> only be billed for the water that passes through the meters at the Point of Delivery, less any amounts that backflow into the KWSC system.

See Agreement, Exh. A-1, p. 35, Art. 4.2. The Parties have expressly agreed that there is no distinction between the sources of water; all the water is owned by KWSC, is effectively KWSC treated water, until delivered to the City, at which point it becomes the City's water. The City is expressly obligated to pay "for the water that passes through the meters at the Point of Delivery."

5.04 **"Treated Water" is Undefined.** There is no language in the Agreement that imposes an obligation on Kempner to deliver water treated by Central Texas to the City. *See Id.* The term "treated water" is not defined in any provision of the Agreement. Article 1.1 of the Agreement defines over sixty (60) terms over five pages of a forty six (46) page agreement. *See* Agreement, p. 3-9, Art. 1.1. In none of those defined terms, nor in the remainder of the Agreement, is the term "treated water" defined. *Id.* Treated water is certainly not defined as water treated by CTWSC as the City would have this Court imply. Because the parties did not agree upon "treated water" having any special meaning as a defined term, it should be given its ordinary meaning. When construing contracts, courts give words their plain, common, or generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense or doing so would defeat the parties' intent or render the contract unenforceable. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656 (Tex. 2005); Masgas v. Anderson, 310 S.W.3d 567 (Tex. App.—Eastland 2010, pet. denied); *Plotkin v. Joekel*, 304 S.W.3d 455 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *Abatement Inc. v. Williams*, 324 S.W.3d 858 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). This rule applies to undefined contractual terms. *Abatement Inc. v. Williams*, 324 S.W.3d 858 (Tex. App.—Houston

[14th Dist.] 2010, pet. denied); *Gray & Co. Realtors, Inc. v. Atl. Hous. Found., Inc.*, 228 S.W.3d 431 (Tex. App.—Dallas 2007, no pet.). This is bolstered by the acknowledgement of the parties in other provisions of the Agreement that water would be mixed but that all water is KWSC water.

5.05 **Payment for Treated Water.** The Agreement states that the City pays for all water delivered through the meters from Kempner to the City, at the City's points of delivery. *See* Agreement, Exh. A-1, p. 23, Art. 3.5 (A). Specifically, the Agreement requires the City to pay Kempner for delivery of treated water at the rate of:

> For each 1000 gallons of water delivered to the City at the City's Points of Delivery, the City shall pay the amount per 1,000 gallons that KWSC pays to CTWSC as CTWSC Treated Water Cost ... being the same rate per 1000 gallons of treated water charged by CTWSC to KWSC ... subject to annual adjustment as provided herein.

Id. This provision of the Agreement governs the rate for **all water** that is provided at all of the City's Points of Delivery by Kempner and is consistent with the provisions of Article 4.2 that expressly obligate the City to pay "for the water that passes through the meters at the Point of Delivery." *See* Agreement, Exh. A-1, p. 23, Art. 3.5 (A); p. 35, Art. 4.2. The Agreement does not provide different rates for water depending on the source of the water, nor does it distinguish between water treated at CTWSC and water treated at KWSC. *Id.* The Agreement also requires that the "bill" delivered to the City each month to state specifically the "quantity of water delivered at the Points of Delivery," making no direct linkage to the amount of water treated at CTWSC for the City. *See* Agreement, Exh. A-1, p. 31-32, Art. 3.10.

5 06 **Water will Mix.** The Parties in the Agreement acknowledge that Kempner and Central Texas water will inevitably mix in the transmission line, and as agreed, the "treated water cost" the City is to pay is determined by the rate set for Central Texas

treated water cost that Central Texas charges Kempner, no matter whether it is Kempner or Central Texas' treated water. *See Agreement, Exh. A-1, p. 30, Art. 3.7.* In fact the Parties went so far as to contractually obligate KWSC to deliver water from its treatment plant at a quality that met all Texas Commission on Environmental Quality and other regulatory requirements. *See Id.* It is impossible to construct a reasonable interpretation of this Agreement that would establish that KWSC is obligated to provide water from the KWSC treatment plant, at a sufficient regulatory quality to the City, without the City being obligated to pay for such water.

5.07 **Kempner's New Facilities.** The Agreement, although entered prior to the construction of the KWSC treatment plant, anticipates its eventual construction. *See* Agreement, Exh. A-1, p. 17-18, Art. 3.1 (C.3) "KWSC New Facilities." Further, the Agreement provides the City the contractual authority to request improvements be made to the "KWSC New Facilities", which by definition would include the treatment plant, for the City's benefit. *See* Agreement, Exh. A-1, p. 17-18, Art. 3.1 (C.3). These provisions highlight the Parties' understanding that the KWSC's treatment plant would be serving at least a portion of the City's treated water needs.

5.08 **Intent to Deliver "treated water."** The recitals of the Agreement make clear that the intent of the Agreement was for KWSC to deliver treated water to the City, regardless of the source. *See* Agreement, Exh. A-1, p. 3. ("WHEREAS, subject to the provisions set out herein, KWSC desires to transmit treated water to the City and the City desires to receive treated water from KWSC in accordance with the terms of this Contract, and..."). The parties acknowledged that their intentions were to meet present and future water needs that did not require dependence on Central Texas' treatment plant:

> WHEREAS, KWSC has intended historically, and in this Agreement intends for the future, to supply the City with treated water in capacities and at pressures consistent with the design parameters of the KWSC and the CTWSC systems, taking into account both the current and future legitimate water supply requirements of the City and the current and future legitimate water storage transmission, capacity and pressure requirements necessary to allow KWSC and the City to meet their own respective regulatory requirements, but without warranty that KWSC's performance under this Agreement will enable the City, at all times and under all circumstances, to meet all of its regulatory requirements by way of reliance upon flow rates and pressures afforded solely by the KWSC system hereunder;

See Agreement, Exh. A-1, p. 3. A recital is a formal statement in a contract that is used to explain the reasons upon which the transaction is based. *Angell v. Bailey,* 225 S.W.3d 834 (Tex. App.—El Paso 2007, no pet.); *EMC Mortg. Corp. v. Davis,* 167 S.W.3d 406 (Tex. App.—Austin 2005, pet. denied); *McMahan v. Greenwood,* 108 S.W.3d 467 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Recitals are not strictly part of the contract, but they may nevertheless be treated as a part of it if this is the apparent intention of the parties. *Universal Health Services, Inc. v. Thompson,* 63 S.W.3d 537 (Tex. App.—Austin 2001, pet. granted), rev'd sub nom. *Universal Health Services, Inc. v. Renaissance Women's Group, P.A.,* 121 S.W.3d 742 (Tex. 2003).

5.09 **Reserved Capacity Provisions.** Under the Agreement the parties agreed that Kempner is obligated to meet the City's reserved treatment capacity needs up to 6.9 MGD. When the Agreement was executed in 2006, there is no dispute that the only source of treated water for Kempner and the City was CTWSC's treatment plant. The parties acknowledged that in Kempner's capacity at CTWSC, the City had 4.84 MGD in capacity for its benefit pursuant to a separate agreement between CTWSC and Kempner. *See* Agreement, Art. 3.1.A. The Agreement also acknowledges that the City has 6.9 MGD capacity in the pipeline for transmission of water. *See* Agreement, Art.

3.1.B. Pursuant to the terms of the Agreement, the City may increase its reserved treatment capacity by 2.06 MGD, to 6.9 MGD. *Id.* In such event, KWSC may elect "at its option" to "provide the added water treatment plant capacity from its water treatment plant instead of from CTWSC." *Id.* This provision further amplifies that Kempner gets to manage the source of water delivered to the City "at its option." The parties would not have to supplement or amend the Agreement to address the cost of delivery of additional treated water since Article 3.5A covers "treated water" no matter its source. Kempner would bill the City at the rate the 1,000 gallons that Central Texas was charging.

B. The City's Interpretation of the Agreement is Absurd: Kempner must meet the City's needs but cannot charge for water, even when water must be treated at its plant.

5.10 The absurdity of the City's requested interpretation is further compounded by the City's position acknowledged at the deposition of its corporate representative, Finley deGraffenried. The City admits that under the Agreement, Kempner is required to (1) meet the additional capacity needs of the City which may be met at Kempner's water treatment plant at its sole option, (2) meet the City's water needs even during events of force majeure when the Central Texas plant is not operable, (3) provide treated water meeting state and federal standards even if Central Texas is unable to meet such requirements, and (4) operate Kempner's system in a manner that benefits all of its customers, not for the City's exclusive benefit, or to the detriment of Kempner's customers. It is the City's contention that the Court should interpret this Agreement to require Kempner to meet all of these obligations, but not be guaranteed the ability to charge the City in the event that water is delivered from Kempner's plant. Such a reading of the Agreement is obviously absurd and should not be indulged by the Court.

5.11. **City's Contentions of Reserved Capacity Provisions**. As explained above, the City may increase its reserved treatment capacity by 2.06 MGD, to 6.9 MGD and in such an event, KWSC may elect "at its option" to "provide the added water treatment plant capacity from its water treatment plant instead of from CTWSC." *Id.* The parties would not have to supplement or amend the Agreement to address the cost of delivery of additional treated water since Article 3.5A covers "treated water" no mater its source. Kempner would bill the City at the rate the 1,000 gallons that Central Texas was charging it. At the deposition of the City's corporate representative, Mr. deGraffenried acknowledged these provisions, but took the position that the Agreement lacked clarity on the subject of what Kempner could charge the City for water delivered pursuant to these express provisions of the Agreement, if Kempner met the City's additional water supply needs from capacity at its plant. *See* deGraffenried Depo., Exh. B, p. 105-109. While the City admitted that Kempner is entitled to compensation for water delivered from its plant pursuant to these terms, the City contends that the parties would have to negotiate a price. *Id.* at p. 105-109. The City's position that the provisions of Article 3.5A do not apply or cover this situation reveals the nonsensical position taken by the City when faced with express provisions that cover a circumstance contemplated by the parties when the Agreement was executed in 2006. Clearly, pursuant to the express provisions of the Agreement, the parties intended that Kempner could provide additional capacity at its plant, deliver water as Kempner determined appropriate and charge the City for water delivered at the Central Texas rate.

5.12 **Acts of Force Majeure.** Article 5.1 of the Agreement outlines acts of force majeure that relieve KWSC and the City from the terms of the Agreement. Despite such contingencies Article 5.1 states, "Notwithstanding the foregoing, this provision shall not

be construed to apply to this delivery and pressure obligations set forth in Article 3.9.A, or to supplant Article 3.9.C, or the specific remedies for Intrusion provided therein." Articles 3.9.A and 3.9.C continue to obligate KWSC to deliver water even in a situation in which CTWSC may be wholly unable to produce treated water. *See* Agreement, Art. 5.1. At the deposition of the City's corporate representative, the City admitted that the Agreement requires Kempner to meet the City's water requirements even if the Central Texas plant burned down overnight. *See* deGraffenried Depo., Exh. B, p. 76-80. Mr. deGraffenried admitted that in such an event, Kempner would be required to provide the City water treated at Kempner's plant, but took the inequitable position that Kempner would not be able to bill the City for it. *Id.* Clearly, such a construction of the Agreement is unreasonable given the provisions of the Agreement that expressly allow Kempner to charge the City for water delivered at the City Points of Delivery at the rate charged by Central Texas.

5.13 **CTWSC Water Quality**. The City admitted that water quality issues may result in KWSC needing to deliver water from its plant. Article 3.7 of the Agreement requires that "KWSC will deliver treated water at the City's Points of Delivery with a disinfectant residual that meets or exceeds minimum standards." The entirety of Article 3.7 provides no exceptions to the quality requirements in the event that CTWSC is unable to provide water that meets residual. *See* Agreement, Article 3.7. In fact, the provision goes on to require that all treated water from KWSC treatment facilities be to a compliant residual. *Id.* The obligation of Article 3.7 is KWSC's and KWSC's alone, and combined with the fact that KWSC's own treated water must meet the same quality requirements only one conclusion can be reached, KWSC is required to deliver treated water of a legally sufficient quality, no matter whether from CTWSC or KWSC. At the

deposition of the City's corporate representative, the City admitted that the Agreement requires Kempner to meet the water quality requirements even if the Central Texas was unable to do so. *See* deGraffenried Depo., Exh. B, p. 110-111. The City admitted that Kempner would be expected to use water treated at its plant, but contends that the Agreement does not permit Kempner to charge the City for the water delivered from its plant. *Id.* The Court should avoid such a caustic, unreasonable interpretation of the Agreement advocated by the City. Instead, the Agreement should be interpreted to permit Kempner to meet specific legal quality standards for its treated water from whatever source Kempner elects to utilize and charge the City at the rate charged by Central Texas.

5.14 **Prudent/Economical Operation for All.** The Agreement requires and permits Kempner to act both prudently and economically for the benefit of all of its customers in operating its system. Article 4.1 of the Agreement provides: "KWSC recognizes its right and duty to operate the KWSC system in the most prudent and economical manner for the benefit of all its customers, including the City." *See* Agreement, Exh. A-1, p. 35, Art. 4.1. Article 4.1 establishes the Parties' intention to provide KWSC with flexibility in the operation of its system. *Id.* This provision implicitly provides KWSC the authority to determine the source of water, whether from KWSC or CTWSC, and how much to take from each treatment facility so as to act prudently and economically to the benefit of all its customers including the City. The Agreement is for a term of eighty (80) years; such a lengthy term requires that KWSC have flexibility as to determining what water is the best source economically and quality wise for its customers. *See* Agreement, Exh A-1, p. 43, Art. 5.4. At the deposition of its corporate representative, the City acknowledged Kempner's rights and obligations pursuant to

Article 4.1. *See* deGraffenried Depo., Exh. B, p. 125-128. The City's contention that Kempner is permitted to choose the composition of the water it delivers to the City pursuant to the provision of Article 4.1, but not charge the City for any water treated at its plant, defies the express language in the Agreement and is an unjust and oppressive interpretation of the Agreement that should be avoided.

C. The Agreement allows KWSC to take below the "floor" and the City is obligated to pay for any "floor" increment charge.

5.15 **Central Texas Operation and Maintenance Expenses.** The Agreement requires the City and Kempner to share in the portion of Central Texas's operation and maintenance ("O&M") expenses that Central Texas bills to Kempner each month. *See* Agreement, Exh. A-1, p. 23-24, Art. 3.5 (B). Central Texas O&M includes all direct costs and expenses incurred by Central Texas for general overhead expense, and also includes non-capital repairs. *Id.* The Agreement also provides that, in the event that demand from the City and Kempner does not meet a minimum threshold (the "Floor") of 26.4% of Central Texas's overall production, the City pay a proportionate share determined by the Agreement. *Id.* This Floor, originally 42%, was negotiated by Kempner with Central Texas in their corresponding wholesale water supply contract, and later reduced when Kempner relinquished some of its (but not the City's) capacity.

5.16 **The "floor" is not contingent on the City's demand.** The Agreement contemplates that any "floor," or take or pay, provision that would be applicable to the Agreement will be negotiated between KWSC and CTWSC, and the City will not be involved. *See id.* The Agreement goes onto say that "to the extent that any floor applies to CTWSC O&M Expense in a particular month, the City and KWSC will pay that increment based on the ratio of their respective capacities...". *Id.* The Agreement

provides no restrictions, limitations, or contingencies on when or why the "floor" may apply, only that the "floor" will be negotiated by KWSC and CTWSC, and that the allocation of any "floor" amount will be allocated based on the City and KWSC's respective capacities. *See id.* This provision in no way conditions itself on the amount of water the City receives from KWSC at its Points of Delivery. *See id.*

5.17 **Economical Operations Affect Floor.** The provisions of Article 4.1 of the Agreement contemplate that Kempner is entitled to determine how to best operate its water system for the benefit of all of its customers not just to benefit the City. This provision implicitly permits KWSC the right to take below the "floor" from CTWSC if such a decision is in the best interest of the KWSC's customers. *See* Agreement, Art. 5.4. The City's contention that Kempner is prohibited from making such operational decisions or from charging the City for water delivered to it that was treated at Kempner's plant is contrary to this provision and an unjust, oppressive interpretation of the Agreement that should not be indulged by this Court. *See* deGraffenried Depo., Exh. B, p. 125-128.

5.18 **Summary.** The plain and unambiguous language of the Agreement reveals one vivid point, that KWSC agreed to deliver treated water and the City agreed to pay for such water, no matter the source. Using the well-established rules of contract construction, there is no need for the Court to consider parole evidence as the four corners of the Agreement establish the basis for KWSC's request for declaratory relief. The Court should rule that the Agreement is unambiguous; Kempner is entitled to bill the City for water delivered to the City at its Points of Delivery at the rate charged for treated water by Central Texas.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Kempner respectfully prays that following the hearing of this Motion, the Court grant Kempner's Motion for Partial Summary Judgment and deny all relief sought by the City in its Petition and that the Court declare that, the Agreement is unambiguous and that under the Agreement, the City is required to: (1) pay Kempner for treated water that is delivered by Kempner to the City's Points of Delivery at the same rate per 1,000 gallons as Kempner pays Central Texas for treated water, no matter the source of the water delivered to Kempner; (2) pay a proportionate share of the Floor—of 26.4% of Central Texas' overall production—in the event demand does not meet the Floor; and (3) pay for Central Texas O&M as set forth in the Agreement regardless of how much of the water supplied by Kempner to the City is produced by the Kempner treatment plant or the Central Texas treatment plant; and for such other and further relief to which Kempner Water Supply Corporation may show itself entitled.

Respectfully submitted,

DAVIDSON TROILO REAM & GARZA, P.C.
7550 West IH-10, Suite 800
San Antonio, Texas 78229-5815
Telephone (210) 349-6484
Facsimile (210) 349-0041

By: Lea A. Ream
Lea Ream
State Bar No. 16636750
Patrick W. Lindner
State Bar No. 12367850
William A. Faulk, III
State Bar No. 24075674
ATTORNEYS FOR
KEMPNER WATER SUPPLY CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2014, a true and correct copy of the above and foregoing Kempner Water Supply Corporation's Motion for Partial Summary Judgment was served by electronic delivery and/or hand delivered to the following:

David P. Lein dlein@gdhm.com
Helen Currie Foster hfoster@gdhm.com
Graves Dougherty Hearon & Moody, P.C.
401 Congress Avenue, Ste. 2200
Austin, TX 78701

Lea A. Ream

Lea A. Ream

CAUSE NO. 19005

CITY OF LAMPASAS, TEXAS *Plaintiff*	§ §	IN THE DISTRICT COURT
	§	LAMPASAS COUNTY, TEXAS
VS.	§ §	
KEMPNER WATER SUPPLY CORP. *Defendant*	§ §	27TH JUDICIAL DISTRICT

KEMPNER WATER SUPPLY CORP.'S AMENDED RESPONSE TO THE CITY OF LAMPASAS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, KEMPNER WATER SUPPLY CORP. (hereinafter "KWSC" or "Kempner") and files this Amended Response to the City of Lampasas' Motion for Summary Judgment. In support thereof KWSC would respectfully show the Court as follows:

I.

SUMMARY OF RESPONSE

1.01 The City of Lampasas ("Lampasas" or "the City") contends in its Petition that Kempner is obligated to meet its water needs from whatever source Kempner must or chooses to utilize, but contends that if Kempner utilizes water treated at its plant to meet the City's needs-out of necessity or choice, Kempner cannot charge the City for the treated water it provides. First, the City argues in its Motion for Summary Judgment that the Agreement is unambiguous and should be interpreted in the absurd way that the City suggests despite clear contractual provisions to the contrary. Significantly, throughout its Motion, the City looks very little to the actual language of the Agreement and instead, chooses to divert attention by relying on inadmissible, parole evidence to

support its unreasonable interpretation of the Agreement. The Court should not be misled by such efforts. The Court should look at the Agreement and ascertain whether the Agreement is ambiguous or not. Upon review, it is apparent that the Agreement is unambiguous and should be read to allow Kempner to deliver water treated from whatever source and to require the City to pay for treated water delivered by Kempner at the City's Points of Delivery in accordance with the plain language of the Agreement.[1] The rate provisions of the Agreement provide that the City is obligated to pay for water delivered at the rate that Central Texas charges KWSC per 1,000 gallons of water treated. This provides the protection that the City desires, Kempner delivering treated water to meet the City's varying needs at a defined Central Texas rate that the City agreed to pay Kempner. The City's interpretation of the Agreement defies reason and the plain and express provisions of the Agreement which do not impose any limitation on the source of treated water delivered by Kempner or Kempner's ability to charge for such water. Rather, the Agreement requires Kempner to deliver "treated water" and requires the City to pay for "treated water." The parties agreed and acknowledged that the water delivered by Kempner would be Kempner water irrespective of who treated it. By definition, it is Kempner's water until, it is delivered to the City's Points of Delivery, at which point it becomes the City's water for which Kempner is entitled to be paid.

1.02 If the Court rules that the Agreement is ambiguous, the City has endeavored to support its summary judgment of its tenuous interpretation of the Agreement with parole evidence arguing that it has met the extraordinary burden of establishing the absence of a fact issue and is entitled to judgment as a matter of law.

1 Kempner has filed a Motion for Partial Summary Judgment on this basis and supporting this relief.

On its face the City's Motion does not meet the requirements for summary judgment.[2] Its Motion is replete with unsupported conjecture and argument that are insufficient to meet the high burden for summary judgment that would be necessary for the Court to determine the meaning of the Agreement, as a matter of law. Such a determination naturally requires evidence of the parties' intent when entering the Agreement in 2006. This is an inherent factual inquiry. The inadequacy of the City's summary judgment is compounded by the evidence that Kempner has attached to this Response which raises additional issues of fact that prevent this Court from finding for the City on the second portion of its Motion.

1.03 The absurdity of the City's requested interpretation is further magnified by the City's admissions at the deposition of its corporate representative. The City admits that under the Agreement it contends that Kempner is required to (1) meet the future additional capacity needs of the City which may be met by Kempner's water treatment plant at Kempner's sole option, (2) meet the City's water needs even during events of force majeure when the Central Texas plant is not operable, (3) provide treated water meeting state and federal standards even if Central Texas is unable to meet such requirements, and (4) operate Kempner's system in a manner that benefits all of its customers, not for the City's exclusive benefit, or to the detriment of Kempner's other customers. It is the City's contention that the Court should determine whether the Agreement is unambiguous and if so determined, interpret this Agreement to require

[2] Kempner has separately filed a Motion for Continuance of the Summary Judgment hearing to allow it to depose Mike Talbot, one of the two affiants that the City relies on in its Motion for Summary Judgment. Mr. Talbot's deposition could not be scheduled until December 15, 2014. Kempner has also separately filed Objections and a Motion to Strike Evidence. Both of these Motions are hereby incorporated by reference in this Response.

Kempner to meet all of these obligations, but not charge the City in the event that water is delivered from Kempner's plant. Such a reading of the Agreement is obviously absurd, is against the plain language of the Agreement and should not be indulged by the Court.

1.04 The Court should interpret this Agreement in accordance with its express, plain terms given the objectives intended and should avoid a construction that is absurd, unreasonable, inequitable and oppressive. The parties agreed that this Agreement should be construed to effectuate the purposes set forth therein, sustain the validity of the contract and to comply with all applicable laws and rules. The interpretation suggested by the City contravenes reason, the language of the Agreement and would effectively invalidate the Agreement. Such an interpretation should be avoided.

II.

SUMMARY JUDGMENT EVIDENCE

2.01 In support of this Response, Kempner incorporates by reference the following Exhibits:

Exhibit A **Affidavit of Delores Goode**

Exhibit B **Affidavit of Perry Steger**

Exhibit C **Deposition Excerpts of Finley deGraffenried, Corporate Representative of the City of Lampasas**

Exhibit D **Deposition Excerpts of Michael Talbot**

III.

APPLICABLE SUMMARY JUDGMENT STANDARDS

3.01 **General Standard.** The City, as movant in a summary judgment proceeding, has the burden of showing that no genuine issue of material fact exists and

that it is entitled to judgment as matter of law. *Starcrest Trust v. Berry*, 926 S.W.2d 343 (Tex. App.--Austin 1996, no writ). The moving party's summary judgment evidence must facially establish its right to judgment as a matter of law; upon such a showing, the burden shifts to the non-moving party to raise a genuine issue of material fact sufficient to defeat summary judgment. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1987).

3.02 **Construction of Contracts.** Texas law presumes that the parties to a contract intended every clause to have some effect. *MasTec N. Am., Inc. v. El Paso Field Services, L.P.*, 317 S.W.3d 431 (Tex. App.—Houston [1st Dist.] 2010, pet. granted), rev'd, 389 S.W.3d 802 (Tex. 2012); *Thedford Crossing, L.P. v. Tyler Rose Nursery, Inc.*, 306 S.W.3d 860 (Tex. App.—Tyler 2010, pet. denied); *Virginia Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *Worldwide Asset Purchasing, L.L.C. v. Rent-A-Ctr. E., Inc.*, 290 S.W.3d 554 (Tex. App.—Dallas 2009, no pet.). A court must consider each part of the document with every other part of the document so that the effect and meaning of one part on any other part may be determined. *Pineridge Associates, L.P. v. Ridgepine, LLC*, 337 S.W.3d 461 (Tex. App.—Fort Worth 2011, no pet.); *Thedford Crossing, L.P. v. Tyler Rose Nursery, Inc.*, 306 S.W.3d 860 (Tex. App.—Tyler 2010, pet. denied). To achieve the objective of ascertaining the true intentions of the parties as expressed in the instrument, a court must examine and consider the entire contract in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *Grohman v. Kahlig*, 318 S.W.3d 882 (Tex. 2010); *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248 (Tex. 2009).

A. **Ambiguity: Question of Law**. Whether the Agreement is ambiguous is a question for the court. *Brown v. Payne*, 176 S.W.2d 306, 308 (Tex. 1943); *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 861 (Tex. 2000)("Whether a contract is ambiguous is a question for law for the court to decide."); *see also Dynegy Midstream Services, Ltd. Partnership v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009). A mere disagreement between the parties on the meaning of a contract does not create an ambiguity. *GTE Mobilnet v. Telecell Cellular, Inc.*, 955 S.W.2d 286, 289 n. 1 (Tex. App.—Houston [1st Dist.] 1997, writ denied).

B. **The Agreement is Not Ambiguous**. If a contract as written can be given a clear and definite legal meaning, then, as a matter of law, it is not ambiguous. *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248 (Tex. 2009). A contract is not ambiguous simply because the parties disagree over its meaning and advance conflicting interpretations of it. *Dynegy Midstream Services, Ltd. Partnership v. Apache Corp.*, 294 S.W.3d 164 (Tex. 2009). An agreement is ambiguous only if it is subject to more than one reasonable interpretation. *Nat'l Union Fire Ins. Co. v. CBI Indus.*, 907 S.W.2d 517, 520 (Tex.1995)(emphasis added). The City's position on how the Court should interpret the Agreement is contrary to the express and plain language of the Agreement, is unreasonable and is absurd.

C. **Parole Evidence is Inadmissible Unless Ambiguity Is Found First by the Court and Even Then is Not Justified in This Case.** If the court determines that the contract is ambiguous, the parties' intent is a fact issue. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). The Court is permitted to consider parole evidence after it determines that the Agreement is ambiguous, but not before such a

determination. Parole testimony is admissible to show what the real contract was to the extent necessary to remove the ambiguity. *Atl. Lloyds Ins. Co. v. Butler, 137 S.W.3d 199, 211 (Tex. App.—Houston [1st Dist.] 2004, pet. denied)* As a result, the Court should not consider the parole evidence submitted by the City in support of its Motion. It should look at the Agreement in isolation to determine whether it is ambiguous. Parole evidence is admissible to explain ambiguous words, phrases, or provisions in a written instrument. *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517 (Tex. 1980). It is not admissible to explain, contradict, or vary the meaning of the unambiguous language of an instrument, and in such a case the instrument should be enforced as written. *Alba Tool and Supply Co., Inc. v. Industrial Contractors*, 585 S.W.2d 662 (Tex. 1979); *Guerra v. Santa Rosa Independent School Dist.*, 241 S.W.3d 594, (Tex. App.--Corpus Christi 2007, pet. denied). In its use of parole evidence in the alternative, the City points to no specific "word, phrase, or provision" in which the extrinsic evidence is supposed to explain or aid in the interpretation of, instead the evidence is a "buck shot" attempt to provide an implied covenant that Kempner may not charge for water treated at Kempner's plant. Implied covenants are not favoured in Texas law. Courts must be quite cautious in exercising the power to imply provisions, and should only declare implied covenants to exist when there is a satisfactory basis in the express contracts of the parties that makes it necessary to imply certain duties and obligations in order to affect the purposes of the parties in the contracts made. *Bank One, Texas, N.A. v. Stewart, 967 S.W.2d 419, 434 (Tex. App.—Houston [14th Dist.] 1998, pet. denied)*; *Universal Health Services, Inc. v. Renaissance Women's Group, P.A.*, 121 S.W.3d 742 (Tex. 2003). A court will not imply a covenant unless it appears

from the express terms of the contract that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it, or appears that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument. *Fein v. R.P.H., Inc.*, 68 S.W.3d 260, 266 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). Additional terms may be read into a written contract only when it is silent about, and not inconsistent with, what is sought to be so interpolated. *Davis v. Texas Co.*, 232 S.W. 549 (Tex. Civ. App.--Galveston 1921), *rev'd on other grounds*, 113 Tex. 321, 254 S.W. 304 (1923). This was a heavily negotiated agreement by both parties' own admissions, and to allow the City to introduce extrinsic evidence now to imply a covenant that is inconsistent with the plain language of the Agreement and in a situation where the provisions for payment of treated water are discussed in great detail is completely counter to a long tradition of law regarding the use of parole evidence and the creation of implied provisions. The entirety of the City's parole evidence should be excluded on the reasons set forth above.

IV.

THE AGREEMENT IS UNAMBIGUOUS; THE EXPRESS, PLAIN LANGUAGE OF THE AGREEMENT DEFIES THE CITY'S CLAIMS

A. The Agreement expressly and plainly requires KWSC to deliver treated water to the City's Points of Delivery and requires the City to pay for the treated water delivered.

4.01 In 2006, at the time that the Agreement was executed, both KWSC and the City were receiving their treated water from CTWSC up to 7.68 MGD. *See* Agreement, Exh. A-1, p. 12-13, Art. 3.1 A. The Agreement addressed KWSC's plans to

build a plant and treat water. *See* Agreement, Exh. A-1, p. 7; p. 12-13, Art. 3.1 (B.1.a). The City contends in its Motion for Summary Judgment that if KWSC delivers water to the City that has been treated at KWSC's plant, that the City is under no obligation to pay for said water. *See* City's MSJ. The Agreement does not impose obligations on KWSC to deliver water that has been treated by CTWSC and certainly does not support a contention that if treated water is delivered from its plant that the City has no obligation to pay for such water.

4.02 **Delivery of Treated Water.** KWSC is required to deliver "treated water" and the City is required to take "treated water" at the City's Points of Delivery. Section 3.9 of the Agreement requires KWSC to use its:

> best efforts to deliver treated water to the City at each of the two Points of Delivery, at a minimum pressure of 55 psi at the 580 Meter, and 78 psi at the 190 Meter; and, unless the City is drawing water at the Points of Delivery at an instantaneous rate greater than 127 percent of the then applicable Maximum Rate of Delivery, KWSC shall deliver treated water to the City at each of the two Points of Delivery, at a minimum pressure of 55 psi at the 580 Meter, and 78 psi at the 190 Meter.

See Agreement, Exh. A-1, p. 31-32, Art. 3.9 (A). In Article 3.6 of the Agreement the "City agree[d] to take treated water at its Points of Delivery defined as the existing meters located on F.M. 580 northeast of the City and on U.S. Highway 190 east of the City, as shown on the System Map. Any modification to Points of Delivery must be mutually agreed to in writing between KWSC and the City." *See* Agreement, Exh. A-1, p. 30, Art. 3.6. The Agreement simply does not specify the location from which the "treated water" is supposed to come.

4.03 **Delivered Water is KWSC Water.** In fact, the Agreement provides that all delivered water, no matter where treated, is KWSC water. By alleging that the City is

only contractually obligated to pay for water treated at the CTWSC treatment facility, the City is disregarding its agreement that all water delivered to the City's Points of Delivery is the property of KWSC, effectively KWSC treated water. Article 4.2 of the Agreement states:

> (i) title to all water supplied to the City shall be in KWSC up to the Points of Delivery at which point title shall pass to the City...and (iii) the City shall only be billed for the water that passes through the meters at the Point of Delivery, less any amounts that backflow into the KWSC system.

See Agreement, Exh. A-1, p. 35, Art. 4.2. The Parties have expressly agreed that there is no distinction between the sources of water; all the water is owned by KWSC, is effectively KWSC treated water, until delivered to the City, at which point it becomes the City's water. The City is expressly obligated to pay "for the water that passes through the meters at the Point of Delivery." Mr. Talbot the City's former City Manager, who negotiated the Agreement concurs that the Agreement provides that title to the water is held in Kempner up to the City's Points of Delivery, and Kempner is entitled to be paid for such. *See* Talbot Depo, Pgs. 51-53

4.04 **"Treated Water" is Undefined.** There is no language in the Agreement that imposes an obligation on Kempner to deliver water treated by Central Texas to the City. *See Id.* The term "treated water" is not defined in any provision of the Agreement. Article 1.1 of the Agreement defines over sixty (60) terms over five pages of a forty six (46) page agreement. *See* Agreement, Ex. A-1, p. 3-9, Art. 1.1. In none of those defined terms, nor in the remainder of the Agreement, is the term "treated water" defined. *Id.* Treated water is certainly not defined as water treated by CTWSC as the City would have this Court imply. Because the parties did not agree upon "treated water" having any special meaning as a defined term, it should be given its ordinary

meaning. When construing contracts, courts give words their plain, common, or generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense or doing so would defeat the parties' intent or render the contract unenforceable. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656 (Tex. 2005); Masgas v. Anderson, 310 S.W.3d 567 (Tex. App.—Eastland 2010, pet. denied); *Plotkin v. Joekel*, 304 S.W.3d 455 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *Abatement Inc. v. Williams*, 324 S.W.3d 858 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). This rule applies to undefined contractual terms. *Abatement Inc. v. Williams*, 324 S.W.3d 858 (Tex. App.—Houston [14th Dist.] 2010, pet. denied); *Gray & Co. Realtors, Inc. v. Atl. Hous. Found., Inc.*, 228 S.W.3d 431 (Tex. App.—Dallas 2007, no pet.). This is bolstered by the acknowledgement of the parties in other provisions of the Agreement that water would be mixed but that all water is KWSC water.

4.05 **Payment for Treated Water.** The Agreement states that the City pays for all water delivered through the meters from Kempner to the City, at the City's Points of Delivery. *See* Agreement, Exh. A-1, p. 23, Art. 3.5 (A). Specifically, the Agreement requires the City to pay Kempner for delivery of treated water at the rate of:

> For each 1000 gallons of water delivered to the City at the City's Points of Delivery, the City shall pay the amount per 1,000 gallons that KWSC pays to CTWSC as CTWSC Treated Water Cost ... being the same rate per 1000 gallons of treated water charged by CTWSC to KWSC ... subject to annual adjustment as provided herein.

Id. This provision of the Agreement governs the rate for **all water** that is provided at all of the City's Points of Delivery by Kempner and is consistent with the provisions of Article 4.2 that expressly obligate the City to pay "for the water that passes through the meters at the Points of Delivery." *See* Agreement, Exh. A-1, p. 23, Art. 3.5 (A); p. 35,

Art. 4.2. The Agreement does not provide different rates for water depending on the source of the water, nor does it distinguish between water treated at CTWSC and water treated at KWSC. *Id.* The Agreement also requires that the "bill" delivered to the City each month to state specifically the "quantity of water delivered at the Points of Delivery," making no direct linkage to the amount of water treated at CTWSC for the City. *See* Agreement, Exh. A-1, p. 31-32, Art. 3.10. Mr. Talbot again confirms that the City is obligated to pay for all treated water delivered through the City's Points of Delivery. *See* Talbot Depo., Pgs. 52-53.

4.06 **Water will Mix.** The Parties in the Agreement acknowledge that Kempner and Central Texas water will inevitably mix in the transmission line, and as agreed, the "treated water cost" the City is to pay is determined by the rate set for Central Texas treated water cost that Central Texas charges Kempner, no matter whether it is Kempner or Central Texas' treated water. *See* Agreement, Exh. A-1, p. 30, Art. 3.7. In fact the Parties went so far as to contractually obligate KWSC to deliver water from its treatment plant at a quality that met all Texas Commission on Environmental Quality and other regulatory requirements. *See Id.* It is impossible to construct a reasonable interpretation of this Agreement that would establish that KWSC is obligated to provide water from the KWSC treatment plant, at a sufficient regulatory quality to the City, without the City being obligated to pay for such water.

4.07 **Kempner's New Facilities.** The Agreement, although entered prior to the construction of the KWSC treatment plant, anticipates its eventual construction. *See* Agreement, Exh. A-1, p. 17-18, Art. 3.1 (C.3) "KWSC New Facilities." Further, the Agreement provides the City the contractual authority to request improvements be

made to the "KWSC New Facilities", which by definition would include the treatment plant, for the City's benefit. *See* Agreement, Exh. A-1, p. 17-18, Art. 3.1 (C.3). These provisions highlight the Parties' understanding that the KWSC's treatment plant would be serving at least a portion of the City's treated water needs.

4.08 **Intent to Deliver "treated water."** The recitals of the Agreement make clear that the intent of the Agreement was for KWSC to deliver treated water to the City, regardless of the source. *See* Agreement, Exh. A-1, p. 3. ("WHEREAS, subject to the provisions set out herein, KWSC desires to transmit treated water to the City and the City desires to receive treated water from KWSC in accordance with the terms of this Contract, and..."). The parties acknowledged that their intentions were to meet present and future water needs that did not require dependence on Central Texas' treatment plant:

> WHEREAS, KWSC has intended historically, and in this Agreement intends for the future, to supply the City with treated water in capacities and at pressures consistent with the design parameters of the KWSC and the CTWSC systems, taking into account both the current and future legitimate water supply requirements of the City and the current and future legitimate water storage transmission, capacity and pressure requirements necessary to allow KWSC and the City to meet their own respective regulatory requirements, but without warranty that KWSC's performance under this Agreement will enable the City, at all times and under all circumstances, to meet all of its regulatory requirements by way of reliance upon flow rates and pressures afforded solely by the KWSC system hereunder;

See Agreement, Exh. A-1, p. 3. A recital is a formal statement in a contract that is used to explain the reasons upon which the transaction is based. *Angell v. Bailey,* 225 S.W.3d 834 (Tex. App.—El Paso 2007, no pet.); *EMC Mortg. Corp. v. Davis,* 167 S.W.3d 406 (Tex. App.—Austin 2005, pet. denied); *McMahan v. Greenwood,* 108 S.W.3d 467 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Recitals are not

strictly part of the contract, but they may nevertheless be treated as a part of it if this is the apparent intention of the parties. *Universal Health Services, Inc. v. Thompson,* 63 S.W.3d 537 (Tex. App.—Austin 2001, pet. granted), rev'd sub nom. *Universal Health Services, Inc. v. Renaissance Women's Group, P.A.,* 121 S.W.3d 742 (Tex. 2003).

4.09 **Reserved Capacity Provisions.** Under the Agreement the parties agreed that Kempner is obligated to meet the City's reserved treatment capacity needs up to 6.9 MGD. When the Agreement was executed in 2006, there is no dispute that the only source of treated water for Kempner and the City was CTWSC's treatment plant. The parties acknowledged that in Kempner's capacity at CTWSC, the City had 4.84 MGD in capacity for its benefit pursuant to a separate agreement between CTWSC and Kempner. *See* Agreement, Ex. A-1, Art. 3.1.A. The Agreement also acknowledges that the City has 6.9 MGD capacity in the pipeline for transmission of water. *See* Agreement, Ex. A-1, Art. 3.1.B. Pursuant to the terms of the Agreement, the City may increase its reserved treatment capacity by 2.06 MGD, to 6.9 MGD. *Id.* In such event, KWSC may elect "at its option" to "provide the added water treatment plant capacity from its water treatment plant instead of from CTWSC." *Id.* This provision further amplifies that Kempner gets to manage the source of water delivered to the City "at its option." The parties would not have to supplement or amend the Agreement to address the cost of delivery of additional treated water since Article 3.5A covers "treated water" no matter its source. Kempner would bill the City at the rate per 1,000 gallons that Central Texas was charging.

4.10 **The City Relies on One Contract Provision.** The City solely relies on the rate provision found in Article 3.5A of the Agreement for its contention that Kempner

cannot charge the City for water treated at Kempner's plant. The plain language of that provision does not support the City's position. Article 3.5A addresses the rate at which Kempner will charge the City per 1,000 gallons of treated water Kempner delivers to the City. Kempner will charge the City "the amount per 1,000 gallons that KWSC pays to CTWSC as CTWSC Treated Water Cost ... being the same rate per 1000 gallons of treated water charged by CTWSC to KWSC ... subject to annual adjustment as provided herein." See Exh. A-1, Art. 3.5A. The City contends that this provision effectively imposes a cap on what Kempner can charge the City. It claims that Kempner can only charge for the volume of water Kempner takes from CTWSC each month. This provision cannot reasonably be read to impose such a limitation. Certainly if that is what the parties intended it would have been very easy to write such a provision. It would have simply said, "Kempner shall bill the City the amount that Kempner is billed by CTWSC each month and no more." The Agreement does not say that. Rather the Agreement provides the rate per 1,000 gallons that Kempner may charge the City for delivery of treated water. The reading of Article 3.5A of the Agreement advocated by the City obliterates many other contractual provisions in the Agreement as discussed at length above. It would necessitate the Court to read the Agreement in an absurd manner or ignore the express terms of many provisions of the Agreement such as the express provisions permitting Kempner to supply additional capacity to the City at Kempner's water treatment plant. It would require the Court to read countless references in the Agreement to "treated water" as "CTWSC treated water" when the parties did not impose this limitation, or negotiate such a limitation. *See* Steger Aff., Exh. B, at ¶ 5. It would also require Kempner to provide treated water to the City from its plant when

CTWSC is unable to meet the City's needs and necessity requires delivery of water treated at Kempner's water treatment plant as discussed at length below. Such a Draconian interpretation of the Agreement should not be indulged by this Court.

B. The City's Interpretation of the Agreement is Absurd: Kempner must meet the City's needs but cannot charge for water, even when water must be treated at its plant.

4.11 The absurdity of the City's requested interpretation is further compounded by the City's position acknowledged at the deposition of its corporate representative, Finley deGraffenried. *See* Exhibit C. The City admits that under the Agreement, Kempner is required to (1) meet the additional capacity needs of the City which may be met at Kempner's water treatment plant at its sole option, (2) meet the City's water needs even during events of force majeure when the Central Texas plant is not operable, (3) provide treated water meeting state and federal standards even if Central Texas is unable to meet such requirements, and (4) operate Kempner's system in a manner that benefits all of its customers, not for the City's exclusive benefit, or to the detriment of Kempner's customers. It is the City's contention that the Court should interpret this Agreement to require Kempner to meet all of these obligations, but not be guaranteed the ability to charge the City in the event that water is delivered from Kempner's plant. Such a reading of the Agreement is obviously absurd and should not be indulged by the Court.

4.12 **City's Contentions of Reserved Capacity Provisions.** As explained above, the City may increase its reserved treatment capacity by 2.06 MGD, to 6.9 MGD and in such an event, KWSC may elect "at its option" to "provide the added water

treatment plant capacity from its water treatment plant instead of from CTWSC." *See* Agreement, Ex. A-1, Art. 3.1.B. The parties would not have to supplement or amend the Agreement to address the cost of delivery of additional treated water since Article 3.5A covers "treated water" no mater its source. Kempner would bill the City at the rate the 1,000 gallons that Central Texas was charging it. At the deposition of the City's corporate representative, Mr. deGraffenried acknowledged these provisions, but took the position that the Agreement lacked clarity on the subject of what Kempner could charge the City for water delivered pursuant to these express provisions of the Agreement, if Kempner met the City's additional water supply needs from capacity at its plant. *See* deGraffenried Depo., Exh. C, p. 105-109. While the City admitted that Kempner is entitled to compensation for water delivered from its plant pursuant to these terms, the City contends that the parties would have to negotiate a price. *Id.* at p. 105-109. The City's position that the provisions of Article 3.5A do not apply or cover this situation reveals the nonsensical position taken by the City when faced with express provisions that cover a circumstance contemplated by the parties when the Agreement was executed in 2006. Clearly, pursuant to the express provisions of the Agreement, the parties intended that Kempner could provide additional capacity at its plant, deliver water as Kempner determined appropriate and charge the City for water delivered at the Central Texas rate.

4.13 **Acts of Force Majeure.** Article 5.1 of the Agreement outlines acts of force majeure that relieve KWSC and the City from the terms of the Agreement. Despite such contingencies Article 5.1 states, "Notwithstanding the foregoing, this provision shall not be construed to apply to this delivery and pressure obligations set

forth in Article 3.9.A, or to supplant Article 3.9.C, or the specific remedies for Intrusion provided therein." Articles 3.9.A and 3.9.C continue to obligate KWSC to deliver water even in a situation in which CTWSC may be wholly unable to produce treated water. *See* Agreement, Art. 5.1. At the deposition of the City's corporate representative, the City admitted that the Agreement requires Kempner to meet the City's water requirements even if the Central Texas plant burned down overnight. *See* deGraffenried Depo., Exh. C, p. 76-80. Mr. deGraffenried admitted that in such an event, Kempner would be required to provide the City water treated at Kempner's plant, but took the inequitable position that Kempner would not be able to bill the City for it. *Id.* Clearly, such a construction of the Agreement is unreasonable given the provisions of the Agreement that expressly allow Kempner to charge the City for "treated water" delivered at the City Points of Delivery at the rate charged by Central Texas. Mr. Talbot takes a much broader view of the Agreement, and says that in such a force majeure event Kempner would have the discretion and obligation to locate a sufficient quality source of water to meet the demands of the City. *See* Talbot Depo, Pg. 56.

4.14 **CTWSC Water Quality.** The City admitted that water quality issues may result in KWSC needing to deliver water from its plant. Article 3.7 of the Agreement requires that "KWSC will deliver treated water at the City's Points of Delivery with a disinfectant residual that meets or exceeds minimum standards." The entirety of Article 3.7 provides no exceptions to the quality requirements in the event that CTWSC is unable to provide water that meets residual. *See* Agreement, Article 3.7. In fact, the provision goes on to require that all treated water from KWSC treatment facilities be to a compliant residual. *Id.* The obligation of Article 3.7 is KWSC's and KWSC's alone, and

combined with the fact that KWSC's own treated water must meet the same quality requirements only one conclusion can be reached, KWSC is required to deliver treated water of a legally sufficient quality, no matter whether from CTWSC or KWSC. At the deposition of the City's corporate representative, the City admitted that the Agreement requires Kempner to meet the water quality requirements even if the Central Texas was unable to do so. *See* deGraffenried Depo., Exh. C, p. 110-111. The City admitted that Kempner would be expected to use water treated at its plant, but contends that the Agreement does not permit Kempner to charge the City for the water delivered from its plant. *Id.* Mr. Talbot in his deposition admitted that Kempner can provide treated water from any source to the City so long as it meets state and federal quality guidelines. *See* Talbot Depo, Pgs. 56-58. Further, he states that in the event that CTWSC provides water that is of an insufficient quality, Kempner has the option to deliver water to the City from Kempner's plant, and be compensated at the CTWSC rate. *See* Talbot Depo, Pgs. 86-87. The Court should avoid such a caustic, unreasonable interpretation of the Agreement advocated by the City. Instead, the Agreement should be interpreted to permit Kempner to meet specific legal quality standards for its treated water from whatever source Kempner elects to utilize and charge the City at the rate charged by Central Texas.

4.15 **Prudent/Economical Operation for All.** The Agreement requires and permits Kempner to act both prudently and economically for the benefit of all of its customers in operating its system. Article 4.1 of the Agreement provides: "KWSC recognizes its right and duty to operate the KWSC system in the most prudent and economical manner for the benefit of all its customers, including the City." *See*

Agreement, Exh. A-1, p. 35, Art. 4.1. Article 4.1 establishes the Parties' intention to provide KWSC with flexibility in the operation of its system. *Id.* This provision implicitly provides KWSC the authority to determine the source of water, whether from KWSC or CTWSC, and how much to take from each treatment facility so as to act prudently and economically for the benefit of all its customers including the City. The Agreement is for a term of eighty (80) years; such a lengthy term requires that KWSC have flexibility as to determining what water is the best source economically and quality wise for its customers. *See* Agreement, Exh. A-1, p. 43, Art. 5.4. At the deposition of its corporate representative, the City acknowledged Kempner's rights and obligations pursuant to Article 4.1. *See* deGraffenried Depo., Exh. C, p. 125-128. The City's contention that Kempner is permitted to choose the composition of the water it delivers to the City pursuant to the provision of Article 4.1, but not charge the City for any water treated at its plant, defies the express language in the Agreement and is an unjust and oppressive interpretation of the Agreement that should be avoided.

4.16 **The City's Former City Manager holds that the City's position in this suit is "unconscionable."** When questioned as to when the parties entered into the Agreement, whether it was anticipated that the Agreement would provide for Kempner to deliver water to the City at no cost, Mr. Talbot brushed away such a conclusion as "unequitable." *See* Talbot Depo, Pg. 103.

> Q. All right. Do you believe that when the parties entered into this agreement in 2006, that Kempner was required to deliver water to the city at no cost?
>
> A. Oh, no.
>
> Q. Okay.
>
> A. No.
>
> Q. That was never the contemplation of the parties?

> A. No. I mean, that's not fair. That would have been unequitable. That would have been unfair. And I would not have -- that would just -- that just wouldn't be right.
>
> Q. Okay. I mean, that really kind of falls as I understand it in municipal law, the city can't even take things for free, right?
>
> A. No. We are prohibited from taking, yes. But, again, it's just **not equitable**. I mean, why would -- **what intent would the city have in trying to bankrupt Kempner to have us deliver water free?** I mean, that just seems to be **unconscionable** and something that -- if that was discussed, I wasn't a part of it because that would be something that I could not agree to. *Id.*(emphasis added).

From the deposition testimony of Mr. Talbot it becomes quite apparent that the City's position in this suit goes completely against the reasoning at the time of the negotiation of the Agreement. From the lips of its own former City Manager, who over saw the negotiation, such a position was "not fair," "unequitable," "just wouldn't be right," and "unconscionable." *Id.*

V.

IF COURT RULES THAT THE AGREEMENT IS AMBIGUOUS, THE CITY'S MSJ IS INADEQUATE AND THERE ARE GENUINE ISSUES OF MATERIAL FACT

A. THE CITY'S INADEQUATE SUMMARY JUDGMENT EVIDENCE

5.01 The City recites numerous purported "facts" in its Motion for Summary Judgment that are not facts at all, but instead are argument or the City's spin on a document. In some instances the City has not supported facts it relies on with any evidence. In other instances it attaches a document, but the document that does not say what the City says that it says. Of course, in a Motion for Summary Judgment proceeding the movant must do more than simply support a "fact" with an affidavit; it must provide evidence that is conclusive as a matter of law. Examples of many of the City's unsupported or disputed factual contentions are discussed below.

The City claims that Kempner is "debt-laden" and "undersubscribed." MSJ at 1. The City offers no evidence to support this allegation and it is untrue. Kempner's system is not "debt-laden" or "undersubscribed," as alleged by the City. *See* Goode Aff., Exh. A, ¶10. Kempner's financial challenges are serious but they are caused by Kempner's payment of Central Texas Operation and Maintenance expenses for the City's benefit. *Id.*

The City claims that Kempner's actions to correct the billing were for Kempner's "own benefit" and are wasting the City's dollars. *See* City's MSJ at 5. This unsupported allegation is false. Kempner is losing money on the Agreement. Id. Kempner is paying 60+% of the operation and maintenance expenses incurred to have water treated at Central Texas which is for the City's sole benefit as all of Kempner's water needs are met by its own water treatment plant. *See* deGraffenreid Depo, Exh. C, p. 161. Additionally, the City is charging its customers for the water delivered by Kempner irrespective of the source of treatment. Id., p. 112-114.

The City classifies and characterizes water traveling through transmission system and tanks from Central Texas as "the City's water" at page 6 of its MSJ . There is no evidence to support this statement and it is completely contrary to how the parties characterized the water in the Agreement. The parties agreed that all water is Kempner water until it is delivered to the City points of delivery. *See* Agreement, Exh. A-1, p. 35, Art. 4.2.

Kempner's water treatment plant's "construction had put Kempner in very deeply in debt, and to this day, it has not come close to meeting the projections Kempner provided to its lender, the Texas Water Development Board-projections that did not

include any payment by the City to Kempner for plant capacity or for a separate treated water cost." City's MSJ at 6-7. The City's sole support for this broad conclusory statement as to the financial health and well-being of Kempner is the projection provided by Kempner to the Texas Water Development Board in 2006 and no other data, evidence or testimony. This evidence does not substantiate the status of Kempner's present financial condition. Kempner's finances are not being strained by debt but from Kempner paying CTWSC costs incurred for the City's benefit. .

"Nonetheless, until 2013 there was no controversy." See City's MSJ at 7. This statement is contradicted by other statements contained in the City's own motion. See City's MSJ at 2, 15-16, and is false. The parties have been arguing about this issue since the City's plant went on line in 2010. Efforts to resolve these disagreements have been unsuccessful to date. Discussions in 2010 and 2011 resulted in a proposed amendment to the Agreement that was rejected by Kempner. *See* Goode Aff., Exh. A, ¶12; Steger Aff., Exh. B, ¶ 9.

B. PARTIES' INTENT

5.02 If the court determines that the contract is ambiguous, the parties' intent is an issue of fact. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). Interpretation of a contract becomes a fact issue to be resolved by extrinsic evidence only when application of pertinent rules of construction leave a genuine uncertainty as to which of two meanings is proper. *Harris v. Rowe*, 593 S.W.2d 303 (Tex. 1979). Courts should adopt construction of an instrument as placed upon it by parties unless there is clear language in instrument indicating an intention to the contrary. *Id.* Here, the clear language of the Agreement does not support the City's interpretation or assertions of the original parties' intent and to the contrary, indicates that the City is well

outside the "plain meaning" of the Agreement. Nonetheless, Kempner provides this response in the unlikely event that the Court deems otherwise.

C. The City's Parole Evidence Does Not Resolve the Ambiguity as a Matter of Law.

5.03 Parole evidence is admissible to explain ambiguous words, phrases, or provisions in a written instrument. *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517 (Tex. 1980). It is not admissible to explain, contradict, or vary the meaning of the unambiguous language of an instrument, and in such a case the instrument should be enforced as written. *Alba Tool and Supply Co., Inc. v. Industrial Contractors*, 585 S.W.2d 662 (Tex. 1979); Guerra v. Santa Rosa Independent School Dist., 241 S.W.3d 594, 228 Ed. Law Rep. 966 (Tex. App. Corpus Christi 2007), review denied, (Apr. 18, 2008). In its use of parole evidence, in the alternative, the City points to no specific "word, phrase, or provision" in which the extrinsic evidence is supposed to explain or aid in the interpretation. Parole evidence, if undisputed, must resolve the ambiguity as a matter of law. *Sec. Sav. Ass'n v. Clifton,* 755 S.W.2d 925, 931 (Tex. App.—Dallas 1988, no writ).

5.04 In examining the use of parole evidence in this matter we must look to the specific relief being sought by the City, and that is in short that "Kempner may not charge the City for water treated by Kempner." *See* City's MSJ at 2. So if any parole evidence is utilized it must be used to determine any ambiguity as to that specific request for relief. The City relies on what is essentially six points of extrinsic evidence to support its Motion for Summary Judgment. *See City's* MSJ at 15-19. They can be classified as follows, (1) statements made by Charlie Steger to the Texas Water Development Board ("TWDB"); (2) annual true up meetings; (3) the January 27, 2011

letter from David Sneed to the City; (4) February/March 2014 KWSC correspondence to TWDB; (5) October 2010 KWSC Board of Directors' discussion; and (6) statements made by Delores Goode in her deposition. Each of these pieces of extrinsic evidence will be addressed individually.

5.05 **Statements by Charlie Steger to TWDB.** The City relies on a June 12, 2006 letter from Charlie Steger to the TWDB for the assertion that his statements "affirmed what the parties knew to be true about the Contract", when he said "This is essentially a pass through contract with no profit for KWSC." City's MSJ at 15. It is unclear from the City's Motion as to how this statement provides any clarification or resolution of any ambiguity in the Agreement, or how it relates at all to the City having to pay for KWSC treated water. Mr. Steger's statement does not reference any provision of the Agreement. In fact the final version of the Agreement had not even been executed at the time his statement was made, *see* Agreement, Exh. A-1, p. 46, and the Kempner water treatment plant was four years from becoming operational, *see* Steger Aff., Exh. B, ¶6. Consequently, Mr. Steger's letter sheds no light on the issues presently in dispute between the City and Kempner concerning the source of water provided to the City since all water provided to both Kempner and the City was provided by CTWSC in 2006. This vague statement by Mr. Steger should be disregarded because it does not resolve any contractual ambiguity.

5.06 **Annual True-Up Meetings.** The City in passing states that the absence of Kempner raising a "different understanding" at the annual true-up meetings is evidence in support of their position. *City's MSJ at 5.* A detailed examination of the minutes of the annual true-up meetings paints a very clear picture; that the meetings were brief and

they were typically limited to three subjects: the reserve requirement, the "true-up" and tank maintenance. *See* City's MSJ, Ex. A-8. In none of the meeting minutes is there any discussion of any specific provision of the Agreement. Further, there is no discussion of charging for Kempner treated water one way or the other. *See id.* The use of parole evidence must resolve the ambiguity as a matter of law. The meeting minutes attached by the City provide no discussion or clarification as to the Agreement's provisions with regards to charging for water treated by Kempner and should be disregarded.

5.07 **January 27, 2011, Letter to City from David Sneed.** The City throughout its Motion attempts to classify KWSC's position in this case as a "new interpretation", but the January 27, 2011 letter to the City from David Sneed, clarifies that this is not a new interpretation and that KWSC believed in 2011 that it had the ability to charge for KWSC treated water and in fact did so. *See City's* MSJ, Ex. A-6. Furthermore, the City relies on Mr. Sneed's statement that "there is not any provision in the Kempner/City contract to purchase water from Kempner's plant" as a clear indication that the Agreement does not allow for such a charge. City's MSJ at 16. It has been the City's position throughout its Motion that the Agreement clearly provides that KWSC may not charge for KWSC treated water, but Mr. Sneed's statement is only stating that there is no provision to the contrary. *See* City's MSJ, Ex. A-6. Mr. Sneed does not go on to cite a specific provision that may be ambiguous or interpreted, and does not go into a lengthy discussion of the Agreement whatsoever. *Id.* In fact after this letter a discussion arose between the parties as to potentially amending the Agreement to clarify the ability of KWSC to charge for their water, and KWSC rejected such an amendment as the

Agreement already permits Kempner to charge for all treated water. *See* Steger Aff., Exh. B, ¶9. The use of parole evidence must resolve the ambiguity as a matter of law. The letter provides no clear indication one way or the other as to how the Agreement should be interpreted and only creates more confusion. The City cites to no word, phrase or provision that the letter provides clarification and should be disregarded.

5.08 **KWSC 2012-13 Audit to TWDB.** The City again relies on general broad statements that provide no clear clarification of any supposed ambiguity with the attachment of the KWSC 2012-13 Audit submitted to the TWDB ("Audit). *See* City's MSJ at 16-17. The City relies on three clauses of the Audit in support of its position, all three of which are true statements, but do not resolve any alleged ambiguity factually or as a matter of law. First, "[CTWSC] entered into a contract....to furnish water to [KWSC] in a 2006 Wholesale Water Contract". This statement is uncontested by the parties; KWSC has entered into a contract to obtain treated water from CTWSC. City's MSJ at 16; *see* Goode Aff., Exh. A, ¶12. Second, "[KWSC] also entered into a contract to furnish water to the City of Lampasas which generates approximately one-half of its revenue." Significantly, this statement does not impose or imply any restriction on the source of treatment for water delivered by Kempner to the City. *Id.* Lastly, "Since the City of Lampasas chose not to use the Kempner plant for its water supply, [KWSC] will continue to purchase water from Central Texas to fulfil its contract with the City of Lampasas." *Id* at 17. Once again this statement fails to address the issue of whether KWSC may charge for KWSC treated water. It merely recites facts already known and does not clearly state that all water delivered to the City must be from CTWSC nor does it discuss or resolve the disputed issue of payment of KWSC treated water. The

statement does not cite to a specific provision of the Agreement, nor does it attempt to clarify the Agreement as a whole. *Id.* The use of parole evidence must resolve the ambiguity as a matter of law. These statements do not clarify or resolve any alleged ambiguity, but merely recite facts that are uncontested by the parties. Accordingly these statements should be disregarded.

5.09 **October 2010 Board Discussion.** The City places into evidence in its motion the October 20, 2010 Minutes of the KWSC Board of Directors ("October Minutes") as extrinsic evidence in support of its position. See City's MSJ at 17 and Exh. C-1. The specific provision of the October Minutes relied on is "Vanita [Craft] asked are we ever going to be rid of CTWSC? No, as long as Lampasas receives water from Central Texas WSC." *Id.* This statement is once again a poor attempt to draw a broad conclusion as to the provisions of the Agreement from a minor vague statement in extrinsic evidence. The question by Ms. Craft is vague, and does not reference or concern the ability of KWSC to charge Lampasas for KWSC treated water. It refers solely to CTWSC, whom KWSC is contracted with to obtain treated water. *Id.* Mr. Sneed's statement is extremely broad as well; he does not refer to the Agreement, but merely refers to Lampasas receiving water from CTWSC. Again, there is no discussion of KWSC charging for KWSC treated water, nor is there any discussion about Lampasas solely receiving water from CTWSC. *Id.* The use of parole evidence must resolve the ambiguity as a matter of law. These statements do not clarify or resolve any alleged ambiguity, but instead, are broad statements about the relationship between KWSC and CTWSC, that are undisputed in this proceeding and should be disregarded.

5.10 **Delores Goode Deposition.** The City in its final discussion of extrinsic evidence improperly concludes that "Kempner's entire argument rests on an interpretation that Kempner freely admits is 'new'". See City's MSJ at 17. They rely on the statements made by Delores Goode in her deposition in an attempt to paint Ms. Goode as a lone wolf who manufactured a wholly new interpretation of the Agreement, that would allow for Kempner to charge the City for Kempner treated water, while at the same time ignoring the fact that David Sneed did the exact thing in late 2010. *See* MSJ 15-16. Mr. Sneed states in his letter that he wanted to reiterate "why the City was charged the way it was starting in May 2010 and ending January 1, 2011...Point being if Kempner had not produced water for the City out of its treatment plant, the City would not have received enough water for its needs." See City's MSJ, Exh. A-6. In 2010-2011 Mr. Sneed took the same exact action that Ms. Goode took in 2013 that precipitated the City filing this lawsuit. *See id.*; *see also* Goode Aff., Exh. A, ¶17. To now classify Kempner's action as somehow new is disingenuous on the part of the City. The City had knowledge that it was KWSC's position in 2010 that it may charge for its treated water. Furthermore, Ms. Goode's statements do not clarify or illuminate any specific provision in the Agreement, nor does her "interpretation" contradict the plain language of the Agreement. The use of parole evidence must resolve the ambiguity as a matter of law; the use of Ms. Goode's statements to attempt to classify KWSC's billing methodology as new is false and contrary to other evidence relied on by the City. It does not provide any clarification of any word, phrase or provision of the Agreement and should be disregarded.

VI.

The City failed to meet the Summary Judgment Burden on Numerous Claims for Relief

6.01 In its Motion for Summary Judgment the City makes several claims for relief. See Lampasas MSJ, pg. 2-3. Two of those claims (ii) and (iv) specifically deal with the "floor charge", which is provided for in Article 3.5.C of the Agreement. In examining the entire body of the City's Motion, with the exception of the outlining of claims and the Prayer, the City fails to address the "floor charge". See City's MSJ. A party moving for a summary judgment has the burden of proving that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. *Browning v. Prostok*, 165 S.W.3d 336 (Tex. 2005). The summary judgment burden of proof is entirely affirmative, so that a summary judgment may not be granted by default, but only on the movant's discharge of the burden of showing the absence of any issue of fact. *Wise v. Dallas Southwest Media Corp.*, 596 S.W.2d 533 (Tex. Civ. App. Beaumont 1979), writ refused n.r.e., (Apr. 30, 1980); *Prassel Const. Co. v. Van De/den Const. Co.*, 562 S.W.2d 542 (Tex. Civ. App. El Paso 1978, writ refused n.r.e.); The goal of summary judgment in this case is the summary termination of a case when it clearly appears that only questions of law are involved and that there are no genuine issues of fact. *Bliss v. NRG Indus.*, 162 S.W.3d 434, 437 (Tex. App.—Dallas 2005, pet. denied). The City has failed to discuss the "floor charge" at all in its motion, not even citing to or referencing the exact provision in the Agreement which contains the reference to the "floor charge", Article 3.5.C, instead wholly passing over it. There is no interpretative discussion on the part of the City to aid the Court in establishing that as

a matter of law that it should rule in the City's favor with regards to the "floor charge" nor does it discuss the absence of a genuine issue of fact regarding the "floor charge". The City has failed to meet its legal burden of proof on the above cited claims, and is not entitled to summary judgment as such. In addition, as established below, there is no prohibition in the Agreement to Kempner taking below the floor.

A. The Agreement allows KWSC to take below the "floor" and the City is obligated to pay for any "floor" increment charge.

6.02 **Central Texas Operation and Maintenance Expenses.** The Agreement requires the City and Kempner to share in the portion of Central Texas' operation and maintenance ("O&M") expenses that Central Texas bills to Kempner each month. See Agreement, Exh. A-1, p. 23-24, Art. 3.5 (B). Central Texas O&M includes all direct costs and expenses incurred by Central Texas for general overhead expense, and also includes non-capital repairs. Id. The Agreement also provides that, in the event that demand from the City and Kempner does not meet a minimum threshold (the "Floor") of 26.4% of Central Texas's overall production, the City pay a proportionate share determined by the Agreement. Id. This Floor, originally 42%, was negotiated by Kempner with Central Texas in their corresponding wholesale water supply contract, and later reduced when Kempner relinquished some of its (but not the City's) capacity.

6.03 **The "floor" is not contingent on the City's demand.** The Agreement contemplates that any "floor," or take or pay, provision that would be applicable to the Agreement will be negotiated between KWSC and CTWSC, and the City will not be involved. Id. The Agreement goes onto say that "to the extent that any floor applies to CTWSC O&M Expense in a particular month, the City and KWSC will pay that

increment based on the ratio of their respective capacities ...". Id. The Agreement provides no restrictions, limitations, or contingencies on when or why the "floor" may apply, only that the "floor" will be negotiated by KWSC and CTWSC, and that the allocation of any "floor" amount will be allocated based on the City and KWSC's respective capacities. Id. This provision in no way conditions itself on the amount of water the City receives from KWSC at its Points of Delivery. *Id.*

6.04 **Economical Operations Affect Floor.** The provisions of Article 4.1 of the Agreement contemplate that Kempner is entitled to determine how to best operate its water system for the benefit of all of its customers not just to benefit the City. This provision implicitly permits KWSC the right to take below the "floor" from CTWSC if such a decision is in the best interest of the KWSC's customers. See Agreement, Art. 5.4. The City's contention that Kempner is prohibited from making such operational decisions or from charging the City for water delivered to it that was treated at Kempner's plant is contrary to this provision and an unjust, oppressive interpretation of the Agreement that should not be indulged by this Court. See deGraffenried Depo., Exh. C, p. 125-128.

VII.

The City fails to meet the Summary Judgment Burden on the Affirmative Defense of Waiver

7.01 In its Motion for Summary Judgment the City makes a passing claim that Kempner has waived the right to amounts owed from 2010 through 2012. *See* City's MSJ, p. 19-20. Waiver occurs when a person who has full knowledge of the material facts acts or fails to act upon a right that person legally holds, and such an act or failure to act is inconsistent with that right or intention to rely upon that right. *Ford v.*

Culbertson, 308 S.W.2d 855 (1958). Waiver ordinarily requires that the relinquishment or abandonment of a known right be voluntary. *Laster v. State, 202 S.W.3d 774, 777 (Tex. App.—San Antonio 2006, no pet.)* Waiver is a voluntary act that requires an element of knowledge. The City has failed to provide any evidence or other basis to support its claim of waiver.

7.02 A defendant is entitled to summary judgment on an affirmative defense if the defendant conclusively proves all the elements of the affirmative defense; to accomplish this, the defendant-movant must present summary-judgment evidence that establishes each element of the affirmative defense as a matter of law. *AFTCO Enterprises, Inc. v. Acceptance Indem. Ins. Co.*, 321 S.W.3d 65 (Tex. App. Houston 1st Dist. 2010), review denied, (Oct. 22, 2010). In its motion the City provides no evidence to that establish the necessary elements of waiver. *See* City's MSJ, p.19-20. No affidavit or documentary evidence is provided regarding waiver, nor does the City even provide the Court with a discussion of the elements of waiver, or basis to support a waiver defense, as to allow for a ruling by the Court that as a matter of law the affirmative defense of waiver has been established. *Id.* As such the City's alternative defense of waiver should be denied in whole, as the City failed to meet its summary judgment burden.

VIII.

Summary

8.01 **Summary.** The plain and unambiguous language of the Agreement reveals one vivid point, that KWSC agreed to deliver treated water and the City agreed to pay for such water, no matter the source. Using the well-established rules of contract

construction, there is no need for the Court to consider parole evidence as the four corners of the Agreement establish the basis for KWSC's request for declaratory relief. The Court should rule that the Agreement is unambiguous; Kempner is entitled to bill the City for water delivered to the City at its Points of Delivery at the rate charged for treated water by Central Texas and deny the City's Motion for Summary Judgment

PRAYER

WHEREFORE, PREMISES CONSIDERED, Kempner respectfully prays that following the hearing of this Motion, the Court deny the City of Lampasas' Motion for Summary Judgment and deny all relief sought by the City in its Petition, and for such other and further relief to which Kempner Water Supply Corporation may show itself entitled.

Respectfully submitted,
DAVIDSON TROILO REAM & GARZA, P.C.
7550 West IH-10, Suite 800
San Antonio, Texas 78229-5815
Telephone (210) 349-6484
Facsimile (210) 349-0041

By: _____

Lea A. Ream
State Bar No. 16636750
Patrick W. Lindner
State Bar No. 12367850
William A. Faulk, III
State Bar No. 24075674
ATTORNEYS FOR
KEMPNER WATER SUPPLY
CORPORATION

6480/5 #233823

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2014, a true and correct copy of the above and foregoing Kempner Water Supply Corporation's Amended Response to City of Lampasas' Motion for Summary Judgment was served by electronic delivery and/or hand delivered to the following was served by electronic delivery and/or hand delivered to the following:

David P. Lein dlein@gdhm.com

Helen Currie Foster hfoster@gdhm.com

Graves Dougherty Hearon & Moody, P. C.

401 Congress Avenue, Ste. 2200

Austin, TX 78701

Lea A. Ream

Lea A. Ream

CASE NO. 19005

CITY OF LAMPASAS, TEXAS	§	IN THE DISTRICT COURT
	§	
Plaintiff	§	
	§	
vs.	§	27TH JUDICIAL DISTRICT
	§	
KEMPNER WATER SUPPLY CORP.	§	
	§	
Defendant	§	
	§	LAMPASAS COUNTY, TEXAS

DEFENDANT KEMPNER WATER SUPPLY CORP. NOTICE OF ORAL DEPOSITION OF PLAINTIFF, THE CITY OF LAMPASAS

TO: **CITY OF LAMPASAS**, by and through its attorney of record:

David P. Lein
Helen Currie Foster
GRAVES DOUGHERTY
HEARON & MOODY, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701

PLEASE TAKE NOTICE that pursuant to Rule 199, Texas Rules of Civil Procedure, Defendant, KEMPNER WATER SUPPLY CORP., by and through its attorneys of record, Lea A. Ream, Davidson Troilo Ream & Garza, 7550 West I.H. 10, Suite 800, San Antonio, Texas 78229, will take the oral deposition of a designated representative of the City of Lampasas. The deposition will take place on November 17, 2014, beginning at 10:00 A.M. at the offices of Graves, Dougherty, Hearon & Moody, P.C., 401 Congress Ave, Austin, TX 78701 or such other location to which counsel may agree. The deposition shall be taken before a certified court reporter and may be videotaped. The deposition will continue thereafter from day to day until completed.

Respectfully submitted,

DAVIDSON TROILO REAM & GARZA, P.C.
7550 West IH-10, Suite 800
San Antonio, Texas 78229-5815
Telephone (210) 349-6484
Facsimile (210) 349-0041

By: _____
Lea A. Ream
State Bar No. 16636750
Patrick W. Lindner
State Bar No. 12367850
William A. Faulk, III
State Bar No. 24075674
ATTORNEYS FOR
KEMPNER WATER SUPPLY CORP.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of November, 2014, a true and correct copy of the foregoing document was and served by electronic delivery and/or facsimile to the parties listed below:

David P. Lein	dlein@gdhm.com	via facsimile (512) 536-9917
Helen Currie Foster	hfoster@gdhm.com	via facsimile (512) 536-9917

Graves Dougherty Hearon & Moody, P.C.
401 Congress Avenue, Ste. 2200
Austin, TX 78701

_____
William A. Faulk, III

EXHIBIT A

DEFINITIONS AND INSTRUCTIONS

In designating the witness(es) and in the deposition, the following terms have the following meanings.

1. "You", "your", "Plaintiff", and "the City" refer to The City of Lampasas and any person or entity acting as its agent, representative, consultant, attorney or employee.

2. "Defendant" and "Kempner" refers to Kempner Water Supply Corp. and any person or entity acting as its agent, representative, consultant, attorney or employee.

3. "Central Texas" refers to the Central Texas Water Supply Corporation.

4. The "2006 Contract" refers to the 2006 Wholesale Water Supply Contract between You and Kempner.

5. The "Central Texas Contract" refers to the 2005 Wholesale Water Supply contract between Kempner and Central Texas.

TOPICS FOR WHICH REPRESENTATIVE TO BE DESIGNATED

Under Texas Rule of Civil Procedure 199.2(b), the City is required to designate one or more individuals to testify on its behalf about the following matters:

1. Your past and current agreements with Kempner, including but not limited to the 2006 Contract.

2. Negotiations resulting in your agreements with Kempner, including but not limited to the 2006 Contract.

3. Your communications with Kempner regarding the 2006 Contract.

4. Your communications with third parties regarding the 2006 Contract.

5. Your communications with third parties regarding the Central Texas Contract.

6. Your agreements and communications with Central Texas.