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ENDORSED
NOV 26 2018
SUPERIOR COURT
COUNTY OF IMPERIAL
MARIA RHINEHART, CLERK
BY JESSICA CISNEROS, DEPUTY

ANGLIN FLEWELLING RASMUSSEN CAMPBELL & TRYTTEN LLP

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 SURREPLY TO REPLY IN SUPPORT OF MOTION TO ENFORCE JUDGMENT

Date: Nov. 28, 2018
Time: 8:30 a.m.
Dept.: 9

ANGLIN FLEWELLING RASMUSSEN CAMPBELL & TRYTTEN LLP

1. INTRODUCTION

The Court specifically asked the parties to address four questions in their filings:

1. Does the Court have jurisdiction to order the relief requested?
2. Given the existence of the judgment, is a new post-judgment injunction seeking to compel compliance with the judgment a proper remedy?
3. Similarly, how would such a post-judgment injunction requiring compliance with the existing judgment make any difference?
4. Would any contract entered into in contravention of the Court's judgment be void or voidable?

These questions largely track those raised in the Imperial Irrigation District's ("IID") opposition to the ex parte application. Plaintiffs' attempt to address these issues shows just how strained their logic is and just how far they are overreaching. Plaintiffs continue to ignore the Enforcement of Judgments Law and ask this court to create an improper and unnecessary remedy.

On an even more fundamental level, Plaintiffs still make no effort to show how they could prevail on the merits of this issue or to demonstrate any imminent or irreparable harm they would suffer in the absence of an injunction. Plaintiffs' Reply only serves to confirm an injunction is entirely unnecessary and inappropriate.

2. QUESTION 1: THE COURT DOES NOT HAVE JURISDICTION TO GRANT THE POST-JUDGMENT INJUNCTIVE RELIEF SOUGHT

Plaintiffs admit that in order to preserve the Court of Appeal's jurisdiction, this Court has no jurisdiction to alter the judgment. (Reply at 1:17-18). Yet, that is exactly what they are trying to do. They seek to expand the scope of the judgment to include the Drought Contingency Plan ("DCP") even though that Plan and its impact was not part of the pleadings, record, statement of decision or judgment. Thus, they seek to alter the judgment to expand it beyond its original terms even though the judgment is pending before the Court of Appeal.

Plaintiffs' reply laches on to a single case, *Frank & Franklin v. 7-Eleven Owners for Fair Franchising*, 85 Cal.App.4th 1168 (2000) (*Franklin & Franklin*), to support their argument that the Court can grant them relief despite the Court of Appeals' exclusive jurisdiction. There are a number of flaws with Plaintiffs' approach.

First, it is completely devoid of any meaningful analysis of the facts and circumstances here. Plaintiffs make the bald assertion that "any injunction or post-judgment order issued by this Court to prevent IID's adoption of the [DCP] will not 'modify or destroy the pending judgment appealed from, but preserve the integrity of one part of it.'" (Reply at 2:9-11 (quoting *Franklin & Franklin*, at 1174). This begs the question: How will an order preventing IID from entering into the DCP preserve the integrity of one part of the judgment? Plaintiffs make no attempt to answer that question or to explain why they believe this relief is not a modification of the judgment. Quite simply, any attempt to modify the judgment from something involving the way in which IID can apportion water to its water users to something that includes agreements with third-parties, who are clearly not IID water users, regarding a completely different subject matter, water storage, is a modification of the judgment already on appeal.

Second, the facts and procedural posture of *Franklin & Franklin* are so completely different from those presented here as to make it totally irrelevant. The post-judgment injunction there was to halt the multiplicity of actions in different courts while one of the actions was on appeal. *Franklin & Franklin,* at 1173. It was directly related to the subject matter of the original action to specifically preserve, not alter, the judgment on appeal. *Id.* Plaintiffs, on the other hand, are seeking an order modifying, expanding or adding new specific language to the existing judgment.

Third, Plaintiffs assertion that they are not asking the Court to alter or modify the judgment in any way, "but merely asking for the Court to enforce the Judgment that this Court entered" is inconsistent with their argument that another order is necessary. (See Reply at 2:13-15). If they really were only asking the Court to enforce the judgment, no additional order would be necessary. Tellingly, Plaintiffs then proceed to take a different track arguing that Plaintiffs want "a more specific order directing that the adoption of the DCP and related agreements would violate this Court's Declaratory Judgment". (Reply at 4:21-22). This is a concession that Plaintiffs want a new "more specific" order than the one currently on appeal. But, as Plaintiffs acknowledged, the Court simply cannot do anything to amend, modify, correct or add more specificity to the judgment on appeal. *See Elsea v. Saberi*, 4 Cal. App. 4th 625, 629 (1992) (trial

court's power to modify judgment is suspended during appeal).

Fourth, one of IID's fundamental challenges to the Court's order (as drafted and advanced by Plaintiffs) is its scope and breadth. Apparently recognizing their error in asking the court to adopt such vague and uncertain language, Plaintiffs now seek a "more specific order." Plaintiffs cannot rectify the error they invited once the judgment is already on appeal.

Finally, Plaintiffs' ham-handed attempt to use comments made at the November 15, 2018 IID board workshop to show that the DCP is encompassed by the judgment is utterly unconvincing. IID's general manager's comments were simply an acknowledgment that Plaintiff Mr. Abatti is *arguing* that the DCP issues are the same as the EDP issues addressed by the judgment. (Sanchez Decl., Ex. A.) Notably, Mr. Kelley does not acknowledge or agree that the issues are the same or that the DCP is in any way related to the judgment. He merely notes that Mr. Abatti's counsel is attempting to twist the DCP into the current litigation to advance an argument for the ownership and control of the water despite the DCP being separate and involving conserved water for which agricultural water users have already agreed to be paid to conserve that water for IID's use. *Id.* Just because Mr. Kelley acknowledged that Mr. Abatti's counsel raised these unfounded arguments in her self-serving letter does not mean he acknowledged their validity.

Plaintiffs' strained and inconsistent arguments only serve to confirm the validity of IID's point: the Court has no ability to grant them the relief they seek because doing so would interfere with the jurisdiction of the Court of Appeal.

3. QUESTION 2: THE EXISTENCE OF THE JUDGMENT BARS A POST-JUDGMENT INJUNCTION REQUIRING COMPLIANCE

Plaintiffs cite to the general statutory and decisional maxims recognizing that the court has jurisdiction to enforce its decrees and judgments. (Reply at 2-3). Granted. But this simplistic analysis does not answer the question presented: whether the existence of a judgment renders an injunction purportedly requiring nothing more than compliance with the judgment superfluous and futile.

As IID pointed out in its Opposition, since 1982, the Enforcement of Judgments Law

("EJL") found at Code of Civil Procedure §§ 680.101 through 724.260 establishes the mechanism available to a party seeking to enforce a judgment. The EJL "is a *comprehensive scheme* governing the enforcement of *all* civil judgments in California." *Imperial Bank v. Pim Elec., Inc.*, 33 Cal. App. 4th 540, 546 (1995) (emphasis added). Because of its comprehensive nature, there is no need for courts to provide additional mechanism or remedies for enforcement. *See Broughton v. Cigna Healthplans*, 65 Cal. App. 4th 314, 327-28 (1998).

Although IID's Opposition pointed out the controlling nature of the EJL, Plaintiffs choose to ignore it entirely. Instead, they rely almost entirely on authorities predating the EJL. They make no effort to address the Legislature's clear statutory pronouncement that judgments such as the one here are enforceable only by contempt proceedings CCP § 717.010. While courts undoubtedly have the authority to enforce their judgments, the EJL specifies the ways in which they can do so. For the instance judgment, that way is a contempt proceeding, not an injunction.

Finally, none of the authorities cited in the Reply justify the type of relief sought here. *Franklin & Franklin*, discussed above, involved an injunction to prevent a party from rendering a pending appeal futile through a second action. *Addiego v. Hill*, 268 Cal.App.2d 280 (1968), predated the EJL and merely required corporate officers to refrain from draining the assets of a corporation while the matter was on appeal. *Id.* at 289. That order was affirmed because of the clear evidence of potential harm and because the trial court could have appointed a receiver pursuant to CCP § 564. *Id.* That code section is not applicable here and barring IID from entering into the DCP is not necessary to prevent any harm. In fact, Plaintiffs fail to identify any harm whatsoever. Quite simply, there is no post-EJL authority for a post-judgment injunction to enforce a judgment and to do so would be superfluous and futile.

4. QUESTION 3: A NEW ORDER COMPELLING COMPLIANCE WITH THE JUDGMENT WOULD BE DUPLICATIVE AND AN IDLE ACT

Plaintiffs responded to Questions 2 and 3 as if they were the same. They are not. Question 2 asks whether such an order is a valid remedy at all. Question 3 asks, even if it is, would it make any difference. Plaintiffs make no effort to address this distinction, probably because they could not fashion an argument for how it would make a difference that would not involve them asking

for this Court to modify the judgment despite the appeal.

An injunction that does nothing more than require IID to comply with the existing judgment would be superfluous and idle. *See Fallon v. Superior Court*, 33 Cal.App.2d 48, 52 (1939) ("An order affirming the last order would be judicially an idle act."). Courts should not waste scarce judicial resources on idle acts. *People v. Ledbetter*, 222 Cal.App.4th 896, 904 (2014).

The only way Plaintiffs can get around this obvious redundancy is if they can convince the Court to expand the judgment to include something new – the DCP. Plaintiffs are not simply asking for an injunction barring IID from violating the judgment; they are asking for an expansion of the judgment to include the DCP. Yet, as discussed above, this is exactly the type of modification, expansion and reinterpretation barred by the appeal.

Finally, the parties' fundamental disagreement over whether entering into the DCP would violate the judgment (it would not) even if the judgment is upheld on appeal confirms that an injunction barring the IID from entering it during the pendency of the appeal would do nothing to resolve the issue. Even if the Court of Appeal upholds the judgment, IID still believes entering into the DCP would be consistent with the judgment. Plaintiffs, on the other hand, would still believe it was not. Thus, an injunction pending the appeal would not make any difference in the instant case, although it would allow Plaintiffs to stall IID's legitimate participation in the DCP with other government entities, it would only result in a trial on the issue in the future in order to be fully resolved. Plaintiffs' position that an injunction is necessary to prevent the need for a subsequent action to invalidate the DCP is insincere as it is clear that Plaintiffs seek to circumvent the need for a new action by their request for the inappropriate remedy of a post-judgment injunction in an attempt to make this litigation all-encompassing to reach any action by IID that Plaintiffs want addressed. (Reply at 8:12-17). Plaintiffs cannot point to any authority that would allow a post-judgment injunction to prevent conduct that is not clearly encompassed by a court order during the pendency of an appeal only to have the issue remain undecided until a later action or case is filed. That is because there is none.

5. QUESTION 4: IF PLAINTIFFS ARE CORRECT THAT THAT THE JUDGMENT MEANS IID HAS NO POWER TO ENTER INTO THE DCP, THEN AN INJUNCTION IS UNNECESSARY BECAUSE THE DCP WOULD BE VOID

The Court wisely queried whether any agreement entered into by IID which was barred by the judgment would be valid. This directly ties into the question as whether a post-judgment injunction is needed at all. In other words: if Plaintiffs are correct that the judgment means IID has no power to enter into the DCP, then wouldn't IID's agreement to participate in the DCP be void or voidable? The obvious answer is "yes." If the judgment means IID has no power to enter into the DCP and if that judgment is affirmed, then any agreement by IID to enter into the DCP would be *ultra vires* and void.

A contract made by a public agency without power or authority is ultra vires and void. *Quantification Settlement Agreement Cases*, 201 Cal. App. 4th 758, 812 (2011) (citing *Foxen v. City of Santa Barbara*, 166 Cal. 77, 82 (1913)). Thus, if the judgment means IID has no power to enter into the DCP then, as the Court already noted, its agreement to the DCP would be void.

Plaintiffs acknowledge this point, but argue that the Court should nevertheless issue an injunction to prevent what they believe will be a void act. That they continue to press this point reveals that they doubt the validity of their position. If they truly believed that the judgment means IID has no power to enter into the DCP then they would not need an injunction. The IID's agreement simply would be void and no injunction would be necessary. Plaintiffs are thus improperly asking the Court for an advisory opinion (in an abbreviated motion practice, no less).

They also argue that if IID enters into the DCP, it will create chaos and uncertainty. (Reply at 5). Although Plaintiffs fail to specify what that uncertainty and chaos will be, they make clear that there will be a new lawsuit to invalidate the DCP if the post-judgment injunction is not granted, thereby creating their own uncertainty and chaos. (Reply 5:17-20). However, if this is the chaos and uncertainty alluded to by Plaintiffs, they fail to identify how a new lawsuit would create uncertainty and chaos and, if successful in their new lawsuit, an invalidated DCP would simply put the existing policies back in place preventing IID from receiving stored water or inadvertently overrunning during shortages. If there is to be chaos and uncertainty among the

parties of the DCP, then that is a concern for IID and the other parties of the DCP, not Plaintiffs. Plaintiffs have no standing to complain about the chaos and uncertainty that may arise between the potential parties to the DCP.

The other potential participants to the DCP (the federal government, the Metropolitan Water District of Southern California ("MWD") and other California agencies, Colorado, New Mexico, Utah, Wyoming, Arizona and Nevada, and certain agencies within those states) are all represented by competent counsel capable of reading the judgment, the DCP and the applicable law. The situation is akin to a lis pendens recorded against real property. A third party can still contract to buy the property based on its own evaluation of the likelihood that the underlying real property claim will succeed. But the lis pendens does not prevent the parties from entering into the contract. So too here. The federal government, the MWD and other parties may all evaluate the judgment and the appeal and conclude that there is no impediment to entering into the DCP with IID. Plaintiffs' position is without merit and concerns over chaos and uncertainty are without any explanation or basis.

6. PLAINTIFFS FAIL TO OVERCOME THE OTHER DEFECTS IN THEIR APPLICATION FOR INJUNCTIVE RELIEF

Plaintiffs continue to rely on Code of Civil Procedure § 526 as the statutory basis for injunctive relief. (Reply at 7-8). Yet, they cannot find any support in the statute or case law for the use of that procedure for a post-judgment injunction to prevent conduct which is not clearly covered by the judgment pending the outcome of an appeal. Nor do they make any attempt to satisfy the requirements for injunctive relief under that Section.

To obtain a preliminary injunction, a plaintiff must demonstrate the likelihood of success on the merits and irreparable harm if the injunction is not issued. *ReadyLink Healthcare v. Cotton*, 126 Cal.App.4th 1006, 1016 (2005). There can be no showing of a likelihood of prevailing on the merits here because there will be no determination on the merits of this claim. The Court has already ruled and issued its judgment. Nor can Plaintiffs identify any harm they will suffer, let alone the imminent or irreparable harm which outweighs the harm to IID.

A. Plaintiffs Are Essentially Asking for a Permanent Injunction Without a Trial or Determination on the Merits

Plaintiffs claim injunctive relief under Code of Civil Procedure § 526 is appropriate because some portions of that section are not limited to preliminary injunctions.[1] (Reply at 7-8). Yet, their ex parte application was brought pursuant to subparagraph (a)(3) which is limited to preliminary injunctions. Moreover, even if portions of Section 526 allow for permanent injunctions, they clearly do not permit the issuance of such injunctions without a determination on the merits. Here, the Court has already issued a determination on the merits and there is no mechanism by which a further determination on the merits could be made. The judgment already constitutes the injunction itself. *Katenkamp v. Superior Court*, 16 Cal.2d 696, 698-700 (1940). Thus, any new or different injunction would be an improper modification of the judgment.

Additionally, the requested injunction is overbroad. An injunction must be narrowly tailored and include specific language so the enjoined party knows exactly what is prohibited. *Evans v. Evans*, 162 Cal. App. 4th 1157, 1167, (2008). Here, Plaintiffs ask the Court to prevent IID from approving the DCP and "related agreements." Given that that the DCP is a draft, it is not clear just what would be barred by such an injunction. Would it include any iteration of the DCP? Is there any version of the DCP that IID could enter? And, what are the "related agreements" that Plaintiffs seek to prevent IID from entering? Because they cannot identify any particular part of the DCP which would violate the judgment, Plaintiffs seek a sweeping injunction barring any DCP no matter what it says or how it seeks to protect the water rights of IID. Such a vague and overbroad injunction is inappropriate.

B. Plaintiffs Have No Evidence of Imminent or Irreparable Harm Outweighing the Harm to the IID

Plaintiffs still present no evidence of harm they would suffer if IID entered into the DCP. As noted in IID's Opposition, Plaintiffs were required to present admissible evidence of the harm they would suffer if an injunction does not issue. *DVD Copy Control Ass'n, Inc. v. Kaleidescape,*

[1] Plaintiffs cite to no case and IID has not found one, applying Section 526 to a request for injunction post-judgment.

Inc., 176 Cal. App. 4th 697, 722 (2009) ("to obtain an injunction a plaintiff ordinarily must show that the defendant's wrongful acts threaten to cause irreparable injury, meaning injury that cannot adequately be compensated in damages."). Their ex parte application included no such evidence and nor does their Reply. Rather, Plaintiffs continue to advance the unsupported, conclusory assertion that they will be harmed.

IID, on the other hand, will lose up to 113,000 acre-feet of conserved water at a cost of approximately $20,000,000 if it cannot reach an agreement regarding the storage of its conserved water in Lake Mead because it will exceed its existing rights to storage in 2018. (Shields Decl., ¶3). An injunction is inappropriate when Plaintiffs have presented no evidence of any harm whatsoever, let alone irreparable harm sufficient to outweigh the harm to IID.

As has been noted: "[e]specially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." *Dawson v. East Side Union High Sch. Dist.*, 28 Cal. App. 4th 998, 1040 (1994) (*quoting Eccles v. Peoples Bank,* 333 U.S. 426, 431 (1948)). Plaintiffs have not shown a clear or definite need for equitable relief and cannot establish any specific harm they would be likely to suffer if IID entered into the DCP. As such, they are not entitled to an injunction.

C. Plaintiffs' Challenge to the DCP Is Not Ripe

Finally, Plaintiffs are improperly trying to prevent something that may never happen. The DCP terms have not been finalized and it is not clear when or whether it will be adopted by all the parties, and if so, in what final form. (See Shields Decl. iso Oppn., ¶¶3-4). As Plaintiffs' Reply notes, IID is engaged in the process of meeting, evaluating and communicating with the public about the DCP. Unless and until it takes an action to approve the DCP, the Court should not issue a preemptive injunction.

"[C]ourts ordinarily cannot issue a preliminary injunction prior to the completion of the administrative process." *Am. Indian Model Sch. v. Oakland Unified Sch. Dist.*, 227 Cal. App. 4th 258, 294 (2014). When an agency is engaged in setting policy or evaluating a potential action, no judicial intervention is appropriate. *Pub. Employees' Ret. Sys. v. Santa Clara Valley Transp. Auth.*, 23 Cal. App. 5th 1040, 1046 (2018). That agency action must be complete, not merely

contemplated, before injunctive relief is available stems from the justiciability requirement which bars courts from providing advisory opinions. *Pac. Legal Found. v. Cal. Coastal Com.*, 33 Cal. 3d 158, 170-71 (1982). Further, despite Plaintiffs' conclusory statement that once a party commits to the DCP it is bound even if no other party agrees is completely false and baseless. The DCP makes clear that all parties must enter into the agreements. Unless and until the parties actually enter into a DCP, Plaintiffs' judicial challenges to it are not ripe and no injunction cannot issue.

7. IF AN INJUNCTION ISSUES A BOND IS REQUIRED

Upon the issuance of an injunction, the court ***must*** require an undertaking by the applicant. CCP § 529(a). Such an undertaking "is an indispensable prerequisite to the issuance of a preliminary injunction". *ABBA Rubber Co. v. Seaquist*, 235 Cal. App. 3d 1, 10 (1991). Code of Civil Procedure § 529(a) requires that the undertaking be sufficient to cover any damages to the defendant caused by issuance of the injunction, if it is determined that Plaintiff was not entitled to the injunction. *Top Cat Productions, Inc. v. Michael's Los Feliz*, 102 Cal. App. 4th 474, 478 (2002) ("The purpose of requiring security is to afford compensation to the party wrongly enjoined or restrained..."). The Court's function is to estimate the likely harmful effects on the restrained party, and to set the undertaking at that sum. *Hummell v. Republic Fed. Savings & Loan Assn.*, 133 Cal. App. 3d 49, 51 (1982).

Here, an injunction barring IID from entering into the DCP will cause IID to lose considerable water it has stored in Lake Mead. (Shields Decl. iso Surreply, ¶3). The value of that loss is estimated to be at least $20,000,000. (*Id.*) Thus, in order to obtain the injunction they seek, Plaintiffs should be ordered to provide a bond or undertaking in that amount.

8. CONCLUSION

Plaintiffs' request for post-judgment injunctive relief should be denied. The relief sought is simply not available and Plaintiffs have not established a need for it.

Dated: November 26, 2018

ANGLIN FLEWELLING RASMUSSEN CAMPBELL & TRYTTEN, LLP

By: Robert A. Bailey

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IMPERIAL IRRIGATION DISTRICT

Via Email

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 301 N. Lake Ave., Ste. 1100, Pasadena, CA 91101.

On the date below, I served the foregoing document(s) described as:

DEFENDANT IMPERIAL IRRIGATION DISTRICT'S SURREPLY TO REPLY IN SUPPORT OF MOTION TO ENFORCE JUDGMENT

on the interested parties in this action by placing a true and correct copy enclosed in a sealed envelope as follows:

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☒ **BY OVERNIGHT MAIL SERVICE:** I am readily familiar with the firm's practice of collection and processing of correspondence by Norco Delivery Services. Under that same practice it would be deposited on that same day in an Norco Delivery Services collection receptacle at Pasadena, California, with instructions to bill sender on the label.

☒ **BY ELECTRONIC MAIL:** Pursuant to court order, I transmitted via email the document listed above to the email addresses set forth above (or below) on this date. I transmitted from my email address, lvelasquesz@afrct.com, without any error or non-delivery message in response.

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

Executed on November 26, 2018, in Pasadena, California.

Lina Velasquez
(Type or Print Name)

(Signature of Declarant)

Via Email