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EXEMPT FROM FILING FEES UNDER GOVERNMENT CODE SECTION 6103

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:
Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Los Angeles, Case No. BC 325201;

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. v. City of Lancaster, Diamond Farming Co. v. City of Lancaster, Diamond Farming Co. v. Palmdale Water Dist., Superior Court of California, County of Riverside, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668;

RICHARD WOOD, on behalf of himself and all other similarly situated v. A.V. Materials, Inc., et al., Superior Court of California, County of Los Angeles, Case No. BC509546.

Judicial Council Coordination Proceeding No. 4408

CLASS ACTION

Santa Clara Case No. 1-05-CV-049053
Assigned to the Honorable Jack Komar

LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40 OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL OF PARTIAL CLASS SETTLEMENT

DATE: October 25, 2013
TIME: 9:00 a.m.
DEPT.: 11, Superior Court of County of Santa Clara

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I. INTRODUCTION

Defendant Los Angeles County Waterworks District No. 40 ("District No. 40") opposes the Wood Class's Motion for Preliminary Approval of Partial Class Settlement because the proposed stipulation of settlement violates California law. The stipulation does not require evidence of reasonable and beneficial use, does not finally resolve disputed class issues and claims, violates the McCarran Amendment, contains inappropriate and unenforceable attorneys' fees provisions, and seeks to bind non-settling parties to the attorneys' fees provisions. The proposed stipulation is an attempt to recover attorneys' fees without conferring benefits to the class or finally resolving claims.

II. THE PROPOSED SETTLEMENT SEEKS TO ESTABLISH WATER RIGHTS WITHOUT EVIDENCE THAT THE WOOD CLASS' WATER USE IS REASONABLE AND BENEFICIAL

In 1928, the California Legislature amended the state constitution to mandate all use of water to be reasonable and beneficial. Specifically, Section 2 of Article X of the California Constitution provides:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be *limited to such water as shall be reasonably required for the* beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

(Cal. Const., art. X, § 2 [emphasis added].) As a result, "[i]t is now necessary for the trial court to determine whether [a riparian or overlying] owners, *considering all the needs of those in the particular water field*, are putting the waters to any reasonable beneficial uses, giving consideration to all factors involved, including reasonable methods of use and reasonable methods of diversion." (*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 524-525 [emphasis added].) The Wood Class is asking this Court to make a finding on Wood Class water use, however, without presenting evidence as to their reasonable and beneficial use.

The proposed settlement's failure to present evidence of reasonable and beneficial use violates California law.

III. THE PROPOSED SETTLEMENT DOES NOT COMPLY WITH THE MCCARRAN AMENDMENT

A. The McCarran Amendment Requires a Comprehensive Determination of Water Rights

Congress has waived the sovereign immunity of the United States in state court law suits involving the adjudication of water rights through the McCarran Amendment, which states in part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

(43 U.S.C.S. § 666(a).)

The purpose of the McCarran Amendment is to avoid piecemeal adjudication of water rights. (*Colorado River Water Conservation Dist. v. United States* (1976) 424 U.S. 800, 819.) In articulating the rationale for this amendment, Senator McCarran stated:

> "S. 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value."

(*United States v. District Court of County of Eagle* (1971) 401 U.S. 520, 525 [quoting S. Rep. No. 755, 82d Cong., 1st Sess., 9].)

B. The Proposed Stipulation Violates the McCarran Amendment's Requirement That The Court Determine Water Rights

The proposed stipulation is inconsistent with the McCarran Amendment because it does not quantify the Wood Class' water rights or establish a proper process to quantify those rights. Instead, the proposed stipulation provides that the settling Defendants "agree not to contest that each Wood Class Member may pump up to 3 acre-feet per year assessment free, subject to court approval, and that such use is subject to a rebuttable presumption that it is domestic until

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established otherwise by competent evidence." (Declaration of Michael D. McLachlan in Support of Motion for Preliminary Approval of Partial Class Settlement ("McLachlan Decl."), Ex. A at p. 9.) There is no method for this "court approval." Nowhere in the agreement is any process set forth for the Wood Class to offer evidence to prove its reasonable and beneficial use, which is essential to determine its water rights. (See Cal. Const., art. X, § 2.) Rather than resolving the water rights dispute, the proposed stipulation, at best, merely restricts the settling defendants' ability to present evidence contrary to Wood Class' assertions. In the absence of any determination of the water rights, the proposed stipulation fails to satisfy the requirement of the McCarran Amendment that water rights be determined by the Court.

C. The Proposed Stipulation Violates the McCarran Amendment's Comprehensiveness Requirement Because It Does Not Bind the Wood Class to a Physical Solution

In the proposed stipulation the Wood Class only agrees to be bound by a physical solution to the extent that the physical solution "is consistent with the terms of this Stipulation." (McLachlan Decl., Ex. A at pp. 11-12.) The proposed stipulation characterizes the right granted to the Wood Class therein as a "3 acre-foot per year pumping right," and it appears that the Wood Class is not bound by a physical solution unless it provides that the Wood Class members can pump up to three acre-feet assessment free. (McLachlan Decl., Ex. A at p. 11, line 12.) Thus, to prevent the Wood Class from opting out of the physical solution and to approve the proposed settlement, the Court must determine the Wood Class' water rights against other parties without an evidentiary hearing. To do this the Court must find that the Wood Class' water use is reasonable and beneficial - a finding the court cannot make without evidence from the Wood Class and the other water users in the Basin. (*Tulare Irrigation Dist., supra*, 3 Cal.2d at pp. 524-525.)

Because the Court cannot make the necessary finding to bind the Wood Class to the physical solution, the proposed stipulation should not be approved. If the proposed stipulation is approved and the Wood Class is not bound to the physical solution, the comprehensiveness requirement of the McCarran Amendment will be violated and jurisdiction over the United States will be lost.

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IV. THE PROVISIONS CONCERNING ATTORNEYS' FEES ARE UNENFORCEABLE

The provisions governing the attorneys' fees and costs are unenforceable because: (1) the proposed stipulation attempts to deprive the Court of its independent duty to evaluate the reasonableness of the fees and costs; and (2) a determination that the fees and costs are reasonable will be binding on non-settling parties who may then be liable to the settling defendants. California courts have long established that "the court had an independent right and responsibility to review the attorney fee provision of the settlement agreement and award only so much as it determined reasonable. The parties could not, by their accord, take away that duty. An agreement of the parties does not bind the court if it is contrary to law or public policy." (*Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal. App. 4th 123, 128 [citations omitted].) Consequently, even though the settling defendants agreed to pay the class counsel, the Court still needs to make a determination on the reasonableness of the agreed upon attorneys' fees and may reduce such fees as it deems to be "fair and proper." (*Id.* at pp. 127-28; see also, McLachlan Decl., Ex. A at p. 19 [payment of fees and costs are to be made within 30 days of the Court's final approval of the stipulated settlement].) However, the Wood Class has not presented any evidence to justify the payment of approximately $900,000 in fees and costs. In fact, neither the Motion for Preliminary Approval nor the accompanying declaration states the number of hours spent by the class counsel on this matter or the billing rate of the class counsel. Without such basic information, the settling parties are, in essence, asking the Court to speculate as to what reasonable fees and costs are. (*Mandel v. Lackner* (1979) 92 Cal.App.3d 747, 757; *Serrano v. Priest* (1977) 20 Cal. 3d 25, 48 ["Fundamental to [the trial court's] determination . . . was a careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case."].)

Moreover, by approving the proposed settlement, the Court will effectively deem the negotiated fees to be reasonable and such a determination will have a binding effect on non-settling parties. This is especially troubling as the proposed stipulation provides: "Settling Defendants reserve all rights and remedies to seek payment/reimbursement of attorneys' fees,

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costs and expenses paid to Wood Class counsel from Non-Settling parties who are not defendants in the Wood Action." (McLachlan Decl., Ex. A at p. 20.)

Further, District No. 40 presumes that the stipulated fees and costs represent a percentage of total fees and costs claimed by the class counsel. If the Court approves the proposed stipulation, class counsel will likely seek to use the same percentage to calculate the alleged reasonable fees against other non-settling parties and will try to estop non-settling parties from disputing the reasonableness of the those fees.

V. THE SETTLING PARTIES FAILED TO DEMONSTRATE THAT THE SETTLEMENT WAS REACHED THROUGH ARM'S LENGTH BARGAINING

"[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class action requires court approval." (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1801 [quoting *Malibu Outrigger Bd. of Governors v. Superior Court* (1980) 103 Cal.App.3d 573, 578-79].) A presumption of fairness exists, only if the settlement proponent proves that: "(1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245.)

In the proposed settlement, the few settling parties have negotiated the fees of the Wood Class counsel. (McLachlan Decl., Ex. A at p. 19 ["the Settling Defendants hereby stipulate and agree to each pay the following amounts of fees and costs, as well as the entire cost of the class notice in pro rata shares"].) While contemporaneous negotiation of fees and settlement terms are not strictly prohibited, courts have consider it in evaluating the adequacy of the class's representation. (*7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal. App. 4th 1135, 1158-59 [citing *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.* (3d Cir. Pa. 1995) 55 F.3d 768, 804].) Simultaneous negotiation of fees and settlement creates a fundamental conflict of interest between the class counsel and the class, and has been held to be a "damning indictment of Plaintiffs' counsel's [lack of] commitment to pursuing a fair, arms-length settlement on behalf of the plaintiff class." (*Acosta v. Trans Union, LLC* (C.D. Cal. 2007) 243 F.R.D. 377,

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398; see also, *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, *supra*, 55 F.3d at 804 ["the likelihood that the parties did negotiate the fees concurrently with the settlement in this case increases our concern about the adequacy of representation"].)[1] Contemporaneous negotiation of fees and class relief is especially inappropriate "where the fees sought are not based on hours actually billed, and where those fees represent a trivial portion of Defendants' overall exposure to liability yet a significant fraction of the total they are expected to pay out under the Settlement." (*Acosta*, 243 F.R.D. at 398.) Here, the settlement fees and costs constitute the only payments to be made by the settling defendants and no evidence has been presented to justify the reasonableness of the fees. As such, the presumption of fairness does not apply, and the Court should reject the proposed settlement, which seeks close to $900,000 in fees and costs without resolving any substantive water right disputes.

VI. THE PROPOSED STIPULATION PROHIBITS NON-SETTLING PARTIES FROM SEEKING CONTRIBUTION FROM SETTLING DEFENDANTS FOR ATTORNEYS FEES

If the Court approves the proposed stipulation, non-settling parties will be bound by the stipulated settlement and prohibited from seeking contribution from the settling defendants for attorneys' fees. Pursuant to the proposed stipulation:

> Wood and Wood Class Counsel remain free to seek an award of fees from other parties to this litigation, and no portion of this Section VIII.D will apply to other Non-Settling parties. Settling Defendants reserve all rights and remedies to seek payment/reimbursement of attorneys' fees, costs and expenses paid to Wood Class counsel from Non-Settling parties who are not defendants in the Wood Action. By approving this settlement, the Court finds and determines that the Settling Defendants have no further liability for payment of attorneys' fees, costs and expenses . . . .

(McLachlan Decl., Ex. A at p. 20 [emphasis added].) In other words, even after getting paid close to $900,000 in fees and costs, the Wood Class and class counsel can seek an award of fees from non-settling parties. The settling defendants may also seek reimbursement from non-settling

[1] California courts may look to federal rules of procedure regarding class actions and the federal cases interpreting them for guidance or "where California precedent is lacking." (*Wershba*, *supra*, 91 Cal. App. 4th at 239-240; *see also*, *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal. App. 4th 1253, 1264 ["California courts may look to federal authority for guidance on matters involving class action procedures."] [citation and quotation marks omitted]; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19, 38 ["when there is no relevant California precedent on point [regarding attorney fees in class action], federal precedent should be consulted."].)

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parties. However, the non-settling parties, who are not parties to this proposed stipulation, cannot seek to reimbursement from the settling defendants. This provision unfairly attempts to bind non-parties to the proposed stipulation.

VII. CONCLUSION

For the reasons stated above, District No. 40 respectfully requests the Court to deny the request of Wood Class and the settling defendants to preliminarily approve the proposed stipulation.

Dated: October 21, 2013

BEST BEST & KRIEGER LLP

By Jeffrey V. Dunn /w.w.
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PROOF OF SERVICE

I, Sandra K. Sandoval, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP,300 South Grand Avenue, 25th Floor, Los Angeles, CA 90071. On October 21, 2013, I served the within document(s):

LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40'S OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL OF PARTIAL CLASS SETTLEMENT

- [x] by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.
- [ ] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.
- [ ] by causing personal delivery by ASAP Corporate Services of the document(s) listed above to the person(s) at the address(es) set forth below.
- [ ] by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on October 21, 2013, at Los Angeles, California.

Sandra K. Sandoval