DISTRICT COURT, PARK COUNTY, STATE OF COLORADO P. O. Box 190 Fairplay, Colorado 80440	DATE FILED: August 31, 2015 4:41 PM FILING ID: 6AA7CA9B798F8 CASE NUMBER: 2014CV30056
Plaintiff: INDIAN MOUNTAIN CORP **v.** **Defendant: INDIAN MOUNTAIN METROPOLITAN DISTRICT**	▲ **COURT USE ONLY** ▲
ATTORNEY FOR INDIAN MOUNTAIN CORP. Adam C. Davenport, #45342 112 North Rubey Drive, Suite 101 Golden, Colorado 80403 Tele: (720) 627-6151 Fax: (720) 216-2055 Email: adam.davenport@indianmtncorp.com	Case No. 14CV30056

INDIAN MOUNTAIN CORP.'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION AND REQUEST FOR REASSIGNMENT AND RESETTING IN ACCORDANCE WITH C.R.C.P. 107(c)

Indian Mountain Corp. ("IMC") by and through undersigned counsel, hereby submits this Reply in Support of Motion for Reconsideration and Request for Reassignment and Resetting in Accordance with C.R.C.P. 107(c) and in support thereof, states as follows:

INTRODUCTION

IMMD's conclusory, albeit verified, Motion for Order to Show Cause does not state a basis for a finding of contempt and should therefore be denied. Even if the hearing is allowed to proceed, it must be reset so as to comport with C.R.C.P. 107, C.R.C.P. 5 and the Court's Show Cause Order. Finally, judicial efficiency and fairness will be served by reassigning this matter to a different judicial officer.

I. IMC RESPECTFULLY REQUESTS THE COURT RECONSIDER THE GRANTING OF IMMD'S MOTION FOR ORDER TO SHOW CAUSE FOR FAILURE TO STATE ANY ACTIONS BY IMC AMOUNTING TO CONTEMPT

In order to support its allegation of contempt, IMMD must demonstrate that an order of the Court has been violated. *People v. Razatos*, 699 P.2d 970, 975 (Colo. 1985). In its endeavor to do so, IMMD reads words into the Court's March 16 Order that are simply not found in the plain text of the Order and makes broad, unsupported assertions regarding IMC's conduct. In its Response, IMMD characterizes the Court's March 16 Order regarding reimbursement for

operation and maintenance as "*going forward*, '[a]s long as IMC elects to retain ownership [of the trust], IMC is entitled to be reimbursed for its actual and reasonable expenses for maintenance, repair and operation of the plan.'" IMMD Motion at 1 (emphasis added). Simply put, the Order does not limit IMC's entitlement to be repaid for its costs operating and maintaining the plan "going forward."

What's more, IMMD's reinterpretation of the March 16 Order to state that IMC is only entitled to repayment "going forward" is flatly contrary to the findings made by the Court that IMC has incurred costs since the 1970s that have never been repaid, including[1]: (1) that IMC operated the Augmentation Plan [from 1976 to 2013] at its own expense without receiving compensation or payment from IMMD or the Indian Mountain lot owners (March 16 Order at p. 3, ¶ 15); (2) wells in the Indian Mountain subdivision have never been curtailed by the Colorado Division of Water Resources through March 31, 2014 (*Id*. at p. 3, ¶ 20); (3) despite the Augmentation Plan never having been out of compliance, that IMMD has not paid any money to IMC[2] (*Id*. at ¶ 21); (4) before March 31, 2014, no lot owner paid money to IMC in exchange for replacement water or operation of the augmentation plan (*Id*. at 22); (5) from the 1970's to 2013, IMC maintained and operated the Augmentation Plan at its own expense (*Id*. at p. 5); (6) "IMMD has always expressed its willingness to pay a reasonable charge for the maintenance and repair of augmentation delivery systems, so the alleged fee for the augmentation water is the only issue" (*Id*. at 7); (7) when Mr. Ingalls purchased the stock of IMC, he stepped into Mr. Campbell's shoes (*Id*. at 8); and that (8) IMC's promotional materials made no mention of ongoing fees *for the right to use augmentation water* and that IMC is estopped from asserting such a right forty years later (emphasis added) (*Id*. at 8). IMMD's assertion that IMC is estopped from seeking repayment for its operation and maintenance costs based on the Court's March 16 Order is simply unfounded given the plain language of the Court's Order. Moreover, the Court made specific findings that charging lot owners for 40 years of *use* of the water rights would result in unjust enrichment and precluded IMC from charging for the same. The Court made no such findings regarding charging lot owners for 40 years of *operation and maintenance* charges and in fact held that IMC was entitled to reimbursement for those costs. This makes logical sense in that an entity could not be unjustly enriched for merely receiving repayment for its actual costs.

In its Response, IMMD also recites the allegations in the Motion for Order to Show Cause but fails to explain how this recitation is any more persuasive the second time around. IMMD does not attempt to explain how either the Letter or Invoice "falsely represent[s] that IMC prevailed in the above captioned action" when that assertion is not found anywhere in the Letter or the Invoice which IMMD claims "(1) contradict the Orders of this Court; and (2) implicate the Orders of this Court in a fraud upon the public." *See* Exhibit 1 to IMMD Motion for Order to Show Cause.

[1] IMC does not waive any argument or right of appeal of any issue or finding of fact in this or any other section of this Reply. The citations to the Court's findings are only to illustrate that neither IMC nor James Ingalls has violated any order of the Court.

[2] This stipulated fact is just as true today as it was on March 16 as IMMD has yet to even offer to repay IMC for any of its operation and maintenance costs.

Similarly, IMMD provides no explanation or citation in the Letter or Invoice for its allegation that IMC "falsely represent[s] . . . that IMC obtained a judgment." A court's final determination of the rights and obligations of the parties in a case is referred to as a "judgment." Black's Law Dictionary, (10th ed. 2014). IMC's reference to the Court's March 16 Order determining the rights and obligations of IMMD, IMC, and the Indian Mountain property owners as a "judgment" does not amount to contempt.

Further, IMMD's assertion that IMC "falsely represent[s] . . . that, as a result of this judgment, the residents of Indian Mountain are under an existing obligation of this Court to pay money to IMC" is disingenuous, at best. As recently as May, IMMD told Indian Mountain lot owners that "the Judge ruled that IMC could only charge [Indian Mountain] property owners for the 'actual and reasonable expenses for maintenance, repair, and operation of the plan.'" Exhibit A to IMC Motion for Reconsideration, IMMD/IMPOA Spring/Summer 2015 Newsletter at 2 (quoting March 16 Order at 8).

Additionally, IMMD's continued reliance upon the Court's May 6 Order Denying IMC's Motion for Post-Trial Relief remains unavailing: the Court's March 16 Order was unaffected by the Court's subsequent April 6 denial of IMC's Motion to Amend pursuant to C.R.C.P. 59. "Once a valid judgment is entered the only means by which the trial court may thereafter alter, amend or vacate the judgment is by appropriate motion under either Rule 59 or 60, R.C.P. Colo." *Cortvriendt v. Cortvriendt*, 361 P.2d 767, 768 (Colo. 1961*); see also, Koch v. District Court, Jefferson County*, 948 P.2d 4, 8 (Colo. 1997) ("Trial judges should correct irregularities in the proceedings or other errors that may affect the fairness of the proceedings and should *grant* post-trial relief to address these issues.") (emphasis added). The May 6 Order denied a motion to amend and did nothing to alter the original March 16 Order.

Finally, it appears that IMMD's entire claim for contempt rests upon one sentence in the Court's May 6 Order that "Plaintiff did not seek payment for such expenses for prior years, and failed to meet its burden of proof regarding any such claimed expenses." *Id*. IMMD's argument that this one sentence now precludes IMC from seeking its "actual and reasonable expenses for maintenance, repair, and operation of the plan" is akin to relying on the denial of a pre-trial motion for summary judgment to preclude the moving party from subsequently pursuing those claims at trial. The Court ruled that IMC was not entitled to additional findings regarding reimbursement for its costs because those claims were not before the Court – even though IMC offered to present additional evidence on the subject – at trial. As a result, IMC was tasked with complying with a judgment that required the augmentation plan be kept in compliance at all times while entitling it to reimbursement for its actual and reasonable expenses for maintenance, repair, and operation of the plan. The letters sent to lot owners by IMC with which IMMD takes much umbrage, provide a justification for why the charges are "actual and reasonable" and only related to "maintenance, repair, and operation of the plan"; without the letters, IMC is arguably not in compliance with the Court's Order.

Quite simply, the conclusory allegations upon which IMMD relies do not demonstrate that IMC has violated any of the Court's orders, let alone that IMC's actions were taken in disrespect for the Court, obstructed the administration of justice, or brought the Court into disrepute. Further,

IMMD's verification of these conclusory allegations is ineffective to grant the Motion any more credence. Because the Motion on its face fails to allege facts sufficient to show that IMC's actions violated the Court's March 16 Order, or any subsequent order for that matter, the Motion for Order to show cause must be denied. *Wyatt v. People*, 28 P. 961, 965 (Colo. 1892) (affidavit which failed to show existence of a court order that was violated insufficient to support contempt).

II. IMC'S REQUEST FOR BRIEFING IS DIRECTED AT THE DEFICIENCIES IN IMMD'S MOTION

In the Response, IMMD claims that IMC is not being denied an opportunity to respond to its allegations because it will be able to do so at the contempt hearing. Response at 3. This misconstrues the nature of IMC's argument. As set forth above, when stripped of its conclusory assertions and strained reading of the Court's orders, IMMD's Motion fails to state facts sufficient to justify a show cause hearing in the first instance. Allowing briefing to proceed on the Motion will promote judicial efficiency and save the parties time and money.

III. THE REQUIREMENTS OF C.R.C.P. 107(C) AND THE COURT'S ORDER HAVE NOT AND COULD NOT BE MET AND THEREFORE THE HEARING MUST BE RESET

Contrary to IMMD's assertions, the mandates of C.R.C.P. 107(c) have not been met in this case as Mr. Ingalls was not personally served with the citation and a copy of the motion, affidavit and order at least 21 days before the show cause hearing was set. Further, the Court properly exercised its discretion and ordered that Mr. Ingalls be so served at least 21 days prior to said show cause hearing. As a result, the show cause hearing must be reset to comport with the Rules and the Court's order.

IMMD correctly cites to C.R.C.P. 5(b)(1) for the proposition that service can be made upon a person represented by counsel. However, the provision plainly states that service must be made personally upon the represented individual if so ordered by the Court: "[s]ervice . . . on a party represented by an attorney is made upon the attorney *unless the court orders personal service on the party*." C.R.C.P. 5(b)(1) (emphasis added). The Court granted IMMD's Proposed Order on August 20, 2015; the Proposed Order plainly states: "At least 21 days before the time designated for the hearing, IMMD shall serve directly upon James Ingalls a copy of the Verified Motion and a Copy of this Order and Citation." Order to Show Cause and Citation at 4. As a result of being granted the exact relief it requested, IMMD may not now rely upon the provisions of C.R.C.P. 5(b)(1) which allow service upon counsel. IMMD's Proposed Order, which was granted by the Court, required that Mr. Ingalls be personally served at least 21 days prior to the date designated for the hearing and since he was not, the hearing must be reset.

Even assuming *arguendo* that service of the citation upon the undersigned counsel via ICCES on August 20 was effective, it was still less than the 21 days before the date of the hearing which the Court set for September 9, 2015. C.R.C.P. 107(c) requires the "*citation* and a copy of the motion, affidavit and order" shall be personally served on the alleged contemnor at least 21 days before the hearing, not merely the motion and proposed order as suggested by IMMD in its Response. The citation was served on undersigned counsel on August 20, 2015 via ICCES which

is 20 days before the September 9 show cause hearing. As this flatly contrary to the mandates of C.R.C.P. 107 and the Court's Show Cause Order, the hearing must be reset.

Finally, IMC agrees that "due process does not require the Court to accommodate Mr. Ingalls' vacation plans." Response at p. 4. However, the fact that IMMD seeks punitive sanctions that carry a maximum jail sentence of six months dictate that some semblance of due process be afforded and the "gloss" that IMMD suggests does not so provide. *See In re Marriage of Alverson*, 981 P.2d 1123, 1125 (Colo. App. 1999) (possibility of incarceration as a result of alleged indirect contempt sufficient to require recognition and protection of many of rights afforded to criminal defendants).

IV. THE SHOW CAUSE HEARING SHOULD BE REASSIGNED TO A DIFFERENT JUDICIAL OFFICER

Based on IMMD's previous public statements that IMC may properly bill lot owners for actual and reasonable operation and maintenance costs, it appears that this contempt proceeding is nothing more than a thinly veiled attempt to re-litigate the issue of ownership (*See* Proposed Order at 21.C.) or to seek redress for an issue that it chose not to appeal. IMMD claims that the matter should not be reassigned because the "sitting Judge is already familiar with the facts of this case, and authored the Orders that form the basis of the contempt hearing." Response at 5. These factors actually weigh in favor of reassigning this matter as the only issue to be determined at the hearing is whether IMC's actions violate an order of the Court.

This is not an opportunity for IMMD to revisit the positions it took at trial or reinterpret the March 16 Order in light of subsequent events, therefore the facts of the case and knowledge of the underlying proceedings are irrelevant. Instead, it will be up to the presiding judge to objectively review IMC's actions and determine whether those actions comport with the plain language of the Court's orders. IMC agrees that given the finite amount of judicial resources available, interests of judicial economy are paramount. However, IMC contends that based on the narrow scope of review at the show cause hearing, judicial economy will not be adversely served by reassignment of this matter to a different judicial officer.

CONCLUSION

WHEREFORE, based on the paucity of facts underlying its Motion for Order to Show Cause, IMC respectfully requests that the Court deny the same. In the alternative, the Court should hold its Order to Show Cause in abeyance so that the parties can fully brief the merits of IMMD's allegations to determine if a show cause hearing is warranted in the first instance. If the show cause hearing is to proceed, the hearing should be reset to comply with the mandates of C.R.C.P. 107, C.R.C.P. 5 and the Court's Order to Show Cause. Finally, IMC respectfully requests that this matter be reassigned to a different presiding judicial officer as the interest of judicial economy will not be adversely served.

Three separate proposed orders have been previously provided for the Court's consideration for the three alternative requests for relief stated herein.

Dated this 31st day of August, 2015.

ATTORNEY FOR INDIAN MOUNTAIN CORP.

By: 

Adam C. Davenport, #45342

E-filed per C.R.C.P. 121 –
Duly signed original on file with counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2015 a true and correct copy of this **REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION AND REQUEST FOR REASSIGNMENT AND RESETTING IN ACCORDANCE WITH C.R.C.P. 107(c)** was filed in Case No. 14CV30056 and was served by e-filing via ICCES and addressed to the following:

S/
Adam C. Davenport

Efiled per C.R.C.P. 121
Duly signed original on file with counsel

Party Name	Party Type	Attorney Name
Indian Mountain Metropolitan District	Defendant	Matthew A. Montgomery Nathan Flynn Peter Ampe