IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

CITY OF RIVERSIDE, Plaintiff and Respondent, v. RUBIDOUX COMMUNITY SERVICES DISTRICT, Defendant and Appellant.	Court of Appeal No. E077716 Superior Court Nos. CIVDS1310520 & RIC1211953

Appeal from a Judgment Superior Court, County of San Bernardino
Honorable Donald Alvarez, Judge

APPELLANT'S OPENING BRIEF

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I. Introduction and Statement of the Case

"In law also the right answer usually depends on putting the right question." **-- *Estate of Rodgers v. Helvering***, (1943) 320 U.S. 410, 413 (Frankfurter, J.)

This appeal arises out of a dispute between a municipality and a community services district over the district's contractual obligations to pay for a $250,000,000+ plan to upgrade and expand a wastewater treatment plant. The basic issue facing this Court involves the interpretation of a contract between Appellant Rubidoux Community Services District ("Rubidoux") and Respondent City of Riverside ("Riverside").

In a 1990 contract, Rubidoux agreed to pay for only those capital upgrades at Riverside's wastewater treatment plant that were "directly related to," "non-discretionary," and "necessitated by" new or revised regulatory requirements that "became effective" after 1990. In 2006, the plant was in full compliance with all applicable regulations. Nonetheless, Riverside chose to embark upon a $250,000,000+ upgrade and expansion project based in large part upon its internal conjecture about potential, over-the-horizon regulatory requirements. This case thus raises the following question: Is Rubidoux required to contribute funds under the 1990 contract based on Riverside's speculation about regulatory changes that are not yet "effective" and might (or might not) occur in the future?

Instead of interpreting the parties' contract, the trial court made a public policy decision based on its perception that anticipatory measures were prudent regardless of cost or need, and despite the lack of a direct relationship to any effective regulation. As Justice Frankfurter observed, this was the wrong question and consequently resulted in the wrong answer.

Rubidoux negotiated specific contractual terms with Riverside in 1990, and the trial court did not have license to amend or alter that language in service of a preferred policy choice. The trial court effectively allowed Riverside to abrogate the 1990 contract *via* its own view of desirable public policy and speculation about possible future regulations by Riverside's own engineering consultants. This decision rendered illusory the express financial protections Rubidoux negotiated in 1990.

Rubidoux is entitled to the benefit of the bargain it struck with Riverside, and for this reason the trial court's decision must be reversed.

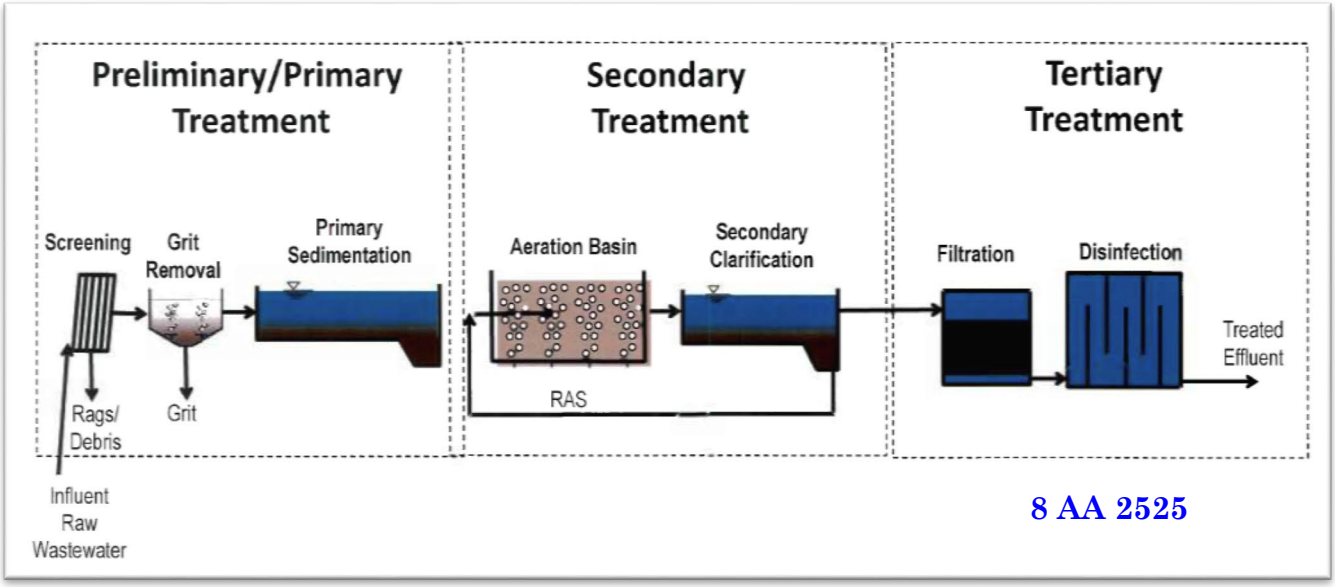
II. Statement of the Facts

A. Glossary of Terms

The issue here involves the interpretation of a contract, and the following definitions are provided by way of introduction to that contract and for the Court's ease of reference:

- **Regional Wastewater Quality Control Plant** ("RWQCP" or the "Regional Plant") – A City owned

sewer treatment facility located in the City of Riverside that treats domestic and industrial wastewater and then discharges the treated water into part of the Santa Ana River. **(6 AA 1973; RT 133-134.)** The Regional Plant's three-step treatment processes are delineated as primary, secondary, and tertiary. **(2 AA 997-999; RT 1639.)** The diagram below shows the traditional treatment process (utilizing conventionally activated sludge) from primary through tertiary treatment:



8 AA 2525

- **Conventionally Activated Sludge** ("CAS") – A "proven wastewater treatment method" **(2 AA 1043)** where cultivated bacteria "eat" biological contaminants (sometimes called "nutrients") in wastewater. **(8 AA 2524; RT 1638–1641.)** This is a secondary treatment process which occurs in large "aeration basins" after the incoming wastewater receives "primary" treatment. **(RT**

1639–1640.) Riverside utilized the CAS system for a number of decades (since 1975) and "had good experience with the process". **(2 AA 1043.**)

- **Community Services District** ("CSD") – An independent special district charged with specific municipal tasks, such as fire suppression, trash removal, or, in this case, provision of potable water, irrigation water, and wastewater collection and disposal. **(RT 521-22.**) Three different CSDs - Jurupa, Edgemont, and Appellant Rubidoux – have capacity rights in the Regional Plant and send their wastewater there for treatment. **(1 AA 250, ¶4; RT 132.**) Rubidoux has the right to send up to 3.055 million gallons per day ("MGD") of wastewater to the Regional Plant for treatment but does not own any portion of the Regional Plant or its physical facilities. **(1 AA 298.**)

- **Regional Water Resources Board** ("Regional Board") – The Santa Ana Regional Water Quality Control Board promulgates and enforce regional water pollution control regulations within the Riverside and other areas. **(9 AA 2940, ¶6 ("Almgren Decl.").**) The Regional Board adopts a Basin Plan to address local water quality conditions and problems. **(9 AA 2941, ¶8.**) The Regional Board's Basin Plan establishes the quality levels that

must be met and maintained to protect the beneficial uses of the region's waters. **(9 AA 2941, ¶9.)**

- **National Pollution Discharge Elimination System permit** ("NPDES") – An order issued by the Regional Board permitting the discharge of pollutants into "navigable waters" of the United States under authority of the federal Clean Water Act (see 33 U.S.C. 466 *et seq*.) and California Water Code. **(RT 1637, 1776.)** The permits are issued to treatment plants like the Regional Plant and sets limits for the discharge of specific pollutants, including total inorganic nitrogen ("TIN") and total dissolved solids ("TDS"). The Regional Board typically issues NPDES permits at five-year intervals, although they are often extended for longer periods **(RT 133; 1 AA 249; 1 AA 341; 1 AA 562; 2 AA 801; 9 AA 2940-2941, ¶¶6-7.)** The Regional Board issued an NPDES permit regulating the Regional Plant during the period of interest in 2006. That permit was set to expire in five years or by 2011, although in fact a subsequent permit was not issued until 2013. **(2 AA 803.)** As of the time the 2006 permit was issued and until it was replaced with the 2013 permit the Regional Plant was meeting all discharge requirements with a few minor exceptions. **(6 AA 1975**; **2 AA 880.)**

- **The Wastewater Collection and Treatment Facilities Integrated Master Plan** ("Master Plan") – A Riverside-prepared comprehensive planning document "to identify and plan for expansion and replacement needs through the year 2025" for the Regional Plant. **(2 AA 990.)** The planning process began in 2006 and was not presented to the CSDs until after it was finalized by the City in 2008. **(2 AA 882, 1071.)** The expansion and upgrade of the Regional Plant contemplated in the Master Plan and ultimately implemented by the City cost upwards of $250,000,000. **(9 AA 3002.)**

- **Membrane Bioreactor Process** ("MBR") – A treatment process that uses a series of filters or filaments to physically separate contaminants from water. **(RT 1645-47.)** Riverside chose to replace the traditional and well-functioning CAS treatment process with MBR as part of the Master Plan expansion and upgrade. **(2 AA 933.)**

B. Earlier Regional Contracts consolidated wastewater treatment at Riverside's Regional Plant.

1. 1976: The contract for the construction of the Regional Plant.

In 1976, Riverside contracted with the Jurupa and

Rubidoux Community Services Districts to build a regional plant in place of separate treatment facilities. **(1 AA 40.)** The 1976 contract was limited to a specific project defined in Section 3 as the construction and operation of a regional wastewater treatment plant with a capacity to treat up to 26 MGD of wastewater. **(1 AA 40, §3.1.)**

The 1976 contract allocated percentages of capital construction costs to Riverside, Jurupa, and Rubidoux. **(1 AA 44.)** The contract further specified that construction was contingent upon receipt of federal or state grant funds that would effectively defray up to 87.5% of the total costs to all parties. **(1 AA 42.)**

2. 1978: The supplemental contract for completing construction of the Regional Plant.

Two years later, the 1978 contract between Riverside, Jurupa, and Rubidoux confirmed that Riverside would continue work on a Regional Plant with additional processes designed to meet Regional Board requirements (*i.e.*, the then-applicable NPDES permit). (1 **AA 79.**) The 1978 Agreement established "capacity rights" for Rubidoux and Jurupa — the right to send a specified daily maximum volume of wastewater to the Regional Plant. Section 5 of the 1978 Contract provided for sharing of defined capital costs; section 17 separately provided for cost sharing of separately defined operations and maintenance (O&M) costs.

At trial, neither party produced a witness who had any pertinent knowledge of the drafting history of the 1976 or 1978 contracts.

3. 1989: Rubidoux and Riverside agree to expanded capacity rights for Rubidoux's sewage treatment.

In 1989, Rubidoux and Riverside agreed to increase Rubidoux's capacity right by .55 MGD, bringing Rubidoux's total right to 1.555 MGD. Rubidoux agreed to pay Riverside $253,000 for this additional capacity. **(1 AA 287.)** Riverside and Rubidoux also stipulated to "continue further discussions" about a potential future expansion of Rubidoux's rights to send wastewater to the Regional Plant. **(1 AA 287, § 9.)**

C. The 1990 Contract for a revised Regional Plant and Rubidoux's purchase of additional capacity.

1. The 1990 Contract and its limited incorporation by reference of prior agreements.

In 1990, Riverside and Rubidoux entered a separate contract (the "1990 Agreement") that expanded Rubidoux's capacity rights in the Regional Plant. **(1 AA 297.)** Riverside agreed to sell to Rubidoux an additional 1.5 MGD of capacity for $6.9 million, bringing Rubidoux's total capacity rights up to 3.055 MGD. **(1 AA 298, §1; 1 AA 299, §3.)** Jurupa entered a separate, parallel agreement for more capacity at the same time. **(RT 155.)**

Rubidoux also agreed to pay a portion of certain, known capital improvements to the Regional Plant. Specifically, Rubidoux agreed to pay $537,000 as its share of the already incurred "Plant Upgrade Costs." **(1 AA 299, §2.)** This sum covered Rubidoux's share of the previously incurred "Plant Upgrade Costs," but also included "any *future* Plant upgrade, added facilities or modifications of facilities which may become necessary to continue providing 3.055 MGD of capacity for Rubidoux, in the Plant and enable the Plant to meet all Federal, State and NPDES permit requirements *which are in effect on the execution date of this Agreement*." **(1 AA 299, §2** (emphasis added)**.)** As Riverside's then Public Works Director Barry Beck testified, this was intended to deal with only then effective regulations in the operative 1987 NPDES permit. **(RT 218:12-219:22.)**

The 1990 Agreement's provision with respect to plant upgrade costs for NPDES requirements that became effective at a later time in the future was dealt with separately in Section 7 of the Agreement:

> 7. CHANGE IN REQUIREMENTS. This Agreement shall not prevent Riverside from assessing Rubidoux its proportionate share of the costs of any facilities which are constructed at the Plant as a direct result of new or revised Federal, State or NPDES permit requirements; provided, however, that such assessments must be directly related to, non-discretionary, and necessitated *by new or revised requirements which become effective following the execution date of this Agreement*.

(1 AA 300-301, §7 (emphasis added)**.)**

The 1990 Agreement amended and supplemented the prior 1976 and 1978 Agreements as stated in Section 10:

> 10. RELATIONSHIP TO REGIONAL AGREEMENTS: The provisions of the Regional and Supplemental Agreements shall continue to be effective as between Rubidoux and Riverside and this Agreement supplements and amends those agreements. No amendment of the Regional Agreements shall supersede the operative provisions of this Agreement.

(1 AA 301, §10.)

2. The drafting history evidences the parties' intent at the time of the agreement.

Riverside's principal witness on the drafting of the 1990 Agreement was Beck, who supervised the Regional Plant. **(RT 182.)** Beck recommended the Riverside City Council approve the 1990 Agreement with Rubidoux. **(RT 190.)**

Beck prepared a memo recommending the City Council approve the 1990 Agreement with both Rubidoux and a related contract another CSD, Jurupa. **(1 AA 303.)** Beck highlighted that both Rubidoux and Jurupa had suggested during negotiations that they might develop their own treatment facilities and abandon the Regional Plant, thereby meaning that "our [Riverside's] net loss would be quite high." **(1 AA 304** (emphasis in original)**.)** Beck was "very concerned" about the CSDs exiting the Regional Plant and recommended approval of the 1990 Agreement because it "is financially beneficial to all parties." **(RT 241.)** Riverside offered both Rubidoux and Jurupa a "discounted"

capital improvement charge and a discount on the amount they had to pay for past capital improvements. (**RT 241-242.**)

D. 1995: Rubidoux and Riverside sign a promissory note for payment of capital costs from prior time periods.

In 1995, Riverside and Rubidoux executed a promissory note providing Rubidoux for a time extension to pay for specific and previously agreed upon capital improvements. **(1 AA 555, §C.)** As of 1995, Rubidoux had paid some of the money owed, but still had a balance of $338,898.50. **(1 AA 555, §C.)** Riverside extended the time for repayment on the balance by three years in exchange for Rubidoux's promise to pay and also pay 6% annual interest on the installments. **(1 AA 556, §D.)** Instead, Riverside described this obligation as "capital improvement participation charges" for 1991-93. **(1 AA 452.)** Riverside clarified these capital improvements were necessitated by a 1992 NPDES permit, *i.e.*, one not in existence at the time of the 1990 Agreement. **(1 AA 452; RT 253-254.)**

The 1995 document was drafted by Riverside and described by both parties as a "promissory note." **(1 AA 554, 555, 558.)** The 1995 Promissory Note included a precise schedule for the payment of the outstanding amount, including a calculation of interest **(1 AA 560-561)**, and Riverside sent Rubidoux a monthly invoice for these costs. **(RT 484.)** Rubidoux made the required

payments and there is no claim that any part of the $388,898.50 balance referenced in that document remains outstanding.

E. The Master Plan and planning process.

In 2006, Riverside undertook a comprehensive effort to upgrade and expand the Regional Plant (the "Master Plan"). Riverside sometimes termed this as "Phase 1". Riverside did not include Rubidoux or the other CSDs in the Master Plan process:

- July 2006: Riverside held its first "kickoff meeting" with its then-primary planning consultant, Carollo Engineers. No CSD representatives were present at this kickoff meeting. **(2 AA 883; RT 616-18)**;

- September 2006 and subsequent Master Plan project meetings were held without the participation of the CSDs **(2 AA 1032)**;

- November 9, 2006: A short Regional Advisory Committee meeting occurred. (**2 AA 925.)** The meeting minutes show a very limited discussion of the Master Plan, summarized as follows: "There was a general discussion about Capital Improvement Projects (CIPs) at the facility and the CSD's participation. The TAC [Technical Advisory Committee] will be evaluating this next year as the RWQCP's Facility Master Plan is

finalized. It is anticipated that a recommendation to the RAC [Regional Advisory Committee] will be presented at the November 2007 meeting." (**2 AA 927**);

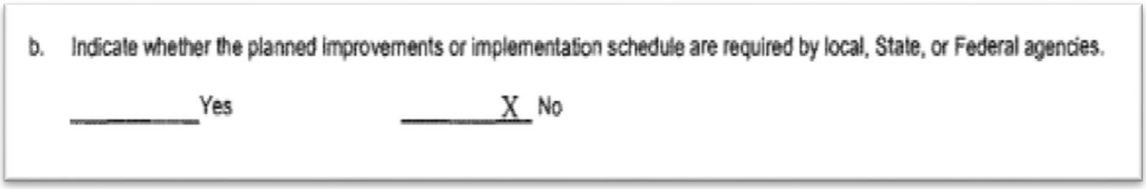
- November 17, 2006: Riverside held another planning meeting with its consultant, Carollo Engineering, which functioned as a "decision-making forum." At this critical meeting, Riverside made the ultimate decision to use MBR as the secondary treatment process (**RT 701-02**; **2 AA 932**);

- November 15, 2007: A further meeting of the regional advisory committee ("RAC") was held, and this time Rubidoux was present through its General Manager David Lopez ("Lopez"). Details of the new Master Plan with its significant capital improvements were deferred to future meetings. The minutes were drafted by Riverside's staff (**3 AA 1122; RT 723**); they state: "Siobhan Foster, City of Riverside Public Works Director, added that Riverside rate projections and the [Riverside] RWQCP master plan will be completed in the first quarter of the calendar year." (**3 AA 1123.**) Regional Plant Manager, Steve Schultz ("Schultz") testified this was just a "general update on the status" of the Master Plan (**RT 724:1-11.**)

- In February 2008, Riverside authorized Carollo Engineering to issue the final version of the Master Plan. **(2 AA 986.)** There was no corresponding meeting of the RAC in February 2008. Instead, the next RAC meeting was not held until November 2008 — nearly eight months after the City issued the final Master Plan. **(3 AA 1124.)**

F. The Master Plan involved a $250,000,000+ upgrade and expansion project for a plant that was in full compliance with its regulatory requirements.

In April 2005, Riverside applied to renew the NPDES permit for its Regional Plant. **(2 AA 769; RT 584-585.)** Riverside's application confirmed the proposed modifications to the plant, which it listed as scheduled for 2008, were *not* required by any State, Federal or local agencies. Riverside's application, submitted under penalty of perjury by Regional Plant Manager Schultz, answered one of the required questions as follows:


b. Indicate whether the planned improvements or implementation schedule are required by local, State, or Federal agencies.

_____Yes _____X_ No

(2 AA 773; RT 596-97 ("We also *elected* to do the comprehensive master plan to include everything") (emphasis added).)

In March 2006, the Regional Board issued Riverside a new

NPDES permit. **(2 AA 801; RT 590.)** The permit contained various specific limitations on the Regional Plant's discharges, and specifically focused on several constituents after treatment at the Plant (plant effluent) as follows:

Constituent	**Limit/Time period**
Biochemical Oxygen Demand (BOD)	20 mg/L [milligram per liter] (monthly) 30 mg/L(weekly)
Total suspended solids (TSS)	20mg/L (monthly) 30 mg/L (weekly)
Total Dissolved Solids (TDS)	250 mg/L (12-month average)
Total Inorganic Nitrogen (TIN)	13 mg/L (12-month weighted running average if plant flow <38 MGD) 10 mg/L (12-month weighted running average if plant flow>38 MGD)
Total Chlorine residual	0.1 (instantaneous maximum)

(2 AA 811.)

The Regional Plant met all these permit requirements as of 2005, with a single day's exception for total chlorine residual. **(2 AA 765.)** As Riverside noted in its cover page of results for the month of January 2005 (and for the entire quarter), other than one day's temporary exceedance for total chlorine residual: "**We are in full compliance with all other permit limits." (2 AA 765** (emphasis in original).)

Riverside submitted its annual report to the Regional Board for the 2006 calendar year. Riverside reported it exceeded the turbidity standard on one or two days in December 2006. Other than the exceedance for turbidity, Riverside again reported

the Regional Plant complied with all other permit limits. This 2006 report covered the period from May through December 2006, which was after the Regional Board had issued Riverside its new 2006 NPDES Permit. (**2 AA 960.**) For the January through April time period, Riverside reported that the Regional Plant also complied with the prior 2001 NPDES permit. (**2 AA 960.**)

Riverside's Schultz, who reviewed and signed the report for 2006 (**2 AA 956**), confirmed the report's statement that "We're in full compliance with all other permit limits" was consistent with his understanding. (**RT 582.**) Schultz testified the Regional Plant was meeting the specific limit for TIN both before and after issuance of the 2006 permit. (**RT 782.**)

Riverside's Regional Plant's Environmental Compliance Manager, Rodney Cruze, testified Riverside prepared reports on a monthly and a cumulative annual basis as part of its obligation under the NPDES permit. (**RT 278.**) Cruze identified three such reports: The annual report for 1995, the monthly report for December 2002, and the monthly report for January 2005. (**2 RT 278, 286, 288; 1 AA 534; 2 AA 731; 2 AA 764.**) Each report shows the Regional Plant complied with the pertinent NPDES permit limits for discharges, with only minor exceptions. (**1 AA 540-541** (chart showing "0" exceedances for Regional Plant in January 1995 with one exception for chlorine residual)**; 2 AA 732** ("We are in full compliance with all permit limits.")**; 2 AA 765** (noting that but for one exception on one day: "We are in full

compliance with all other permit limits.").)

During this time period, Regional Board staff inspected the Regional Plant. Cruze testified that after the inspections the Regional Board staff would discuss the inspection results with him and that those inspectors had "nothing but positive" things to say. **(RT 301-303.)** Cruze testified he never heard the Regional Board staff inspectors say the Regional Plant's effluent was in any way unsatisfactory. **(RT 305.)** One such inspection report from November 2005 is contained at 2 AA 785. The inspector's summary was: "I found that RRWQCP is in full compliance with Order No. 01-003, NPDES No. CA 0105350." **(2 AA 792.)** The reference to Order No. 01-003 in this statement was to the operative NPDES permit issued in 2001 by the Regional Board. **(2 AA 805.)**

Riverside's report of the Regional Plant's performance for 2006 summarized the Plant's compliance with the existing NPDES permits:

> "In conclusion, with the exception of the violation in December of 2006, the treatment facility operated in compliance with all other permit requirements. It is also important to note that downstream aquatic communities have flourished due to Riverside's commitment to environmental protection."
> **(2 AA 960.)**

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G. Riverside Pursues The $250,000,000+plant based on its speculation about potential future regulations.

At the "kick-off" meeting in August 2006, Riverside's primary consultant, Carollo Engineers, advised "the project" would be based on current regulations and "potential future regulations." **(2 AA 885.)** Riverside and Carollo agreed *not* to include the Regional Board — *the body responsible for the Regional Plant's NPDES permit* — in the process as to regulatory issues. Rather, as the kickoff meeting minutes concluded: "**It was decided to involve the [Regional] Board after the [internal] workshop, *as needed*.**" **(2 AA 885** (emphasis added)**.)** From 2006 through the Master Plan's completion in 2008, the Regional Board's input on potential future regulations was never sought. **(2 AA 1019** (final Master Plan only referencing internal "regulatory brainstorming sessions" as to possible future regulations)**.)**

On September 6, 2006, Riverside and Carollo held an internal "brainstorming" workshop to focus on potential future "regulatory issues" and to develop "treatment processes to meet them." **(2 AA 900.)** Carollo's lead consultant, Bryce "Toby" Weissert stated the role of city staff was to "make the final decision about which regulations *are likely to be* implemented." **(2 AA 901** (emphasis added)**.)** In turn, Weissert promised that Carollo's role was: "To provide suggestions on processes that will allow the future facilities to meet *those future anticipated*

standards." **(2 AA 901.)** These were discretionary decisions based on speculation about potential future regulations. Riverside's design choices were not required to meet the plant's existing regulatory requirements.

H. Riverside elects an expensive MBR unit to replace the existing CAS system.

The initial July 2006 Master Plan "kick-off" meeting between Riverside and Carollo included a discussion about getting a prior report from City staff (Cruze and Schultz) about "Membrane Reactor Technology." **(2 AA 886.)** Riverside was considering MBR technology even *before* the "kick-off" meeting with Carollo.

On November 17, 2006, Riverside and Carollo held a further "decision-making" meeting just four months after the initial kick-off meeting. In the first group of decisions about "treatment processes," Carollo's notes reflect that Riverside selected the MBR "as the secondary treatment process." **(2 AA 933.)** Riverside's selection was based on its own prediction of the "direction" of potential future regulations and the City's own desire for a "higher quality of water effluent." **(2 AA 935.)** There was no regulatory requirement that Riverside adopt the MBR technology, and Carollo itself presented at least three different technologies to the City as "alternatives for treatment, including retaining (with slight modifications) the existing CAS." **(2 AA 934, 938.)** Later, a City-commissioned engineering review of the

Master Plan's initial design recommended Riverside retain the traditional, less-expensive CAS treatment process instead. **(5 AA 1424.)**

Riverside did not formally advise Rubidoux or the other CSD of its intended selection of MBR until August 2007 — nine months after the City selected the MBR unit in November 2006. **(2 AA 979, 985.)**

I. Rubidoux questions Riverside's unilateral decision to spend $250,000,000+ to upgrade the Regional Plant.

As early as September 2006, Rubidoux raised the issue of how potential new capital costs in Riverside's new Master Plan fit within the existing contractual framework. At a September 28, 2006 meeting, Rubidoux's General Manager Lopez raised this very question: "Dave Lopez raised the issue of the agreements between the City and the CSDs and suggested they be reviewed to determine what applies to the respective agencies in terms of capital participation. He explained that the agreements delineate what triggers CSD participation in the Sewer Division's capital improvement projects." **(2 AA 911.)**

The next meeting was not held until nearly 11 months after Lopez first raised this concern at the end of August 2007. **(2 AA 977.)** In the 2007 meeting, Carollo presented a PowerPoint overview of the new Master Plan without any discussion of the costs associated with it or how the costs should be allocated

under the 1990 Agreement. **(RT 497-99; 2 AA 979.)**

Riverside did not discuss how its new $250,000,000+ in capital costs would be addressed at a subsequent meeting in November 2007. Instead, Riverside waited until a meeting with Rubidoux and the other CSDs in July 2008 to unveil the price tag for its project. At this juncture, the estimated costs had jumped to $259,000,000. **(2 AA 1076.)** Rubidoux's General Manager, Lopez, stated there should be a meeting with decision-makers at City Hall to discuss this complex and expensive undertaking. **(2 AA 1072.)** Lopez made this suggestion because the staff-level individuals at this meeting could not make key policy decisions such as the potential application of the 1990 Agreement to the proposed quarter-billion dollars expenditure for capital costs. (**RT 503-504.**) The meeting Lopez requested Riverside's with decision makers never happened. **(RT 504.)**

Riverside followed the July 2008 meeting with a further meeting in August. Rubidoux was not represented at the August 2008 meeting **(2 AA 1079.)** Riverside presented its proposed allocation of the $259,000,000 in costs (now apparently reduced to $253,000,000) to the CSDs, with a suggested payment by Rubidoux of approximately $17,400,000. (**2 AA 1085.**)

Sam Gershon engineer for the Edgemont CSD, was present at the August 2008 meeting. His uncontradicted testimony is that Riverside, through its representative, Sandy Caldwell, intended to ignore the prior agreements. Instead, Riverside's purpose was to put the CSDs on a payment scheme similar to those for

industrial users by basing costs on "equivalent dwelling units". **(RT 2662-2663.**)

On August 20, 2008, Riverside called another meeting, this time approaching the question of CSD payments for part of its new Master Plan as an "informational item" on the agenda. **(3 AA 1102.**) Riverside referenced Volume 11 to the Master Plan it had finalized in February 2008. Caldwell explained these costs in terms of "new industrial user including capacity charge and volumetric flow." **(3 AA 1104.**) The minutes do not reflect that Caldwell explained how this model for a "new industrial user" applied to CSDs who were existing users with existing (and fixed) capacity rights.

This time, Lopez was present and directly raised the issue of whether Riverside's request was consistent with the 1990 Agreement. **(3 AA 1104.**) In response, Riverside answered only that Carollo looked at the CSD agreements. Lopez disagreed and, for a second time, asked for a meeting at City Hall if necessary, with each side's attorneys present. **(3 AA 1105.**) Riverside did not convene this meeting to discuss whether its new Master Plan was consistent with the 1990 Agreement. Rather, as City staff member Craig Justice ("Justice") testified, there was never any resolution of what, if anything, any of the CSDs (including Rubidoux) should pay for the capital costs in the new Master Plan. **(RT 1298.**)

On November 20, 2008, Riverside hosted a meeting and

Rubidoux, Edgemont and Jurupa were all present. There was no reference to the new Master Plan in the minutes for that meeting. **(3 AA 1124.)**

Riverside hosted an "Informational Meeting" on March 26, 2009 with the objective of coming to an agreement about the new Master Plan and the best way to share costs for that plan. **(3 AA 1138.)** However, what Riverside attached for the meeting's agenda was a restatement of the March 2008 proposal based on an industrial rate approach. Riverside's suggested share for Rubidoux remained $17,400,000. **(3 AA 1139, 1142.)** Riverside's agenda for the March 2009 meeting made no reference to the 1990 Agreement.

The agenda for the March 2009 "informational" meeting also contained an attachment relating to proposed cost allocations to each CSD of specific project capital costs. Riverside however, did not tie this allocation to any specific contract. Rather, it stated that the proposed "Costs are allocated based on the number of equivalent dwelling units within a participant's jurisdiction." **(3 AA 1142.)**

By early October 2009, the City held its first all-hands meeting with its newly selected construction team comprised of representatives of two new engineering firms, Montgomery Watson Harza ("MWH") and Camp Dresser McGee ("CDM"). **(4 AA 1261.)** Meetings with the newly approved contractors continued throughout October and November of 2009 with additional decisions made by the City representatives at the

meetings. (4 AA 1268, 1274.) No CSD representative was present at any of these decision-making meetings. (4 AA 1262, 1268, 1274, 1278, 1284, 1290, 1294, 1298.) The construction started without any commitment to any cost-sharing plan by Rubidoux or any of the other CSDs.

J. Riverside's own consulting team urged reconsideration of MBR, but the City said "No" because it wanted higher effluent quality water for its own sales.

Although the City retained outside consultants to design and construct the Master Plan in the summer of 2009, it paused in early 2010 to allow a sub-group of consultants to perform a "value engineering" analysis of the design plan at the 10% completion threshold. As described in their study: "In the simplest of terms, VE is a structured methodology to analyze the functional requirements of a project for the purposes of ensuring the essential capabilities at the lowest overall cost." (5 AA 1343.) This study utilized the general guidance provided by EPA for large-scale capital projects. (5 AA 1341; 1 AA 117.)

The value engineering study made numerous recommendations and two conceptual changes, one of which was to use a CAS treatment process *in lieu* of the MBR facility. (5 AA 1346.) In an appendix to the study, the consultants suggested that changing back to a CAS treatment process would "save considerable capital" and result in "less moving parts to

maintain" and "less energy." **(5 AA 1424.)**

Riverside's response to the value engineering study's conceptual change came within less than a week of the presentation: Riverside wanted MBR for its own reasons—potential sale of higher quality water to its own reuse customers. **(5 AA 1477, 1480.)** As City engineer Warren Hwang put it in justifying Riverside's rejection of the study's "conceptual changes": "[The] City's goal is to provide high quality water *for its reuse customers*." **(5 AA 1480** (emphasis added)**;** *see also* **5 AA 1486; RT 1146 – 1149.)**

Riverside's response to the study is notable in three respects: (1) It said nothing about whether Riverside's "goal" was consistent with the 1990 Agreement; (2) it did not say Riverside's "goal" was mandated by anything in the existing NPDES permit; and (3) it revealed the real beneficiary of MBR was Riverside.

K. September 2010 - August 2012: The City files this lawsuit.

In September 2010, Riverside's Wastewater Systems Manager, Gary Valladao, wrote a memorandum to a city group described as the "CSD Billing Strategy Work Group," in which he outlined various approaches for getting the Rubidoux and the other CSDs to pay for the new Master Plan. **(5 AA 1511; RT 1255-1256.)** Valladao's memorandum presented alternative proposals to get the Rubidoux and the other CSDs to voluntarily agree to a new cost-billing system. He concluded: "Should the

CSDs refuse to pay according to the new CSD billing method, the City may decide to proceed with litigation as a method for security payment from all customers." **(5 AA 1514; RT 1264.)**

The subsequent meetings between Riverside and the CSDs were less than cordial. In a July 2011 meeting with the CSDs, Valladao conceded the Master Plan did not address current regulatory requirements but rather Riverside "looked only at future regulatory requirements." **(5 AA 1586.)** Lopez responded that discussing capital costs not required by the 1990 Agreement was "a waste of time[]." **(5 AA 1586.)**

At an August 2011 meeting, Valladao modified his statement to candidly state that Riverside "did not distinguish between regulatory requirements in effect pre1990 and post 1990 when conducting the Master Plan." **(5 AA 1633.)** Jeff Sims summarized the discussion at that point: "[T]he CSDs will only participate in facility upgrades if the City shows direct nexus to regulatory requirements post 1990. The fundamental issue for not participating in any replacement/repair of the facility is simply contractual (the 1990 Agreement)." **(5 AA 1634.)** The minutes do not reflect any of Riverside's response to Sims' observation.

Riverside hosted another meeting on March 15, 2012 where Valladao presented a memorandum that summarized Riverside's position. The memorandum contained several points, but two are of particular importance: (1) there was a "difference of opinion" about the interpretation of the 1990 Agreement; and (2) aside

from plant expansion costs, it was now Riverside's position that all Master Plan capital costs (now termed "Phase 1 costs") were necessary "to continue to meet regulatory requirements." **(6 AA 1721, 1722.)** Riverside's then-Director of Public Works, Tom Boyd, bluntly asked at this meeting if Rubidoux and the other CSDs would agree to pay for the Master Plan improvements. Valladao recalled that the CSD response was "No." **(RT 1251.)** There is no record of any further meetings between Riverside and Rubidoux on this payment topic.

Five months later, Riverside sued Rubidoux. **(6 AA 1732.)**

III. Procedural History

A. The Operative Pleadings and Trial Phase 1.

Riverside filed its initial complaint for declaratory relief in August 2012 in Riverside County Superior Court. **(6 AA 1732.)** The case was later transferred to San Bernardino Superior Court, where it was assigned for all purposes to the Hon. David Alvarez.

Riverside subsequently filed a Second Amended Complaint that alleged one cause of action for declaratory relief and one corresponding cause of action for breach of contract against Rubidoux. **(7 AA 2095.)** The Second Amended Complaint sought a judicial declaration that Rubidoux was required to pay to Riverside all "costs required to upgrade and improve treatment facilities at the City Regional Plant to comply with past, present

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and future NPDES Permit discharge limitations" and also separately sought an award of damages from Rubidoux for alleged breach of contract. **(7 AA 2117-2118.)**[1]

Rubidoux denied the material allegations of Riverside's complaint. **(7 AA 2125.)** Rubidoux also filed a cross-claim seeking in essence a counter-declaration that Rubidoux was *not* required to make any payment pursuant to any of the prior agreements.

Trial was bifurcated. Phase 1 was a trial before the Court on the equitable claims for declaratory relief. Phase 2 was initially designed to be a jury trial for any damage claims.

Phase 1 of the bifurcated trial commenced in October 2017 to satisfy the five-year rule. **(RT 56-59.)** Trial was then adjourned until February 2018 and continued through April 2018. **(RT 2004.)**

The trial court issued a tentative statement of decision in favor of the City and against Rubidoux in May 2019 **(8 AA 2815.)** Rubidoux's objections to the initial tentative statement as to declaratory relief issues were filed, briefed, and summarily rejected.

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[1] Riverside also sought a declaration that Rubidoux was responsible for repair costs allegedly due to purported poor-quality influent sent from Rubidoux to the Regional Plant. This claim was tacitly dropped at trial and forms no portion of the trial court's opinions now at issue.

B. The Phase 2 trial, judgment, award of costs and appeals.

Phase 2 of the trial focused on Riverside's claim for damages resulting from the breach of contract as determined in Phase 1. After the conclusion of the Phase 2, the trial court filed a separate Statement of Decision in favor of Riverside and awarding it specific monetary damages. Notice of entry of a judgment of approximately $21,000,000 and confirming the granting Riverside declaratory relief was mailed on August 5, 2021. (**10 AA 3344.**) Rubidoux timely filed its notice of appeal on September 13, 2021. (**10 AA 3426.**)

Thereafter, plaintiff filed a separate motion for its claimed costs in the case, including expert witness fees. The trial court granted in part and denied in part Rubidoux's motion to tax certain claimed costs. (**10 AA 3622.**) Rubidoux filed a separate appeal of that determination on January 19, 2022. (**10 AA 3644.**)

IV. Statement of Appealability

This is a consolidated appeal from a final judgment and a post-judgment order awarding costs and is authorized pursuant to Code of Civil Procedure section 904.1, subdivisions (a)(1) and (a)(2).

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V. Argument

A. The Issues and Standard of Review

This appeal raises four basic questions: (1)Were the terms of the 1990 contract clear and unambiguous as to requirements for the incurrence of future costs?; (2) Did the trial court err in admitting extrinsic evidence, particularly of alleged "custom and practice" as to prior payments by Rubidoux; (3) If, *arguendo*, there was a breach of contract, did the trial court's award of $21 million in damages constitute error; and (4) If *arguendo* Riverside was entitled to costs, was the trial court's award of some $570,000 in costs an error? These questions involve different standards of review.

1. This Court must independently review the trial court's interpretation of the meaning of the 1990 Agreement.

The trial court's decision turns on an interpretation of contract, which must be interpreted in accordance with its unambiguous terms. (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822; *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955 ("*Newport Beach*").) If there is no ambiguity in the contract's terms, extrinsic evidence is inadmissible. (*Coral Farms, L.P. v. Mahony* (2021) 63 Cal.App.5th 719, 726.) Extrinsic evidence is only admissible if there is ambiguity in the contract's terms and the language of the contract is "reasonably

susceptible" to the interpretation urged by the advocate of such evidence. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.)

The first step is to evaluate the trial court's ruling on the threshold determination of "ambiguity" in the contract, which is a question of law. (*Winet*, *supra*, 4 Cal.App.4th at p. 1165.) "The threshold issue of whether to admit the extrinsic evidence — that is, whether the contract is reasonably susceptible to the interpretation urged—is a question of law subject to de novo review." (*Newport Beach*, *supra*, 109 Cal.App.4th at p. 955.)

2. This Court reviews independently the trial court's decision to admit extrinsic evidence.

The trial court's interpretation of the meaning of the contract turned, in part, upon its view of the "parties understanding" of the 1990 Agreement. This Court reviews de novo the trial court's decision with respect to whether a contract was sufficiently ambiguous to admit extrinsic evidence regarding the "parties' understandings" of its meaning. (*Newport Beach*, *supra*, 109 Cal.App.4th at p. 960 (rejecting extrinsic evidence offered as to undisclosed statements regarding "understanding" of the Right of First Offer contract).)

3. The award of $15.4 million in construction costs is subject to substantial evidence review.

The trial court awarded Riverside $15.4 million in "design and construction costs" related to the 2008 Master Plan in the Phase 2 trial. Whether the contract mandates any contribution by Rubidoux to the 2008 Master Plan is subject to *de novo* review.

But if damages are awarded, the trial court's award of design and construction costs is reviewed under the substantial evidence standard. (*Toscana v. Greene Music* (2004) 124 Cal.App.4th 685, 691.)

4. The award of "construction financing" costs or interest Riverside paid to its municipal bondholders is subject to independent review as to the allowance of such costs.

The trial court awarded Riverside an additional sum of $5.7 million as Rubidoux's share of "bond finance interest costs." (**10 AA 3230.**) The trial court's award of "bond finance interest costs" is subject to a two-part review. First, this Court must determine de novo whether such interest charges or costs were reasonably foreseeable at the time of the 1990 Agreement. (*Mendoyoma, Inc. v. County of Mendocino* (1970) 8 Cal.App.3d 873, 879-80.) Second, even if the costs were reasonably foreseeable, this Court must ascertain whether $5.7 million is reasonable or whether substantial evidence supports Rubidoux's position that such expenditures were "extravagant and unnecessary" for carrying out the improvements to the Regional Plant. (*Mendoyoma*, *supra*, 8 Cal.App.3d at p. 879.)

5. The trial court's award of costs to a prevailing party is subject to review under the abuse of discretion standard.

The trial court's post-trial order denying in part Rubidoux's motion to tax costs sought by Riverside is reviewed for an abuse

of discretion. (*Berkeley Cement, Inc. v. Regents of Univ. of California* (2019) 30 Cal.App.5th 1133, 1139.)

B. This Court should reverse the judgment because the trial court ignored the 1990 Agreement's plain and unambiguous terms.

The trial court stated that the key issue in this case was the interpretation of the contracts and the corresponding obligations of the parties under the contracts. **(8 AA 2815.)** It erred in interpreting the unambiguous terms of the 1990 Agreement in several respects.

1. The trial court implicitly and erroneously found Section 7 of the 1990 Agreement to be ambiguous.

Rubidoux was not required to pay its proportionate share of the Master Plan because the Master Plan was not "directly related to," "non-discretionary," and "necessitated by new or revised" NPDES permit requirements. Section 7 of the 1990 Agreement is plain and unambiguous. It requires Rubidoux to pay "its proportionate share of costs of any facilities" to be constructed "as a direct result of new or revised Federal, State or NPDES permit requirements that are directly related to, non-discretionary, and necessitated by new or revised requirements which became effective following the execution date of this agreement." Rubidoux agreed only to pay for those plant upgrades necessary to comply with the plant's NPDES permit

requirements. It did not grant Riverside *carte blanche* for any and all non-essential improvements it and its legion of consulting engineers decided might be worth making.

The record reflects that the Master Plan was not "directly related to," "non-discretionary," or "necessitated" by NPDES permit requirements. The Regional Plant's existing CAS system was in "full compliance" with its NPDES permit. **(3 RT 579-80, 582; 4 RT 782; 2 RT 278, 286, 288; 1 AA 541-542; 2 AA 731; 2 AA 764; 2 AA 792; 2 AA 960.**) Nonetheless, Riverside chose to spend $250,000,000+ on the Master Plan projects, even though the new MBR and many other "upgrades" were not required to comply with the NPDES permit. Although Riverside was free to make discretionary upgrades unrelated to current permit requirements, it was not free to force Rubidoux to contribute to those upgrades. Under the 1990 Agreement, Rubidoux agreed to pay only for necessary and non-discretionary upgrades. The Master Plan was an unnecessary and discretionary upgrade and, therefore, fell outside the scope of Section 7.

In its Statement of Decision, the trial court did not find Section 7 was ambiguous. Nor did it find any of the specific terms in Section 7 to be inaccessible to a layperson or require technical interpretation. In fact, the trial court quoted the precise terms of Section 7, but spent no time evaluating the impact of that language on either the prior agreements or the precise existing permit requirements that the Regional Plant was meeting as of the 2006 NPDES permit. **(8 AA 2821-2822.**)

The trial court departed from the requirement that clear and explicit terms such as "directly related," "non-discretionary," and "necessitated" be afforded their plain, common-sense meaning. None of these words in the 1990 Agreement has a technical meaning, nor did the trial court find that they required technical analysis. Rather, the trial court mistakenly *added* words to the contract. It held that Rubidoux was required to "share in the costs to ensure that the Plant remains in compliance with its post-1990 regulatory limits, both now *and in the future*." **(8 AA 2831** (emphasis added)**.)** The trial court's reading of the contract to apply to regulatory requirements "*in the future*" is found nowhere in Section 7, which discusses modifications necessitated by "*new or revised* requirements *that became effective* following the execution date of this agreement." (**1 AA 300-301** (emphasis added)**.)** This phrase – which was the subject of express negotiation between the parties in 1990 – can only be read to apply if: (1) after 1990, the regulators imposed a new regulatory requirement for the plant; and (2) the new regulatory requirement "*became effective*" (past tense). This is fundamentally different than the trial court's projection of *potential*, "future" requirements the Regional Board or other regulators *might* impose at some unknown date (but have not yet done so).

Rubidoux did not agree to pay for Riverside's speculation (or the speculation of its consultants) about what upgrades might be necessary to comply with potential, future regulations;

Rubidoux agreed to pay only for those upgrades that were actually necessary to comply with any "new or revised" regulations that "became effective" after 1990. When Riverside embarked upon its Master Plan, it did so in anticipation of "future requirements" that did not yet exist. The trial court thus erred in concluding that the Master Plan fell within the language of Section 7 of the 1990 Agreement.

2. The trial court erred in relying upon extrinsic evidence to alter the plain and unambiguous meaning of the 1990 Agreement.

The trial court erred in departing from the plain language of the 1990 Agreement based on extrinsic evidence. Where the contract language is unambiguous, a court cannot contradict the plain meaning by using conditionally admitted extrinsic evidence. (*Newport Beach*, *supra*, 109 Cal.App.4th at p. 955.)

Here, the trial court inferred from extrinsic evidence that the parties intended for "future regulations" which had not yet "become effective" to be included in the 1990 Agreement. The plain language of Section 7 is not reasonably susceptible to this interpretation. The trial court should not, therefore, have relied on extrinsic evidence to divine an interpretation of the 1990 Agreement that conflicted with its plain language. **(8 AA 2826-2831** (citations to various types of extrinsic evidence)**.)**

3. The trial court relied on inadmissible extrinsic evidence.

Case law specifically precludes a court from relying on the

types of "extrinsic evidence" cited by the trial court.

The trial court mistakenly relied on the parties' unexpressed subjective intent. For example, the trial court cited to internal meeting minutes of Rubidoux's Board of Directors. These minutes were *not* typically disclosed to outsiders, and no evidence was presented that they were sent to Riverside. **(8 AA 2828-2829; 2825-2826** [citing RCSD Board meeting minutes, RSCD Board Minutes, and also various staff Memoranda to Directors]**.)** This type of "undisclosed" evidence of subjective intent is irrelevant under the objective theory of contract interpretation. (*Newport Beach*, *supra*, 109 Cal.App.4th at p. 960.)

The trial court also cited as extrinsic evidence Rubidoux's performance (by making payments) under a 1995 Promissory Note. **(1 AA 553; 8 AA 2829-2830.)** Indeed, the trial court went so far as to refer to this separate, post-1990 Promissory Note as "estoppel by contract." **(8 AA 2830.)** Case law, however, precludes a court from inferring the parties' "intent" in entering a prior agreement based upon their actions (including payments) in a subsequent agreement. (*Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 918 (affirming trial court's exclusion of "performance evidence" based on subsequent agreements, not the original insurance policy).)

The trial court cited evidence about discussions the parties had about a potential *but never fulfilled* Wastewater Capital Reserve Fund. **(8 AA 2829:9-25.)** The trial court speculated that

the parties *might* have used such a fund to pay for capital improvements. **(8 AA 2829:9-25.)** But discussions about a potential agreement that was never executed cannot serve as evidence of what the parties intended in a prior executed agreement, such as the 1990 Agreement. (*Winet, supra*, 4 Cal.App.4th at p. 1166.)

The trial court cited Rubidoux's payment of certain capital costs in two contracts drafted prior to the 1990 Agreement — the 1976 Agreement and the 1978 Agreement. **(8 AA 2821:3-9)** But these earlier contracts were subject to the express amendment of their terms by the 1990 Agreement. **(1 AA 301, §10.)** One of the changes made in the 1990 Agreement was with respect to the funding obligation of Rubidoux for future capital costs. That change was memorialized in Section 7 of the 1990 Agreement and constituted an amendment of the prior agreements. **(1 AA 300, §7.)** "The court generally may not consider extrinsic evidence of any prior agreement or contemporaneous oral agreement to vary or contradict the clear and unambiguous terms of a written, integrated contract." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126.) This rule applies with even greater force where the prior agreements were expressly amended by the 1990 contract, which supplemented and *amended* those agreements.

The trial court relied upon the 2013 NPDES permit as evidence that there was a new standard for TIN. But the trial court never examined whether, even with that subsequent

permit, the Regional Plant was capable of meeting the TIN as of 2006. It was and it did meet that standard without any change in the Master Plan. **(2 AA 960.)** Even if this 2013 Permit were valid extrinsic evidence, it must be evaluated in the context of the language of the 1990 Agreement, which limited Riverside to charge for only a plant upgrade that was the "direct result" of a regulation. The change in TIN limit, issued 7 years after the Master Plan process, was not such a result. "The intent of the parties to a contract is to be ascertained as of the time the contract was made, not some later date." (*Thomas v. Buttress & McClellan, Inc.* (1956) 141 Cal.App.2d 812, 816; Civ. Code §1636 [same].)

Finally, the trial court relied on the conduct of the parties after the execution of the 1990 Agreement and before any conflict arose. **(8 AA 2826-2831.)** Like other types of extrinsic evidence, course of dealing "may not be relied upon to alter or add to the terms of the writing." (*Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n* (2013) 55 Cal.4th 1169, 1174; Civ. Proc., §1856(a), (c) (allowing course of dealing evidence to "explain" or "supplement" terms, not contradict them).) By its plain terms, Section 7 allowed the City to only "assess Rubidoux its proportionate share of costs of any facilities . . . as a direct result of new or revised Federal, State or NPDES permit requirements that are directly related to, non-discretionary, and necessitated by new or revised requirements which became effective following the execution date of this agreement."

C. The trial court's policy-based analysis contradicts the plain meaning of the 1990 Agreement.

The court below started its analysis with a third-party document – the NPDES permit the Regional Board issued to Riverside. This document read: "For all environmental regulations affecting the Plant, the maximum discharge limits and treatment requirements set by Federal, State or Regional authorities, the City must now and in the future anticipate and meet those limits for the protection of the environment and human health." **(8 AA 2824.)** From its "you should be pro-active" perspective, the trial court imposed a corollary contractual duty upon Rubidoux: that is, a duty to pay not just for capital costs to ensure the Regional Plant was complying with the NPDES permit but also to pay for potential but not yet "effective" regulations based on Riverside's unilateral prediction of what the regulators might do in the future. **(8 AA 2825-2826.)**

1. The trial court's policy position ignores the express terms of the NPDES permit, which ensures stakeholder stability for a specific time period and nothing more.

The trial court's interpretation of the contract based on its own policy inferences from the NPDES permit was founded on a faulty premise — *i.e.*, that an NPDES permittee was obligated to anticipate potential *future* regulatory demands. Nothing could be further from the truth. The entire NPDES permit process is a

collaborative one geared to establish fixed, current requirements based on the Regional Board's Basin Plan. **(9 AA 2946-2948, ¶¶24-26.)** The process also provides a "safe harbor" period of at least five years before any new requirement can be imposed by the regulator. (*See* 33 U.S.C. §1342(b)(1)(B) (providing for an authorized state to issue a permit for a five-year term).) This process provides stability for any permittee and ensures that it will not be subject to a sudden shift in regulatory requirements. In fact, the Water Board issued permits to Riverside consistent with this five-year standard, and sometimes extending them until the issuance of a new permit even beyond the five-year period. **(1 AA 257** (providing that 1987 Order imposing discharge requirements ends in 1992)**; 1 AA 603** (providing that 1995 Order remains in place until 2000)**.)** The Water Board took six years between 2000 to issue the next NPDES permit in 2006 **(2 AA 803** [issuance date of April 2006)]**.)** The 2006 NPDES permit remained effective for another seven years until 2013.

The federal statute authorizing NPDES permits provides that compliance with an *existing* NPDES permit provides a shield for any liability as to discharge of pollutants to the permittee (Riverside). (33 U.S.C.§1342(k).) Courts have held that a permittee in compliance with a permit is effectively shielded from legal liability during the period of that permit: "The permit shield is a major benefit to a permittee because it protects the permittee from any obligation to meet more stringent limitations promulgated by the EPA unless and until the permit expires."

(*Natural Resources Defense Council, Inc. v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, 1204, *cert. denied*, (2014) 572 U.S. 1100; see *Alaska Community Action on Toxics v. Aurora Energy Serv., LLC* (9th Cir. 2014) 765 F.3d 1169, 1171 [same].)

The trial court attempted to justify its policy-influenced interpretation of the 1990 Agreement in terms of the potential liability to Riverside if it did *not* comply with an existing permit. Yet, the trial court also found Riverside complied fully with all NPDES permits during the time period in question. **(8 AA 2824.)** More importantly, as long as Riverside complied with its existing permit, it was safe under the statutory "shield" provision from liability, even if EPA (or the Water Board) changed standards during the applicable permit period. The trial court's belief that Riverside was legally required to anticipate whether more stringent regulations could potentially be imposed in the future and upgrade its plant even before any such new regulations had become effective (if they ever were) as part of a new permit is legal error.

2. The trial court erroneously re-wrote Section 7 of the 1990 Agreement to add new words — "future regulation which might become effective."

Even if *arguendo* the lower court's interpretation of the NPDES permit was correct, the court effectively rewrote the terms of Section 7 of the 1990 Agreement. In addition to the actual language of Section 7, the trial court effectively added an

entirely new paragraph: "Riverside may also assess Rubidoux its proportionate share of costs of any facilities which are constructed at the Plant as a result of any anticipated a future Federal, State, or NPDES permit requirement which might become effective at some point in the future." This too was error.

Courts are not at liberty to revise contracts or add language beyond what the parties agreed to. "Our function is to determine what, in terms and substance, is contained in the contract, not to insert what has been omitted. We do not have the power to create for the parties a contract that they did not make and cannot insert language that one party now wishes were there." (*Vons Companies, Inc. v. United States Fire Ins. Co.* (2000) 78 Cal.App.4th 52, 58-59; *Dameron Hosp. Assn. v. AAA Northern California, etc.* (2014) 229 Cal.App.4th 549, 569.)

3. The trial court's suggestion that a contrary contractual interpretation would result in an "illegal" contract against public policy is erroneous.

As an additional reason for its interpretation of the 1990 Agreement in favor of Riverside, the trial court stated that the various agreements "did not provide that the City's successful compliance with environmental regulations will excuse RCSD from its capital improvement obligations. If a violation of regulatory requirements was such a condition precedent to RCSD's obligation, the Parties' Agreements would be illegal and against public policy." **(8 AA 2824:18-23.)**

The trial court's reasoning incorrectly posits a hypothetical straw man in place of Rubidoux's actual contractual position and then relies upon readily distinguishable caselaw to support its flawed premise. The trial court also erred in ignoring the substantial evidence before it. When Riverside did exceed one of the 2006 NPDES permits' regulatory requirements, it negotiated a work-around amendment to the permit without any necessity of further capital expenditures by anyone.

The rhetorical straw man first: Rubidoux's position was that Section 7 of the 1990 Agreement meant what it said. Rubidoux agreed that *if* a new or revised regulation *became effective* and directly resulted in a required *non-discretionary* capital expenditure, *then* it would be contractually obligated to pay a proportionate share of the cost. Rubidoux did not agree to Riverside's assertion that the City was free to charge Rubidoux an immense sum for *discretionary* expenditures based upon Riverside's internal, unilateral predictions of future regulations that may or may not someday become effective.

The trial court's cited authority is inapposite. The first cited case, *Vitek, Inc. v. Alvarado Ice Palace, Inc.* (1973) 34 Cal.App.3d 586, dealt with a contractor's agreement to construct an ice-skating rink for the defendant. The contractor was not licensed at the time of contract execution, but it became licensed and stayed licensed for the duration of the work related to the contract. (*Id.* at p. 588.) The defendant argued the contractor was not duly licensed at all times, barring recovery under section

7031 of the Business and Professions Code. (*Id.* at p. 589.) The Court of Appeal found that section 7031 was satisfied as all performance was completed while the license was in effect. (*Ibid.*)

The court in *Vitek* refused to bar the contractor's recovery based on its observation that "[t]he contract is void only if it falls within the area which the Legislature intended as part of the deterrence necessary to protect the public interest." (34 Cal.App.3d at 593.) In *Vivek*, such deterrence was not found necessary.

The second case cited by the trial court, *Felix v. Zlotoff* (1979) 90 Cal.App.3d 155, concerned a breach of contract action filed by a licensed building designer against defendant who allegedly did not pay him for preliminary plans and specifications for condominium units. Defendant sought to excuse his non-payment by reference to a section of the Business and Professions Code because the plans were not signed and did not bear the registration number of a licensed building designer. (*Id.* at pp. 157-58.) The court referenced the general rule that "requires courts-even absent a statutory prohibition ... to withhold relief under the terms of an illegal contract or agreement which is violative of public policy." (*Id.* at pp. 161-62.) The court however, found to the contrary, noting that "[t]he effect of denying Felix access to the courts, where the Legislature has not seen fit to do so, is to decree a forfeiture, to authorize unjust enrichment without any counterbalancing discernable public policy which justifies such drastic medicine. Forfeitures are viewed with

legislative and judicial disfavor." (*Id.* at p. 163.)

Vitek and *Felix* are distinguishable. They involved claims that at the start of the contractual performance the party seeking recovery had done something "illegal" such as not complying with a technical licensing or certification requirement. Here, it is clear the parties' 1990 Agreement concerns obligation to pay a proportionate share of costs of any facilities as a direct result of new or revised federal, state, or NPDES permit requirements. The improvements Riverside unilaterally decided to implement were not necessitated by new or revised permit requirements; rather they were for the purposes of providing high quality water for its *reuse customers* and in anticipation of what "future" regulations might be imposed by the regulators at some future date. **(5 AA 1480; RT 361:2-362:18.)**

The trial court's suggestion that Riverside faced potential illegal consequences ignores the only substantial evidence as to what actually happened when Riverside fell out of compliance with the 2006 NPDES permit. The 2006 NPDES permit imposed various discharge conditions, including one related to total dissolved solids ("TDS"). The 2006 NPDES permit specifically limited Riverside's plant from discharging TDS in excess of a specified average level. **(2 AA 811.)** Riverside however, reported to the Regional Board in March 2009 that the Regional Plant exceeded this existing regulatory standard for the first three months of 2009. Riverside determined that it was a monitoring point placed after the disinfection chemical (chlorine) was applied

that caused the high readings, and requested the Regional Board approve an alternative point for measuring TDS prior to the injection of the disinfectant compound. The Regional Board agreed and resolved the City's prior non-compliance with the TDS limit without further ado. **(5 AA 1501, 1509-1510.**)

D. Even if, *arguendo*, Rubidoux could be charged a share of some regulatory costs, that share cannot include any share of the $60,000,000+ MBR system.

Rubidoux cannot be fairly charged for any "share" of Riverside's spending on what it speculated might be necessary for projected future regulatory requirements under the 1990 Agreement. If this Court disagrees, however, the trial court still erred in determining what Rubidoux's "proportionate share" of the Master Plan costs should be.

1. The trial court erred in imposing a "proportionate" share based on Rubidoux's right to send influent wastewater to the Regional Plant.

The terms of the 1990 Agreement provided that the City could assess to Rubidoux a "proportionate share" of charges for certain necessary regulatory requirements. The 1990 Agreement is silent as to what a "proportionate share" meant. The preliminary recitals in the 1990 Agreement referenced a "capacity right" held by Rubidoux and stated that Rubidoux had

agreed to pay for certain plant upgrade costs based upon its original capacity right of 1.5 MGD. **(1 AA 298.)** In the operative provisions of the 1990 Agreement, even if Rubidoux acquired an additional capacity right, "The purchase of this additional capacity right [did] not entitle Rubidoux to any ownership interest in specific land or facilities." **(1 AA 298.)** To the contrary, the 1990 Agreement specifically obligated Riverside "to operate and maintain the Plant at all times so as to provide adequately for the treatment and disposal of a total of 3.055 MGD of wastewater delivered by Rubidoux from its wastewater collection system to the Plant while at all times meeting all Federal, State and NPDES permit requirements." **(1 AA 298, 299.)**

To award Riverside recovery of an assessment, the trial court was required to: (a) decide what constituted a "proportionate share" and then determine (b) "the costs of any facilities which are constructed at the Plant as a direct result of new or revised Federal, State or NPDES permit requirements." The trial court undertook neither analysis in its Statements of Decision. Rather, it simply defaulted to the value suggested by Riverside — a 7.64% "share" based on an entirely different concept — the "capacity right" Rubidoux had in the plant based on a 40 MGD capacity. This was despite the fact that the Master Plan would ultimately increase the total treatment capacity at the Regional Plant from 40 MGD to 46 MGD. **(2 AA 997.)**

To adjust for this difference in capacity, the trial court accepted the testimony of Riverside's accounting expert, Eugene Lash ("Lash"), who claimed he excluded the difference between the original 40 MGD capacity and the new increase to 46 MGD from Riverside's total claimed costs. According to Lash, this resulted in a 13% reduction of claimed costs against Rubidoux. **(10 AA 3218.**)

Lash's math does not work. If Rubidoux had a "capacity right" of 3.055 MGD/46 MGD, and this capacity was the basis for the "proportionate share" to be assessed against Rubidoux, the ratio should be 6.64% (3.055 divided by 46). But the trial court did not use this ratio; it used the ratio of 7.64%. This one percent difference is critical. In computing a "proportionate share" of some $201 million, a difference in one percent means an economic difference of $2.1 million.

In lieu of this $2.1 million reduction, the trial court accepted a Lash-invented ratio in which he compared 40 MGD (the original plant capacity) with 46 MGD (the new plant capacity) and concluded that it yielded a ratio of 87%. Lash then used this ratio to "reduce" Rubidoux's share of total claimed costs (some $231 million) by 13% (some $30 million) to arrive at a "net adjusted" cost of $201 million. It was to this "net adjusted" cost figure that Lash then applied the 7.64% ratio to calculate Rubidoux's share. The problem is that there is no basis in the contract language to support this interpretation of the phrase "proportionate share." Riverside made up a calculation for its

damages claim. Not only is it untethered to any contract language, it is also unrelated to any specific "reasonably foreseeably" damages resulting from Rubidoux's alleged breach.

2. The trial court erred in assigning a portion of the MBR costs from Plant 1 to Rubidoux.

Even if *arguendo* the trial court was correct in applying a blanket 7.64% ratio of certain capital costs to Rubidoux, it erred in awarding the City the cost of the MBR unit — in excess of $65 million — that only Riverside wanted to build. Riverside, without input from Rubidoux or any other CSD, selected the MBR technology over all other alternatives, including the existing CAS process. **(2 AA 933, 935; 2 AA 999.)** Even when challenged by an independent value engineering team about a potential cost savings of $65,000,000, Riverside rejected that challenge. Riverside wanted higher quality effluent for its water reuse customers. **(5 AA 1472; 5 AA 1486.)**

Rubidoux should not pay for Riverside's expensive, pet-project MBR system. Although the trial court concluded "the City is entitled to rely on profession recommendations by qualified engineers in determining the best value and making selections for treatment," **(10 AA 3225)**, it ignored the fact that it was Riverside, not its consulting engineers, that selected MBR. **(2 AA 934, 935.)** The trial court likewise ignored the fact that Riverside's decision was based on its own determination of the value of the MBR system for Riverside's prospective water reuse customers. This was not a technical decision based on a unified

engineering recommendation; it was an economic decision driven by profit motives. Nothing in any of the agreements requires Rubidoux to contribute to Riverside's water-reuse enterprise.

E. Riverside's unilateral decision to finance the Regional Plant expansion through a series of municipal bond offerings does not justify the imposition of $5,000,000 in interest charges to Rubidoux.

1. Riverside's "lump it all together" approach to the Plant charges ignores the contract language.

Riverside committed to a $250,000,000+ "capital improvement plan" for the Regional Plant and chose to finance the costs over a multi-year series of municipal bonds. Riverside, however, financed much more than just the costs of the Regional Plant improvements. It also included a variety of improvements to its separate sewer line system. Riverside initially funded the projects by selling two municipal bonds issued in 2009, the 2009A and 2009B offerings. **(3 AA 1150** (showing multiple disbursements to sewer lines, manhole cover replacements, *etc.*)**.)** Riverside in the Phase 2 trial purported to segregate just the interest cost of the "Phase 1" Regional Plant improvements from other projects based on its internal percentage allocations. **(9 AA 2932** (showing "interest attributable to WQCP" [Water Quality Control Plant]).) But even this effort to allocate includes a

multitude of items not directly related to the Regional Plant's expansion. For example, Riverside allocated the costs of a new computer, food vendor, and FedEx charges, and its costs of publishing (presumably) a construction bid posting in the local newspaper to the "Phase 1" expansion project. **(8 AA 2904.)** Riverside's approach of lumping together plant charges and non-plant expansion charges (such as food vendor expenses), and then attributing a "percentage of interest paid" based on that lumped charge is not consistent with any language in the 1990 Agreement. The lumped charges reflect costs not "directly related" to the Regional Plant's improvement for regulatory needs and should not be part of any interest charge now allocated to Rubidoux.

2. The $5,700,000 in bond interest costs was a special damage not reasonably foreseeable to Rubidoux.

A party who breaches a contract is potentially liable for two types of damages — "general" (those arising directly from the breach) or "special or consequential" damages (those that are an indirect consequence of a breach due to the unique nature of the contract or to the parties). (*Lewis Jorge Constr. Management, Inc. v. Pomona Unified Sch. Dist.* (2004) 34 Cal.4th 960, 968 ("*Lewis Jorge*").)

Here, the trial court treated interest that Riverside paid on its municipal bond offerings starting in 2009 and continuing in a subsequent series of offerings through 2017 as a "general" or

"direct damage." **(10 AA 3221.)** In doing so, the trial court misapplied *Lewis Jorge* to this case.

In *Lewis Jorge*, the California Supreme Court rejected a contractor's effort to seek as contract "damages" a claim that his bond rating was impaired, leading to a reduction in the contractor's ability to bid on future public contracts, which required posting a bond. (34 Cal.4th at pp. 970-71.) The Court noted that lost profits from "collateral transactions" typically arise when the contract involves crops, good intended for resale, or an agreement creating an exclusive sales agency. (*Id.* at pp. 971-72.) It held that an impaired bonding ability was not awardable as a general damage amount; it then examined whether such damages constituted a type of "special damages," which must not only be pled with particularity, but also proven as to "their occurrence and their extent." (*Id.* at p. 975.) The Court rejected that claim as well.

Here, the trial court found the interest Riverside paid on various municipal bonds was allowable as a general damage item. It made this legal conclusion based on a summary sentence distinguishing *Lewis Jorge* on the ground that "the City's financing damages are akin to other financing charges RCSD paid for prior capital improvement projects, were foreseeable to RCSD, and arose directly and inevitably from RCSD's breach of the Parties' Agreements." **(10 AA 3221.)** In a footnote, the trial court also noted three out-of-state cases as support for its holding that the financing charges are a "general," damage amount. (**10**

AA 3221, fn.3.) The three out-of-state cases are inapposite to these facts.

3. The trial court's finding that Rubidoux paid similar charges "akin" to the bond financing lacks substantial evidence.

The trial court's first conclusion — that Riverside's bond financing charges "are akin to other financing charges RCSD paid for prior capital improvement projects" — is not supported by substantial evidence. The 1990 Agreement provided Rubidoux would pay for two distinct items: (1) an expanded capacity right to send influent to the Plant in the sum of $6.9 million; and (2) specific "plant upgrade costs" in the sum of $537,000. These two payments were lumped together to calculate a specific amount that Rubidoux owed to Riverside, payable in installments with a fixed interest amount (8% per annum) on the outstanding balance due under those installments. **(1 AA 299, §3.**) There was no reference to interest or any amount of principal due under Section 7 of the 1990 Agreement, which is the basis for Riverside's current claim. Nor was there any mention in any provision of the 1990 Agreement that Riverside might obtain bond financing for unknown future plant upgrades and might incur interest costs.

Next, the trial court cited to a "RCSD witness, Mr. Sam Gershon," who testified that he was aware the City intended to finance the Phase 1 Project with bonds. **(10 AA 3221, fn.2.**) The trial court ignored one critical fact: Gershon represented the

Edgemont CSD, not Rubidoux. **(2 AA 1079** (showing meeting attendee: "Sam Gershon, A.A. Webb & Associates Rep. for Edgemont CSD)**; 2 AA 910** (same for earlier meeting)**.**) As to the meeting notes the trial court cited, there is no showing a Rubidoux representative attended. Whatever knowledge Gershon may have had, it cannot be imputed to Rubidoux.

The only reference in the August 5, 2008 meeting to financing *via* bonds is at best ambiguous: "Sam Gershon-Why can't the CSD [Edgemont] just pay for the improvements as the City pays off the bond over the 25 year period? The City will look into this. The City may need to develop a reserve fund aside from the City's sewer fund." **(2 AA 1079.**)

Nothing in this summary of a hearsay discussion suggests Riverside will charge interest to the CSDs (let alone Rubidoux) based on Riverside's bond financing. Rather, the question put forth by Gershon in 2008 was whether his CSD (Edgemont) could make payments over the same time period as the life of the bonds as Riverside made its (principal) payments. The backup pages to the August 5, 2008 meeting show some projected costs — without interest. **(2 AA 1085.**)

The standard for recoverability of contract damages is whether they were "reasonably foreseeable" at the time of the contract (1990 Agreement) (*Lewis Jorge*, *supra*, 34 Cal.4th at p. 970.) As one court explains: "Certainly it cannot be said that appellant's resorting to borrowing, and the subsequent obligation to pay interest, was foreseeable by either party at the time of

contracting, or that the respondent had notice, or should have had notice, that the appellant would become liable for the payment of interest." (*Mendoyoma, supra*, 8 Cal.App.3d at p. 880.)

Here, the trial court took an at-best ambiguous discussion with a separate CSD representative some 18 years after the entry of the 1990 Agreement and inferred that this must have been the "understanding" of Rubidoux when it entered the 1990 Agreement. This was error.

4. The trial court's conclusion that Rubidoux's breach "directly resulted" in Riverside's bond offerings lacks substantial evidence.

The trial court's conclusion that interest charges on the municipal bond financing "arose directly" from Rubidoux's alleged breach is unsupported by substantial evidence. Initially, Riverside's decision to bundle a series of public works projects into one large offering (including but certainly not limited to the expansion of the Regional Plant) was hardly the "direct" result of Rubidoux's alleged refusal to pay $17 million under the 1990 Agreement. Riverside's own figures show that its 2009 bond offerings (made before this litigation) amount to $240 million. **(3 AA 1150.)** Riverside's summary of construction costs paid under either of the two bonds issued in 2009 for what it described as the "WQCP [Water Quality Control Plant] Phase 1 Expansion" showed the expenditures from the 2009A bonds was roughly 10% of the $19,900,000 in all construction costs allocated to that bond.

As to the 2009B, Riverside in its requisition No. 50 against the bond proceedings showed a total expenditure for the Plant Expansion of $18,200,000 in past and current draws, as against an overall payment for all costs for the various projects of some $46,800,000 —roughly 39% of the total expended for total construction. **(4 AA 1254-1255.)**

It beggars belief that Rubidoux "directly" caused Riverside to borrow $300,000,000 because the CSD refused to pay $17,000,000 in capital costs. At the time of these two bond offerings, Riverside had not yet made an express demand for payment to Rubidoux, and a demand letter that did not come until five years later in 2014. **(7 AA 2092.)** There is no evidence, let alone substantial evidence, that Rubidoux's purported non-payment to Riverside triggered its decision to seek bond financing.

F. The trial court abused its discretion in imposing $560,000 in non-retained expert costs on Rubidoux.

Riverside sought to recover expert witness fees for various witnesses, including individuals who testified as non-retained experts at trial. This included John Ciccotelli, a contractor and consultant Riverside hired in connection with the work his firm (MWH) did with the plant expansion. At trial, Ciccotelli was allowed to express expert opinions about the alleged necessity and propriety of that same work. The Code provides for an

express series of conditions, including the production of expert reports and writings for expert witnesses, and among these requirements is a statement of the expert's hourly and daily fee for providing deposition testimony and consulting work. (Civ. Pro. §§2034.260, 2034.270.) Riverside only listed Ciccotelli as a "non-retained expert who may offer expert opinions at trial . . ." along with several other individuals, and the provision for allowing expert witness fees to a prevailing party with a win greater than its prior demand under section 998 does not apply. That section allows for a discretionary award of fees only for "expert witnesses, who are not regular employees of any party." (Civ. Pro. §998(d).)

In addition, the trial court allowed a "multiplier" fee to be imposed on Rubidoux for the work of a disclosed expert, Merlo of the Brown & Caldwell firm. An expert fee should be limited to his reasonable hours at his hourly rate, not an additional "firm add-on" of 3.4%.

VI. Conclusion

For the foregoing reasons, the Judgment of the trial court should be reversed and the trial court's separate order awarding

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costs based on Riverside's prevailing party status should also be reversed.

Respectively Submitted,

Dated: November 7, 2022

RING BENDER LLP

By: */s/ Patrick K. Bobko*
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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief excluding the cover page and tables contains 12,816 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: */s/ Patrick K. Bobko*
PATRICK K. BOBKO

PROOF OF SERVICE

City of Riverside v. Rubidoux Community Services District, et al.

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is: 3150 Bristol Street, Suite 220, Costa Mesa, CA 92626. My email address is: ngonzales@ringbenderlaw.com

On November 7, 2022, I served the foregoing document(s) described as:

APPELLANT'S OPENING BRIEF

on all interested parties in this action by placing ☒ a true copy ☐ the original thereof enclosed in sealed envelopes addressed as follows:

☒ BY ELECTRONIC TRANSMISSION VIA TRUEFILING: Based on a court order and/or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent via TrueFiling to the persons indicated on the Service List as receiving electronic service. According to the TrueFiling website, these persons are registered TrueFiling users who have consented to receive electronic service of documents in this case. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on November 7, 2022, at Costa Mesa, California.

Natasha Gonzales — Natasha Gonzales

(Type or print name) (Signature)

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