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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF FRESNO,

Plaintiff and Respondent,

v.

PINEDALE COUNTY WATER DISTRICT,

Defendant and Appellant.

F064112

(Super. Ct. No. MCV043413)

**OPINION**

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

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

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

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

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

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

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

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *The 1976 Contract*

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

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

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

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

### *The 2007 Agreement*

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

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

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

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

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

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

#### *The Present Dispute*

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

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

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

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

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

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

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<sup>1</sup> Subsequent references to dates shall be to dates in 2008 unless otherwise noted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### *This Lawsuit*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **DISCUSSION**

### I. Specific Performance

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

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

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

#### A. The Interpretation of Paragraph 19

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

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

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<sup>2</sup> Undesignated statutory references are to the Civil Code unless otherwise noted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### B. Breach

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

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

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

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

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

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

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

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

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

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

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

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

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

### C. Notice of Default

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

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

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

#### D. Determination of Necessity

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

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

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

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

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

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

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

## II. Other Claims

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

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

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

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

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

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

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

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

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

**DISPOSITION**

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

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Gomes, Acting P.J.

WE CONCUR:

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Detjen, J.

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Franson, J.