Government Code Section 810 et seq.

(c) In the event of concurrent negligence on the part of District or any of its officers, officials, employees, agents or volunteers, and City or any of its officers, officials, employees, agents or volunteers, the liability for any and all such claims, demands and actions in law or equity for such losses, fines, penalties, forfeitures, costs and damages shall be apportioned under the State of California's theory of comparative negligence as presently established or as may be modified hereafter.

(d) Notwithstanding the preceding paragraphs (b) and (c) of this section, City shall not be liable to District for damage or loss caused by any failure of the City sewer system to receive sewage from the District sewer system, whenever such failure is caused by, or results from, any natural disaster, act of God, riot or insurrection, act of war or sabotage, fire, flood, epidemic, quarantine restriction, or other condition which is beyond the control and without the fault of City in the exercise of good and efficient management and maintenance of the City sewer system.

(e) This section shall survive expiration or termination of this Agreement.

17. Insurance. It is understood and agreed that District and City maintain insurance policies or self-insurance programs to fund their respective liabilities. The parties agree that such respective programs or policy coverage for Workers' Compensation shall contain a waiver of subrogation as to the other party and each of its officers, officials, agents, employees and volunteers. Evidence of Insurance, Certificates of Insurance or other similar documentation shall not be required of either party under this Agreement.

18. Attorney's Fees. If either party is required to commence any proceeding or legal action to enforce or interpret any term, covenant or condition of this Agreement, the prevailing party in such proceeding or action shall be entitled to recover from the other party its reasonable attorney's fees and legal expenses.

19. Maintenance of Records and Audit. District shall maintain all records pertaining to their sewage collection system and obligations under this Agreement including, without limitation, the identification of all District customers and respective premises, and all charges and receipts for sewer service. Such records shall be available to City or its authorized representatives, within a reasonable time but not to exceed 10 calendar days' of City's request, during regular business hours throughout the life of this Agreement and for a period of four years after termination or, if longer, for any period required by law. In addition, all books, documents, papers, and records of District pertaining thereto shall be available to City for the purpose of making audits, examinations, excerpts, and transcriptions for the same period of time. District agrees to make available to City a copy of all independent audits and to allow City to conduct audits of the fiscal records of District pertaining to this Agreement as City may determine necessary. City shall have a reciprocal obligation to with respect to City's sewer revenue program and related reports. This section shall survive expiration or termination of this Agreement.

20. Notices. Any notice required or intended to be given to either party under the terms of this Agreement shall be in writing and shall be deemed to be duly given if delivered personally, transmitted by facsimile followed by telephone confirmation of receipt, or sent by United States registered or certified mail, with postage prepaid, return receipt requested, addressed to the party to which notice is to be given at the party's address set forth on the signature page of this Agreement or at such other address as the parties may from time to time designate by written notice. Notices served by United States mail in the manner above described shall be deemed sufficiently served or given at the time of the mailing thereof.

21. Binding. Once this Agreement is signed by all parties, it shall be binding upon, and shall inure to the benefit of, all parties, and each parties' respective heirs, successors, assigns, transferees, agents, servants, employees and representatives.

22. Exhibits. Each exhibit and attachment referenced in this Agreement is, by the reference, incorporated into and made a part of this Agreement.

23. Compliance With Law. The parties shall at all times comply with all applicable laws of the United States, the State of California and City, and with all

applicable regulations promulgated by federal, state, regional, or local administrative and regulatory agencies, now in force and as they may be enacted, issued, or amended during the term of this Agreement.

24. Waiver. The waiver by either party of a breach by the other of any provision of this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this Agreement. No provisions of this Agreement may be waived unless in writing and signed by all parties to this Agreement. Waiver of any one provision herein shall not be deemed to be a waiver of any other provision herein.

25. Governing Law and Venue. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of California, excluding, however, any conflict of laws rule which would apply the law of another jurisdiction. Venue for purposes of the filing of any action regarding the enforcement or interpretation of this Agreement and any rights and duties hereunder shall be Fresno County, California.

26. Headings. The section headings in this Agreement are for convenience and reference only and shall not be construed or held in any way to explain, modify or add to the interpretation or meaning of the provisions of this Agreement.

27. Severability. The provisions of this Agreement are severable. The invalidity, or unenforceability of any one provision in this Agreement shall not affect the other provisions.

28. Interpretation. The parties acknowledge that this Agreement in its final form is the result of the combined efforts of the parties and that, should any provision of this Agreement be found to be ambiguous in any way, such ambiguity shall not be resolved by construing this Agreement in favor of or against either party, but rather by construing the terms in accordance with their generally accepted meaning.

29. Precedence of Documents. In the event of any conflict between the body of this Agreement and any Exhibit or Attachment hereto, the terms and conditions of the body of this Agreement shall control and take precedence over the terms and conditions expressed within the Exhibit or Attachment. Furthermore, any terms or conditions contained within any Exhibit or Attachment hereto which purport to modify the allocation of risk between the parties, provided for within the body of this Agreement, shall be null and void.

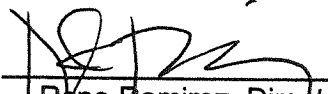
30. Cumulative Remedies. No remedy or election hereunder shall be deemed exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity.

31. No Third Party Beneficiaries. The rights, interests, duties and obligations defined within this Agreement are intended for the specific parties hereto as identified in the preamble of this Agreement. Notwithstanding anything stated to the contrary in this Agreement, it is not intended that any rights or interests in this Agreement benefit or flow to the interest of any third parties.

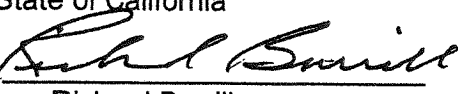
32. Extent of Agreement. Each party acknowledges that they have read and fully understand the contents of this Agreement. This Agreement represents the entire and integrated agreement between the parties with respect to the subject matter hereof and supersedes all prior negotiations, representations or agreements, either written or oral, including, but not limited to, the Contract. This Agreement may be modified only by written instrument duly authorized and executed by both City and District.

IN WITNESS WHEREOF, the parties have executed this Agreement at Fresno, California, the day and year first above written.

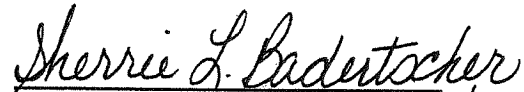
City of Fresno,
a California municipal corporation

By: 
Rene Ramirez, Director
Department of Public Utilities

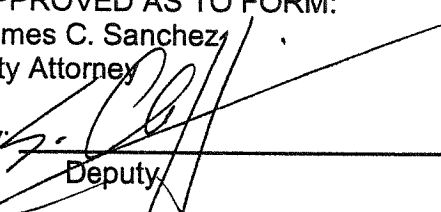
Pinedale County Water District,
a public entity created by and under the laws of
the State of California

By: 
Richard Burrill
President

ATTEST:
Rebecca E. Klisch
City Clerk

By: 
Deputy 2/14/07

APPROVED AS TO FORM:
James C. Sanchez,
City Attorney

By: 
Deputy

Addresses:
City:

City of Fresno
Department of Public Utilities
Attention: John M. Watkins,
Management Analyst
2600 Fresno Street
Fresno, CA 93721
Phone: (559) 621-8612
FAX: (559) 498-1304

APPROVED AS TO LEGAL FORM:
Hargrove & Costanzo

By: 
Neal E. Costanzo, Esq.
Attorney for Pinedale County
Water District

District:

Pinedale County Water District
Attention: General Manager
480 West Birch St.
Pinedale, California 93650
Phone: (559) 439-2362
FAX: (559) 439-1309

Attachments:

1. Exhibit A – Boundaries of District's Existing and Future Expanded Sewage Collection System.
2. Exhibit B – Current Rates (page 116 and pages 127 through 133 of the MFS effective 07/01/06 - MFS Amendment #440 (June 2006)).

NAA:eb [39535v.4eb/naa] 12/21/06

CITY OF FRESNO MASTER FEE SCHEDULE

PUBLIC UTILITIES DEPARTMENT

COMMUNITY SANITATION

<u>Fee Description & Unit/Time</u>	<u>Current</u>	<u>Amnd</u>
Cathode Ray Tube Disposal		In-Lieu
Computer Monitors	29.97	06//05
Televisions under 24"	34.97	
Televisions over 25"	39.96	
Console televisions	49.95	
Illegal Pile - trash and debris		435
Total labor and equip first hour minimum	149.85	
Total labor and equip after first hour	186.11	
Refrigerator Disposal	19.98	

CONNECTION CHARGES -- SEWER (FMC 9-503)

<u>Fee Description & Unit/Time</u>	<u>Current</u>	<u>Amnd</u>
Deferment of Payment (FMC 9-503.1) applicable to existing single-family residences anywhere in the City's service area [and commercial or industrial development in the Enterprise Zone]:		407
Application		
Interest on unpaid balance / per annum, maximum 15-year term [1 2% above the City's pooled cash rate or maximum amount authorized by law, whichever is less as determined pursuant to FMC Section 9-503.1 (c)(1)]	15.00 [Variable 1]	
House Branch Sewer Charge		
House Branch Connection / Contract cost plus	100%	
Inspection/administration / Contract cost	10.00 +10%	
Interest charge (5 year limit) / Total	7%	
Lateral Sewer Charge		
Maximum lot depth 100 feet / per square foot	0.10	
Major Facilities Sewer Charge Unit	-0-	
Oversize Charge * Maximum lot depth 100 feet / per square foot	0.05	
* For parcels in the UGM area, oversize charges are deposited into separate UGM oversize charge service area accounts.		
Copper Avenue Sewer Lift Station Benefit Service Area Fee per Equivalent Dwelling Unit (EDU)	650.00	410

CITY OF FRESNO MASTER FEE SCHEDULE

PUBLIC UTILITIES DEPARTMENT

FACILITY CHARGES -- SEWER (FMC 9-505.1)

<u>Fee Description & Unit/Time</u>	<u>Current</u>	<u>Amnd</u>
--	----------------	-------------

Trunk Sewer Charge (Residential Users)

Trunk sewer service area maps are maintained by the Director of the Public Works Department.

Fee not applicable for development existing as of 10/01/92 in the Fowler Service Area per map (attached as Exhibit A).

Cornelia Service Area / Living unit	419.00	
Fowler Service Area / Living unit	344.00	
Grantland Service Area / Living unit	419.00	
Herndon Service Area / Living unit	496.00	

UGM Trunk Sewer Fee

See Development Dept - UGM Fees

Wastewater Facilities Sewer Charge (Residential Users)

- for maps vested between October 25, 1992, through December 30, 1995 (Phase 1a) / per unit or LUE	1910.00	
- for maps vested after December 30, 1995 (Phase 1b) / per unit or LUE (Reso 95-278, adopted 10/31/95)	2119.00	

Wastewater Facilities Sewer Charge (Commercial & Industrial Users)

Formula:

Sewer Flow charge = (W * Sewer flow rate)

BOD charge = (W + 1,000,000) * X * BOD rate)

TSS charge = (W + 1,000,000) * Y * TSS rate)

W = Sewer Flow in gallons/day

X = BOD concentration in mg/L * 8.345

Y = TSS concentration in mg/L * 8.345

Sewer Flow rate / gallon per day

BOD rate / per pound

TSS rate / per pound

	3.40	
	760.88	
	626.35	

Trunk Sewer Charge (Commercial and Industrial Users)

Grantland/Cornelia Service Area / gallon per day	1.012	
Fowler Service Area / gallon per day	1.233	
Herndon Service Area / gallon per day	1.460	

CITY OF FRESNO MASTER FEE SCHEDULE

PUBLIC UTILITIES DEPARTMENT

SEWER REIMBURSEMENTS/CREDITS -- SEWER MAINS (FMC 9-503-2)

Fee Description & Unit/Time	Current	Amnd
Sewer oversize credit for private installation when required to be constructed to a size larger than 8 inches (per linear foot):		
10-inch diameter	2.50	
12-inch diameter	4.50	
15-inch diameter	8.00	
18-inch diameter	13.00	
21-inch diameter	19.00	
24-inch diameter	26.00	
27-inch diameter	31.00	
UGM area, except as provided in FMC 9-503.2(c) - maximum	17,000.00	
Extra depth credit for oversize sewer installations (per linear foot):		
Depth over 8 to 12 feet	1.00	
Depth over 12 to 16 feet	4.00	
Depth over 16 to 20 feet	9.00	
Depth over 20 feet	15.00	

CITY OF FRESNO MASTER FEE SCHEDULE

PUBLIC UTILITIES DEPARTMENT

WASTEWATER RATES

Each Wastewater rate below consists of two components, Capital and Operation and Maintenance (O&M). This breakdown is listed below each rate for your information.

Fee Description & Unit/Time	Current	Amnd
-----------------------------	---------	------

Sewer Service Charges, Industrial Users (as defined in Section 9-501.1 of the FMC)

High Industrial: Sewage effluent volume of 25,000 gallons in a single day, or Biochemical Oxygen Demand (BOD) greater than 265 mg/liter (mg/l), or Total Suspended Solids (TSS) greater than 300 (mg/l).

Total fee amount is based on three components:

Flow (in hundred cubic feet (HCF) or gallons), pounds of BOD, and pounds of TSS.

Potable water, metered

Per HCF	.293	
Capital	.057	
O&M	.236	
+ BOD / pound	.151	
Capital	.028	
O&M	.123	
+ TSS / pound	.172	
Capital	.032	
O&M	.140	

or

Per 1,000 gallons*	.392	
Capital	.077	
O&M	.315	
+BOD / pound	.151	
Capital	.028	
O&M	.123	
+ TSS / pound	.172	
Capital	.032	
O&M	.140	

CITY OF FRESNO MASTER FEE SCHEDULE

PUBLIC UTILITIES DEPARTMENT

WASTEWATER RATES

Fee Description & Unit/Time	Current	Amnd
-----------------------------	---------	------

High Industrial (continued)

Sewage effluent, metered

Per HCF

Capital .063

O&M .260

+ BOD / pound

Capital .028

O&M .123

+ TSS / pound

Capital .032

O&M .140

or

Per 1,000 gallons¹

Capital .083

O&M .350

+ BOD / pound

Capital .028

O&M .123

+ TSS / pound

Capital .032

O&M .140

Pounds of BOD or TSS can be calculated using the following formulas:

*Pounds BOD = (W ÷ 1,000,000) * 8.345 * BOD concentration in mg/l)*

*Pounds TSS = (W ÷ 1,000,000) * 8.345 * TSS concentration in mg/l)*

Low Industrial:

Potable water, metered

HCF

Capital .121

O&M .501

1,000 Gallons¹

Capital .161

O&M .670

¹ There are 748 gallons in a hundred cubic feet (HCF). Rates per 1,000 gallons are approximate as they have been rounded to the 3rd decimal place.

CITY OF FRESNO MASTER FEE SCHEDULE

PUBLIC UTILITIES DEPARTMENT

WASTEWATER RATES

Fee Description & Unit/Time		Current	Amnd
Low Industrial (continued)			
Sewage effluent, metered			
HCF		.684	
Capital	.131		
O&M	.553		
1,000 Gallons ¹		.914	
Capital	.177		
O&M	.737		
Minimum Charge			
Month		14.86	
Capital	2.874		
O&M	11.991		
Sewer Service Charges, Commercial Users - classification determined by concentration (mg/l) of Biochemical Oxygen Demand (BOD) or Total Suspended Solids (TSS) present in flow.			
High: BOD or TSS greater than or equal to 501 mg.			
Portable water, metered			
HCF		2.029	
Capital	.392		
O&M	1.637		
1,000 Gallons ¹		2.712	
Capital	.525		
O&M	2.187		
or			
Sewage effluent, metered			
HCF		2.231	
Capital	.432		
O&M	1.799		
1,000 Gallons ¹		2.983	
Capital	.577		
O&M	2.406		
Minimum Charge			
Month		14.86	
Capital	2.874		
O&M	11.991		

¹ There are 748 gallons in a hundred cubic feet (HCF). Rates per 1,000 gallons are approximate as they have been rounded to the 3rd decimal place.

CITY OF FRESNO MASTER FEE SCHEDULE

PUBLIC UTILITIES DEPARTMENT

WASTEWATER RATES

Fee Description & Unit/Time	Current	Amnd
Medium: BOD or TSS without a range of 201-500 mg/l		
Potable water, metered		
HCF	1.035	
Capital	.200	
O&M	.835	
1,000 Gallons ¹	1.385	
Capital	.268	
O&M	1.117	
or		
Sewage effluent, metered		
HCF	1.139	
Capital	.220	
O&M	.919	
1,000 Gallons	1.523	
Capital	.294	
O&M	1.229	
Minimum charge		
Month	14.86	
Capital	2.874	
O&M	11.991	
Low: BOD or TSS within the range of 0-200 mg/l		
Potable water, metered		
HCF	.622	
Capital	.121	
O&M	.501	
1,000 Gallons ¹	.831	
Capital	.161	
O&M	.670	
or		
Sewage effluent, metered		
HCF	.684	
Capital	.132	
O&M	.552	
1,000 Gallons ¹	.914	
Capital	.177	
O&M	.737	

¹ There are 748 gallons in a hundred cubic feet (HCF). Rates per 1,000 gallons are approximate as they have been rounded to the 3rd decimal place.

CITY OF FRESNO MASTER FEE SCHEDULE

PUBLIC UTILITIES DEPARTMENT

WASTEWATER RATES

Fee Description & Unit/Time	Current	Amnd
-----------------------------	---------	------

Minimum Charge		14.86
Month		
Capital	2.874	
O&M	11.991	

Sewer Service Charges, Residential Users

Single Family:

Unit per month		14.86
Capital	2.874	
O&M	11.991	

Senior Citizen (62 years or older) meeting all the conditions listed below / per month:		13.38
---	--	-------

1. Single-family residents only;
2. Service must be in name of senior citizen;
3. Occupants of residence must be senior citizen or dependants of senior citizen (not to exceed three occupants per residence);
4. Benefitting senior citizen must notify the City when they no longer qualify.

Multi-family:

First unit / per month		14.86
Capital	2.874	
O&M	11.991	
Each Additional unit / per month		9.99
Capital	1.928	
O&M	8.063	

Sewer Service Charges, Schools (on the basis of average daily attendance):

Kindergarten/elementary

Student/Year		9.208
Capital	1.766	
O&M	7.442	

Middle

Student/Year		14.289
Capital	2.757	
O&M	11.532	

Senior high

Student/Year		16.874
Capital	3.621	
O&M	13.613	

CITY OF FRESNO MASTER FEE SCHEDULE

PUBLIC UTILITIES DEPARTMENT

WASTEWATER RATES

Fee Description & Unit/Time	Current	Amnd
Sewer Service Charges, Schools (continued)		
Parochial		
Student/Year	4.982	
Capital	.973	
O&M	4.009	
College		
Student/Year	6.144	
Capital	1.189	
O&M	4.955	
Septage Disposal		In-Lieu
Pumper truck		06/05
1,000 gallons ¹	69.812	
Capital	13.496	
O&M	56.316	
Septic disposal station keys:		
Replacement / per key	25.00	
Pretreatment Surcharges (monthly charges)		
Category I - Individual permit*	27.54	
Category II - General permit**	4.05	
Category III - No permit required***	1.29	
Category IV - All residential users	0.06	

* All industrial high-strength and categorically regulated users.

** All commercial establishments which may require pretreatment and monitoring activity (automotive repair, bakeries—retail, car washes, hotels/motels with dining facilities, laundromats, markets with garbage disposals, mortuaries, nursing homes, printers, restaurants, shopping centers).

*** No discharge of process water (automotive—retail, business/services).

¹ There are 748 gallons in a hundred cubic feet (HCF). Rates per 1,000 gallons are approximate as they have been rounded to the 3rd decimal place.

CITY OF FRESNO MASTER FEE SCHEDULE

PUBLIC UTILITIES DEPARTMENT

WASTEWATER RATES

Fee Description & Unit/Time	Current	Amnd
Special Charges and Penalties		435
Disconnection or reconnection inspection fee / per inspection	12.50	
Discharge flow dye test / per test	43.75	
Penalty for non-submittal of wastewater discharge permit application		
HCF	0.75	
1,000 gallons	1.003	
Administrative penalty for failure to meet reporting deadlines:		
First day late (after 5 business days grace period) / per day	35.00	
Each additional day late	17.50	
General inorganic and bacteriological analysis/per hour	50.00	
Composite Sampler Rental / per day	75.00	
Pretreatment enforcement charges/per hour	45.00	
Miscellaneous non-enforcement charges/per hour	45.00	

January 31, 2007

Council Adoption: 1/30/07

Mayor Approval:

Mayor Veto:

Override Request:

TO: MAYOR ALAN AUTRY
FROM: REBECCA E. KLISCH, CMC
City Clerk

SUBJECT: TRANSMITTAL OF COUNCIL ACTION FOR APPROVAL OR VETO

At the Council meeting of 1/30/07, Council took legislative action entitled **Appv agrmnt w/Pinedale Co. Water Dist, rescind 1976 contract for sewer transportation and treatment, Item No. 1A**, by the following vote:

Ayes	:	Calhoun, Dages, Duncan, Sterling, Westerlund, Xiong, Perea
Noes	:	None
Absent	:	None
Abstain	:	None

Please indicate either your formal approval or veto by completing the following sections and executing and dating your action. Please file the completed memo with the Clerk's office on or before February 12, 2007. In computing the ten day period required by Charter, the first day has been excluded and the tenth day has been included unless the 10th day is a Saturday, Sunday, or holiday, in which case it has also been excluded. Failure to file this memo with the Clerk's office within the required time limit shall constitute approval of the ordinance, resolution or action, and it shall take effect without the Mayor's signed approval.

Thank you.

APPROVED:

VETOED for the following reasons: (Written objections are required by Charter; attach additional sheets if necessary.)

Alan Autry, Mayor

Date: _____

COUNCIL OVERRIDE ACTION:

Date: _____

Ayes	:
Noes	:
Absent	:
Abstain	:

EXHIBIT 2

1 **BETTS & RUBIN, A Professional Corporation**
Attorneys at Law
2 907 Santa Fe Avenue, Ste. 201
Fresno, California 93721
3 Telephone: (559) 438-8500
Facsimile: (559) 438-6959

FILED
MADERA SUPERIOR COURT

OCT 04 2011

4 James B. Betts (State Bar #110222)
5 Joseph D. Rubin (State Bar #149920)

BONNIE THOMAS CLERK
DEPUTY

6 Attorneys for Plaintiff CITY OF FRESNO

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF MADERA

10
11 CITY OF FRESNO,

12 Plaintiff,

13 v.

14 PINEDALE COUNTY WATER DISTRICT;
15 and DOES 1 through 15, inclusive,

16 Defendants.

Case No. MCV043413

[PROPOSED] JUDGMENT

17
18 This action came on regularly for trial over the course of several day (including
19 January 7, 2011, January 21, 2011, March 4, 2011, March 18, 2011 and April 29, 2011)
20 before the Honorable James E. Oakley, sitting without a jury. Plaintiff City of Fresno
21 was represented by Joseph D. Rubin of Betts & Rubin. Defendant Pinedale County
22 Water District was represented by Neal Costanzo of Costanzo & Associates. Evidence
23 and points and authorities having been presented and received, the cause having been
24 argued and submitted for decision, and the Court, having caused to be made and filed
25 a written statement of decision which applies the law to the facts of this case and
26 adjusts the equities between the parties, a copy of which is attached hereto as Exhibit

27 A:

28 ///

1 **IT IS ORDERED, JUDGED AND DECREED THAT:**

- 2 1. Judgment shall be entered in favor of Plaintiff City of Fresno and against
3 Defendant Pinedale County Water District on the City of Fresno's cause
4 of action for specific performance of the 2007 Agreement, and the Court
5 grants the City of Fresno's request for injunctive relief and for an
6 accounting to the extent that such remedies are congruent with its request
7 for specific performance;
- 8 2. Plaintiff City of Fresno shall be allowed to conduct an investigation and
9 audit of the District's internal financial controls and operations including,
10 but not limited to, all records pertaining to the sewage collection system
11 and the District's obligations under the Agreement, in order to determine
12 whether the Pinedale County Water District is fulfilling its obligations
13 under the 2007 Agreement;
- 14 3. The City of Fresno may recover its costs, including attorney's fees, as
15 permitted by statute and/or contract as determined pursuant to a timely
16 filed Memorandum of Costs; and
- 17 4. The Court shall retain jurisdiction to address and resolve any issues
18 and/or disputes relating to costs and/or arising between the parties
19 following the issuance of this judgment which relates to the enforcement
20 of the terms of the judgment and its Statement of Decision.
21

22 **IT IS SO ORDERED**

23
24 Dated: OCT 04 2011
25 July __, 2011

JAMES E. OAKLEY

Judge James E. Oakley

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_____ (By Overnight Courier) I caused such envelope with postage fully prepaid, to be sent by _____.

 x **(By Mail)** I placed the envelope for collection and processing for mailing following this business' ordinary practice with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

each envelope was addressed as follows:

____ (By Telecopy) I caused each document to be sent by telecopier to the
aforementioned number(s).

Debbie Mazza

EXHIBIT A

FILED
MADERA SUPERIOR COURT

OCT 04 2011

BONNIE THOMAS CLERK
DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MADERA

CITY OF FRESNO,

Plaintiff,

vs.

PINEDALE COUNTY WATER
DISTRICT,

Defendant.

Case No. MCV043413

STATEMENT OF DECISION

Trial Date: 4-29-11

Department: 5

The above-entitled action came on regularly for trial on April 29, 2011, in Department 5 of the above-entitled court, the Honorable James E. Oakley, presiding. The plaintiff CITY OF FRESNO was represented in court by its attorney Joseph D. Rubin of Betts & Rubin. The defendant PINEDALE COUNTY WATER DISTRICT was represented in court by its attorney Neal E. Costanzo of Costanzo & Associates.

This Court issued its proposed Statement of Decision on July 5, 2011; received objections and heard additional argument; directed the plaintiff to file a revised Statement of Decision; and allowed the District to provide a response. Having done so, the Court now sets forth its findings

STATEMENT OF DECISION

1 in this Statement of Decision pursuant to section 632 of the Code of Civil Procedure and Rule
2 3.1590 of the California Rules of Court.

3 **I. PROCEDURAL BACKGROUND**

4 On June 3, 2008, the plaintiff filed the Complaint in this action in the Fresno County
5 Superior Court, seeking injunctive relief, specific performance and declaratory relief. On or
6 about August 1, 2008, the action was transferred to the Madera County Superior Court pursuant
7 to the provisions of section 394 of the Code of Civil Procedure. On December 19, 2008, the
8 plaintiff filed a First Amended Complaint, seeking injunctive relief, specific performance,
9 declaratory relief and an accounting. On January 9, 2009, the defendant filed its Answer.

10 By agreement of the parties, the evidence was submitted to the Court by written
11 declarations and other documentary evidence. On November 24, 2010, the plaintiff filed its
12 Opening Trial Brief and evidence. On December 15, 2010, the defendant filed its Trial Brief and
13 evidence. On December 28, 2010, the plaintiff filed its Reply Brief.

14 On March 4, 2010, and March 18, 2010, the parties appeared for trial, through counsel,
15 and argued the issues of the admissibility of evidence proposed by each party. The parties
16 stipulated to the admission of certain evidence, and agreed that the Court would rule on the
17 admissibility of the evidence remaining in dispute. On March 30, 2011, the Court entered an
18 Order on Objections to Evidence, outlining the evidence upon which the parties were in
19 agreement, and ruling on the objections to evidence upon which the parties were not in
20 agreement. Thereafter, at the trial of April 28, 2011, the parties agreed to the admissibility of
21 additional evidence, and the Court ruled on the admissibility of other additional evidence.
22 Thereafter, counsel for the parties orally presented their closing arguments, and the matter was
23 submitted to the Court entirely upon the admitted written evidence.

24 No party filed a written request for statement of decision and/or sought particular issues
25 to be addressed prior to the matter being submitted on April 29, 2011.

1 **II. FACTUAL FINDINGS**

2 In 2007, the City of Fresno ("City") entered into an agreement (the "2007 Agreement")
3 with the Pinedale County Water District ("District") for the transportation and treatment of
4 District's sewage. (Exh. 1). The 2007 Agreement was part of a settlement between the parties of
5 previous litigation. The most important sections of the 2007 Agreement, for the purposes of the
6 present litigation, are sections 8 and 19.

7 Section 8 of the 2007 Agreement reads as follows:

8 Cooperation and Inspection. District and City shall at all times cooperate
9 and take such action as required to carry out the terms and spirit of this
10 Agreement. District and City shall each adopt and keep in force, to the extent
11 allowed by law, ordinances and regulations allowing employees of the respective
12 parties to this agreement to enter upon and inspect lands and premises connected
13 to their respective sewer systems. The authorized employees and representatives
14 of each party shall, upon request, accompany and assist the other in making
15 inspections of the respective sewer systems, connections thereto, and discharges
16 therein, and make full disclosure to the other of all available information
17 necessary to determine if there is compliance with the provisions of this
18 Agreement.

19 Section 19 of the 2007 Agreement reads as follows:

20 Maintenance of Records and Audit. District shall maintain all records
21 pertaining to their sewage collection system and obligations under this Agreement
22 including, without limitation, the identification of all District customers and
23 respective premises, and all charges and receipts for sewer service. Such records
24 shall be available to City or its authorized representatives, within a reasonable
25 time but not to exceed 10 calendar days' of City's request, during regular business
26 hours throughout the life of this Agreement and for a period of four years after
27 termination or, if longer, for any period required by law. In addition, all books,
28 documents, papers, and records of District pertaining thereto shall be available to
29 City for the purpose of making audits, examinations, excerpts, and transcriptions
30 for the same period of time. District agrees to make available to City a copy of all
31 independent audits and to allow City to conduct audits of the fiscal records of
32 District pertaining to this Agreement as City may determine necessary. City shall
33 have a reciprocal obligation with respect City's sewer revenue program and
34 related reports. This section shall survive expiration or termination of this
35 Agreement.

36 City decided in November of 2007 that it wanted to go forward with an audit of District's
37 records under the 2007 Agreement. The City hired an outside accountant, Fausto Hinojosa of

1 Price, Paige & Company, to perform the audit. The parties dispute the exact sequence of events
2 that occurred subsequently; however, the Court having reviewed the documents submitted to it,
3 finds that the following occurred: On December 11, 2007, City sent correspondence to District
4 informing it of issues with District's performance under the 2007 Agreement. At the end of the
5 letter of December 11, City stated that it intended to commence an audit pursuant to "Paragraph
6 10 [sic]" of the 2007 Agreement, and that it would be in contact with District in January of 2008
7 to coordinate the audit.

8 In response to City's letter of December 11, 2007, counsel for District wrote to counsel
9 for City on December 14, 2007, (Exh. 41) as follows:

10 Regarding the City's notice that it will conduct an audit pursuant to
11 paragraph 10 of the contract, assuming, that you are referring to paragraph 19 of
the Agreement, the District will comply with that request.

12 Please take notice that the District will conduct an audit of the City
13 pursuant to paragraph 19 of the Agreement. The District anticipates it will be
14 contacting the City in January of 2008 to arrange specific times and dates for the
audit.

15 District's letter of December 14, 2007, evidences one, District's acknowledgment that
16 City was demanding to conduct an audit pursuant to paragraph 19 of the 2007 Agreement; two,
17 District's consent to such an audit; and three, notice that District itself would exercise its
18 reciprocal right to conduct an audit of City's financial records pursuant to the 2007 Agreement.
19 District's reference to "specific times and dates for the audit" evidences District's understanding
20 of the scope of such audit as being something more than City merely providing documents to
21 District.

22 Curiously, in light of District's letter of December 14, 2007, District, again through
23 counsel, sent a letter by facsimile to City on February 22, 2008, (Exh. 43) commencing as
24 follows:

25 ////

1 As I read your December 11, 2007, letter, it does not provide any notice of
2 an intent to conduct any audit pursuant to paragraph 10 of the Settlement
3 Agreement between the parties. . . .

4 Later on February 22, 2008, in response to District's facsimile letter of February 22,
5 2008, City, through its counsel, sent an unambiguous notice to the General Manager of District
6 (Exh. 6), with copy to District's counsel, which read as follows:

7 PLEASE BE ADVISED THE CITY WILL BE CONDUCTING AN
8 AUDIT OF THE FISCAL RECORDS OF THE DISTRICT PERTAINING TO
9 THE AGREEMENT FOR TRANSPORTATION AND TREATMENT OF
10 PINEDALE COUNTY WATER DISTRICT SEWAGE. Price, Page & Company
has been designated as the City's authorized representative for the purposes of
conducting the audit. A representative of Price, Paige & Company will be
contacting the District shortly to make arrangements for the specific times and
dates for the audit.

11 Also on February 22, 2008, and also in response to District's facsimile letter of February
12 22, 2008, counsel for City sent a letter to counsel for District (Exh. 7), which stated in part:

13 I am in receipt of your correspondence dated February 22, 2008, in which
14 you claim a) the City's correspondence of December 11, 2007, "does not provide
15 any notice of an intent to conduct any audit" and b) the City's correspondence of
December 11, 2007, and follow-up notification of February 13, 2008, allegedly
constitutes (an unspecified) breach of the Agreement between the parties.

16 I am somewhat surprised by the assertion the District now claims the City
17 has not given any notice of intent to conduct an audit. The City's correspondence
18 of December 11, 2007, (entitled "Notice of Audit") clearly notifies the District of
19 the City's intent to exercise its audit rights under the Contract, and specifically
20 notes "the City anticipates it will be contacting the District in January of 2008 to
arrange specific times and dates for the audit." In response, your correspondence
dated December 14, 2007, acknowledges the City's notice and intent to conduct
an audit, and states:

21 "Regarding the City's notice that it will conduct an audit
22 pursuant to paragraph 10 of the contract, assuming, that you are
referring to paragraph 19 of the Agreement, the District will
comply with that request."

23 After a telephone conversation between counsel for each party, counsel for District again
24 wrote to counsel for City on March 4, 2008, (Exh. 44) as follows:

25 ////

1 This will confirm our conversation concerning the City's attempts to
2 schedule or conduct an audit under paragraph 19 of the agreement for
3 transportation and treatment of Pinedale County Water District sewage. . . .
4 Pinedale has serious concerns about the true motivation behind the attempts to
5 conduct this audit. I suggested during our conversation that it would be much
6 easier, and far less intrusive for the District if you would simply have your auditor
7 list for us the items of information needed to make a determination of whether the
8 District is conforming to the requirements of the agreement and we will make
9 every effort to timely comply with those requests. After all, the documents that
10 relate to the sewer charges are public records that the District is required to make
11 available. The District simply objects to being subjected to what it views as
12 rather abusive demands for audits, consisting of an in-office review of the
13 financial records of the District. That would seem unnecessary to determine
14 whether the District is conforming to the agreement. . . .

15 In this letter, District is confirming its suggestion made during an earlier telephone
16 conversation between counsel for each party, that District would prefer to simply provide City
17 with designated documents rather than having City conduct an audit as demanded by City
18 pursuant to the 2007 Agreement.

19 On March 12, 2008, counsel for District again wrote to counsel for City (Exh. 45), stating
20 in part as follows:

21 The point of my conversation with you on March 4, 2008, was to get you
22 to actually read the provision under which you are purporting to seek a "audit."
23 The provision does not allow you to do what you are attempting to do. The
24 provision simply states that the District shall "maintain all records pertaining to
25 their sewage collection system and obligations under this agreement". It provides
that those records, and only those records shall be made available to the City
within a reasonable time not to exceed 10 days of the City's request for those
records. . . .

. . . If you would like to be reasonable in your requests and ask for the
specific information that you are entitled to receive under paragraph 19 of the
agreement, the District will be happy to make that available to you along with its
invoice for all actual cost incurred in retrieving, compiling and making that
information available to you. It will not allow an employee or contractor of the
City to simply have access to all of its computerized records of every nature.

In response, counsel for City wrote to counsel for District on March 14, 2008, (Exh. 46),
in part, as follows:

////

1 It is unfortunate the District is taking a position clearly contrary to the
2 express terms of the Agreement and will not allow the City's independent auditor
3 access to all fiscal records pertaining to public funds associated with that contract.
...

4 In summary, the District has refused to make all fiscal records pertaining
5 to the Agreement available The City requests District staff contact the
6 independent contractor to set a mutually agreeable time in which to make all the
7 District's records available in whatever format they may be stored in the regular
8 course of business. If the City does not receive confirmation of the District's
willingness to meet the express terms of our Agreement and allow an audit by
March 21, 2008, the City will have no choice but conclude the District will not
comply with the Agreement, and the City will pursue appropriate remedies.

9 Thereafter, in response to the letter of March 14, 2008, above, although erroneously dated
March 4, 2008, (Exh. 47), District, through counsel, wrote, in part, as follows:

10 You have already received confirmation of the District's willingness to
11 meet the express terms of the agreement and to allow the inspection of those
12 records that are referred to in that paragraph and that are reflective of the
13 District's compliance with the terms of that agreement which relates solely and
14 completely to charges and receipts of payment of those charges for sewer
15 collection services proved by the District. The City certainly has more than the
16 choice of concluding that the "District will not comply with the agreement," it has
17 the choice of actually reading the contract, my letters in response to your
inappropriate demands for a generalized audit of the District's finances and
recognizing that it has absolutely no right to be concerned with "financial issues
associated with the District's activities," to the extent that those activities have
nothing to do with the sewage collection system. Given the provisions of the
contract, one would think it would only be prudent for the City to objectively
evaluate the validity of the interpretation that it is apparently assigning to
paragraph 10 of our agreement.

18 Kindly let me know if you intend to continue to insist on a generalized
19 audit and I will file with the court a declaratory relief or other complaint.

20 Responding on March 19, 2008, (Exh. 48), counsel for City wrote to counsel for District,
21 in part, as follows:

22 I am in receipt of our correspondence dated "March 4, 2008," referencing
my correspondence of March 15, 2008.

23 There has never been grounds for the District's delays based on its
24 assertion the City is conducting some sort of general audit of the District's records
25 as to anything other than the fiscal records of the District pertaining to the
Agreement. As has been repeatedly stated throughout the City's correspondence
over the last several months, our phone conference, and the Notice provided by

1 the City, the City is demanding access to the District's fiscal records pertaining to
2 the Agreement for the purposes of the audit. In this regard, the City's Notice of
3 Audit dated February 22, 2008, clearly specifies:

4 "PLEASE BE ADVISED THE CITY WILL BE CONDUCTING
5 AN AUDIT OF THE FISCAL RECORDS OF THE DISTRICT
6 PERTAINING TO THE AGEEMENT FOR TRANSPORATION
7 [sic] AND TREATMENT OF PINEDALE COUNTY WATER
8 DISTRICT SEWAGE."

9 There is no reference to a general audit, and indeed, the Notice uses the
10 same language as set forth in the Agreement.

11 Notwithstanding months of delay regarding this matter, the District still
12 continues to assert it will allow the audit, but then simultaneously states a) it will
13 not permit an audit as there has not been proper authorization within the City to
14 conduct an audit; b) the audit is otherwise improper; and/or c) the District refuses
15 to make available all fiscal records of the District pertaining to the Agreement.
16 There delaying tactics are not only a violation of the time limits to make available
17 its fiscal records as set forth in Paragraph 19 of the Agreement, but are contrary to
18 the express terms of the contract which requires the "District . . . shall at all times
19 cooperate and take such action as required to carry out the terms and spirit of this
20 Agreement." (Agreement, Paragraph 8.) . . .

21 As the City has yet to receive confirmation of the District's willingness to
22 meet the express terms of our Agreement as to all the fiscal documents relating to
23 the contract and to allow an audit by March 21, 2008, and given the District staff
24 have still refused to return the independent auditor's calls to set a mutually
25 agreeable time for inspection of the District's fiscal records, the City has no
choice but to conclude the District will not comply with the Agreement. . . .

Again on March 26, 2008, (Exh. 49), counsel for City wrote to counsel for District, in
part, as follows:

The City requested the District contact it or the City's independent auditor
to arrange a mutually agreeable time in which to conduct the audit by no later
than March 21, 2008. This date has come and gone, and despite months of efforts
b the City, the District continues to a) refuse to contact or return the calls of the
independent auditor to set a mutually agreeable time for inspection of the
District's fiscal records; b) refuse to contact the City to set a mutually agreeable
time for inspection of the fiscal records in conjunction with the audit; and c)
refuses to affirm it will make available for audit all fiscal documents associated
with the Agreement, including electronic records.

The City has no choice but to conclude the District will not comply with
the Agreement. . . .

1 On April 2, 2008, (Exh. 50), counsel for District responded to counsel for City, in part, as
2 follows:

3 You can pursue any remedy you think you have available; but, given our
4 repeated advisements that we have made literally every document that is relevant
5 to performance under the agreement available to you, I suspect any remedy you
6 seek to pursue will only be futile but will expose the City to liability for breach.
... You have no right, and the contract plainly provides no right, to seek to audit
the District's financial affairs, in general.

7 We do know why you are attempting to conduct such an unrestricted
8 audit. It is to provide the City with what it needs to advance its hostile takeover
attempts of the District. , , ,

9 Responding on April 4, 2008, (Exh. 51), counsel for City wrote to counsel for District, in
10 part, as follows:

11 Thank you for your letter dated April 2, 2008. Based upon your
12 representation that the District will now make "literally every document that is
13 relevant to the performance under the agreement available," and assuming this
14 includes relevant electronic records, the City looks forward to commencing the
audit. In this regard, and previously requested, please provide dates the District
will make "literally every document that is relevant to the performance under the
agreement" available for inspection by the City's independent auditor. . . .

15 I look forward to receiving the dates from your office.

16 Over one month later, on May 9, 2008, (Exh. 52), counsel for City wrote to counsel for
17 District, in part, as follows:

18 Despite the passage of months, PCWD [District] continues to refuse to
19 provide dates it will make its records available to the City to conduct the audit;
PCWD has failed to respond to the City's correspondence; and PCWD refuses to
20 communicate with the City regarding the audit of all fiscal records relating to the
Agreement. As a result, on May 6, 2008, the City Council authorized the City to
21 commence litigation against PCWD.

22 Absent prompt communication from PCWD providing dates it will make
23 available for audit all fiscal records pertaining to the Agreement, including
relevant electronic records and spreadsheets, the City intends to move forward
24 with litigation. Please advise me as soon as possible if this matter can be resolved
without litigation.

25 Responding on May 19, 2008, (Exh. 53), counsel for District wrote to counsel for City, in

1 part, as follows:

2 The District has not refused to provide dates on which it would make
3 records available to the City that it is entitled to receive under the subject
4 agreement relating to sewage collection and disposal system and I have advised
5 you repeatedly, in writing, that the records that are pertinent to performance under
6 that agreement are available to you at the District office during regular business
7 hours. You have failed, despite the passage of months since I have made this
8 material available to you to attempt any review of it. . . .

9 What you do apparently appear to be interested in is conducting an
10 unrestrained "audit", of virtually every aspect of the District's operations,
11 something that you are not entitled to do under our agreement. . . .

12 Responding on May 22, 2008, (Exh. 54), counsel for District wrote to counsel for City, in
13 part, as follows:

14 Thank you for responding to the City's correspondence of May 9, 2008.

15 Your letter dated May 19, 2008, raises several different issues. Rather
16 than address each in detail, suffice it to say the City does not agree with the
17 District's representations and believes the record will establish the District's
18 fluidity regarding its positions in making available the fiscal records relating to
19 the Agreement. However, given the District's current representation it will now
20 make "document" available at its office during "regular business hours," please
21 accept this courtesy notice that a representative of Price, Paige & Company will
22 be appearing at the District's office this Friday, May 23, 2008, to commence the
23 audit. The City anticipates District staff will promptly make available all fiscal
24 records of the District pertaining to the Agreement for Transportation and
25 Treatment of Pinedale County water District Sewage, including electronic copies
of fiscal records relating to the Agreement such as spreadsheets.

As quoted above, on May 19, 2008, District had advised City that District had not
refused to make such records available to City, and that the records were available to City for
inspection during regular business hours. In response, on May 23, 2008, City sent its auditor,
Mr. Hinojosa, to the offices of District, who was informed that the documents were not, in fact,
available to him. City was afterwards informed that the papers were no longer available and
would not soon be made available again due to the expense involved. Further, District made it
clear to City that City would not be allowed to have electronic data of District downloaded for
the purpose of the auditor conducting the audit under the 2007 Agreement.

1 This is where the matter stood until City filed its complaint in the Fresno County
2 Superior Court.

3 **III. ANALYSIS**

4 City has brought suit to address what it calls a breach of the 2007 Agreement, seeking
5 specific performance, declaratory and injunctive relief and an accounting. As correctly noted by
6 District, there are only two principal controverted issues in this case: (1) the meaning and effect
7 of the 2007 Agreement; and (2) whether the agreement was breached by District. All other
8 issues are dependent upon, or are part of, the determination of these questions. See District's
9 Response to Requests for Statement of Decision; Objections to Submission of Proposed Revised
10 Statement of Decision, filed September 21, 2011, pgs. 2:28 – 3:4.

11 District argued at trial that City had not shown definitively that District breached the
12 contract and, therefore, was not entitled to specific performance of the contract. Moreover,
13 District argued that, by failing to offer District the opportunity to cure its alleged defect, City has
14 waived its right to sue for any damages under the contract.

15 **A. The Audit Of District Records Was Properly Authorized**

16 On or about March 18, 2011, the Court denied District's argument that someone other
17 than the people involved in the decision to request an audit was required. Specifically, the
18 decision to request the audit was not required to be undertaken by the Mayor or pursuant to a
19 resolution of the City Council. Although a contract may require City Council approval,
20 execution, performance and demand for performance of the contract in this instance did not.

21 The evidence established that the 2007 Agreement was approved by the Fresno City
22 Council. The decision to conduct an audit of District's records was made and/or approved by a
23 number of individuals in several departments of City, including the Controller of the Finance
24 Department, the Director of the Department of Public Utilities, as well as the City Manager.

25 In sum, the Court finds that these individuals had the authority to request an audit under

1 the 2007 Agreement.

2 **B. The City Had A Proper Basis To Conduct Audit Of District Records**

3 On or about March 18, 2011, the Court provided its ruling as to its interpretation of
4 Section 19 of the Agreement, which states, in part, as follows:

5 District agrees to make available to City a copy of all independent audits
6 and to allow City to conduct audits of the fiscal records of District pertaining to
7 this Agreement as City may determine necessary. [Emphasis Added].

8 The Court interprets this provision to mean that City is required to make the decision to
9 audit in "good faith." In making this determination, the Court relies, by analogy, on the
10 reasoning in *Locke v. Warner Bros., Inc.* (1977) 57 Cal.App.4th 354, 363. The *Locke* decision
11 described the thought process of the Court as follows:

12 Where a contract confers on one party a discretionary power affecting the
13 rights of the other, a duty is imposed to exercise that discretion in good faith and
14 in accordance with fair dealing. (*Id.*)

15 After the Court's ruling as to the aforementioned provision in Paragraph 19, the parties
16 stipulated that the City of Fresno satisfied the "good faith" standards enunciated by the Court in
17 seeking the audit. The Court accepted this stipulation and no further evidence was required to
18 establish this fact.

19 **C. City Satisfied Its Obligations Under Paragraph 15 Of The 2007 Agreement**

20 At trial, District claimed that City failed to provide notice of "default" under Paragraph
21 15 of the Agreement. The evidence and law established that City complied with this provision;
22 District waived it; and/or compliance was unnecessary as it would have been a futile act.

23 The term "default" is broad and means "the omission or failure to perform a legal or
24 contractual duty." *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 143.
25 Serving a notice or demand does not compel District to take any action, but affords District an
opportunity to consider the matter before City resorts to litigation. See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1083.

1 As quoted extensively above, commencing on or about December 11, 2007, City
2 repeatedly notified District of its breach of the 2007 Agreement, and afforded it an opportunity to
3 cure. (See e.g., Trial Exhs. 4, 8, 46, 48, 49, 51 and 52). In fact, District's own documents
4 evidence that it had notice as District's counsel wrote on December 24, 2007: "Section A of your
5 letter essentially accuses Pinedale of failing to comply with the Agreement. . . ." (Exh. 41) On
6 April 2, 2008, over sixty days before the lawsuit was filed, the District's counsel indicates:

7 Making the same groundless assertions, over and over again, will not
8 make them true. Just file your suit and we will proceed to have I dismissed and
the City of Fresno and you personally sanctioned. (Exh. 50).

9 District asserted that City had waived its right to pursue any sort of remedy against it
10 because City failed to give it the opportunity to cure its default under the 2007 Agreement.
11 Looking at the record as a whole, however, the Court finds that, even though City did not
12 reference the defect provisions specifically, City did give District ample opportunity to cure the
13 defects in performance. See Civil Code Section 3528 ["The law respects form less than
14 substance"]. Specifically, City gave District several opportunities to allow City to conduct an
15 audit of District's fiscal records pertaining to the 2007 Agreement. Therefore, the Court finds
16 that City satisfied its obligations under Paragraph 15 of the 2007 Agreement.

17 **D. City Established Its Claim For Specific Performance**

18 City essentially seeks to have the Court order specific performance of the 2007
19 Agreement. In order to obtain specific performance of a contract, a plaintiff must show: (1) the
20 contract's terms are sufficiently definite; (2) consideration for the contract is adequate; (3) there
21 is substantial similarity of the requested performance to the contractual terms; (4) there is
22 mutuality of remedies; and, (5) plaintiff's legal remedy is inadequate. See *Blackburn v.*
23 *Charnley* (2004) 117 Cal. App. 4th 758, 765.

24 As recently stated by the California Supreme Court in *Patel v. Liebermensch* (2008) 45
25 Cal.4th 344, 349:

1 Settled principles of contract law govern this case. The equitable remedy
2 of specific performance cannot be granted if the terms of a contract are not certain
3 enough for the court to know what to enforce. [Citation Omitted]. However,
4 “[t]he law does not favor but leans against the destruction of contracts because of
uncertainty; and it will, if feasible, so construe agreements as to carry into effect
the reasonable intentions of the parties if [they] can be ascertained . . .”.
[Citations Omitted].

5 The terms of a contract are reasonably certain, and are subject to specific performance, if
6 they provide a basis for determining the existence of a breach and for fashioning a remedy.
7 *Weddington Productions, Inc. v. Flick* (1998) 60 Ca.App.4th 793, 811. The Court finds that the
8 terms of the 2007 Agreement are sufficiently certain to allow for specific performance.

9 District argues that there is an additional element, namely, that there must be a breach of
10 the contract. *See Mansouri v. Superior Court* (2010) 181 Cal. App. 4th 633, 642. Indeed,
11 *Mansouri* specifically states that “where no time is specified for performance, there is no breach
12 of a contractual promise to perform an act in the future by a party who has the ability to perform
13 where there has been no demand for performance and refusal to perform.” *Id.*

14 Here, City’s allegation is that City demanded performance (namely, an audit of District’s
15 relevant financial documents) and that District refused to perform. As stated above, District
16 contends that it made the documents available, and that City did not avail itself of the documents.
17 Because there can be no remedy without a breach, the cause of action for specific performance
18 turns on the Court’s determination of whether or not there was a breach.

19 Having considered all the documents, declarations and deposition transcripts in evidence,
20 the Court finds that there was a breach by District of the 2007 Agreement. Under the terms of the
21 2007 Agreement, City is entitled “to conduct audits of the fiscal records of District pertaining to
22 [the 2007 Agreement] as City may determine necessary.” The parties dispute the exact scope of
23 the audit called for by the 2007 Agreement. District argues that the word “audit” as used in the
24 contract should be interpreted as being analogous to section 2030.230 of the Code of Civil
25 Procedure, which allows a party, rather than making a “compilation, abstract, audit, or summary

1 of or from the documents” where required to respond to an interrogatory, may instead make the
2 documents available to the requesting party for its own opportunity to “examine, audit or
3 inspect.” The Court rejects the application of section 2030.230 to the interpretation of the
4 “audit” provision of the 2007 Agreement in this action. The contract does not reference the
5 Code of Civil Procedure, and there is nothing in the 2007 Agreement that would work to limit
6 the scope of the right to audit as District argues.

7 Webster’s Ninth New Collegiate Dictionary (1984) defines the terms as follows: “Audit”
8 is “a formal examination of an organization’s or individual’s accounts or financial situation . . . a
9 methodical examination and review.” Black’s Law Dictionary defines “audit” as a “formal
10 examination of an individual’s or organization’s accounting records, financial situation, or
11 compliance with some other set of standards.” (Black’s Law Dictionary, 10th Ed. 2009); *see also*
12 *Robert F. Kennedy Medical Ctr. v. Belshe* (1996) 13 Cal. 4th 748, 761-762 (“Indeed, although
13 ‘audit’ is not defined for purposes of the statute in question . . . standard definitions thereof
14 include a ‘final statement of account’ (Webster’s New Internat. Dict. (3d ed. 1961) p. 143) and a
15 ‘rendering and settling of accounts’ (*Ibid.*).” (internal citation omitted) (Mosk, J., dissenting)).

16 The California Supreme Court had cause to consider the scope of audits generally in *Bily*
17 *v. Arthur Young & Co.* (1992) 3 Cal.4th 370. According to the Court in *Bily*:

18 In a typical audit, a CPA firm may verify the existence of tangible assets,
19 observe business activities, and confirm account balances and mathematical
20 computations. It might also examine sample transactions or records to ascertain
21 the accuracy of the client company’s financial and accounting systems. For
22 example, auditors often select transactions recorded in the company’s books to
23 determine whether the recorded entries are supported by underlying data
(vouching). Or, approaching the problem from the opposite perspective, an
auditor might choose particular items of data to trace through the client’s
accounting and bookkeeping process to determine whether the data have been
properly recorded and accounted for (tracing).” (*Id.* at 380 (citation omitted)).

24 . . . Initially, the CPA firm plans the audit by surveying the client’s
25 business operations and accounting systems and making preliminary decisions as
to the scope of the audit and what methods and procedures will be used. The firm
then evaluates the internal financial control systems of the client and performs

1 compliance tests to determine whether they are functioning properly. Transactions
2 and data are sampled, vouched for, and traced. Throughout the audit process,
3 results are examined and procedures are reevaluated and modified to reflect
4 discoveries made by the auditors. For example, if the auditor discovers
5 weaknesses in the internal control system of the client, the auditor must plan
6 additional audit procedures which will satisfy himself that the internal control
7 weaknesses have not caused any material misrepresentations in the financial
8 statements. *Id.* (internal citations and quotations omitted).

9 Moreover, the 2007 Agreement emanated from previous litigation brought by City. The
10 contractual provision ensures access to all documents and information that enable City to ensure
11 compliance with the 2007 Agreement, including:

- 12 1. District "shall . . . take such action as required to carry out the terms and spirit
13 of the Agreement" (§8);
- 14 2. District "shall . . . make full disclosure . . . of all available information
15 necessary to determine if there is compliance with the provisions of this
16 Agreement" (§8);
- 17 3. "District shall maintain all records pertaining to their sewage collection
18 system and obligations under this Agreement Such records shall be
19 made available to City or its authorized representatives" (§19);
- 20 4. "All books, documents, papers and records of District pertaining thereto shall
21 be available to City for the purpose of making audits, examinations, excerpts
22 and transcriptions" (§19); and
- 23 5. District allows City to conduct audits of the fiscal records pertaining to the
24 Agreement (§19).

25 The provisions of the 2007 Agreement, and the circumstances under which the
Agreement was drafted, amply support the City's opposition that it should be allowed access to
District's fiscal records and information pertaining to the Agreement and compliance thereof.
City is entitled to audit, examine, make excerpts and transcribe District records relating to the
2007 Agreement.

The evidence further establishes that: (1) the 2007 Agreement provides City with the
ability to audit and examine District records and internal controls to confirm accuracy of
information being provided to City and compliance with the Agreement; (2) City properly

1 exercised its rights to conduct an audit of the records of District in accordance with the
2 Agreement [e.g., Trial Exhs. 4-7]; (3) City's request was properly tailored to the 2007
3 Agreement and to ensure that the underlying data collection and information was reliable [e.g.,
4 Trial Exhs. 4, 6, 8, 48]; and (4) District breached the agreement by failing to comply with City's
5 requests, by failing to cooperate, and by not timely providing the requested documents and
6 information to City.

7 The correspondence between City and District from December 2007 through May 2008
8 demonstrate the dispute between the parties over the scope of the "audit" allowed by the 2007
9 Agreement. District has maintained that the scope of the audit should be limited to District
10 merely providing documents to City, while City has maintained that the mere providing of
11 documents is not a reasonable interpretation of the "audit" provision of paragraph 19 of the 2007
12 Agreement. Although there may have been a good faith disagreement between the parties as the
13 scope of the audit as provided in the 2007 Agreement, for the reasons set forth above, the Court
14 agrees with City and finds that the interpretation of the audit provision maintained by District is
15 not reasonable. The plain language of the audit provision calls for considerably more than that
16 which was ever offered by District.

17 Further, the Court finds that District breached the 2007 Agreement. It is clear that
18 District at all times had the ability to provide records to City for inspection and to "allow City to
19 conduct audits of the fiscal records of District pertaining to this Agreement." The Court finds
20 that District repeatedly denied City the ability to perform the audit as defined in paragraph 19 of
21 the 2007 Agreement. From December 2007 through May 2008, District repeatedly represented
22 to City that it would comply with the audit provision of the 2007 Agreement, but then would
23 unreasonably restrict the scope of the audit to the mere offer to provide District with documents.
24 Further, District denied City the opportunity to conduct the audit by mischaracterizing City's
25 requests as being "demands for a generalized audit of the District's finances," (Exh. 47), or

1 accusing City of being interested in "conducting an unrestrained 'audit', of virtually every aspect
2 of the District's operations." (Exh. 53). In fact, City's demands were phrased in the precise
3 language of the applicable provisions of the 2007 Agreement itself.

4 Having weighed all the evidence and considered the inferences to be drawn, the Court
5 finds that: (1) despite repeated requests from December 2007 through May 2008, District never
6 provided documents, and failed to provide access for City to review the documents; (2) after
7 indicating that it would provide access to review some documents (although District introduced
8 no evidence as to which documents, if any, were set aside and/or how the documents were
9 complied), District then refused to grant access to City's auditor; (3) prior to the filing of the
10 lawsuit, District did not allow Mr. Hinojosa or City personnel access to the facility to review
11 documents and/or to provided them any documents; (4) District did not introduce any evidence
12 from District personnel that they made any attempt to compile documents prior to the lawsuit
13 and, in fact, Pam Einsel, District's Person Most Knowledgeable¹, indicated she was not even
14 aware that City was coming to review records prior to Mr. Hinojosa's arrival:

15 Q. You indicated you believe that when the independent auditor showed up at the
16 District, that was your first notice of somebody requesting an audit of District's
documents?

17 A. Yes.

18 Q. And to your recollection, you didn't have any advance notice that any
19 independent auditor was coming to your office?

20 A. Not that I remember

21 * * *

22 Q. Did you have any understanding that the District agreed to make documents

23 ¹ Under section 2025.230 of the Code of Civil Procedure, the entity must produce the person with the most
24 knowledge, and must further provide him/her with all the knowledge that is reasonably available to the entity on the
25 issue. See *Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1395-6 [under section 2025.230 of the Code
of Civil Procedure, "if the particular officer or employee designated lacks personal knowledge of all the information
sought, he or she is supposed to find out from those who do!"]].

1 available to [Mr. Hinojosa] during regular business hours?

2 A. No.

3 Q. Did anybody in the District office, to your knowledge, express that to you?

4 A. No.

5 (Dep. of Einsel, pp. 66:7-15; 67:7-16); (5) certain District records were not provided to City until
6 August 2008, after the litigation commenced; and (6) Ms. Einsel identified additional documents
7 at her deposition that had not been previously provided to City.

8 Based upon both the dictionary definition and the case law, "audit" means substantially
9 more than what District has asserted in its papers. Because District did not cooperate in allowing
10 City's representatives access to its internal financial controls, the Court finds that District
11 breached the 2007 Agreement.

12 The Court finds that there is no adequate remedy at law, because there is no monetary
13 compensation for a failure to allow an audit – the audit is the means to determine if other aspects
14 of the 2007 Agreement are being followed. The Court also finds that there is a mutuality of
15 remedy. In short, the Court finds that City has demonstrated that each of the elements required
16 for specific performance of the 2007 Agreement has been met.

17 **E. Claim for Declaratory Relief**

18 Pursuant to section 1060 of the Code of Civil Procedure, "[i]t is elementary that questions
19 relating to the formation of a contract, its validity, its construction and effect, excuse for
20 nonperformance, and termination are proper subjects for declaratory relief." *Foster v. Masters*
21 *Pontiac Co.* (1958) 158 Cal.App.2d 481, 486. The purpose of declaratory relief is to eliminate
22 uncertainties and controversies in certain relationships and to attempt to quiet or stabilize those
23 controversies and to guide future conduct. *City of Tiburon v. Northwestern Pacific Railroad*
24 *Company* (1970) 4 Cal.App3d 160, 173.

25 A declaratory judgment is a cumulative remedy and does not preclude additional relief

1 based on the same facts. *Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135,
2 1167. Section 1062 of the Code of Civil Procedure provides as follows:

3 The remedies provided by this chapter are cumulative, and shall not be
4 construed as restricting any remedy, provisional or otherwise, provided by law for
5 the benefit of any party to such action, and no judgment under this chapter shall
6 preclude any party from obtaining additional relief based upon the same facts.

7 The Court grants the City's request for declaratory relief to the extent that City has the
8 right to seek an audit of the internal controls and financial operation of District limited to
9 District's operations under the 2007 Agreement. On an ongoing basis, the 2007 Agreement
10 should be construed in accordance with this Decision.

11 **F. Claim for Injunctive Relief**

12 A permanent injunction is a determination on the merits that a plaintiff has prevailed on a
13 cause of action against a defendant and that equitable relief is appropriate. *Art Movers, Inc. v. Ni*
14 *West, Inc.* (1992) 3 Cal.App.4th 640, 646. Like any judgment, a permanent injunction,
15 notwithstanding its discretionary component, must be sufficiently supported by the evidentiary
16 record. *Richards v. Dower* (1883) 64 Cal. 62, 64.

17 Irreparable harm supporting an injunction may be established where there is the fact of an
18 injury, such as that arising from a breach of contract, but where there is an inability to ascertain
19 the amount of damage. In other words, to say that the harm is irreparable is simply another way
20 of saying that pecuniary compensation would not afford adequate relief or that it would be
21 extremely difficult to ascertain the amount that would afford adequate relief. *Syngenta Crop*
22 *Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1167; *DVD Copy Control Assoc., Inc.*
23 *v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 721.

24 Section 3422 of the Civil Code, which is the statutory basis for a permanent injunction to
25 prevent a breach of an obligation, does not even mention "irreparable harm." As pertinent here,
Section 3422 provides as follows:

1 [A] final injunction may be granted to prevent the breach of obligation
2 existing in favor of the applicant:

- 3 1. Where pecuniary compensation would not afford adequate relief; . . .
4 [or]
5 3. Where the restraint is necessary to prevent a multiplicity of judicial
6 proceedings. . . .

7 As noted above, the Court finds that District breached the 2007 Agreement and that
8 pecuniary compensation to City is inadequate. The court further finds that the issuance of a
9 permanent injunction to require District to comply with the 2007 Agreement is appropriate.
10 However, to the extent that this claim seeks any relief beyond the relief granted by the Court in
11 the specific performance claim, the claim is denied.

12 **G. Claim for Accounting**

13 An action for accounting lies in equity when the suit is for recovery of an amount that is
14 unascertained and that cannot be determined without an accounting. *St. James Church v.*
15 *Superior Court* (1955) 186 Cal.App.4th 352, 259. An accounting may arise out of a contract.
16 *Molecular Analytical Systems v. CIPHERGEN Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 713.

17 For an equitable accounting, City must establish: (1) a relationship between the parties or
18 other circumstances that require an accounting in equity (or, in other words, circumstances
19 showing that legal remedies are inadequate); and (2) that an unknown balance is due that cannot
20 be ascertained without an accounting. *Tesell v. McLaughlin* (2009) 173 Cal.App.4th 156, 179.
21 Moreover, an accounting is available when there is a dispute as to the accuracy of the
22 defendant's books or where the amount sought is "unliquidated and unascertained." *Ely v. Gray*
23 (1990) 224 Cal.App.3d 1257, 1262; *Civic Western Corp. v. Zila Industries, Inc.* (1977) 66
24 Cal.App.3d 1, 14.

25 The duty of District to account to City is defined by the 2007 Agreement. Therefore,
City's accounting claim essentially folds into its claim for specific performance, and the Court

1 finds for City on the same grounds and for the same reasons as those describe in the Court's
2 analysis of the specific performance claim. Again, to the extent that this claim seeks any relief
3 beyond the relief granted by the Court in the specific performance claim, the claim is denied.

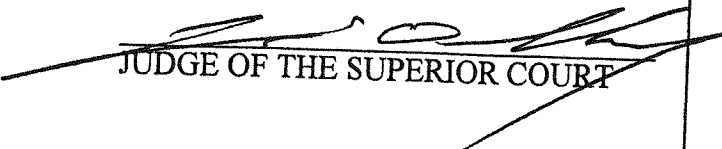
4 **Defenses**

5 As discussed previously, the Court considered the various defenses raised by the District
6 to justify its non-compliance, and finds that none of them are established. (See Section III, A-D).

7 **IV. CONCLUSION**

8 The Court finds in favor of City on the claims asserted at trial. The Court grants City's
9 request for specific performance of the 2007 Agreement, and grants City's request for injunctive
10 relief and for an accounting to the extent that such remedies are congruent with an audit of
11 District's internal financial controls and operations involved in fulfilling its obligations under the
12 2007 Agreement. The Court reserves jurisdiction to enforce the Judgment entered pursuant to
13 this Decision.

14
15 Dated: October 4, 2011

16 
JUDGE OF THE SUPERIOR COURT

FILED
MADERA SUPERIOR COURT

MADERA COUNTY SUPERIOR COURT
209 W. YOSEMITE AVE., MADERA CA 93637

OCT 04 2011
BONNIE THOMAS
CLERK
DEPUTY

CASE NO: MCV043413

CASE TITLE: City of Fresno vs. Pinedale County Water District

Certificate of Mailing with Statement of Decision

I, the undersigned, hereby certify that I am a Deputy Clerk of the Superior Court, County of Madera, for the State of California, and not party to this action; that on or before October 4, 2011, I served the Statement of Decision on the parties named by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the Superior Court mail basket for deposit in the United States Post Office at Madera, California, addressed as follows:

Joseph Rubin
907 Sante Fe Ave #Ste 201
Fresno, CA 93721

Neal E Costanzo
575 E Locust Ave #Ste 115
Fresno, CA 93720

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

Dated: October 4, 2011

FILIGATA SAMUEL U

Deputy Clerk

EXHIBIT 3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

CITY OF FRESNO,

Plaintiff and Respondent,

v.

PINEDALE COUNTY WATER DISTRICT,

Defendant and Appellant.

F064758

(Super. Ct. No. MCV043413)

OPINION

APPEAL from orders of the Superior Court of Madera County. James E. Oakley, Judge.

Costanzo & Associates, Neal E. Costanzo and Michael G. Slater for Defendant and Appellant.

Betts, Rubin & McGuinness, James B. Betts and Joseph D. Rubin for Plaintiff and Respondent.

-ooOoo-

This is the companion case to *City of Fresno v. Pinedale County Water Dist.* (Sept. 17, 2013, F064112) [nonpub. opn.], in which we affirmed the judgment entered in favor of defendant and respondent City of Fresno (City) following a court trial on the City's claims for specific performance based on breach of contract, declaratory relief, and accounting. Here, the Pinedale County Water District (District) appeals from post-judgment orders awarding costs and attorney fees to the City. We affirm.

BACKGROUND

The District and City are parties to an Agreement that requires (1) the City receive, transport, treat and dispose of the District's sewage, (2) the District bill and collect sewer charges from its customers at rates set forth by City ordinances and regulations, and (3) the District remit payment to the City as specified in the agreement. Section 18 of the Agreement includes an attorney fees provision which states that "[i]f either party is required to commence any proceeding or legal action to enforce or interpret any term, covenant or condition of this Agreement, the prevailing party in such proceeding or action shall be entitled to recover from the other party its reasonable attorney's fees and legal expenses."

Beginning in December 2007, the City informed the District it wanted to conduct an audit of the District's fiscal records pursuant to a contractual provision that states, in part, that the District shall "allow City to conduct audits of the fiscal records of District pertaining to this Agreement as City may determine necessary." The District refused to submit to an audit, contending the entirety of the contractual provision only required it to produce certain documents to the City, which the City could then examine. After an exchange of letters between the attorneys for both entities over a six month period, the City filed suit against the District, asserting claims for breach of contract, declaratory relief, and accounting, seeking both specific performance and an injunction.

A bench trial was held based solely on documentary evidence, declarations and deposition testimony. In a statement of decision, the trial court found in the City's favor

on all of its claims. The trial court issued a judgment which ordered that the City be allowed to conduct an investigation and audit of the District's internal financial controls and operations in order to determine whether the District was fulfilling its obligations under the Agreement. The judgment also provided: "The City of Fresno may recover its costs, including attorney's fees, as permitted by statute and/or contract as determined pursuant to a timely filed Memorandum of Costs."

The Motion to Tax Costs

On October 17, 2011, the City filed its Memorandum of Costs, in which it sought \$2,298.53 in total costs. On November 3, 2011, the District filed a motion to strike the memorandum of costs and tax the City's costs. In asking the trial court to strike the cost memorandum, the District noted that when something other than monetary relief is recovered, the court is required to determine the "prevailing party" and the award of costs is discretionary, citing Code of Civil Procedure section 1032, subdivision (a)(4).¹ The District contended that since the City was not entitled to recover costs as a matter of right, it could only recover costs by filing a motion for an award of costs, where the trial court could exercise its discretion to determine the prevailing party and availability of costs, and its failure to timely file such a motion was fatal to its claim for costs. In its opposition, the City argued that the trial court had already ruled in its judgment that the City was the prevailing party and was entitled to recover its costs pursuant to the filing of a memorandum of costs.

The District's motion was heard on December 8, 2011. The trial court began with its tentative ruling. It explained that it was operating under section 1032 with respect to the identification of the prevailing party, and this case came within section 1032, subdivision (a)(4), which gives the trial court discretion to allow costs and, if allowed, to apportion costs between the parties pursuant to the rules adopted under section 1034.

¹ All undesignated statutory references are to the Code of Civil Procedure.

The court stated that, “in this case, [it] does determine that the City of Fresno is the prevailing party, and will exercise its discretion to allow costs.” The court then explained that it was inclined to tax \$875 of the costs, leaving a net cost award to the City of \$1,423.53.

The District’s attorney argued that, as set forth in the District’s motion, it believed costs should be awarded by motion due to the nature of the case, “move[d] that the determination of prevailing party should be made after argument,” and submitted on the pleadings. The City’s attorney argued about the costs the court proposed to tax, asking it to exercise its discretion to allow some of the costs. The trial court stated it “was going to ultimately exercise its discretion as it indicated.” The City’s attorney agreed to prepare an order.

On December 15, 2011, an order was entered which stated that (1) the City was the prevailing party in this matter, (2) the District’s motion to strike the entire memorandum of costs was denied, (3) the District’s motion to tax certain cost items was granted, and (4) \$1,423.53 in costs were awarded to the City.

The Attorney Fees Motion

On December 1, 2011, the City filed a motion to fix attorney fees. The City asserted it was entitled to \$83,193 in attorney fees pursuant to the terms of the Agreement. The City sought to recover attorney fees billed by two City attorneys who handled the litigation from May 2008, when the complaint was drafted, to February 2010, when outside counsel Betts & Rubin became attorney of record for the City. One City attorney, Deputy City Attorney Shannon Chaffin, billed 160 hours at rates ranging from \$117 to \$123 per hour, while the other City attorney, Senior Deputy City Attorney Greg Myers, billed 42 hours at \$123 per hour. The billings totaled \$23,877.90. Detailed billing summaries from the City Attorney’s Office were attached to Chaffin’s declaration.

The City also sought to recover fees billed by Betts & Rubin, who became counsel of record for the City in February 2010 and were involved in written discovery, taking

and defending depositions, multiple discovery motions, and trial and post-trial matters. Joseph D. Rubin, whose billing rate was \$215 per hour, expended approximately 322.4 hours handling the matter, which resulted in the City incurring legal fees of \$69,316. In a declaration, Rubin explained that these fees do not represent all the fees that were billed to the City, as fees incurred for the services of James B. Betts and paralegal Tim Morris were not being sought. Moreover, the hourly rate billed was on the lower end of the spectrum of the rates Rubin charges. Rubin was familiar with the hourly rates charged by litigation attorneys in Fresno and believed \$215 per hour was on the lower side of the customary range of fees charged for contractual litigation by civil litigation attorneys with similar training and experience in the geographic area. In Rubin's opinion, the legal services and time spent were reasonably necessary and required to enforce the Agreement, but in an effort to avoid any argument as to the duplication of efforts or specific time entries, the City reduced its fee request from its billings of \$93,193 to \$83,193. Detailed billing summaries from Betts & Rubin were attached to Rubin's declaration.

The City argued it was entitled to recover attorney fees since the trial court had determined in the judgment that it was the prevailing party on the Agreement. The City asserted the fees incurred were reasonable because (1) to enforce and interpret the Agreement, and to defeat the District's repeated attack relating to it, the City was forced to engage in significant law and motion practice and required to brief and analyze a myriad of procedural and substantive issues; (2) the number of hours expended was reasonable, given that the City's attorneys were required to expend over 500 hours in bringing this action due to the District's tactics; and (3) the billing rates were reasonable.

The District filed written opposition to the motion in which it argued that (1) the City did not make a motion for a determination that it was the prevailing party or ask the court to determine who is the prevailing party, as required by Civil Code section 1717, and instead improperly sought fees as an allowable cost under section 1033.5; and (2) the

City did not present any evidence that the fees claimed were incurred to enforce the Agreement or that the City was billed or obligated to pay such fees. The District also filed written objections to the City's evidence. The City filed a reply brief, in which it responded to the District's arguments.

At the January 6, 2012 hearing on the motion, the trial court began by addressing the issue of whether it had determined that the City was the prevailing party, stating it believed the City was the prevailing party. The court explained that it had indicated in the statement of decision that the City "may" be awarded attorney fees and costs upon application, and while the use of the word "may" was perhaps "inartful," even if not explicitly stated in the statement of decision or judgment, "it certainly was a fact from the judgment that the [City] was the prevailing party[.]" which fact the court made explicit in its order on costs. The court understood there was a different analysis between costs and attorney fees, but with respect to the motion before it under Civil Code section 1717, it believed the City was entitled to attorney fees under the contractual provision.

The trial court stated it used the lodestar method of determining reasonable fees, and was inclined to find: (1) Rubin's hours prior to the filing of the motion were 322.4 and his hourly rate of \$215 was reasonable, for a total of \$69,316; (2) Chaffin's hours were 160 at an hourly rate of \$117, for a total of \$18,720; (3) Myers' hours were 42, at an hourly rate of \$123, for a total of \$5,166; (4) the City's fees totaled \$93,202; (5) the City requested the fees be reduced to \$83,193; (6) Rubin spent 9.5 hours at \$215 per hour, for a total of \$2,042.50, in preparing this motion; and (7) the court was inclined to grant attorney fees of \$85,235. The court ruled on the District's evidentiary objections, sustaining some and overruling others. The court further explained that it did not find it necessary to consider what other courts had done elsewhere and that it could use its own judgment from having heard many cases of this type about what are reasonable hours and rates. There was no question in the court's mind that the rates for all of the attorneys "were extraordinarily modest."

The District's attorney responded that the trial court did not have any evidence before it on which to base an attorney fee award under Civil Code section 1717, as there was no evidence of the fees the City actually incurred, namely what it paid or became liable to pay. The trial court, however, stated it was appropriate to use the reasonable value of the attorney's services, based upon prevailing market rates for attorneys of comparable experience, and the rates being claimed in this case were extremely modest compared to what the court would view as the prevailing market rate for attorneys of comparable experience. The court did not believe the bills themselves were necessary and from the evidence presented, it had been established what had been incurred and paid.

A written order subsequently was entered which stated, as pertinent here: (1) the City was the prevailing party in this matter; (2) the claims in the lawsuit fell under the scope of the attorney fees provision; (3) the rates charged and hours expended by Rubin and the City Attorney's office were reasonable; (4) the City's motion to fix attorney fees was granted; and (5) the City "shall recover" from the District its legal fees in the amount of \$85,235, as part of the judgment. An amended judgment was entered which provided that the City recover from the District its fees and costs in the amount of \$86,658.53.

DISCUSSION

I. The Memorandum of Costs

The District contends the trial court erred in awarding costs to the City because the City did not bring a motion for a discretionary determination of prevailing party status and the right to costs.

The parties agree that the determination of who was the prevailing party in this case is governed by the second sentence of section 1032, subdivision (a)(4), which provides: "When any party recovers other than monetary relief . . . the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties

on the same or adverse sides pursuant to the rules adopted under Section 1034.” This provision requires the trial court to determine which party is prevailing and then exercise its discretion in awarding costs; it does not require the trial court to award costs to the prevailing party “as a matter of right[,]” as stated in section 1032, subdivision (b).² (*Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1248-1249.)

The District asserts the trial court abused its discretion in awarding costs to the City because it treated the City’s memorandum of costs as an application for a cost award by the prevailing party, as set forth in California Rules of Court, rule 3.1700,³ “based on the false assertion that the judgment determined [the City] was the prevailing party.” Although the District claims this assertion was “false,” the trial court reasonably could conclude that the judgment it signed in fact determined the City to be the prevailing party, as the judgment states that the City “may recover its costs . . . as determined by a timely filed Memorandum of Costs.” Since the trial court had determined the City to be the prevailing party, the City properly sought to recover its costs by serving and filing a memorandum of costs pursuant to rule 3.1700, which provides, in pertinent part, that “[a] prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment . . .”.

The District next asserts the trial court treated the City as if it were the prevailing party and entitled to costs as a matter of right, and therefore applied an improper legal standard in determining whether to award costs, as it never made a determination of prevailing party status. The District argues application of an improper legal standard amounts to an abuse of discretion, citing *Costco Wholesale Corp. v. Superior Court*

² Section 1032, subdivision (b) provides: “Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.”

³ Subsequent references to Rules are to the California Rules of Court.

(2009) 47 Cal.4th 725, 733; and *Dyer v. Department of Motor Vehicles* (2008) 163 Cal.App.4th 161, 174. Contrary to the District's characterization of the record, the reporter's transcript of the hearing on the motion to tax costs shows that the trial court recognized it had discretion to determine who was the prevailing party and how costs should be apportioned. The record further reveals the trial court used its discretion to determine the City was the prevailing party and to award the City a portion of the costs it was claiming. There is no abuse of discretion.

Moreover, even if the City were required to file a separate motion to have itself declared the prevailing party, the District has not shown it was prejudiced by the City's failure to proceed in this manner. The District makes no argument that the trial court would have reached a different decision on the issue of the prevailing party had such a motion been filed. An exercise of discretion will not be disturbed on appeal unless it is shown that a clear abuse of discretion resulted in a miscarriage of justice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) Moreover, a judgment will not be reversed on the basis of such an error unless prejudice is affirmatively demonstrated. (§ 475; Cal. Const., art. VI, § 13.) Prejudice is not presumed and the burden is on the appellant to show its existence. (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1038.) Having failed to show prejudice, the District's claim of error in apportioning costs to it fails.

II. Attorney Fees Motion

The standard of review of an award of attorney fees after trial is abuse of discretion. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) The trial judge is considered the best assessor of the value of professional services in his or her court. (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 148.) As a result, the decision will not be disturbed unless it is shown that it is clearly wrong or is inconsistent with applicable legal principles. (*Ibid.*)

A. The City Attorney Fees

The District first contends the City is not entitled to recover the fees incurred for the services of the City Attorney's Office. Likening the Deputy City Attorneys who worked on this litigation, Chaffin and Myers, to pro se attorney litigants who may not recover attorney fees under Civil Code section 1717, the District asserts the City cannot recover the fees for their City attorneys' work because (1) there is no evidence the City incurred any fee in paying for their work, as the attorneys are City employees, and (2) Chaffin and Myers were representing their own interests as City attorneys when they represented the City in this litigation, namely "the interest in advancing their perverse interpretation of the agreement and validating the correctness of their determination and demand that [the District] could be subjected to an audit."

In *Trope v. Katz* (1995) 11 Cal.4th 274 (*Trope*), our Supreme Court considered the limited question of "whether an attorney who chooses to litigate in propria persona rather than retain an attorney to represent him [or her] in an action to enforce a contract containing an attorney fee provision can recover attorney fees under Civil Code section 1717[.]" and answered that question in the negative. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1092 (*PLCM*).) The Court in *PLCM* pointed out "that, by definition, the term 'attorney fees' implies the existence of an attorney-client relationship, i.e., a party receiving professional services from a lawyer." (*Ibid.*, citing *Trope, supra*, 11 Cal.4th at p. 280.)

As summarized in *Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 524: "Where an attorney-client relationship exists, the courts uniformly allow for the recovery of attorney fees under Civil Code section 1717. (*PLCM, supra*, 22 Cal.4th at p. 1093 [party represented by in-house lawyers]; *Mix v. Tumanjan Development Corp.* (2002) 102 Cal.App.4th 1318, 1321 [successful pro per litigant can recover attorney fees under Civil Code section 1717 for legal services of assisting counsel even though they did not appear as attorneys of record]; *Gilbert v.*

Master Washer & Stamping Co. (2001) 87 Cal.App.4th 212, 220 [attorney represented by other members of his or her own law firm entitled to recover contractual attorney fees].”) (See also *Musaelian v. Adams* (2009) 45 Cal.4th 512, 520 [explaining that in cases in which the California Supreme Court held that attorney fees could be recovered by the Labor Commissioner who represented a party without charge, in-house counsel, and a party represented by an attorney under a contingency fee arrangement, “. . . attorney fees were ‘incurred’ in the sense that there was an attorney-client relationship, the attorney performed services on behalf of the client, and the attorney’s right to fees grew out of the attorney-client relationship.”].) As our Supreme Court has explained, in cases where an attorney-client relationship exists, such as where a litigant is represented by in-house counsel, the in-house counsel, unlike a pro se litigant, does not represent his or her “own personal interests and [is] not seeking remuneration simply for lost opportunity costs that could not be recouped by a nonlawyer.” (*PLCM, supra*, 22 Cal.4th at p. 1093.)

Here, an attorney-client relationship existed between the City Attorney’s Office and the City. As explained in the declaration of Assistant City Attorney Francine Kanne, Myers “was involved in the representation of the City” prior to outside counsel taking over the litigation. Chaffin states in his declaration that he has been “the attorney of record to the City” regarding District matters, he had litigated a variety of claims on behalf of the City and was handling the litigation in this case until outside counsel took over the litigation. Moreover, Fresno City Charter Section 803 provides that City Attorney’s powers include: “(a) Represent and advise the Council and all city officers in all matters of law pertaining to their offices; (b) Represent and appear for the city in any or all actions or proceedings in which the city is concerned or is a party. . . .” There is no question that, in litigating this case, the attorneys in the City Attorney’s Office were performing services on the City’s behalf, not their own, and the fees incurred grew out of that relationship. (See, e.g., *Gutierrez v. G & M Oil Co., Inc.* (2010) 184 Cal.App.4th 551, 559 [In-house counsel has attorney-client relationship with employer].)

B. Fees for Outside Counsel

The District next contends the trial court erred in awarding fees for the work of outside counsel Betts & Rubin because (1) no evidence was presented concerning the market value of outside counsel's services, (2) no bills were presented with Rubin's declaration, and (3) there is no evidence the City incurred fees for the hours reflected in the billing summary or that the City actually paid those fees. The District asserts that to recover attorney fees, the City was required to disclose "what the precise arrangements are with respect to the hourly rate and what was actually charged and paid for or which Fresno became liable to pay." The District also contends the fees awarded were not reasonable because the billing summary attached to Rubin's declaration shows the "vast majority of time is spent on duplicative efforts to conduct discovery and prepare the matter for trial and to try the case on the basis of what amounts to a procedure similar to the unfiled summary adjudication motion prepared by the City attorneys."

An appellate court will reverse an award of attorney fees as excessive only where there has been a manifest abuse of discretion. (*EnPalm, LCC v. Teitler Family Trust* (2008) 162 Cal.App.4th 770, 774 (*EnPalm*).) Reasonable attorney fees authorized by contract shall be awarded to the prevailing party as "fixed by the court," giving the trial court broad discretion to determine the amount considered reasonable, governed by equitable principles. (*Ibid.*) The pleadings, depositions, and other evidence of actual work performed by the City's counsel are before the court, and upon this evidence, the court alone has the discretion to set the fee award. (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 624.)

The first step in determining the amount of fees is using the lodestar figure, a calculation based on the number of hours reasonably expended by the attorney multiplied by the attorney's hourly rate. (*EnPalm, supra*, 162 Cal.App.4th at p. 774.) After determining the lodestar figure, the court considers whether the total award calculated under all of the circumstances of the case is more than a reasonable amount, and if it is,

the court can reduce the award. (*Id.* at p. 775.) Some factors considered to assess reasonableness are the necessity and nature of the litigation, skill required, experience of counsel, attention given, and the success or failure of the case. (*Id.* at p. 774.)

In some instances, an award of attorney fees may be made solely on the basis of the experience and knowledge of the trial judge without the need to consider any evidence. (*Fed-Mart Corp. v. Pell Enterprises, Inc* (1980) 111 Cal.App.3d 215, 226.) Moreover, it is well established detailed billing records are *not* required to affirm an attorney fees award. “In California, an attorney need not submit contemporaneous time records in order to recover attorney fees. . . . Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records.” (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559; see also *Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 293.)

Here, the trial court found both that Rubin’s hourly rate and the time spent on this litigation were entirely reasonable. Contrary to the District’s assertion, the City was not required to produce evidence of the “precise arrangements” it had with Betts & Rubin or that the City actually incurred the fees. The evidence clearly shows that Betts & Rubin had an attorney-client relationship with the City, as the City retained the firm to represent it in this litigation. Numerous circumstances exist in which attorney fees are awarded even though not they are not actually incurred. A prime example is in our Supreme Court’s decision in *PLCM, supra*, 22 Cal.4th at pp. 1094-1095, holding that attorney fees may be recovered under Civil Code section 1717 for the work of in-house counsel. The Court expressly held the trial court was not required to use a “cost-plus approach,” namely a calculation of the actual salary, costs and overhead of in-house counsel, and could instead use market value to determine reasonable attorney fees. (*Id.* at pp. 1096-1097.) This conclusion was reached even though Civil Code section 1717 specifically refers to fees which are “incurred.” (See also *Lolley v. Campbell* (2002) 28 Cal.4th 367,

371, 374 [rejecting contention that attorney fees “incurred” under a Labor Code provision means only fees a litigant actually pays or becomes liable to pay from his own assets; court could award fees to employee who could not afford counsel and was represented by Labor Commissioner]; *Beverly Hills Properties v. Marcolino* (1990) 221 Cal.App.3d Supp. 7, 12 [affirming an award of reasonable attorney fees under Civ. Code, § 1717 for pro bono services].)⁴

While the District complains that the fees awarded are not reasonable, generalized and unsubstantiated objections to a fee award that do not address specific costs are inadequate to rebut the presumption that the City’s fees are reasonably and necessarily incurred. (*Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 684 (*Hadley*).) In *Hadley*, the defendant who prevailed in an action on a contract appealed from an award of attorney fees and costs that totaled less than 20 percent of his actual expenses, asserting the award was unreasonably low. (*Id.* at p. 680.) In determining how the trial court reached its decision, the appellate court noted the plaintiff had claimed that certain attorney fees were unreasonable because they were for duplicative services incurred as a result of his adversary’s need to hire a new attorney. (*Id.* at p. 683.) While the appellate court was unable to determine from the record precisely what portion of the defendant’s total fees were attributable to work of a repetitive nature, it identified two possible items of work,

⁴ In *Trope, supra*, 11 Cal.4th at p. 280, which the District cites, our Supreme Court observed that “the usual and ordinary meaning of the words ‘attorney’s fees,’ both in legal and in general usage, is the consideration that a litigant actually pays or becomes liable to pay in exchange for legal representation.” In *PLCM*, the Supreme Court explained that its reference in *Trope* “was not intended to imply that fees can be recovered only when, and to the extent that, a litigant incurs fees on a fee-for-service basis, a question not raised therein.” (*PLCM, supra*, 22 Cal.4th at p. 1097, fn. 5.) *Trope* held that an attorney who represents himself cannot recover attorney fees under Civil Code section 1717; “otherwise, we would in effect create two separate classes of pro se litigants – those who are attorneys and those who are not – and grant different rights and remedies to each.” (*Trope, supra*, 11 Cal.4th at p. 277.)

but noted they accounted for no more than 25 hours of the total claimed. (*Ibid.*) The plaintiff also objected to other items he believed were unreasonable by setting forth a string of dates and fees corresponding to those contained in the defendant's cost bill instead of explaining the basis for their generalized objections, which the appellate court found to be an inadequate challenge. (*Id.* at 684.)

Here, while the District complains that the "vast majority" of outside counsel's work was duplicative, the trial court did reduce the fees awarded, at the City's request, to take into account duplicate work. The District does not demonstrate on appeal that this was an abuse of discretion. Instead, the District asserts that the billing summary attached to Rubin's declaration shows the trial court should have reduced the fees significantly more, but fails to identify precisely what portion of outside counsel's fees are attributable to work of a repetitive nature. The District has not alleged its objections with enough specificity to rebut the presumption that the City's fees were reasonably incurred.

In sum, the District has not shown that the trial court abused its discretion in its award of attorney fees to the City.

DISPOSITION

The trial court's post-judgment orders are affirmed. Respondent shall recover its costs on appeal.

WE CONCUR:

Gomes, Acting P.J.

Detjen, J.

Franson, J.

EXHIBIT 4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

CITY OF FRESNO,

Plaintiff and Respondent,

v.

PINEDALE COUNTY WATER DISTRICT,

Defendant and Appellant.

F064112

(Super. Ct. No. MCV043413)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. James E. Oakley, Judge.

Costanzo & Associates, Neal E. Costanzo and Michael G. Slater for Defendant and Appellant.

Betts, Rubin & McGuinness, James B. Betts and Joseph D. Rubin for Plaintiff and Respondent.

-ooOoo-

Appellant Pinedale County Water District (District) and respondent City of Fresno (City) are parties to a contract that requires (1) the City receive, transport, treat and dispose of the District's sewage, (2) the District bill and collect sewer charges from its customers at rates set forth by City ordinances and regulations, and (3) the District remit

payment to the City as specified in the agreement. Beginning in December 2007, the City informed the District it wanted to conduct an audit of the District's fiscal records pursuant to a contractual provision that states, in part, that the District shall "allow City to conduct audits of the fiscal records of District pertaining to this Agreement as City may determine necessary." The District refused to submit to an audit, contending the entirety of the contractual provision only required it to produce certain documents to the City, which the City could then examine. After an exchange of letters between the attorneys for both entities over a six month period, the City filed suit against the District, asserting claims for breach of contract, declaratory relief, and accounting, seeking both specific performance and an injunction.

A bench trial was held based solely on documentary evidence, declarations and deposition testimony. The trial court found in the City's favor on all of its claims and issued a judgment in the City's favor which ordered that the City be allowed to conduct an investigation and audit of the District's internal financial controls and operations in order to determine whether the District was fulfilling its obligations under the contract.

The District appeals, contending (1) the trial court erred in its interpretation of the contractual provision at issue, (2) the undisputed facts show there was no breach of contract, (3) the City's lawsuit is barred by its failure to serve a notice of default on the District and provide it an opportunity to cure, (4) the City did not make a determination that the audit was necessary, (5) the contract is not sufficiently certain to permit specific performance, and (6) the trial court erred by awarding declaratory and injunctive relief, as well as an accounting, based only on its determination that specific performance was warranted. As we explain, we disagree with the District's contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The 1976 Contract

The City, which the County of Fresno designated the “Chief Sewering Agent” in 1966, owns and operates treatment works used to transport and treat wastewater and sewage. Between 1974 and 1977, the City expanded the treatment works by constructing a West Fresno-Herndon interceptor and enlarging its regional wastewater treatment facilities (RWTF).

Before 1976, the District treated and disposed of sewage from its service area through its own primary treatment and disposal facilities. In the 1970s, the California Regional Water Quality Control Board mandated the District solve treatment problems the District was experiencing. In 1976, the District and the City entered into a written contract for the City to transport and treat District sewage after the District determined disposal of its sewage through the City’s interceptor and RWTF was a more fiscally sound solution than upgrading its existing treatment facilities. Under the 1976 contract, the District would continue to charge and invoice its customers at specified rates, and pay a portion of the charges collected to the City to compensate it for use of the RWTF.

The 1976 contract included the following provision: “For purpose of this Contract, the District agrees to make available to the City a copy of all independent audits and to allow the City to conduct audits of the fiscal records of the District pertaining to this Contract as determined necessary by the City. The City shall have a reciprocal obligation to the District with respect to the City’s Sewer Revenue Program and related Reports.”

After the 1976 contract was executed, the District was connected to the City’s treatment works via the interceptor, and the City received, transported, treated and disposed of all District sewage pursuant to the terms of the 1976 contract.

The 2007 Agreement

In the 1990s, the City constructed capital improvements to the RWTF to restore and expand its capacity. Beginning in 1993, the costs of restoration were incorporated into the sewer service charge. Thereafter, a dispute arose between the City and District regarding the amounts the District was required to collect and remit to the City with regard to the capital component under the 1976 contract. The dispute resulted in the City filing a lawsuit against the District in 2005.

The parties entered into an agreement, effective January 1, 2007, which settled the 2005 lawsuit (the Agreement). The Agreement rescinded the 1976 contract and set forth new terms and conditions for the transportation and treatment of District sewage. The Agreement required the District to bill and collect sewer charges from its customers at rates set forth by City ordinances and regulations, and remit payment to the City as specified in the Agreement.

Paragraph 8 of the Agreement provides: “Cooperation and Inspection. District and City shall at all times cooperate and take such action as required to carry out the terms and spirit of this Agreement. District and City shall each adopt and keep in force, to the extent allowed by law, ordinances and regulations allowing employees of the respective parties to this Agreement to enter upon and inspect lands and premises connected to their respective sewer systems.” The authorized employees and representatives of each party shall, upon request, accompany and assist the other in making inspections of the respective sewer systems, connections thereto, and discharges therein, and make full disclosure to the other of all available information necessary to determine if there is compliance with the provisions of this Agreement.”

Paragraph 19 of the Agreement provides: “Maintenance of Records and Audit. District shall maintain all records pertaining to their sewage collection system and obligations under this Agreement including, without limitation, the identification of all District customers and respective premises, and all charges and receipts for sewer service.

Such records shall be available to City or its authorized representatives, within a reasonable time but not to exceed 10 calendar days' of City's request, during regular business hours throughout the life of this Agreement and for a period of four years after termination or, if longer, for any period required by law. In addition, all books, documents, papers, and records of District pertaining thereto shall be available to City for the purpose of making audits, examinations, excerpts, and transcriptions for the same period of time. District agrees to make available to City a copy of all independent audits and to allow City to conduct audits of the fiscal records of District pertaining to this Agreement as City may determine necessary. City shall have a reciprocal obligation to [sic] with respect to City's sewer revenue program and related reports. This section shall survive expiration or termination of this Agreement."

The Agreement further provides, in pertinent part, that (1) the section headings are for reference only and are not to be construed or held to explain, modify or add to the interpretation or meaning of the Agreement's provisions, and (2) the parties acknowledge that if any provision of the Agreement is found to be ambiguous, "such ambiguity shall not be resolved by construing this Agreement in favor of or against either party, but rather by construing the terms in accordance with their generally accepted meaning." Paragraph 32 of the Agreement states that the Agreement "represents the entire and integrated agreement between the parties with respect to the subject matter hereof and supersedes all prior negotiations, representations or agreements, either written or oral, including, but not limited to, the Contract."

The Present Dispute

In November 2007, the City decided to conduct an audit of the District's records under the Agreement. The decision was made by Karen Bradley, who at the time was the Interim City Controller/Finance Director, with the consent of the Director of Public Utilities, an attorney with the City Attorney's office, and the accountant responsible for managing the District's account. The City Manager also approved the audit. The City

hired an independent accountant, Fausto Hinojosa of Price, Paige & Company, to perform the audit.

In a December 11, 2007 letter to the District's general manager, Deputy City Attorney Shannon L. Chaffin advised that the City had issues with respect to the District's performance under the Agreement and explained those issues. At the end of the letter, Chaffin stated that "given the District's statements of non-compliance, as well as apparent accounting discrepancies, the City hereby gives the District written notice it will conduct an audit pursuant to paragraph 10 *[sic]* of the Contract. The City anticipates it will be contacting the District in January of 2008 to arrange specific times and dates for the audit."

In a December 14, 2007 letter to Chaffin, the District's counsel, Neal E. Costanzo, addressed the issues the City raised. Costanzo also stated: "Regarding the City's notice that it will conduct an audit pursuant to paragraph 10 of the contract, assuming, that you are referring to paragraph 19 of the Agreement, the District will comply with that request. [¶] Please take notice that the District will conduct an audit of the City pursuant to paragraph 19 of the Agreement. The District anticipates it will be contacting the City in January of 2008 to arrange specific times and dates for the audit."

On February 13, 2008,¹ Chaffin sent a letter to the District's general manager which stated that, pursuant to the City's December 11, 2007 written notice of its intent to audit the District's records, the City had retained the independent firm of Price, Paige & Company to conduct the audit, and that a representative of that firm would contact the District shortly to arrange the specific times and dates for the audit.

On February 22, Costanzo responded in a letter that, "[a]s I read your December 11, 2007, letter, it does not provide any notice of an intent to conduct any audit pursuant to paragraph 10 *[sic]* of the Settlement Agreement between the parties. If you

¹ Subsequent references to dates shall be to dates in 2008 unless otherwise noted.

wish to conduct an audit, we will insist that you do so in conformity with the agreement.” Costanzo further stated that the City was in “clear breach of the agreement” by issuing the December 11, 2007 and February 13 letters.

That same day, Chaffin sent a written notice to the District’s general manager which stated: “PLEASE BE ADVISED THE CITY WILL BE CONDUCTING AN AUDIT OF THE FISCAL RECORDS OF THE DISTRICT PERTAINING TO THE AGREEMENT FOR TRANSPORTATION AND TREATMENT OF PINEDALE COUNTY WATER DISTRICT SEWAGE. Price, Paige & Company has been designated as the City’s authorized representative for the purposes of conducting the audit. A representative of Price, Paige & Company will be contacting the District shortly to make arrangements for the specific times and dates for the audit.”

Also that day, Chaffin sent Costanzo a separate letter addressing Costanzo’s February 22 letter. Chaffin stated he was “somewhat surprised” by the District’s assertion that the City had not given any notice of intent to conduct an audit, as (1) the December 11, 2007 letter clearly notified the District of the City’s intent to exercise its audit rights under the Agreement, (2) that letter specifically noted the City would contact the District to arrange specific times and dates for the audit, (3) Costanzo acknowledged the notice and intent to conduct the audit in his December 14, 2007 letter, and (4) the City’s February 13 letter reiterated the City’s intent to conduct an audit. Chaffin clarified the City was invoking paragraph 19 of the Agreement, not paragraph 10 as inadvertently stated in the first letter, in exercising its right to conduct an audit and repeated the February 10 notice provided to the District’s general manager so there would be no confusion regarding the City’s intent.

On March 4, Costanzo sent a letter confirming a telephone conversation he had with Chaffin that day concerning the City’s attempts to schedule or conduct an audit under paragraph 19 of the Agreement. Costanzo stated: “As we discussed, the way I read paragraph 19 is that the determination to conduct the audit you are attempting to

conduct now must be by the City. Although not specified anywhere in the agreement, the provision certainly seems to imply and to be rationally interpreted to mean that the decision to conduct the audit must come from the body or person authorized by law to require the audit. . . . Pinedale has serious concerns about the true motivation behind the attempts to conduct this audit. I suggested during our conversation that it would be much easier, and far less intrusive for the District if you would simply have your auditor list for us the items of information needed to make a determination of whether the District is conforming to the requirements of the agreement and we will make every effort to timely comply with those requests. After all, the documents that relate to the sewer charges are public records that the District is required to make available. The District simply objects to being subjected to what it views as rather abusive demands for audits, consisting of an in-office review of the financial records of the District. That would seem unnecessary to determine whether the District is conforming to the agreement. . . . ”

In a March 7 letter from Chaffin to Costanzo, which references Costanzo’s March 4 letter and a subsequent conversation the two had, Chaffin listed the District’s contentions and explained why the City disagreed with those contentions. Chaffin stated that the deadline for providing records had run, as the City gave notice on February 22 and the Agreement requires the District to make all records available to the City within 10 days of the City’s request, and the District’s staff failed to return the auditor’s calls to coordinate this matter. Chaffin further stated that “in the spirit of compromise” the City was willing to extend the deadline to make all records available for examination by the independent auditor to March 10.

On March 12, Costanzo wrote Chaffin stating, in part, as follows: “The point of my conversation with you on March 4, 2008 was to get you to actually read the provision under which you are purporting to seek a[n] ‘audit.’ The provision does not allow you to do what you are attempting to do. The provision simply states that the District shall ‘maintain all records pertaining to their sewage collection system and obligations under

this agreement.’ It provides that those records, and only those records[,] shall be made available to the City within a reasonable time not to exceed 10 days of the City’s request for these records. As far as I can see, the City has not made any request for any particular records[;] it has simply ‘advised’ the District that it will ‘be conducting an audit of the financial records of the District.’ The provision gives the City no such right. . . . [¶] . . . If you would like to be reasonable in your requests and ask for the specific information that you are entitled to receive under paragraph 19 of the agreement, the District will be happy to make that available to you along with its invoice for all actual costs incurred in retrieving, compiling and making that information available to you. It will not allow an employee or contractor of the City to simply have access to all of its computerized records of every nature.”

In response, Chaffin wrote to Costanzo on March 14, in part, as follows: “It is unfortunate the District is taking a position clearly contrary to the express terms of the Agreement and will not allow the City’s independent auditor access to all fiscal records pertaining to the public funds associated with that contract. . . . [¶] In summary, the District has refused to make all fiscal records pertaining to the Agreement available, . . . The City requests District staff contact the independent contractor to set a mutually agreeable time in which to make all the District’s records available in whatever format they may be stored in the regular course of business. If the City does not receive confirmation of the District’s willingness to meet the express terms of our Agreement and allow an audit by March 21, 2008, the City will have no choice but [to] conclude the District will not comply with the Agreement, and the City will pursue appropriate remedies.”

Costanzo responded by letter to Chaffin, in part: “You have already received confirmation of the District’s willingness to meet the express terms of the agreement and to allow the inspection of those records that are referred to in that paragraph and that are reflective of the District’s compliance with the terms of that agreement which relates

solely and completely to charges and receipts of payment of those charges for sewer collection services provided by the District. The City certainly has more than the choice of concluding that the 'District will not comply with the agreement,' it has the choice of actually reading the contract, my letters in response to your inappropriate demands for a generalized audit of the District's finances and recognizing that it has absolutely no right to be concerned with 'financial issues associated with the District's activities,' to the extent that those activities have nothing to do with the sewage collection system. Given the provisions of the contract, one would think it would only be prudent for the City to objectively evaluate the validity of the interpretation that it is apparently assigning to paragraph 19 of our agreement. [¶] Kindly let me know if you intend to continue to insist on a generalized audit and I will file with the court a declaratory relief or other complaint."

Responding on March 19, Chaffin wrote Costanzo: "There has never been grounds for the District's delays based on its assertion the City is conducting some sort of general audit of the District's records as to anything other than the fiscal records of the District pertaining to the Agreement. As has been repeatedly stated throughout the City's correspondence over the last several months, our phone conference, and the Notice provided by the City, the City is demanding access to the District's fiscal records pertaining to the Agreement for the purposes of the audit." Chaffin referenced the February 22 notice of audit, which did not refer to a general audit and used the same language set forth in the Agreement.

Chaffin further stated: "Notwithstanding months of delay regarding this matter, the District still continues to assert it will allow the audit, but then simultaneously states a) it will not permit an audit as there has not been proper authorization within the City to conduct an audit; b) the audit is otherwise improper; and/or c) the District refuses to make available all fiscal records of the District pertaining to the Agreement. These delaying tactics are not only a violation of the time limits to make available its fiscal

records as set forth in Paragraph 19 of the Agreement, but are contrary to the express terms of the contract which requires the ‘District . . . shall at all times cooperate and take such action as required to carry out the terms and spirit of this Agreement.’ (Agreement, Paragraph 8.) [¶] . . . [¶] As the City has yet to receive confirmation of the District’s willingness to meet the express terms of our Agreement as to all the fiscal documents relating to the contract and to allow an audit by March 21, 2008, and given the District staff have still refused to return the independent auditor’s calls to set a mutually agreeable time for inspection of the District’s fiscal records, the City has no choice but to conclude the District will not comply with the Agreement. . . .”

On March 26, Chaffin wrote Costanzo advising that March 21 had passed and “despite months of efforts by the City, the District continues to a) refuse to contact or return the calls of the independent auditor to set a mutually agreeable time for inspection of the District’s fiscal records; b) refuse to contact the City to set a mutually agreeable time for inspection of the fiscal records in conjunction with the audit; and c) refuses to affirm it will make available for audit all fiscal documents associated with the Agreement, including electronic records. [¶] The City has no choice but to conclude the District will not comply with the Agreement. Since we are engaged with matters involving public funds, the City will pursue all appropriate remedies.”

Costanzo responded by an April 2 letter: “You can pursue any remedy you think you have available; but, given our repeated advisements that we have made literally every document that is relevant to performance under the agreement available to you, I suspect any remedy you seek to pursue will not only be futile but will expose the City to liability for breach. . . . You can see from [my prior] correspondence that the limit of your claimed right to inspect documents – which you keep trying to characterize as a[n] ‘audit’ of all ‘matters involving public funds’ – is defined by the agreement as those documents bearing on the District’s performance under the agreement. As I have told you repeatedly, and what you consistently attempt to ignore, those documents would be

limited to documents reflecting the charges levied by the District, the amounts received in payment of those charges and the amounts remitted to the City. You have no right, and the contract plainly provides no right, to seek to audit the District's financial affairs, in general. [¶] We do know why you are attempting to conduct such an unrestricted audit. It is to provide the City with what it needs to advance its hostile takeover attempts of the District. . . . ”

On April 4, Chaffin wrote Costanzo that, “[b]ased upon your representation that the District will now make ‘literally every document that is relevant to the performance under the agreement available,’ and assuming this includes relevant electronic records, the City looks forward to commencing the audit. In this regard, and as previously requested, please provide dates the District will make ‘literally every document that is relevant to the performance under the agreement’ available for inspection by the City’s independent auditor. [¶] ... [¶] I look forward to receiving the dates from your office.”

Over a month later, on May 9, Chaffin again wrote Costanzo: “Despite the passage of months, [the District] continues to refuse to provide dates it will make its records available to the City to conduct the audit; [the District] has failed to respond to the City’s correspondence; and [the District] refuses to communicate with the City regarding the audit of all fiscal records relating to the Agreement. As a result, on May 6, 2008, the City Council authorized the City to commence litigation against [the District]. [¶] Absent prompt communication from [the District] providing dates it will make available for audit all fiscal records pertaining to the Agreement, including relevant electronic records and spreadsheets, the City intends to move forward with litigation. Please advise me as soon as possible if this matter can be resolved without litigation.”

Responding on May 19, Costanzo wrote: “The District has not refused to provide dates on which it would make records available to the City that it is entitled to receive under the subject agreement relating to the sewage collection and disposal system and I have advised you repeatedly, in writing, that the records that are pertinent to performance

under that agreement are available to you at the District office during regular business hours. You have failed, despite the passage of months since I have made this material available to you to attempt any review of it. . . . The fact is that the only thing available to you under the provision of the contract relating to the sewage collection system, . . . are documents that pertain to the agreement and performance thereunder. We have identified those records as those that relate to charges for and remittance to the District for sewer service during the life of the agreement and those that relate to remittances by the District to the City. Based on your apparent unwillingness to inspect the documents that we have been making available for your inspection for many months, we assume you are not interested in reviewing this material. [¶] What you do apparently appear to be interested in is conducting an unrestrained 'audit,' of virtually every aspect of the District's operations, something that you are not entitled to do under our agreement. . . ."

On May 22, Chaffin responded that, "given the District's current representation it will now make 'documents' available at its office during 'regular business hours,' please accept this courtesy notice that a representative of Price, Paige & Company will be appearing at the District's office this Friday, May 23, 2008, to commence the audit. The City anticipates District staff will promptly make available all fiscal records of the District pertaining to the Agreement . . . , including electronic copies of fiscal records relating to the Agreement such as spreadsheets."

On May 23, the City's independent auditor, Hinojosa, arrived at the District's office. Hinojosa spoke with Pam Einsel and explained to her that he was the auditor the City engaged to conduct an audit of customer billings. Einsel told him she needed to speak with her attorney. When she returned from making a telephone call, she told him they just were informed the previous evening that he would be coming in and he would have to reschedule. After Hinojosa asked her if he could reschedule the appointment to obtain the electronic billing records, Einsel asked if he wanted to download records. Hinojosa explained that he did not want to access her computer system, but merely

wanted her to copy the District's electronic billing records onto his removable flash drive. Einsel asked why paper records were not good enough. Hinojosa told her he could perform more effective and efficient analysis of electronic records. Einsel said she could not do that, she could not reschedule without talking to her attorney, and she would call Hinojosa on Tuesday, May 27, 2008 to reschedule.

On May 28, Chaffin sent Costanzo a letter expressing the City's disappointment in the District's "latest refusal to make its fiscal records available for audit review." Chaffin recounted the District's positions on this issue since December 2007, and reiterated the City's position that (1) it had consistently sought audit review of all fiscal records pertaining to the Agreement, (2) the City was not seeking to conduct a "general audit" of the District's fiscal records unrelated to the Agreement, and (3) the City was not seeking to access the District's computer system, but was seeking electronic copies of those fiscal records pertaining to the Agreement as part of its "audit examination." Chaffin stated that unless an immediate response was received providing "affirmative clarification of dates and times all fiscal records (including electronic copies of spreadsheets) will be made available to the City, the City will move forward with seeking judicial guidance in this matter."

Costanzo responded in a May 29 letter that he understood the City now agreed that "all that the District is required to make available to you are those specific documents showing charges, receipts and remittances relating to sewer collection services within the District." Costanzo explained: "We previously made all of these documents available for you and you failed to make any attempts to inspect the documents. Naturally, after the passage of 'months' as you put it we placed the materials back in our files. Needless to say, it is not possible at current staffing levels to immediately compile and produce for your inspection the documents yet again." He asked if the City would be satisfied with the production of those records that show the amount charged, collected and remitted to

Fresno for sewer service, but stated the District would only provide hard copies, not electronic ones.

Chaffin responded on June 2 that the City would be satisfied with the production of the records Costanzo listed, as no fiscal records other than documents reflecting charges, payments, collections and remissions to the City for sewage services were known to be responsive, but only if electronic copies of fiscal records kept on computers were also made available. Chaffin noted that the District continued to refuse to make electronic copies of computer files available and reiterated the City's position that it was entitled to all fiscal records that relate to the Agreement, including documents or spreadsheets the District kept in electronic format. Chaffin asked Costanzo if the District would be willing to make electronic copies available, allow the auditor to communicate with District staff for purposes of the audit, provide dates and times the fiscal records would be available to the City, and cooperate with the City in conducting the audit.

This Lawsuit

On June 3, the City filed its complaint in this action in Fresno County Superior Court. After the action was transferred to Madera County Superior Court, the City filed a First Amended Complaint, in which it alleged causes of action for breach of contract, declaratory relief, and accounting, and sought as remedies specific performance and injunctive relief.

The case proceeded to a court trial. By agreement of the parties, the evidence was submitted to the trial court through written declarations and documentary evidence. The parties also submitted trial briefs. The parties appeared for trial on March 4, 2011, and argued the admissibility of evidence. The parties stipulated to the admission of certain evidence and agreed the trial court would rule on the admissibility of evidence that remained in dispute. In addition, the trial court, with the District's urging, chose to bifurcate the issues of the authority of City personnel to request an audit under the

Agreement and whether the District could object to the determination that an audit was necessary.

On March 18, 2011, the trial court ruled on the bifurcated issues. The trial court found (1) the City's determination that it was necessary to conduct an audit could be made by the City's employees, particularly the ones who made the decision here, and did not have to be made by its governing body, and (2) such a determination must be made in good faith. The District's counsel stated that the District was willing to enter into a stipulation that, given the trial court's determination that a staff person is able to, and did, make the determination of necessity, "the basis for that staff person's determination of necessity is really not relevant to our case." After further discussion, the parties stipulated that, for the purposes of this action only, the issue of good faith would not need to be resolved or, as stated by the District's counsel, "there's no issue relative to whether or not whatever they are requesting is or is not necessary." The parties then addressed other evidentiary matters.

On March 30, 2011, the trial court issued a written order on the evidentiary objections. On April 29, 2011, the trial court addressed further evidentiary issues, admitted additional documents and heard closing arguments. The matter was submitted to the trial court entirely upon the admitted written evidence.

On July 5, 2011, the trial court issued its proposed statement of decision, in which it found (1) based on the dictionary definition of the term "audit," as well as case law regarding the term, the term "audit" in the Agreement "means substantially more than what District has asserted in its papers"; (2) the District breached the Agreement because it did not cooperate in allowing the City's representatives access to its internal financial controls; and (3) specific performance is warranted because there is no adequate remedy at law. The trial court further found for the City on its accounting and injunctive relief claims on the same grounds and reasons as the specific performance claim, and granted the City's request for declaratory relief "to the extent that it has the right to seek an audit

of the internal controls and financial operations of District limited to District's operations under the Agreement." The trial court rejected the District's contention that the City waived its right to pursue any remedy because it failed to give it the opportunity to cure its default under the Agreement.

The District filed objections to the proposed statement of decision, while the City filed a request for additions. A hearing on the proposed statement of decision, objections and request for additions, was held on September 1, 2011. After hearing oral argument, the trial court announced it was going to modify the statement of decision, and invited the City's counsel to submit further proposals to the statement of decision. The trial court agreed to e-mail both parties its statement of decision, gave the City until September 14 to submit additional proposals, and gave the District until September 21 to file further objections, after which the trial court would take the matter under submission. The City served a proposed revised statement of decision on September 14, 2011, and the District filed further objections.

On October 4, 2011, the trial court filed its final statement of decision and rendered judgment in the City's favor. The trial court found: (1) the audit of the District's records was properly authorized by a number of individuals in several departments of the City and did not need to be authorized by the Mayor or City Council; (2) the City was required to exercise good faith in determining whether the audit was necessary, and since the parties stipulated the City satisfied this standard, no further evidence on this issue was required; (3) the District's contention that the City failed to provide notice of default and an opportunity to cure any breach as required under paragraph 15 of the Agreement was without merit, as the evidence and law established that either the City complied with the paragraph, the District waived compliance, or compliance was unnecessary as it would have been a futile act; and (4) the provisions of the Agreement, and the circumstances under which it was drafted, amply support the City's position that it "should be allowed access to District's fiscal records and

information pertaining to the Agreement and compliance thereof. City is entitled to audit, examine, make excerpts and transcribe District records relating to the Agreement.”

The trial court further found: (1) the District breached the Agreement, as it was clear that the District had the ability to provide records to the City for inspection and allow the City to conduct audits of its fiscal records, yet the District repeatedly denied the City the ability to perform the audit as defined in Paragraph 19 of the Agreement; and (2) the City had demonstrated each of the elements required for specific performance of the Agreement had been met. The trial court granted the City’s request for declaratory relief “to the extent that City has the right to seek an audit of the internal controls and financial operation of District limited to District’s operations under the 2007 Agreement.” The trial court found it was appropriate to issue a permanent injunction to require the District to comply with the Agreement. Finally, the trial court found the Agreement defined the District’s duty to account, therefore the City’s accounting claim essentially folded into its specific performance claim. The trial court accordingly found for the City on its accounting claim on the same grounds and reasons as the claim for specific performance.

Judgment was entered as follows: (1) in favor of the City on its cause of action for specific performance of the Agreement, and granting the City’s request for injunctive relief and for an accounting to the extent that such remedies are congruent with the City’s request for specific performance; (2) the City “shall be allowed to conduct an investigation and audit of the District’s internal financial controls and operations including, but not limited to, all records pertaining to the sewage collection system and the District’s obligations under the Agreement, in order to determine whether the [] District is fulfilling its obligations under the 2007 Agreement”; (3) the City may recover its costs, including attorney fees, as permitted by statute or contract as determined pursuant to a timely filed memorandum of costs; and (4) the Court shall retain jurisdiction to address and resolve any issues or disputes relating to costs or arising

between the parties following the issuance of this judgment which relates to the enforcement of the terms of the judgment and statement of decision.

The District moved for a new trial, which the trial court denied on December 8, 2011. Thereafter, the District filed this appeal.

DISCUSSION

I. Specific Performance

The City's primary claim against the District is for specific performance. Specific performance is an equitable remedy available for breach of contract. (*Blackburn v. Charnley* (2004) 117 Cal.App.4th 758, 766; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 49; *Tamarind Lithography Workshop, Inc. v. Sanders* (1983) 143 Cal.App.3d 571, 575 (*Tamarind*).) In addition to proving the contract has been breached, a plaintiff seeking specific performance must demonstrate that: (1) the legal remedy is inadequate; (2) the underlying contract is reasonable and supported by adequate consideration; (3) a mutuality of remedies exists; (4) the contractual terms are sufficiently certain such that the court knows what it is to enforce; and (5) the requested performance is substantially similar to that promised in the contract. (*Tamarind, supra*, at p. 575.)

The District contends the trial court erred in ordering specific performance because (1) Paragraph 19 does not require it to submit to the type of audit the City demanded, but rather requires only that the District provide the City with the documents listed in that paragraph, (2) there is no evidence to support the trial court's finding that it breached the Agreement, as the attorney correspondence shows the City demanded an audit that involved more than what the District was required to provide under Paragraph 19 and the District consistently offered to provide the documents it was obligated to provide, (3) the City failed to serve a notice of default as required by Paragraph 15 of the Agreement, (4) neither the City Council nor the Mayor made the decision to conduct the

audit, and (5) the contract is not sufficiently certain to permit specific performance, as the term “audit” is ambiguous.

A. The Interpretation of Paragraph 19

We begin with the terms of the contract. The dispute in this case is over the meaning of the word “audits” as contained in Paragraph 19 of the Agreement, and the scope of the District’s obligation to provide documents to the City. The District contends “audits” should be “accorded the commonly understood meaning of ‘to examine’, ‘check’ or ‘verify’ specified documents[,]” and, under that definition, the District only was required to provide the City with the documents listed in the first sentence of Paragraph 19, which documents the City could then examine. The City contends the term “audit” is much broader and confers on the City the right to verify and reconcile amounts the District provided under the Agreement, to ascertain the validity and reliability of the information, and to assess the District’s internal controls to ensure the material is accurate. The trial court found the District’s interpretation of the term “audit” was not reasonable, as “[t]he plain language of the audit provision calls for considerably more than that which was ever offered by District.”

The fundamental objective of contract interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636;² *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1356 (*Wolf*)). When the contract is a written one, the parties’ intention is determined from the writing alone, if possible. (§ 1639; *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.) “The words of a contract are to be understood in their ordinary and popular sense.” (§ 1644; see also *Jenkins v. Valley Oil Co.* (1964) 226 Cal.App.2d 41, 45 [“In California the rule is that ‘The terms of a writing are presumed to have been used in their primary and general acceptance,’” quoting Code Civ. Proc., § 1861];

² Undesignated statutory references are to the Civil Code unless otherwise noted.

Binder v. Aetna Life Ins. Co. (1999) 75 Cal.App.4th 832, 851-852 [“A contract must receive such an interpretation as will make it . . . reasonable . . . if it can be done without violating the intention of the parties,” quoting § 1643].)

Contract interpretation requires a two-step process. (*Wolf, supra*, 114 Cal.App.4th at p. 1351.) First, a trial court provisionally receives all credible extrinsic evidence concerning the parties’ intentions to determine whether the contract is ambiguous, that is, whether it is reasonably susceptible to a meaning proffered by a party. (§§ 1638, 1639, 1644; *Wolf, supra*, at p. 1351.) In the second step, the trial court interprets the contract. If the court has determined the contract is ambiguous, then the court may admit relevant extrinsic evidence to aid in interpretation. (*Wolf, supra*, at p. 1351.) A contract must be interpreted by consideration of the whole agreement, with the provisions in context, not in isolation. (§ 1641; *City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 240.)

Determination of ambiguity of a contract is a question of law, subject to independent review on appeal. (*Roden v. Bergen Brunswick Corp.* (2003) 107 Cal.App.4th 620, 625; *Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554-555; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166.) We review the interpretation of a contract de novo where the trial court based its interpretation solely upon the words of the unambiguous contract, where the relevant admissible extrinsic evidence is not conflicting, or where there is an issue as to admissibility of extrinsic evidence. (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912-914.) Here, the District asserts the only extrinsic evidence submitted to construe the term “audit” is the 1976 contract and the fact that the Agreement resulted from settlement of litigation the City initiated over the 1976 contract. Since this evidence is not conflicting, our determination of the meaning of Paragraph 19 is a pure question of law.

The District contends the first two sentences of paragraph 19 – “District shall maintain all records pertaining to their sewage collection system and obligations under

this Agreement including, without limitation, the identification of all District customers and respective premises, and all charges and receipts for sewer service. Such records shall be available to City or its authorized representatives, within a reasonable time but not to exceed 10 calendar days' of City's request, during regular business hours throughout the life of this Agreement and for a period of four years after termination or, if longer, for any period required by law." – "make clear that the only obligation imposed by the entire paragraph is to maintain and make available within 10 days of a request those documents which pertain to the sewage collection system, specifically those which identify customers, their premises, charges and receipts for sewer service." The District asserts these are the only relevant documents and the City is required to specify precisely what records it wants the District to make available to it.

The first two sentences of Paragraph 19, however, do not use the word "documents;" instead, they use the word "records," which implies more than the hardcopy documents the District insists is the only format of records it is required to produce. As used in this paragraph, "records" can encompass both written and electronic formats. In addition, while the first sentence lists certain records the District must maintain, i.e. "the identification of all District customers and respective premises, and all charges and receipts for sewer service," the mandate is not limited to only these records, as it specifically states the records include, "without limitation," those specified records. Given the broad language in these sentences, they are not reasonably susceptible to the District's interpretation that the only records it is required to maintain and produce on request are hardcopies of documents pertaining to the identification of the District's customers and their premises, and all charges and receipts for sewer service.

The District next asserts the term "audits" in the third sentence – "In addition, all books, documents, papers, and records of District pertaining thereto shall be available to City for the purpose of making audits, examinations, excerpts, and transcriptions for the same period of time." – is used in the same manner as Code of Civil Procedure section

2030.230, which provides for the right to “examine, audit and inspect” documents a party has made available.³ The District further contends that in the third sentence, as well as in the fourth sentence of the paragraph, i.e. “District agrees to make available to City a copy of all independent audits and to allow City to conduct audits of the fiscal records of District pertaining to this Agreement as City may determine necessary[,]” the word “audit” is a transitive verb and therefore must be accorded the “meaning of ‘to examine,’ ‘check’ or ‘verify.’”⁴ Finally, the District asserts the term “fiscal records,” which is

³ Code of Civil Procedure section 2030.230 provides: “If the answer to an interrogatory would necessitate the preparation of the making of a compilation, abstract, audit, or summary of or from the documents of the party to whom the interrogatory is directed, and if the burden or expense of preparing or making it would be substantially the same for the party propounding the interrogatory as for the responding party, it is a sufficient answer to that interrogatory to refer to this section and to specify the writings from which the answer may be derived or ascertained. This specification shall be in sufficient detail to permit the propounding party to locate and to identify, as readily as the responding party can, the documents from which the answer may be ascertained. The responding party shall then afford to the propounding party a reasonable opportunity to examine, audit, or inspect these documents and to make copies, compilations, abstracts, or summaries of them.”

⁴ This is the District’s reasoning: (1) the word “audits” as used in the third and fourth sentences is a transitive verb, meaning that it is a verb “characterized by having or containing a direct object[,]” (Merriam-Webster Online Dict., <<http://www.merriam-webster.com/dictionary>> [as of Sept. 11, 2013]; (2) the definition of “audit” when the word is used as a transitive verb is “[t]o examine, verify, or correct the financial accounts of” (American Heritage Online Dict. (5th ed. 2011) <<http://www.ahdictionary.com>> [as of Sept. 11, 2013]; and (3) based on that definition, the City only had the right to examine or verify the records listed in the first sentence of paragraph 19.

The grammatical argument fails, however, because the premise is incorrect. The word “audits” is not a verb in these sentences. A verb is “[t]he part of speech that expresses existence, action, or occurrence . . .[,]” while a noun is “[t]he part of speech that is used to name a person, place, thing, quality, or action and can function as the subject or object of a verb . . .” (American Heritage Online Dist. (4th ed. 2011) <<http://www.ahdictionary.com>> [as of Sept. 11, 2013].) The verb in the pertinent part of the third sentence is “making,” while the nouns are “audits, examination, excerpts, and transcriptions.” The verb in the pertinent part of the fourth sentence is “conduct” and the nouns are “audits of the fiscal records.”

undefined in the Agreement, necessarily refers to the records specified in the first sentence, namely those pertaining to the sewage collection system and all charges and receipts for sewer services.

The District's reading that paragraph 19 simply allows the City to examine the documents specified in the first sentence of the paragraph renders many of the terms used without significance, such as "without limitation," "[i]n addition, all books, documents, papers, records of District . . . shall be available to City . . .," "examination," and "allow City to conduct." Moreover, if the District were required to provide the City with only the listed documents for examination, the third and fourth sentences would be almost entirely unnecessary, as there is nothing in the first two sentences that prohibits the City from examining the documents provided to it. (1 Witkin, Summary of Cal. Law, (10th ed. 2005) Contracts, §§ 745, 750, pp. 833, 840 ["an interpretation [of a contract] which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect"]; § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"].

Moreover, notwithstanding District's counsel assertion at oral argument that "in every dictionary you will find when audit is used as a verb, it means to examine, inspect, scrutinize, that sort of thing," not every dictionary defines the word that way. The Merriam-Webster Online Dictionary defines "audit," when used as a transitive verb, as "to perform an audit of or for <audit the books> <audit the company>." (Merriam-Webster Online Dict., <<http://www.merriam-webster.com/dictionary>> [as of Sept. 11, 2013].) This definition does not limit an audit when used as a verb to an examination or inspection; instead, when coupled with the definition of the noun "audit" "in the Merriam-Webster Online Dictionary, the verb "audit" means "to perform a formal examination of an organization's or individual's accounts or financial situation[.]" or "to perform a methodical examination and review." (Merriam-Webster Online Dict., <<http://www.merriam-webster.com/dictionary>> [as of Sept. 11, 2013] [defining the noun "audit" as "a formal examination of an organization's or individual's accounts or financial situation" or "a methodical examination and review."].)

In contrast to the District's strained reading of paragraph 19, the trial court's reading – that the City is entitled to audit, examine, make excerpts and transcribe District records relating to the Agreement, and has the ability to audit and examine District records and internal controls to confirm the accuracy of information being provided to it as well as compliance with the Agreement – allows each of the contract terms to assume their “ordinary and popular” meaning and renders none as surplusage. (§ 1644.) A plain reading of the first two sentences of the paragraph reveals that the District is required to maintain *all* records, whether in electronic or hardcopy form, pertaining to its sewage collection system and obligations under the Agreement, and to make those records, in any form, available to the City within 10 days of the City's request during regular business hours.

The third and fourth sentences impose additional rights and obligations on the parties, as the third sentence begins “[I]n addition, ...” The third sentence states “all books, documents, papers, and records of the District pertaining thereto,” i.e. to the sewage collection system and the District's obligations under the Agreement, “shall be available to the City” for certain purposes, i.e. making audits, examinations, excerpts, and transcriptions. In the fourth sentence, the District agrees to “make available to City a copy of all independent audits and to allow City to conduct audits of the fiscal records of District pertaining to this Agreement”.

In interpreting these provisions, we look to the dictionary definition of “audit” to aid us. (*Scott v. Continental Ins. Co.* (1996) 44 Cal.App.4th 24, 30 [“It is safe to say that the ‘ordinary’ sense of a word is to be found in its dictionary definition.” (fn. omitted)]; § 1644 [“The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning.”].) “Audit” commonly means “a formal examination of an organization's or individual's accounts or financial situation” or “a methodical examination and review.” (Merriam-Webster Online Dict., <<http://www.merriam-webster.com/dictionary>> [as of Sept. 11, 2013]; see also American

Heritage Online Dict., <<http://www.ahdictionary.com/>>[as of Sept. 11, 2013] (“audit” means: “1. An examination of records or financial accounts to check their accuracy. [¶] 2. An adjustment or correction of accounts. [¶] 3. An examined and verified account. [¶] 4. A thorough examination or evaluation.”)⁵

Thus, the phrase “making audits” in the third sentence means that the District is required to make available to the City “all books documents, papers, and records” pertaining to its obligations under the Agreement so the City may verify and reconcile amounts being provided by the District under the Agreement, and the phrase “allow City to conduct audits” in the fourth sentence means the District must permit the City to ascertain the validity and reliability of the District’s fiscal records that pertain to the Agreement, including assessing the District’s internal controls to ensure the information is accurate. The provision does not allow for a general audit of all of the District’s records, as it limits the audit to those records that pertain to the Agreement.

The trial court’s interpretation is supported by the terms of the Agreement which clearly mandate the City have access to District records and information that pertains to the contract so the City can ensure compliance with the contract: (1) District and City “shall at all times cooperate and take such action as required to carry out the terms and spirit of this Agreement. . . .” (¶8); (2) the parties shall “make full disclosure to the other of all available information necessary to determine if there is compliance with the provisions of this Agreement.” (¶8); (3) “District shall maintain all records pertaining to their sewage collection system and obligations under this Agreement . . . Such records shall be available to City or its authorized representatives, within a reasonable time . . .” (¶19); (4) “all books, documents, papers, and records of District pertaining thereto shall

⁵ These definitions are of the word “audit” when used as a noun. As we explained in footnote 2, *supra*, the word “audit” is used in paragraph 19 as a noun. The District concedes in its reply brief that when “audit” is used as a noun, these definitions control.

be available to City for the purpose of making audits . . . ” (§19); and (5) District “agrees to make available to City a copy of all independent audits and to allow City to conduct audits of the fiscal records of District pertaining to this Agreement” (§19).⁶

The circumstances under which the Agreement was executed also support a broad interpretation of Paragraph 19. The Agreement resulted from a negotiated settlement of a lawsuit over the amounts the District was required to collect and remit to the City. In the previous contract between the parties, the right to audit was found in Paragraph 13: “For purpose of this Contract, the District agrees to make available to the City a copy of all independent audits and to allow the City to conduct audits of the fiscal records of the District pertaining to this Contract as determined necessary by the City. The City shall have a reciprocal obligation to the District with respect to the City’s Sewer Revenue Program and related Reports.” Paragraph 19 of the Agreement contains the same language, but builds on it by adding the first two sentences regarding the District’s obligation to maintain all records pertaining to the Agreement and to make those records available to the City. Paragraph 19 also adds the third sentence, which requires the District to make available to the City “for the purpose of making audits” “all books, documents, papers, and records” pertaining to the Agreement. By adding these sentences, the parties clearly attempted to specify broad rights for the City to inspect and examine District records. As the City points out, given the nature of the collection arrangement, it would be nearly impossible for the City to determine whether the District was properly collecting and remitting amounts to it under the Agreement without access to the District’s records and a reasonable opportunity to audit them.

⁶ It is noteworthy that the District allows its own auditors the ability to come to the District’s office, request and gather documents, ask questions and make requests for further information.

In sum, Paragraph 19 means what it says. The District is required to: (1) maintain *all* records pertaining to the sewage collection system and obligations under the Agreement; (2) make those records available to the City or its authorized representative within a reasonable time not to exceed 10 days of the City's request; (3) make available to the City *all* District "books, documents, papers and records" pertaining to the Agreement "for the purpose of making audits, examinations, excerpts, and transcriptions"; (4) make available to the City copies of all independent audits; and (5) allow the City to "conduct audits" of its "fiscal records" pertaining to the Agreement as the "City may determine necessary." The last requirement bestows broad discretion on the City to determine both whether an audit is necessary and the scope of that audit, limited only by the requirement that the records pertain to the Agreement. There is nothing in this paragraph, or the Agreement, that limits the audit's scope only to an examination of the records listed in the first sentence of Paragraph 19, or that prohibits the City from asking the District to provide an auditor with access to the District's records and employees to determine compliance with the Agreement. To the contrary, the District is required "to allow" the City to conduct such an audit.

The District contends the terms of Paragraph 19 are not sufficiently certain to permit specific performance. "The equitable remedy of specific performance cannot be granted if the terms of a contract are not certain enough for the court to know what to enforce. (§ 3390, subd. 5; *Buckmaster v. Bertram* (1921) 186 Cal. 673, 676.) However, "[t]he law does not favor but leans against the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if [they] can be ascertained." (Patel v. Liebermensch (2008) 45 Cal.4th 344, 349.)

But as we have already explained, the terms of Paragraph 19 clearly require the District to (1) maintain all records pursuant to the Agreement, (2) timely make those records available to the City upon request, (3) make available to the City all books,

documents, papers and records pertaining to the Agreement so the City may conduct audits, and (4) allow the City to conduct audits of the District's fiscal records pertaining to the Agreement. There is nothing ambiguous or uncertain about these terms. That the District asserted a different understanding of these requirements does not render them uncertain.

B. Breach

Based on the trial court's interpretation of Paragraph 19, i.e. it "provides City with the ability to audit and examine District records and internal controls to confirm accuracy of information being provided to City and compliance with the Agreement," the trial court found (1) the City properly exercised its right to conduct an audit of the District's records in accordance with the Agreement, (2) the City's request was properly tailored to the Agreement and to ensure the underlying data collection and information was reliable, and (3) the District breached the Agreement by failing to comply with the City's requests, failing to cooperate, and by not timely providing the requested documents and information to the City.

On the issue of breach, the trial court further found (1) at all times, the District had the ability to provide records to the City for inspection and to allow it to conduct an audit of the District's financial records that pertained to the Agreement, (2) the District repeatedly denied the City the ability to perform the audit as defined in Paragraph 19, (3) from December 2007 through May 2008, the District repeatedly represented to the City it would comply with the audit provision, but then would unreasonably restrict the scope of the audit to the mere offer to provide documents, and (4) the District denied the City the opportunity to conduct the audit by mischaracterizing the City's requests as being "demands for a generalized audit of the District's finances," or accusing the City of being interested in "conducting an unrestrained "audit" of virtually every aspect of the District's operations."

The trial court made additional factual findings, after weighing the evidence and considering the inferences to be drawn: (1) despite repeated requests from December 2007 through May 2008, the District did not provide Hinojosa or City personnel with documents or access to review the documents before the lawsuit was filed, (2) after indicating it would allow the City to review some documents, the District then refused to grant access to the City's auditor, (3) the District did not introduce any evidence from District personnel that they made any attempt to compile documents before the lawsuit was filed and, in fact, Pam Einsel, the District's "Person Most Knowledgeable," indicated she was not even aware the City was coming to review records before Hinojosa's arrival; (5) certain District records were not provided to City until August 2008, after litigation commenced; and (6) Einsel identified additional documents at her deposition that had not been provided previously to the City.

Arguing that our standard of review on this issue is de novo because the evidence is not conflicting, the District contends the trial court erred in finding it breached the Agreement because "[t]he evidence shows that the District tendered performance on numerous occasions and on each occasion was met with the contention that its tender amounted to a breach of the contract and a refusal to provide access to fiscal records pertinent to the agreement."⁷ The District asserts "[t]here is only one reasonable interpretation of the letters; that Chaffin was demanding until May 28 an audit that involved more than what the District was required to provide under the contract and that

⁷ While the District contends our review is de novo, citing *WRI Opportunity Loans II LLC v. Cooper* (2007) 154 Cal.App.4th 525 and *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, the City contends it is for substantial evidence, citing *Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, *Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474, *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, *Milton v. Perceptual Develop. Corp.* (1997) 53 Cal.App.4th 861, and *Bazaure v. Richman* (1959) 169 Cal.App.2d 218. We need not resolve this issue because, as we explain, the District has failed to carry its appellate burden of showing reversible error.

the District consistently offered to provide [that] which it had an obligation to provide, but the offers were refused.” The District claims it was the City, not the District, which breached the contract.

The District’s argument, however, is premised on its interpretation of the Agreement, i.e. that it only was required to provide the City with documents that correspond to the areas listed in the first sentence of Paragraph 19. But, as we have already explained, Paragraph 19 required the District to do much more than that. Instead, the District was obligated to make available to the City *all* records, including books, documents, and papers, whether in written or electronic formats, pertaining to the Agreement *and* allow the City to audit its fiscal records, including providing access to records and internal controls so the City may confirm the accuracy of information being provided to it. The District does not contend it tendered such performance, and therefore has not demonstrated error in the trial court’s finding of breach. It is appellant’s burden on appeal to affirmatively demonstrate error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

The District asserts the City recognized after Hinojosa’s May 23, 2008 visit to the District office that the documents the District offered were the only ones it was required to provide, citing Costanzo’s statement to that effect in his May 29 letter to Chaffin. The District further asserts the City conceded Paragraph 19 did not impose an obligation on the District to allow the City’s auditor access to District computers and “the right to interrogate its employees.” But the record does not support the District’s claims. Instead, the record shows that, while the City recognized the documents the District had offered were the only documents it knew of that were responsive, it maintained it was entitled to electronic copies of the fiscal records, which the District could download, and access to District staff for purposes of the audit, both of which the District refused to provide. The District’s failure to allow the City to conduct such an audit amounts to a breach of the Agreement.

The District also challenges some, but not all, of the trial court's evidentiary findings. For example, the District contends the trial court erred in finding it had not introduced evidence it attempted to compile documents before the lawsuit was filed, as Einsel testified that the District's "books" were made available to the City through Costanzo, and Costanzo's letters show that the documents were in fact available. The District also contends the trial court erred in finding Einsel identified additional documents at her deposition that the District had not produced to the City, as no evidence supports the finding, and relied on events that occurred after the lawsuit was filed to establish a breach.

We need not discuss these contentions because, even if we were to agree with them, there was other evidence of breach that the District fails to address. Put another way, even if we conclude that the District did compile the documents and they were available for review, there was another basis to find the District breached the Agreement, as it did not allow the City to conduct an audit of those documents, including providing electronic copies of the records and giving the auditor access to the District's internal controls so the City could confirm the accuracy of information being provided to it and the District's compliance with the Agreement.

In order to secure the reversal of an adverse judgment, it is not enough for the appellant to establish that the trial court committed some error during the course of the proceedings under review. The appellant must also affirmatively demonstrate that the error complained of caused injury and was therefore prejudicial. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *People v. Watson* (1956) 46 Cal.2d 818, 835-836 (*Watson*); *Tupman v. Haberkern* (1929) 208 Cal. 256, 263 (*Tupman*); *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833 (*Waller*); *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318.) In other words, prejudice is not presumed from error, and the reviewing court is obliged to declare "whether the error found to exist has resulted in a miscarriage of justice, and not to reverse the judgment unless such error be prejudicial."

(*Tupman, supra*, at p. 263.) Prejudice is established when the reviewing court “is of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*Watson, supra*, at p. 836; *Waller, supra*, at p. 833.) This principle has been a part of the law of California since 1914. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 408, pp. 459-460.)

Here, the District has failed to show that, even if we conclude the trial court erred in the ways it purports, the result would be a reversal of the judgment. This is because the trial court’s finding that the District breached the agreement also was based on facts other than the complained of factual findings. These other facts support a finding of breach. The District does not raise any appellate issue in its briefs with respect to these alternative findings, such as that they are legally unsound or otherwise would not have supported, standing alone, a ruling in the City’s favor. Thus, even if the trial court was wrong in making the findings the District challenges, it has not affirmatively shown the other factual findings do not require the same result. (See *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329; *Tupman, supra*, 208 Cal. at p. 263; see also *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 853-854.)

C. Notice of Default

At trial, the District claimed the City failed to provide notice of default under Paragraph 15 of the Agreement which states, in pertinent part: “Upon any default of a party hereto which has not been cured within 30 calendar days of written notice from the other party, such other party may . . . (ii) proceed by appropriate court action to enforce the terms of the Agreement; . . .”. The trial court found the evidence and law established (1) the City complied with this provision, (2) the District waived it, and (3) compliance was unnecessary as it would have been a futile act. The trial court specifically found that, although the City did not reference this provision, beginning on December 11, 2007 the City repeatedly notified the District of its breach of the Agreement and afforded it an opportunity to cure the defects in performance.

On appeal, the District contends that before a party may resort to any rights or remedies for breach, Paragraph 15 requires specific service of a notice of default and a failure to cure the identified default within 30 days. The District asserts service of this notice was a condition precedent to a suit for breach of contract, failing to provide such notice bars such a suit, citing *Gonsalves v. Hodgson* (1951) 38 Cal.2d 91, 99, and there is no factual or legal basis for the trial court's determination the City complied with this provision or the District waived it.

Although the District addresses the compliance and waiver grounds for the trial court's ruling, it completely fails to address in its appellate briefs the third ground, i.e. that compliance was unnecessary because it would have been futile. (See, e.g., *Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1186 [". . . California law allows for equitable excusal of contractual conditions causing forfeiture in certain circumstances, including circumstances making performance futile."].) As we have already explained, an appellant must establish both that the trial court erred and that the error was prejudicial. (*Watson, supra*, 46 Cal.2d at pp. 835-836; *Tupman, supra*, 208 Cal. at p. 263; *Waller, supra*, 12 Cal.App.4th at p. 833.) By not presenting any appellate argument with respect to the third basis for the trial court's ruling, the District has failed to show that, even if we conclude the trial court erred in finding for the City on the first two grounds, reversal of the judgment is required.

D. Determination of Necessity

At trial, the court rejected the District's argument that someone other than the people involved in the decision to request the audit was required, such as the Mayor or by a resolution of the City Council. The court noted that while a contract may require City Council approval, execution, performance and demand for performance of the contract, the Agreement did not. The court found the evidence established (1) the Agreement was approved by the City Council, (2) the decision to conduct the audit of the District's records was made or approved by a number of individuals in several City departments,

including the Controller of the Finance Department, the Director of the Department of Public Utilities, and the City Manager, and (3) these individuals had the authority to request an audit under the Agreement.

The trial court also found that the City's determination of necessity as required by Paragraph 19 means that the City is required to make the decision to conduct an audit, i.e. to make the decision that an audit is "necessary," in good faith, as the contract confers on the City a discretionary power, citing *Locke v. Warner Bros., Inc.* (1977) 57 Cal.App.4th 354, 363. After the trial court made this finding, the parties stipulated that the issue of whether the City actually acted in good faith in determining the audit was necessary need not be resolved.

On appeal, the District contends the trial court erred in making these findings because there is no evidence the City made any determination of necessity. To the extent the District is asserting that the City was required to act through official channels, such as through the Mayor or City Council, and not through its employees, we disagree. The cases the District cites for its position do not support it, as they all involve situations where a party is attempting to impose a contractual obligation on a municipality based on the representations of its employees (*Burchett v. City of Newport Beach* (1995) 33 Cal.App.4th 1472, 1479; *Air Quality Products, Inc. v. State of California* (1979) 96 Cal.App.3d 340, 350-351), or one stating the power of administrative agencies, which can only be conferred on them by the Constitution or statute (*Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 872-873). In contrast here, the Agreement had already been formed through proper channels, as it was approved by the City Council, and was being executed by City employees when they decided it was necessary to conduct an audit. Nothing in the Agreement required City Council approval of that decision.

To the extent the District is contending that the City employees did not determine an audit was necessary, this contention flies in the face of the concession it made below. Generally, a litigant cannot change his or her position on appeal and assert a new theory,

as it would be unfair to the trial court and opposing party. (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.) The District's position below, as stated by its attorney Costanzo, was that "[t]here's no issue relative to whether or not whatever they are requesting is or is not necessary." As Costanzo further explained: "I'm simply saying that if the Court has determined that the necessity provision in there is satisfied by a staff person's determination that there is a necessity, I'm fine with that and we'll just go forward. Um, and I don't think all of this information, primarily in the declaration of Frank Balakian, in the multiple e-mails by Frank Balakian primarily, pointing out his, what I consider to be baseless conclusions which Mr. Watkins acknowledged in his deposition were fully and satisfactorily responded to by the District. I'm trying to keep that out. Because if it comes in, I have to get Mr. Balakian in here in order to tear that apart. Because there's no basis for Mr. Balakian's claims of discrepancies, and he knows it. And he can't avoid admitting that if I put him on the stand."

Having agreed at trial that there was no issue regarding whether City staff determined the audit was necessary, the District cannot now contend that City employees failed to make such a determination or that "the supposed 'accounting discrepancies' justifying the request for the audit are plainly discrepancies that did not exist and which staff acknowledged did not exist." The District has forfeited its claim on this particular point.

II. Other Claims

The District asserts (1) the judgment is void as it is not sufficiently clear and definite to enable District to comply with its requirements; (2) the award of an injunction is "superfluous;" (3) the City cannot have a viable action for both declaratory relief and specific performance, and declaratory relief does not exist to redress such past wrongs; and (4) there is no basis for an accounting because there is no fiduciary relationship between the parties.

We begin with the judgment. It provides that the City “shall be allowed to conduct an investigation and audit of the District’s internal financial controls and operations including, but not limited to, all records pertaining to the sewage collection system and the District’s obligations under the Agreement, in order to determine whether the [] District is fulfilling its obligations under the 2007 Agreement.” While the District contends this is overbroad, as it “requires the District to allow Fresno access to any information in the District’s possession no matter how maintained, or what it relates to,” we disagree. Although the judgment does state that the audit includes, but is not limited to all records pertaining to the sewage collection system and the District’s obligations under the Agreement, it limits the investigation and audit to determining whether the District is fulfilling its obligations under that Agreement. It is not overbroad as in the cases the District cites, *Johnson v. Farmer* (1940) 41 Cal.App.2d 874, 882, and *Smith v. Silvey* (1983) 149 Cal.App.3d 400.

In an argument lasting precisely one sentence and without analysis or citation to authority, the District asserts “[t]he award of an injunction to the same tenor as the specific performance order is superfluous.” As a consequence of the District’s affirmative burden to demonstrate reversible error based on adequate legal argument (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556-557), when points are perfunctorily raised, without adequate analysis and authority, we pass them over and treat them as abandoned. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.) We do so here.

The District next asserts the trial court erred in granting declaratory relief because a plaintiff cannot have a viable action for both declaratory relief and specific performance, and declaratory relief does not exist to redress past wrongs. Declaratory relief “operates prospectively, and not merely for the redress of past wrongs.” (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848; see also *Roberts v. Los Angeles County Bar Assoc.* (2003) 105 Cal.App.4th 604, 618.) “The purpose of a judicial declaration of rights

in advance of an actual tortious incident is to enable the parties to shape their conduct so as to avoid a breach.” (*Babb, supra*, 3 Cal.3d at p. 848.) Where there exists a fully matured breach of contract claim for money damages, the party must seek the remedy of damages and not pursue a declaratory relief claim. (*Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1497.)

But here there is not a fully matured claim for money damages that precludes declaratory relief. As the City points out, a determination of whether declaratory relief is necessary and proper is a matter within the trial court’s discretion and will not be disturbed on appeal absent a clear showing of abuse of that discretion. (*California Physicians’ Service v. Garrison* (1946) 28 Cal.2d 790, 801; *Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 974.) By its terms, the Agreement is “perpetual” and continuing. The trial court clearly had the ability to guide the parties’ future conduct on a variety of contractual provisions. The District has not shown the trial court abused its discretion. (See Code Civ. Proc., § 1062 [“The remedies provided by this [declaratory relief] chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts.”]; *Warren v. Kaiser Foundation Health Plan, Inc.* (1975) 47 Cal.App.3d 678, 683 [doubts resolved in favor of declaratory relief].)

Finally, the District contends the trial court erred in finding for the City on the accounting claim because the City failed to prove the fiduciary relationship required for such a claim. “A cause of action for accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting.” (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179 (*Teselle*)). As explained in *Teselle*, “a fiduciary relationship between the parties is not required to state a cause of action for accounting. All that is required is that some relationship exists that requires an

accounting. [Citation.] The right to an accounting can arise from the possession by the defendant of money or property which, because of the defendant's relationship with the plaintiff, the defendant is obliged to surrender." (*Teselle, supra*, 173 Cal.App.4th at pp. 179-180.) Here, there is a continuing contractual relationship between the City and the District that requires the District to collect money on the City's behalf and remit that money to the City. By virtue of this relationship, the District possesses money that it is obliged to surrender to the City. This is a sufficient relationship.

An accounting is available when there is a dispute as to the accuracy of the defendant's books or where the amount sought is "unliquidated and unascertained." (*Ely v. Gray* (1990) 224 Cal.App.3d 1257, 1261-1262; *Heber v. Yaeger* (1967) 251 Cal.App.2d 258, 265.) Without an accounting, the City cannot determine whether the District's records are accurate or the amounts paid to the City are correct. The trial court did not err in finding for the City on its accounting claim.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

WE CONCUR:

Gomes, Acting P.J.

Detjen, J.

Franson, J.

EXHIBIT 5

1 **BETTS & RUBIN, A Professional Corporation**
2 Attorneys at Law
3 907 Santa Fe Avenue, Ste. 201
4 Fresno, California 93721
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6 Facsimile: (559) 438-6959

7 James B. Betts (State Bar #110222)
8 Joseph D. Rubin (State Bar #149920)
9 Attorneys for Plaintiff CITY OF FRESNO

FILED
MADERA SUPERIOR COURT

JAN 28 2012

CLERK

DEPUTY

10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF MADERA

12 CITY OF FRESNO,

13 Plaintiff,

14 v.

15 PINEDALE COUNTY WATER DISTRICT;
16 and DOES 1 through 15, inclusive,

17 Defendants.

Case No. MCV043413

AMENDED JUDGMENT

18 On October 4, 2011, the Court entered its Judgment in this matter. A true and
19 correct copy of said Judgment is attached hereto as Exhibit "A." The Court has ordered
20 costs of 1,423.53 and fixed attorney's fees at \$85,235.00.

21 Thus, IT IS ORDERED AND ADJUDGED AND DECREED that the Judgment
22 should be amended to specifically include that Defendant City of Fresno shall recover
23 its fees and costs in the amount of \$86,658.53 against Defendant Pinedale County
24 Water District.

25 Dated: January 23, 2012

JAMES E. OAKLEY

Judge James E. Oakley

EXHIBIT B

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2 907 Santa Fe Avenue, Ste. 201
Fresno, California 93721
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4 James B. Betts (State Bar #110222)
5 Joseph D. Rubin (State Bar #149920)

6 Attorneys for Plaintiff CITY OF FRESNO

FILED
MADERA SUPERIOR COURT

APR 06 2015

BONNIE THOMAS

CLERK

~~BERNICE L JACKSON HYATT~~ DEPUTY

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF MADERA

10
11 CITY OF FRESNO,

12 Plaintiff,

13 v.

14 PINEDALE COUNTY WATER DISTRICT;
and DOES 1 through 15, inclusive,

15 Defendants.
16
17
18
19

Case No. MCV043413

SECOND AMENDED JUDGMENT

20 On January 23, 2012, the Court entered its Amended Judgment in this matter in
21 the amount of \$86,658.58. On December 18, 2013, the City filed its Memorandum of
22 Costs on Appeal in the amount of \$938.91, and no motion to tax such costs was filed.
23 On January 31, 2014, this Court issued its Order Granting Plaintiff's Motion to Fix
24 Attorney's Fees on Appeal, and awarded additional attorney's fees in the amount of
25 \$39,918.00 to be included as part of the Judgment.

26 Thus, IT IS ORDERED, ADJUDGED AND DECREED that the Amended
27 Judgment should be amended to specifically include the referenced costs and fees,
28

1 and that Defendant City of Fresno shall recover the sum of \$127,515.84 against
2 Defendant Pinedale County Water District.

3
4 Dated: 4-6-, 2015

By [Signature]
Judge James E. Oakley
Judge of the Superior Court

5
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7
8
9
10
11 I, HEREBY CERTIFY THAT THE FOREGOING INSTRUMENT
12 TO BE A CORRECT COPY OF THE ORIGINAL ON FILE IN THE
OFFICE OF THE CLERK OF THE SUPERIOR COURT OF
MADERA COUNTY, CALIFORNIA.

13 ATTEST: BONNIE THOMAS
CLERK OF THE COURT

14 DATE: OCT 30 2018

15 BY: [Signature]
DEPUTY



26
27
28

EXHIBIT C

1 Neal E. Costanzo SBN 122352
2 Michael G. Slater SBN 247302
3 Costanzo & Associates
4 A Professional Corporation
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6 Fresno CA 93720
7 Telephone: (559) 261-0163
8 Facsimile: (559) 261-0706

9 Attorneys for Pinedale County Water District

10 NO FILING FEE REQUIRED GOVERNMENT CODE §6103

11 **SUPERIOR COURT OF CALIFORNIA**

12 **COUNTY OF KINGS**

13 CITY OF FRESNO,	)	CASE NO. 18C-0051
14	)	
15 Petitioner,	)	CROSS-COMPLAINT FOR RESCISSION
16	)	OF CONTRACT, DECLARATORY
17 v.	)	RELIEF
18	)	
19 PINEDALE COUNTY WATER	)	
20 DISTRICT, and DOES 1 through 15,	)	
21 inclusive,	)	
22	)	
23 Respondent	)	
24	)	
25 PINEDALE COUNTY WATER	)	
26 DISTRICT, a County Water District,	)	
27	)	
28 Cross-Complainant,	)	
29	)	
30 v.	)	
31	)	
32 CITY OF FRESNO, a Municipal	)	
33 Corporation, and DOES 1 through 5	)	
34 inclusive,	)	
35	)	
36 Defendants.	)	
37	)	

38 Respondent and Cross-Complainant, Pinedale County Water District, a County
39 Water District organized and existing under the County Water District law of the State of
40 California alleges:

41 **PARTIES**

42 1. Cross-Complainant is a County Water District and a Public Entity organized and
43 CROSS-COMPLAINT

1 existing under California law.

2 2. Petitioner and Cross-Defendant, City of Fresno, is a Charter City organized and
3 existing under the laws of the State of California.

4 **BACKGROUND ALLEGATIONS**

5 3. On June 16, 2017, Cross-Defendant, City of Fresno, filed a Petition for Writ of
6 Mandate to compel Respondent to pay judgment in the Fresno County Superior Court
7 Case No. 17 CECG 02055. The proceeding was subsequently transferred to this Court
8 pursuant to Code of Civil Procedure §394.

9 4. On June 3, 2008, Cross-Defendant, City of Fresno filed an action naming
10 Pinedale County Water District as Defendant in Fresno County Superior Court Case No.
11 08 CECG 01899 which was subsequently transferred to the Madera County Superior Court
12 as Case No. MCV04341.

13 5. The action filed by the City of Fresno as Madera County Superior Court Case
14 No. MCV043413 sought specific performance consisting of an order that the City be
15 allowed to conduct an investigation and audit of the District's internal financial controls and
16 operations, including, but not limited to, all records pertaining to the sewage collection
17 system of Pinedale County Water District and the Pinedale County Water District's
18 obligations under a written agreement relating to the transportation treatment and disposal
19 of sewage.

20 6. In Madera County Case No. MCV043413, a Judgment was entered granting the
21 request for specific performance and stating that Plaintiff, City of Fresno, shall be allowed
22 to conduct an investigation and audit of the District's internal financial controls and
23 operations including, but not limited to, all records pertaining to the sewage collection
24 system and the District's obligations under the agreement relating to transportation
25 treatment and disposal of sewage on October 4, 2011. Since October 4, 2011, Cross-
26 Defendant, City of Fresno has never sought to conduct any investigation or audit of the
27 District internal financial controls or operations or of any records pertaining to the
28 aforementioned agreement.

1 7. Following entry of the aforementioned October 4, 2011 Judgment, Cross-
2 Defendant, City of Fresno secured a Judgment on January 23, 2012 awarding it Attorney's
3 fees in the amount of \$85,235.00 and costs in the amount of \$1,423.53 and on February
4 7, 2014, Cross-Defendant secured a Judgment awarding \$39,919.00 for Attorney's fees
5 on subsequent appeals pursuant to a provision of the agreement for transportation
6 treatment and disposal of sewage.

7 8. On May 13, 2014, Cross-Defendant, City of Fresno, caused to be recorded in
8 the Fresno County Recorder's Office an Abstract of Judgment and on June 2, 2014, filed
9 a different Abstract of Judgment with the Madera County Recorder. The Cross-Defendant
10 thereby created, pursuant to CCP §697.310(a) a lien on all of the real property owned by
11 Pinedale County Water District in the Counties of Fresno and Madera. (CCP §697.340).
12 Recording of the Abstracts of Judgment transformed the City of Fresno, Cross-Defendant,
13 into a Secured Creditor and the security for payment of the amounts owed under the
14 Judgements, if any, was against real property. As a secured creditor, Fresno was required
15 to pursue all of the real property security first in any attempt to enforce the underlying debt
16 through judicial process in one form of action authorized by CCP §726.

17 9. On January 15, 2015, Cross-Defendant, City of Fresno, recorded a release of
18 both Abstracts of Judgment.

19 10. The Agreement for Transportation and Treatment of Pinedale County Water
20 District Sewage, a copy of which is attached as Exhibit 1 to the Petition for Mandate to
21 compel Cross-Complainant to pay Judgment is between Cross-Defendant, a "Public Entity
22 crated by and under the laws of the State of California" and the Cross-Defendant, City a
23 "Municipal Corporation". In or about 1976, Cross-Complainant, Pinedale County Water
24 District, operated its own sewage collection and wastewater treatment works and in or
25 about that year, the District's collection system was connected to the City interceptor line
26 causing all sewage generated within the boundaries of Pinedale County Water District to
27 be transported to the wastewater treatment facility owned and operated by the City. The
28 Cross-Complainant, District, retains ownership of its existing and since, expanded, sewage

1 collection system and the sewage collected by virtue of its connection to the interceptor
2 line, transports all sewage collected to the wastewater treatment facility owned and
3 operated by the City of Fresno. The Agreement, Exhibit 1 to the Petition on file herein at
4 Section 4, requires the District to adopt the same rates for sewer charges as set forth in
5 any Ordinance or regulation of the City of Fresno as it now exists or as thereafter modified,
6 and provides for a specified percentage of the amount billed and collected as required by
7 that Section 4 of the Agreement to be paid to the City. (Petition Exhibit 1. at page 2-3,
8 Section 4). At Section 7, the Agreement requires the District to "adopt and enforce a
9 regulation prohibiting discharges as City imposes on discharges within the City of Fresno
10 pursuant to" a specified City Ordinance "as it now reads or it may hereafter be amended".
11 Section 15 of the Agreement, Exhibit 1 to the Petition, provides that it is "perpetual and
12 may not be cancelled or terminated except by mutual written consent of the Parties thereto".

13 **FIRST CAUSE OF ACTION**

14 **(RESCISSION OF CONTRACT)**

15 11. Cross-Complainant, Pinedale County Water District, incorporates by reference
16 each and every allegation made and contained in paragraphs 1 through 10, of this Cross-
17 Complaint as though fully set forth at this point.

18 12. Cross-Complainant, District has the statutory authority to set rates for all
19 services provided by the County Water District and is further authorized to provide sewer
20 services. (Water Code §31100, 31101). In setting rates for services, the District is subject
21 to numerous statutory and constitutional requirements, including but not limited to the Fee
22 Mitigation Act, which generally requires the setting of rates for sewer service to be
23 commensurate with the cost of providing that service where it is provided by a public entity
24 (Government Code §60000 et seq) and what is commonly known as Proposition 218
25 (California Constitution Articles XIII C and XIII D) requiring that any change or increase in
26 sewer rates charged by the District be set only after the conduct of a public hearing and
27 observance of protest procedures and the District is constitutionally prohibited from
28 changing rates for sewer service in the event the District receives a majority protest.

1 13. The Agreement, Exhibit 1 to the Petition is illegal, invalid and void in that the
2 District has no authority to contract away its statutory and constitutional authority to set
3 rates for sewer service and is precluded by law from delegating to any other person or
4 entity, or public entity, its statutory power and obligation to set sewer rates in accordance
5 with applicable provisions of statute. The Agreement, Exhibit 1 to the Petition, is an
6 improper, perpetual agreement that cannot be terminated and therefore requires the
7 District and its governing board in advance and forever, to refrain from exercising their
8 judgment and authority with respect to sewer collection services and rates and requires
9 that the District exercise a legislative power granted to it by statute, the power to set rates
10 for sewage service in a manner that is contrary to statutes and Constitution of the State of
11 California and other provisions of law that govern its exercise so that the Agreement is
12 invalid, illegal and contrary to the public policy of the State of California.

13 14. In 2007 and continually thereafter, the District has sought City's agreement to
14 termination of the agreement, Ex. 1 to the Petition, because it is an illegal, invalid and void
15 contract and City has refused all proposed changes to the contract.

16 15. Because the perpetual contract unlawfully surrenders discretionary and
17 mandatory governmental powers and requires the District to act in a manner that is
18 contrary to law the District is entitled to rescind the Agreement, Ex. 1 to the Petition, and
19 recover from Cross-Defendant, City of Fresno, the consideration paid under the Agreement
20 together with interest at the legal rate. Cross-Complainant, Pinedale County Water District
21 has not received any benefit from the Agreement that it has not already paid for.

22 16. Cross-Complainant has notified Cross-Defendant that the Agreement, Exhibit
23 1 to the Petition is, in fact, unlawful and subject to rescission; but, Plaintiff has not yet given
24 formal notice of its exercise of its right to rescind the Agreement and pursuant to the
25 provisions of Civil Code §1691 the service of this Cross-Complaint in this action shall be
26 deemed to be such notice and an offer to restore to Cross-Defendant, if anything,
27 everything of value that has been received by the Cross-Complainant, District, under the
28 contract.

SECOND CAUSE OF ACTION
(DECLARATORY RELIEF)

17. Cross-Complainant refers to and incorporates by reference each and every allegation made and contained in paragraphs 1 through 16 of this Cross-Complaint as though fully set forth at this point.

18. Although Petitioner and Cross-Defendant, City of Fresno, knows, and alleges in its Petition that the only means by which a money judgment may be collected from a public entity is by Petition for Writ of Mandate (see Petition p. 3, ¶11), the City intentionally and maliciously recorded the aforementioned Abstracts of Judgment in Fresno and Madera County in an effort to enforce the monetary judgment that is the subject of the Petition on May 13 and June 2, 2014.

19. Pursuant to CCP §697.310(a) and 697.340, recordation of the Abstracts of Judgment transformed Cross-Defendant, Fresno, into a secured creditor and the security was, pursuant to the terms of the Abstracts of Judgment, real property. Pursuant to the provisions of CCP §726(a), by virtue of Cross-Defendant voluntarily recording the release of the Abstracts of Judgment previously recorded Cross-Defendant is relieved entirely, of any and all liability for the judgment that is the subject of the Petition.

20. An actual controversy has arisen and now exists between Cross-Complainant and Cross-Defendant regarding their respective rights and duties under the Judgments that are the subject of the Petition. Cross-Complainant maintains that by recording the release of abstracts following a wrongful recordation, carried out for the purpose of maliciously injuring Cross-Complainant, Pinedale County Water District, that said Cross-Defendant is discharged from any underlying debt represented by the Judgments that are the subject of the Petition; whereas, Cross-Defendant contends that it may wrongfully abuse the court's process making itself a secured creditor and still release, unilaterally and voluntarily, the abstracts of judgment without regard to the provisions of CCP §726(a) by attempting to obtain payment on the debt alleged in the Petition or to reach unpledged assets before exhausting the security it created by the recording of the abstracts.

1 21. Cross-Defendant desires a judicial determination of its rights and duties and
2 a declaration that the recording of the release of the abstracts, pursuant to the provisions
3 of CCP §726(a) released and discharged the Cross-Complainant from any obligation under
4 the judgments that are the subject of the Petition.

5 22. A judicial declaration is necessary and appropriate at this time under all the
6 circumstances so that Cross-Defendant may determine its rights and duties under the
7 judgments.

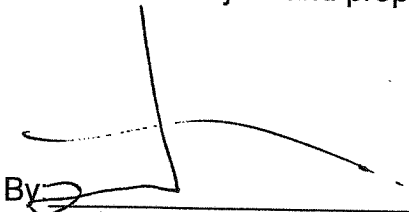
8 Wherefore Cross-Complainant demands judgment as follows:

- 9 1. Rescinding the Agreement, Exhibit 1 to the Petition;
10 2. Awarding Cross-Complainant the sum of \$150,000, the amount paid to Cross-
11 Defendant as consideration for the Agreement, Exhibit 1 to the Petition;
12 3. A declaration of the court that Cross-Defendant is released and discharged from
13 the obligation, if any, created by the Judgments that are the subject of the Petition;
14 4. For attorney's fees and costs, as allowed by contract or statute;
15 5. For such other and further relief as the court deems just and proper.

16 //

17 //

18 Dated: April 3, 2018

By 

Neal E. Costanzo,
Attorney for Defendant, Pinedale
County Water District

PROOF OF SERVICE

The undersigned declares:

I, Julia Sellers, the undersigned, declare that:

I am employed in the County of Fresno, State of California. I am over the age of eighteen years, and am not a party to the within action. My business address is 575 E. Locust Avenue, Suite 115, Fresno California 93720.

I am familiar with the regular mail collection and processing practice of said business, and in the ordinary course of business the mail is deposited with the United States Postal Service that same day.

On April 3, 2018, I served the foregoing document described as:

CROSS-COMPLAINT FOR RESCISSION OF CONTRACT, DECLARATORY RELIEF

on all parties to this action by causing a true copy thereof to be:

- (X) Telecopied Via Facsimile
- (X) Placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail
- () Delivered by Hand
- (-) Sent Via Overnight Delivery (see below)

as addressed below:

James B. Betts
Joseph D. Rubin
Betts & Rubin
907 Santa Fe Avenue, Suite 201
Fresno, CA 93721
Fax: (559) 438-6959

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

Date: April 3, 2018


Julia Sellers

EXHIBIT D

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Francine M. Kanne, Chief Assistant City Attorney (State Bar 139028)
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7 James B. Betts (State Bar #110222)
Joseph D. Rubin (State Bar #149920)
8 Attorneys for Petitioner City of Fresno
9

CONFORMED COPY
ORIGINAL FILED ON

OCT 22 2018

MICHELLE S. MARTINEZ, CLERK OF COURT
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF KINGS
DEPUTY

10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF KINGS

13 CITY OF FRESNO,

14 Petitioner,

15 v.

16 PINEDALE COUNTY WATER DISTRICT,
17 and DOES 1 through 15, inclusive,

18 Respondent
19

Case No. 18C-0051

ORDER TO SUSTAIN DEMURRER

Date: July 11, 2018

Time: 8:15

Dept: 8

Judge: James LaPorte

10/14
Order to Sustain Demurrer

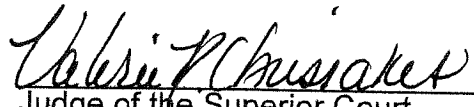
1 On July 11, 2018, Petitioner City of Fresno's demurrer to Respondent's Cross-
2 Complaint came on for hearing before the Honorable James LaPorte, Judge Presiding.
3 Petitioner City of Fresno appeared by and through its attorney of record; James B. Betts;
4 Respondent appeared by and through its attorney of record, Neal E. Costanzo.

5 Having considered the briefs and submissions for the parties, and having received
6 oral argument from counsel, this Court ruled as follows:

7 To sustain Petitioner's demurrer to the cross-complaint without leave to amend on
8 the grounds set forth in this Court's tentative ruling a copy of which is attached hereto.

9
10 IT IS SO ORDERED.

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12 Dated: 10/2/18, 2018

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14 Judge of the Superior Court
15 CCP 3635 VALERIE R. CHRISSAKIS
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1 PROOF OF SERVICE

2 I am a citizen of the United States of America, a resident of Fresno County,
3 California, over the age of 18 years and not a party to the within-entitled cause or
4 matter. My business address is 907 Santa Fe Avenue, Suite. 201, Fresno, CA. On
5 October 16, 2018, I served **PROPOSED ORDER (COVER SHEET) AND ORDER TO
SUSTAIN DEMURRER** on the parties in this action by placing an original/a true copy in
an envelope and delivering it as follows:

6 _____ (By Overnight Courier) I caused such envelope with postage fully prepaid, to be
sent by _____.

7 _____ (By Mail) I deposited the envelope, with postage fully prepaid, with the United
8 States Postal Service at Fresno, Fresno County, California.

9 X (By Mail) I placed the envelope for collection and processing for mailing following
10 this business' ordinary practice with which I am readily familiar. On the same
day correspondence is placed for collection and mailing, it is deposited in the
ordinary course of business with the United States Postal Service with postage
fully prepaid.

11 X (By Electronic Mail) I caused each document to be sent electronically to the
12 address below.

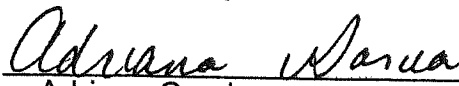
13 Each envelope was addressed as follows:

14 Neal E. Costanzo Esq.
15 Michael G. Slater Esq.
16 Costanzo & Associates
A Professional Corporation
575 E. Locust Avenue, Suite 115
17 Fresno, CA 93720
Email: ncostanzo@costanzolaw.com

Attorneys for:
PINEDALE COUNTY WATER DISTRICT

18 _____ (By E-Mail) I caused each document to be sent by e-mail.

19 I declare under penalty of perjury under the laws of the State of California that
20 the above is true and correct. Executed on October 16, 2018, at Fresno, California.
21

22 
23 Adriana Garcia
24
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The city's demurrer to Pinedale's cross-complaint is sustained without leave to amend. Pinedale has failed to cite persuasive authority that it may file a cross-complaint to a petition for writ of mandate filed in accordance with Government Code sections 970.2 and 970.4. The city obtained a judgment confirming its contractual right to audit the records of Pinedale. As the prevailing party under the contract, the city was awarded its attorney fees and costs. (2007 Agreement ¶18) The judgment as to this dispute (which was affirmed on appeal to the Fifth District Court of Appeal) is final. Pinedale has filed an answer asserting affirmative defenses, which the city does not dispute the right of Pinedale to assert. However, no case or statutory authority was cited to support the filing of the cross-complaint in this special proceeding to enforce a judgment against a public entity. Pinedale argues that this court has authority to entertain the cross-complaint. (*Tidewater Associated Oil Company v Superior Court* (1955) 43 Cal.2d 815, 825.) Even if this court has discretion to entertain a cross-complaint, the court will not exercise that discretion to allow the filing of the cross-complaint to a petition filed to enforce a final judgment in the city's favor. Given this ruling, the other arguments in support of or in opposition to the demurrer are moot.

EXHIBIT E

1 Douglas T. Sloan, City Attorney (State Bar #194996)
2 Francine M. Kanne, Chief Assistant City Attorney (State Bar 139028)
3 **CITY OF FRESNO**
2600 Fresno Street, Room 2031
Fresno, California 93721-3602

**CONFORMED COPY
ORIGINAL FILED ON**

OCT 22 2018

MICHELLE S. MARTINEZ, CLERK OF COURT
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF KINGS
DEPUTY

4 **BETTS & RUBIN, A Professional Corporation**
5 907 Santa Fe Avenue, Suite 201
Fresno, California 93721
6 Telephone: (559) 438-8500
Facsimile: (559) 438-6959

7 James B. Betts (State Bar #110222)
8 Joseph D. Rubin (State Bar #149920)

9 Attorneys for Petitioner City of Fresno

10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF KINGS

13 CITY OF FRESNO,

14 Petitioner,

15 v.

16 PINEDALE COUNTY WATER DISTRICT,
17 and DOES 1 through 15, inclusive,

18 Respondent

Case No. 18C-0051

ORDER TO DENY MOTION TO
TRANSFER, CONSOLIDATE AND
STAY PROCEEDINGS

Date: October 4, 2018

Time: 8:15

Dept: 8

Judge: Valerie Chrissakis

1 On October 4, 2018, Respondent Pinedale County Water District's Motion to
2 Transfer, Consolidate and Stay Proceedings came on regularly for hearing. Respondent
3 and Moving Party Pinedale County Water District appeared by and through its counsel of
4 record, Neal E. Costanzo; Petitioner and Responding Party City of Fresno appeared by
5 and through its counsel of record, James B. Betts.

6 Having considered the briefs and submissions of the parties, and having received
7 oral argument from counsel, this Court ruled as follows:

8 To deny Respondent's Motion to Transfer, Consolidate and Stay Proceedings on
9 the grounds set forth in this Court's tentative ruling, a copy of which is attached hereto.

10 This ruling does not preclude Respondent from pursuing a motion to amend its
11 answer as it deems appropriate.

12
13 IT IS SO ORDERED.

14
15 Dated: 10/22, 2018


Judge of the Superior Court
VALENTINE R. CHRISSAKIS

City of Fresno v Pinedale County Water District

Case No. 18 C0051

Pinedale's motion to order a Fresno Superior Court lawsuit transferred and consolidated with this writ of mandate is denied. This court has already considered the arguments made by Pinedale contesting the legality of the contract on which a judgment affirmed on appeal arose. This court found that Pinedale failed to cite persuasive authority to support the filing of a cross-complaint in a special proceeding brought as a collection matter against a public entity under Government Code sections 970.2 and 970.4.

This court sustained the demurrer to the cross-complaint without leave to amend. The prevailing party failed to draft a formal order. Under these circumstances, the non-prevailing party may submit an order to the court, in order to obtain appellate review of the ruling on demurrer. (California Rule of Court, rule 3.1312 (d).) Pinedale's decision to file a complaint in Fresno Superior Court (which alleges the same causes of action as alleged in the stricken cross-complaint) and then seek transfer, consolidation and a stay to conduct discovery is an improper and unsupported attempt to seek reconsideration of the court ruling on the demurrer. Motions for reconsideration are jurisdictional, they apply to interim orders, and they must be supported by new and different facts or law. (Code Civ. Proc. §1008, subd. (a) and (e).) No new facts or law have been cited to support the consolidation of a complaint alleging the same causes of action as the stricken cross-complaint. Nothing the visiting judge said at the hearing on the demurrer would support an argument that the decision would be different if a complaint was before the court, as opposed to a cross-complaint. The motion for transfer, consolidation and a stay is denied.

There are no other tentative rulings. Consistent with California Rule of Court, rule 3.1308 (a)(2), no notice of intent to appear is required. If the non-prevailing party does not appear for hearing, the tentative ruling will become the order of the court. The prevailing party shall prepare an order for the court's signature.

There are no tentative rulings for Wednesday, October 3, 2018

There are no tentative rulings for Tuesday, October 2, 2018

Tentative Rulings for Monday, October 1, 2018 for Department 8, Judge Chrissakis presiding

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Each envelope was addressed as follows:

Attorneys for:
PINEDALE COUNTY WATER DISTRICT

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 16, 2018, at Fresno, California.

Adriana Garcia
Adriana Garcia