FEE EXEMPT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

CHINO BASIN MUNICIPAL WATER DISTRICT,

Plaintiff,

v.

CITY OF CHINO et al,

Defendants,

Case No. RCVRS 51010

Assigned for All Purposes to the Honorable Gilbert G. Ochoa

REPLY TO OPPOSITION TO APPROPRIATIVE POOL MOTION FOR AWARD OF EXPENSES PER CONTRACT AND CIVIL CODE SECTION 1717

Date: August 29, 2024
Time: 9:00 a.m.
Dept. R17

Motion Filed: June 26, 2024

[Declaration of Chris Diggs; Declaration of Todd M. Corbin; Declaration of John J. Schatz; Declaration of Mitchell C. Tilner; filed concurrently herewith]

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I. ATTORNEY FEE-SHIFTING

A. The Amount of $393,017 of Appeal Attorney Fees Sought by the Motion is Clear and Has Not Changed Because of the Watermaster Computation

City of Ontario, Monte Vista Water District, and Monte Vista Irrigation Co. (collectively "Ontario" unless otherwise indicated) claim because the two categories of payments sought by the Appropriative Pool (AP) motion for expenses and attorney fees (Motion) overlap, and that a Watermaster computation is required, the amount of appeal attorney fees sought by the Motion is unclear. Watermaster has now provided that calculation, with which Ontario concurs. [Corbin Decl.; Jones Decl. ¶ ¶ 4-5; Scott-Coe Decl. ¶ ¶ 4-5].

The Motion clearly states the amount of attorney fees AP incurred defending against Ontario's appeal: $393,107 [Schatz Decl. ¶ 12, Tellez-Foster Decl. ¶ 3; Motion - Proposed Order].

The Tellez-Foster Declaration included with the Motion states "[i]f the total outstanding invoices of $262,761.21 are paid in full by the four appellant parties, all AP parties will have paid their proportional shares of AP administrative and legal costs to date." [Tellez-Foster Decl. ¶ 3, emphasis added]. The Tellez-Foster Declaration then goes on to say what will happen if the court grants the Motion and awards AP all its fees on appeal as the prevailing party: "if the court awards any of the legal expenses be paid by the AP parties other than based on their proportional share of AP administrative and legal expenses, Watermaster will perform the calculation and bill the appropriate parties for the appropriate charges and issue refunds due to the appropriate parties." [*ibid*].

As explained in the Corbin Declaration included in this Reply, at the time the Motion was filed Watermaster had not yet completed the calculation to determine the amount of appeal attorney fees included in the $262,761.21 on a proportional shares basis, which would then be deducted from the $393,107 to determine the remaining amount of attorney fees if the Court awards a 100 percent attorney-fee shift. [Corbin Decl. ¶ ¶ 3-7].

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Consequently, the $393,107 amount of appeal attorney fees stated in the Motion, has not changed. The $196,687.01 of appeal attorney fees cited in the Opposition Declarations, which is based on the calculation prepared by Watermaster after the Motion was filed and is reflected in the Corbin Declaration, takes into account the amount of appeal attorney fees included in the AP Special Assessments and Ag Pool Assessments and deducts that amount from the $393,107 total. [Corbin Decl. ¶ ¶ 3-7].

The calculation of the total amount of appeal attorney fees has also been adjusted to account for the City of Chino paying 100 percent of its share of appeal attorney fees as part of the recent Chino/AP settlement agreement. [Corbin Decl. ¶ ¶ 4, 6-7].

In summary, the Watermaster calculations show how much of the $393,107 of appeal attorney fees are included in the $262,761.21, which when deducted from the $393,107 yields the balance of appeal attorney fees the non-settling appellants will owe if this court awards the AP all of its appellate fees as the prevailing party on appeal (taking into account that Chino has paid its share of those fees). Specifically, if Ontario and MVWD/MVIC pay 100 percent of their shares of appeal attorney fees like Chino did, plus their unpaid invoices, Ontario would pay $270,962.93 and MVWD/MVIC would pay $120,783.76, for a total of $391,746.69. Of this amount, $160,365.99 would be 100 percent of their shares of appeal attorney fees taking into consideration the amount of appeal attorney fees included in the unpaid AP legal invoices. [Corbin Decl. ¶ ¶ 6-7].

Per the Schatz and Tilner declarations included with this Reply, the AP has incurred an additional $44,637 of AP appeal legal expenses in preparing this Reply. [Schatz Reply Decl. ¶ 2]. The total amount of AP legal expenses, including for this Reply, is $205,002.99. The allocation of those Reply-related fees as between Ontario and Monte Vista Water District and Monte Vista Irrigation Company is subject to a Watermaster calculation because Watermaster did not include the additional $44,637 when calculating the net amount due from those parties. [Corbin Decl. ¶ 7].

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B. The Appeal Arose out of Section 5.4(a) of the Peace Agreement, when Appellants Challenged the Terms of Agreement (TOA) and its Approval

Ontario claims that after the TOA was executed the nature of the dispute shifted [Opp. 7: 22-24], or the original dispute transformed into a new dispute between the Ontario and the AP regarding the legal effect of the TOA [Opp. 8: 26-28, citing Nicholls Dec.]. In their view, the "transformed" dispute arose out of the Judgment, not out of the Peace Agreement, hence the latter's fee-shifting provision does not apply.

Ontario's claim should be rejected. Their appeal sought to invalidate the TOA, which itself resolved a dispute arising under the Peace Agreement. Ontario's Opening Brief frankly recognized that the dispute on appeal arose under the Peace Agreement:

1. "The Order from which this appeal is taken arises from a dispute over the meaning of the Peace Agreement, in particular Section 5.4(a), which delineates the scope of the Appropriative Pool assessments and expenses." [AOB 17].
2. "The TOA provides for the payment of many hundreds of thousands of dollars of previously incurred Agricultural Pool legal expenses without ever obtaining documentation showing that any portion of this amount is payable under Section 5.4(a) of the Peace Agreement. Such provisions include $370,000 toward Agricultural Pool legal expenses for which the Agricultural Pool sought and failed to establish any entitlement, as determined by the Court pursuant to the December 3 Order." [AOB 23-24]. It goes on.
3. Section II.B: "The TOA Unlawfully Amends the Peace Agreement Without the Consent of all Parties." [AOB 43-44].
4. Section II.C: "The TOA Unlawfully Modifies the May 28 and December Orders," which concerned the Pools' respective rights and obligations under the Peace Agreement. [AOB 44-45].

By its own admission, Ontario's appeal arose under the Peace Agreement and was directed to casting aside the TOA and reverting to the May and December 2021 trial court Orders [AOB

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44] in defiance of the TOA. In its opening sentence, the TOA states: "[t]hese Terms of Agreement … are for the purpose of comprehensively resolving the current dispute and avoiding future disputes between the Ag Pool and AP … *with respect to Peace Agreement Section 5.4(a).*" [Schatz Decl. ¶ 9, p. 163, emphasis added]. The TOA was the reason for the appeal.

The Court of Appeal Opinion, attached as Exhibit A to the Tilner Declaration submitted with the Motion, included several conclusions that foreclose Ontario's attempt to isolate the Appeal from the Peace Agreement:

"[t]he Peace Agreement resolved the parties' disputes regarding a number of matters pertaining to the power and authority of the Court and Watermaster under the Judgment…."" [COA Op. 6].

"… the Peace Agreement acknowledged and affirmed the AP Pool's power to resolve disputes over the Pools obligations via majority. In executing the [Peace] Agreement, appellants stated their desire 'to resolve issues by consent under [its] express terms and conditions.'" [COA Op. 15, underlining added].

and: "…, the governance structure embodied within the Judgment, coupled with the Peace Agreement, enables administration of the Judgment through collective decision making by each Pool." [COA Op. 16].

Ontario's Opposition admits "[t]he original dispute with the Ag Pool – but not the later TOA dispute – turned on the meaning of Section 5.4(a) of the Peace Agreement." [Nicholls Decl., ¶ ¶ 2, 10]. As admitted by Ontario in its Opening Brief, the TOA is not a later dispute but an ongoing dispute about the Peace Agreement.

In view of Ontario's own statements that the appeal arose under the Peace Agreement and the cited Court of Appeal determinations that the Peace Agreement addresses Judgment matters, including governance, Ontario's attempt to label the appeal as merely a dispute about the Judgment and not a Peace Agreement dispute to avoid paying the AP's attorney fees is clearly wrong.

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C. Ontario's Obligation Under the Peace Agreement's Fee-Shifting Clause is Not Vitiated By the Section 9.1 Notice of Default Provision

Ontario alleges the AP did not give any Notice of Default and opportunity to cure, which they argue is required to trigger the remedies under Part IX of the Peace Agreement. Peace Agreement Section 9.1 does not say who shall provide a notice of default or that, absent a notice of default, the breaching party can avoid the remedies set forth in Section 9.2. [Schatz Decl. ¶ 4]. In any event, at the March 22, 2022 AP meeting when the vote was taken to approve the TOA, Ontario declared and provided a notice of its own default. The report on the vote records Ontario's position, which it does not dispute: "Vote on settlement and disclose that the City of Chino, City of Ontario, Monte Vista Water District, and Monte Vista Irrigation Company do not consent to the terms of settlement, want to be excluded from the Terms, and are not obligated to *and will not comply with the Terms.*" [Schatz Decl. ¶ 9, p. 161, emphasis added].

This record satisfies the purpose of providing a notice of default, which is to afford the breaching party an opportunity to cure. Ontario announced on the record in the report out of AP confidential session it would not accept the TOA, which resolved the Pools' dispute under the Peace Agreement, and would not comply with its terms. Ontario was true to its word, withholding for more than two years the payments owed for Ag. Pool invoices until making payment just before the AP filed the present Motion. [Motion, 14, fn. 7]. Ontario had no intention to cure and obviously knew it was in default regarding obligations to pay Ag Pool legal expenses pursuant to the TOA.

Further, Peace Agreement Section 9.2(c) provides: "If the non-breaching Party [here, the AP] fails to exercise or delays in exercising any right or remedy, the non-breaching Party does not thereby waive that remedy." Thus, although Ontario stated, in effect, it was in default and appealed the April 22 Order regarding the TOA arising under the Peace Agreement, if there was any purpose in this case of providing a Section 9.1 default notice, Section 9.2(c) preserves the AP's remedies, including Section 9.2(d) Attorneys' Fees.

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Finally, Ontario notes the Ag Pool issued a Section 9.1 Notice of Default "in the original dispute". [Opp. 15, fn 6]. To the extent a Notice of Default is required notwithstanding the foregoing, because the appeal challenging the TOA Order is a continuance of the Peace Agreement Section 5.4(a) dispute, the Ag Pool's seminal Notice of Default satisfies Section 9.1.

D. D. The Cost Allocation Clause in Peace Agreement Section 10.5 Applies Only to Fees Incurred in the Original Peace Agreement Negotiation, Not Fees Incurred Later on an Appeal Arising Under the Peace Agreement

Ontario seeks to avoid fee-shifting by relying on Peace Agreement Section 10.5 which states: "Each Party Bears Own Costs. Each Party is to bear its own costs, expenses, and attorneys' fees arising out of or in connection with the subject matters of this Agreement and the negotiation, drafting, and execution of this Agreement. Each of the Parties understands that this Agreement includes all claims for loss, expense and attorneys' fees, taxable or otherwise, incurred by it or arising out of any matters leading up to the execution of this Agreement".

Section 10.5 is part of the Article X, General Provisions, of the Peace Agreement, not part of Article IX, Dispute Resolution, and by its own terms only applies to the negotiation of the original Peace Agreement. If applicable to disputes arising after the Peace Agreement was executed, it would be in conflict with the Dispute Resolution provisions of Article IX, including Section 9.2(d) providing for attorney's fees in adversarial proceedings occurring after execution of the Agreement.

E. Awarding Attorney Fees Under the Agreement's Fee-Shifting Provision is Consistent With the Costs Awarded by the Court of Appeal

Ontario suggests the Court of Appeal's award of "costs" to AP, without mentioning "fees," precludes AP's current Motion for fees. The Rules of Court expressly reject this very suggestion: "Unless the court orders otherwise, an award of costs neither includes attorney's fees on appeal nor precludes a party from seeking them under rule 3.1702." Cal. Rules of Court, rule 8.278(d)(2); see *Early v. Becerra* (2021) 60 Cal.App.5th 726, 732, fn. 2 ["a cost award in the Court of Appeal is irrelevant to a motion for attorney fees in the trial court"].)

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Here, Section 9.2(d) of the Peace Agreement provides that the "prevailing Party shall be entitled to recover their costs, including attorneys' fees." [Peace Agreement §9.2(d)]. In the Disposition, the Court of Appeal stated: "[r]espondents are to recover costs on appeal. [COA Op. 24]. The AP was the prevailing party and thus entitled to recover both its costs, which the court expressly awarded, and its attorneys' fees, which the cost award did not foreclose.

F. Civil Code Section 1717 Authorizes Parties to the Peace Agreement to Alter the American Rule

Ontario alleges the Motion cites Civil Code section 1717 as a potential basis for attorney fee-shifting without explaining the statute's relevance. Section 1717 authorizes contracting parties to alter the American rule, which requires parties to bear their own attorney fees, by providing in their contract that the court may award attorney fees to the party who prevails in litigation between them. (*Drink Tank Ventures LLC v. Real Soda in Real Bottles, Ltd.* (2021) 71 Cal.App.5th 528, 546; see *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1257 [citing section 1717 as a statutory exception to the American rule]; *Westwood Homes, Inc. v. AGCPII Villa Salerno Member, LLC* (2021) 65 Cal.App.5th 922, 927 ["section 1717 provides an exception [to the American rule] where the parties enter into an enforceable agreement authorizing an award of fees"].) That is the case here where the parties to the Peace Agreement, which is a contract, agreed to prevailing party attorneys' fee in Section 9.2(d).

G. The AP and Ag. Pool Attorneys Have Established that the Fees Claimed are Reasonable

Ontario faults the Motion and its supporting declarations for stating aggregate fee amounts and legal high-level summaries of services rendered, without supporting documentation to show the claimed fees are reasonable. Ontario's statement that there is no supporting documentation for payments made to Mr. Schatz as AP legal counsel is part of its argument as addressed in Section II., below.

"[T]here is no legal requirement that an attorney supply billing statements to support a claim for attorney fees. As this court has held, 'An attorney's testimony as to the number of hours

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worked is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records.' (Steiny & Co. v. California Electric Supply Co. (2000) 79 Cal.App.4th 285, 293; see also Martino v. Denevi (1986) 182 Cal.App.3d 553, 559." (Mardirossian & Associates, Inc. v. Ersoff (2007) 153 Cal.App.4th 257, 269, parallel citations omitted.)

"[U]nlike some other jurisdictions, California law does not require detailed billing records to support a fee award." (Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker (2016) 2 Cal.App.5th 252, 263–264.)

The declarations AP's attorneys submitted with the Motion explain why the fees sought were reasonable. Other than arguing the court cannot determine reasonableness absent the invoices themselves—a position contrary to California law—Ontario does not dispute that the fees claimed are reasonable.

II. THE MAY 2021 ORDER REGARDING AG POOL INVOICES DOES NOT REQUIRE THE AP TO PROVIDE ATTORNEY INVOICES TO ITS OWN MEMBERS. AP MEMBERS ARE BOUND BY AP MAJORITY VOTE TO PAY THE APPROVED AP SPECIAL ASSESSMENTS

Ontario states it is ready and willing to pay its share of the AP legal expenses into a Watermaster escrow account with the funds to be released from escrow upon Ontario's receipt of the supporting legal invoices. [Opp. 16: 11-13]. Ontario states the May 28, 2021 order is applicable to AP legal invoices. Not so.

The May 28, 2021 Order states: "[t]he ruling of the court on the instant motion for attorney fees is intended to apply only to the specific attorney fee dispute between the AgPool and the Appropriative Pool. It is not intended to have any general effect on any other party or pool, or to give the Appropriative Pool any legal basis to object to any other aspect or any other budget item." [Opp. RJN ¶ 5]. Thus, the court broadly limited its Order to the Ag Pool legal fees dispute (later resolved by the TOA) to preclude any party from bootstrapping its provisions to other disputes, as Ontario currently attempts to do. Moreover, the dispute between the Ag Pool and AP regarding Ag Pool expenses arising under the Peace Agreement, the subject of the May 28, 2021 order, has

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no relevance and is not analogous to the internal administration of the AP or its Pooling Plan, to which the invoices now at issue relate.

AP members vote to approve expense budgets and to assess themselves accordingly. The majority vote is conclusive with respect to its binding effect on its members and not conditional upon a member's receipt and review of supporting information, including AP legal invoices. [Diggs Decl. ¶ 7; and see generally for AP administration including conclusory effect of Watermaster invoices].

III. CONCLUSION

For the reasons set forth in the Motion and herein, and based on Watermaster's final calculations, which were not available before AP filed its Motion but are presented with this Reply, the AP respectfully requests that:

1. The Court order $160,365.99 of attorney fees AP incurred on appeal to be paid by Ontario, Monte Vista Water District and Monte Vista Irrigation Company per the Watermaster calculation that shows the amount for each provided herein.
2. The Court order $231,380.70 of unpaid AP invoices to be paid by Ontario, Monte Vista Water District and Monte Vista Irrigation Company without imposing any conditions for the AP to receive payment.
3. Per the Schatz and Tilner Declarations included with this Reply, the court award the additional amount of $44,637 of appeal attorney fees the AP incurred in preparing this Reply, to be paid by Ontario, Monte Vista Water District and Monte Vista Irrigation Company per a Watermaster calculation to allocate this amount between them.
4. The court order that Ontario, Monte Vista Water District and Monte Vista Irrigation Company shall be jointly and severally liable for obligations imposed by Paragraphs 1-3, above.

August 15, 2024

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CHINO BASIN WATERMASTER
Case No. RCVRS 51010
Chino Basin Municipal Water District v. City of Chino, et al.

PROOF OF SERVICE

I declare that:

I am employed in the County of San Bernardino, California. I am over the age of 18 years and not a party to the action within. My business address is Chino Basin Watermaster, 9641 San Bernardino Road, Rancho Cucamonga, California 91730; telephone (909) 484-3888.

On August 15, 2024 I served the following:

1. REPLY TO OPPOSITION TO APPROPRIATIVE POOL MOTION FOR AWARD OF EXPENSES PER CONTRACT AND CIVIL CODE SECTION 1717

/ X / BY MAIL: in said cause, by placing a true copy thereof enclosed with postage thereon fully prepaid, for delivery by the United States Postal Service mail at Rancho Cucamonga, California, addresses as follows:
See attached service list: Mailing List 1

/___/ BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee.

/___/ BY FACSIMILE: I transmitted said document by fax transmission from (909) 484-3890 to the fax number(s) indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting fax machine.

/ X / BY ELECTRONIC MAIL: I transmitted notice of availability of electronic documents by electronic transmission to the email address indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting electronic mail device.
See attached service list: Master Email Distribution List

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

Executed on August 15, 2024 in Rancho Cucamonga, California.

By: Ruby Favela Quintero
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