RUTAN & TUCKER, LLP
Michael Rubin (State Bar No. 62588)
mrubin@rutan.com
18575 Jamboree Road, 9th Floor
Irvine, CA 92612
Telephone: 714-641-5100
Facsimile: 714-546-9035

OFFICE OF THE ANAHEIM CITY ATTORNEY
Kristin A. Pelletier (State Bar No. 155378)
Chief Assistant City Attorney
kpelletier@anaheim.net
200 S. Anaheim Boulevard, Suite 356
Anaheim, California 92805
Telephone: 714-765-5169
Facsimile: 714-765-5123

Attorneys for Respondent
CITY OF ANAHEIM

JAMS ARBITRATION

SANTIAGO GEOLOGIC HAZARD ABATEMENT DISTRICT, a political subdivision of the state of California, Claimant, vs. CITY OF ANAHEIM, Respondent.	JAMS Reference No. 1200059076 Hon. Nancy Wieben Stock (Ret.) **CITY OF ANAHEIM'S OPENING ARBITRATION BRIEF** Arbitration Hearing Date: January 30, 2023 Time: 10:00 a.m. (Via Zoom)

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I. Description of the Dispute in Arbitration.

Respondent City of Anaheim ("City") and Claimant Santiago Geologic Hazard Abatement District (the "District" or "SGHAD") are parties to an agreement made in 1999 (Ex. 17) (the "Agreement") which provides in paragraph 6 at page 4:

> Effective upon the satisfaction of all conditions to this agreement, the District hereby assumes sole and total responsibility for all ownership, control, operational, maintenance, and repair responsibilities relating to the Dewatering Facilities. The District shall operate, maintain, and repair all or part of the Dewatering Facilities, as well as any additional new or replacement facilities the District may construct or install, in a manner within its discretion which will control groundwater levels to prevent reactivation and/or to abate movement of the Santiago Landslide.

The District is a separate political subdivision of the State of California (Pub. Resources Code § 26570) and is governed by a five-person Board of Directors. It is not a political subdivision of or an agency of the City. It was formed pursuant to Public Resources Code section 26500, *et seq.* (Stipulated Facts #13.) The District's members are the owners of the approximately 303 Assessor parcels of properties within the District boundaries. (Stipulated Facts #24.)

As of January 1, 2023 the District has $381,210.06 in cash or cash alternatives (Stipulated Facts #19), and its operating budget for 2022-2023 is $339,566, which includes the legal costs associated with these arbitration proceedings (Stipulated Facts #18). During the two years when legal costs associated with the arbitration were not incurred (2019-2020 and 2020-2021), the operating budgets of the District averaged a little over $268,000 per year. (Stipulated Facts #18.) While the District has the power to raise additional funds by means of assessments on the properties making up the District, an assessment will be defeated if a majority of the assessed value that actually votes, votes against the assessment. (Stipulated Facts #24.) The District proposed assessments in 2019 and 2022, but the property owners that make up the District voted down both proposed assessments. (Stipulated Facts #25 and #28,)

SGHAD's demand for arbitration seeks a declaration that its performance of any contractual obligation to maintain, operate, or repair the Dewatering Facilities will be excused when the funds on hand have been depleted based on the doctrines of impossibility, impracticality,

and/or frustration of purpose. Alternatively, SGHAD seeks a declaratory judgment that the Agreement does not impose on SGHAD any obligation to operate, maintain, or repair the Dewatering Facilities upon the depletion of its funds. (Stipulated Facts #30.)

The City disagrees (i) that SGHAD is entitled to a declaratory judgment, and/or (ii) that the doctrines of impossibility, impracticality, and/or frustration of purpose apply. In addition, the City contends that there is no actual controversy as required by California Code of Civil Procedure section 1060 that would warrant a declaratory judgment. (Stipulated Facts #31.)

II. Background Facts to the Dispute in Arbitration.

The District's initial funding of $3.5 million was by way of a settlement in 1999 of 15 consolidated lawsuits (the "Delmonico Lawsuit") filed against the City and other parties in connection with a landslide (the "Santiago Landslide") and the cross-complaints filed in those lawsuits. (Stipulated Facts #5 & #10.)[1] Gross movement of the Santiago Landslide (that accelerated in January 1993) was stopped by the City's installation of a complex system of Dewatering Facilities that lowered the ground water levels in the area. (Stipulated Facts #1.) The City retained geological and geotechnical consultants, Eberhart & Stone, Inc. ("E&S") to assist the City with the emergency response and to investigate the geologic conditions and report its findings and conclusions. (Stipulated Facts #2.) E&S prepared and submitted its June 28, 1996 report to the City ("E&S Report") that documented the conditions and incidents associated with the Santiago Landslide. The E&S Report recommended "[t]he implementation of a Geological Hazard Abatement District ("GHAD") [as] a means of raising the necessary funds for maintaining,

[1] The "Santiago Landslide" refers to an area encompassing roughly 25 acres of developed and natural terrain in the Anaheim Hills area of Anaheim, California consisting of portions of Tracts 7587, 9080, 9133, 9134 and 10996. Ground deformations associated with the Santiago Landslide accelerated in January 1993 during massive rainstorms that hit Orange County. The rainstorms wreaked damage throughout Orange County causing the California Governor to proclaim a state of emergency in Orange County and ultimately cause President Clinton to declare Orange County a disaster area. The City also declared a state of emergency and defined the area of the Santiago Landslide a "Disaster Area." Pursuant to this declaration, the City took emergency actions including the installation (within publicly owned and privately owned properties) and operation of a system of vertical and horizonal wells to lower ground water levels for the area, as well as installation of observation wells, piezometers, manometers and other devices to measure ground water levels and ground movement as well as facilities to power the equipment and to discharge the withdrawn ground water ("Dewatering Facilities"). The intent and result of the operation of the Dewatering Facilities was to lower groundwater levels and thereby stop further earth movement. By February 15, 1993 gross earth movement ceased. (Stipulated Facts #1.)

monitoring, and managing the dewatering system for the benefit of all properties threated by renewed landslide movement." The E&S Report further concluded: "Expenditures for operation, maintenance, and monitoring of the system will continue as long as the potential for high ground water remains. Therefore, the existing dewatering operation and its associated costs are likely to remain necessary indefinitely. (Stipulated Facts #4.)

In 1993, approximately 464 individuals, representing ownership of approximately 249 separate parcels of real property in Anaheim Hills, some within what was later found to be the Santiago Landslide boundaries and some outside of those boundaries, filed 15 separate lawsuits against the City and several other defendants. (Stipulated Facts #5.) The City filed cross-complaints against a group of the plaintiff property owners and others. (Stipulated Facts #6.)

In 1998, after a series of preliminary rulings in the Delmonico Lawsuit and the deposition testimony of a neutral court appointed geologist, settlement negotiations ensued between the City and the Delmonico Lawsuit plaintiffs (and other parties to the lawsuit). Part of the settlement discussions involved the proposal for the City to initiate the formation of a GHAD. The formation of the GHAD required a vote of the owners of the properties within the boundaries of the proposed district, whereby a majority protest (based upon assessed value) would preclude the formation of the district. One issue in the settlement negotiations between the City and the plaintiffs was how much of the settlement dollars would be dedicated to fund the district, if it were formed. (Stipulated Facts #8.)

The City proposed that $8 million of the settlement funds in the proposed settlement with the Plaintiffs be directed towards funding the proposed GHAD and its proposed responsibilities in connection with the Dewatering Facilities. After consultation with their clients, Plaintiffs' attorneys rejected that proposal and responded that Plaintiffs would only agree to setting aside a maximum of $3.5 million of the settlement funds towards funding the proposed GHAD. (Decl. of Michael Rubin, ¶ 6.)

The meeting notes of the plaintiffs' Landslide Committee dated March 5, 1998 (which the SGHAD included in its agenda package for its September 8, 2022 public meeting (see Ex. 3, ANA 533-535, and see Ex. 38, SGHAD 4773- 4775) reflect the proposal for the $8 million GHAD

allocation that the City made back in 1998. As set forth in those meeting notes, "The City would like the GHAD to be funded at 8 million dollars." The meeting notes go on to state: "our attorneys prefer that more of the settlement money go into our pockets than be in a hazard abatement district, where a future surplus might then be used by the City for other purposes. Our attorneys have run the numbers and say that $3.5 million would pay for pumping, repairs, replacement and maintenance for many decades." (Decl. of Michael Rubin, ¶ 7.)

A settlement agreement ("Delmonico Agreement") was reached between the City and the plaintiffs dated March 2, 1999. The total settlement sum to settle the Delmonico Lawsuit (including consolidated cases) under the Settlement agreement with the City was $15,500,000. (Stipulated Facts #9.)

The Delmonico Agreement provided that $3.5 million of the $15.5 million settlement sum was to "be paid to the GHAD, if approved, providing the GHAD enters into the contract with the City referred to herein relating to the Dewatering System by April 30, 1999. If the GHAD is not approved or if the GHAD does not enter into the contract with the City by April 30, 1999, the Agreement shall have no further force or effect and neither the Settlement Distribution nor the GHAD Distribution shall be made, unless the City agrees to waive the GHAD conditions." (Stipulated Facts #10.)

On February 23, 1999, in anticipation of the proposed settlement, Anaheim's City Council passed Resolution No. 99R-31 which initiated proceedings to form a geologic hazard abatement district pursuant to Public Resources Code section 26500, *et seq*. The Resolution set a public hearing on March 16, 1999 to consider the formation of the district and to receive written objection from owners of real property proposed to be included with the GHAD boundaries. A majority protest, i.e., written objections from property owners representing greater than 50 percent of the assessed valuation, would preclude the formation of the district. (Stipulated Facts #11.)

The overwhelming majority of the properties within the boundaries of the SGHAD were properties that had been owned by Plaintiffs in the Delmonico Lawsuit. A map showing the properties within the boundaries of the SGHAD that had been owned by Plaintiffs in the Delmonico Lawsuit was included by the SGHAD in its agenda package for its September 8, 2022

public meeting (see Ex. 38, SGHAD 4772). (Decl. of Michael Rubin, ¶ 10.)

On March 16, 1999, the City Council, after finding that it had not received written objections from property owners representing greater than 50 percent of the assessed valuation, passed Resolution No. 99R-50 approving the formation of the SGHAD. (Stipulated Facts #12.)

The members of the Board of the SGHAD were sworn in and held their first meeting on March 29, 1999. (Stipulated Facts #14.) Michael Rubin attended that meeting on behalf of the City as did attorneys for the SGHAD, and an attorney for the Delmonico plaintiffs. At that meeting, Mr. Rubin was asked by one of the Board members what the cost was to operate the Dewatering Facilities. Mr. Rubin responded that the cost being paid by the City had been approximately $230,000 per year. The Board member responded that the $3.5 million would not be enough to cover those costs indefinitely. Mr. Rubin concurred and indicated that the City had proposed a larger amount of the settlement go to the SGHAD but that had been rejected. The gist of this discussion is reflected in the minutes of the March 29, 1999 SGHAD Board meeting (Ex. 12, pp. SGHAD 4085-4089, at the bottom of p. SGHAD 4088). (Decl. of Michael Rubin, ¶ 11; see also Stipulated Facts #14 at lines 17-23.)

The SGHAD Board met again on April 12, 1999. At that meeting various costs for management of the SGHAD were discussed including $1,000 per month proposal by a consultant to provide management services, $7,400 per month for well monitoring, and $9,000 per month for geologic engineering services by Eberhart & Stone for monitoring. The SGHAD Board met on April 28, 1999 and among other things discussed the proposed agreement with the City. The SGHAD Board met on May 10, 1999 and among other things received a presentation by geologic engineer, Mark McLarty of Eberhart & Stone and also received a bid for liability insurance for $63,000 per year. In addition to the SGHAD Board members, representatives of the law firm of Burke Williams & Sorenson attended all of these meetings as General Counsel for the SGHAD. (Stipulated Facts #14 at lines 23 through end of paragraph.)

At the May 10, 1999 SGHAD Board meeting, Chairman Collett made a motion to not approve the contract with the City based upon his belief that the SGHAD would be underfunded. This motion was seconded by Director Muratori who stated that he agreed with Chairman Collett.

The motion to not approve the contract failed 3-0. After further discussion a motion was made to approve the contract which passed by a 2-1 vote. (Stipulated Facts #15, also see Ex. 13, Minutes of May 10, 1999 SGHAD Board Meeting, at p. SGHAD 4084.)

III. The Key Terms of the Agreement.

On or about June 10, 1999, Anaheim and SGHAD entered into the Agreement. (Stipulated Facts #16.)

Recital G of the Agreement (Ex. 17, at p. SGHAD 483) provides:

> The proposed settlement of lawsuits filed in connection with the Santiago Landslide provides that the city will initiate proceedings for the formation of Geologic Hazard Abatement District which would be responsible of funding, operating, monitoring, maintaining and repairing the Dewatering Facilities and to take such other actions as are necessary to prevent reactivation and abate movement of the Santiago Landslide.

Recital H of the Agreement (Ex. 17, at p. SGHAD 483) provides:

> It is anticipated that $3,500,000 of the settlement proceeds called for under the proposed Settlement Agreement will be transferred to the District to fund its operations, provided that certain conditions are met. (The $3,500,000 is referred to herein as the "GHAD Distribution".) One of these conditions is the execution of this Agreement by the City and the District to provide for, among other things, the ownership, operation, maintenance, and repair of the Dewatering Facilities by the District in order to prevent reactivation and to abate movement of the Santiago Landslide.

Section 6(a) of the Agreement (Ex. 17, at p. SGHAD 485) provides:

> Effective upon the satisfaction of all conditions to this agreement. the District hereby assumes sole and total responsibility for all ownership. control, operational, maintenance, and repair responsibilities relating to the Dewatering Facilities. **The District shall operate, maintain, and repair all or part of the Dewatering Facilities, as well as any additional new or replacement facilities the District may construct or install, in a manner within its discretion which will control groundwater levels to prevent reactivation and/or to abate movement of the Santiago Landslide**. [bolding added.]

Section 5 of the Agreement (Ex. 17, at p. SGHAD 485) provides:

> The GHAD Distribution, and any interest or earnings thereon, may only be expended for construction, acquisition, operation, maintenance, and repair of dewatering wells and other devices for the purpose of monitoring, abating and/or stabilizing past, present and future land movement of the Santiago Landslide and/or lowering groundwater levels in the vicinity of the Santiago Landslide reasonably deemed to materially or substantially promote the objective of stabilizing or abating past, present and future land movement of the Santiago Landslide or to party administrative expenses reasonably related thereto. The

> GHAD Distribution, and any interest or earnings thereon, cannot be used to fund activities or facilities which do not materially or substantially promote this objective. The District is free, in its discretion, to perform any activities and functions it is empowered to perform by Public Resources § 26500 et seq. with funds from other sources. However, the GHAD Distribution, and any interest or earnings thereon, may only be expended for the purposes set forth in this section.

SGHAD has operated, maintained, and repaired the Dewatering Facilities since approximately late 1999 or early 2000. (Stipulated Facts # 17.)

IV. Section 1060 of the California Code of Civil Procedure Requires a Case of Actual Controversy and Does Not Embrace Controversies that Are Conjectural, Anticipated to Occur in the Future, or an Attempt to Obtain an Advisory Opinion From the Court.

California Code of Civil Procedure section 1060 provides in relevant part:

> Any person interested ... under a contract ... may, in cases of actual controversy, relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties ...

The California Supreme Court applied and interpreted section 1060 in *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634. In that case, plaintiffs, who had contracts with Sprint for cellular telephone service, sued Sprint for alleged violations of the unfair competition laws and for declaratory relief, based upon the alleged illegality and unconscionability of contractual provisions that (i) required binding arbitration of disputes, (ii) waived the right to a jury trial in resolving disputes, (iii) waived class action in arbitration, (iv) failed to provide for discovery before arbitration, (v) split the cost of arbitration, (vi) disclaimed warranties and limited liability, (vii) permitted Sprint to unilaterally change the terms of the customer service agreement, (viii) imposed a 60-day limitation period for initiating billing disputes, and (ix) imposed a $150 early termination fee. Sprint had not sought to enforce any unconscionable term against the plaintiffs and had not actually imposed additional transaction costs on the plaintiffs. The Court first upheld the denial of relief under the various unfair competition laws because the plaintiffs had not been injured, and then upheld the sustaining of a demurrer to the declaratory relief cause of action.

The Court's opinion stated at p. 648:

> declaratory relief is designed in large part as a practical means of resolving controversies, so that parties can conform their conduct to the law and prevent future litigation. There may indeed be cases in which the settlement of questions of the validity of contractual remedies has practical consequences, such as when a party's decision to enter into a contract reasonably turns on the answer to these questions (see *Suttles, supra,* 220 Cal.App.3d 1148, 269 Cal.Rptr. 709), or when a party alleges with sufficient particularity that the continuation of a contractual relationship plausibly hinges on such answers. But when resolution of the controversy over future remedies would have little practical effect in terms of altering parties' behavior, courts have considerable discretion, pursuant to Code of Civil Procedure section 1061, to deny declaratory relief because it "is not necessary or proper at the time under all the circumstances" …
>
> In the present case, plaintiffs have not with any particularity alleged that the resolution of the declaratory relief action concerning contractual remedies would, at this point, have any practical consequences. No dispute has arisen that would cause these remedial provisions to come into play, and plaintiffs do not allege that the continuation of the contractual relationship depends on the resolution of these questions. We therefore conclude the trial court did not abuse its discretion in sustaining a demurrer to plaintiffs' declaratory relief action.

(*Id.* at p. 648.)

In the current arbitration, there is no case of actual controversy that meets the tests set forth by the California Supreme Court in the *Meyer* case. There is no allegation that the City has threatened to sue SGHAD if SGHAD fails to continue the operation of the Dewatering Facilities after SGHAD's funds run out. If the hypothetical circumstance of running out of funds arises, SGHAD is essentially predicting the action of a future city council by positing the controversy. In fact, it would seem to be an idle act to sue the SGHAD to perform under such circumstances, because the SGHAD would not have the capability of performing.

SGHAD is unable to show how declaratory relief in this matter will assist the parties to conform their conduct to the law and prevent future litigation. Claimant here has initiated litigation/arbitration in a matter where no future litigation/arbitration is likely to be avoided. There may be no better example of when to deny declaratory relief, because granting declaratory relief will encourage arbitration/litigation (and both parties' expenditure of fees and time) when none otherwise would be likely. This runs clearly afoul of the purposes of declaratory relief as explicated by the California Supreme Court in *Meyer*.

SGHAD's position is that it will continue to perform under the Agreement so long as it has

the wherewithal to do so. The continuation of its performance does not hinge on SGHAD's requested declaratory relief. There is no allegation that the issuance of declaratory relief will have any practical consequences or that such issuance is likely to alter the parties' behavior. This matter fails all of the tests set forth by the California Supreme Court in the *Meyer* decision.

The *Meyer* decision, of course, does not stand alone. As set forth in *Lee v. Silveira* (2016) 6 Cal.App.5th 527, 546, the actual controversy language in section 1060 "does not embrace controversies that are 'conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court.'" The *Lee* case involved an action brought by three members of the Board of a homeowners' association against six other board members, but not against the homeowners' association itself, alleging that the six engaged in improprieties in obtaining bids for and awarding a management contract. The plaintiffs did not seek the invalidation of the management contract (which would have required a suit against the association and the manager) but sought declaratory relief to govern the future conduct of the Board members and the Association's officers (such as requiring three bids for contracts involving material amounts, following "proper" bidding procedures, making verbatim transcripts of Board proceedings, etc.). The defendants brought an anti-SLAPP motion to strike the declaratory relief complaint and the trial court denied that motion. The Fourth District Court of Appeal reversed that denial and ordered dismissal of the plaintiffs' case. The Court noted that there was no evidence to show there was an actual controversy between the parties concerning the taking of verbatim notes of board meetings by the board secretary. (*Lee,* at p. 547) The Court dealt with other declaratory relief requests as follows (*Id.,* at pp. 548-549):

> Lastly, as noted *ante*, several of the subject matters in which plaintiffs requested a judicial declaration appear to involve controversies that were "conjectural," "anticipated to occur in the future," or would result in an "advisory opinion" from the court,16 including No. 1 ["at least three bids are required before the FVHOA can award contracts in material amounts"]; No. 5 ["contractors doing business with the FVHOA ... should be free of conflicts of interests"]; No. 6 ["FVHOA should not enter into contracts based upon former employees using confidential information"]; No. 7 [the FVHOA board "should not disclose confidential information of the FVHOA" with the manager defendants]; and No. 9 [manager defendants and FVHOA should "not be permitted to retaliate against [FVHOA] members for their lawful public participation or questions of their [b]oard"]. (See *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170–171, 188 Cal.Rptr. 104, 655 P.2d 306 [ripeness doctrine generally prevents courts from issuing purely advisory opinions on matters before the controversy between

> the parties has become sufficiently " 'definite and concrete'"]; see also *Brownfield*, 208 Cal.App.3d at p. 410, 256 Cal.Rptr. 240.)
>
> In addition, it appears at least one of the nine subject matters in plaintiffs' request for judicial declaration involved past wrongdoing of one or more members of the "majority block" that cannot be the basis of a judicial declaration: No. 8 ["the FVHOA treasurer [i.e., McDonald] should not be retaliated against by the [m]ajority [b]lock ... because he raised legitimate concerns about the FVHOA reserve deficiency, and raised ways of reducing FVHOA costs"].

SGHAD layers conjecture upon conjecture in this action. It assumes that its property owner members, who are living in an area threatened by the reactivation of the Santiago Landslide if ground water levels rise, will not seek and approve an assessment before the SGHAD's funds run out. Perhaps the members would be more likely to vote for a reduced annual assessment that is more in line with the budgets of less than $270,000 per year that the SGHAD operated under before it began incurring the legal expenses of this arbitration proceeding, as opposed to the budget of $466,900 that SGHAD sought to fund in its 2022 proposed assessment (see Decl. of Uri Eliahu, submitted with SGHAD's opening arbitration brief, at page 3, line 3). This conjecture is layered upon the conjecture that a future City Council will sue the SGHAD if the SGHAD fails to operate the Dewatering Facilities when the SGHAD has no funds to do so.

Simply put, this matter fails to meet the requirement of a case of actual controversy as set forth in California Code of Civil Procedure section 1060 and as elucidated by the California Supreme Court in the *Meyer* case.

V. The Doctrines of Impossibility, Impracticality, and/or Frustration of Purpose Do Not Apply in This Matter.

The doctrines of Impossibility, Impracticality, and/or Frustration of Purpose cannot serve as grounds to excuse performance by SGHAD because it was foreseeable that the SGHAD would run out of funds if its' constituent members did not replenish the SGHAD's funds through an assessment. Moreover, running out of money to perform a contract has never been an excuse to performance. It could be grounds for bankruptcy protection which may relieve a party from performance obligations. It may also make it impossible for the aggrieved party to compel performance, which only means that some breaches of contract may be without redress. But there is simply no authority that merely running out of funds is an absolute excuse to performance.

The California Supreme Court addressed the issue as far back as 1944 in *Lloyd v. Murphy* (1944) 25 Cal.2d 48. That case involved a 1940 lease where the lessee defendant would use the premises for the selling of new automobiles and sale of gasoline and nothing else without the consent of the lessor, plaintiffs. Governmental restrictions resulting from World War II placed severe restrictions on those uses and, though plaintiff waived the restrictions on the limited use, the defendant repudiated the lease, arguing impossibility and frustration of purpose. The Court explained in its decision that impossibility and frustration of purpose are similar defenses, but that in frustration of purpose situations, performance remains possible, but the expected value of performance has been destroyed by a fortuitous event. The Court summarized the lack of foreseeability requirement inherent in the defense as follows:

> The courts have required a promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counterperformance is totally or nearly totally destroyed, for frustration is no defense if it was foreseeable or controllable by the promisor, or if counterperformance remains valuable.

(*Id.* at p. 54)

Ultimately, the Court affirmed the judgement adverse to the defendant lessee finding that "Defendant has therefore failed to prove that the possibility of war and its consequences on the production and sale of new automobiles was an unanticipated circumstance wholly outside the contemplation of the parties." (*Id.* at p. 56.) In addition, the Court found that defendant had also failed to prove a total or near total destruction of the leased premises, which was also required under the doctrine.

The same principal requirements for application of frustration of purpose were applied in *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1336, where the court cited *Lloyd* in stating:

> [W]here performance remains possible, but the reason the parties entered the agreement has been frustrated by a supervening circumstance that was not anticipated, such that the value of performance by the party standing on the contract is substantially destroyed, the doctrine of commercial frustration applies to excuse performance.

Foreseeability is similarly a requirement of the defense of impossibility (and its derivative, impracticality). *See Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66

Cal.App.3d 101, 154 ["Since the evidence at bar is devoid of any condition or expense which could not reasonably have been anticipated, Misbin and Holmes cannot eschew their contractual obligation by relying upon the defense of impossibility."]

The facts demonstrate that the SGHAD was under no misapprehension that the initial $3.5 million in funding from the settlement sums in the Delmonico Lawsuit would not last indefinitely and would have to be supplemented within decades. The City urged $8 million to be allocated to the District, but the property owner plaintiffs, encouraged by their attorneys, would agree to only $3.5 million. (See Decl. of Michael Rubin, ¶ 6 and see the meeting notes of the plaintiffs' Landslide Committee dated March 5, 1998, Ex. 3, ANA 535.) The overwhelming majority of the properties within the boundaries of the SGHAD are properties that had been owned by plaintiffs in the Delmonico Lawsuit. (See Decl. of Michael Rubin, ¶ 10, and Ex. 38, p. SGHAD 4772.) One of the Directors of the SGHAD that voted to approve the Agreement with the City at the SGHAD's May 10, 1999 Board meeting was Ed Muratori. (See Ex. 13, p. SGHAD 4084.) Ed Muratori was a plaintiff property owner who was present at the March 5, 1998 Landslide Committee meeting wherein the City's proposal to allocate $8 million to the SGHAD was discussed and the plaintiffs' attorneys preference for a $3.5 million allocation was also discussed. (See Ex. 3, ANA 533 and 535.)

At the first meeting of the SGHAD Board, on March 29, 1999, Board member Salene asked City representative, Michael Rubin, about the cost of operating the Dewatering System. Mr. Rubin responded that the cost being paid by the City was approximately $230,000 per year. Mr. Salene stated that $3.5 million would not be enough to cover the costs indefinitely and Mr. Rubin concurred, indicating that the City had proposed a larger amount of the settlement sum go to the SGHAD but that had been rejected. (See Decl. of Michael Rubin, ¶ 11 and March 29, 1999 SGHAD Minutes, Ex. 12, at the bottom of p. SGHAD 4088.) In addition the SGHAD would have to pay for the costs of its legal counsel that attended its Board meetings. (Stipulation of Facts #14.) At its May 10, 1999 meeting the Board discussed the bid it received for liability insurance for $63,000 per year. (Stipulation of Facts #14.) The annual costs of the SGHAD which were known to the SGHAD before its Board approved the Agreement with the City on Mary 10, 1999

made it obvious that an assessment would be needed to supplement the $3.5 million in less than 30 years. In fact, at the May 10, 1999 SGHAD Board meeting, Chairman Collett made a motion to not approve the contract with the City based upon his belief that the SGHAD would be underfunded. This motion was seconded by Director Muratori who stated that he agreed with Collett.

Accordingly the doctrines of impossibility, impracticality, or frustration of purpose have no application to this matter, because it was completely foreseeable (and foreseen) that the $3.5 million would be depleted, unless an assessment was passed to supplement the SGHAD's funds.

VI. Declaratory Relief in This Matter is Not Appropriate and Should be Denied by the Arbitrator.

There is no actual controversy in this matter that is minimally required for the issuance of declaratory relief. There is no allegation that the City has threatened to sue SGHAD if SGHAD fails to continue the operation of the Dewatering Facilities after SGHAD's funds run out. In fact, it would seem to be an idle act to sue the SGHAD to perform under such circumstances, because the SGHAD would not have the capability of performing. SGHAD is unable to show how declaratory relief in this matter will assist the parties to conform their conduct to the law and prevent future litigation. There is no, and can be no, allegation that the continuation of the contractual relationship between the parties hinges on the SGHAD's requested declaratory relief. There is no allegation that the issuance of declaratory relief will have any practical consequences or that such issuance is likely to alter the parties' behavior. This matter fails all of the requirements for declaratory relief set forth by the California Supreme Court in the *Meyer* decision.

Moreover, SGHAD also fails in its justification for a declaration that it will be excused from further performance if it runs out of funds. It cannot meet the requirements to be excused through the doctrines of impossibility, impracticality and/or frustration of purpose because SGHAD is unable to show that depletion of the $3.5 million GHAD Distribution was unforeseeable.

Awarding declaratory relief in this matter would encourage litigation to determine

questions that need never otherwise become lawsuits/arbitrations. Some may ask why not open the courts to whatever hypothetical questions that trouble a party to a contract. Public policy, as incorporated in Code of Civil Procedure section 1060, has answered that question by limiting declaratory relief and excluding matters like this one, which need never manifest in litigation.

Respectfully submitted,

Dated: January 23, 2023

RUTAN & TUCKER, LLP
MICHAEL RUBIN

By: _____
Michael Rubin
Attorneys for Respondent, City of Anaheim

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP 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 18575 Jamboree Road, 9th Floor, Irvine, CA 92612. My electronic notification address is mmartinez@rutan.com.

On January 23, 2023, I served on the interested parties in said action the within:

CITY OF ANAHEIM'S OPENING BRIEF

as stated below:

Eric J. Benink
BENINK & SLAVENS, LLP
8885 Rio San Diego Dr., Ste. 207
San Diego, CA 92108

E-Mail: eric@beninkslavens.com

☒ (BY ELECTRONIC TRANSMISSION VIA JAMS ACCESS) by transmitting a true copy of the foregoing document(s) to the e-mail addresses set forth above.

Executed on January 23, 2023, at Irvine, California.

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

Marisol Martinez	/s/ *Marisol Martinez*
(Type or print name)	(Signature)