Case 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, et al.,
Defendants and Respondents.

RESPONDENTS' BRIEF

Appeal from a Judgment of the Superior Court of California
Ventura County Superior Court Case No. 56-2013-00433986-CU-WM-VTA
Honorable Kent M. Kellegrew

RUTAN & TUCKER, LLP
JEFFREY M. ODERMAN (SBN 63765)
611 Anton Boulevard, Fourteenth Floor
Costa Mesa, California 92626-1931
Telephone: 714-641-5100

Attorneys for CASITAS MUNICIPAL WATER DISTRICT and
CASITAS MUNICIPAL WATER DISTRICT COMMUNITY FACILITIES
DISTRICT NO. 2013-1 (OJAI)

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I. ISSUES PRESENTED

1. Did the trial court abuse its discretion in determining there was "good cause" under Code of Civil Procedure ["CCP"] §863 to excuse appellant Golden State Water Company's ("GSW's") failure to timely complete service by publication on "all interested persons"?

2. May public agencies with express statutory condemnation powers utilize the Mello-Roos Community Facilities Act of 1982 (Government Code §§53311 *et seq.*, the "Mello-Roos Act") to finance the acquisition of property by eminent domain or are they limited to using Mello-Roos funding for voluntary negotiated purchases?

3. May public agencies utilize Mello-Roos Act funds to acquire "intangible" property rights that are merely incidental to a property owner's "tangible" property rights?

4. Even if the Mello-Roos Act is narrowly interpreted to prohibit a public agency from financing the acquisition of intangible property rights that are merely incidental to a property owner's tangible property rights, should the Mello-Roos community facilities district ("CFD") challenged by GSW in this action be invalidated when GSW has failed to show either that (1) it *possesses* any intangible property rights or (2) any such rights it does possess will be compensable over and above the value of its tangible property?

5. May public agencies utilize the Mello-Roos Act to finance the incidental costs of property acquisition such as appraisal costs and eminent domain attorney fees?

6. Should GSW be permitted to raise for the first time on this appeal respondent Casitas Municipal Water District's ("CMWD's") alleged violation of Government Code §53313?

7. If a public agency has the authority to acquire property under the "facilities" section of the Mello-Roos Act (Government Code §53313.5) does it lose that authority if the acquisition is not independently justifiable under the "services" section of the Mello-Roos Act (§53313)?

II. INTRODUCTION AND SUMMARY OF ARGUMENT

In this validation action (see Government Code §53359 and CCP §860 *et seq.*), GSW seeks to invalidate resolutions adopted by CMWD's Board of Directors in March 2013 to form a CFD, authorize the imposition of special taxes on properties in the CFD, and authorize the sale of CFD bonds, all of which actions are in furtherance of CMWD's plan to acquire GSW's Ojai water utility.

GSW's water rates are over twice as high as CMWD's water rates. Fed up with GSW's high and upward-spiraling water rates and its opaque and non-responsive management, GSW's Ojai customers decided they're "not going to take it any more" and they asked CMWD to take over. A unanimous Ojai City Council, the local school board, and their County

Supervisor support them. And when the citizens of Ojai were asked to vote, *an astounding 87.42% voted to tax themselves up to $60 million to finance the acquisition*!

Mello-Roos financing is the only viable "tool for the job" that will enable CMWD to finance the acquisition.[1]

CMWD is authorized to use Mello-Roos financing to purchase, including, if necessary, condemn, GSW's Ojai water utility. This includes the authority for CMWD to utilize the Mello-Roos Act to finance the acquisition of such intangible property rights, if any, that GSW may own that are merely incidental to its tangible property rights, and the authority to pay all other incidental costs of the acquisition.

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[1] It is not practical for CMWD to accumulate $60 million in cash reserves to buy GSW's Ojai property. Nor is it practical for CMWD to finance the acquisition by selling revenue bonds secured by a surcharge on the water bills of GSW's customers, since CMWD must pay cash for GSW's property *before* the acquisition becomes final (Government Code §7267.2(a)(1), CCP §1268.010) and until the acquisition *is* final the customers who would pay the surcharge are not CMWD customers and CMWD has no ability to "surcharge" them at all. Finally, it is not practical for CMWD to tax or surcharge its *existing* customers outside Ojai to acquire GSW's Ojai utility since those customers are not benefited. GSW understands these realities and its insistence that by electing to proceed under the Mello-Roos Act CMWD has chosen the "wrong tool" in the toolbox (GSW Brief, p. 15) is cynical and misleading.

III. STATEMENT OF FACTS

A. Background: CMWD Formed the CFD in Response to the Pleas of its Ojai Constituents and to Lower Their Oppressively High Cost of Water.

Contrary to GSW's assertion (GSW Brief, p. 5), CMWD does not want--or need—to acquire GSW's "service area." CMWD's boundaries already encompass 140 square miles of western Ventura County, *including the entire City of Ojai and GSW's entire service area.* (Respondents' Appendix ["RA"] 0491, 0498.)[2] Moreover, contrary to GSW's inference that it is the "urban" water supplier and CMWD serves only the "agricultural and exurban area" (GSW Brief, p. 5)—which appears to be a jab at CMWD's competence to serve the portion of Ojai it does not already serve--CMWD currently provides water service to 60,000-70,000 residents, including many in the cities of Ventura and Ojai. (*Id.*)

GSW admits that "some" GSW customers asked CMWD to replace GSW as their service provider. (GSW Brief, p. 5.) In fact, in May 2011

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[2] The Appellant's Appendix ("AA") submitted by GSW is seriously deficient. It scrambles the factual record by taking the 26 exhibits attached to the Declaration of Jeffrey M. Oderman (AA 792-808) and instead "attaching" them to CMWD's Request for Judicial Notice (AA 816-820). (See AA 821-1273.) It omits both the legislative history of the Mello-Roos Act that *was* attached to CMWD's Request for Judicial Notice (See AA 817, ¶1) and all 3 exhibits attached to the Declaration of Steven E. Wickstrum. (AA 809-815.) Finally, it omits the evidence and 2 Superior Court orders pertaining to GSW's failure to properly and timely publish the summons needed to obtain jurisdiction over "all persons interested" in this action. For these reasons, CMWD is filing an extensive Respondents' Appendix.

Ojai Friends for Locally Owned Water ("Ojai FLOW"), a local grass-roots organization formed to get rid of GSW, presented petitions to CMWD's Board signed by approximately ***1,900*** registered voters--more than half the 3,367 votes cast in the last general election in Ojai—urging CMWD to take over. These petitions were backed by unanimous supporting resolutions from the Ojai City Council and Ojai Unified School District. (RA 0492-0493.)

It is not hard to understand why the Ojai community is opposed to GSW: *GSW's water rates are over twice as high as the rates charged by CMWD for the same services in the surrounding area and GSW's rates increased 65% in just the 3 years prior to Ojai FLOW's appearance before CMWD's Board.* (RA 0491-0492, 0502, 0508-0512, 0534-0541.) If CMWD's water rates applied in GSW's Ojai service area GSW's few thousand Ojai customers collectively would save *$3.14 million annually.* And the future prospects for GSW's Ojai customers if it continues to be their service provider are grim: GSW is proceeding with $17-27 million in additional capital improvement projects in Ojai for which it will doubtless seek California Public Utilities Commission ("CPUC") approval of even *higher* water rates. (RA 0491-0492, 0562-0565.)

Ojai FLOW presented a detailed financial feasibility study to CMWD's Board demonstrating how GSW's Ojai customers will save

substantially if CMWD takes over—even after factoring in the estimated acquisition price that must be paid to GSW. (RA 0491-0492, 0499-0556.)

CMWD carefully analyzed Ojai FLOW's request and feasibility study. With the assistance of its attorneys and financial advisors, CMWD determined that: (1) Mello-Roos financing is an appropriate means of financing acquisition of GSW's Ojai water system consistent with the objective of placing the financial burden on GSW's Ojai customers, not CMWD's existing customers located outside GSW's Ojai service area; (2) Mello-Roos financing protects the Ojai community by requiring that CMWD's levying of Mello-Roos taxes and sale of bonds be approved by at least 2/3 of the voters; (3) Mello-Roos financing is feasible as the maximum annual $3.14 million Mello-Roos special tax will generate over $40 million in net bond proceeds, whereas the best estimate of the value of GSW's Ojai utility is in the $16-21.4 million range; (4) any "surplus" amount raised by Mello-Roos bonds not needed to pay acquisition costs will be applied to capital improvements of benefit to GSW's Ojai service area without the need to further increase water rates (unlike the situation that will apply if GSW's customers are required to pay for GSW's $17-27 million Master Plan through future rate increases); and (5) after the Mello-Roos bonds are paid off in 30 years the total cost of water to GSW's former Ojai customers will decline dramatically. (RA 0018-0027, 0493-0494.)

CMWD also determined that public ownership of GSW's Ojai water utility will produce several "governance" benefits: (1) GSW's Ojai customers have no right to participate in GSW management decisions, as they will with CMWD; (2) unlike the situation with GSW, CMWD's Board members live in the community and are accessible to local residents; (3) CMWD's Board members perform a public service with almost no personal financial return, whereas GSW's Board represents an out-of-area corporation seeking to maximize profits for the company's owners; (4) unlike GSW, CMWD conducts its business in public meetings within its service area and is subject to the Brown Act and California Public Records Act; (5) under Proposition 218 (Cal. Const., Article XIII.D) CMWD's voters have numerous protections prior to having their water rates increased, including the right to "protest out" proposed fee increases by majority vote (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 217), whereas GSW's customers do not; and (6) CMWD's customers can express their wishes at the local level, whereas the only "recourse" for GSW's Ojai customers is to attempt to pierce the technical and legalistic CPUC process with officials and staff located hundreds of miles away. (RA 0494.)

On March 13, 2013, CMWD's Board held a public hearing to consider forming a CFD, authorizing the levy of special taxes and sale of bonds, and setting an election to submit these actions to the voters for

approval. The hearing resulted in a massive outpouring of public support. (AA 449-492.) At the hearing's conclusion, the CMWD Board voted unanimously to proceed and adopted the required resolutions. (AA 493-524.)

B. The Voters Overwhelmingly Approved the CFD Special Taxes and Issuance of CFD Bonds to Enable CMWD.

The CFD election was held on August 27, 2013. The results were nothing short of overwhelming. GSW had a full opportunity to present all of the "scare" scenarios to the voters--its customers--that it now outlines to this Court: how GSW's Ojai water system is not for sale and CMWD will have to try to condemn it; how GSW will tie CMWD up in "protracted litigation" over CMWD's right to take GSW's property and how GSW will defeat CMWD's "right to take"; how the fair market value of GSW's water system is over $100 million and CMWD cannot afford to buy it; how CMWD's condemnation action will be dismissed or CMWD will have to abandon it, CMWD will have to pay millions of dollars in damages, and the Ojai ratepayers will be left with a huge tax burden and nothing to show for it; how the heavy CFD debt burden will subject Ojai properties to an increased risk of default and foreclosure; etc., etc. So what was the voters' response? First of all, the community was enormously mobilized—*in a single-issue special election fully 51.44% of the registered voters turned out to the polls*. And how did they vote? By

a landslide of 87.42% to 12.58% GSW's ratepayers voted to tax themselves in order to support CMWD's acquisition and rid themselves of GSW. (AA 1299-1302.)

Unfazed by the will of the people, GSW has turned back to the courts to challenge the validity of the CFD. CMWD cannot sell bonds while this lawsuit is pending and must first obtain clearance from this Court that its acquisition program is legal.

C. GSW Misstates Both What CMWD Has Approved to Date and its Future Plan of Action.

Contrary to GSW's allegation (GSW Brief, pp. 2, 5), CMWD does not "aim to invoke its eminent domain power to oust [GSW] by the forced acquisition of its property." Only if GSW refuses to voluntarily sell its property after CMWD prepares a formal appraisal, makes an offer of just compensation, and attempts to negotiate a mutually satisfactory purchase-sale agreement (Government Code §7267.2) will CMWD's Board be required to schedule a condemnation hearing to consider whether to adopt a "resolution of necessity" authorizing acquisition by eminent domain. (CCP §§1245.210-1245.240.)[3]

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[3] Since GSW insists it will refuse to voluntarily sell its Ojai utility to CMWD, CMWD reluctantly acknowledges this dispute may well end up in condemnation, however. Since CMWD needs to be certain that it can utilize Mello-Roos funds to finance condemnation of GSW's Ojai water utility *if necessary*, CMWD agrees with GSW that this question *is* ripe for judicial review (if the Court reaches the merits of GSW's claims at all—but see §§IV.A and V.A below).

In addition, and contrary to GSW's assertion (GSW Brief, pp. 6, 7), CMWD has *not* decided to sell $60 million in bonds payable over 40 years. The $60 million figure and the 40-year CFD bond term are *maximum* not-to-exceed figures, which is what the Mello-Roos Act requires at the time the initial CFD formation and bond authorization resolutions are adopted. (AA 318-319, 385-386, 391-394, 399; Government Code §§53321(d), 53325.1(a).) CMWD derived the $60 million figure by determining the highest amount of CFD bonds it could reasonably expect to be able to sell based on the maximum CFD special tax figure of $3.14 million per year (the differential between GSW's water rates in its service area and the rates for similar service charged by CMWD), using optimistic assumptions regarding interest rates and an assumed 40-year CFD bond term (longer than the standard 25-30 year term that will likely be utilized). (*Id.*) Based on CMWD's estimate that the true value of GSW's Ojai water system is in the range of $16-21.4 million, the actual CFD bond needed to pay "just compensation" to GSW is estimated to be much less than the maximum authorization.

CMWD also needs to correct GSW's assertion that CMWD necessarily intends to use Mello-Roos financing to pay for *intangible* property owned by GSW. In fact, GSW has completely failed to establish it even *possesses* any intangible property. GSW refers vaguely to "contracts, water rights and business goodwill" (GSW Brief, pp. 4, 10),

but it failed to submit any evidence to the trial court it has any such rights, that those rights are "intangibles," or that they have any value for which CMWD would be required to pay over and above the value of GSW's tangible property. Indeed, even assuming GSW has any water rights, its attorney lectured the CMWD Board prior to the CFD formation hearing "that all water rights in California, including appropriative rights, *are a form of real property*," not intangible property, and he demanded that CMWD "publicly acknowledge" GSW holds "*real property rights* to. . . groundwater." (AA 373-37; emphasis added.)[4]

IV. PROCEEDINGS BELOW

A. GSW Violated Code Civ. Proc. §§ 861, 861.1, and 863 by Failing to Timely Re-Publish Its Summons After the August 27, 2013, CFD Election, But The Trial Court Found GSW's Violations Were Excused By "Good Cause."

Notwithstanding the dual provisions in the Mello-Roos Act providing for a validation action challenging a CFD to not be filed until *after* the CFD's voters approve it,[5] GSW filed its Complaint on March 26,

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[4] Finally, and contrary to GSW's baseless speculation (GSW Brief, pp. 18-19), CMWD has no intention of using Mello-Roos financing to purchase "pencils" or other GSW assets that do not have "an estimated useful life of five years or longer." (Government Code §53313.5.)

[5] Government Code §53341 provides that:

> "Any action or proceeding to attack, review, set aside, void, or annul the levy of a special tax. . . pursuant to this chapter shall be commenced within 30 days *after the special tax is approved by the voters. . . .*" (Emphasis added.)

Government Code §53359 additionally provides that:

2013, 5 months *before* the August 27, 2013, election. (AA 1.) GSW then published the summons that is required to obtain jurisdiction over "all persons interested" (see CCP §§861, 861.1, and 863) in April 2013. The published summons required anyone wishing to file a responsive pleading to do so by May 2, 2013. (RA 0001-0012.)

On June 10, 2013, the trial court correctly ruled that GSW filed its action *prematurely.* The court stayed the action until after the election. (RA 0674-0677.)

After the election, GSW failed to re-publish the summons. Accordingly, CMWD asked the trial court to dismiss GSW's lawsuit. CMWD argued that the summons GSW published back in April 2013 did not confer jurisdiction on the trial court as no interested person lawfully could be compelled to appear in court to defend the validity of the CFD special taxes and bonds several months before the voters took the final

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> "An action to determine the validity of bonds issued pursuant to this chapter or the validity of any special taxes levied pursuant to this chapter may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure but shall. . . be commenced within 30 days *after the voters approve the issuance of the bonds or the special tax* if the action is brought by an interested person pursuant to Section 863 of the Code of Civil Procedure. . . ." (Emphasis added.)

essential step in the CFD formation process—approval of the CMWD Board's actions by the requisite 2/3rds vote. (AA 1325-1328.)

The trial court agreed with CMWD that since GSW's published summons "identified a compliance date in May 2013—which was a date before the case could properly be brought,. . .[t]his had the practical effect of requiring interested persons to respond to a claim which did not yet exist, and thereby impermissibly shortened the time in which they otherwise should have had to respond." This error, the trial court continued, "'cannot be considered to be minor or inconsequential.'" (RA 0680, quoting from *Community Youth Athletic Center v. City of National City* (2009) 170 Cal.App.4th 416, 429 ["*CYAC*"].) The trial court nevertheless declined to dismiss GSW's lawsuit, finding there was "good cause" to excuse GSW's error. (*Id.*) The trial court allowed GSW to re-publish its summons and file proof of service thereof after the statutory deadline had passed. (RA 0681.)

If the accrual of GSW's 60-day deadline to publish the summons and file proof of service thereof (see CCP §863) were tolled between the date on which GSW actually filed its Complaint until August 27, 2013, the date of the CFD election, GSW would have had until October 26, 2013, to complete these actions. It did not complete its re-publication of summons until October 31, 2013 (5 days late), and it did not file its proof

of service until approximately November 8, 2013 (13 days late). (RA 0683-0686.)

B. At No Time During the Proceedings Below Did GSW Raise the Issue of Whether CMWD's CFD Violates Government Code §53313 by Purporting to "Supplant" Another Service Provider.

The third of the 3 "questions presented" in GSW's Brief asks: "Can the Mello-Roos Act be used by one service provider to supplant another service provider, providing the same service to the same customers with the same facilities?" Curiously, this question is nowhere addressed in its Complaint (AA 1-47) or in any of its briefing (AA 178-209, 1274-1286, 1331-1337) or its oral argument at trial (see Reporter's Transcript ["RT"].) GSW is raising this issue for the first time on this appeal.

C. The Trial Court Carefully Considered Each of the Arguments GSW Presented to It; GSW's Cheap Shots At the Trial Court Are Unjustified.

Unhappy with the trial court's rejection of the legal arguments GSW *did* present, GSW now takes the "low road" and insults the judge—implying he was unprepared (GSW Brief, p. 11 n. 7), criticizing his decision as consisting of "only seven short paragraphs of rationale" (*id.*, p. 3),[6] and summarizing his ruling as showing he "evidently felt the heat generated by the [CFD] election," that he had a "fundamental misunderstanding of the concept of judicial review," and that all he did

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[6] GSW did not request that the trial court issue a statement of decision so the trial court had no obligation to "explain[] the factual and legal basis for its decision as to each of the principal controverted issues." (CCP §632.)

was "merely to count noses" and determine the voters' will trumps "the language of the law." (GSW Brief, pp. 4 and 42.) In fact, the trial judge affirmed he had read all of the voluminous papers filed by the parties (RT 4-6, 33), he directed incisive questions to both GSW's and CMWD's counsel and demonstrated a full understanding of the issues (RT 6-33), he took the matter under submission in order to read additional cases cited by GSW's counsel (RT 33, 34), and he promised "to do my best to faithfully read the statutes and the cases" (RT 34). His written ruling (which he, not CMWD's counsel wrote) considered and rejected each of GSW's arguments with detailed reference to the supporting statutes. GSW has no basis for disparaging the trial judge.

Final judgment was entered on April 29, 2014. (AA 1486-1501.)

V. ARGUMENT

A. There Was No "Good Cause" Excusing GSW's Failure to Timely Obtain Jurisdiction Over All Persons Interested in the Validity of the CFD; Accordingly, This Action Should Have Been Dismissed.

Before this Court reaches the merits of GSW's appeal, it must decide whether GSW timely and properly obtained jurisdiction at the trial court level to have its appeal *considered* on the merits. In this regard, while the trial court found "good cause" under CCP §863 excusing GSW's failure to timely re-publish the summons after the August 27,

2013, CFD election, CMWD submits this aspect of the trial court's ruling was erroneous.[7]

GSW filed this case as a validation action pursuant to CCP §§860 *et seq.*, which is the statutory scheme referred to in the Mello-Roos Act for challenging the levying of Mello-Roos special taxes and issuance of Mello-Roos bonds. (Government Code §53359, quoted in footnote 6 *ante.*) The validation statutes permit a public agency or any "interested person" to bring a lawsuit against "all persons interested" seeking to validate (or invalidate) an act of the public agency when "any other law" (here, the Mello-Roos Act) so authorizes. (CCP §§860, 863, 861, 861.1.)

In validation actions, a number of special procedural requirements apply, including a requirement the summons be published in a newspaper of general circulation designated by the court. (CCP §861.) The publication must occur once a week for three successive weeks (*id;* Government Code §6063), and publication must be completed and proof

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[7] This Court is concerned with the correctness of the trial court's judgment, not the reasoning the trial court utilized in reaching that result. (*People v. Mason* (1991) 52 Cal.3d 909, 944; *Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 956.) If the trial court's decision upholding CMWD's actions in forming the CFD, levying CFD special taxes, and authorizing the sale of CFD bonds is correct on any legal ground, including GSW's failure to timely obtain jurisdiction under CCP §§861, 861.1, and 863, this Court must affirm the trial court judgment even if the trial court's reasoning on the jurisdictional question was incorrect. (*Coral Constr., Inc. v. City & County of San Francisco* (2010) 50 Cal.4th 315, 336.)

of service thereof must be filed with the court "within 60 days from the filing of [the] complaint." (*Id.*, §863).

These statutory publication requirements are strictly enforced by the courts. "Failure to publish a summons in accordance with the statutory requirements deprives the court of the power to rule upon the matter. . . [T]he court cannot overlook a defective summons. Unless the plaintiff has published a summons in compliance with the statutory requirements, the court has no jurisdiction to rule upon the matter that is the subject of the action." (*Katz v. Campbell Union High School Dist.* (2006) 144 Cal.App.4th 1024, 1032 [validation action properly dismissed because published summons failed to specify concrete response date and response date calculable from language of summons provided 6 days less than the amount of time required].) Accord, *CYAC, supra,* 170 Cal.App.4th at 428-429 (defect in published summons which shortened response period by 3 days "cannot be considered to be minor or inconsequential, but instead is jurisdictional"), and *County of Riverside v. Superior Court* (1997) 54 Cal.App.4th 443, 446-451 (published summons which informed its readers they had 30 days to file responsive pleading but which failed to specify precise date was defective; dismissal required). Moreover, even though CMWD is the only indispensable party, "it does not matter that all indispensable parties have appeared in the action. Our concern is with the court's jurisdiction over the matter to be validated."

Katz, 144 Cal.App.4th at 1033. Nor does it matter that CMWD suffered no prejudice. "The alleged absence of prejudice does not supply a *reason* for plaintiff's failure to comply with the statutes." (*Id.* at 1036; emphasis in original.)

As noted in §IV.A above, the trial court correctly recognized that GSW's April 2013 published summons (specifying a May 2, 2013, responsive pleading deadline) was a nullity in that it wrongly purported to require interested parties to respond to "a claim which did not yet exist" and thereby "impermissibly shortened the time in which they should have had to respond." (RA 0680.)[8] Nevertheless, since the 60-day deadline under CCP §863 for completing publication and filing proof of service thereof is supposed to run from the filing of the complaint, the trial court felt there was "good cause" for GSW's failure to timely re-publish because, having filed its Complaint prematurely, GSW "was left with no practical way to comply. . . ." (*Id.* at 0681.)

CMWD respectfully submits that GSW should not be permitted to take advantage of its *first* mistake in prematurely filing this action as the supposed "good cause" to excuse its *second* mistake in failing to properly re-publish its summons. If any confusion was caused by GSW's inability

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[8] CMWD, of course, agrees. If a published summons which shortens the response period by 3 days is defective and requires dismissal (*CYAC, supra*), *ipso facto* a published summons which shortens the response period by at least *5 months* must be defective and require dismissal as well.

to properly complete service by publication within 60 days from filing its Complaint *GSW is the source of that confusion.* Moreover, GSW did not even *argue*—much less submit a declaration of counsel—that in fact it *was* concerned or confused about how to comply with the 60-day deadline for completing service under CCP §863 after the August 27, 2013, election. Instead, it took the *clearly* erroneous position its original prematurely published summons was sufficient and no re-publication was required *at all.* (AA 1333-1334.)

After the trial court issued its June 10, 2013, order finding GSW's Complaint was prematurely filed, GSW had a choice. It could have dismissed its Complaint without prejudice and re-filed it after the August 27th election. If GSW had done so, it could have published a *new* summons and filed its proof of service within 60 days after filing its *new* complaint. Alternatively, GSW could have kept its existing lawsuit on file and re-published the summons after the election. Having chosen this second course of action, however, GSW should have understood it *would* have to re-publish the summons and that its *best case scenario* was that its deadline for doing so would be tolled only until after the election, *not excused entirely.*

The requirements for timely published notice in a validation action are too well settled to simply ignore. "The good cause which must be shown [in order to excuse non-compliance with the service requirements

in the validation statutes] 'may be equated to good reason for a party's failure to perform that specific requirement [of the statute] from which he seeks to be excused.' [Citation.] The rule is that 'a mistake as to the law does not require relief from default as a matter of law. [Citation.]. The issue of which mistakes of law constitute excusable neglect presents a fact question; the determining factors are the reasonableness of the misconception and the justifiability of lack of determination of the correct law. [Citation.] Although an honest mistake of law is a valid ground for relief where a problem is complex and debatable, ignorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief. . . .The procedure to be followed with respect to the form and publication of summons in such a case as this is not complex. . . . the law was in all the books and readily available to plaintiffs' attorney." (*Community Redevelopment Agency of Los Angeles v. Superior Court* (1967) 248 Cal.App.2d 164, 174-175 ["*CRA*"]; *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, 346.)

In *CRA*, the court *reversed* a trial court order finding good cause under CCP §863. CMWD submits this Court should do the same. Once the trial court informed GSW on June 10, 2013, that its action was prematurely filed, there was no "good reason" for GSW's misperception that it could rely upon a summons prematurely published back in April, with a responsive pleading deadline in early May, to obtain jurisdiction

over all persons interested. Much more minor lapses have resulted in dismissal of other validation actions. See *Katz, CYAC, and County of Riverside, supra*—in each of which cases the plaintiffs at least timely published a summons in what was at the time a justiciable controversy. "Even validation actions are not exempt from the traditional principle that a justiciable action must satisfy the requirements of both ripeness and standing." (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 66.) GSW's "ignorance of the law coupled with [its] negligence in ascertaining it" (*CRA, supra*) should have resulted in the trial court finding there was *not* good cause to excuse GSW's failure to timely re-publish its summons after the August 27, 2013, election. The trial court's ruling to the contrary, CMWD submits, was an abuse of discretion and its judgment affirming the validity of the Mello-Roos special taxes and Mello-Roos bonds should be affirmed on that ground.

B. CMWD Has the Authority to Condemn GSW's Property, If Necessary, Under its Organic Law, the Eminent Domain Law, and the Mello-Roos Act.

1. CMWD Has Been Expressly Granted Condemnation Authority Under its Organic Law and California's Eminent Domain Law.

As the trial court noted (RT 8, AA 1475) and GSW concedes (GSW Brief, p. 25), CMWD is expressly authorized under the Municipal Water District Law of 1911 (Water Code §71000 *et seq.*) to "exercise the right of eminent domain to take any property necessary to supply the

district or any portion thereof with water" (§71693) and to "exercise the right of eminent domain to take any property necessary to carry out any powers of the district" (§71694). See also CCP §1240.110(a), a provision of California's Eminent Domain Law, which provides that "[e]xcept to the extent limited by statute, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire any interest in property necessary for that use including, but not limited to, submerged lands, *rights of any nature in water, subsurface rights*,. . ., [and] *public utility facilities and franchises*. . . ." (Emphasis added.) Other local agencies utilizing the Mello-Roos Act similarly have eminent domain authority in their respective organic acts. (See, *e.g.*, Government Code §§37350.5 (cities) and 25350.5 (counties) and Education Code §35270.5 (school districts).)

When the Legislature adopted the foregoing statutes it did *not* say the affected public agencies only have eminent domain powers when they finance their property acquisitions in a particular manner or out of a particular source of funds. Statutory grants of eminent domain power universally focus on the purpose for which a property acquisition is justified, *not* the source of funding.

2. The Mello-Roos Act is a Financing Statute That Provides Public Agencies With a Supplemental Means of Paying For Public Facilities and Certain Public Services.

The Mello-Roos Act provides an alternative method of *financing* public facilities. In the broadest possible terms, Government Code §53313.5 authorizes a CFD to "finance the purchase, construction, expansion, improvement, or rehabilitation of any real or other tangible property with an estimated useful life of five years or longer. . ., including, but not limited to, . . (h) Any . . . governmental facilities which the legislative body creating the community facilities district is authorized by law to contribute revenue to, or construct, own, or operate."

The Mello-Roos Act provides for the formation of a community facilities district or CFD, the levying of special taxes on properties in the CFD, and the issuance of bonds to fund approved facilities. (Government Code §§53318-53329.6, 53340-53344.4, and 53345-53365.7.) CFD special taxes are levied consistent with a "rate and method of apportionment" approved at the time of CFD formation. (*Id.*, §§53325.1(a) and 53321(d).) Consistent with Proposition 13 (Cal. Const. Article XIII.A), two-thirds of the qualified electors in the CFD must approve levying the CFD special tax and selling CFD bonds. (§§53328, 53329, 53340(a), and 53355.)[9]

[9] In addition to the public facilities that can be financed under

The Legislature declared the Mello-Roos Act "shall be liberally construed in order to effectuate its purposes" (Government Code §53315) and that a local agency proceeding under the Mello-Roos Act may "take any actions or make any determinations which it determines are necessary or convenient to carry out the purposes of this chapter and are not otherwise prohibited by law" (§53312.5).

Contrary to GSW's contention (GSW Brief, pp. 15-16), the Mello-Roos Act is *not* limited to financing the construction of new infrastructure improvements attendant to "large-scale new developments," as distinguished from the acquisition of *existing* facilities in already developed areas. While the initial focus of the Mello-Roos Act was "especially" (if not exclusively) to provide a financing vehicle "in developing areas and areas undergoing rehabilitation" (Government Code §53311.5), the Legislature quickly clarified that the Mello-Roos Act is *not* so restricted. In 1985, the Legislature amended Government Code §53321(c) to authorize a CFD to purchase *completed* facilities and it amended §53317 to add broad definitions of the terms "cost" and "incidental expenses"--to include the cost of acquiring land, rights of way

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Government Code §53313.5 (the "facilities" section of the Mello-Roos Act), the Act permits public agencies to finance—on a strictly "pay-as-you-go" basis--a limited number of supplemental public *services* under §53313 (the "services" section). Water services are not among them, however. (See also, Government Code §53345.3 [no authority to finance §53313-authorized services with CFD bonds].) CMWD is *not* proceeding under §53313.

and easements, and "[a]ll . . .costs otherwise incurred in order to carry out the authorized purposes of the district."[10] The next year, the Legislature *deleted* the requirement in §53313.5 and former §53319(e) that facilities financed through a CFD must be "necessary to meet increased demands upon the local agency as a result of new development or rehabilitation." (Stats. 1986, c. 1102; RA 0489, LH 002556, 002584, 002711, 002714.) As one of the co-authors of the Mello-Roos Act stated at the time: "In short, if a public agency has authority to build or buy it, and it will likely last five years or more, the Mello-Roos Act probably can help finance it." (RA 0489, LH 002386.)

3. CMWD's Condemnation Authority Set forth in the Water Code and Eminent Domain Law Must be Read "*in Pari Materia*" With its Authority Under the Mello-Roos Act to Finance the Purchase and Construction of Facilities.

When the Legislature enacted the Mello-Roos Act, there was no need for it to restate CMWD's (or any other public agency's) condemnation authority. It must be assumed the Legislature had in mind the various statutory grants of eminent domain authority and to have enacted the Mello-Roos Act in their light, with the intent of maintaining a consistent body of statutes. *People v. Yartz* (2005) 37 Cal.4th 529, 538.

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[10] The legislative history of the original Mello-Roos Act and 12 amendments thereto was attached as Exhibit "A" to CMWD's Request for Judicial Notice at the trial court level (see RA 0486) and can be found on the disk provided at RA 0489. See legislative history ("LH") 001266-1267.)

The Legislature did not *need* to re-state in the Mello-Roos Act that local agencies have eminent domain authority to finance the acquisition of facilities for public purposes—*the law was already settled they do*.

GSW points out that public agencies have no inherent power of eminent domain, a public agency's right to condemn property must be expressly authorized by statute, and reasonable doubts as to whether a public agency possesses eminent domain authority are resolved *against* it. (GSW Brief, pp. 30-31.)[11] CMWD has no problem with these general propositions. *They have no bearing on the outcome of this case, however, since CMWD* ***does*** *have multiple express statutory grants of eminent domain authority to acquire GSW's Ojai water utility.* It is simply not necessary that CMWD's condemnation authority be expressly reiterated in each financing statute CMWD may use in order to exercise its expressly granted eminent domain powers and none of the authorities cited by GSW holds to the contrary.

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[11] *City of Oakland v. Oakland Raiders* (1982) 32 Cal.3d 60, the first case cited by GSW in this regard, cited the general rule and then went on to find that the city did in fact have the authority to condemn a professional football franchise--despite the lack of any express statutory authorization to do so. *Mulville v. City of San Diego* (1920) 183 Cal. 734, *Harden v. Superior Court* (1955) 44 Cal.2d 630, and *Kenneth Mebane Ranches v. Superior Court* (1992) 10 Cal.App.4th 276, the other 3 cases cited by GSW, stand for the proposition that a public agency's *extra-territorial* condemnation authority is narrowly construed. Those cases are inapposite, however, since (1) GSW's Ojai water utility is entirely located *within* CMWD's territorial boundaries and (2) CMWD *does* possess extra-territorial condemnation authority under CCP §1240.125.

The Mello-Roos Act and the Municipal Water District Law of 1911 under which CMWD operates (as well as the many other statutory grants of eminent domain authority to various public agencies) are "*in pari materia* [and] should be construed together so that all parts of the statutory scheme are given effect." *Levin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-1091. "[I]n the construction of a particular statute or any of its provisions, all acts having the same general purpose or relating to the same subject should be read together as if one law, and harmonized if possible, even though they may have been passed at different times, regardless of the fact that one of them may deal specifically and in greater detail with a particular subject while the others do not." (58 Cal.Jur.3d "Statutes" (West, 2012), §118, p. 537, citing numerous cases.)

Moreover, CMWD's statutory condemnation authority and its authority under the Mello-Roos Act to finance the acquisition of public facilities which it "is authorized by law to contribute revenue to, or construct, own, or operate" (Government Code §53313.5(h)) must both be interpreted in light of (1) the Legislature's command the Mello-Roos Act "shall be liberally construed in order to effectuate its purposes" (Government Code §53315) and (2) the Legislature's statement that a public agency proceeding under the Mello-Roos Act "may take *any* actions or make *any* determinations which it determines are necessary or convenient to carry out the purposes of [the Mello-Roos Act] ***and are not***

otherwise prohibited by law" (§53312.5; emphasis added). In short, absent some express *prohibition* on the use of eminent domain set forth in the Mello-Roos Act, which does not exist, there is no basis for the Court to prohibit CMWD from using the Mello-Roos Act to finance the condemnation of GSW's Ojai water utility.

4. The Mello-Roos Act's Grant of Financing Authority to "Purchase" and "Acquire" Property Includes the Right to Acquire Property by Eminent Domain.

In the broadest possible terms, Government Code §53313.5 authorizes a CFD to "finance the purchase, construction, expansion, improvement, or rehabilitation of any real or other tangible property with an estimated useful life of five years or longer" for a variety of public facilities, including "(h) Any other governmental facilities that the legislative body creating the community facilities district is authorized by law to contribute revenue to, or construct, own, or operate."

GSW reads this language as a *limitation* rather than as a *grant* of authority. GSW argues the Legislature's use of the word "purchase" in §53313.5 demonstrates an intent to preclude local agencies from using Mello-Roos Act financing to acquire property by eminent domain—in other words, that the term "purchase" *excludes* acquisition by condemnation. Nothing could be further from the truth.

"Purchase includes every mode of coming to an estate, except inheritance." *Greer v. Blanchar* (1870) 40 Cal. 194, 197, quoted in

People v. Cockrill (1923) 62 Cal.App. 22, 33. Even assuming CMWD is unsuccessful in negotiating a *voluntary* purchase of GSW's Ojai property and CMWD is forced to condemn it CMWD still plans to "purchase" the system.

In ascertaining legislative intent, the courts "giv[e] the words of the statute their usual and ordinary meaning." *People v. Ramirez* (2009) 45 Cal.4th 980, 987. The usual and ordinary meaning of the term "purchase" includes purchase by eminent domain.

GSW's assertion that the Legislature's use of the term "purchase" in a statute *excludes* purchase by eminent domain has been expressly rejected by the California Supreme Court. In *People v. Superior Court of San Bernardino County* (1937) 10 Cal. 2d 288, the title of a statute called for establishment of a prison and "to provide for purchase or acquirement of farm lands by unconditional gift or use of lands owned by the state therefor." The Court held this wording was sufficient to embrace acquisition by eminent domain:

> "Directing attention to the particular words that occur therein, to wit: 'to provide for *purchase*,' it well may be argued that "*ex proprio vigore*," such language imports authority not only to acquire lands by bargain and sale agreement for their agreed cash value, by possible exchange of some previously-owned land by the state for other land that

might be more suitable for prison purposes, or even by the means that was adopted and sought to be made effective herein, to wit: ***by means of an action in the exercise of the right of eminent domain. In other words, that the word 'purchase' is broad enough to include within its meaning any means other than by descent.*** The books abound with general definitions of the word 'purchase.' In Words and Phrases, volume 7, page 5853, may be found references to many different cases, wherein it is held, respectively, that 'Acquisition by purchase' includes every mode of taking title except descent or inheritance'; also, 'The term 'purchase' in its general signification, and which is the legal sense of it, includes all modes of acquiring property except by descent . . .' In full accord with such authorities and extending the principle specifically to situations in analogy with that herein presented, in each of several condemnation suits, it has been held that the word 'purchase' includes authority to bring a condemnation proceeding. ***In the case of United States v. Beaty, 198 Fed. 284, the court said: 'When used in a statute, the word 'purchase' is frequently held to include any method of acquisition other than by descent. . . . To construe the word here to mean only acquisition by buying,***

we must assume that Congress had in mind the method of acquisition rather than the general purpose to acquire. The mere use of the word 'purchase' -- which may have been used in its technical sense -- is not to my mind a sufficient reason for such assumption. If, as we must, we give the members of Congress credit for a reasonable knowledge of human nature, they must be assumed to have known that to restrict acquirement to voluntary sales by the owners would most probably defeat the chief purpose for which the appropriation was made . . . The very purpose of that (first) section was to authorize condemnation whenever, theretofore or thereafter, an act of Congress authorized land to be 'procured' for public use.'" (*Id. at* 294-295; emphasis added.)

GSW points to scattered examples of the Legislature authorizing various public agencies to acquire property by various means, including "by grant, purchase, gift, devise, lease, or eminent domain" or similar phraseology, and from this GSW infers a universal legislative determination that the terms "purchase" and "eminent domain" are mutually exclusive. (GSW Brief, pp. 27-28.) Once again, GSW's purported distinction fails. First of all, the words listed in the string of words after "acquisition" in the statutes cited by GSW are not, as GSW

would have this Court conclude, mutually exclusive—one can "purchase" a "lease" (Government Code §§53382, 93020(c)), a "grant" is a "gift" (Government Code §53382, CCP §1240.130), and a "mortgage," "pledge," "lien," and "security instrument" all describe essentially the same thing (Commercial Code §1201(b)(29)). Second, CMWD could cite just as many examples where the Legislature has used different phraseology more clearly expressing the understanding that acquisition by eminent domain is one means of "purchase." See, *e.g.*, Civil Code §798.80(e)(7) ("Subdivision (a) does not apply to any of the following . . . The *purchase* of a mobilehome park by a governmental entity *under its powers of eminent domain.*"; Civil Code §800.10(e)(7) ("This section does not apply to . . .[t]he *purchase* of a floating home marina by a governmental entity *under its powers of eminent domain.*"); and Education Code §19957.5 ("The terms '*purchase* of land' or 'acquisition of land'. . . *shall include, but shall not be limited to, the acquisition of land by eminent domain.*"). (Emphasis added.) Third, on occasion the Legislature has contrasted eminent domain with a *voluntarily negotiated* purchase, which also strongly implies the Legislature's recognition that eminent domain is an *involuntary* purchase (but, still, a form of "purchase"). See, *e.g.*, Government Code §65863.11(m) ("This section shall not apply to. . . a government taking by eminent domain or *negotiated* purchase.") and Revenue and Taxation Code §5091(c) ("This

section. . . does not affect the validity of any property acquisitions by *negotiated* purchase or eminent domain.").

GSW also conveniently fails to mention that the Mello-Roos Act itself uses the terms "purchase" and "acquisition" interchangeably. See Government Code §§53345.3 (Mello-Roos bonds can finance incidental costs for the "construction or *acquisition* of buildings, or both; *acquisition* of land, rights-of-way, water, sewer, or other capacity or connection fees. . . "), 53313.5(e) (reimbursements to CFD from public utility may be used to "acquire" additional facilities), 53313.5(f) (CFD may finance "acquisition" of property for flood control and storm protection services), 53313.5(k) (CFD may finance "acquisition" of property for purposes of hazardous material remediation), and 53313.4 (referring to CFDs established for "acquisition" of school facilities). Even GSW must acknowledge the term "acquisition" includes acquisition by eminent domain as every statute it cites at pp. 27-28 of its Brief refers to eminent domain as one means of "acquiring" property.) If the Legislature truly had chosen the word "purchase" in the introductory clause of Government Code §53313.5 in order to *exclude* eminent domain, presumably it would have used the same narrow term "purchase" in those other sections of the Mello-Roos Act as well, which it did not do. As the court stated in *New Davidson Brick Co. v. County of Riverside* (1990) 217 Cal.App.3d 1147, 1151 n. 4, another case involving an interpretation of the Mello-Roos Act,

"[i]t is, of course, axiomatic that, '[i]f possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.'" "Legislative intent should be gathered from the whole act rather than from isolated parts or words. . . The meaning of a statute may not be determined from a single word or sentence. Its words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear so as to make sense of the entire statutory scheme. No part or provision of a statute should be construed as useless or meaningless, and none of its language rendered surplusage." 58 Cal. Jur.3d, "Statutes," §113, pp. 529-530, citing numerous cases. Applying these basic principles of statutory construction, the Legislature's alternating use of the terms "purchase," "acquire," and "acquisition" in the Mello-Roos Act demonstrates the Legislature intended the terms to be interpreted in a harmonious and expansive manner, not a restrictive one; otherwise, GSW's narrow interpretation of the term "purchase" in §53313.5 would make the terms "acquire" and "acquisition" in other sections of the Mello-Roos Act inconsistent or surplusage.

Finally, GSW's reference (at p. 29, footnote 13 of its Brief) to Government Code §53317.5 is a red herring. That statute refers to how Mello-Roos taxes are apportioned if property is condemned, *not* to whether the Mello-Roos Act authorizes (or prohibits) use of the eminent

domain power for acquisitions financed under the Mello-Roos Act. GSW is mixing apples with oranges.

The trial court said it "rejects" GSW's assertion "that exercise of the power of eminent domain is not a purchase." (AA 1474.) This Court should as well.

5. The Legislative History of the Mello-Roos Act Does *Not* Support GSW's Assertion the Legislature Changed the Wording of the Bill to Eliminate the Authority of CFDs to Finance Property Acquisitions With Eminent Domain.

CMWD takes no issue with the general rule of statutory interpretation that the Legislature's "rejection of a specific provision contained in an act as originally introduced is 'most persuasive' that the act should not be interpreted to include what was left out." GSW Brief, p.32, quoting *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1107. That rule has no applicability here, however.

GSW provides a truncated and distorted summary of the legislative history of the 1982 bill that resulted in adoption of the Mello-Roos Act. (GSW Brief, pp. 28-29.)[12] Contrary to GSW's assertion, the bill was *not* modified to delete the authorization for financing property acquisitions by eminent domain.

The *true* legislative history is as follows: Originally, Assemblyman Roos introduced AB 3564 to authorize local agencies to

[12] See footnote 2 *ante*.

create a new form of local *assessment district* for the financing of public facilities and services in the wake of Proposition 13 (Cal. Const. Art. XIII.A). The original bill consisted of 16 single-spaced pages and proposed the addition of a new Division 8 to the *Streets & Highways Code*, where most of California's assessment district statutes are located.[13] The bill contained a definition of the term "acquisition" borrowed from one of the other assessment district statutes that, had the bill been adopted in that form, would have expressly authorized acquisition by eminent domain. (Compare the draft §7001(a)(2) [RA 0489, LH 000019], with Sts. & Hys. Code §5023.1, a definition of the same term in the Improvement Act of 1911.)

The eminent domain language in AB 3564 generated not a word of comment or criticism. Instead, opposition arose for an entirely different reason: because the bill proposed to authorize public agencies to finance with *assessments* public services that historically had been funded through *taxes* and to do so *without the two-thirds voter approval that Proposition 13 requires for special taxes.*

The Legislative Counsel immediately raised concerns that AB 3564 "may be determined by the courts to authorize a special tax, rather than a

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[13] See, *e.g.*, Streets & Highways Code §§5000 *et seq.* (Improvement Act of 1911), §10000 *et seq.* (Municipal Improvement Act of 1913), §22500 *et seq.* (Landscaping and Lighting Act of 1972), and §36600 (Property and Business Improvement District Law of 1994).

benefit assessment, which could not be imposed without a two-thirds vote of the voters of the affected area." (RA 0489, LH 000654-55.) The Legislature's staff chimed in that the bill would "break[] major new ground with regard to what can be funded using benefit assessments." (*Id.,* LH 000855-56.) The bill ran into a buzz saw of opposition from powerful organizations such as the California Chamber of Commerce, the California Taxpayers Association, and the California Association of Realtors for these same reasons. Over 30 years later, the Legislature's files on the original version of AB 3564 are replete with television and newspaper editorials and letters from irate constituents vehemently denouncing it. (*Id.*, LH 000119-121, 000409-35, 000594-95, 000865-76, 901-03, 000925, 000934-35.) As opposition mounted, however, *there is not a shred of evidence that any concerns were expressed with the language authorizing acquisition of property through eminent domain.*

The bill's author retreated: *the entire text of the original bill* was sc*rapped.* In its place, on May 28, 1982, Assemblyman Roos substituted the first draft of what eventually became the Mello-Roos Act. (*Id.*, LH 000039-58.) The Legislature did not tweak particular provisions of the prior assessment district proposal containing the property acquisition language to which GSW now points; rather, the entire initial draft of the bill went into the "round file" and Assemblyman Roos started over. As Senator Mello, co-sponsor on the State Senate side, commented with

considerable understatement a few months later, the bill "achieved considerable attention in its earlier form, as a special assessment bill. *It has been completely changed.*" (*Id.*, LH 001015; emphasis added.) The revised form of the bill changed the "assessments" to "special taxes," moved the statute to where it now sits in the Government Code, and added the all-important provision that any CFD must be approved by two-thirds of the voters in an authorizing election. (See Government Code §§53325.3 and 53328-29 in the form of the amended bill printed May 28, 1982. *Id.*, LH 000044-45, 000483.) On *this* basis, *not* because of any concern with condemnation, the prior opponents of AB 3564 switched to positions of support and the bill sailed through the Legislature and secured the Governor's signature. (*Id.*, LH 000166, 000238-239, 000977.)

Interestingly, the term "purchase" in the introductory sentence of Government Code §53313.5—the term GSW primarily focuses upon—did not even appear in the first major amendment of the bill published on May 28, 1982, again showing the Legislature was *not* focused on narrowing the term "acquisition" (as defined in the original bill) to "purchase" because of any concerns with the use of eminent domain. Instead, the first draft of the amended bill stated simply (in what was then §53313) that a CFD could "*provide* any one or more of the following types of facilities." (*Id.*, LH 000041; emphasis added.] A few months *later*, on August 2, 1982, the bill was further amended to *expand upon* the term "provide" and

clarify that a CFD may "provide for the purchase, construction, expansion, or rehabilitation of any real or other tangible property with an estimated useful life of five years or longer. . . ." (*Id.*, LH 000061.) In context, then, the Legislature added the term "purchase" *not* to eliminate condemnation authority but, rather, to clarify the expansive scope of activities for which a public agency would be permitted to utilize CFD financing. The bill underwent other revisions as it moved toward ultimate passage but, once again, *not a single word was raised from any source, within the Legislature or from a single member of the public, relating to the use of eminent domain.* (See LH 000001-001249.)

In short, GSW's assertion that the Legislature balked at including condemnation powers in the Mello-Roos Act is poppycock and the authorities cited at p. 32 of GSW's Brief have no applicability here. More *apropos* is *Salem v. Superior Court* (1989) 211 Cal.App.3d 595, 601 n. 2, where, after noting the Legislature had deleted the "entire wording" of a proposed statutory section and inserted a substitute section, the court stated:

> "Since the deletion of language referred to . . . was the deletion of the entire bill, in favor of completely new textual material, ***we derive no indication of intent as respects a single phrase in the deleted bill.*** [Emphasis added]."

It would be more correct to regard the original "acquisition" language of AB 3564 aas part of a bill that was never enacted, which brings to mind what the courts have historically said about the difficulty of gleaning legislative intent from unpassed bills: "[A]s we have often explained, unpassed bills, as evidences of legislative intent, have little value." (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal. 4th 914, 927 [internal citations omitted]; *Lolley v. Campbell* (2002) 28 Cal. 4th 367, 378-379 [accord].)

GSW's argument--that condemnation is such an "awesome" and inherently risky power that the Legislature could not possibly have intended CFDs would use it—finds not one iota of support in either the language of the Mello-Roos Act or its extensive legislative history. CMWD researched every page of the legislative history of the 1982 Mello-Roos Act and no fewer than 12 amendments to the statute adopted in 1983, 1984, 1985, 1986, 1987, 1988, 1990, 1991 (2 separate bills), 1992, 1993, and 2007 that address the eligible purposes and costs that can be financed by a CFD--*some 9,766 pages of legislative history*—and found not a single statement, a single word, a single concern raised by *any* legislator, *any* member of the Legislature's staff, or *any* organization or individual commenting on any of the bills indicating the Legislature has ever been concerned with CFDs being used to fund condemnation actions. (See RA 0017-0018.)

6. 1986 Amendments to the Mello-Roos Act and Subdivision Map Act Demonstrate the Legislature Intended to Allow CFDs to Finance the Condemnation of Property.

GSW's Brief is curiously silent about 1986 amendments to the Mello-Roos Act and Subdivision Map Act (Government Code §66411 *et seq.*) that prove beyond question the Legislature *did* intend to authorize CFD financing to be used for the condemnation of property.

Prior to 1986, Government Code §§66462 and 66462.5 authorized a local agency, as a condition to approving a final tract map, to require the subdivider to enter into a contract obligating the subdivider to complete public improvements that would be financed through "an appropriate special assessment act." If neither party to the contract owned the property on which the improvements were to be made, §66462.5 authorized the local agency to use its condemnation power to acquire the property--financed with proceeds from the assessment district.

In 1986, the Legislature amended §66462 (as well as multiple provisions of the Mello-Roos Act) and expressly added Mello-Roos financing to assessment district financing as a means of paying for offsite subdivision improvements, by condemnation if necessary. (Stats. 1986, Chapter 1102; RA 0489, LH 002540, 002551, 002562-63, 002721-22, and 002730.) See Government Code §66462.5(a), which expressly cross-references the Eminent Domain Law and contemplates a local agency's

use of eminent domain "to acquire an interest in the land which will permit the [subdivision] improvements to be made," §66462.5(c), which authorizes the local agency "to require the subdivider to enter into an agreement to complete the improvements pursuant to Section 66462 at such time as the [local agency] acquires an interest in the land that will permit the improvements to be made," and §66462(a)(2)(A) and (B), which after the 1986 statutory amendments, contemplates the local agency/subdivider contract may be one to "[i]nitiate and consummate proceedings under . . . the Mello-Roos Community Facilities Act of 1982. . . ." Given this statutory language that for nearly 30 years has authorized the Mello-Roos Act to be used to finance the cost of condemning offsite property for subdivision improvements it is absurd for GSW to argue the Mello-Roos Act *prohibits* using CFDs to finance condemnation actions.

7. It Was Entirely Appropriate for CMWD to Provide Evidence to the Trial Court Concerning the Long-Standing Administrative Practice of Using Mello-Roos Financing to Acquire Properties by Eminent Domain.

California courts often look to administrative practice in interpreting ambiguous provisions of the California Constitution and statutory law, *including administrative practice testified to by attorneys.* See, *e.g.*, *Marek v. Community Redevelopment Agency* (1988) 46 Cal.3d 1070, 1085 (administrative practice testified to by attorney); *Ste. Marie v. Riverside County Regional Park & Open-Space District* (2009) 46 Cal.4th

282, 292-293, n. 7 and accompanying text and cases cited therein. Accordingly, even assuming there is any ambiguity in the Mello-Roos Act as to the propriety of using that statute to pay condemnation costs (but see §V.B.1-6 above), it was appropriate for CMWD's counsel to submit a declaration to the trial court stating that he and his law firm have been involved in no fewer than four (4) other condemnation matters financed with Mello-Roos bond proceeds. (RA 0014-0017, 0028-0167.) GSW's analogizing CMWD's attorney to a "petty thief" and its characterization of his experience as "[he] did it once and got away with it" (GSW Brief, pp. 44-45) are false and wrongly insulting statements. GSW's assertion the administrative practice of other public agencies was wrongly offered as a "legal conclusion" (*id.*, p. 43) is similarly false. *Marek, supra.*

It should be noted that at both the trial court level and on this appeal GSW has boldly argued *without any factual foundation whatsoever* there has been only *one* prior use of the Mello-Roos Act to fund a condemnation action in the State of California and CMWD's use of the Mello-Roos Act is "unprecedented." (AA 6, ¶18 of GSW's Verified Petition/Complaint; *cf.* GSW Brief, p. 1, where GSW imaginatively asserts that "other public agencies are watching this case to see whether it is legal to *radically expand* Mello-Roos Act bond funding beyond the plain words of the Act's enabling statute. . . .") GSW "opened the door" on whether there is an administrative practice of California public

agencies using the Mello-Roos Act to finance acquisition of properties by eminent domain. Having raised the issue, GSW should not be heard to complain when CMWD proves the falsity of its assertions!

8. It is Necessary to Interpret the Mello-Roos Act As Permitting Use of CFD Financing to Pay for Condemnation Costs in Order to Promote, Rather than Defeat, the General Purpose of the Statute.

GSW's assertion that the Mello-Roos Act must be "strictly confined according to its terms" flatly contradicts the Legislature's expressed intent that the statute "shall be liberally construed in order to effectuate its purposes" and its broad statement that a public agency proceeding under the Mello-Roos Act "may take any actions or make any determinations which it determines are necessary or convenient to carry out the purposes of [the Mello-Roos Act] and are not otherwise prohibited by law" (Government Code §§53315 and 53312.5.) See *Prunty v. Bank of America* (1974) 37 Cal.App.3d 430, 440, interpreting the words "purchase" and "purchaser" in CCP §580b in an expansive fashion in order to provide a "liberal construction" consistent with the legislative intent underlying California's anti-deficiency laws. To the extent there is any ambiguity in the term "purchase" in Government Code 53313.5, this Court should "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation

that would lead to absurd consequences." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [internal citations omitted].) One of the central purposes of the Mello-Roos Act is to provide a supplemental means of financing the acquisition and construction of public facilities. Only if the Mello-Roos Act is interpreted broadly, to permit CFD financing to be used to acquire property by condemnation, will this legislative purpose be achieved.

GSW argues that eminent domain is risky—a jury award may be higher than anticipated, an eminent domain case may be dismissed by the court or abandoned by the condemnor—and because of those risks the Legislature must have decided to deny public agencies the right to use CFDs to finance condemnation actions. (GSW Brief, pp. 36, 39; emphasis in original.) GSW's argument is misplaced, pure invention, and proves too much.

First of all, the risks to a public agency endeavoring to complete an important public project for which real property must be acquired at a reasonable cost are even *greater* if it *lacks* condemnation authority. What if the public agency forms a CFD and sells Mello-Roos bonds but the property owner then refuses to sell--must the public project be abandoned? What if the property owner, knowing the public agency has no condemnation power, jacks up its asking price far above fair market

value--must the public agency pay whatever price the owner (unreasonably) demands?

Moreover, a public agency forming a CFD cannot be expected to enter into negotiated purchase/sale agreements with each property owner whose property is to be acquired *before* it has formed the CFD and held the required CFD election—it must have the funds in hand *before* it can make a purchase offer[14] and it must form the CFD and sell the Mello-Roos bonds in order to obtain the funds.

Finally, as stated above, GSW's argument proves too much. If condemnation is risky for CFDs, why is it not also risky for assessment districts, as to which GSW must concede the power of eminent domain exists? (Streets & Highways Code §5023.1(c) (1911 Act).) Why not with respect to a public agency's condemnation under the authority set forth in its organic act? What is so different or special about CFDs that justifies attributing some inferred intent to the Legislature that CFDs should never finance condemnation actions? What legislative policy would be served by such an interpretation? GSW has no answer.

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[14] See Government Code §§7267.1 and 7267.2(a)(1), which require a public agency to first appraise the owner's property to determine its fair market value and then "make an offer to the owner or owners of record to acquire the property for the full amount so established"

C. CMWD's Authority to Use Mello-Roos Financing to Acquire GSW's Property Includes the Authority to Fund Incidental Property Acquisition Costs Such As Legal Fees, Appraisal Costs, and Other Litigation Expenses.

The Court should also reject GSW's argument that CMWD cannot use CFD financing to pay appraisal, attorney, and similar incidental costs it will incur to acquire GSW's Ojai water utility. (GSW Brief, pp. 33-36.) GSW's argument is derivative of its primary argument that a CFD cannot be used to fund eminent domain at all and fails for the same reasons.

Government Code §53345.3 authorizes the amount of any Mello-Roos bonded indebtedness to include "*all* costs and estimated costs incidental to, or connected with, the accomplishment of the purpose for which the proposed debt is to be incurred, including, but not limited to, the estimated costs of . . . acquisition of building. . .; acquisition of land, rights-of-way. . .; architectural, engineering, inspection, legal, fiscal, and financial consultant fees. . . ." (Emphasis added.) The term "cost" is defined in §53317(c) to include "the expense of . . .purchasing the public facility and of related land, right-of-way, easements, including incidental expenses." The term "incidental expenses" is defined in §53317(e) to include "(2). . . costs otherwise incurred in order to carry out the authorized purposes of the district." Collectively, these statutory provisions encompass all costs CMWD intends to incur in its effort to acquire GSW's Ojai water utility.

Appraisal costs, legal expenses (including, if applicable, eminent domain attorney fees), and the like are all clearly "incidental to, or connected with, the accomplishment of the purpose for which the proposed debt [to acquire GSW's Ojai water utility] is to be incurred." GSW's argument that the Legislature intended to strictly limit incidental costs to costs directly related to "planning, building, and organizing" (GSW Brief, pp. 34-35) simply ignores or overlooks the above-quoted statutory provisions that contradict its position. GSW is arrogant in the extreme when it threatens to engage in "protracted litigation" against CMWD (GSW Brief, pp. 35, 25 fn. 11) and argues that *that* is a reason for the Court to prevent CMWD from using Mello-Roos financing to pay its attorneys.

In an abundance of caution, and in order to provide full disclosure to the voters at the CFD election, CMWD included in its list of eligible incidental costs the possibility of damages payable to GSW if CMWD's eminent domain action is dismissed by the court or abandoned by CMWD. While GSW would have the Court believe the risk of an unsuccessful condemnation (and, hence, the risk that damages will be paid) is high, CMWD believes the risk is extremely speculative and remote.[15] In any event, even in the extremely unlikely event any damages

[15] Dismissal/abandonment damages are addressed in CCP §§1268.210-1268.220. In order to get to that point, CMWD would have to be

ultimately do have to be paid CMWD most vigorously asserts they would be incidental to its efforts to acquire GSW's property for authorized purposes and therefore are eligible to be included in the CFD financing. Not every attempted acquisition of property turns out to be successful; not every plan prepared for a public project ends up being used; not every project proceeds in a neat linear fashion from Point A to Point Z with every expense along the way producing a tangible benefit. The voters have assumed the risk. There is no indication in the Mello-Roos Act the Legislature intended to require a public agency using Mello-Roos financing to guarantee in advance that every cost and incidental expense incurred will produce positive results (as determined by whom?) in order to qualify for use of Mello-Roos financing in the first place. A contrary ruling by this Court would severely constrain use of the Mello-Roos Act, result in unwarranted second-guessing (and litigation) over whether funds

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unsuccessful in negotiating the purchase of GSW's Ojai water utility with GSW (a process that has not even started), CMWD's Board would then have to hold a hearing pursuant to the Eminent Domain Law and decide by a minimum 2/3 vote to initiate an eminent domain action (CCP §§1245.220-1245.240) (which hasn't happened), and either the court in the eminent domain action would have to determine that CMWD does *not* have the right to take GSW's property and order the action to be dismissed (CCP §§1260.110-1260.120) (which has not happened) or the finder of fact would have to render a verdict for an amount *far* in excess of the amount CMWD believes is the likely just compensation amount such that CMWD would be forced to abandon the eminent domain action because of its inability to pay (CCP §1268.510) (which, again, has not happened). For a more detailed explanation of why CMWD believes the risk of dismissal/abandonment to be speculative and remote, see RA 0018-0027, 0169-0482.

were wisely spent, and defeat, rather than promote, the accomplishment of the Mello-Roos Act's salutary purposes.

D. GSW Cannot Invalidate CMWD's CFD Based on the Claim that Mello-Roos Funds Cannot Be Used to Pay for Acquisition of Intangible Property Rights.

GSW's argument proceeds as follows: (1) GSW has or may have water rights and contract rights and will suffer a loss of business goodwill if CMWD acquires its Ojai water utility; (2) these rights are compensable over and above the value of GSW's other property interests; (3) these rights are "intangible" in nature; and (4) Government Code §53313.5 prohibits the use of Mello-Roos financing to acquire "intangible" property. From this construct, GSW asserts the CFD should be found to be invalid. All 4 premises of GSW's argument are incorrect.

First of all, GSW has *not* established it has *any* water or contract rights or business goodwill. *It submitted no evidence (as distinguished from attorney argument) on this subject to the CMWD Board at the CFD formation hearing or to the trial court below.* With respect to water rights, CMWD contends GSW's "rights" are nothing more than the right to pump groundwater to serve GSW's Ojai customers, a "right" which is already accounted for in the value of GSW's Ojai utility that will be the subject of CMWD's offer of just compensation. CMWD has no idea what "contracts" GSW is even referring to. With respect to business goodwill, GSW has the burden of *proving* to the court (in an eminent domain action)

that each of the 4 statutory conditions set forth in CCP §1263.510 is satisfied before GSW would even be allowed to submit the issue of lost business goodwill to a jury (*Regents of Univ. of Cal. v. Sheily* (2004) 122 Cal.App.4th 824, 830-831), which, of course, it has not done.

Secondly, even if GSW *does* have water or contract rights and/or business goodwill, it has not established any of these "rights" would be compensable in a condemnation action separate and apart from the compensation GSW would be entitled to receive for its other property. CMWD's position is that whatever "water rights" GSW may have are appurtenant to its real property and are included in the fair market value CMWD intends to offer to pay GSW for its Ojai water utility. Similarly, CMWD intends to pay GSW for the value of its estimated future profits as part of the fair market value of its real property under the "income approach" to determining fair market value, such that there will not be any uncompensated "loss of business goodwill" left to pay. (See CCP §1263.510(a)(3) and *Los Angeles Unified School District v. Casasola* (2000) 187 Cal.App.4th 189, 209 [under CCP §1263.510(a)(3) and (a)(4), the property/business owner in a condemnation action has the burden of proving that compensation for loss of business goodwill "is not includable" in the compensation otherwise awarded]. See also, RA 0024-0026.)

Third, as GSW's own pre-litigation counsel admitted (see §III.C *ante*) and the only case authority GSW cites on the subject states (*State of California v. Superior Court* (2000) 78 Cal.App.4th 1019, 1025), water rights are "'appurtenant to' or 'part and parcel of' an interest in real property," *not* "intangible" assets.[16] "Water in its natural state is a part of the land, and therefore *real property.* 13 Witkin, *Summary of California Law* (10th ed. 2005) "Personal Property," §91, p. 113, citing several cases (emph. in orig.). See Civil Code §658 and cases such as *Northern Light etc. Co. v. Stacher* (1910) 13 Cal.App. 404, 409-410 (water is appurtenant to real property; inherent in the right to acquire property for water supply and delivery purposes is the right to take all appurtenant interests, including water); *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n.* (1939) 34 Cal.App.2d 159, 174-175 (water for irrigation, while in ditches and reservoirs, is "real property"); and *Schimmel v. Martin* (1923) 190 Cal. 429, 432 (accord).

Fourth, even *if* GSW were able to establish that it has compensable water or contract rights or that it will suffer a compensable loss of business goodwill from the acquisition of its Ojai water utility, and that

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[16] *Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, another case cited by GSW (GSW Brief, p. 21), presented a *tax* question as to whether a copyright and technology transfer agreement constitutes tangible or intangible property. That case had nothing to do with the Mello-Roos Act or whether water rights are tangible or intangible property rights.

any of those rights is an "intangible" property right, CMWD's payment for those items would qualify as part of the "cost. . . of purchasing the public facility and of related land, right-of-way, easements, including incidental expenses" within the meaning of Government Code §§53317(c) and (e) and 53343.5. (See also, CCP §1240.110(a).) Virtually *any time* a public agency acquires real property it will acquire appurtenant water rights and *any time* a public agency acquires property occupied by a going business it may have to pay for the business's goodwill losses. If GSW's argument were accepted, CFD financing could never be used to acquire property with appurtenant water rights or property on which a business with goodwill is operating—*regardless* of whether the property/business is acquired by voluntary purchase or eminent domain. As the trial court recognized (AA 1474), such an interpretation would *severely* constrain use of the Mello-Roos Act, in violation of the Legislature's declaration that the Act "shall be liberally construed the effectuate its purposes" (Government Code §53315), the provision in the Act authorizing a local agency forming a CFD to "take any actions or make any determinations which it determines are necessary or convenient to carry out the purposes of this chapter and are not otherwise prohibited by law" (§53312.5), and the general rule that the Court must "select the construction [of the Act] that comports most closely with the apparent intent of the Legislature,

with a view to promoting rather than defeating the general purpose of the statute." (*Day v. Fontana*, *supra*, 25 Cal.4th at 272.)

E. GSW Should Not be Permitted to Invalidate the CFD Based on the Contention the CFD Cannot Be Justified Under Government Code §53313.

1. GSW Did Not Plead or Argue a Violation of Government Code §53313 At the Trial Court Level And Should Not be Permitted to Make Such an Argument for the First Time on Appeal.

At the trial court level, GSW did not plead or argue that CMWD violated Government Code §53313, an argument it makes for the first time on this appeal. (See §IV.B *ante.*) CMWD submits that the Court should refuse to consider the point. See *Andreini & Co. v. MacCorkle Ins. Service, Inc.* (2013) 219 Cal.App.4th 1396, 1404 (court declines to consider equal protection argument raised for first time on appeal, where defendant had no valid excuse for waiting until appeal to develop argument).

2. Government Code §53313's Prohibition on Mello-Roos Financing Being Used to Supplant Existing Services Has Nothing To Do With This Action.

Even assuming this Court allows GSW to raise its Government Code §53313 argument for the first time on this appeal, the argument must be rejected.

CMWD is proposing to use Mello-Roos financing to acquire (and construct) "facilities" under Government Code §53313.5, *not* to finance the provision of water "services" under §53313. CMWD intends to

acquire GSW's land, buildings, pipelines, pump stations, and other water *facilities* in its Ojai service area. Water *services* are financed through water *rates* paid by GSW's *customers*, who will continue to pay for those services (to CMWD) *after* GSW has been paid for its facilities (with Mello-Roos funds) and CMWD's acquisition is complete. Section 53313 is simply irrelevant. Sections 53313.5 and 53313 are *alternative* grants of financing authority under the Mello-Roos Act for very different types of actions; a public agency does not have to qualify under *both.*

Even if one looks at §53313 in isolation, its inapplicability to this case is patent. The limited list of "services" that can be financed under §53313 *does not include water services.* If §53313 came into play, the Court would not need to reach the issue of whether CMWD is using Mello-Roos funds to "supplant" services already provided by GSW, as water services cannot be funded through Mello-Roos special taxes *at all.* In addition, the services that *can* be financed under §53313 (*e.g.,* police and fire protection services, recreation program services, and library services) cannot be financed with bonds (§53345.3), so if §53313 applied to CMWD's CFD, the CFD bonds would be improper for *that* reason, *regardless* of whether CMWD is purporting to "supplant" services provided by GSW.

The apparent purpose of the language in §53313 prohibiting a public agency from using the Mello-Roos funds to "supplant services

already available within [the CFD] when the district was created" is to prevent a public agency that typically funds police, fire, or other services out of general tax revenues from diverting those general tax revenues to other purposes and then "double-taxing" property owners by hitting them with additional Mello-Roos taxes. That concern has no applicability to a CFD that is restricted to the financing of facilities, not the provision of services.

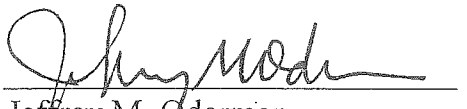
VI. CONCLUSION

For the foregoing reasons, CMWD submits this Court should affirm the trial court judgment in its entirety.

Dated: October 24, 2014

Respectfully submitted

RUTAN & TUCKER, LLP
JEFFREY M. ODERMAN

By: 

Jeffrey M. Oderman
Attorneys for Respondents
CASITAS MUNICIPAL
WATER DISTRICT and
CASITAS MUNICIPAL
WATER DISTRICT
COMMUNITY FACILITIES
DISTRICT NO. 2013-1 (OJAI)

CERTIFICATE OF COMPLIANCE

I certify that pursuant to California Rule of Court 8.204(c)(1) the Respondents' Brief contains 13,319 words (a brief produced on a computer must not exceed 14,000 words, including footnotes).

Dated: October 24, 2014

RUTAN & TUCKER, LLP
JEFFREY M. ODERMAN

By: _____
Jeffrey M. Oderman
Attorneys for Respondents
CASITAS MUNICIPAL WATER DISTRICT and CASITAS MUNICIPAL WATER DISTRICT COMMUNITY FACILITIES DISTRICT NO. 2013-1 (OJAI)

PROOF OF SERVICE BY MAIL

Golden State Water Company v. Casitas Municipal Water District, et al.
Ventura County Superior Court Case No. 56-2013-00433986-CU-WM-VTA

STATE OF CALIFORNIA, COUNTY OF ORANGE

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On October 27, 2014, I served on the interested parties in said action the within:

RESPONDENTS' BRIEF and
RESPONDENTS' APPENDIX, 3 Volumes

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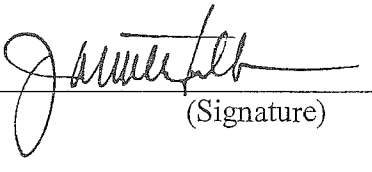
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Janette Hollmer
(Type or print name)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Manatt, Phelps & Phillips, LLP George M. Soneff David T. Moran 11355 West Olympic Boulevard Los Angeles, CA 90064-1614 Phone: (310) 312-4000 Fax: (310) 312-4224 Email: gsoneff@manatt.com	Attorneys for Petitioner GOLDEN STATE WATER COMPANY
Law Office of Ball & Yorke Allen R. Ball Joseph Rocco Jones 1001 Partridge Drive, Suite 330 Ventura, CA 93003 Phone: (805) 642-5177 Fax: (805) 642-4622 Email: aball@ballandYorkelaw.com	Attorneys for Defendants RICHARD H. HAJAS, DALE HANSON, PATRICK J. MCPHERSON, ROBERT R. DADDI, LOUIS TORRES, STANLEY GREENE, AND OJAI FRIENDS OF LOCALLY OWNED WATER
Ryan Blatz Law Ryan Blatz 407 Bryant Circle, Suite #A2 Ojai, CA 93023 Phone: (805) 798-2249 Fax: (805) 521-3633 Email: ryan@ryanblatzlaw.com	Attorneys for Defendants RICHARD H. HAJAS, DALE HANSON, PATRICK J. MCPHERSON, ROBERT R. DADDI, LOUIS TORRES, STANLEY GREENE, AND OJAI FRIENDS OF LOCALLY OWNED WATER
Clerk of the Court Ventura County Superior Court 800 S. Victoria Ave. – Hall of Justice Ventura, CA 93009	*Superior Court – Brief only*
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