**22-01239479**

Indian Wells Valley Groundwater Authority vs. Mojave Pistachios, LLC,

**1. Plaintiff Indian Wells Valley Groundwater Authority's Notice of Motion and Motion for Preliminary Injunction ROA 63**

**2. Order to Show Cause re: Objections to Boundary**

**3. Status Conference**

Plaintiff Indian Wells Valley Groundwater Authority ("Authority") moves for a preliminary injunction ordering defendants Mojave Pistachios and Mary and Paul Nugent (as trustees, etc.) ("Mojave") to cease pumping groundwater without paying the Authority's Basin Replenishment Fee (enacted in Resolution No. 03-20), including all back fees currently owed. In opposition, Mojave asks that its expert, Anthony Brown, be permitted to give oral testimony at the hearing. Searles Valley Minerals, a party to other cases arising from the Authority's Groundwater Sustainability Plan ("GSP"), has filed a purported joinder in Mojave's opposition.

For the reasons set forth below:

1. The motion for a preliminary injunction is GRANTED.
2. The request to let Brown provide oral testimony is DENIED.
3. Searles' joinder is DENIED.

Mojave's request for judicial notice is GRANTED. However, insofar as Mojave seeks notice of court filings, the Court takes notice only of those filings' existence, not the truth of any matter asserted therein.

In ruling on this motion, the Court has carefully considered the Declaration of Rodney Stiefvater, the owner of Mojave Pistachios. (ROA 79) Among other things, that Declaration describes his substantial investment in his farming operation and the purported financial harm to his business if the requested preliminary injunction is granted. Indeed, as acknowledged by the Court of Appeal, the "pay first, litigate later" rule that applies to this case is fairly characterized as "Draconian." (*Mojave Pistachios, LLC v. Superior Court* (2024) 99 Cal.App.5th 605, 613.) If there was a viable way to avoid this purported harm, then the Court would give it serious consideration. However, for the reasons set forth below, there is no path for avoiding an injunction in light of clear precedent this Court is bound to follow.

**GROUNDS FOR RULING**

**I. Background**

**A. This Case**

This is one of several related actions involving the overdrawn Indian Wells Valley Groundwater Basin. The Authority is the Basin's designated groundwater sustainability agency under the Sustainable Groundwater

Management Act of 2014. ("SGMA," Water Code § 10720, et seq.) Defendants (collectively "Mojave") own and operate a pistachio orchard in the Indian Wells Valley and pump groundwater from the Basin.

Pursuant to SGMA, the Authority adopted a groundwater sustainability plan ("GSP"). The GSP determined the Basin's groundwater is not sustainable without the development of augmentation and overdraft mitigation projects. The Authority thereafter adopted Ordinance No. 03-20, establishing a "Basin Replenishment Fee" of $2,130 per acre foot extracted. (See Wat. Code § 10730.2(a) (after adoption of a GSP, agency may "may impose fees on the extraction of groundwater from the basin to fund costs of groundwater management")). Not all pumpers within the Basin are subject to the Basin Replenishment Fee, but Mojave is.

The Basin Replenishment Fee went into effect on January 1, 2021. Mojave failed to pay the fee. In June 2021, the Authority adopted Resolution No. 04-21, ordering Mojave to stop pumping until its fee payments are brought current (including interest and penalties). This did not induce Mojave to pay the fee. To date, Mojave has never paid the fee though it has continued pumping.

### B. Pertinent Related Cases

Mojave has challenged the GSP and Basin Replenishment Fee in other cases. In No. 2021-01187275, Judge Nakamura denied Mojave's application for an order preliminarily enjoining the Authority from implementing the GSP and Basin Replenishment Fee, holding its challenge was barred by the "pay first, litigate later" rule. (See ROA 143 in No. 2021-01187275.)

In No. 2021-01187589, Mojave brought a host of challenges to the GSP and actions taken thereunder. The Authority demurred to portions of Mojave's then-operative third amended petition. The Court sustained the demurrer because the challenged causes of action were barred by the "pay first, litigate later" rule. Mojave petitioned for writ review of this ruling. In a published opinion, the Court of Appeal denied the petition. (*Mojave Pistachios, LLC v. Superior Court* (2024) 99 Cal.App.5th 605.)

## II. "Pay First, Litigate Later"

"A taxpayer ordinarily must pay a tax before commencing a court action to challenge the collection of the tax. This rule, commonly known as 'pay first, litigate later,' is well established and is based on a public policy reflected in the state Constitution, several statutes, and numerous court opinions." (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1116.) In *Mojave Pistachios*, the Court of Appeal held the "pay first, litigate later" rule applies to challenges to fees imposed by groundwater sustainability agencies under the SGMA. (*Mojave Pistachios*, *supra*, 99 Cal.App.5th at p. 631.) "Accordingly, . . . any cause of action that attacks the propriety of the Replenishment Fee or attempts to impede its prompt collection cannot proceed unless Mojave first pays the outstanding amounts owed. This is true even if the challenged fee allegedly violates SGMA and California water law, and *even if Mojave allegedly cannot afford*

*to pay the fee.*" (*Id.*, at p. 633; emphasis added.)

In this action, Mojave doesn't bring its own causes of action that seek to impede collection of the Basin Replenishment Fee. However, "'It is well established that the applicability of [the "pay first, litigate later" rule] does not turn on whether the action at issue specifically seeks to prevent or enjoin the collection of a tax. Instead, the provision bars "not only injunctions but also a variety of prepayment judicial declarations or findings which would impede the prompt collection of a tax." [Citation.] The relevant issue is whether granting the relief sought would have the effect of impeding the collection of a tax. [Citation.]'" (*Water Replenishment Dist. of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1465 (*City of Cerritos*) (quoting *California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247-248).)

*City of Cerritos* is instructive. There, Cerritos stopped paying a replenishment assessment levied by the Water Replenishment District, and the District sued to collect the fee. The District sought a preliminary injunction requiring Cerritos to either pay the fee or stop pumping water. Even though an interim order in related litigation found the assessment violated Proposition 218, the Court of Appeal held the "pay first, litigate later" rule required Cerritos to pay the challenged assessment until the related litigation reached a final judgment. Cerritos argued the rule did "not apply because [Cerritos] is not seeking to enjoin the assessment; it is the District that is seeking an injunction. But [Cerritos] is urging a defense seeking '"prepayment adjudication that would effectively prevent the collection of a tax,"' which is barred" by the rule. (*Id.*, at p. 1465.) As a result, Cerritos should have been enjoined from pumping water unless and until it paid the assessment. (*Id.*, at pp. 1464-1470.)

Here, as in *City of Cerritos*, the "pay first, litigate later" rule bars any attempt by Mojave to argue the merits of its challenges to the Basin Replenishment Fee in opposition to the preliminary injunction motion. That Mojave raises these challenges as affirmative defenses (or as arguments made in opposition to the motion) rather than independent causes of action is irrelevant.

**III. <u>Preliminary Injunction Standard</u>**

"'In deciding whether to issue a preliminary injunction, a court must weigh two "interrelated" factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction. [Citation.]'" (*Id.*, at p. 1461 (quoting *Butt v. State of California* (1992) 4 Cal.4th 668, 677-678).) "'The trial court's determination must be guided by a "mix" of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. [Citation.] Of course, "[t]he scope of available preliminary relief is necessarily limited by the scope of the relief likely to be obtained at trial on the merits." [Citation.] A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim. [Citation.]'" (*Id.*, at p. 1462 (quoting *Butt*, *supra*, 4 Cal.4th at p. 678).)

## IV. Likelihood of Prevailing on Merits

Under *City of Cerritos*, the "pay first, litigate later" rule bars Mojave from arguing the merits of its defenses. As a result, this factor conclusively favors the Authority. In any event, it is undisputed that Ordinance No. 03-20 applies to Mojave, and Mojave has never paid the Basin Replenishment Fee.

Mojave's merits argument in opposition is less "we will win on the merits" and more "the Court should wait." Mojave contends that it intends to petition the United States Supreme Court for certiorari review of the Court of Appeal's decision in *Mojave Pistachios* (the California Supreme Court already has denied review). But (1) Mojave has yet to file such a petition, only a plan to do so, and (2) the odds that certiorari will be granted on any one of the thousands of such petitions filed annually are miniscule.

More generally, Mojave contends its challenges to the GSP (and related actions) in No. 2021-01187589 remain pending, and the Court should resolve those challenges first before deciding this motion. *City of Cerritos* forecloses this argument. There, the related litigation had already resulted in an interim ruling that the assessment at issue violated Proposition 218—a more favorable procedural setting for Cerritos than Mojave has here. Nevertheless, the Court of Appeal held that only a final judgment in the related litigation would be reason to avoid application of the "pay first, litigate later" rule.

In short, this factor weighs strongly in favor of injunctive relief.

## V. Balancing of Harms

Initially, the Authority argues the "pay first, litigate later" rule bars Mojave from arguing the balancing of harms. While the thrust of the *Mojave Pistachios* opinion tends to support this contention, the *City of Cerritos* suggests otherwise. There, while the Court of Appeal held the "pay first, litigate later" rule applied, it separately evaluated Cerritos' claimed harm. (*City of Cerritos*, *supra*, 220 Cal.App.4th at p. 1469 (finding Cerritos "will not suffer irreparable harm" if injunction is issued).)

Based on *City of Cerritos*, the Court considers Mojave's arguments about the balancing of harms. However, to the extent an argument about the balancing of harms is simply a repackaging of a merits argument, it is barred by the "pay first, litigate later" rule.

### A. Presumption of Harm to the Authority

"Where a governmental entity seeking to enjoin the alleged violation of an ordinance which specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant. If the defendant shows that it would

suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72 (footnote omitted).)

The Authority contends the *IT Corp.* presumption applies here. Mojave does not contend otherwise. To the contrary, it says *IT Corp.* "crafted this standard carefully to avoid tilting the scales unfairly in the government's favor." (Opp. at pp. 10-11.) Because both sides agree the *IT Corp.* presumption is applicable here, the Court will apply it.

**B. Harm to Mojave**

Because the *IT Corp.* presumption applies, Mojave bears the burden of showing "that it would suffer grave or irreparable harm from the issuance of the preliminary injunction." (*IT Corp.*, *supra*, 35 Cal.3d at p. 72.) Mojave offers several arguments for grave or irreparable harm.

**1. Inability to Pay/Destruction of Business**

First, Mojave argues it cannot pay its arrearage and ongoing yearly fee, so an injunction would bankrupt Mojave and result in the closure of its business. This argument is not without evidentiary support. But "'the most severe financial hardship resulting in bankruptcy' is 'not an irreparable injury sufficient to permit judicial intervention' in violation of [the] 'pay first' rule." (*Mojave Pistachios*, *supra*, 99 Cal.App.5th at p. 628 (quoting *Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 282).) Put another way, even if this argument is factually true, it isn't legal grounds to avoid the rule that Mojave must pay the fee before challenging it.

In any event, Mojave overreaches when it argues this harm is irreparable. As the California Supreme Court has explained, "*irreparable* injuries" are "ones that cannot be adequately compensated in damages." (*Intel Corp. v. Hamdi* (2003) 30 Cal.4th 1342, 1352 (emphasis original).) The loss of Mojave's business can be compensated in damages. In fact, Mojave's fourth amended petition in No. 2021-01187589 seeks damages "in excess of $200,000,000" flowing from the Authority's adoption of the GSP and subsequent implementing actions, including the Basin Replenishment Fee. (See ROA 612 in No. 2021-01187589, at Prayer for Relief.) Either the harms caused by the Basin Replenishment Fee are compensable in damages or they are not. Mojave cannot take conflicting positions on this question depending on whether it is a plaintiff with affirmative claims for damages or a defendant seeking to avoid an injunction.

Moreover, Mojave's counsel testifies that his scope of retention includes negotiating the purchase of transient pool allocations. (Slater Decl. ¶¶ 14-15.) By way of background, "the Authority established a transient pool of 51,000 acre-feet of groundwater and determined that all qualified agricultural pumpers would receive a transient pool allotment based on their reported agricultural uses. Eligible pumpers could then either (1) reject their allotment and continue pumping while paying the Replenishment Fee, (2) accept their allotment and associated mitigation fee

or accept the allotment and negotiate a sale of it to the Authority. Use of the transient pool was voluntary. [¶] Ten agricultural pumpers, including Mojave, were deemed '"potentially" qualified' to participate in the program. Three of those pumpers, including Mojave, failed to timely submit a required pumping verification questionnaire, so the Authority determined they were not eligible to participate. The 51,000 acre-feet in the transient pool were thereafter allotted among the seven eligible agricultural pumpers." (*Mojave Pistachios*, *supra*, 99 Cal.App.5th at p. 620.) The record reflects that transient pool members pay $17.50 per acre-foot for water within their allocation, rather than the $2,130 per acre-foot Basin Replenishment Fee.

Mojave's planned purchase of transient pool allocations could have the effect of drastically lowering the amount of money it owes the Authority. In fact, if Mojave were to purchase 10,440 acre-feet of allocations, it would owe *nothing* in arrears, a point the Authority concedes in reply. (See Opp. at p. 18, Reply at p. 9.) Mojave therefore has the ability to significantly mitigate the harm it claims it will suffer.

**2. <u>Destruction of Trees</u>**

Mojave also argues that if it is enjoined from pumping water, its pistachio trees will die. It contends the loss of its pistachio trees is an irreparable harm, citing *Christopher v. Jones* (1964) 231 Cal.App.2d 408, 416. But Mojave's pistachio trees are agricultural crops, not plants with a unique aesthetic value. While *Christopher* lends some support to the notion that destruction of crops is an irreparable harm, more recent case law cited by the Authority supports the notion that crop destruction is compensable with damages. Indeed, the Authority's case law arises specifically in the context of pistachio trees grown for agricultural purposes. (See *Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 446-448 (discussing different methods of valuing lost pistachio trees).) To the extent there is a conflict between *Christopher* and *Santa Barbara Pistachio Ranch*, the Court will follow the more recent, more factually on-point decision.

Furthermore, Mojave's fourth amended petition in No. 2021-01187589 specifically seeks "just compensation for the taking of . . . pistachio trees." (ROA 612 in No. 2021-01187589 at ¶ 471.) Again, Mojave cannot switch positions on whether the loss of trees is compensable with damages depending on its status as a plaintiff or a defendant.

Since the loss of Mojave's pistachio trees is compensable by damages, it is not an irreparable harm.

**C. <u>Conclusion on Harms</u>**

Only if Mojave rebuts the *IT Corp.* presumption of harm will Court proceed to a traditional harms-balancing analysis. In order to rebut that presumption, Mojave must show it will suffer grave or irreparable injury if an injunction is entered. For the reasons set forth above, Mojave has not met that burden. The *IT Corp.* presumption therefore carries the day for the

Authority.

Because the *IT Corp.* presumption remains unrebutted, the Court will not engage in a traditional harms-balancing analysis. Accordingly, Anthony Brown's testimony going to the harm the Authority will suffer (or not suffer) if an injunction isn't entered is therefore irrelevant. The Court denies Mojave's request to permit Brown's oral testimony at the hearing.

**VI. Delay in Seeking Relief**

Mojave also contends injunctive relief should be denied because the Authority waited too long to seek it, filing this motion over two years after it first filed suit. While delay in seeking relief can be grounds for denying an injunction, the Court finds that principle inapplicable here. As the Authority points out in reply, the Court made clear that it intended to wait until after the Court of Appeal decided *Mojave Pistachios* to consider injunctive relief in this case. The Authority's motion was filed less than a month after *Mojave Pistachios* was decided.

**VII. Alternative Relief**

Finally, Mojave asks the Court to consider an alternative remedy. Rather than calculating arrearages and ongoing pumping fees at the $2,130 per acre-foot rate set by Ordinance No. 03-20, it proposes to calculate arrearages and ongoing pumping fees at the $17.50 per acre-foot rate paid by transient pool members.

The Court sees no basis to *order* such relief. To be clear, if Mojave *purchases* allocations from transient pool members, it appears Mojave would be entitled to pay $17.50 per acre-foot. But a *Court order* for payment at $17.50 per acre-foot would signal to other pumpers that the Basin Replenishment Fee is effectively unenforceable. Pumpers who are currently deterred from pumping excessive groundwater by the $2,130 per acre-foot fee would rationally respond by increasing their pumping and withholding payment, expecting they would be ordered to pay $17.50 per acre-foot if the Authority filed an enforcement action.

**VIII. Searles' Joinder**

Searles purports to join in Mojave's opposition. Its joinder is denied because Searles is not a party to this case, and Searles cites no authority allowing a non-party to join in a party's motion or opposition.

Searles' statement in the footnote to its joinder that this case was consolidated with *Searles Valley Minerals Inc. v. Indian Wells Groundwater Authority* by the Kern County Superior Court before transfer to Orange County appears to be incorrect. This case was filed in Orange County in the first instance, not in Kern County. To the Court's knowledge, this case has not been consolidated with any other cases, though it is related to the Basin

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| | | groundwater cases.<br><br>**IX. <u>Conclusion</u>**<br><br>As set forth above, the Court finds the Authority is likely to prevail on the merits. And because the *IT Corp.* presumption remains unrebutted, the Court finds the balance of harms favors the Authority. Accordingly, the motion for a preliminary injunction is granted. |
| | **21-01187275**<br><br>Mojave Pistachios, LLC vs. Indian Wells Valley Water District | 1. Defendant, Cross-Defendant, and Cross-Complainant Searles Valley Minerals Inc.'s Notice of Motion and Motion to Set a Phase 2 Trial on Safe Yield and a Phase 3 Trial to Adjudicate Groundwater Rights and Establish a Physical Solution **ROA 1310**<br><br>2. Defendants and Cross-Defendants Meadowbrook Daily Real Estate, LLC, Big Horn Fields, LLC, Brown Road Fields, LLC, Highway 395 Fields, LLC, and The Meadowbrook Mutual Water Company's Joinder in Motion to Set a Phase 2 Trial on Safe Yield and a Phase 3 Trial to Adjudicate Groundwater Rights and Establish a Physical Solution **ROA 1312**<br><br>3. Order to Show Cause re: Objections to Boundary<br><br>4. Status Conference<br><br>5. Defendant, Cross-Complainant, & Cross-Defendant Indian Wells Valley Water District's Joinder in Searles Valley Minerals Inc.'s Motion to Set a Phase 2 Trial on Safe Yield and a Phase 3 Trial to Adjudicate Groundwater Rights and Establish a Physical Solution **ROA 1320** |