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Monte Vista Building Sites, Inc., and A.V. Materials, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

Coordination Proceeding Special Title
(Rule 1550 (b))

ANTELOPE VALLEY GROUNDWATER CASES

Included **CONSOLIDATED** Actions:

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company
Los Angeles Superior Court Case No. BC325201

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company
Kern County Superior Court Case No. S-1500-CV-254348 NFT

Diamond Farming Company vs. City of Lancaster Riverside County Superior Court Lead Case No. RIC 344436 [Consolidated w/ Case Nos. 344668 & 353840]

Willis v. Los Angeles County Waterworks District No. 40; Los Angeles Superior Court Case No. BC 364553

Wood v. Los Angeles County Waterworks District No. 40; Los Angeles Superior Court Case No. BC 391869

Judicial Council Coordination No. 4408
[Assigned to Hon. Jack Komar; Dept 17]

Santa Clara Case No.: 1-05-CV-049053

LANE FAMILY'S REPLY TO GRANITE CONSTRUCTION COMPANY'S OPPOSITION TO MOTION FOR POST-JUDGMENT SUPPLEMENTAL ORDER

[Declaration of Theodore A. Chester, Jr. and Exhibits Thereto; Declaration of George M. Lane and Exhibits Thereto; Objections to Granite's Opposition Declarations Filed Concurrently Herewith]

Date: **March 21, 2016**
Time: **1:30 p.m.**
Dept.: **1**
Court: **San Jose Superior Court**
191 N. First Street
San Jose, CA 95113

1 In *City of Santa Maria v. Adam*, 211 Cal.App.4th 266, 311 (2012), the court stated:

> "'In determining whether a proceeding is embraced in or affected by the appeal, we must consider the appeal and its possible outcomes in relation to the proceeding and its possible results.' (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189). A postjudgment proceeding that is ancillary or collateral to the appeal is not stayed 'if the proceeding could or would have occurred regardless of the outcome of the appeal.' (*Id.* at p. 191). If the postjudgment proceedings would not affect the effectiveness of the appeal, the proceedings are permitted. (*Id.* at p. 189.)"

In *Santa Maria* non-stipulating parties argued that the trial court could not consider, and rule upon, certain groundwater monitoring and other plans submitted post-judgment by certain stipulating parties. The court held that possible outcomes of the pending appeal could not affect the postjudgment rulings, and those rulings would not make the appeal ineffective. *Id.* at 311. The court reasoned that the stipulating parties could seek a judicial determination "among themselves" without affecting the appeal.

Here, there is a dispute between a landlord and tenant, who are settling parties, concerning title to water rights allocated pursuant to the global settlement. A determination of this issue, as between Granite and the Lane Family, will have absolutely no bearing on any of the issues that are on appeal. Similarly, the issue of title as between Granite and the Lane Family requires a determination independent of the appeal and "could or would have occurred regardless of the outcome" of the appeals that were noticed last month in this case.[2]

II. THERE WAS NO APPORTIONMENT AGREEMENT BETWEEN GRANITE AND THE LANE FAMILY

Granite states (at 1) that the Lane Family and Granite "orally agreed" to allocate the water "during the global settlement discussions" that occurred in March 2014. Granite states (at 2) that there was an "oral agreement." It sets forth (at 4-5) a number of alleged statements made

enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."

[2] If the Court does determine it lacks jurisdiction under Section 916(a), the Lane Family respectfully requests that the Court order a mandatory settlement conference which order clearly would meet the *Santa Maria* tests.

during the March 2014 settlement negotiations by Granite's and the Lane Family's lawyers, whereby the terms of a proposed agreement were allegedly discussed. Granite states (at 5) that the two parties' lawyers jointly "advised the larger group" that Granite and the Lane Family had "reached agreement on allocation." It states (at 5) that this "agreed allocation [was] reached on March 31, 2014." It repeats (at 8, 9) that the alleged agreement was reached in "March 2014."

However, these statements that a March 2014 agreement was reached are not supported by the facts or the law. First, Granite makes no showing that there existed a written apportionment agreement signed by Little Rock or a member of the Lane Family. Such a signed writing is required under *Code of Civil Procedure* § 664.6. *J.B.B. Investment Partners, Ltd v. Fair*, 232 Cal.App.4th 974, 985 (2014). [3]

Second, the evidence is clear that no separate apportionment agreement, oral or written, was reached at the March 31, 2014 settlement meeting or at any other time. Mr. Robert Kuhs, attorney for Granite, testifies that the Lane Family's lawyer said "he would check with his client and advise," and, then he and Mr. Kuhs "advised" others that Granite and the Lane Family had "agreed on an allocation." Kuhs Decl. ¶7. But that testimony is controverted. Chester Decl. ¶8. And in any event it is self-serving and not credible. None of Granite's other lawyer declarants provide support; they don't claim that the Lane Family's lawyer "advised" them of such an agreement. McLachlan Decl. ¶6; Joyce Decl. ¶6; Zimmer Decl. ¶6; Hughes Decl. ¶6.

Mr. Kuhs' testimony is in conflict with his December 10, 2014 letter (Kuhs Decl. ¶12. Ex. E, p.4) where he states that after the Lane Family's lawyer's stated that he needed to talk with his client, "that is where the discussion left off."

Importantly, about a month later, on May 21, 2014, the Lane Family's lawyer emailed Mr. Kuhs as follows: "I have not heard from you regarding the Granite/Lane proposal. We should nail this down." Chester Decl. ¶9. Mr. Kuhs did not respond but instead replied "Ted, I'm short on time this week." *Id.* Then, two days later on May 23, 2014, the Lane Family's lawyer emailed Mr. Kuhs:

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[3] A signed writing is also required with respect to an agreement relating to water rights as real property interests. Cal. Civil Code § 1624; Cal. Code of Civil Proc. § 1971.

> "With respect to Granite/Lane, I will draft a settlement agreement consistent with what I proposed several weeks ago. Obviously, if we can't settle, we will have to have the court decide the issue." Chester Decl. ¶9.

Again, in his reply email Mr. Kuhs failed to address the clear statement that a Granite/Lane apportionment agreement had not been reached as of May 23, 2014. *Id.*

Subsequent events demonstrate that no agreement was reached. From August 2014 through December 2014 settlement meetings and settlement communications occurred between Granite and the Lane Family and among their lawyers. Kuhs Decl. ¶¶10, 11, 12, and 13; Lane Decl. ¶¶11, 12, 13 and 14; Chester Decl. ¶10.[4] On December 31, 2014, the Lane Family informed the Court that the dispute remained unresolved. Chester Decl. ¶13. The Court's January 7, 2015 Minute Order so recognized. On February 20, 2015 the Lane Family's lawyer, consistent with the Court's January 7, 2015 Minute Order, submitted the Lane Family's Stipulation signature pages to counsel for the United States, acting as the settling parties' collector of signatures, with the following statement:

> "Also, the signature of Little Rock Sand and Gravel, Inc. is provided with the understanding that the subdivision of the joint allocation to Granite and Little Rock shown on Ex. 4 of the proposed judgment remains unresolved, and such subdivision will be addressed and resolved at a later time." Chester Decl. ¶14.

Clearly, counsel for the United States, and those attorneys he informed, were aware that the issue remained unresolved and subject to later determination pursuant to the Court's January 7, 2015 Minute Order. McLachlan Decl. ¶9.

In its October 6, 2015 CMC Statement, the Lane Family confirmed its understanding that the Granite/Lane issue remained outstanding and reserved until after final approval of the global settlement.

In summary, there was no apportionment agreement reached in March 2014, and, although many agreement attempts were made since that date, the validity of Granite's attribution theory remains unresolved and is in need of resolution.

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[4] The Lane Family has objected under Evid. Code §1152 to the introduction into evidence of all settlement communications except to the extent they are offered to show the existence or non-existence of an agreement. *Moving Picture Union v. Glasgow Theaters, Inc.*, 6 Cal.App.3d 395, 402 (1970).

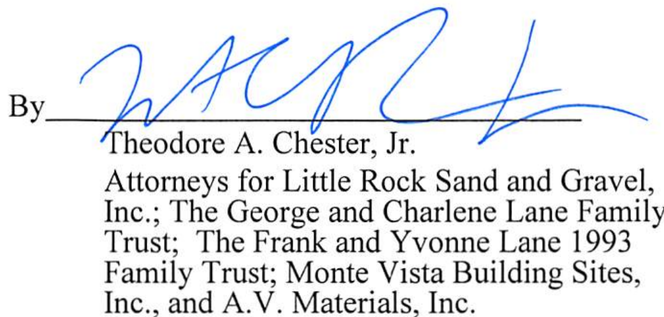
authority that a tenant's exercise and use of an overlying groundwater right on leased property can be attributed to other property owned by the tenant. Instead, Granite asserts (at 7) that it has a "future" need for water on its adjacent land and thereby is entitled to an allocation.[5] It cites *City of Barstow* and *Tehachapi-Cummings*. But neither of those cases authorized an allocation right to raw land where no pumping or beneficial use had previously occurred and where overlying rights had not previously been exercised. In fact, such an allocation would be inconsistent with this Court's December 23, 2015 Statement of Decision which held (at 14) that "unexercised overlying rights . . . are not entitled to an allocation in the Physical Solution."[6]

Conclusion

For the foregoing reasons, the Lane Family respectfully requests that the Court grant its motion.

Dated: March 14, 2016

SMILAND CHESTER ALDEN LLP



By_________________________
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[5] Granite states (at 7) that the mineral deposits on the Leased Property are "essentially depleted," and it is Granite's Adjacent Property that now needs water. It states (at 8) that the Lane Family has "no need for water" on the Leased Property. However, these statements are contrary to the facts. There is no testimony that water use on the Leased Property will cease. Just the opposite is true. Mr. Taylor declares that Granite "will continue to use" the wells, and process aggregate, on the Leased Property "for the foreseeable future." Taylor Decl. ¶¶12, 13. Under the terms of the Lease, at least until the current term ends in 2021, groundwater from the three wells will be used on the Leased Property. Lane Decl. ¶¶6, 7, 8.

[6] Granite suggests (at 8-9) that one resolution of this dispute be that Granite and the Lane Family be presumed cotenants with equal shares. Granite cites (at 9) the *Caito* case. But neither *Caito* nor any other reported case holds that such a presumption applies where water rights are judicially allocated. And, in any event, if such presumption existed it has been rebutted herein.