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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

CHINO BASIN MUNICIPAL WATER
DISTRICT,

Plaintiff,

vs.

CITY OF CHINO, ET AL.,

Defendants.

Case No: RCVRS 51010

*Assigned for All Purposes to:
Honorable Stanford E. Reichert*

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION OF APPROPRIATIVE POOL
MEMBER AGENCIES RE:
AGRICULTURAL POOL LEGAL AND
OTHER EXPENSES**

[Concurrently Filed with Notice of Motion;
Decl. of Scott Burton; Decl. of J. Scott-Coe;
Request for Judicial Notice; Proposed Order]

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 A dispute exists between the Overlying (Agricultural) Pool (“Ag Pool”) and the
4 Appropriative Pool (“AP”) regarding the proper interpretation of the Peace Agreement. Section
5 5.4(a) delineates the scope of the AP’s obligation to pay Ag Pool expenses during the term of the
6 Peace Agreement. It provides for the payment of “all assessments and expenses” for matters
7 initiated by Watermaster within a pre-approved budget, to the extent expenses are reasonable and
8 consistent with legitimate Ag Pool functions under the Judgment.

9 The Ag Pool disagrees. It demands payment of expenses that the Ag Pool independently
10 incurred apart from Watermaster-initiated actions, programs, or projects. In other words, the Ag
11 Pool claims to hold a blank check from the AP for any expenses it may choose to incur. The Ag
12 Pool’s unreasonably broad interpretation of the Peace Agreement, if adopted by the Court, would
13 require the AP to pay any and all Ag Pool expenses, including unlimited attorney and expert
14 expenses for Ag Pool-initiated disputes or undisclosed purposes.

15 AP Members repeatedly have objected to payment of Ag Pool expenses not contemplated
16 by Section 5.4(a).¹ The dispute now presents itself in a new, concrete controversy caused by the
17 Ag Pool’s efforts to compel the AP to pay expert and legal expenses for the “Storage Contests.”
18 The Storage Contests were initiated by the Ag Pool to challenge the local water storage
19 applications of certain AP members. Currently the Ag Pool is demanding, and Watermaster has
20 allowed, the Ag Pool to use a “blank check” under Section 5.4(a) to improperly fund the Storage
21 Contests. Going forward the Ag Pool will use this blank check to fund new disputes against the
22 AP unless restrained by this Court.

23 In addition, the AP – which is comprised predominantly of public water utilities – has
24 been denied the opportunity to review the expenses, which ultimately will be borne by public
25 ratepayers and taxpayers. Specifically, AP Members have asked both Watermaster and the Ag
26 Pool for (and been denied) redacted invoices of Ag Pool legal and expert expenses.

27 _____
28 ¹ For example, a prior dispute in 2009 was resolved by a Special Joint Pool Committee including
representatives of the Agricultural and Appropriative Pools. See Section II.B below.

1 The AP Members seek (1) a Court determination that places appropriate limits on the
2 expenses that the AP can pay under the Peace Agreement, and (2) a determination that the AP is
3 not obligated to pay expenses independently incurred by the Ag Pool in bringing the Storage
4 Contests against certain AP Members. Following is a summary of the many reasons why the
5 Court may grant the requests of the AP Members:

- 6 • Section 5.4(a) only provides for payment of certain Watermaster-initiated expenses
7 consistent with the Peace Agreement;
- 8 • Expenses for the Ag Pool-initiated Storage Contests are not recoverable under §5.4(a)
9 or any section of the Peace Agreement that addresses legal fee-shifting;
- 10 • Recovery by the Ag Pool of its expenses for the Storage Contests is expressly
11 prohibited by the Watermaster Regulations, and the Ag Pool's attempt to recover these
12 expenses from the AP through §5.4(a) violates the Regulations and the Peace
13 Agreement;
- 14 • Resolution of a prior dispute between the Pools in 2009 established that, to be payable
15 under §5.4(a), Ag Pool expenses must be initiated by Watermaster within a pre-
16 approved budget, and must be consistent with the legitimate Pool function; and
- 17 • The Ag Pool has refused to provide any documentation (even redacted) from which
18 the reasonableness and necessity of its claimed legal and expert expenses could be
19 evaluated; instead, the Pool demands a "blank check" in violation of public policy.

20 The Court's approval of the Peace Agreement enables the Court to make the requested
21 determinations as an exercise of its continuing jurisdiction under the Judgment, Section 15. The
22 Court also is empowered under Section 31 to review Watermaster actions and decisions such as
23 Watermaster's issuance of an invoice to the AP based on expenses demanded by the Ag Pool.

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1 **II. FACTUAL BACKGROUND**

2 The Peace Agreement, dated June 29, 2000, was entered into among the three Pool
3 Committees and various parties to the Judgment including the AP Members, and subsequently
4 amended (as amended, the “Peace Agreement”). The Peace Agreement was approved by this
5 Court. It addresses implementation of the Optimum Basin Management Plan (“OBMP”) for the
6 Basin and allows Watermaster to administer transfers, recharge, and storage/recovery of water in
7 the Chino Basin. Section 5.4(a) delineates the scope of the AP’s obligation to pay certain Ag
8 Pool assessments and expenses during the term of the Peace Agreement.

9 **A. 2009 Dispute Regarding the Interpretation of Peace Agreement, § 5.4(a).**

10 Questions regarding the proper interpretation of Section 5.4(a) of the Peace Agreement
11 previously arose in 2009. At that time, the AP and Ag Pool disputed which Pool should fund a
12 Watermaster-initiated expense. The expense at issue was an invoice for the Pathogen Total
13 Maximum Daily Loads Task Force Study (“TMDL Study”) for the Middle Santa Ana River
14 Watershed. That dispute was limited to whether the TMDL Study constituted a Special Project
15 Expense subject to payment by the AP under Section 5.4(a) of the Peace Agreement.

16 At that time representatives of the Ag Pool took the position that “‘all’ means ‘all’” in
17 connection with the Section 5.4(a) phrase “all assessments and expenses of the Agricultural Pool
18 Committee shall be paid by the Appropriative Pool.” More specifically, according to the Ag
19 Pool, the AP was obligated under Section 5.4(a) to pay the Ag Pool’s expenses and attorneys’
20 fees incurred in relation to the TMDL Study. In support of its position, the Ag Pool relied on
21 Section 4.1(b) of Article IV of the Watermaster Regulations, which provides: “Special Project
22 Expenses shall consist of special engineering, economic or other studies, litigation expense, meter
23 testing or major operating expenses. . . .”

24 The three Pool Chairpersons, including the current Ag Pool Chairman, formed a Special
25 Joint Pool Committee to resolve the dispute. The Joint Committee ultimately recommended that
26 Watermaster approve the budget transfer request to pay for the TMDL Study and the AP was
27 assessed for the Study.

1 However, the Joint Committee did not adopt the Ag Pool's broad reading of Section
2 5.4(a). To the contrary, it interpreted Section 5.4(a) narrowly. Specifically, the Joint Committee
3 agreed that any Special Projects chargeable to the AP under Section 5.4(a) must be undertaken by
4 Watermaster, and cannot be undertaken by the Ag Pool on its own initiative. The Joint
5 Committee resolved, in relevant part as follows:

6 **[T]he Agricultural Pool agrees to participate in the regular**
7 **Watermaster Budget Process and present an annual budget in the same form**
8 **and fashion as the other Pools.** This will include: legal fees, consultant fees,
meeting fees and projects. All of the budgets will be reviewed through the Pool
process, approved and submitted by the Advisory Committee to the Watermaster.

9 **Only Watermaster is authorized to undertake Special Project expense**
under Judgment Section 54 and Section 27. Such expense can only be allocated to
10 a specific Pool if the Pool agrees or the court so orders, but **this is not an**
11 **authorization for the Pool to undertake such expense on its own initiative.**
(See e.g. Judgment section 54 and Peace Agreement Section 5.4(a).) Under Section
12 38 (a) Pool Committees are limited to 'developing policy recommendations for
administration of its particular Pool.' Special Project expense necessarily must be
13 part of the Physical Solution which is under the control of the Court and its Court
appointed Watermaster. While the Pool Committees are there to provide advice
14 and assistance to Watermaster they may not supplant Watermaster's Physical
Solution authority under Section 41.

15 (Declaration of J. Scott-Coe, filed concurrently herewith ["Scott-Coe Decl."], at ¶¶2-3, Exh. A;
16 Exh. 1 to Request for Judicial Notice, filed concurrently herewith ["RJN"] [emphasis added].)

17 Following resolution of the dispute in 2009, the AP has paid the Ag Pool assessments and
18 expenses submitted for payment under Section 5.4(a). (Declaration of S. Burton, filed
19 concurrently herewith ["Burton Decl."], at ¶15.) However, until recently the AP understood such
20 assessments and expenses were both related to Watermaster-initiated projects, programs, or
21 actions, and consistent with legitimate Ag Pool functions promulgated in the Judgment. (*Ibid.*)

22 **B. Current Dispute Regarding Interpretation of § 5.4(a) as Applied to Ag Pool**
23 **Expenses Generated by its Storage Contests.**

24 The dispute regarding the scope of Ag Pool expenses that the Ag Pool believes are
25 recoverable under Section 5.4(a) of the Peace Agreement was recently renewed by Ag Pool-
26 initiated Storage Contests. In May 2017, the Ag Pool filed Storage Contests pursuant to
27 Paragraph 10.13 of the Watermaster Regulations. (Burton Decl., at ¶2.) The Ag Pool Storage
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1 Contests are the first of their kind, representing the first time the Contest procedure has been
2 utilized. (Burton Decl., at ¶3.)

3 The Storage Contests challenge applications for Local Storage Agreements submitted by
4 certain members of the AP. (Burton Decl., at ¶4.) Initially, the Ag Pool opposed approval of the
5 applications asserting that the Safe Yield reset was pending and water in storage accounts exceeds
6 the safe storage capacity of the Basin, which the Ag Pool argued would cause a material physical
7 injury to the Basin. (*Ibid.*) The Storage Contests were consolidated for hearing and assigned to
8 Mr. Kurt Berchtold as the Hearing Officer. (*Ibid.*)

9 The Ag Pool has incurred significant legal and expert expenses to prosecute the Storage
10 Contests against certain AP Members, contributing to an overrun of the Ag Pool's Watermaster-
11 approved budget for the present Fiscal Year 2019-2020. (Burton Decl., at ¶5.) The overrun
12 resulted in the Ag Pool's recent request to Watermaster for a budget increase and transfer to cover
13 unpaid legal and other expenses of the Ag Pool. (*Ibid.*)

14 Despite resolution of the Pools' 2009 dispute, the Ag Pool has continued to assert an
15 unreasonably broad interpretation of Section 5.4(a) in connection with the present dispute.
16 Specifically, the Ag Pool asserts that the AP must pay all legal and expert expenses incurred by
17 the Ag Pool, for any purpose whatsoever. (Exh. 2 to RJN.) The Ag Pool also takes the position
18 that redacted details of the expenses need not be revealed to the payor (i.e., the AP) because of
19 attorney-client privilege. (*Ibid.*; Burton Decl., at ¶11, Exh. E.)

20 On June 30, 2020, the Ag Pool took action demanding that the AP pay the Ag Pool's
21 unbudgeted legal and expert expenses in the amount of approximately \$167,000. (Burton Decl.,
22 at ¶¶9,13; Exhs. 2 to RJN; see also Exh. 4 to RJN.) According to the Ag Pool: "[p]ursuant to the
23 terms of the Peace Agreement (Paragraph 5.4(a)), all assessments and expenses of the Ag Pool
24 shall be paid by the Appropriative Pool." (Exh. 2 to RJN.) The Ag Pool further demands that
25 Watermaster amend the Ag Pool budget "as appropriate and necessary to cover all pending
26 invoices." (*Ibid.*)

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1 Objecting to the unbudgeted legal and expert expenses and the overrun, and without any
2 detail regarding the basis of such fees and expenses, AP Members asked Watermaster to provide
3 the appropriately redacted supporting documentation and objected to Watermaster's payment of
4 the Ag Pool's invoices until the AP had an opportunity to review the information. (Burton Decl.,
5 at ¶8, Exh. C.) Watermaster responded that it treats Ag Pool legal invoices as attorney-client
6 privileged communications and, as such, Watermaster neither reviews Ag Pool legal invoices nor
7 would it release the invoices (redacted or otherwise) to the payor of said invoices (i.e., the AP).
8 (Burton Decl., at ¶¶6-8, 12, Exhs. A,B,C.)

9 The AP Members then directed their request for appropriately redacted invoices to the Ag
10 Pool. (Burton Decl., at ¶10, Exh. D.) The Chairman of the Ag Pool Committee responded on the
11 Pool's behalf. His letter stated that the Ag Pool will not provide the redacted invoices, and that if
12 the AP does not pay its expenses, the Ag Pool will sue the AP Members. (Burton Decl., at ¶11,
13 Exh. E; see also Exh. 4 to RJN [Ag Pool "notice of default" to AP].) On September 10, 2020, the
14 Watermaster acknowledged during an AP meeting that the Ag Pool provided no backup for its
15 claimed expenses and Watermaster did not ask for any. (Burton Decl., at ¶14; see also Exh. 3 to
16 RJN.) Thus, the AP has been denied any opportunity to review the basis of the expenses being
17 passed on to determine whether the expenses are appropriate as contemplated under
18 Section 5.4(a).

19 On August 25, the Watermaster Board voted to issue invoices to the AP for the
20 \$165,694.75 that the Ag Pool incurred in legal and expert fees in excess of its budget.² (Burton
21 Decl., at ¶13.) The Ag Pool's response to the AP and the resulting Watermaster-issued invoice
22 necessitated the AP Members' instant Motion.

23 **III. LEGAL ARGUMENT**

24 In interpreting the meaning of a contract, "the overriding goal ... is to give effect to the
25 parties' mutual intentions as of the time of contracting." (*Shaw v. Regents of Univ. of California*

26 ² Also, the Ag Pool recently requested to increase its Fiscal Year 2020-2021 budget for legal
27 expenses upward from the previously approved amount of \$300,000, by an additional
28 \$200,000 to a new annual budget of \$500,000. (Burton Decl., ¶14.) This reflects the Ag
Pool's intent to continue with the same conduct resulting in excessive charges to the AP.

1 (1997) 58 Cal.App.4th 44, 53.) In doing so, the contract must be read as a whole, “taken together,
2 so as to give effect to every part, if reasonably practicable, each clause helping to interpret the
3 other.” (Civ. Code, § 1641.) The words of the contract must “be understood in their ordinary and
4 popular sense . . . unless a special meaning is given to them by usage, in which case the latter
5 must be followed.” (Civ. Code § 1644; see also Code Civ. Proc, § 1861.) When resolving a
6 dispute ““over the meaning of contract language, the first question to be decided is whether the
7 language is “reasonably susceptible” to the interpretation urged by the party. If it is not, the case
8 is over.”” (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516,
9 524.) Here, the language of the Peace Agreement, when read as a whole, makes clear that Section
10 5.4(a) does not provide the Ag Pool an unlimited blank check from the AP.

11 **A. The Peace Agreement Establishes that Only Expenses for Watermaster-**
12 **Initiated Actions Are Payable “Expenses” Contemplated Under § 5.4(a).**

13 The Peace Agreement establishes that “all assessments and expenses” refers to expenses
14 for Watermaster-initiated actions – not expenses for Ag Pool-initiated actions such as the Storage
15 Contests. The Ag Pool’s unreasonably broad (i.e. blank check) interpretation of Section 5.4(a)
16 cannot be reconciled with either the plain language or the purpose and context of the Peace
17 Agreement. Section 5.4(a) states in relevant part:

18 During the term of this Agreement, all assessments and expenses of the
19 Agricultural Pool Committee shall be paid by the Appropriate Pool. This
20 includes but is not limited to OBMP Assessments, assessments pursuant to
21 Paragraphs 20, 21, 22, 30, 42, 51, 53, 54 both General Administrative Expenses
22 and Special Project Expenses, 55, and Exhibit F (Overlying Agricultural Pool
23 Plan) of the Judgment

24 The Recitals establish the overall purpose of the Peace Agreement and therefore context
25 for understanding Section 5.4(a). The last Recital states that “the Parties intend that this
26 Agreement shall enable the adoption and implementation of an OBMP.” Notably, the purposes of
27 the Peace Agreement do not include matters such as the Ag Pool’s initiation of Storage Contests
28 to address the Safe Yield reset (see Burton Decl., ¶4), nor to address adoption/implementation of
29 ///

1 any other requirement under the Judgment or Peace II in which Ag Pool legal or other expenses
2 may be generated.

3 To provide further context, Sections 5.1, 5.2 and 5.3 of the Peace Agreement allow
4 Watermaster to administer transfers, recharge and storage/recovery of water in the Basin. The
5 title of Section 5 is “Watermaster Performance.” Combined, these Sections and the title of
6 Section 5 provide more context for Section 5.4, which is: payment of expenses for Watermaster
7 actions, projects, and programs agreed upon by the parties under the Peace Agreement.

8 Consistent with this context, the introductory language to Section 5.4 clearly states that the
9 “Parties expressly consent to *Watermaster’s performance of [certain] actions, programs or*
10 *procedures* regarding assessments.” (Emphasis added.) In addition, Section 5.4, titled
11 “Assessments, Credits, and Reimbursements,” must be read within the foregoing context as
12 referring to assessments and expenses arising from Watermaster’s performance – not as creating a
13 blank check to pay for Ag Pool-initiated actions such as the Storage Contests or other disputes.

14 Examples of payable “assessments and expenses” enumerated in Section 5.4(a) include
15 OBMP Assessments, General Administrative Expenses, and Special Project Expenses. These
16 specific examples are illustrative to establish the meaning and limited scope of “assessments and
17 expenses.” Notably, Section 5.4(a) does not mention legal and expert expenses.³

18 Collectively, the Recitals along with Sections 5.1, 5.2 and 5.3 of the Peace Agreement and
19 both the introductory language and the language of Section 5.4 itself, establish that “all
20 assessments and expenses” refers to expenses for Watermaster-initiated actions – not expenses for
21 independent Ag Pool-initiated actions.⁴

22 The Ag Pool’s unreasonably broad (i.e., blank check) interpretation of Section 5.4(a),
23 cannot be reconciled with either the plain language or the purpose and context of the Peace

24 ³ Although the definition of “Special Project Expense” under ¶54(b) of the Judgment and ¶4.1(b)
25 of the Regulations includes “litigation expense,” it does not address legal fee-shifting and the
issue of Special Projects was addressed by the Pools in 2009.

26 ⁴ Storage Contests cannot give rise to payable “expenses” under §5.4(a) for the additional reason
27 that the concept of Storage Contests did not exist and could not have been contemplated at the
time §5.4(a) was authored. The Peace Agreement was signed in July 2000. Regulations were
28 a later creation, having been developed by Watermaster with input from the Pools and the
Advisory Committee as per ¶18 of the Judgment, and adopted by Watermaster in June 2001.

1 Agreement. Based on the foregoing alone, this Court may issue the judicial determinations
2 requested in this Motion.

3 **B. Storage Contest Expenses Are Not Recoverable Under Any Section of the**
4 **Peace Agreement that Addresses Legal Expenses.**

5 Under the Peace Agreement, legal fee-shifting is governed by Sections 10.5 and 9.2(d).
6 These sections are more specific than Section 5.4(a) as to the Ag Pool's legal expenses arising
7 from Storage Contests filed by the Ag Pool against certain AP Members.

8 Section 10.5 of the Peace Agreement requires that "[e]ach Party is to bear its own costs,
9 expenses, and attorneys' fees arising out of or in connection with the subject matter of this
10 Agreement and the negotiation, drafting, and execution of this Agreement." (Emphasis added.)
11 "Parties" include any party to the agreement (Peace Agreement, §1.1(gg)), i.e., the Ag Pool is a
12 "Party" that must bear its own legal expenses incurred for matters arising out of or connected with
13 the Peace Agreement.

14 Section 9.2(d) of the Peace Agreement supplies another specific legal fee-shifting rule
15 applicable to adversarial proceedings between Parties:

16 In any adversarial proceedings between the Parties other than the [alternative]
17 dispute resolution procedure set forth below and under the Judgment, **the**
18 **prevailing Party shall be entitled to recover their costs, including reasonable**
19 **attorneys' fees.** If there is no clear prevailing Party, the Court shall determine the
20 prevailing Party and provide for the award of costs and reasonable attorneys' fees.
21 In considering the reasonableness . . . the Court shall consider the quality,
22 efficiency, and value of the legal services [Emphasis added.]

23 Under this Section 9.2(d), as a Party to the Peace Agreement, the Ag Pool must bear its own legal
24 fees and costs in any adversarial proceedings with other Parties such as the AP or the AP
25 Members. The only exception would occur if the Ag Pool were declared "prevailing party" for
26 purposes of a judicially determined fee award. No such fee award has occurred, nor can it be
27 awarded in Ag Pool-initiated Storage Contests proceeding not in any court, but rather before Mr.
28 Berchtold as the Hearing Officer.⁵

27 ⁵ A predicate to any such fee award, were it available, would be judicial review to determine
28 reasonableness. (Peace Agreement, § 9.2(d); see also, e.g., *EnPalm, LLC v. Teitler* (2008) 162
Cal.App.4th 770; *Kanner v. Globe Bottling Co.* (1969) 273 Cal.App.2d 559.) Here, the Ag

1 It is a well-settled principle of contract interpretation that a specific provision controls
2 over a general provision relating to the same subject. (*Kanno v. Marwit Capital Partners II, L.P.*
3 (2017) 18 Cal.App.5th 987, 1017; see also *Miller v. Superior Court* (1999) 21 Cal.4th 883, 895
4 [proposition is “well settled”].) Applying this principle, Ag Pool legal expenses are governed by
5 Sections 10.5 and 9.2(d) of the Peace Agreement, and these sections require the Ag Pool to bear
6 its own legal expenses. Such expenses cannot be shifted to the AP via Watermaster assessments
7 under Section 5.4(a).

8 For this additional reason, this Court may issue the judicial determinations requested in
9 this Motion.

10 **C. The Peace Agreement and Watermaster Regulations Prohibit Recovery of the**
11 **Ag Pool’s Legal Expenses for Storage Contests.**

12 Expenses incurred by the Ag Pool for its Storage Contests are not recoverable for another
13 additional reason: “Storage Contests” are a creation of the Watermaster Regulations, which were
14 adopted after the Peace Agreement (see footnote 4 above) and are consistent with it. (Regulations
15 [“Regs”], ¶1.3.) The Regulations expressly prohibit the Ag Pool from shifting its legal expenses
16 for the Storage Contests to the AP, and the Ag Pool’s attempt to do so violates the Regulations
17 and the Peace Agreement.⁶

18 Pool and Watermaster have categorically refused to provide any information, even redacted
19 legal invoices, upon which findings of necessity and reasonableness could be based.

20 ⁶ The Ag Pool’s demand for payment of its independently incurred legal expenses breaches the
21 implied covenant of good faith and fair dealing under the Peace Agreement. Every contract
22 incorporates an implied covenant of good faith and fair dealing by each party not to do
23 anything which will deprive the other parties of the benefits of the contract. (*Sutherland v.*
Barclays American/Mortgage Corp. (1997) 53 Cal.App.4th 299, 314.) A party breaches the
implied covenant by interfering with or failing to cooperate with the performance of the
contract. (1 Witkin, Summary of Cal. Law (8th ed. 2005) Contracts, §798, p.892; see also
Sutherland, supra, 53 Cal.App.4th at p. 314.)

24 Here, the implied covenant in the Peace Agreement requires the Ag Pool to refrain from doing
25 anything that would undermine the Peace Agreement’s stated purpose. (See *April Enterprises,*
Inc. v. KTTV (1983) 147 Cal.App.3d 805, 816.) An express purpose of the Peace Agreement
26 set forth at the second to last Recital is “to preserve and maintain Watermaster’s role under the
Judgment without compromising the Parties’ collective and individual ‘benefits of the bargain’
27 under this [Peace] Agreement.” But the Ag Pool has induced Watermaster to impose the Ag
Pool’s independently incurred legal expenses. This action by the Ag Pool undermines and
28 compromises Watermaster’s role under the Judgment, including its administration of Court-
approved Regulations requiring each Storage Contest party to bear its own expenses. (Regs,

1 The Watermaster Regulations allow for a “Contest” to be filed by parties. (Regs, ¶1.1(z).)
2 Contest procedures under the Regulations apply to challenges made to any application submitted
3 to Watermaster requesting to participate in a local storage and recovery program, such as the
4 Storage Contests. (See Regs, ¶10.3, ¶10.13.) Paragraph 10.26(a) of the Regulations requires that
5 “[e]ach party to the [Contest] proceeding **shall bear its own costs and expenses associated with**
6 **the proceeding.**” (Emphasis added.) Thus, the Ag Pool must bear its own expenses, including
7 legal fees and expert costs, in connection with the Storage Contests.

8 The Ag Pool’s legal expenses for Storage Contests that the Ag Pool initiated against
9 certain members of the AP under the Regulations cannot be “shifted” to the AP Members through
10 an unreasonably overbroad interpretation of Section 5.4(a) of the Peace Agreement. The Ag
11 Pool’s demand for payment of the expenses is contrary to the Regulations and violates the Peace
12 Agreement.

13 **D. Resolution of the 2009 Dispute Confirmed that, to Be Payable Under §5.4(a),**
14 **Ag Pool Expenses Must Be Initiated by Watermaster Within a Pre-Approved**
15 **Budget, and Must Be Consistent with Legitimate Ag Pool Function.**

16 The resolution of the 2009 dispute between the Ag Pool and the AP established
17 parameters for applying Section 5.4(a) of the Peace Agreement. As discussed in Section II.B
18 above, the 2009 dispute involved a disagreement between the Ag Pool and AP about the meaning
19 of Section 5.4(a) with respect to payment of expenses related to the TMDL Study. Chairpersons
20 of the three Pools formed a Special Joint Pool Committee to resolve the dispute. Although the
21 Joint Committee ultimately recommended that Watermaster approve a budget transfer request to
22 pay for the expense at issue, it also clarified the scope of assessments and expenses contemplated
23 by Section 5.4(a) and documented the mutual understanding in a joint resolution.

24 In its resolution, the Joint Committee described the Ag Pool’s agreement to obtain
25 Advisory Committee review and Watermaster prior approval for its annual proposed budget.
26 Specifically, the Ag Pool agreed to:

27 _____
28 ¶10.26(a).) Also it contravenes Sections 10.5 and 9.2(d) of the Peace Agreement, which
require the Ag Pool to bear its own legal expenses. (See §III.B above.)

1 participate in the regular Watermaster Budget Process and present an annual
2 budget in the same form and fashion as the other Pools. . . . **All of the budgets will**
3 **be reviewed through the Pool process, approved and submitted by the**
4 **Advisory Committee to the Watermaster.**

4 (Scott-Coe Decl., at ¶¶2-3, Exh. A; Exh. 1 to RJN [emphasis added].) As confirmed in this
5 resolution, prior approval is a prerequisite for payment of Ag Pool expenses under Section 5.4(a)
6 of the Peace Agreement.

7 In support of the principle that expenses payable by the AP under Section 5.4(a) must be
8 initiated by Watermaster and not unilaterally incurred by the Ag Pool, the Joint Committee
9 resolved and agreed that “[o]nly Watermaster is authorized to undertake Special Project
10 expense under Judgment Section 54 and Section 27.” (Exh. 1 to RJN, emphasis added.) The
11 Joint Committee cited Section 5.4(a) of the Peace Agreement and Sections 27 and 54 of the
12 Judgment, which clarify what constitute general Watermaster administrative expenses and special
13 project expenses payable under Section 5.4(a).⁷ The Joint Committee emphasized that “**this is**
14 **not an authorization for the Pool to undertake such expense on its own initiative.**” (Exh. 1 to
15 RJN, emphasis added.)

16 In further support of the principle that the Ag Pool may not unilaterally incur a Special
17 Project Expense, the Joint Committee reasoned:

18 Under Section 38(a) Pool Committees are limited to “developing policy
19 recommendations for administration of its particular Pool.” Special Project
20 expense necessarily must be part of the Physical Solution which is under the
21 control of the Court and its Court appointed Watermaster. While the Pool
Committees are there to provide advice and assistance to Watermaster they may
not supplant Watermaster’s Physical Solution authority under Section 41.

22 (Exh. 1 to RJN, emphasis added.) The Joint Committee pointed out that Section 38(a) empowers
23 each Pool to “develop[] policy recommendations for administration of its particular Pool.”
24 Nowhere else in the Judgment or the Pooling Plans is the Ag Pool entitled to be compensated for
25 employing legal counsel or experts for other purposes.

26
27 ⁷ §27 of the Peace Agreement discusses studies that Watermaster may undertake; §54 clarifies
28 which administrative expenses qualify as General Watermaster Administrative Expenses
versus Special Project Expenses.

1 In summary, the Joint Committee did not adopt the Ag Pool’s position that “all” expenses
2 includes any independent undertaking of the Ag Pool. Instead, the Joint Committee endorsed
3 principles, based on the Judgment, limiting what expenses qualify for payment by the AP under
4 Section 5.4(a) of the Peace Agreement. The agreed-upon principles are fairly summarized as
5 follows: to be payable under Section 5.4(a), Ag Pool expenses must be (1) for actions, programs,
6 or projects initiated by Watermaster; (2) within a budget pre-approved by Watermaster following
7 review through the Pool process including approval and submission by the Advisory Committee
8 to the Watermaster; and (3) consistent with legitimate Ag Pool functions pursuant to Section 38 of
9 the Judgment.⁸

10 The Ag Pool’s recent requests for reimbursement of expenses related to its Storage
11 Contests deviate from this standard. The Storage Contest expenses are not related to
12 Watermaster-initiated actions, programs or projects. Nor are the expenses consistent with
13 legitimate Ag Pool functions under the Judgment.⁹ Instead, these expenses stem from the Ag
14 Pool independently inserting itself into operations of another pool, seeking to supplant the role of
15 Watermaster in implementing the Physical Solution. As such, the Ag Pool should be responsible
16 to pay its own, independently-incurred expenses. These expenses cannot be imposed on the AP.

17 **E. The “Blank Check” Sought by the Ag Pool Violates Public Policy.**

18 The Peace Agreement cannot be read to allow virtually any expense – no matter how
19 divorced from the appropriate role and authority of the Ag Pool under the Judgment, and without
20 providing documentation (redacted or otherwise) – on public ratepayers.

21 As discussed in Section III.B above, legal fee shifting for adversarial proceedings such as
22 the Storage Contests is discussed in Section 9.2(d) of the Peace Agreement, which imposes
23 appropriate strict limits. First, a court must determine the “prevailing party” in the proceeding.
24 Then a court must assess whether the fees sought were reasonable and necessary. (Peace

25 ⁸ As noted in Section II.A above, although the AP has paid certain Ag Pool assessments and
26 expenses submitted for payment under §5.4(a), payment was based on the understanding that
27 such assessments were related to and expenses stemmed from Watermaster-initiated actions
and were consistent with legitimate Ag Pool functions promulgated in the Judgment.

28 ⁹ Without opportunity to review the invoices, AP is not able to confirm if the fees incurred are
reasonable, but in light of the excessive unbudgeted expenses, contend that they are not.

1 Agreement, § 9.2(d).) In this way the Peace Agreement comports with California law, which
2 requires courts to ascertain the fees due under any contractual fee-shifting provision based on
3 reasonableness. (Civ. Code, §1717; *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1091 [one-
4 sided and oppressive fee-shifting provisions are not enforced].)

5 Courts are particularly unwilling to enforce “blank checks” because to do so would be a
6 clear violation of public policy. (See, e.g., *Ecco-Phoenix Electric Corp. v. Howard J. White, Inc.*
7 (1969) 1 Cal.3d 266, 272 [unilateral fee-shifting provision that requires one party to pay the
8 other’s fees whenever any lawsuit is necessary would encourage frivolous litigation and is
9 unenforceable as contrary to public policy].) Public policy concerns are heightened where the
10 blank check would be funded by public agencies.

11 The AP Members are public water utilities, and accordingly costs imposed on them
12 ultimately are borne by the public through, e.g., water rates and taxes. The AP Members have
13 obligations under California law such as Proposition 218 to justify their costs as necessary and
14 reasonable. Such principles of public fiscal transparency caution against passing through
15 potentially unlimited, unseen costs to the public. The Ag Pool is comprised predominantly of
16 private (not public) individuals and enterprises, notwithstanding the State’s participation (see
17 Exhibit C to the Judgment, listing the Stipulating Overlying Agricultural Producers). It would be
18 unreasonable and contrary to public policy for the AP to provide private members of the Ag Pool
19 an unlimited, unreviewable fund to do as they please.

20 At a minimum, the AP Members should be provided with supporting and redacted
21 invoices regarding expenses they are requested to pass-through to the public. Contrary to
22 assertions of Watermaster and the Ag Pool, according to the California Supreme Court such
23 information is not categorically privileged and exempt from disclosure. (*Los Angeles County*
24 *Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282.)¹⁰

25
26 ¹⁰ *Los Angeles County Board of Supervisors v. Superior Court, supra*, holds that legal invoices of
27 public entities are public records subject to disclosure. The contents are privileged only to the
28 extent they communicate information for the purpose of legal consultation. The fact that parts
of an attorney invoice may contain privileged information does not justify withholding the
entire document where the invoice can be disclosed with appropriate redactions.

1 The interpretation of Section 5.4(a) advanced by the Ag Pool would allow virtually any
2 expense, for any purpose, without limitation or documentation. This interpretation defies equity,
3 violates public policy, and cannot be reconciled with the plain language and context of the
4 Judgment and Peace Agreement.

5 **IV. CONCLUSION**

6 For all of the foregoing reasons, the AP Members respectfully request that this Court
7 enter an order declaring that, to be payable under Section 5.4(a) of the Peace Agreement, Ag
8 Pool expenses must be (1) for actions, programs, or projects initiated by Watermaster; (2) within
9 a budget pre-approved by Watermaster following review through the Pool process including
10 approval and submission by the Advisory Committee to the Watermaster; (3) consistent with the
11 Peace Agreement and legitimate Ag Pool functions pursuant to Section 38 of the Restated
12 Judgment; and (4) reasonable. Consistent with that determination, the AP Members respectfully
13 request that the Court declare that they are not obligated to pay any Ag Pool legal and expert
14 expenses related to Storage Contests initiated by the Ag Pool, and the AP is entitled to a refund
15 of any such expenses already paid.

16
17
18 Dated: September 17, 2020

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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 within action. My business address is Chino Basin Watermaster, 9641 San Bernardino Road, Rancho Cucamonga, California 91730; telephone (909) 484-3888.

On September 18, 2020 I served the following:

1. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF APPROPRIATIVE POOL MEMBER AGENCIES RE: AGRICULTURAL POOL LEGAL AND OTHER EXPENSES

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

See attached service list: Mailing List 1

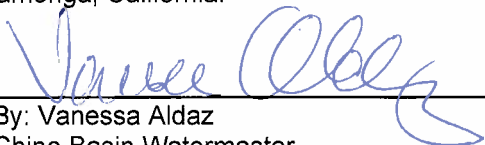
/ / BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee.

/ / 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.

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

Executed on September 18, 2020 in Rancho Cucamonga, California.


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