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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT

ANTELOPE VALLEY GROUNDWATER CASES

INCLUDED ACTIONS:
Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Los Angeles, Case No. BC325201;

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Kern, Case No. S-1500-CV-254348;

Wm. Bolthouse Farms, Inc. v. City of Lancaster, Diamond Farming Co. v. Lancaster, Diamond Farming Co. v. Palmdale Water Dist., Superior Court of California, County of Riverside, Case Nos. RIC 353840, RIC 344436, RIC 344668;

Rebecca Lee Willis v. Los Angeles County Waterworks District No. 40 Superior Court of California, County of Los Angeles, Case No. BC364553;

Wood v. A.V. Materials, Inc., et al. v. Superior Court of California, County of Los Angeles, Case No. BC 509546; and

Little Rock Sand and Gravel, Inc. v. Granite Construction Co., Superior Court of California, County of Los Angeles, Case No. MC026932

Judicial Counsel Coordination No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to Honorable Jack Komar

REPLY TO OPPOSITION TO OPENING BRIEF OF LITTLE ROCK SAND AND GRAVEL, INC. RE TITLE TO GROUNDWATER ALLOCATION ARISING FROM LITTLE ROCK SAND AND GRAVEL'S LAND AND GRANTED UNDER JUDGMENT AND PHYSICAL SOLUTION

[*Declaration Stephen R. Isbell filed concurrently herewith*]

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TIME: 9:00
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Little Rock Sand and Gravel, Inc. ("Little Rock") hereby submits this brief in reply to Granite Construction Company's ("GCC") Opposition to Little Rock's Opening Brief ("Opening Brief") regarding the dispute between these two parties over ownership of the 234 acre-feet annual groundwater allocation (the "Allocation") granted to "Granite Construction Company (Little Rock Sand and Gravel, Inc.)" under the Judgment and Physical Solution entered in the Antelope Valley Groundwater Cases ("AVG Cases").[1]

I. INTRODUCTION

Rather than being grouped in the AVG Cases with the class of landowners whose overlying rights are unexercised or arguing for a production right against all of the landowners with exercised overlying rights, GCC has used this litigation to attempt to strip its long-time landlord, Little Rock, of its groundwater rights. Without ever explaining why a tenant could or should be permitted to take its landlord's property, GCC contends that it is entitled to a portion of the Allocation because of an "oral" agreement that was never made or, alternatively, that the Court should simply split the Allocation between it and Little Rock.

GCC takes these positions because, without the "oral" agreement or the Court's acquiescence in its pitch to split the Allocation, GCC has no legitimate claim to any groundwater right associated with the quarry operated on Little Rock's land. In that there was never an agreement between the parties to split or share the Allocation, and the issue of title to the Allocation is reserved for the Court's determination, the Court should decide that the Allocation belongs exclusively to Little Rock, because, between it and GCC, Little Rock is the only party that has exercised its overlying rights on its land.

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[1] This reply brief will use the defined terms previously used in Little Rock's Opening Brief and its Opposition ("Opposition") to GCC's Motion to Interpret and Enforce the Judgment and to Partition the Exhibit 4 "Granite Construction Company (Little Rock Sand and Gravel, Inc.)" Production Right ("Motion").

II. ARGUMENT

A. The Court's Determination Of Who Holds Title To The Allocation Should Be Based On The Exercise of Little Rock's Overlying Rights On The Land Little Rock Leases To GCC

1. There Has Never Been a Final Agreement Regarding Who Owns the Allocation or Any Portion Thereof, and That Issue Has Been Reserved for Determination by the Court.

In its Opening Brief, Little Rock proved with documentary and declaratory evidence that GCC and it never reached a final agreement to split or share the Allocation despite their negotiations over nearly two years. Additionally, Little Rock showed that, before and after the parties' executed the Stipulation, Little Rock reserved the issue of title to the Allocation for later determination, which the Court has acknowledged. (See Opening Brief, 8:16-13:8; Declaration of George M. Lane in support of Little Rock's Opening Brief ("Lane Decl.") ¶¶ 26-42 and Exs. E-H; Declaration of Theodore A. Chester in support of Little Rock's Opening Brief ("Chester Decl."), ¶¶ 11-31 and Exs. B-I; Request for Judicial Notice in support of Little Rock's Opening Brief ("RJN"), Ex. 23; RJN, Ex. 25, p. 47; RJN, Ex. 30, ¶ 7; and RJN, Ex. 31, p. 3.)

In response to Little Rocks evidence, GCC has failed to prove with admissible or credible evidence (1) the existence of a final, binding agreement with Little Rock to split or share the Allocation or (2) that Little Rock failed to reserve the issue of title to the Allocation for later resolution. Instead, GCC raises a number of unpersuasive arguments based on hearsay and its counsel's unsupported, self-serving declaration in an attempt to bind Little Rock to an "oral" agreement that was never made or, alternatively, to exclude Little Rock from the Stipulation and Judgment thereon. For the reasons discussed below, GCC's positions should be disregarded, and the Court should follow California law by deciding this dispute based on the facts that prove the exercise of Little Rock's overlying rights on its land.

a) The parties failed to reach a final, binding agreement to split the Allocation.

Little Rock proved that the parties negotiations over title to the Allocation failed, because they could not agree to a material term regarding which of them would benefit from any future increase in the amount of the Allocation and which would suffer any decrease. The parties'

correspondence confirms that this impasse is where the parties' negotiations "left off." (Opening Brief, 9:3-10:3; RJN, Ex. 30, ¶ 7; Chester Decl., Ex. C, p. 1, ¶ 2; Chester Decl., Ex. E; Chester Decl., Ex. F, p. 4, ¶ 3.) This fact conclusively establishes that there was never a final, binding agreement, because contract law, which applies to the analysis of stipulations for judgment (*Los Angeles City School Dist. of Los Angeles County v. Landier Management Co.* (1960) 177 Cal.App.2d 744, 750-751), provides that, unless the parties agree on all material terms, no contract formation has occurred. *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 797.

Despite admitting that the parties never agreed to which of them would benefit from any future increase in the Allocation and which would suffer any future decrease (RJN, Ex. 30, ¶ 7; Chester Decl., ¶¶ 16-17, Ex. E, and Ex. F, p. 4, ¶ 3), GCC attempts to avoid this fact by arguing that this term is immaterial to an agreement to split the Allocation, because there has never been an increase or decrease in the production rights allocated in Exhibit 4 to the Physical Solution, including the Allocation. This position is baseless, because the Physical Solution, at Sections 5.1.1.4, 18.5.9 and 18.5.10, contemplates and allows for future increases and decreases of the amount of the Allocation. Thus, in the absence of an understanding on this material term, Little Rock and GCC failed to form a final, binding agreement to split the Allocation.

Additionally, GCC's claim of an "oral" agreement fails, because as raised in Little Rock's Opening Brief at p. 21, but ignored in GCC's Opposition, an unwritten agreement to split the Allocation is insufficient and unenforceable, as settlement agreements and agreements affecting title to real property (which includes water rights like the Allocation (*Santa Clarita Water Co. v. Lyons* (1984) 161 Cal.App.3d 450, 461)) must be in writing. California *Civil Code* ("Civ. Code") § 1624; California *Code of Civil Procedure* ("*CCP*") §§ 664.6 and 1971; *J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 985.

Accordingly, the lack of an agreement on all material terms and the absence of an executed writing expressing the parties' agreement to split the Allocation compel the conclusion that GCC's claimed "oral" agreement is no agreement at all. Therefore, in ruling on this issue, the Court should disregard GCC's unsupported claims of an "oral" agreement.

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b) *Little Rock is a party to the Stipulation despite reserving the issue of title to the Allocation.*

Alternatively, GCC argues that Little Rock is either fully bound by the Stipulation or is not a party thereto. GCC claims that (1) by executing the Stipulation, Little Rock is a party to the Stipulation, and its reservation of the issue of title to the Allocation is meaningless, or (2) due to its reservation of this issue (which GCC misconstrues as Little Rock's "conditional" entry in the Stipulation), Little Rock is not a stipulating party. Neither of these positions are persuasive, as they both ignore the facts and misapply the law.

In summary of the facts established in the Opening Brief, Little Rock repeatedly reserved the issue of title to the Allocation for post-Stipulation determination and, while maintaining that reservation, it executed the Stipulation with the intent to be bound by all of its terms but with the issue of title to the Allocation reserved for later determination by the Court. (Opening Brief, 8:16-13:8, 19:1-22:6; Lane Decl., ¶¶ 26-42 and Exs. E-H; Chester Decl., ¶¶ 11-31 and Exs. B-I; RJN, Exs. 22, 24, 28.) President of Little Rock, George Lane, testified at deposition that, in its execution of the Stipulation, Little Rock intended to be bound by all terms of the Stipulation but recognized that the dispute with GCC over title to the Allocation remained reserved and unresolved. (Declaration of Stephen R. Isbell in Support of Little Rock's Brief in Opposition to Granite's Motion, Ex. C, 39:19-40:15, 42:12-43:1, 44:5-8, 46:6-15, 47:10-18, 49:1-4.) Thus, Little Rock's reservation of this issue is not a rejection of the terms of the Stipulation, including the amount of the Allocation or the production rights granted to the other parties. [2]

Both before and after the Stipulation was executed, the Court acknowledged the reservation of this issue. In its January 7, 2015 Minute Order, the Court stated, "There remains an outstanding issue between … the Lane Family … and Granite …, which the Court reserved for further discussion …" Similarly, in its March 29, 2016 Order denying the Lane Family's Motion

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[2] As Little Rock's reservation only concerns who, between it and GCC, holds title to the Allocation, the resolution of this dispute will not affect any other term or party to the stipulated Judgment. Rather, contrary to GCC's claim that the resolution of this issue will undo the entire Stipulation, the Court's decision on this issue will only clarify the stipulated Judgment by deciding the reserved issue, which has remained undecided and unclear due to stipulated Judgment's use of the ambiguous term "Granite Construction Company (Little Rock Sand and Gravel, Inc.)" as the "Producer" granted the Allocation under Exhibit 4 of the Physical Solution.

for Post-Judgment Supplemental Order, the Court wrote, "There are several references in the record … that the internecine rights between Granite and Lane as to the water production on the subject real property was undecided …", and that "the court has the power in equity to resolve the intra-ownership dispute …" (Chester Decl., ¶¶ 23; RJN, Ex. 23; RJN Ex. 31, p. 3.)

Furthermore, the Stipulation and Judgment do not determine who, between Little Rock and GCC, owns the Allocation or, if they are to split the Allocation, how much of the Allocation each party owns. The term that jointly-references Little Rock and GCC in Exhibit 4 to the Physical Solution (i.e., "Granite Construction Company (Little Rock Sand and Gravel, Inc.)") was offered by the Court in May 2013 during the Phase 4 trial in response to Little Rock's counsel informing it that GCC was attempting to prove the exercise of overlying rights with evidence of groundwater pumping and use on Little Rock's Leased Land under the parties' Lease. (RJN, Ex. 17, 8:10-9:21.) After the Court offered this term as a temporary reference to the parties' ownership dispute, Little Rock and GCC never reached an agreement to split or share the Allocation. When that term was revisited by the parties during their settlement negotiations, both Little Rock and GCC agreed to leave the term unrevised to avoid any "suggest[ion that] the parties have reached any particular understanding with respect to the manner in which title [to the Allocation] is held." (Chester Decl., ¶ 15 and Ex. D.)

In an attempt to avoid the facts that (1) establish Little Rock's reservation of the subject issue and (2) indicate that the Stipulation did not resolve this issue, GCC cites *Ellena v. State of California* (1977) 69 Cal.App.3d 245 ("*Ellena*"), *In re Marriage of Hahn* (1990) 224 Cal.App.3d 1236 ("*Hahn*"), and *Sargon Enterprises, Inc. v. University of Southern California* (2013) 215 Cal.App.4th 1495 ("*Sargon*") for the proposition that once a party signs a stipulation for judgment, it is bound by the terms of the stipulation despite any reservation made outside of stipulation. These cases do not apply here for at least two reasons. First, unlike Little Rock in this case, none of the parties claiming a reserved issue in those cases expressly reserved an issue with the Court

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before executing their stipulations.[3] Second, those cases do not involve a situation like this case where the reserved issue is also unresolved by the terms of the stipulated judgment. For the reasons discussed above, the stipulated Judgment's use of the term "Granite Construction Company (Little Rock Sand and Gravel, Inc.)" does not decide who owns the Allocation.

Additionally, *Ellena* does not support GCC's position for two more reasons. First, the *Ellena* opinion states the rule that the "res judicata effect" of a stipulated judgment "only extends to those issues embraced within the consent judgment." *Ellena, supra*, 69 Cal.App.3d at p. 260. The stipulated Judgment in this case does not determine who owns the Allocation or how much of the Allocation each party owns, because (1) the use of term "Granite Construction Company (Little Rock Sand and Gravel, Inc.)" (which was only to be used as a temporary reference to the unresolved ownership dispute between Little Rock and GCC) in Exhibit 4 to the Physical Solution does not resolve this issue, (2) there was no agreement to split or share the Allocation and (3) Little Rock reserved the issue for post-Stipulation determination.

Second, the *Ellena* opinion allows for the examination of "extrinsic evidence" in determining whether an issue was withdrawn from a stipulation by express reservation. In that case, the court reviewed evidence outside of the terms of the stipulated judgment to determine whether, as the plaintiff claimed, "an otherwise included issue [was] withdrawn by an express reservation." While the court in *Ellena* found that the extrinsic evidence did not support the plaintiff's claimed reservation, its search for an "express reservation" extended beyond the terms of the stipulated judgment. *Ellena, supra*, 69 Cal.App.3d at p. 261. Thus, under the *Ellena* opinion, Little Rock's pre-Stipulation reservation of the issue of title to the Allocation was sufficient to remove this dispute from the res judicata effect of the stipulated Judgment.

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[3] In the divorce proceeding discussed in *Hahn*, the husband, after stipulating to the value of the community house, attempted to reopen the proceedings to present evidence that the house was worth more than the parties stipulated. In upholding the trial court's decision to deny the husband's request, the *Hahn* Court stated that, based on the evidence offered post-stipulation, the husband could not rescind his stipulation. *Hahn, supra*, 224 Cal.App.3d at p. 1240. Similarly, in *Sargon*, after a trial court ruling precluding certain evidence at trial in support of Sargon's damages theory, the parties stipulated to a judgment of "all issues," including all theories of damages, in order to accelerate an appeal. After the appeal, Sargon attempted to but was precluded from re-litigating its damages claim. *Sargon, supra*, 215 Cal.App.4th at p. 1501. Likewise, in *Ellena*, the Court found no evidence of an express reservation of a damages issue before the parties entered into their stipulation for judgment. *Ellena, supra*, 69 Cal.App.3d at pp. 260-263.

Accordingly, Little Rock is a party to the Stipulation, bound to the terms of the stipulated Judgment, and it is only requesting the Court to decide the issue over title to the Allocation, which has remains reserved and unresolved to date.

2. With No Agreement to Split the Allocation, the Court's Decision of Who Holds Title to the Allocation Should Focus on the Facts That Little Rock's Overlying Rights Are Exercised, GCC's Overlying Rights in Its Adjacent Land Are Unexercised, and Little Rock's Land Has a Proven, Current Need for Water.

As quoted in Section IV of the Court's Statement of Decision regarding "Stipulating Landowner Parties and Public Overliers ...," "'when[, as in this case,] it is alleged that the water supply is insufficient to satisfy all users the court must determine the quantity needed by those with overlying rights ... [a]nd it stands to reason that when there is a shortage, the court must determine how much each of the overlying owners is using *in order to fairly allocate the available supply among them.*'" (See Court's December 23, 2015 Statement of Decision at RJN, Ex. 27, 10:27-11:6, quoting *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 298 (emphasis added by Court in Statement of Decision).)

In accordance with the foregoing, the Court determined that the members of the Willis Class are not entitled to a production right under the Physical Solution, because, among other things, the landowners' use exceeded the native safe yield while the public water suppliers are pumping; the members of the Willis Class "have no present reasonable beneficial use"; and granting the Willis Class members a production right would create an unworkable uncertainty in the implementation of the Physical Solution and render the landowners' exercise of their overlying rights "legally meaningless." (See Court's December 23, 2015 Statement of Decision at RJN, Ex. 27, 14:18-15:21.) While GCC is not a member of the Willis Class, it, as the owner of the Adjacent Land with unexercised overlying rights thereon, is identical to the Willis Class members, such that the Court's foregoing findings and analysis should equally apply to GCC with respect to its Adjacent Land and the quarry operated on Little Rock's Leased Land.

Consistent with the this Court's reasoning in denying the parties with unexercised overlying rights a production right under the Physical Solution, the Court in *Tehachapi-Cummings County Water Dist., v. Armstrong* (1975) 49 Cal.App.3d 992, 1000, instructed,

> The proportionate share of each owner is predicated not on his past use over a specified period of time, nor on the time he commenced pumping, but solely on his current reasonable and beneficial need for water. (Cal. Const., art. XIV, § 3; *Katz v. Walkinshaw, supra*, 141 Cal. 116; *Peabody v. City of Vallejo*, 2 Cal.2d 351 [40 P.2d 486]; *Burr* v. *Maclay Rancho Water Co., supra*, 160 Cal. 268, 281-282 [116 P. 715]; *Hudson v. Dailey*, 156 Cal. 617, 628-629 [105 P. 748]; Hutchins, The Cal. Law of Water Rights, pp. 437-438; 51 Cal.Jur.2d, Waters, § 400, p. 870.)

Accordingly, it would be consistent with this Court's findings and California law to determine who owns title to the Allocation based on whose overlying rights have been exercised and whose land has a current reasonable and beneficial need for water. The facts here, summarized below, show that, between Little Rock and GCC, only Little Rock has exercised the overlying rights on its land and only Little Rock's land has a current need for water.

Little Rock owns three of the five parcels of the Leased Land (RJN Ex. 1-16; Lane Decl., ¶¶ 1-13 and Ex. A) and, under the Lease, Little Rock leases/subleases the entirety of the Leased Land to GCC, which includes the leasehold right to use all rights to "underground water" "occurring therein" or "appurtenant thereto." (Lane Decl., ¶¶ 15-16 and Ex. B, §§ 1, 3.1 and 3.2.) Thus, as explained in the Opening Brief but unaddressed in GCC's Opposition, all of GCC's use of the water rights on the Leased Land under the permission granted by the Lease is considered lessor Little Rock's exercise and beneficial use its overlying rights. (See *CCP* § 326 - "the possession of the tenant is deemed the possession of the landlord"; see also, *Miller & Starr, California Real Estate* 2d § 18:48 - "the possession of the tenant is considered the possession of the landlord for all purposes"; see also, *Joerger v. Pacific Gas & Electric Co.* (1929) 207 Cal. 8, 34 – renting water is beneficial use of lessor's water rights; see also, *Fryer v. Fryer* (1944) 63 Cal.App.2d 343, 346 and 348 – lessee cannot gain title to lessor's water rights through permissive use under lease agreement.)

Additionally, all of the groundwater that GCC pumped from the Basin for its quarry operation was used on the Leased Land, with roughly 91% of that water used on Little Rock's Parcels A, B and C. (Opening Brief, 4:24-5:21; Little Rock's Opposition to GCC's Motion, 10:7-26; Lane Decl., ¶¶ 21-23 and Exs. A and B; Chester Decl., Ex. A, 38:15-20; Declaration of Stephen R. Isbell in Support of Opening Brief, ¶¶ 6-10 and Exs. A-G; RJN, Ex. 4, Ex. 19, ¶¶ 3-6, and Ex. 21, ¶¶ 3-5.) Unlike Little Rock, GCC has not shown the use of any measurable amount of

groundwater used on its Adjacent Land. (Opening Brief, 6:3-9; Chester Decl., Ex. A, 38:15-20; RJN, Ex. 18, ¶¶ 3-5 and Ex. A thereto, items 6-10; RJN, Ex. 21, ¶¶ 3-5; RJN, Ex. 29, ¶¶ 8-13.)

Thus, these facts establish that only Little Rock's overlying rights have been exercised by the use of groundwater in the operation of a quarry on the Leased Land, while the overlying rights in GCC's Adjacent Land have gone unexercised. See *Barstow, supra*, 23 Cal.4th at p. 1240, and *Pasadena v. Alhambra* (1949) 33 Cal.2d 908, 925 – groundwater rights are only exercised by use on the overlying landowner's land.

These facts also show that Little Rock has a current reasonable and beneficial need for groundwater on its land and that GCC does not on its Adjacent Land. At the time of the Judgment, GCC conducted no quarrying on its Adjacent Land, and now, for any quarrying it does do there, it uses groundwater on the Leased Land where it processes the material it quarries. Moreover, GCC will continue to have the leasehold right to use the groundwater rights associated with the Leased Land until the Lease expires, which is currently scheduled for 2021 but may be extended by GCC to 2041. (RJN, Ex. 29, ¶9.)

In an attempt to avoid these determinative facts, GCC contends that the amount of the Allocation was based not only on its historic pumping and use of groundwater on the Leased Land, but also on its future need for water at its distant Big Rock Land and claimed need for water there. However, the evidence only shows that the Allocation is based on the groundwater rights exercised on the Leased Land.

First, the amount of the Allocation cannot have been based on GCC's water needs at Big Rock, because despite showing that it annually used only 16 acre-feet of groundwater there, Exhibit 4 to the Physical Solution specifically separated the Big Rock Land from any other claim GCC had to a production right by creating the Producer Name "Granite Construction Company (Big Rock Facility)" and giving it its own annual production right of 126 acre-feet. (RJN, Ex. 21, ¶ 6; RJN, Ex. 26, Ex. A thereto, Ex. 4 thereto, p. 2.) This fact shows that the parties gave GCC a production right at Big Rock, such that the inclusion of an additional water right from the Allocation for GCC's use at Big Rock is illogical and inconsistent with the terms of the stipulated Judgment. Moreover, had GCC needed more water at Big Rock, it should have negotiated with all

of the parties for it rather than relying on an attempt to strip a portion of the Allocation away from Little Rock and the Leased Land.

Second, the amount of the Allocation cannot be based on claimed needs for water on the Adjacent Land, because, for the reasons discussed above, there is no current need for water on that land. GCC has even admitted that once the Adjacent Land is "played out" of profitable aggregate, it will abandon the Leased Land and Adjacent Land, and move its quarrying operation 10 miles away to Big Rock. (Supplemental Declaration of William Taylor in Support of GCC's Motion, ¶¶ 6-7.) Thus, the amount of the Allocation cannot include GCC's contrived need for water on the Adjacent Land.

Third, GCC submits no admissible evidence that the stipulating parties agreed to the amount of the Allocation to ensure that, after splitting the Allocation with Little Rock, GCC has enough groundwater to operate a quarry at Big Rock. Rather, GCC's claim only relies on hearsay and the unsupported, self-serving declaration of its counsel. Further, as Little Rock has not agreed to split or share the Allocation, it is undisputed that at least one of the stipulating parties did not agree to the amount of the Allocation because, as GCC claims, the parties were to share the Allocation, and GCC needs more water at Big Rock.

Therefore, with only Little Rock's overlying rights having been exercised, the Court should find that Little Rock is the exclusive owner of the Allocation.

B. The Stipulated Judgment Does Not Support A Finding That Little Rock And GCC Equally Share The Allocation Or That They Are Tenants-In-Common Thereto

As it did in its Motion, GCC argues in the alternative that it and Little Rock should share or equally split the Allocation as tenants-in-common. To avoid unnecessarily burdening the Court with a verbatim repetition of the reasons why GCC's position has no merit, Little Rock hereby incorporates by reference Section II. C. of its Opposition (at pp. 6-7) to GCC's Motion and only summarizes the points made therein below.

As the Stipulation and Judgment are not a final resolution of the issue regarding who holds title to the Allocation, the stipulated Judgment has not yet created or conveyed any interest in the Allocation, such that the law upon which GCC relies for this argument, including *Civil Code*

Section 686 and *Caito v. United California Bank* (1978) 20 Cal.3d 694, 705, is inapplicable. As explained in *Wilson v. S.L. Rey, Inc.* (1993) 17 Cal.App.4th 234, 242, in its discussion of *Civil Code* Section 686, the creation of a tenancy-in-common "requires … equal right of possession or unity of possession," and to date, there has been no determination of Little Rock's and GCC's respective rights to possession of the Allocation. Accordingly, the Court should reject any argument by GCC that the stipulated Judgment requires a split or sharing of the Allocation, and instead, decide this issue based on the material facts that show the exercise of Little Rock's overlying rights and the current need for water on its land.

C. Equity Favors A Ruling That The Allocation Belongs Solely To Little Rock

As it did in its Motion, GCC argues that equity favors a decision that it owns a share of the Allocation. Again, to avoid unnecessarily repeating the equity arguments it previously stated, Little Rock incorporates herein by reference Section II. F. of its Opposition (at pp. 12-14) to GCC's Motion. In short, equity substantially favors Little Rock and the Lane Family over GCC, because, in this litigation, Little Rock and the Lane Family are only trying to protect their water rights from misappropriation by their tenant/subtenant GCC, while GCC has taken advantage of (1) its status as a tenant with permissive possession of the Lane Family's land and groundwater rights and (2) the depleted Basin and resulting AVG Cases to create a no-lose opportunity to strip Little Rock and the Lane Family of water rights solely for the purpose of moving water rights miles from the Leased Land to Big Rock in order to increase its profits.

In addition to what it argued in its Motion, GCC now claims that awarding the Allocation to Little Rock would (1) void its overlying rights in the Adjacent Land; (2) deprive it of the "benefit of its bargain;" (3) leave GCC with insufficient water for its operations in the Basin; (4) give Little Rock a windfall; and (5) reward Little Rock for "fail[ing] to negotiate in good faith." These claims contradict the facts and do not show that Little Rock acted in bad faith. Nor do they explain why GCC, as a tenant, has any right, in equity or law, to take its landlord's property.

First, awarding Little Rock the Allocation will not void GCC's overlying rights in the Adjacent Land. As GCC has repeatedly argued against Little Rock's claims to the Allocation, following the entry of the Judgment, GCC no longer has overlying rights in the Adjacent Land

regardless of how the Court decides this issue. Also, the lack of water rights in the Adjacent Land does not negatively affect GCC, because GCC does not have a need for water on the Adjacent Land. As it admits, GCC wants as much of the Allocation as it can get only so it can move that water right to Big Rock.

Second, finding that Little Rock holds exclusive title to the Allocation will not deprive GCC of the benefit of its bargain, because with respect to title to the Allocation, there has been no agreement.

Third, the claim that awarding Little Rock title to the entire Allocation will leave GCC with insufficient water for its mining operations is immaterial and untrue. Whether an annual production right of 126 acre-feet is sufficient for GCC's future quarry at Big Rock is not a factor in determining whether Little Rock holds title to the Allocation. Additionally, Big Rock already has its own production right, and if GCC needs more water on that land, it should have negotiated for more, or it can obtain water from other sources or through the procedures provided in the Physical Solution. Little Rock and the Lane Family should not be deprived of their full water rights merely because GCC wants more water to use somewhere other than the Leased Land.

Fourth, finding that Little Rock owns entire Allocation would not grant it a windfall. Little Rock and the other Lane Family Entities have owned the Leased Land for decades, and before the entry of Judgment, their overlying rights in that land were only limited to an amount necessary for reasonable use. *Water Code* § 100; *Barstow, supra*, 23 Cal.4th a p. 1240. As an annual production right of 234 acre-feet is substantially less than the overlying right Little Rock and the Lane Family enjoyed previously, finding that Little Rock holds title to the entire Allocation will not amount to a windfall for Little Rock, especially in light of the fact that GCC could enjoy the benefits of the entire Allocation for the duration of the Lease, which could be another 23 years. In contrast, however, with unexercised rights in the Adjacent Land and Big Rock having obtained a sizable production right despite GCC's minimal, historic overlying use and no real current need for water there, granting GCC any share of the Allocation would be a windfall to it.

Fifth, Little Rock did not negotiate with GCC in bad faith. Rather, for nearly two years, its President, Mr. Lane, and its counsel attempted to negotiate a split of the Allocation with GCC, but

the parties reached an impasse that they could not overcome. During those negotiations and thereafter, Little Rock made clear to the parties and the Court that the issue of title to the Allocation remained unresolved and reserved for later determination. In short, Little Rock's negotiating was straightforward and honest, but through no fault of Little Rock, the parties were unable to agree.

Accordingly, to the extent that the Court's decision regarding this dispute will be based on weighing the equities, the Court should find in favor of Little Rock, the party who is only seeking to protect its groundwater rights from its tenant's unjustified efforts to take them.

D. Little Rock's Opening Brief Complies With The Briefing Schedule Agreed To By The Parties And Ordered By The Court

In an attempt to avoid a decision of the instant dispute on the merits, GCC argues that Little Rock is not entitled to a decision that it owns the Allocation, because its Opening Brief was not filed as a "noticed motion" and, thus, is "procedurally defective." GCC's "form over substance" argument is overstated and unsupported by the facts.

GCC points to a Stipulation and Order dated October 9, 2017, wherein the parties agreed to resolve this dispute by "law and motion practice." Yet, GCC ignores the parties' subsequent meet and confer agreement and the Court's resulting order that set the parties' briefing schedule and hearing date. Specifically, in preparation for the January 31, 2018 case management conference, counsel for Little Rock and GCC met and conferred by telephone, during which they discussed resolving the parties' dispute "on the papers" (as opposed to a trial with live testimony) and agreed to a briefing schedule to present to the Court. During that conference, the parties did not agree to or even discuss page limits or whether to file the papers as noticed motions. Based on that discussion, Little Rock's counsel prepared and submitted a Case Management Conference Statement that stated, "The parties agreed to the following briefing schedule:

> Opening Briefs: April 13, 2018
> Oppositions: May 11, 2018
> Replies: June 8, 2018
> Hearing: June 20, 2018 (or last week of June 2018)"

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At the January 31st case management conference, the Court accepted and ordered the parties' proposed briefing schedule and hearing date but did not impose a page limit on the parties' briefs. (Decl. of Stephen R. Isbell in support of Little Rock's Reply to GCC's Opposition, ¶¶4-8 and Ex. A, § 19. B.)

Given the parties' agreement to try this dispute "on the papers" with the above-listed briefing schedule and the Court's acceptance of that agreement, Little Rock's counsel understood that the parties would present the Court with briefs and supporting evidence that set forth all of the facts, law and argument, which, as shown by the 13 page statement of facts in Little Rock's Opening Brief, was unavoidably extensive. (Id., ¶9.)

Little Rock's counsel also did not believe that a noticed motion was agreed to or required, because each party already had actual notice of the briefing and hearing schedule (by agreeing and offering it to the Court at the January 31st case management conference), and the briefing schedule does not reflect the timing required for noticed motions under *CCP* section 1005(b). On that understanding, Little Rock timely filed and served its opening paper as an "Opening Brief." (Id., ¶¶10-11.)

Additionally, GCC has not been prejudiced by Little Rock's Opening Brief. Contrary to GCC's contrived confusion about the relief Little Rock requests, like its First Amended Complaint from which this trial "on the papers" arose, Little Rock's Opening Brief is clear throughout (including, in the title, opening paragraph, Introduction and Conclusion) that Little Rock requests a ruling from the Court that it holds exclusive title to the Allocation and that GCC has no interest therein except for a temporary leasehold right under the parties' Lease.

Moreover, GCC had four weeks, from April 13 to May 11, 2018, to prepare an opposition to the Opening Brief, which is much longer than the five court days contemplated by *CCP* section 1005(b). Also, GCC's Opposition is 24 pages (nine pages over the limit for opposition briefs under California *Rules of Court*, Rule 3.1113(d)), to which Little Rock has no objection, as a its Opening Brief is of equal length, and GCC's Opposition is in the form and length anticipated by Little Rock's counsel based on his agreement to the briefing schedule and trying this dispute "on the papers."

As GCC had ample notice and time to oppose Little Rock's Opening Brief and, thus, was not prejudiced, the Court should disregard GCC's "procedural" argument and, as was intended by the parties, decide this dispute on the merits as presented in their papers.

III. CONCLUSION

Based on the foregoing and the points set forth in its Opening Brief and Opposition to GCC's Motion, Little Rock respectfully requests that the Court order that Little Rock holds fee title to the Allocation and that GCC has no rights, title or interest therein except to the extent granted to it under the express terms and conditions of the Lease.

DATED: June 8, 2018

MUSICK, PEELER & GARRETT LLP

By: _____
Theodore A. Chester, Jr.
Stephen R. Isbell
Attorneys for Plaintiff LITTLE ROCK SAND AND GRAVEL, INC.

PROOF OF SERVICE

Antelope Valley Groundwater Cases
Santa Clara County Case No. 1-05-CV-049053
Judicial Council Coordination ("JCCP") No. 4408
California Court of Appeal, Fourth District, Division Two, Case No. E065512

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is Musick Peeler & Garrett LLP, One Wilshire Boulevard, Suite 2000, Los Angeles, CA 90017-3383.

On June 8, 2018, I served the foregoing document described as: **REPLY TO OPPOSITION TO OPENING BRIEF OF LITTLE ROCK SAND AND GRAVEL, INC. RE TITLE TO GROUNDWATER ALLOCATION ARISING FROM LITTLE ROCK SAND AND GRAVEL'S LAND AND GRANTED UNDER JUDGMENT AND PHYSICAL SOLUTION** on the interested parties in this action by posting the document listed above to the http://www.avwatermaster.org website in regard to the Antelope Valley Groundwater Adjudication matter, pursuant to the Electronic Filing and Service Standing Order of Judge Komar and through the OneLegal website (www.onelegal.com).

The file transmission was reported as complete to all parties appearing on the http://www.avwatermaster.org electronic service list and (www.onelegal.com)for the Antelope Valley Groundwater Cases, Case No. 2005-1-CV-049053; JCCP 4408.

☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the address listed below and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Musick, Peeler & Garrett LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Los Angeles, California.

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

Executed on June 8, 2018, at Los Angeles, California.

/s/ Felicia L. Herbstreith
Felicia L. Herbstreith