NOSSAMAN LLP
FREDERIC A. FUDACZ (SBN 50546)
ffudacz@nossaman.com
JENNIFER L. MEEKER (SBN 260138)
jmeeker@nossaman.com
GINA R. NICHOLLS (SBN 270174)
gnicholls@nossaman.com
TARA E. PAUL (SBN 305366)
tpaul@nossaman.com
777 S. Figueroa Street, 34th Floor
Los Angeles, CA 90017
Telephone: 213.612.7800
Facsimile: 213.612.7801

Robert A. Bailey (SBN 214688)
rbailey@afrct.com
ANGLIN FLEWELLING RASMUSSEN CAMPBELL & TRYTTEN, LLP
301 N. Lake Ave., Suite 1100
Pasadena, California 91101-4158
Telephone: (626) 535-1900
Facsimile: (626) 577-7764

Attorneys for Defendant
IMPERIAL IRRIGATION DISTRICT

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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 MOTION TO ENFORCE JUDGMENT THROUGH ORDER TO SHOW CAUSE RE: CONTEMPT

Date: February 4, 2020
Time: 8:30 a.m.
Dept.: 9

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I. INTRODUCTION

Once again, plaintiffs Michael Abatti, Trustee of The Michael And Kerri Abatti Family Trust and Mike Abatti Farms, LLC (collectively, "Abatti") come to this Court seeking "enforcement" of the Court's August 25, 2017 Declaratory Judgment ("Judgment") that is not available to them – both factually and as a matter of law.

Previously, in November 2018, Abatti sought an injunction to halt the Imperial Irrigation District ("IID") Board of Directors' potential approval and execution of a set of agreements with other Colorado River agencies for the Drought Contingency Plan, but failed to show their claim was embraced by the initial pleadings giving rise to the Judgment. The Court rejected the prior application because, "the relief sought by Abatti by the instant motion would not be subject to enforcement pursuant to the judgment, even if the court had jurisdiction over the parties to do so" (RJN Exh. B, 3:9-11) based on the pending appeal.

Attempting to disrupt IID's regular course of business and improperly usurp the IID Board's discretion yet again, Abatti now brings a second application to invalidate the amendment of a preexisting contract between IID and Heber Geothermal Company LLC and Heber Field Company (collectively "Heber") (the "Agreement") – supported only by their counsel's conclusory declaration – that in no way establishes a clear violation of the Judgment and/or is enforceable pursuant to the Enforcement of Judgments Law ("EJL"). Civ. Proc. Code §§ 680.101-724.260.

Instead, just as with their prior request for an injunction, Abatti seeks to use the Judgment as a weapon and expand their reach over matters that were never at issue and/or embraced in the underlying action giving rise to the Judgment. Contrary to Mr. Hejmanowski's conclusory declaration, he does not have personal knowledge as to the actual terms between IID and Heber and therefore has no ability to declare whether it in fact violates the Judgment or not.

If he did have personal knowledge, as Tina Shields does, and as set forth in her declaration, he and Abatti would know that IID is expressly not agreeing to the guaranteed delivery of water during times of shortage under the Agreement, among other grounds defeating the motion. Indeed, neither of the actual parties to the Agreement – IID and Heber – have ever

believed or intended that Heber would be entitled to a guaranteed amount of water during times of shortage.

Without these requisite showings, this Court is without jurisdiction to even consider issuing an Order to Show Cause ("OSC") – which is procedurally necessary for a finding of contempt. Civ. Proc. Code § 1211(a). Abatti attempts to skip over this step and have the Court "Enforce Judgment Through Order To Show Cause Re: Contempt" outright. The motion must be denied.

II. SUMMARY OF RELEVANT FACTS

On November 27, 2013, Abatti filed a Verified Petition for Writ of Mandate and Complaint challenging IID's adoption and implementation of its October 2013 Equitable Distribution Plan. After rounds of demurrers, the case was at issue when IID filed its answer on March 18, 2015.

A. The Court's Declaratory Judgment and Statement of Decision

This Court heard this matter on April 17, 2017. On August 15, 2017, this Court issued a statement of decision. On August 25, 2017, this Court issued the Judgment, which declared, *inter alia*:

> Effective as of August 15, 2017, Imperial Irrigation District is not empowered to enter into **any *new* contracts** committing to the provision of water **to any non-domestic or non-agricultural user which *guarantees* the supply of water *during times of shortage*** in a manner that **is inconsistent with the Court's findings** in its August 15, 2017 State of Decision in this action. (Emphasis added.)

On August 31, 2017, the court issued the Writ of Mandate commanding the repeal of the EDP.

IID timely filed its Notice of Appeal on September 26, 2017. Abatti timely filed their Notice of Cross-Appeal on October 16, 2017. The appeals are currently pending and have been fully briefed by the parties, with four amicus curaie filing briefs in support of IID, including the State Water Resources Control Board; and one amicus curaie filing a brief in support of Abatti. The parties are currently awaiting the Court of Appeal to set oral argument.

IID has at all times been operating in compliance with the Judgment since it was issued. On February 6, 2018, IID repealed the EDP and currently has no apportionment program in place.

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B. IID's Existing Contract with Heber and Its Amendment

Abatti's past efforts to accuse IID of violating the judgment have been contrived, and this newest attempt should be summarily rejected. Abatti's latest accusation arises out of IID's approval of Amendment No. 1 ("Amendment") to the Amended and Restated Water Supply Agreement between IID and Heber dated September 1, 2015 ("2015 Agreement") – which is obviously an existing contract that was agreed to long before the Judgment. Abatti takes issue with the fact that the Amendment allows IID to provide Heber with a maximum of 2,300 acre-feet of water per year, instead of the maximum 1,800 acre-feet of water per year that was allowed in the 2015 Agreement.

Notably, the Amendment provides that, "Except as expressly amended herein, the [2015 Agreement] remains unmodified and in full force and effect." (Declaration of Tina Shields [Shields Decl.], ¶ 3, Exh. A.) This is critical because the plain and unambiguous terms of the 2015 Agreement make clear that IID does not – and never has – guaranteed Heber any specific amount of water in general, and most specifically in times of shortage. The 2015 Agreement anticipated almost every circumstance under which IID could modify and reduce the quantity of water delivered to Heber. Moreover, the 2015 Agreement specifically anticipated and provided for a change to the amount of water delivered to Heber should a court subsequently order IID to do so. (*Id.*)

Specifically, Section 7.3 of the 2015 Agreement states:

> IID shall use best efforts to provide a water supply to the Plant and Plant Site under the Agreement. However, ***[Heber] understands and acknowledges that events*, including but not limited to:** flood, drought, earthquake, tornado, storm, fire, pestilence, lightning and any other natural catastrophe, epidemic, war, riot, civil disturbance or disobedience, strike, labor dispute, labor or material shortage, sabotage, and also including: **restraint, prohibition or enjoinder by proper judicial, civil or military authority (whether valid or invalid), inaction or non-action by or inability to obtain or keep the necessary authorizations or approvals from any governmental agency or authority,** operational failures and/or repairs to IID facilities, ***may prevent IID from delivering a fixed amount of water to the Plant or Plant Site on a daily or annual basis***. If any such event shall occur, **IID shall undertake reasonable measures to remedy such event as soon as possible and *will continue to supply water to the Plant and Plant Site to the extent that it is reasonably capable of doing so*.**

(*Id.*, emphasis added.)

There can be no violation of this Court's Judgment when this provision provides that, if there is a "shortage" and because IID is subject to the Judgment, the water delivered to Heber under the 2015 Agreement and the Amendment will be adjusted in accordance with the Judgment!

Additionally, Section 6.8 states:

> **To the extent that IID receives an *order or directive from a governmental authority having appropriate jurisdiction that reduces the volume of water available to IID* from the Colorado River** during all or any part of the Term of this Agreement, ***IID may reduce the Maximum Use Amount* [i.e. the 2,300 AFY],** as directed by the IID Board; provided however that in no event shall the ratio of (i) such reduction in the Maximum Use Amount to (ii) the total reduction of water available to IID from the Colorado River exceed the ratio of (a) the Maximum Use Amount to (b) the current total amount of water available to IID from the Colorado River for otherwise applicable calendar year.

(*Id.*, emphasis added.)

Finally, Section 6.7 states:

> **If IID implements a water allocation or apportionment program** pursuant to the Equitable Distribution Plan during all or any part of the Term of this Agreement, **IID shall have the right to *apportion [Heber's] water as an Industrial User consistent with the terms of the Equitable Distribution Plan*.**

(*Id.*, emphasis added.)

At bottom, the plain terms of the 2015 Agreement do not guarantee Heber a specific amount of water, particularly during times of shortage.

Because the Amendment does not violate the Judgment, there was no reason to delay entering into it while the appeal is pending. On the other hand, time was of the essence for Heber to increase the maximum amount of water that it may request under the 2015 Agreement. Heber is a geothermal power plant that operates pursuant to conditional use permits ("CUPs") issued by Imperial County, and is permitted to generate up to 52 megawatts.

On November 10, 2015, after the approval of the 2015 Agreement, Imperial County issued CUP #15-0013 to Heber for new facilities to allow the geothermal plant to operate at its permitted 52-megawatt capacity. CUP #15-0013 authorized the installation of a new Ormat Energy Converter, modification of an existing Ormat Energy Converter, installation of a new three-cell cooling tower and a new isopentane tank. (Kessler Decl., ¶ 5.)

Under previous operations, the plant has been able to utilize flashes of geothermal brine to make steam, which made water condensate that was then used in the cooling tower. However, the newly permitted facilities will rely on a new operational process that will not result in the flashes of geothermal brine, and water will not condensate to then be available for use in the cooling tower.

The loss of condensate required Heber to request that water from IID. (Kessler Decl., ¶ 6.)

In exchange for agreeing to increase the cap on the amount of water Heber could request from IID, Heber promised to make a one-time payment of a "Water Supply Payment Supplement" in the amount of $3,657,750 for the development of water conservation projects, storage projects, and other water augmentation projects through alternative sources. (Shields Decl., ¶ 5, Exh. B; Kessler Decl., ¶ 9.) This is good for the Valley; good for Heber; and good for IID.

III. THE MOTION IS FRIVOLOUS AND VIOLATES CCP § 128.7

Abatti came back to this Court on an ex parte basis to accuse IID of willfully and contemptuously violating the Court's judgment. Abatti and their counsel have made accusations of breach without any basis for believing there is any evidentiary support for them.

The **sole** basis for Abatti's motion is the baseless and false claim that IID has "entered into a new agreement that guarantees and prioritizes water to a non-domestic and non-agricultural user in a manner that is inconsistent with the Court's decision." (Motn. at 1:28-2:1). The facts above disprove this contention, and Abatti inexplicably ignores the terms of the 2015 Amendment. There simply was no violation of the following at-issue provision of the Court's Judgment:

> Effective as of August 15, 2017, Imperial Irrigation District is not empowered to enter into any new contracts committing to the provision of water to any non-domestic or non-agricultural user which guarantees the supply of water during times of shortage in a manner that is inconsistent with the Court's findings in its August 15, 2017 State of Decision in this action.

The sole "evidence" supporting Abatti's assertion is Mr. Hejmanowski's declaration and the Amendment. (Motn. at 2:2; Exhibit 5 to the Hejmanowski Decl.) Mr. Hejmanowski falsely claims to have personal knowledge of the information stated in his declaration and then asserts the legal conclusion that IID entered into a new agreement that would guarantee and prioritize water to a non-domestic and/or non-agricultural user. (Hejmanowski Decl. ¶ 4). As discussed above, the Amendment says no such thing. Although purportedly made under penalty of perjury, this statement is demonstrably false.[1]

[1] It also presents an inadmissible legal conclusion, lacks foundation, violates the best evidence rule and presents hearsay in its attempt to describe the contents of a written instrument. As such it is wholly inadmissible and cannot be used to support the motion at all. See Evid. C. §§ 403;

Despite claiming to have personal knowledge of the facts stated (which is also false), Mr. Hejmanowski obviously did not read the 2015 Agreement. Or, if read, he has either forgotten or ignored the above-cited provisions. Assuming the most innocent explanation for this significant omission, had Mr. Hejmanowski or Abatti bothered to review that 2015 Agreement they would have seen that it ***does not guarantee*** a supply of water to Heber during times of "shortage." Rather, it clearly and explicitly states that the water available to Heber can and will be reduced under multiple circumstances, including in times of "shortage." (Shields Decl., ¶ 3, Exh. A, Sec. 7.3). And, while the Judgment does not explain or define what a "shortage" actually would be, the 2015 Agreement clearly provides that if a "shortage" results from a governmental order or directive reducing the available water to IID, then IID may reduce the amount of water available to Heber. (*Id.*, Sec. 6.8). Under no circumstances could any reasonable person, let alone an attorney, reading this language believe the existing 2015 Agreement guaranteed Heber a supply of water in times of shortage.

The 2015 Agreement further reflects that ***if*** IID adopts a new apportionment program, because one does not exist today, IID will apportion Heber's water "as an Industrial User" consistent with the terms of that apportionment program. (*Id.*, Sec. 6.7). And, if IID were to adopt a new apportionment program before conclusion of this case on appeal, IID would be required for any such program or Equitable Distribution Plan to be consistent with this Court's Judgment.

Even assuming ignorance of the existing 2015 Agreement when asserting the patently false statement that IID entered into a new contract by amending this 2015 Agreement "that would guarantee and prioritize water to a non-domestic and/or non-agricultural user," Abatti and their counsel have violated CCP § 128.7.[2] That section prohibits an attorney from submitting

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720; 1200, 1521; and *Prudential Ins. Co. of Am. v. Superior Court*, 98 Cal.App.4th 585, 603 (2002).

[2] There was not enough time based on the briefing schedule to provide notice of a Motion for Sanctions pursuant to Code of Civil Procedure, section 128.7 with the required 21-day safe harbor period. However, it is IID's position that had there been sufficient time, Section 128.7 sanctions for Abatti's plainly frivolous motion would have been appropriate under these circumstances.

papers containing factual allegations which do not "have evidentiary support, or if specifically so identified are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." CCP § 128.7(b)(3). Mr. Hejmanowski did not make his assertions on information and belief. He did not say that he suspected the 2015 Agreement or the Amendment guaranteed a quantity of water in times of shortage but desired to do further investigation. He **falsely claimed to have *personal knowledge*** of the contents of the 2015 Agreement or the Amendment **when, in fact, he did not**.

Mr. Hejmanowski's false statements in the current declaration are even more troubling, given that IID's counsel pointed out their impropriety in the hearing on the ex parte application. IID's counsel pointed out that unless Mr. Hejmanowski "can honestly say on his own personal knowledge that the contract includes that term [a guarantee of an amount of water during a time of shortage]," then he cannot ask the Court to invoke its contempt powers. (Hejmanoski Decl., Ex. 9 at 5:19-23). Mr. Hejmanowski nevertheless now asserts something that is demonstrably false as if it were based on his own personal knowledge, when it clearly is not.

These tactics reveal that Abatti and their counsel are presenting this motion for an improper purpose in violation of CCP § 128.7(b)(1). They seek to have this Court expand its judgment and participate – nay, overrule – the exercise of discretion of IID's Board and IID's business activities. Having obtained a favorable judgment, Abatti seeks to blur the separation of powers and have this Court second-guess – even rewrite – the decisions of the duly elected Board of IID. This is the second post-judgment attempt by Abatti to expand the scope of the Court's Judgment and involve the Court in a cook's tour of IID's operations, regardless of whether they are encompassed by the Judgment. He apparently believes he only need claim there is a violation and the Court will delve further into IID's decision-making. The motion was presented for an improper purpose and such tactics cannot be condoned. The motion should be denied as frivolous.

IV. THE JURISDICTIONAL LIMITS ON THE COURT'S ACTION

The Court asked the parties to brief whether it has jurisdiction to decide Abatti's request to hold IID in contempt despite the pendency of the appeal. Oddly, Abatti now expands on the relief

they are seeking and alters the nature of this motion. This also dramatically alters the jurisdictional question.

Abatti is no longer seeking just a contempt order based on a purported violation of a court order or judgment. They are now seeking additional relief based on the Court's general powers to enforce its orders. In this way, they are asking the Court to do things it has no authority or jurisdiction to do, both because of and despite the appeal.

A. The Court's Lacks Jurisdiction To Find IID In Contempt

As IID pointed out in its opposition to Abatti's ex parte application, "[t]he filing of a sufficient affidavit is a jurisdictional prerequisite to a contempt proceeding." *In re M.R.*, 220 Cal. App. 4th 49, 57 (2013). Because Mr. Hejmanowski's original affidavit failed to include a factual statement that IID had entered into a ***new*** contract which ***guaranteed*** a non-domestic or non-agricultural user a quantity of water during a time of ***shortage***, the Court's jurisdiction to institute contempt proceedings was never met. Simply put, Abatti's counsel's declaration fails to set forth "all of the facts" to meet the standard necessary to even initiate contempt proceedings. *Groves v. Superior Court of L.A. Cty.*, 62 Cal. App. 2d 559, 568 (1944).

Had those threshold requirements been met, then IID acknowledges and agrees that the Court would have jurisdiction to render a contempt order for a violation of a prohibitory injunction despite an appeal.

B. The Court Lacks Jurisdiction or Authority to Grant the Other Relief Abatti Seeks

Perhaps recognizing the futility of their contempt motion, Abatti now asks for different relief pursuant to the Court's general powers to enforce its orders and judgments. The Court lacks the ability to do so.

As a threshold matter, Abatti's "Motion to Enforce the Court's Judgment Pursuant to Code of Civil Procedure Section 128" in addition to sections 177 and 187 (5:23-26) is not legally cognizable. IID already submitted authority concerning the controlling nature of the Enforcement of Judgments Law governing the Judgment in its opposition to Abatti's prior application. Abatti ignores this authority and continues to raise statutes that are not properly applied in this post-

judgment matter.

This is in contravention of the Enforcements of Judgments Law ("EJL" which "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); CCP § 717.010; *see* 8 Witkin, *Cal. Proc.* (5th Ed. 2008), Enforcement of Judgments, § 340, pp. 365-366 (sole remedy for violation of nonmonetary judgment is invocation of contempt process). Division 3 of the EJL, CCP §§ 712.010-717.010, sets forth the methods for enforcing non-monetary judgments. When, as here, the non-monetary judgment is not of the type specifically discussed (such as for transfer of personal or real property), Section 717.010 provides that it may be enforced by invoking the court's contempt power. Because of its comprehensive and specific nature, the non-specific and general discussion of courts' powers in CCP §§ 128, 177, and/or 187 are unhelpful and inapplicable to the instant motion. *See Broughton v. Cigna Healthplans*, 65 Cal. App. 4th 314, 327-28 (1998). While the Court undoubtedly has the authority to enforce the non-monetary Judgment, the EJL requires enforcement be by way of contempt proceedings. Abatti's efforts to invoke Section 177 and 187 are actually attempts to get the Court to rewrite and expand the scope of the Judgment it already issued, when it is clear that the appeal restricts the trial court's ability to amend, modify, expand or rewrite the judgment. CCP § 917; *Cal. State Auto. Ass'n Inter-Ins. Bureau v. Jackson*, 9 Cal.3d 859, 862 n. 3 (1973) [trial court may not modify a judgment or enter a supplemental judgment]; *O'Hare v. Peacock Dairies*, 39 Cal. App. 2d 506, 508 (1940) [trial court may not correct the judgment other than for clerical errors].

V. A RULING DELAYED UNTIL AFTER THE COURT OF APPEAL RULES WILL NOT RESULT IN ANY LOSS OR PREJUDICE

The Court asked the parties to address Abatti's claim of urgency requiring immediate action. Abatti's motion does so only in the most perfunctory way. It argues that the Court should not delay until after the trial court rules because water is a finite resource that cannot be recovered after distributed. (Motn. at 10). This is a generality lacking in any real substance, or evidence.

IID is not currently operating under any type "shortage." (Shields Decl., ¶ 6). Neither Abatti nor anyone else has been denied access to any water they have requested or ordered since

the Court's August 2017 Judgment. (*Id.*) And, even more crucially, Heber will not begin to draw on the additional 500 acre-feet of water provided for by the Amendment in 2020 – well after the Court of Appeal is anticipated to rule. (Kessler Decl., ¶ 9). Thus, there is no urgency and the Court need not act before the Court of Appeal rules.

Indeed, the Motion concedes that "the Water Supply Payment Supplement will be used for the development of *potential* water supply, replacement, and/or conservation projects…" (Motion, 11:1-6 (original emphasis).) Thus it is unclear what harm under the Judgment is at stake here. Abatti simply argues, "[o]nce water has been distributed, there is no way to get it back." (Motion, 10:13.) Yet, the Motion fails to identify the harm that may occur if water is distributed to Heber. No apportionment program exists today. And Abatti is not being denied any amount of water because Heber may be delivered the 500 acre-feet near the end of the year.

VI. HEBER'S OPERATIONS REQUIRED ENTRY OF THE AMENDMENT

The Court also posed a hypothetical question. It asked, assuming the Amendment violates the order, why did IID enter it now rather than waiting for the Court of Appeal to rule. As noted above, the Amendment does not violate the Court order and IID would not have entered into it if it believed it did.

Additionally, the timing of the Amendment was driven by Heber's operational requirements. In order for Heber to start the process of switching to a new process, it needed the Amendment to provide a basis upon which it could reasonably believe it would have access to sufficient water to operate under that new process. (Kessler Decl., ¶¶ 5-7). While Heber understands that its right to the full amount of the water is not guaranteed and could be reduced in times of "shortage" per the plain terms of the 2015 Agreement, it needed to know that absent such circumstances, it would have access to the water it needed before engaging in the time, effort and resources to implement its new process.

VII. THE BURDEN OF PROOF AND ABATTI'S FAILURE TO MEET IT

Abatti starts by postulating that the burden of proof for their motion to enforce the judgment pursuant to CCP § 128, 177 and 187 is by a preponderance of the evidence. (Motn. at 5). Abatti has no authority for this conclusion and does nothing but cite the statutes themselves.

Id. at 5:25-26. Thus, Abatti appears to be making up a standard. Yet, as discussed above, the proper mechanism by which the Court would enforce a judgment as generally contemplated by Section 128, 177 or 187 is via contempt. See CCP § 717.010. Indeed, Section 178 explicitly provides: "For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt in the cases provided in this Code." CCP § 178. Thus, Abatti's manufactured preponderance of the evidence standard is false and unsupportable, given the contempt requirements.

Abatti correctly acknowledges that the burden of proof for contempt is beyond a reasonable doubt. (Motn. at 7). Proof beyond a reasonable doubt is required, and there is no presumption in support of the contempt order. *Raiden v. Superior Court*, 34 Cal.2d 83, 86 (1949). The California Supreme Court has repeatedly held all contempt proceedings are quasi-criminal in nature and that, as a consequence, "an accused on trial for contempt must be proved guilty beyond a reasonable doubt." *Bridges v. Superior Court*, 14 Cal.2d 464, 485 (1939), revd. on other grounds, 314 U.S. 252 (1940).

Additionally, punishment for contempt "can only rest upon clear, intentional violation of a specific, narrowly drawn order. Specificity is an essential prerequisite of a contempt citation." *In re Marcus,* 138 Cal. App. 4th 1009, 1016 (2006). "A most basic premise in the law of contempt is that such punishment can only rest upon clear, intentional violation of a specific, narrowly drawn order. Specificity is an essential prerequisite of a contempt citation." *Wilson v. Superior Court*, 194 Cal.App.3d 1259, 1272-73 (1987).

There is **NO** evidence to support a finding of contempt here at all – let alone evidence of contempt beyond a reasonable doubt. Abatti asks the Court to take their counsel's word for the fact that IID entered into a contract whose terms violate the Judgment. No reasonable attorney could believe that a court would find the evidence presented sufficient to meet this standard. There is literally no admissible evidence in any of Abatti's materials demonstrating any of the elements necessary for a violation. There is no evidence of a "new" contract – this is an amendment of the existing 2015 Agreement that was agreed to long before the 2017 Judgment. This is not a contract with a "new water user," over which the Court expressed concern in its

statement of decision. (Hejmanowski Decl., Ex. 1, p. 6:6). There is no evidence that the contract "guarantees" any amount of water to Heber, and certainly no evidence it guarantees such an amount during a time of "shortage." Abatti has invoked this process based entirely on a supposition as to contract terms without making any effort to even put those terms in front of the Court. To find this showing deficient or inadequate would be generous. IID would be entitled to prevail on the motion without submitting any evidence because Abatti utterly failed to carry their burden.

The burden is not on IID to prove that it did not violate the judgment. Nevertheless, it has provided the Court with actual contract language at issue to demonstrate just how frivolous and improper Abatti's Motion is. Given the clear contract language showing that there is no guarantee of a quantity of water to Heber in a time of "shortage," let alone a guarantee that is inconsistent with the language of the Judgment or Statement of Decision, it is also impossible for Abatti to meet their burden to show that IID willfully took action to violate the Judgment. Clearly, IID believed and still believes the conditional 2015 Agreement with Heber, as amended, is entirely consistent with and does not violate the terms of any judgment or order of this Court, especially the 2017 Declaratory Judgment.

VIII. THE REMEDIES ABATTI SEEKS ARE NOT AUTHORIZED

Not only is Abatti's declaration by their counsel insufficient to convey jurisdiction on the Court, but the remedies Abatti seeks to enforce the Judgment are not permitted, regardless. Without establishing the Amendment has any bearing on the Judgment, Abatti improperly asks this Court to either "void" or alternatively to "reform" it, requiring new conditions or language added to the Judgment. (Motn., 5:7-9.) But other than to discuss the general provision regarding the Court's power, Abatti makes no effort to explain why they think this Court would have the power to void or even rewrite a contract between IID and Heber.

Heber is not a party to the action and the Court lacks jurisdiction to void or alter its contract rights. See *Irwin v. Manhattan Beach*, 227 Cal.App.2d 634, 636-37 (1964). In *Irwin*, the plaintiff claimed a contract between the City and a third party was *ultra vires* and entered without authority. The third party was a defendant in the action but was apparently never served and did

not appear. The trial court agreed that the contract was *ultra vires* and declared the contract void. The Court of Appeal reversed and found the judgment to be void because a trial "court is without authority to render a judgment which would materially affect the rights of absent, known, indispensable parties." *Id.* at 637. Abatti's tactics here are even more egregious, as they are trying to use what is supposed to be a post-judgment hearing on an order to show cause for contempt to ask the Court to materially affect a non-party's rights. The Court has no power to do so and that request for relief must be denied.

Moreover, Abatti essentially asks that this Court impose a mandatory injunction and rewrite the Judgment – again under the guise of "enforcement" – forcing IID to:

- "[i]nclude a provision in the Heber Geothermal agreement that the IID shall not distribute any portion of the amended 'Maximum Use Amount' to Heber Geothermal unless IID has used the Water Supply Payment Supplement successfully to generate new water through conservation sufficient to cover the amended Maximum Use Amount" (Motn., 6:15-19);
- "IID could include a provision that during times of drought or water shortage, the amended Maximum Use Amount will be the first water withheld by the IID from its water users" (Motn., 6:19-21); or
- "secure a new source of water to be transferred to Heber Geothermal to prevent injury to existing agricultural and other users as required by the Court's judgment." (Motn., 2:5-8.)

This approach is problematic for a number of reasons.

First, as previously briefed in IID's opposition and surreply to Abatti's 2018 injunction papers, these types of expansive measures go far beyond the language of the Judgment and have nothing to do with the equitable distribution of water among IID's users. The claims of this case and resulting Statement of Decision and Judgment directly relate to and are limited to the equitable distribution of water and not the IID Board's discretion to enter into and the terms and conditions of amendments to water supply agreements. Such an order would alter the scope and greatly expand the Judgment currently under review by the Court of Appeal, which is improper.

Elsea v. Saberi, 4 Cal.App.4th 625, 629 (1992) (trial court's power to vacate or modify a judgment is suspended while an appeal is pending); *Vosburg v. Vosburg*, 137 Cal. 493, 496-97 (1902) ("[a]n appeal from a judgment or order would be futile, and this court would be deprived 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."); *see also Varian Medical Systems, Inc. v. Delfino,* 35 Cal.4th 180, 189 (2005); *Elsea v. Saberi*, 4 Cal. App. 4th 625, 629 (1992) (trial court's power to modify judgment is suspended during appeal).

Second, California authority is unequivocal that any injunction mandatory in character is automatically stayed pending appeal. *Food & Grocery Bureau* v. *Garfield*, 18 Cal.2d 174, 176 (1941); *Byington* v. *Superior Court*, 14 Cal.2d 68, 70 (1939); *Ohaver* v. *Fenech*, 206 Cal. 118, 121 (1928); *City of Pasadena* v. *City of Alhambra*, 75 Cal.App.2d 91, 95 (1946) ("[i]t is established that an injunction mandatory in character is automatically stayed by an appeal and that a prohibitory injunction is not so stayed"); *Ambrose* v. *Alioto*, 62 Cal.App.2d 680, 685 (1944); *Pomin* v. *Superior Court*, 44 Cal.App.2d 206, 209 (1941). Under the ruse of "enforcement," Abatti is asking this Court to modify the Judgment to mandate a specific course of action by IID through reformation of the terms of the 2015 Agreement. This is not "enforcement" of the Judgment, but instead an attempt to transform it into a mandatory injunction. Such a remedy is clearly beyond the jurisdiction of this Court.

Abatti's blatant attempt to have this Court amend, modify, correct or add more language to the Judgment to exact the remedies they desire is not authorized. *Elsea, supra,* at 629. This Court previously denied a similar tactic by Abatti for "enforcement" approximately a year ago. In denying their unlawful request for an injunction, the Court ruled:

> However, to the extent that the motion seeks relief connected with any action by Defendant Imperial Irrigation District to enter into any water transfer agreements with third parties in times of shortage in the Lower Colorado River Basin that would impinge on the overall water supply available to it (other than outright sale) the court rules that evaluation of such agreements is not embraced by the initial pleadings giving rise to the judgment in this case, which were solely concerned with the distribution of such water as Defendant Imperial Irrigation District would ultimately be entitled to physically receive. (RJN, Exh. B.)

The same analysis applies to Abatti's renewed efforts. The remedies they seek are not subject to

enforcement and/or otherwise barred. The Court should not condone their repeated efforts to expand the Judgment and usurp the authority and discretion of the IID Board of Directors to conduct the public's business.

IX. CONCLUSION

For the foregoing reasons, Abatti's "Motion to Enforce Judgment Through Order to Show Cause re: Contempt" must be denied.

Dated: January 22, 2020

ANGLIN FLEWELLING RASMUSSEN CAMPBELL & TRYTTEN, LLP

By: _____
Robert A. Bailey
Attorneys for Defendant
IMPERIAL IRRIGATION DISTRICT

Dated: January 22, 2020

NOSSAMAN LLP

By: _____
Jennifer L. Meeker
Attorneys for Defendant and Respondent
IMPERIAL IRRIGATION DISTRICT

PROOF OF SERVICE

The undersigned declares:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action; my business address is c/o Nossaman LLP, 777 South Figueroa Street, 34th Floor, Los Angeles, CA 90017.

On January 22, 2020, I served the foregoing documents **DEFENDANT IMPERIAL IRRIGATION DISTRICT'S OPPOSITION TO MOTION TO ENFORCE JUDGMENT THROUGH ORDER TO SHOW CAUSE RE: CONTEMPT** on the parties to the within action as follows:

SEE ATTACHED SERVICE LIST

☐ (By U.S. Mail) On the same date, at my said place of business, Copy enclosed in a sealed envelope, addressed as shown on the attached service list was placed for collection and mailing following the usual business practice of my said employer. I am readily familiar with my said employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, on the same date at Irvine, California.

☑ (By Overnight Service) I served a true and correct copy by overnight delivery service for delivery on the next business day. Each copy was enclosed in an envelope or package designated by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.

☑ (By Electronic Service) By emailing true and correct copies to the persons at the electronic notification address(es) shown on the accompanying service list. The document(s) was/were served electronically and the transmission was reported as complete and without error.

Executed on January 22, 2020.

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

Judith Robbins

SERVICE LIST

Lee E. Hejmanowski Marisa Janine-Page Jack R. Leer CALDARELLI HEJMANOWSKI & PAGE LLP 12340 El Camino Real, Suite 430 San Diego, CA 92130 Telephone: (858) 720-8080 Facsimile: (858) 720-6680 leh@chpllaw.com mjp@chpllaw.com jrl@chpllaw.com	*Attorneys for Plaintiffs and Petitioners Michael Abatti, Trustee of the Michael and Kerri Abatti Family Trust and Mike Abatti Farms, LLC*
Cheryl A. Orr c.orr@musickpeeler.com MUSICK, PEELER & GARRETT LLP 624 South Grand Avenue, Suite 2000 Los Angeles, California 90017-3383 Tel: (213) 629-7600	*Attorneys for Plaintiffs and Petitioners Michael Abatti, Trustee of the Michael and Kerri Abatti Family Trust and Mike Abatti Farms, LLC*