MEMORANDUM

Date: April 4, 2022

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: Jan Lesher
Acting County Administrator

Re: Additional Materials Board of Supervisors April 5, 2022 Addendum Item 6 – Differential Water Rate Lawsuit Update

I had been waiting for substantive progress on this case to share an update with you. However, in the absence of such, I am instead providing a recap of the lawsuit to date and next steps.

Per your direction, Snell and Wilmer L.L.P. filed a lawsuit in Pima County Superior Court December 17, 2021 on behalf of the County regarding the City of Tucson's adoption of a differential water rate in select unincorporated areas. The actions leading to the lawsuit were summarized in County Administrator Huckelberry's November 22, 2021 review of chronology and options.

As I communicated to you on December 17, 2021, the Complaint for Declaratory and Injunctive Relief was filed that day in Pima County Superior Court primarily based on:

- Violation of Arizona Revised Statutes requiring that rates be "just and reasonable";
- Common law rate discrimination by not treating similarly situated customers equally;
- Violation of the 14th Amendment of the United States Constitution and Article II, Section 13 of the Arizona Constitution, providing for equal protection under the law and protection against race-based discrimination; and
- Violation of Article IV, Part 2, Section 19 of the Arizona Constitution prohibiting governments from enacting "special laws."

On February 2, 2022, I communicated to you that the City of Tucson retained the firm of Gust Rosenfeld to represent the City in this litigation and filed a motion of change of venue to move the case to Maricopa County, as per their statutory right. On January 18, 2022, the motion to move the case to Maricopa County was approved.

On February 16, 2022, I informed you that Judge Randall Warner had been assigned to the case and provided you with the City of Tucson February 14 answer to our complaint. Also included in that communication was their Motion to Compel Arbitration, arguing that the 2000 County/City Intergovernmental Agreement supplementing the 1979 Agreement, provides for the current dispute to be resolved through arbitration in lieu of proceeding with the case in Superior Court.

On March 3, 2022, our attorneys filed the attached Response to Motion to Compel Arbitration. The Response argued that the arbitration clause is not applicable because the current dispute does not "arise under" either the 1979 IGA or the 2000 Supplemental IGA—neither of which concern water rate setting. The Response also argued that forcing the case into arbitration would violate public policy.

On March 11, City attorneys filed the attached Reply to Response to Motion to Compel Arbitration, requesting the Court set a case status conference to start the discovery process. That conference occurred on March 29 and resulted in Judge Warner scheduling the hearing on the motion to compel arbitration for April 7 I will update you following that meeting.

Please let me know if you have any questions.

JKL

Attachments

c: Carmine DeBonis, Jr., Deputy County Administrator for Public Works
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ATTACHMENT 1

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Attorneys for Plaintiff Pima County

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PIMA COUNTY, a body politic in the State of Arizona,

Plaintiff,

v.

CITY OF TUCSON, a municipal corporation of the State of Arizona, REGINA ROMERO, in her official capacity as the Mayor of Tucson, LANE SANTA CRUZ, in her official capacity as Tucson City Councilmember, PAUL CUNNINGHAM, in his official capacity as Tucson City Councilmember, KEVIN DAHL, in his official capacity as Tucson City Councilmember, NIKKI LEE, in her official capacity as Tucson City Councilmember, RICHARD FIMBRES, in his official capacity as Tucson City Councilmember, STEVE KOZACHIK, in his official capacity as Tucson City Councilmember, and MICHAEL ORTEGA, in his official capacity as

No. CV2022-001141

RESPONSE TO MOTION TO COMPEL ARBITRATION

Tucson City Manager,

Defendants.

Plaintiff Pima County ("Pima" or "County") responds in opposition to Defendants City of Tucson, Regina Romero, Lane Santa Cruz, Paul Cunningham, Kevin Dahl, Nikki Lee, Richard Fimbres, Steve Kozachik, and Michael Ortega (collectively, "Tucson" or "City")'s Motion to Compel Arbitration ("Motion").

In this action, Pima challenges Tucson City Ordinance No. 11881 on the grounds that the Ordinance discriminates against certain Tucson Water Department ("Tucson Water") customers living in unincorporated areas. Pima does not allege that Ordinance No. 11881 violates any provision, or duty created by, the 1979 "Sewer Merger Intergovernmental Agreement" (the "1979 IGA") or the "Supplemental Intergovernmental Agreement Relating to Effluent" (the "2000 Supplemental IGA") (collectively, the "IGAs") entered into between the County and the City. Nor would any such allegation make logical sense. The IGAs only concern the *County*'s administration of the region's *wastewater* management systems, not the City's management of the region's water.

Still, Defendants argue that this important case, which impacts thousands of Pima County residents, must be forced into private arbitration because in the 2000 Supplemental IGA the County and the City agreed to arbitrate all disputes "arising under" the 2000 Supplemental IGA or the 1979 IGA. But Pima's claims do not "arise under" the IGAs: "resolution" of this case does not "require[] a reference to or construction of some portion of the [IGAs]" *Dusold v. Porta-John Corp.*, 167 Ariz. 358, 362 (App. 1990). Instead, Pima's claims all allege that Ordinance No. 11881 violates legal duties "generally owed to others besides the contracting parties"—namely, A.R.S. § 9-511.01, the common law, the equal protection provisions in the U.S. and Arizona Constitutions, and the Arizona Constitution's prohibition on "special laws." *See id.* at 363. The Arizona Court of Appeals has explained that arbitration clauses covering disputes "arising under" a contract do not reach these types of claims. *Id.* at 362-363.

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It is irrelevant that Pima's Complaint cites to the IGAs. Those citations were included largely for historical reference and to help show that Tucson is a regional water supplier. While it is certainly true that Tucson's role as regional water supplier *supports* Pima's legal claims, Pima's causes of action related to the City's discriminatory and unconstitutional acts exist even if the County and the City had never entered into the IGAs.

Even setting these fatal defects aside, compelling arbitration of Pima's claims that Ordinance No. 11881 discriminates on the basis of race and against similarly situated customers—in violation of, among other things, the Arizona and U.S. Constitutions—based on two, decades old, agreements, which primarily concern the County's takeover of wastewater management systems from the City, would be patently absurd and contrary to public policy. The City's theory that it can hide behind highly technical intergovernmental agreements dealing with wastewater to avoid judicial scrutiny of its severely discriminatory and unconstitutional differential water rate scheme is not supported by the 1979 IGA, 2000 Supplemental IGA, or applicable law.

For all these reasons, the Motion should be denied.

ARGUMENT

"Although it is commonly said that the law favors arbitration, it is more accurate to say that the law favors arbitration of disputes *that the parties have agreed to arbitrate*." *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, 51, ¶ 11 (1999) (emphasis added); *see also E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("[W]e do not override the clear intent of the parties. . . simply because the policy favoring arbitration is implicated."). Moreover, the general policy favoring arbitration has little force where, as here, the entire dispute focuses on constitutional, common law, and statutory issues: while arbitrators have "specialized competence" in contractual matters, "[t]his expertise does not extend to . . . statutory and constitutional issues." *See Horne v. New England Patriots Football Club, Inc.*, 489 F.Supp. 465, 470 (D. Mass. 1980); *see also Dusold*, 167 Ariz. at 362 (noting that arbiters lack expertise in personal injury claims).

Here, in the 2000 Supplemental IGA the parties agreed to arbitrate "any dispute

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arising under" the 2000 Supplemental IGA or the 1979 IGA. [Compl. Ex. E at § 14.1 (emphasis added).] The County's statutory, common law, and constitutional claims do not "aris[e] under" the 1979 IGA or the 2000 Supplemental IGA. The Motion should be denied.

I. The 1979 IGA and the 2000 Supplemental IGA Do Not Govern Tucson Water Rates.

As a preliminary matter, the City's Motion (at 2-3) distorts the role that the 1979 IGA and the 2000 Supplemental IGA play in this dispute. While the City correctly acknowledges (at 2) that "Pima County brought this action to challenge a Tucson City ordinance that effects differential water rate charges for certain Tucson Water Department customers located outside of City limits," it fails to note that Pima County has *not* alleged that Ordinance No. 11881 violated, or in any way impacted, the 1979 IGA or 2000 Supplemental IGA. [*See* Compl. at ¶¶ 151-211 (setting forth causes of action, all of which are brought against Ordinance No. 11881 alone).] Not even the City argues that the IGAs and Ordinance No. 11881 are somehow connected—the best the City can do is state that certain allegations in the Complaint somehow "flow" from the IGAs. [Motion at 2.]

Nevertheless, and to be clear, the 1979 IGA and the 2000 Supplemental IGA have essentially *nothing* to do with the rates that Tucson Water can charge (with the possible exception that these agreements help show that Tucson Water customers in unincorporated areas actually subsidize the handling for wastewater services, therefore undermining the City's position that unincorporated customers "cost more" than in-city customers *see* Compl. at ¶¶ 98-100). Rather, those agreements concern the County's control of the region's wastewater facilities.

This is explained in Article 1 of the 1979 IGA, which states that the agreement's purpose was to provide "guidelines for the orderly and timely transfer of the City of Tucson's *sewerage* system . . . to Pima County." [Compl. Ex. D at 3 (emphasis added).] The 1979 IGA therefore has Articles related to, among other things: "Treated and Reclaimed Water (Effluent)" (Article III); "Assumption of Sewer System Financing and Liabilities" (Article IV); constructing wastewater storage facilities (Article V); and

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transferring City sewer department employees to the County (Article IX). [*Id.* at 5-13, 18-21.]

The 2000 Supplemental IGA, for its part, was only intended to "supplement the 1979 IGA." [Compl. Ex. E at § 1.6.] Some of these "supplements" include provisions granting the County greater control over wastewater effluent generated in non-metropolitan areas (Section 4); creating a pool of wastewater effluent for certain riparian projects (Section 5); and providing provisions for coordinating wastewater treatment between the City and County (Section 10)—among other things. [*Id.* at §§ 4.1-4.2, 5.1-5.1.4, 10.1-10.6.]

In short, the IGAs are included in the Complaint for background information. These documents do not form the basis of any of the legal claims in the Complaint.

II. The Arbitration Clause Does Not Apply.

A. This Litigation Does Not "Arise Under" the IGAs, Under the Standard Set Forth in *Dusold v. Porta-John Corp.*

The relevant portion of the 2000 Supplemental IGA's arbitration clause states:

> 14.1. The following non-binding alternative dispute resolution process shall be followed for any dispute *arising under* this Supplemental IGA or the 1979 IGA.
>
> 14.1.1 The City and the County shall meet and confer about the issue or issues in an attempt to resolve the dispute. If there are issues that cannot be resolved by City and County, each shall appoint one arbitrator to a three party panel of arbitrators which will decide the dispute. The appointment of the two arbitrators will occur within 30 days of the meeting referred to above.

[*Id.* at § 14.1 (emphasis added).]

In *Dusold v. Porta-John Corp.*, 167 Ariz. 358 (App. 1990), the Arizona Court of Appeals held that "in order for the dispute to be characterized as arising out of or related to the subject matter of the contract, and thus subject to arbitration, it must, at the very least, raise some issue the resolution of which requires a reference to or construction of some portion of the contract itself." 167 Ariz. at 362. The Court further explained that "[i]f the contract places the parties in a unique relationship that creates new duties *not otherwise*

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imposed by law, then a dispute regarding a breach of a contractually-imposed duty . . . would be one arising from the contract terms and therefore subject to arbitration . . ." *Id.* at 363 (emphasis added). "If, on the other hand, the duty alleged to be breached is one imposed by law in recognition of public policy and *is generally owed to others besides the contracting parties*, then a dispute regarding such a breach is not one arising from the contract. . . a contractually-imposed arbitration requirement like the one at issue here would not apply to such a claim." *Id.* (emphasis added).

The distinction between a claim arising out of a contract versus a claim arising out of a duty generally owed to others is illustrated in *Dusold*. There, Dusold entered into a Service Contract Agreement with Porta-John to service and clean portable toilets. *Id.* at 259. The Service Contract Agreement contained a clause requiring arbitration for "any controversy or claim arising out of, or relating to this agreement, or the breach thereof." *Id.* After several months, Dusold sued Porta-John alleging that the company had failed to warn him of the toxic nature of the cleaning chemicals and failed to provide him with adequate instructions for their use. *Id.* The Court of Appeals held that because Porta-John's duties to warn Dusold about the toxic nature of the chemicals were "owed to him by Porta-John even if he were a contractual stranger," those claims were *not* subject to arbitration. *Id.* at 363.

Notably, the arbitration clause in *Dusold* was actually broader than the arbitration clause at issue here, because it required arbitration of any dispute "arising out of, *or relating to*" the services agreement. *See Sun Valley Ranch 308 Ltd. P'ship ex rel. Englewood Properties, Inc. v. Robson,* 231 Ariz. 287, 292 ¶ 14 (App. 2012) (distinguishing between "arising under" and "related to" contractual language); *see also Mediterranean Enter., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983) ("The phrase 'arising under' has been called 'relatively narrow as arbitration clauses go'" (citation omitted)); *U.S. ex rel. Dorsa Miraca Life Sciences, Inc.*, No. 3:13-CV-01025, 2019 WL 13130022, at *3 (M.D. Tenn. Dec. 11, 2019) ("The arbitration provision in the Employment Agreement is narrower than those in cases addressing broadly-worded arbitration clauses because it explicitly limits the scope of the clause to the disputes arising 'under the terms of this agreement' and does

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not include claims 'related' to the agreement . . ."). Yet, the Court still determined that Dusold's tort claims, which were far more closely related to Service Contract Agreement than the County's claims are to the IGAs here, were not subject to arbitration. *Dusold*, 167 Ariz. at 363.

Applying *Dusold*, it becomes clear that the arbitration clause in the 2000 Supplemental IGA does not apply here. In this case, the "issues" that require "resolution" are as follows:

- **Count I (A.R.S. § 9-511.01)**: (a) whether Tucson is a "municipality engaged in a domestic water or wastewater business" and, if so (b) whether Ordinance No. 11881 imposes rates that are not "just and reasonable." A.R.S. § 9-511.01(A), (D).
- **Count II (Common Law Rate Discrimination)**: whether Ordinance No. 11881 charges discriminatory rates between similarly situated customers. *Town of Wickenburg v. Sabin*, 68 Ariz. 75, 77-78 (1948).
- **Count III (Equal Protection – Similarly Situated Customers)**: whether Ordinance No. 11881: (a) discriminates between; (b) similarly situated Tucson Water customers; (c) in a manner that is not rationally related to a legitimate governmental interest. *Big D. Const. Corp. v. Court of Appeals*, 163 Ariz. 560, 566 (1990).
- **Count IV (Equal Protection – Race Based Discrimination)**: whether Ordinance No. 11881: (a) discriminates between; (b) similarly situated Tucson Water customers on the basis of race; (c) in a manner that is not necessary to serve a compelling government interest. *Kenyon v. Hammer*, 142 Ariz. 69, 83 (1984)
- **Count V (Special Law)**: whether Ordinance No. 11881 fails one of the following requirements: (a) it must have a rational relationship to a legitimate governmental objective; (b) the classification made in Ordinance No. 11881 must be legitimate, encompassing all members that are similarly situated, and (c) "the classification must be elastic, allowing 'other individuals or entities to come within' and move out of the class." *Gallardo v. State*, 236 Ariz. 84, 88 ¶ 11 (2014) (citation omitted); *State Compensation Fund v. Symington*, 174 Ariz. 188, 193 (1993).

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Resolving these issues does not "require" referencing or construing the IGAs. *Dusold*, 167 Ariz. at 362. For instance, Counts I-III and V require the County to establish, at some level, that the City's purported justifications for Ordinance No. 11881—"rewarding" annexation, disproportionate financial risks between in-city and out-of-city customers, environmental sustainability, cost of service and staying consistent with other municipalities—are untethered to differential rates. The Complaint sets forward various reasons why this is the case, all without citing the 1979 IGA or the 2000 Supplemental IGA, including that: (1) incentivizing annexation is not a legitimate reason to impose differential rates and, in any rate, differential rates will not in fact increase annexation [Compl. at ¶¶ 75-90]; (2) the County actually subsidizes in-City Tucson Water customers through, among other things, Central Arizona Water Project taxes [*Id.* at ¶¶ 91-105]; (3) differential rates based on jurisdiction, rather than consumption, do not increase water conservation [*Id.* at ¶¶ 106-115]; (4) the City's Cost of Service studies are fundamentally flawed [*Id.* at 116-138]; (5) the fact that other municipalities charge differential rates does not justify Ordinance No. 11881. [*Id.* at. 139-142.]

Similarly, to show Counts II-IV, the County will establish that Tucson Water customers exempted from differential rates (in-city customers, customers on Native American tribe lands, and Tucson Unified School District campuses) are "similarly situated" to customers not exempted (those living in unincorporated areas). *E.g.*, *Town of Wickenburg*, 68 Ariz. at 77-78; *D. Constr. Corp.*, 163 Ariz. at 566; *Gallardo*, 236 Ariz. at 88 ¶ 11. While the 1979 IGA and the 2000 Supplemental IGA may be relevant background to this inquiry, there are a myriad other ways to establish that the exempted and non-exempted customers are clearly "similarly situated." For example, a legitimate cost-of-service study is proof enough. [*See* Compl. Ex. P (showing that exempted and non-exempted customers often live within 1,000 feet of each other).]

Further, each claim asserted by the County stems from legal duties "imposed by law" that are "generally owed to others besides the contracting parties." *Dusold*, 167 Ariz. at 363. Counts I and II are brought under statutory and common law duties that apply to *all*

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municipalities engaging in water utility services. A.R.S. § 9-511.01(A), (D); *Town of Wickenburg*, 68 Ariz. at 77-78. Counts III-V alleges that Ordinance No. 11881 violate provisions in the U.S. and Arizona Constitutions applicable to all government entities. [Compl. at ¶¶ 172-211.] All of these duties would be owed by Tucson to Pima even if the two parties were "contractual stranger[s]." *Dusold*, 162 Ariz. at 363.

At bottom, the County's claims are independent of and would exist without the 1979 IGA and the 2000 Supplemental IGA. Given this set of circumstances, the County's claims do not "arise under" those agreements. *See Dusold*, 167 Ariz. at 363; *Dorsa Miraca Life Sciences, Inc.* 2019 WL 13130022, at *3 (holding that plaintiff's claim that he was retaliated against for filing False Claims Act violation did not "arise from" an employment agreement because the retaliation claim "would exist even without the contract").

B. The City's Argument that Some of the County's Allegations "Flow" From the IGAs is Incorrect and Irrelevant.

The City does not explain how this litigation "arises under" the IGAs—the Motion does not cite *Dusold* at all. Rather, the City (at 2-3) contends that arbitration is required here because (1) supposedly each of the County's claims are "based, at least in part, on the non-regional nature of the differential water rates charged to customers in unincorporated and incorporated areas"; and (2) the "County's allegation that the City is the regional water supplier flow[s] from" the IGAs. This argument fails for several reasons.

First, the City's position improperly presumes that because the IGAs provide *factually relevant* background to this dispute, the arbitration clause in the 2000 Supplemental IGA must be binding. As *Dusold* makes clear, however, the key question is not whether a contract with an arbitration clause is relevant to a dispute—rather, Courts look at whether the dispute "raise[s] some issue the resolution of which requires a reference to or construction of some portion of the contract itself." *Dusold*, 167 Ariz. at 362. As explained above, it is not necessary to reference or construe the IGAs to resolve this dispute.

Second, the County's legal claims are not "based on" the City's role as a regional water supplier. Instead, the County's legal claims are "based on" the City's enactment of

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discriminatory and irrational differential water rates for certain Tucson Water customers living in unincorporated areas, in violation of A.R.S. § 9-511.01, the common law, the equal protection guarantees in Article II, Section 13 of the Arizona Constitution and the 14th Amendment of the U.S. Constitution, and Article IV, Part 2, Section 19 of the Arizona Constitution's prohibition on special laws. The bottom-line is that the City cannot use water rates to achieve other non-water policy goals, such as annexation by extortion. The reality that the City serves as a regional water supplier, which is substantiated by the IGAs, does not form the legal *basis* for any of these claims.

Third, even *if* the County's legal claims did somehow rely on the City's role as regional water supplier (and they do not), it is not necessary to reference or construe any portion of the IGAs to establish this fact. The City's role as regional water supplier is evidenced by a litany of other historical documents, including the City's ordinance establishing the now-defunct Metropolitan Utilities Management Agency and in statements made by the City in a lawsuit against the County. [*See* Compl. at ¶¶ 26-27 (quoting a joint policy statement released by the Tucson City Council and the Pima County Board of Supervisors); 30; 34.] The City is wrong to conflate the IGAs with the general fact that Tucson is the region's water supplier.

III. Forcing this Case into Arbitration Would Violate Public Policy

The Motion should be denied for all the reasons stated above. However, even if the arbitration clause in the 2000 Supplemental IGA was applicable, forcing this important case into arbitration would be grossly contrary to public policy and absurd. *See generally e.g. Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A.*, 991 F.2d 244, 248 (5th Cir. 1993) (explaining general rule that courts may vacate arbitral awards that violate public policy). In the Complaint, Pima alleges that Ordinance No. 11881 blatantly violates the equal protection provisions in the U.S. and Arizona Constitutions—including by discriminating on the basis of race—by arbitrarily and irrationally increasing water prices for select, politically unfavored, residents living in unincorporated areas. [Compl. at ¶¶ 143-149, 172-196.] It also alleges that Tucson is vindictively using its control of the city's water supply

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in order to force unincorporated customers to vote in favor of annexation. [*Id.* at ¶¶ 76-80.] Compelling arbitration here based on decades old IGAs that govern the minutiae of the County's takeover of the City's wastewater system is absurd and harmful to the public policy, embedded in the U.S. and Arizona constitutions, common law, and statute, favoring non-discrimination among similarly situated rate payers. This is especially true given that the City does *not even attempt* to tie Pima County's legal claims with the actual duties and requirements set forth in the 1979 IGA and the 2000 Supplemental IGA. *See S. Cal. Edison Co.,* 194 Ariz. at 51, ¶ 11 (cautioning that arbitration should only be compelled to resolve disputes the parties have "agreed to arbitrate); *see also Air Methods Corp. v. OPEIU*, 737 F.ed 660, 665 (10th Cir. 2013) (holding that arbitrators do not have "unlimited" authority to "dispense [their] own brand of industrial justice" and that therefore an arbitral award is only legitimate as long as "it draws its essences from the [contract]" (citation omitted)).

In short, the City cannot hide behind private arbitration to avoid the transparency inherent in judicial review of important public matters—especially not by referencing inapplicable IGAs that were only included in the Complaint for historical background and to help show that the City has assumed responsibility for providing water throughout the region.

IV. Only Claims "Arising Under" the IGAs are Subject to Arbitration

Finally, and only as an alternative argument, in the event the Court determines that some of the County's claims do "arise under" the IGAs (and none of the County's claims arise under those agreements), *only* those claims are subject to arbitration.[1] *See S. Cal. Edison Co.,* 194 Ariz. at 51 ¶ 11; *see also Est. of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 234 Ariz. 18, 26 ¶ 33 (App. 2014) (forcing some, but not all, claims to arbitration). This is especially true given that the arbitration clause in the 2000 Supplemental IGA only covers disputes "arising under" that agreement, rather than all

[1] The County does not dispute that if the arbitration clause in the 2000 Supplemental IGA did apply in this case (and it does not), the County's claims against the Mayor, Councilmembers, and City Members would also be subject to arbitration under *Sun Valley Ranch 308 Ltd. P'ship ex rel. Englewood Props., Inc. v. Robson*, 231 Ariz. 287 (App. 2012).

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claims that "relate to" the IGAs. *See Petition of Kinoshita & Co.,* 287 F.2d 951, 953 (2d Cir. 1961) ("The agreement to arbitrate is limited to such matters as those just enumerated when it refers to dispute or controversies 'under' or 'arising out of' the contract.")

The City's citation (at 5-6) to *Sun Valley Ranch 308 Ltd. P'ship ex rel. Englewood Props., Inc. v. Robson*, 231 Ariz. 287 (App. 2012) for the proposition that all of the County's claims are subject to arbitration is misleading. Although the Court in that case ultimately determined that every claim was subject to arbitration, it did so only after conducting a claim-by-claim *Dusold* analysis. *Robson*, 231 Ariz.at 293-295 ¶¶ 18-31.

CONLCUSION

At bottom, this case simply does not "arise under" the IGAs. The City and the County have never agreed to arbitrate the types of claims at issue in this case. Therefore, the Motion should be denied.

DATED this 3rd day of March, 2022.

SNELL & WILMER L.L.P.

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The foregoing was electronically filed via TurboCourt this 3rd day of March, 2022,

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PIMA COUNTY, a body politic in the State of Arizona,

Plaintiff,

v.

CITY OF TUCSON, a municipal corporation of the State of Arizona, REGINA ROMERO, in her official capacity as the Mayor of Tucson, LANE SANTA CRUZ, in her official capacity as Tucson City Councilmember, PAUL CUNNINGHAM, in his official capacity as Tucson City Councilmember, KEVIN DAHL, in his official capacity as Tucson City Councilmember, NIKKI LEE, in her official capacity as Tucson City Councilmember, RICHARD FIMBRES, in his official capacity as Tucson City Councilmember, STEVE KOZACHIK, in his official capacity as Tucson City Councilmember, and MICHAEL ORTEGA, in his official capacity as Tucson City Manager,

Defendants.

No. CV2022-001141

REPLY TO RESPONSE TO MOTION TO COMPEL ARBITRATION

CWW:cww 4391453.1

Memorandum of Points and Authorities

I. The arbitration clause applies.

A. Resolution of this case requires reference to the 1979 IGA.

The subject arbitration provision applies to "any dispute arising under this Supplemental IGA or the 1979 IGA." "[I]n order for the dispute to be characterized as arising out of or related to the subject matter of the contract, and thus subject to arbitration, it must, at the very least, raise some issue the resolution of which requires a reference to or construction of some portion of the contract itself." *Dusold v. Porta-John Corp.*, 167 Ariz. 358, 362 (App. 1990).

The County's argument that resolution of this case does not require reference to the IGAs cannot be squared with its own allegations. Its Complaint begins by alleging that the City is a regional water supplier that has always and must continue to treat all customers in the region equally:

> While many municipal water utilities charge differential rates to unincorporated customers, Tucson Water is unique. From the 1970's onward, Tucson Water has served as a regional—rather than municipal—water supplier. The City has always treated its customers equally, whether located in incorporated or unincorporated areas. The law requires it to continue treating those customers equally today.

(Complaint, ¶ 2; *see also* ¶ 139, "Tucson Water is not analogous to 'other' municipalities.").

The County goes on to allege that "[t]he 1979 IGA ... formalized the prior understanding that Tucson would be responsible for regional water services...." (Complaint, ¶ 36.) Reference to the IGAs is necessary because that allegation is the underpinning of the County claims and the City denies the allegation that the IGA formalizes any such understanding. (Answer, ¶ 36.) And whatever portion of the IGA the County relies on for its allegation may have to be construed.

Based on 1979 IGA, the County repeatedly alleges that the City is "a regional water provider" or "regional water source." (Complaint, ¶¶ 75, 91, 101, 140.)

Taking the next step, the County further alleges and prays that "because Tucson Water is a regional water provider" its differential rate setting ordinance should be declared "illegal and unenforceable":

- "[B]ecause Tucson Water is a *regional* water provider it is inappropriate for Tucson to attempt to advance its own interests – like 'reward[ing]' annexation or incorporation – in setting rates for Tucson Water." (¶ 75, emphasis in original.)
- "[B]ecause Tucson Water is a *regional* water provider it is inappropriate for Tucson to attempt to advance its own interests – like reducing financial risk – in setting rates for Tucson Water. (¶ 91, emphasis in original.)
- "[B]ecause Tucson Water is a regional water provider it is a 'monopoly service provider with captive customers.'" (¶ 101.)
- "Tucson Water serves as a *regional* water source, with a captive consumer base." (¶ 140, emphasis in original.) "Thus, while it may be appropriate for 'other' municipalities to charge differing rates to unincorporated customers, it is not appropriate here." (¶ 141.)

All of the above-referenced emphatic allegations are incorporated in each of the County's five claims. (*Id.*, ¶¶ 151, 160, 172, 186 and 198.) Each of those claims allege and is based, at least in part, on the non-regional nature of the differential water rates charged to customers in unincorporated and incorporated areas. Key allegations were quoted in the City's motion (at 2-3).

Therefore, whether "[t]he 1979 IGA ... formalized the prior understanding that Tucson would be responsible for regional water services" is at issue. (¶ 36.) Accordingly, reference must be made to it and some portion of it may have to be

construed. Consequently, the arbitration provisions of the 2000 Supplemental IGA apply to this dispute.

The County cannot avoid its reliance on the 1979 IGA to support its allegation that the City is a regional water provider by pointing to "a litany of other historical documents." (Response at 9.) The referenced 1974 "joint policy statement" expressed a mutual "desire" for, *inter alia*, "regional and local water systems." (Complaint, ¶ 26.) The subsequently formed Metropolitan Utilities Management Agency ("M.U.M.") was dissolved in 1976. (*Id.*, ¶¶ 28, 31.) And mere allegations in the City's 1977 lawsuit are not somehow binding today against the 1979 IGA that resolved that lawsuit and "formalized" the settlement. (*Id.*, ¶¶ 34, 36.) All of that is, as the County says, "historical." What matters today is the County's allegation that the "[t]he 1979 IGA ... formalized the prior understanding that Tucson would be responsible for regional water services." (¶ 36.)

B. The arbitration clause applies to claims other than for breach of contract.

The County argues that the arbitration clause does not apply because its claims are of the types that could be asserted by others who are not parties to the IGAs. The County bases that argument on excerpts of language from *Dusold* that supported the court of appeals' reasoning that the arbitration clause in Dusold's contract with Porta-John did not apply to his personal injury claim:

> This reasoning is supported by the analysis employed by Arizona courts in differentiating tort claims "arising out of contract" from tort claims that arise solely out of legal duties imposed by law, for the purpose of awarding attorneys' fees pursuant to A.R.S. § 12–341.01(A). (Citations omitted.) If the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of a contractually-imposed duty is one that arises from the contract. (Citation omitted.) Analogously, such a claim would be one arising from the contract terms and therefore subject to arbitration where

> the contract required it. If, on the other hand, the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties, then a dispute regarding such a breach is not one arising from the contract, but sounds in tort. *Id.* Therefore, a contractually-imposed arbitration requirement like the one at issue here would not apply to such a claim.

167 Ariz. at 363.

Such an analysis does not apply to this case because there is no claim of breach of contract herein. Consequently, the analysis does not disqualify this case from arbitration. It remains true under the primary *Dusold* reasoning that the arbitration clause applies herein because resolution of the claims requires reference to and possibly construction of the IGAs.

II. The scope of the arbitration clause is sufficiently broad.

The County makes much of the fact that the subject arbitration clause uses the phrase "arising under" rather than "relating to" the IGAs. That distinction does not make a difference because, as discussed above, resolution of this case will require reference to and perhaps construction of the IGAs.

III. Arbitration will not violate public policy.

The City has not moved to compel arbitration in order to "avoid judicial scrutiny" or "to hide behind private arbitration to avoid the transparency inherent in judicial review of important public matters." (Response at 2, 10.)

There is nothing in the arbitration provisions about privacy. (*See* Complaint, Ex. E, Section XIV.)

Moreover, the decision of the arbitrators in this dispute between two public bodies will be a public record subject to inspection. A.R.S. § 39-121 ("Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours.").

And judicial review is not necessarily avoided because if either party "declines to accept the decision of the arbitration panel it may initiate an action in the appropriate court ... to obtain a judicial determination of the underlying dispute." (Complaint, Ex. E, Section XIV, § 14.2.)

IV. The arbitrators will be "skilled and experienced" in the claims.

The County argues that the policy favoring arbitration should be given little force in this case because the nature of the claims are supposedly beyond the "specialized competence" of the arbitrators. In addition to overplaying the generality of words in the *Horne v. New England Patriots Football Club* and *Dusold* cases, the County ignores the provision of the 2000 IGA that the "Arbitrators appointed to the arbitration panel shall be skilled and experienced in the field or field pertaining to the dispute." (Complaint, Ex. E, Section XIV, § 14.1.2.)

The notions that arbitration is chosen only in contract disputes, *Horne*, 489 F.Supp. 465, 470 (D. Mass. 1980), and that arbitrators only have expertise in such disputes, *Dusold*, 167 Ariz. at 362, deny the reality of arbitration's increased usage since those cases were decided thirty and forty-plus years ago. Now, arbitrators decide all manner of disputes. *E.g.*, *Chang v. Siu*, 234 Ariz. 442 (2014) (arbitration of property dispute within dissolution of marriage action). And "common law duties and remedies grounded in statutes" can be subject to arbitration. *Sun Valley Ranch 308 Ltd. P'ship ex rel. Englewood Props., Inc. v. Robson*, 231 Ariz., 287, 293, ¶ 18 (App. 2012). Indeed, if arbitrators lack expertise in personal injury claims, why are lawyers appointed as arbitrators in personal injury cases pursuant to Rule 73 of Civil Procedure?

V. Conclusion.

As a matter of public policy, Arizona favors arbitration as a means of resolving controversies when parties have agreed to do so. *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, 51 (1999). Here, two equally sophisticated political

subdivisions of the State of Arizona, with billion-dollar budgets, selected arbitration as the method to resolve any disputes "arising under" their IGAs, in other words, that require reference to and/or construction of them, and to possibly avoid the costs of litigation. This court should order the County to follow that method.

Respectfully submitted on March 11, 2022.

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