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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF IMPERIAL

MICHAEL ABATTI, TRUSTEE OF THE MICHAEL AND KERRI ABATTI FAMILY TRUST and MIKE ABATTI FARMS, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY,

Plaintiffs,

v.

IMPERIAL IRRIGATION DISTRICT and DOES 1-20, inclusive,

Defendant.

Case No: ECU 07980

Assigned for All Purposes to Honorable L. Brooks Anderholt, Dept. 9

DEFENDANT IMPERIAL IRRIGATION DISTRICT'S OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION TO ENFORCE JUDGMENT AND ENJOIN VIOLATION OF THE JUDGMENT; DECLARATION OF TINA SHIELDS

Date: Nov. 15, 2018
Time: 8:30 a.m.
Dept.: 9

1. INTRODUCTION

Plaintiffs' ex parte application seeks extraordinary relief in a manner wholly inconsistent with the law. Laced with political rhetoric, inflammatory language and ad hominin attacks on Imperial Irrigation District ("IID") officers and employees, the application attempts to paint IID in the most negative light possible, apparently to detract from the complete absence of legal or factual support for their position.

Plaintiffs ask this Court for a remedy not authorized by any statute or case authority. They ask this court to issue a post-judgment injunction to enforce an order in a way not only inconsistent with the language of the judgment, but also in a way that would undermine the Court of Appeals' review of that order on appeal. Quite simply, this Court cannot issue a post-judgment injunction order as a device to enforce a declaratory judgment that is already on appeal.

Even putting aside these systemic problems with Plaintiffs' approach, they fail to show any exigency that would justify ex parte relief. They have known about the Lower Basin Drought Contingency Plan ("LBDCP") discussions between the federal government, the states and their water agencies, including the Metropolitan Water District of Southern California ("MWD") and IID for months. They can offer no explanation for why they waited until November 15, 2018 to file this extraordinary application consisting of well over 300 pages. This is not a proper subject for resolution on an ex parte basis and the application should be denied.

Finally, Plaintiffs fail to demonstrate that they would suffer immediate and irreparable harm. Plaintiffs' "expert," Craig Morgan, comments on the LBDCP and its *potential* impact on IID's water, but neither he nor anyone else can point to any imminent harm or irreparable injury Plaintiffs themselves would suffer if IID's board is allowed to continue its evaluation and consideration of the LBDCP. Without admissible evidence of an imminent and irreparable injury they themselves would suffer, Plaintiffs cannot obtain an injunction ex parte.

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2. THE COURT LACKS AUTHORITY TO GRANT THE RELIEF PLAINTIFFS SEEK

Plaintiffs bring this post-judgment ex parte application seeking relief which the Court has no authority to grant. They ask the court to fashion a novel remedy not permitted by any case law or statute. They are asking, ex parte, for an order modifying a judgment that is already on appeal. They are also asking for what they believe to be an injunction barring a violation of an injunction. This makes no sense and, not surprisingly, Plaintiffs fail to provide any authority establishing the Court's ability to provide this type of relief. That is because there is none.

A. The Appeal Deprives the Court of Jurisdiction to Award the Relief Requested

Plaintiffs correctly note that the Court of Appeal declined to issue a stay barring enforcement of the writ of mandate and judgment requiring the repeal of the Equitable Distribution Plan ("EDP") pending appeal because the Court of Appeal found it constituted a prohibitory injunction. (Appl. at 10). However, Plaintiffs are not merely trying to enforce the judgment; they are impermissibly trying to *rewrite* the judgment.

The trial in this matter, the Court's statement of decision and the declaratory judgment all relate to the manner in which IID can apportion its water among its users in its service area. It was concerned with the equitable distribution of water among IID's users including between Plaintiffs and other non-domestic or non-agricultural users. (See Index of Exhibits, Ex. 15; p.2). It said nothing about and had no bearing on IID's arrangements or potential arrangements with third parties who are not water users within IID and allowing IID flexibility to store water, which *might* have an impact on all of IID's users equally, regardless of type.

With the ex parte application, Plaintiffs seek to alter the judgment to encompass the *draft* LBDCP. (See Appl. at 6). The LBDCP involves arrangements with other agencies, including the MWD and federal government, respecting the total water supply available to IID. (Index of Exhibits, Ex. 12 at 239-240). It does not have any bearing on the manner or equality of distribution of that total water supply among IID's users.[1] It does not include a commitment to

[1] Plaintiffs assert an interpretation of the LBDCP relying entirely on the improper legal opinions of Craig Morgan. Mr. Morgan improperly offers legal opinions as to the meaning and

provide "water to any non-domestic or non-agricultural user which guarantees the supply of water during times of shortage." (Index of Exhibits, Ex. 15, p.2). Notably, Plaintiffs can point to no provision of any of the draft agreements "which guarantees the supply of water" to anyone, let alone providing for water to IID's non-domestic or non-agricultural users. To the contrary, the LBDCP allows IID to store water in Lake Mead in IID's name. As such, it is not encompassed by the statement of decision or declaratory judgment.

Plaintiffs seek to expand the scope of the judgment to include any transaction which would have an impact (positive or negative) on the total amount of water available to IID. Specifically, they state:

> The Court should enjoin, during the pendency of IID's appeal, the making of the new contracts, including the LB DCP and all related contracts, including the side-agreement with the MWD, which commit the transfer of water from IID to Lake Mead, outside the district, and away from the irrigating landowners' of the district who have the equitable and beneficial right to the use of that water for irrigating their lands within the district and which undermine the irrigating landowners' vested senior rights in violation of the "no injury" rule in favor of more junior rights holders and the federal government.

(App. at 16:16-22). Such an injunction goes well beyond the petition and complaint that Abatti filed in this matter, the issues presented at trial and the Court's declaratory judgment. It has nothing to do with the equitable distribution of water among IID's users. It seeks to bar agreements with third parties who are not IID's water users, which *might* have an impact on *all* IID users. Such an order would, therefore, alter the scope and greatly expand the judgment currently under review by the Court of Appeal. Although the Court of Appeal confirmed that there is no stay of the judgment itself, the Court still cannot modify or alter a judgment currently on appeal. (*Elsea v. Saberi* (1992) 4 Cal. App. 4th 625, 629 [trial court's power to vacate or modify a judgment is suspended while an appeal is pending].) As the Supreme Court observed long ago, "An appeal from a judgment or order would be futile, and this court would be deprived

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effect of the draft LBDCP. (Morgan Decl., ¶¶ 26-28). Interpreting written instruments is solely a judicial function. *Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 865 (1965). Thus, in addition to being inaccurate, Mr. Morgan's interpretation is meaningless and inadmissible. Most of the rest of his declaration consists of inadmissible hearsay or statements lacking in any foundational basis. It should be disregarded entirely.

of jurisdiction if pending the appeal the judgment or order appealed from could be modified or changed into something radically different by a subsequent order of the lower court." (*Vosburg v. Vosburg* (1902) 137 Cal. 493, 496-97; *see also Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189.

Mr. Morgan's declaration makes clear that this application has nothing to do with the EDP that was the subject of the trial and this trial court's declaratory judgment. Rather, Plaintiffs are trying to amend the judgment to challenge IID's *continued* participation and obligations under the federal government's Guidelines, Pilot Programs and Memoranda of Understanding which were never part of the lawsuit brought by Plaintiffs. (See Morgan Decl., ¶¶ 4-8). Plaintiffs are improperly trying to fold these preexisting arrangements and potential changes or plans related to them into a judgment which did not involve these issues, and also did not include these other parties.

Indeed, Section 5 of the Boulder Canyon Project Act (43 U.S.C. §§ 617-617t), a key federal act governing the Colorado River, requires that all users of Colorado River water to have contracts with the Secretary of the Interior. IID holds such a contract with the Secretary. Except for IID's present perfected rights, the Secretary has the exclusive authority to allocate Colorado River water. (*See Arizona v. California* (1963) 83 S. Ct. 1468, 1487.) Thus, by way of a post-judgment ex parte motion, Plaintiffs are trying to circumvent federal issues that directly impact not only IID, but the federal government, the MWD and other California agencies, Colorado, New Mexico, Utah, Wyoming, Arizona and Nevada, as well as all of the agencies within those states. The impact on these other parties shows just how far afield this application goes from the narrow issue of the EDP litigated in this matter. Plaintiffs may not undermine these parties' interests by ex parte application in an action to which they were not parties.

Thus, even if there is no stay on the enforcement of the declaratory judgment, Plaintiffs' current attempt must be rejected as an improper attempt to *modify* the judgment.

B. <u>There Is No Legal Basis for A Post-Judgment Injunction to Prevent an Alleged Violation of a Judgment</u>

Even if the appeal did not deprive this Court of jurisdiction to revise the judgment in the

manner requested by Plaintiffs, the Court still could not grant them what amounts to an injunction to obey the declaratory judgment requiring IID to act (or not act) in a certain manner.

The Legislature has established the manner in which judgments can be enforced in the "Enforcement of Judgments Law," Code of Civil Procedure § 681, et seq. This statute was enacted in 1982 and controls over the historical cases cited on page 19 of Plaintiffs' ex parte application dealing with the generalities of the enforceability of judgments. (See 8 Witkin, *Cal. Proc.* (5th Ed. 2008), Enforcement of Judgments, § 18, pp. 53-54.) It establishes the entirety of the means by which a party may enforce a judgment. (*Id.*)

Code of Civil Procedure § 681.010 sets forth the manner in which various types of judgments may be enforced. It provides:

> Except as otherwise provided by statute:
>
> (a) A money judgment is enforceable as provided in Division 2 (commencing with Section 695.010).
>
> (b) A judgment for possession of personal property is enforceable as provided in Chapter 2 (commencing with Section 714.010) of Division 3.
>
> (c) A judgment for possession of real property is enforceable as provided in Chapter 3 (commencing with Section 715.010) of Division 3.
>
> (d) A judgment for sale of real or personal property is enforceable as provided in Chapter 4 (commencing with Section 716.010) of Division 3.
>
> (e) A judgment requiring performance of an act not described in subdivisions (a) to (d), inclusive, or requiring forbearance from performing an act, is enforceable as provided in Chapter 5 (commencing with Section 717.010) of Division 3

(Code Civ. Proc. § 681.010.) The applicable section to this non-monetary judgment is paragraph (e). That paragraph provides that the only mechanism for enforcement is found in Code of Civil Procedure § 717.40.

Section 717.40, in turn, provides procedures for contempt proceedings. Notably, it does not provide for post-judgment injunctive relief to "enjoin violation of the judgment." Such an injunction is not available under the Enforcement of Judgments Law. Thus, if Plaintiffs truly believed that IID has violated the declaratory judgment (it hasn't), then their sole remedy is

invocation of the contempt process.[2] (See 8 Witkin, *Cal. Proc.* (5th Ed. 2008), Enforcement of Judgments, § 340, pp. 365-366.)

Indeed, Plaintiffs invoke Code of Civil Procedure § 526 as the basis for their request for an injunction here. (Appl. at 8). Section 526 empowers courts to issue *preliminary* injunctions during the pendency of the litigation. (*See Dodge, Warren & Peters Ins. Servs., Inc. v. Riley* (2003) 105 Cal. App. 4th 1414, 1418 [purpose of injunction under Section 526 is "to preserve the status quo pending a determination on the merits of the claim"].) This litigation in the trial court is over, the Court has already made a determination on the merits and a judgment was issued, which is now pending appeal. Section 526 does not allow for post-judgment injunctions.

In short, Plaintiffs' entire approach to enforcing this judgment through another injunction is not legally cognizable and must be rejected.

C. The Court Simply Cannot Issue an Injunction Ex Parte

Plaintiffs are not seeking a temporary restraining order followed by an order to show cause re: injunction, they are simply seeking an injunction. Code of Civil Procedure § 527(c) bars such an injunction on an ex parte basis. Rather, an injunction issued ex parte may not last more than 15 days, or 22 days if good cause is shown. (Code Civ. Proc. § 527, subd. (d).) Plaintiffs' overreaching attempt to seek a quasi-permanent injunction ex parte is improper and abusive.

With a total submission of close to 300 pages, it is difficult to imagine how Plaintiffs believe this is a proper subject for ex parte relief. They apparently believe burying the Court and opposing counsel in paper will be sufficiently daunting or intimidating to justify the relief they seek. They are wrong and their failure to follow the law or statutory procedures justifies denial of the application.

3. THERE IS NO EXIGENCY TO JUSTIFY EX PARTE RELIEF

Ex parte relief is only available upon an affirmative factual showing of irreparable harm or immediate danger. (Cal. R. Ct. 3.1202(c).) Similarly Local Rule 3.3.0 provides that ex parte relief should be resolved for "unavoidable, emergency matters only." Without a showing of such

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[2] Plaintiffs presumably have not invoked that procedure because they know it is doomed to fail. IID has not and will not knowingly violate the judgment.

emergency, an ex parte application must be denied.

Plaintiffs attempt to justify this ex parte application by claiming "the parties intend to approve the DCP and related documents by the end of November, or no later than December 11, 2018." (Appl. at 15:24-25). To support this position they rely on Mr. Morgan's inadmissible hearsay description of what the Commissioner of the Bureau of Reclamation purportedly said in a May 9, 2018 press release. (Morgan Decl., ¶14). How this could be in any way attributable to or binding on IID is a mystery. Even if credited, this hearsay statement merely indicates a desire by Reclamation, a third party, to have drought contingency plans in place by the end of the year. It is not evidence that any such plans actually will be in place or even that they could be in place by the end of the year.

Plaintiffs also reference Exhibits 9 and 12 as support for their claim of urgency. (App. at 15:25). Exhibit 9 is minutes of an August 14, 2018 regular meeting. The reference to the LBDCP in that exhibit is in item 10 on page 8. (See Index of Exhibits, p. 165). That discussion merely references preliminary discussions about a LBDCP and a possible "path forward" in negotiations with the MWD and federal government. (*Id.*). It says nothing about entering into the LBDCP by the end of November or no later than December 11, 2018. Exhibit 12 is just a draft of an agreement. It includes nothing about a deadline for its execution by the parties, let alone any indication whether or when IID might execute it.

Moreover, the materials Plaintiffs cite indicate that any urgency is of Plaintiffs' own making. They reference a May 9, 2018 press release and an August 14, 2018 meeting. One must wonder why Plaintiffs waited until November 15, 2018 to seek ex parte relief. Plaintiffs cannot obtain urgent ex parte relief when they created the urgency. "[T]he urgency with which the trial court was forced to decide plaintiffs' motion may have been, to some extent, of plaintiffs' own making – a fact that the trial court, as a court of equity, should have taken into account in determining what weight to give plaintiffs' claim of imminent irreparable injury." (*O'Connell v. Superior Court* (2006) 141 Cal. App. 4th 1452, 1481; *West v. Lind* (1960) 186 Cal. App. 2d 563, 565 [the power to issue a temporary restraining order is "an extraordinary one and should be exercised with great caution and only where it appears that sufficient cause for hasty action

exists.... Appellant's demand for the extraordinary remedy is inconsistent with her delay and on this ground alone, we could affirm the exercise of the trial court's discretion in denying the remedy sought."].) As stressed in *Lydo Enterprises, Inc. v. City of Las Vegas* (9th Cir. 1984) 745 F.2d 1211, 1213, "[a] delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief. A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiffs rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action . . . ." (citations omitted).

No urgency exists here. The process of entering into the LBDCP involves dozens of steps and confirmation by many parties. (Shields Decl., ¶5). The language presented in the draft agreements referenced by Mr. Morgan has not been agreed to or adopted by any of the parties yet. (*Id.*, ¶3). IID is holding four workshops on the DCP for the public, and the fourth workshop has not even been scheduled yet. (*Id.*). There also is no date scheduled for IID's Board to vote to approve the draft agreements. (*Id.*). And even if IID's board agrees to the language of the LBDCP proposed, it does not mean that the agreement will be adopted in that form by all parties. (*Id.*) It could undergo further changes by the other participants necessitating additional negotiations and further approval by IID. (*Id.*). Thus, any board action approving the terms of the LBDCP is merely a step in the process, it does not mean the current form of LBDCP will become effective or be implemented any time soon. (*Id.*, ¶4).

By pursuing this extraordinary relief ex parte, Plaintiffs are trying to prevent IID from demonstrating the flaws in Plaintiffs' claim that the LBDCP is encompassed in and barred by this Court's declaratory judgment. Had Plaintiffs brought a properly noticed motion, IID could have shown all the ways in which Plaintiffs' (or, more accurately, Mr. Morgan's) interpretations of the draft agreements, and indeed the judgment itself, are flawed.

4. PLAINTIFFS CANNOT ESTABLISH GREAT AND IRREPARABLE INJURY

Code of Civil Procedure § 527 requires that "great or irreparable injury" must appear "by affidavit or by the verified complaint" before an injunction can issue without notice. (Code Civ. Proc. § 527, subd. (c)(1).) California Rules of Court, Rule 3.1202(c) also requires any ex parte application to include an affirmative showing via "competent testimony based on personal

knowledge of irreparable harm, immediate danger or any other statutory basis for granting relief ex parte." Speculation and hyperbole is not enough to justify the "extraordinary remedy of [an] injunction." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352.) Plaintiffs have made no such showing.

Plaintiffs claim to be fearful that their water rights will be impacted if IID's board agrees to the LBDCP. They make a number of general comments to this affect but fail to support them with factual or legal authority. The LBDCP is a *contingency* plan that *may* result in the contribution of water to Lake Mead apportioned among its potential participants. For IID, that contribution can only be in the form of stored water. The LBDCP allows IID to store water in Lake Mead in IID's name – including IID's excess conserved water from 2018 that IID will otherwise lose because it currently lacks storage rights for that water without the LBDCP. Under the draft LBDCP, IID would be able to call upon that stored water in times of shortages subject to limitations. Without the LBDCP, IID will not have the ability to overrun or withdraw stored water from Lake Mead in times of shortages. Contrary to Plaintiffs' apocalyptic tone of their application, the LBDCP protects all of IID's users. (See Shields Decl., ¶4).

And, again, even if IID agreed to the draft agreement in its current form, there is certainly no guarantee that any other participants would also agree or that the LBDCP would eventually be adopted in its current form. (See *Id.* ¶¶3, 5). Additionally, Plaintiffs have not specifically articulated how they would be harmed if IID's board was allowed to vote to participate in the LBDCP. Such a vote is merely the first in a long line of future steps before the LBDCP could come to fruition. (*Id.*) There is no way that step alone could cause a great or irreparable injury to Plaintiffs.

Plaintiffs' own skewed characterization of the impact of the LBDCP acknowledges that it, at most, creates potential for water storage that may become contributions with the ability for that water to be recovered depending on the future elevations of Lake Mead. (Appl. at 15). Plaintiffs have not shown that the contingencies are likely or, if they do happen, will actually have a detrimental impact on *them*. Plaintiffs rely exclusively on the declaration of Mr. Morgan, but he never even attempts to articulate any irreparable harm or immediate danger that Plaintiffs

themselves would suffer. Without a showing of an injury, let alone an imminent, great and irreparable one, Plaintiffs' ex parte request for an injunction must be denied.

5. CONCLUSION

Plaintiffs' ex parte application is hopelessly flawed and seeks relief the Court simply cannot grant. It should, therefore, be denied.

Dated: November 15, 2018

ANGLIN FLEWELLING RASMUSSEN CAMPBELL & TRYTTEN, LLP

By: _____

Robert A. Bailey
Attorneys for Defendant
IMPERIAL IRRIGATION DISTRICT

DECLARATION OF TINA A. SHIELDS

I, Tina A. Shields, hereby declare as follows:

1. I have been employed by the Imperial Irrigation District ("IID" or "the district") since 1992. Currently, I hold the position of Water Department Manager, and have worked for IID in that position since October 2014. As such, I have personal knowledge of the facts stated in this declaration, except as to those matters stated on information and belief. If called to testify, I could and would competently testify to the facts stated herein. I make this declaration in support of IID's Opposition to Plaintiffs' Ex Parte Application to Enforce Judgment and Enjoin Violation of the Judgment.

2. My entire employment with IID has included positions relating to water resource management, water supply planning and Colorado River resource policy, including positions such as: "Colorado River Resources Manager," "Assistant Water Department Manager for Water Supply Planning – Colorado River & QSA" and "Assistant Water Department Manager for the Resources Planning & Management Section." In my employment with IID, I implement Board directives, develop policy and implement programs such as: IID's Temporary Land Conversion Fallowing Policy, equitable distribution plan and on-farm efficiency and system conservation programs. During my employment at IID, I have directed, managed and supervised professional staff of up to 30 employees within the district's Water Department.

3. I have been involved in IID's efforts to enter into a Drought Contingency Plan. IID has been communicating with the federal government, the Metropolitan Water District of Southern California ("MWD") and representatives from Arizona and Nevada regarding what has been referred to as the Lower Basin Drought Contingency Plan ("LBDCP"). To date, none of these parties has agreed to the LBDCP – it is still in negotiations. The process of entering into the LBDCP involves dozens of steps and confirmation by many parties. IID is holding four workshops on the draft LBDCP for the public, and the fourth workshop has not yet been scheduled. There also is no date scheduled for IID's Board to vote to approve the draft agreements. Even if IID's board agrees to the language of the LBDCP proposed to date, it does not mean that the agreement will be adopted in that form by all parties. It could undergo further

changes by the other participants necessitating additional negotiations and further approval by IID.

4. The DCP is a *contingency* plan that *may* result in contributions of water to Lake Mead apportioned among its potential participants. For IID, that contribution can only be in the form of stored water. The LBDCP allows IID to store water in Lake Mead in IID's name – including IID's excess conserved water from 2018 that IID will otherwise lose because it currently lacks storage rights for that water without the LBDCP. Under the draft LBDCP, IID would be able to call upon that stored water in times of shortages subject to limitations. Without the LBDCP, IID will not have the ability to overrun or withdraw stored water from Lake Mead in times of shortages.

5. There is no deadline for the completion of the process to approve the LBDCP by all of the parties, and I expect it will go into 2019 before the LBDCP could be fully executed, approved and implemented by all of the participants – if at all.

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

Executed November 15, 2018 in Imperial, California.

Tina A. Shields