No. B255408

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

GOLDEN STATE WATER COMPANY,
Plaintiff and Appellant,

vs.

CASITAS MUNICIPAL WATER DISTRICT; CASITAS MUNICIPAL WATER DISTRICT COMMUNITY FACILITIES DISTRICT NO. 2013.1 OJAI; ALL PERSONS INTERESTED IN THE VALIDITY OF CASITAS MUNICIPAL WATER DISTRICT RESOLUTIONS NOS. 13.12, 13.13 AND 13.14 ET AL,
Defendants and Respondents.

On Appeal from the Ventura County Superior Court
No. 56-2013-00433986-CU-WM-VTA
The Honorable Kent M. Kellegrew

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT GOLDEN STATE WATER COMPANY AND *AMICUS CURIAE* BRIEF OF THE CALIFORNIA WATER ASSOCIATION IN SUPPORT OF APPELLANT GOLDEN STATE WATER COMPANY

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT GOLDEN STATE WATER COMPANY

The California Water Association ("CWA"), through its attorneys and pursuant to the California Rules of Court, Rule 8.200, subdivision (c), respectfully applies for leave to file the following *amicus curiae* brief in support of Appellant Golden State Water Company ("Golden State").

1. Identity and Interest of *Amicus Curiae*

CWA is a statewide organization representing California's investor-owned water utility service providers that are subject to the jurisdiction of the California Public Utilities Commission ("CPUC"). CWA has a unique interest in the issues in this case as

they relate to the water utilities' efforts to provide the public with safe, reliable drinking water at rates reflecting the cost of providing that service.

CWA is familiar with the facts of this case, the questions involved, and the scope of parties' presentations to date, and seeks to assist the court in addressing the issue as to whether Casitas Municipal Water District ("Casitas MWD"), a public water agency, by creating a community facilities district pursuant to Government Code § 53311 *et seq.* (the "Mello-Roos Act"), is authorized to acquire all of the assets of a public water system serving the City of Ojai that is owned and operated by Golden State, an investor-owned water utility subject to the jurisdiction of the CPUC. As the representative of water utilities subject to CPUC jurisdiction, CWA is qualified to assist the court in determining this issue. Moreover, CWA believes that there is necessity for the foregoing assistance.

2. Funding and Authorship

Pursuant to California Rules of Court, rule 8.200, subdivision (c)(3), CWA states that no party or counsel for a party in the pending appeal authored this proposed *amicus* brief, or any part of it, nor did they make any monetary contribution to fund the preparation or submission of the brief. CWA is the only person or entity that funded the preparation and submission of this application and the proposed *amicus* brief.[1]

[1] It is noted that Golden State is a member of CWA and pays dues on a regular basis, but Golden State has not made any payment related in any way to CWA's preparation and submission of the proposed *amicus* brief.

3. Conclusion

For the reasons set forth above, *amicus curiae*, CWA, respectfully requests that the court accept the brief below for filing and consideration in this appellate proceeding.

Dated: January 28, 2015

NOSSAMAN LLP

By: _____
Martin A. Mattes

Attorneys for *Amicus Curiae*
California Water Association

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AMICUS CURIAE BRIEF OF THE CALIFORNIA WATER ASSOCIATION IN SUPPORT OF APPELLANT GOLDEN STATE WATER COMPANY

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I. INTRODUCTION

Amicus curiae is the California Water Association ("CWA"), a statewide organization representing the interests of California's investor-owned water utilities subject to the jurisdiction of the California Public Utilities Commission ("CPUC"). CWA represents its member water utilities before the CPUC, other California administrative agencies, such as the State Water Resources Control Board, the California Legislature, and in state and federal courts on matters affecting the investor-owned water utility industry. CPUC-regulated water utilities, which group includes Appellant Golden State Water Company ("Golden State"), provide retail water utility service to approximately sixteen percent of California's water service customers.

CWA's membership is diverse in terms of size, geographical location, customer composition, water supply, and a host of other factors. But there is no more fundamental a concern shared among California's 113 investor-owned water utilities than for the use by public agencies of their power of eminent domain to seize ownership of water systems owned and operated by investor-owned companies. CWA concurs in and supports the arguments presented by Golden State in its September 25, 2014 Opening Brief while also seeking, through this *amicus curiae* brief, to inform the court of the industry's perspective on an issue in this case that is of concern to all of CWA's members.

II. STATEMENT OF THE CASE

The issues before this court have been presented as: (i) whether the condemnation of an operating public water system through the use of eminent domain is a "purchase" that a public agency can finance with bonds and special property taxes authorized by

Government Code § 53311 *et seq.* (the "Mello-Roos Act"); and (ii) whether the condemnation results in a taking of intangible property that is not permitted under the Mello-Roos Act.

A key question, therefore, is not just whether Mello-Roos financing may be used to fund a condemnation of *property* but, also, whether Mello-Roos financing can be used to fund the condemnation of an *ongoing business enterprise*. The answer to that question is: No.

III. THE MELLO-ROOS ACT CANNOT BE USED TO FINANCE AN EMINENT DOMAIN ACTION THAT ACQUIRES AN ONGOING BUSINESS ENTERPRISE

A public water system's overall business value includes not only the value of tangible assets such as wells, pipes, pumps, and storage tanks, but also the value of intangible assets, including business goodwill. (Civ. Code, § 655.) Respondents have referred derisively to Golden State's supposed lack of goodwill in the community. But such shallow dismissal of the value of business goodwill is an incorrect characterization in the eminent domain context.

An eminent domain action condemning an ongoing business enterprise must compensate the owner of the targeted business not just for the tangible property of the business, but also for its entire going concern value. (Code Civ. Proc., § 1263.510 [entitling the owner of a condemned business to compensation for loss of business goodwill]; *see also*, *Community Development Com. v. Asaro* (1989) 212 Cal.App.3d 1297, 1301-1302 [explaining that "a comprehensive revision to California's eminent

domain law" in 1975 expressly authorized compensation for the loss of business goodwill].) In the case of a viable business enterprise, such as Golden State's water system serving the City of Ojai, the going concern value could exceed by a wide margin the value of tangible property dedicated to the business. The difference between the going concern value – for which compensation must be paid – and the value of tangible property, comprises the intangible assets of the business. Intangible assets may be accounted for under a variety of headings, the most prominent of which is business goodwill.

Because this case is not the condemnation action itself, the record does not contain definitive evidence of such values. However, from this lack of evidence, it cannot be assumed that the intangible assets are of no significant value. Indeed, CWA believes the opposite is the case.[2] In any event, it would not be appropriate to reach a result on this record that assumes intangible assets have little or no value, or, as discussed below, that they therefore could be acquired through a Mello-Roos financing.

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[2] Respondents Casitas MWD and Casitas Municipal Water District Community Facilities District No. 2031.1 (together, "Casitas") argue that they will pay for the value of Golden State's pipes, improvements and other tangible property by using the income approach and thus concludes that any compensation for Golden State's intangible assets would be duplicative. (Casitas Respondents' Brief, at 51.) Casitas is wrong. By way of example, if an agency condemns a building, the building can be valued using the income approach. But the income generated from the building is wholly separate and distinct from the business enterprise that uses that building and the profits the business enterprise generates by operating the building. The condemning agency must pay for both, even if the owner of the building is the same as the owner of the business. Here, valuing a water utility's pipes, wells, and other tangible assets reflects only a portion of the income generated by the business enterprise that utilizes those improvements.

Another way of looking at the assets of an ongoing business enterprise subject to an eminent domain claim is to consider the compensation to be paid to the owner of the targeted enterprise as a form of damages for deprivation of a viable future business opportunity. Those damages consist of the value of tangible assets taken plus the present value of future income to be earned from the business. (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 271 [holding that "Courts have long accepted that goodwill may be measured by the capitalized value of the net income or profits of a business or by some similar method of calculating the present value of anticipated profits."].) The latter is another way of characterizing the intangible assets of the business – the value of its business goodwill.

Because the Mello-Roos Act expressly provides that financing pursuant to its terms may be used only to purchase "real or other tangible property with a useful life of five years or longer" (Gov. Code, § 53313.5), the acquisition of intangible assets, whether characterized as the value of an ongoing business or as the payment of damages to compensate for the loss of an ongoing business concern, is not a "purchase" within the meaning of the statute.

While Mello-Roos financing can be used to pay "incidental" expenses for items other than tangible property, such aspects of an ongoing business do not fall under the definition of "incidental expenses." Under the Mello-Roos Act, "incidental expenses" are defined to include expenses related to planning, organizing a community facilities district, and constructing the physical facilities authorized to be purchased by the statute. (Gov. Code, § 53317.) The intangible assets at issue here cannot reasonably be said to

fall into any of these categories of expenses. In any event, the business goodwill of a profitable ongoing business concern like Golden State is more than "incidental" by its nature.

As discussed, the acquisition through condemnation is of an ongoing business enterprise, including an acquisition of substantial intangible assets. It cannot be funded by the Mello-Roos Act, which by its terms is available only for acquisition of tangible assets. If one were to try to value the tangible assets owned by the enterprise, and break that value out from the value of the going business, that would be the outer limit for which Mello-Roos funds could be used. CWA submits that the entirety of any such acquisition would be an improper use of Mello-Roos funds because it is the acquisition of an ongoing business. Even were the court were to conclude that some part of the acquisition was for tangible property, the decision in this case should be limited to such specific property.

IV. CONCLUSION

The trial court's decision is flawed because it fails to recognize the limitations on the use of Mello-Roos financing to condemn an operating public water system – an ongoing business enterprise, the value of which far exceeds the value of its wells, pipes, pumps, tanks, trucks and other tangible assets. If this court were to sustain the broad interpretation applied by the trial court, condemning public agencies would be able to employ and apply Mello-Roos bond funding far beyond the plain words and intent of the statute. This has the potential to impair the business operations and prospects of investor-owned water utilities across the state. For the reasons set forth above, and those stated in

Golden State's principal briefs on the merits, CWA respectfully urges this court to reverse the decision of the court below.

January 28, 2015

Respectfully submitted,

NOSSAMAN LLP

By _____
Martin A. Mattes

Attorneys for *Amicus Curiae*
California Water Association

RULE 8.204(C)(1) CERTIFICATION

As required by Rule 8.204(c)(1) of the California Rules of Court, I certify that this document is at 13 point font and contains 1,416 words. In making this certification, I have relied upon the word count function of Microsoft Word, the computer program used to prepare the brief.

Date: January 28, 2015

NOSSAMAN LLP

By: _____
Martin A. Mattes

Attorneys for *Amicus Curiae*
California Water Association

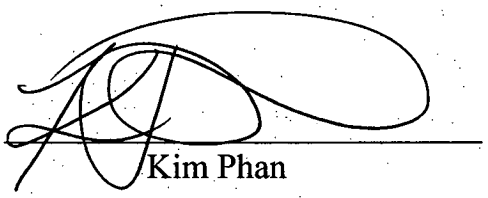
PROOF OF SERVICE

I am a citizen of the United States, over 18 years of age, employed by Nossaman LLP, and not a party to the subject cause. My business address is 50 California Street, 34th Floor, San Francisco, CA 94111.

On January 28, 2015, I served the following: **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT GOLDEN STATE WATER COMPANY** on the parties to these actions by causing a true copy thereof to be mailed by first class mail to all parties listed on the attached service list.

I declared under penalty of perjury that the foregoing is true and correct.

Executed on January 28, 2015 at San Francisco, California



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