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57774074.v2

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I. INTRODUCTION

Consistent with the Court's Order issued at the November 13, 2020 hearing conducted on the Motion of Appropriative Pool Member Agencies Re: Agricultural Pool Legal and Other Expenses ("Motion"), which directed the parties to participate in mediation, the Appropriative Pool member agencies ("AP Members") hereby submit this status report describing the parties' progress toward mediation. In short, the AP Members have informed the Ag Pool that they would agree to at least one of the mediators proposed by the Ag Pool. However, the Ag Pool has not agreed. Instead, the Ag Pool has demanded that, prior to reaching any other agreements, the AP Members must agree that the AP will pay the mediation expenses of the Ag Pool. This demand is unacceptable to the AP Members, and has resulted in an impasse. In order to break the impasse, the AP Members seek the Court's resolution of two issues: (1) appointment of a mutually agreeable mediator, and (2) confirmation that the Ag Pool must bear its own costs and expenses in connection with its participation in the Court-ordered mediation, including half of the mediation expenses.

II. DISCUSSION

A. The Parties Have Not Agreed Upon a Mediator.

On November 24, the AP Members proposed the following JAMS mediators to the Overlying (Agricultural) Pool ("Ag Pool"):

Hon. Diane Wayne (Ret.)

Hon. Sheila Sonenshine (Ret.)

Hon. Dickran Tevrizian (Ret.)

Hon. Rebecca Westerfield (Ret.)

On December 4, the Ag Pool proposed the following list of mediators to the AP Members:

Hon. Jeffrey King (Ret.)

Hon. Peter D. Lichtman (Ret.)

Hon. Edward J. Wallin (Ret.)

Hon. John W. Kennedy, Jr. (Ret.)

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The AP Members responded that Judge Kennedy from the Ag Pool's list would be acceptable to the AP members, assuming the Ag Pool also would agree to him as the mediator. The Ag Pool has not agreed yet.

Instead on December 4, the Ag Pool demanded that the AP Members agree that the AP will pay the mediation expenses of the Ag Pool. According to counsel for the Ag Pool, "there is no purpose in choosing a mediator when there is no financial means to pay for their services." The issue of which parties should pay for the mediation is addressed in Section II.C below.

B. The Parties Have Reached Preliminary or Tentative Agreements Regarding How the Mediation Will Be Conducted.

Based on discussion conducted to date, it appears that the parties will be able to reach agreement regarding logistics of how the mediation will be conducted. For example, the parties appear to agree that the mediation should be scheduled for one day instead of two. Also, the parties appear to agree that principals should be allowed or encouraged to participate in the mediation, that the mediation should be conducted remotely via videoconference, and that each side (i.e., the Ag Pool and the AP Members) should submit a confidential mediation brief in advance of the mediation, subject to a reasonable page limit to be determined.

These preliminary or tentative agreements have not been finalized yet. As explained above, according to counsel for the Ag Pool, no further progress can be made until there is a resolution of the Ag Pool's demand that the AP pay all the mediation expenses of the Ag Pool.

The Ag Pool's assertion that it lacks financial means to pay for its participation in the mediation should be ignored, for multiple reasons. First, the Ag Pool fails to cite any authority for the proposition that alleged lack of resources is a basis for fee-shifting in the present dispute, and there is none. Second, the suggestion that the Ag Pool cannot pay for its participation in the Court-ordered mediation is unsupported by facts. The AP understands from Watermaster that the Ag Pool has \$355,349 in reserve funds, based on Watermaster's financial report as of September 30, 2020. This reserve of approximately \$355,349 exists *in addition* to the Ag Pool's annual budget including its legal budget. The Ag Pool recently increased its legal budget from \$300,000 to \$500,000 based on the minutes of the Ag Pool's September 3, 2020 special meeting.

C. The Ag Pool Must Bear Its Own Mediation Expenses.

There is no reasonable dispute that the Ag Pool must bear its own fees and costs for its participation in Court-ordered mediation. California follows the "American" rule regarding attorney fee-shifting. The American rule requires that, absent a statutory or contractual basis to recover attorney's fees, each party must bear its own attorney's fees. (Pearl, Cal. Attorney Fee Awards [Cont.Ed.Bar 3d ed. 2010] § 1.2, p. 3.) California Code of Civil Procedure Section 1021 codifies this rule: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties"

The Peace Agreement sets forth the agreement of the parties regarding attorney feeshifting for purposes of the present dispute. Section 10.5 expressly governs attorney fee-shifting and prohibits it, as follows:

Each Party is to bear its own costs, expenses, and attorneys' fees arising out of or in connection with the subject matter of this Agreement and the negotiation, drafting, and execution of this Agreement.

Section 10.5 is controlling here, because there is no other, more specific provision that expressly addresses attorney fee-shifting.²

The Peace Agreement contains another attorney fee-shifting provision at Section 9.2(d). However, by its own terms, this attorney fee-shifting provision does not appear to apply to the present dispute, as shown below.

In any adversarial proceedings between the Parties other than the dispute resolution procedure set forth below [i.e., in Section 9.3], the prevailing Party shall be entitled to recover their costs, including reasonable attorneys' fees.

The Proposed Order submitted by Watermaster to the Court on November 25 states that the parties are "ordered to submit their present dispute to non-binding mediation consistent with the provisions of section 9.3(c) of the Peace Agreement." Assuming the dispute is proceeding to mediation under Section 9.3 of the Peace Agreement, as indicated in the Proposed Order, then

² It is a well-settled principle of contract interpretation that a specific provision controls over a general provision relating to the same subject. (*Kanno v. Marwit Capital Partners II, L.P.* (2017) 18 Cal.App.5th 987, 1017; see also *Miller v. Superior Court* (1999) 21 Cal.4th 883, 895 [the proposition is "well settled"].)

attorney fee-shifting is not available based upon the determination of a prevailing party under Section 9.2(d).

The Ag Pool's stated position is that the AP must pay for all expenses of the Ag Pool, including the Ag Pool's share of mediation expenses. This assertion by the Ag Pool assumes prematurely that the Ag Pool will prevail on the very issue at the center of the parties' dispute – i.e., what is the reasonable interpretation of Section 5.4(a) of the Peace Agreement?

As discussed in detail in the AP Members' Motion and supporting papers, the Ag Pool's expansive interpretation of Section 5.4(a) is patently unreasonable. Among many other reasons why payable "expenses" cannot reasonably include all legal expenses of the Ag Pool, Section 5.4(a) does not mention attorney fees.³ Sections 9.2(d) and 10.5 of the Peace Agreement do address legal fee-shifting, and accordingly these more specific provisions control. (See footnote 2 above.)

The Ag Pool's recent assertion that the AP must pay for the Ag Pool's participation in the mediation violates public policy, for reasons discussed in the Motion. One such reason, especially relevant here, is that Under Civil Code Section 1717(a), any contractual provision that purports to provide for unilateral attorney fee-shifting in favor of a particular party, must always be interpreted by the court as being bilateral, such that

the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. (Civ. Code, § 1717(a).)

This statutory policy, which renders all attorney fee-shifting provisions bilateral in adversarial proceedings to enforce a contract, illustrates one of many reasons why the Ag Pool's interpretation of Section 5.4(a) is unreasonable. Civil Code Section 1717(a) establishes that the AP cannot be required under the Peace Agreement to pay "all" the Ag Pool's legal expenses. Instead, the Peace Agreement and the Code require that the Ag Pool must bear its own costs and

³ As explained in more detail in the AP Members' Motion and supporting papers, while certain attorney fees incurred by the Ag Pool may be payable under Section 5.4(a) to the extent they are for, e.g., a Watermaster-initiated Special Expense, Section 5.4(a) does not address attorney fee-shifting, and it cannot reasonably interpreted as giving the Ag Pool a "blank check" to incur legal and other expenses and make the AP pay.

| 1 | expenses incurred in connection with the present dispute, including its share of Court-ordered | | |
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| 2 | mediation expenses. | | |
| 3 | II. CONCLUSION | | |
| 4 | The AP Members respectfully request that the Court break the parties' impasse by issuing | | |
| 5 | an order to help move the mediation process forward. Specifically, the AP Members request that | | |
| 6 | that the Court resolve two issues: (1) order the appointment of a mutually agreeable mediator, an | | |
| 7 | (2) order that the Ag Pool must bear its own costs and expenses in connection with its | | |
| 8 | participation in the Court-ordered mediation, including paying one-half of the mediation | | |
| 9 | expenses. | | |
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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

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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 December 10, 2020 I served the following:

| | On December 10, 2020 I served the following. |
|------------------|---|
| | 1. APPROPRIATIVE POOL MEMBER AGENCIES' STATUS REPORT RE: MEDIATION |
| / <u>X</u> / | 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. |
| <u>/ X _</u> / | 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. |
| decla correct | re under penalty of perjury under the laws of the State of California that the above is true and t. |
| | Executed on December 10, 2020 in Rancho Cucamonga, California. |
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