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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

WINEHAVEN LEGACY LLC,

Plaintiff,

v.

CITY OF RICHMOND; CITY OR RICHMOND CITY COUNCIL; AND DOES 1-20,

Defendants.

Case No. C22-01081

[Hon. Clare M. Maier, Dept. 36]

~~[PROPOSED]~~ **ORDER DENYING PLAINTIFF'S APPLICATION FOR ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION**

Date: August 18, 2022
Time: 9:00 a.m.
Dept.: 36

On August 18, 2022, at 9:00 a.m., the Order to Show Cause Re: Issuance of a Preliminary Injunction came on regularly for hearing. Andrew B. Sabey, Esq. appeared on behalf of plaintiff Winehaven Legacy, LLC. D. Dennis La, Esq. appeared on behalf of defendants City of Richmond ("City") and the City's City Council. The Court has considered the papers and arguments at the hearing, and rules:

Plaintiff's request for a preliminary injunction is denied. The temporary restraining order, issued on June 9, 2022, is hereby dissolved. The basis for this ruling is as follows.

A. Preliminary Matters.

A-1. The "Specially Appearing" Parties.

On June 9, 2022, non-party Guidiville Rancheria of California filed opposition papers. On July 26, 2022, non-party Upstream Point Molate, LLC filed opposition papers. In doing so, Guidiville and Upstream both purported to be making special appearances in this action.

The Court finds that these opposition papers are technically improper. The Court is not aware of legal authority allowing anyone to make a special appearance in a Superior Court action, except for the limited purpose of moving to quash service of process. The non-parties shall not file additional papers until (1) they have been named as defendants or (2) they have formally intervened in this action.

This being said, the Court has exercised its discretion to consider the legal authorities cited by the non-parties, and to take judicial notice of the documents submitted by the non-parties. (Cf. *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal. 4th 1233, 1249 [court may reconsider a prior ruling even if prompted by an improper motion].) The nonparties' opposition papers were welcome, because for reasons that remain obscure, plaintiff chose not to address the crucially important issue of prior exclusive jurisdiction in plaintiff's opening papers.

Plaintiff has not objected to the Guidiville opposition. Plaintiff's objection to the Upstream opposition is overruled.

A-2. The City's Evidentiary Objections.

Objections To The Declaration of Thomas Butt

The City objects that "the declaration is entirely devoid of foundational facts, and is

comprised of speculation, hearsay, and political mudslinging." The Court concurs with, and sustains, this global objection. More specifically, the following allegations are improper for the reasons stated in the global objection:

- In paragraph 13, the declarant speculates that four of his colleagues, who are duly elected members of the City Council, would have rejected unidentified proposals that plaintiff did not make. In paragraph 14, the declarant speculates that these same colleagues would have rejected unidentified documentation that plaintiff did not submit, and unidentified actions that plaintiff did not take. This kind of linguistic froth has no evidentiary value.

- Many of the key allegations are made on information and belief. (See Butt Dec., ¶¶ 12-14, 16, and 19.) This is improper. (See, Evid. Code, § 702, subd. (a); *Baustert v. Superior Court* (2005) 129 Cal.App.4th 1269, 1275, fn. 5 ["[t]he declaration was made on information and belief and therefore did not provide competent evidence of the facts stated therein"].)

- An example of political mudslinging is the declarant's allegation that four of the declarant's duly elected colleagues on the City Council have "a primary obsession and commitment of trying to undermine" the subject development agreement. (Butt Dec., ¶ 10. See also, ¶ 11 ["serial bad faith efforts"]; ¶ 12 ["fabricated a narrative"]; ¶ 14 [declarant's colleagues were determined to act "without regard to the consequences"]; ¶ 15 ["continuous efforts to thwart development"], and; ¶ 16 [declarant's colleagues "collaborated with other elected officials in their efforts to undermine" the development agreement].)

The City's individual objections, Nos. 1 through 11, are each sustained on all grounds stated except relevance. With regard to the improper opinions that the City correctly identifies, the Court notes the following multiple defects:

- Insofar as the declarant is attempting to testify as an expert, he does not specifically identify, much less authenticate, all of the documents on which he relies. Accordingly, the declarant's opinions lack foundation. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743.)

- The declaration consists primarily of improper legal conclusions and rhetorical statements, rather than cogent expert opinions. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510 ["an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value"].)

- The declarant improperly relies on case-specific hearsay. (*People v. Sanchez* (2016) 63 Cal.4th 665, 676 ["an expert has traditionally been precluded from relating case-specific facts about which the expert has no independent knowledge"].)

- The declaration offers improper opinions on issues of law. (*Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1179 ["[t]he prohibition against expert opinion on an issue of law has been applied in many contexts"].)

- The opinions are improperly speculative. (See, *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761-765.)

The Court is also not impressed by the declarant's unsupported "belief" that the City's actions were part of a vast conspiracy, which included the Board of Supervisors, the East Bay Regional Park District, and the California State Senate — the nefarious goal of which was to establish "a regional park." (Butt Dec., ¶ 16.)

In sum, the declaration does not set forth a single competent allegation that the Court finds helpful. But perhaps that is to be expected of a declaration that, as plaintiff rather startlingly admits, consists of a series of statements mined from a single politician's "blog posts." (Cohn Dec., filed on 8-1-22, ¶¶ 3-4.) It is not surprising that these blog posts, which sported titles such as "RPA Runs The Table," "RPA Spins Point Molate to Gullible East Bay Times Reporter," and "RPA Four Go For The Nuclear Option On Point Molate," did not prove to contain a rich vein of competent evidence.

In light of these rulings, the Court finds it unnecessary to consider the additional global objection that the declaration violates Government Code section 54963. This, however, is not a trivial concern, given that the declarant expressly acknowledges the following as part of the basis for his opinions:

> 5. I was elected to the City Council in 1995. I am the only City Council member who has been continuously seated since that time, nearly 27 years ago. During that time, I have participated in and voted on dozens of actions involving Point Molate, including confidential briefings and actions taken in closed session and confidential settlement discussions held in federal court. [Emphasis added.]

(Butt Dec., filed on 7-27-22, ¶ 5.) This self-congratulatory reliance on privileged and confidential communications is set forth in a publicly filed declaration drafted by plaintiff's counsel — not in a blog post. The City's request that the Court simply strike the entire declaration has substantial merit.

While the Court does not reach the privilege issue, the Court does note as follows. Plaintiff may be technically correct that the attorney client privilege issue is moot because — as plaintiff assumes for purposes of argument — plaintiff's declarant has repeatedly violated the privilege by publishing privileged communications in publicly available blog posts. But one might think that having to rely on such evidence to support one's position would give thoughtful attorneys pause. The fact that the City, for whatever reason, chose to dismiss its lawsuit based on the privileged communications does not give rise to some inference that the City "waived" the privilege. And in

fact, plaintiff neglects to mention that before dismissal the City successfully obtained a preliminary injunction against further alleged violations of the privilege. (Case No. MSN21-2247, "Order After Hearing" filed on 1-28-22.)

The Court also makes no ruling on the City's argument that plaintiff's contacts with the declarant, who is a party-affiliated witness, merit the disqualification of plaintiff's counsel. The Court's preliminary assessment is that the City's contemplated motion to disqualify would be denied, but the City may bring such a motion if it believes that doing so would be justified.

Objections to the Declaration of Chris Austin

The City's individual objections, Nos. 1 through 9, are each sustained on all grounds stated except relevance. Additional legal authorities supporting these rulings are cited above. The Court means no disrespect to Mr. Austin, whose declaration does not feature some of the more startling defects found in the companion declaration.

B. Jurisdiction.

The Court finds that it lacks jurisdiction to grant the preliminary injunction that plaintiff seeks, because doing so would interfere with the District Court's supervision of the amended federal judgment under the rule of prior exclusive jurisdiction. The basis for this ruling is as follows.

B-1. Governing Law.

The rule of prior exclusive jurisdiction has been summarized as follows:

> The most obvious jurisdictional hurdle is the "ancient and oft-repeated . . . doctrine of prior exclusive jurisdiction-- that when a court of competent jurisdiction has obtained possession, custody, or control of particular property, that possession may not be disturbed by any other court." 14 Charles Alan Wright et al., Federal Practice and Procedure § 3631, at 8 (3d ed. 1998). This principle was definitively incorporated into American law long ago:
>
> The Federal and state courts exercise jurisdiction within the same territory, derived from and controlled by separate and distinct authority, and are therefore required, upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovereignty. If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty.

> *Palmer v. Texas*, 212 U.S. 118, 125, 53 L. Ed. 435, 29 S. Ct. 230 (1909) (emphasis added); see also *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229-30, 67 L. Ed. 226, 43 S. Ct. 79 (1922).
>
> Although the doctrine "is based at least in part on considerations of comity," 14 Federal Practice and Procedure § 3631, at 12, and prudential policies of avoiding piecemeal litigation, see, e.g., Colorado River, 424 U.S. at 819, it is no mere discretionary abstention rule. Rather, it is a mandatory jurisdictional limitation. [Emphasis added.] *Palmer*, 212 U.S. at 125; Hagan v. Lucas, 35 U.S. (10 Pet.) 400, 403, 9 L. Ed. 470 (1836) ("[P]roperty could not be subject to two jurisdictions at the same time. The first levy, whether it were made under the federal or state authority, *withdraws the property from the reach of the process of the other.*" (emphasis added)).

(*State Eng'r v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians of Nev.* (9th Cir. 2003) 339 F.3d 804, 809-810. See also *Applied Underwriters, Inc. v. Lara* (9th Cir. 2022) 37 F.4th 579, 600.) The Court finds that this rule is applicable in the case at bar. Plaintiff's arguments to the contrary lack merit.

B-2. Plaintiff's Arguments.

Plaintiff's primary argument is that that proceedings to enforce the amended federal judgment are *in personam* and not *in rem*. This argument lacks merit, for the common sense reason stated in the State Engineer decision:

> The tribe and the federal government try to escape this inexorable jurisdictional bar by emphasizing that contempt actions are in personam rather than in rem. But Alpine, like this case, was not styled as an in rem action, yet the formalistic distinction made not the least bit difference. Lest we "exalt form over necessity," *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1328 (9th Cir. 1982), we look behind "the form of the action" to "the gravamen of a complaint and the nature of the right sued on," *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1520 (9th Cir. 1985), superseded by statute on other grounds as stated in *Northrop Corp. v. Triad Int'l Mktg. S.A.*, 842 F.2d 1154 (9th Cir. 1988) (per curiam). There can be no serious dispute that the contempt action was brought to enforce a decree over a res--i.e., the Humboldt River. [Emphasis added.] Given the zero-sum nature of the resource, any party's unlawful diversion of water from the stream necessarily affects other users. This inescapable fact is, after all, the motivating force behind Nevada's comprehensive system for adjudicating water rights in the first place. See Nev. Rev. Stat. § 533.090.

(*State Eng'r, supra*, 339 F.3d at 810-811.)

In the case at bar, on June 21, 2022, the judge in the federal action issued an order to show cause re contempt sanctions. (Supplemental Sabey Dec., filed on 8-1-22, Exh. 1.) Like the contempt proceeding in State Engineer, this OSC was issued "to enforce a decree over a res ..." The OSC required the City to sign a transfer deed and place it into a sales escrow, specifically referring to "the property subject to the amended judgment in this case." (Ibid.)

Plaintiff's argument that the federal action is somehow not in rem is, to put it mildly, strained. The Court finds that the argument lacks merit.

Plaintiff's other arguments on the rule of prior exclusive jurisdiction are even more strained, and do not merit individual attention. Just as one example, however, the amended federal judgment requires the City to transfer title to the property "forthwith," and plaintiff argues that this term is vague enough to accommodate several years of litigation in this Superior Court action and one or two years of appellate review. (Supplemental Brief, filed on 8-10-22, p. 6, fn. 2. See also, p. 8, lines 11-14 [describing years of litigation as "a short pause"].) The term "forthwith" is not vague; Merriam-Webster defines "forthwith" as meaning "without any delay: IMMEDIATELY."

B-3. Conclusion.

The Court lacks jurisdiction to issue a preliminary injunction that would prevent the City from transferring the subject real property to a third party. This lack of jurisdiction constitutes one of two fully independent grounds for denying plaintiff's request for a preliminary injunction.

C. The Substantive Merits Of Plaintiff's Request.

Even if the rule of prior exclusive jurisdiction did not apply, the Court would still deny plaintiff's request for a preliminary injunction, based on the request's substantive merits. The basis for this ruling is as follows.

C-1. Summary Of Ruling.

After carefully weighing the ***admissible*** evidence, and considering both the likelihood that plaintiff will prevail at trial and the "relative interim harm" to both sides, the Court finds that the issuance of a preliminary injunction would not be appropriate. (See, *City of San Jose v. MediMarts, Inc.* (2016) 1 Cal.App.5th 842, 850; *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452,

1463-64.)

C-2. The Likelihood That Plaintiff Will Prevail.

The Court finds the City's evidence far more persuasive than plaintiff's admissible evidence. The Court was particularly impressed with the opposition declaration of Anne Lanphar, which quite lucidly sets forth facts indicating that the City did not breach its agreement with plaintiff, and that plaintiff itself in fact breached the agreement in several respects.

In addition to this evidentiary hurdle, plaintiff also fails to address a legal hurdle it will face at trial. Plaintiff advocates for the following proposition: it is self-evident that the City was required to approve plaintiff's CFD proposal, and no reasonable minds could differ. The Court does not find the proposition self-evident. Proving that the City's rejection of the proposal reflected bad faith, rather than legitimate concerns about the impact on the City's finances, will prove challenging at trial; jurors are taxpayers, not real estate developers, and may be sympathetic to plausible fiscal concerns. Plaintiff has also not satisfactorily explained why it did not have an alternative financing proposal in reserve, and why it apparently did not give serious consideration to seemingly credible alternatives proposed by the City.

C-3. Relative Interim Harm.

While the Court recognizes that each parcel of real property is unique, plaintiff has understated the interim harm to the City if a preliminary injunction were granted. The City has been attempting to find a developer for this property since at least 2004, and the City has a strong interest in finally reaching closure and having development move forward — with *someone*.

Further, the tortuous federal litigation is on the verge of being completed, and California recognizes a strong public policy favoring the finality of judgments. (See *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982.) This public policy applies with equal force to the amended federal judgment in the case at bar.

C-4. Conclusion.

Even if there were no problem with jurisdiction, the Court would exercise its discretion to deny plaintiff's request for a preliminary injunction. The weakness of the request's substantive merit, compared to the strength of the evidence and arguments presented by the City, constitutes the

second of two fully independent grounds for denying plaintiff's request.

D. Comment.

The Court assumes that escrow will close promptly, resulting in a transfer of the subject real property to a third party. Plaintiff should be prepared to explain, in its opposition to the pending demurrer, what remains of plaintiff's case; plaintiff concedes that the parties' agreement does not allow plaintiff to seek damages from the City.

It is so Ordered.

Dated: August 23, 2022

Hon. Clare M. Maier