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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

Introduction

In 1987, Granite leased rock quarry land from the Lane Family. Under the lease Granite was authorized to conduct mining operations on the property and to use and exercise the property's appurtenant groundwater rights in its operations. For the last 28 years it has done so. It has extracted more than 400 acre-feet per year from three wells located on the leased premises and used that groundwater in its operations on the leased premises. But for the lease, Granite would not have operated the land, or pumped from, and used water on, the land.

In 2008 Granite purchased land adjacent to the leased premises. No mining activity or water use has occurred on the adjacent land.

A historic global settlement of this case was reached in 2014. In reaching that settlement many factors were considered and all settling parties compromised their claims to groundwater in order to reach settlement.

In the negotiations Granite asserted a theory that its pumping and use of water on the Lane Family's land supported a water right allocation to Granite's adjacent land, even though Granite had only recently purchased that land and no groundwater had ever been pumped or used on that land. This position had not been asserted by any of the other settling parties who were tenants on productive lands who also owned other lands. No other tenant claimed credit for pumping conducted on leased lands.

The Lane Family disagreed with Granite's theory, which, if adopted, would have the effect of reducing or eliminating the quantification of the groundwater right appurtenant to the Lane Family's land, and would thereby contradict the terms of the lease which allowed Granite's groundwater use only during the Lease term.

For purposes of the global settlement there was one use relevant, and that was Granite's extraction and use of more than 400 acre-feet per year. That use was settled among the settling parties at 234 acre-feet.

The question then, as between Granite and the Lane Family, was whether and to what extent Granite's unique pumping and use attribution theory should be recognized. No compromise was achieved after many attempts, and the Court was informed that this two-party

dispute between two settling parties to the global settlement remained outstanding. The Court determined to address the issue after final approval of the global settlement.

That time has come. The validity of Granite's attribution theory, and any subdivision of the 234 acre-foot water right between Granite and the Lane Family, remains unresolved and is in need of resolution.

I. THE COURT'S JURISDICTION

In its opening brief the Lane Family showed that the Court specifically reserved the Granite/Lane ownership issue for post-judgment determination and that under its inherent power, and pursuant to Section 6.5 of the Judgment, the Court retained jurisdiction to determine the issue. Granite argues that the Court lacks jurisdiction.

A. THE COURT DIRECTED THAT THE ISSUE BE RESERVED

The Lane Family's December 31, 2014 Case Management Statement requested that its "two-party dispute with Granite be included" in the Court's pretrial schedule for determining disputed matters. However, as reflected in the Court's January 7, 2015 Minute Order the Court directed that the issue be "reserved" until after final settlement approval.

Granite argues (at 9-10) that Granite and the Lane Family resolved their issue by their signing the Stipulation. Granite argues (at 10) that the Lane Family now has "no authority or ability to unilaterally change" the terms of the global settlement.

But the Lane Family makes no attempt here to change the global settlement. Instead, an open issue between two landlord-tenant settling parties was reported to the Court and the Court determined to delay determination of that issue. That issue remains unresolved. The Court's determination now would resolve this issue in the first instance, it would not change or alter a previously resolved term of the Judgment.

The Lane Family adhered to the Court's direction to refrain from asserting its issue with Granite until after final settlement approval. Contrary to Granite's request, compliance with the Court's directive should not result in penalty, nor should it leave an important issue undecided and unresolved.

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B. THE COURT HAS INHERENT AND EXPLICIT RESERVED JURISDICTION

The Lane Family showed (at 5) that the Court maintains an inherent power to address this issue. Granite's papers are silent concerning the Court's inherent power.

The Lane Family showed (at 5-6) that under Section 6.5 of the Judgment, the Court expressly reserved jurisdiction to decide this issue. The first clause of Section 6.5 reserves jurisdiction to "interpret, enforce, administer or carry out" the Judgment. Granite admits (at 11) that the Court has jurisdiction to interpret the terms of the Judgment. In doing so, the Court would construe the terms to be consistent with all applicable laws. 1 Witkin, *Summary of Calif. Law,* Contracts § 752 (10th Ed.). An interpretation could not adopt Granite's invalid attribution theory.

The second clause of Section 6.5 reserves jurisdiction to "provide for such other matters as are not contemplated" by the Judgment. The Lane Family points out (at 6) that the language of the second clause has been held to be "broad," "expansive" and "appropriate," if not necessary, in cases involving water rights, citing *Central and West Basin Water Replenishment Dist. v. Southern Cal. Water Co.,* 109 Cal.App.4th 891, 903 (2003).

Granite fails to address the second clause of Section 6.5 and the *Central and West Basin* case. Instead, Granite argues (at 11-12) that the Lane Family seeks to "alter the terms of the Judgment" and that the Court does not have jurisdiction to do so.

Again, the Lane Family does not seek to alter a settled term of the Judgment. It seeks resolution of an undecided and important issue, which is well within the Court's reserved jurisdiction to decide.

C. THESE POST-JUDGMENT PROCEEDINGS ARE NOT STAYED PENDING APPEAL

Granite argues (at 12) that CCP § 916(a) automatically stays, and the Court loses jurisdiction to hear, these post-judgment proceedings because of appeals filed by certain non-settling parties.[1]

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[1] CCP § 916(a) provides: "[T]he perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including

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

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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).

III. LITTLE ROCK SHOULD BE DECLARED FEE OWNER OF THE WATER RIGHT

The Lane Family showed (at 1-2) the following undisputed facts:

- That Granite as lessee has occupied and conducted its quarrying operations on the Leased Property since 1987.
- Pursuant to the Lease, during the term of the Lease, the lessee is granted lessor's water rights to use underground water located under the leased premises.
- There are three groundwater wells located on the Leased Property.
- Since 1987 to the present Granite mined aggregate from the Leased Property, processed the mined materials at a "rock plant" located on the Leased Property, and utilized a pond located on the Leased Property into which water from the three wells was pumped and from which water was used for operations on the Leased property.
- The amount of groundwater pumped and used on the Leased Property has exceeded 400 AF per year since 2000.

The Lane Family showed (at 7-8), based on these undisputed facts, that Granite's exercise of the Leased Property's overlying groundwater rights and its use of groundwater on the Leased Property for more than 28 years is an attribute of the Leased Property, and Granite can claim no separate rights for itself. Granite fails to address the cited legal authorities that (1) the groundwater rights are appurtenant to, and part and parcel of, the Leased Property, (2) Granite as tenant is estopped from denying, and from claiming as its own, the Lane Family's groundwater rights, and (3) Granite's possession and use of groundwater on the Leased Property as tenant, inures to, and is deemed the possession and use by, the Lane Family as landlord.

Instead, Granite argues (at 1, 7) that Granite's 2008 purchase of 55 acres of adjacent raw land, its non-use of water on that land to date, and its possible future use of groundwater on that land, justifies a share, if not all, of the allocated water right. Granite states (at 8) its legal theory as follows: "the law permits Granite to exercise its overlying rights to the Granite Adjacent Land by pumping on the Leased Property." But Granite does not cite to any such law. There is no

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_____
Theodore A. Chester, Jr.
Attorneys for Little Rock Sand and Gravel, Inc.; The George and Charlene Lane Family Trust; The Frank and Yvonne Lane 1993 Family Trust; Monte Vista Building Sites, Inc., and A.V. Materials, Inc.

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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.

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I, Felicia Herbstreith am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 140 South Lake Avenue, Suite 274, Pasadena, California 91101.

On **March 14, 2016**, I served the foregoing document described as: **LANE FAMILY'S REPLY TO GRANITE CONSTRUCTION COMPANY'S OPPOSITION TO MOTION FOR POST-JUDGMENT SUPPLEMENTAL ORDER** on the interested parties in this action by posting the document listed above to the Santa Clara County Superior website in regard to the Antelope Valley Groundwater Adjudication matter, pursuant to the Electronic Filing and Service Standing Order of Judge Komar.

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

Executed on **March 14, 2016**, at Pasadena, California.

Felicia Herbstreith