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DISTRICT NO. 40

**EXEMPT FROM FILING FEES
UNDER GOVERNMENT CODE
SECTION 6103**

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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

16 ANTELOPE VALLEY GROUNDWATER
17 CASES

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

20 Los Angeles County Waterworks District No.
21 40 v. Diamond Farming Co., Superior Court
of California, County of Kern, Case No. S-
22 1500-CV-254-348;

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

26 RICHARD WOOD, on behalf of himself and
27 all other similarly situated v. A.V. Materials,
Inc., et al., Superior Court of California,
28 County of Los Angeles, Case No. BC 509546

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'S EX PARTE
APPLICATION TO CONTINUE THE
FINAL FAIRNESS HEARING RE PARTIAL
WOOD CLASS SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
JEFFREY V. DUNN

[Filed concurrently with [Proposed] Order]

Hearing

Date: November 26, 2013

Time: 8:30 a.m.

Dept.: Santa Clara Superior Court, Dept. 1

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on November 26, 2013, at 8:30 a.m. or as soon
3 thereafter as the matter may be heard, Los Angeles County Waterworks District No. 40 (“District
4 No. 40”) will, and hereby does, move this Court by way of an *ex parte* application, for an order
5 continuing the Final Fairness Hearing on the partial Wood Class action settlement from
6 December 11, 2013 to a date some time after the completion of the Phase 5 trial. Good cause
7 exists for the relief sought. Specifically:

8 1. The Wood Class’ Motion for Approval of Award of Attorneys Fees and Costs
9 (“Fees Motion”) were not submitted in a timely manner and were not in compliance the Code of
10 Civil Procedure section 1005(b);

11 2. District No. 40 needs additional time to review the voluminous records that
12 accompanied the Fees Motion, which may bind District No. 40 – a non-settling party; and

13 3. Proceeding with the Final Fairness Hearing on December 11, 2013 will deprive
14 District No. 40 the opportunity to conduct discovery concerning the Fees Motion.

15 The hearing of this application will occur telephonically via CourtCall only in Department
16 1 of the Santa Clara Superior Court, located at 161 North First Street, San Jose, California, or in
17 such other location as the Court may designate. No court reporter will be present.

18 In compliance with California Rules of Court, Rule 3.1203, counsel for District No. 40
19 provided notice at 9:24 a.m. on November 25, 2013 to all parties of this *ex parte* motion, the
20 location and time, the specific relief to be requested, and asked whether counsel would appear and
21 object by posting to the court’s designated website for this coordinated proceeding. (See Dunn
22 Decl., ¶ 6, Ex. B.)

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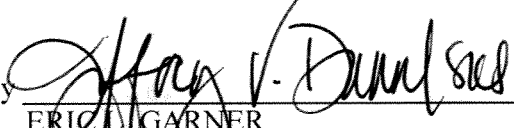
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This application is made pursuant to California Rules of Court, rules 3.1200 *et seq.*, and Code of Civil Procedure section 128. This application is based on this application, the attached memorandum of points and authorities and Declaration of Jeffrey V. Dunn and exhibits thereto, the [Proposed] Order, the pleadings and papers on file herein, and on such further argument and material as the Court may consider at the hearing on this matter.

Dated: November 25, 2013

BEST BEST & KRIEGER LLP

By 
ERIC D. GARNER
JEFFREY V. DUNN
Attorneys for LOS ANGELES COUNTY
WATERWORKS DISTRICT NO. 40

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to California Rules of Court, rules 3.1200 *et seq.*, and Code of Civil Procedure
4 section 128, Los Angeles County Waterworks District No. 40 (“District No. 40”) hereby makes
5 this *ex parte* application for an order continuing the Final Fairness Hearing on the partial Wood
6 Class action settlement and related motions from December 11, 2013 to a date some time after the
7 completion of the Phase 5 trial.

8 **II. FACTUAL BACKGROUND**

9 During the October 25, 2013 hearing on the Wood’s Class’ Motion for Preliminary
10 Approval of Partial Class Settlement (“Preliminary Motion”), counsel for Wood Class
11 represented that it would file all motions related to the partial class settlement (“Settlement”) in a
12 timely manner consistent with the statutorily required notice period so that the matters can be
13 heard on December 11, 2013. (See Dunn Decl., Ex. C at 54:1-3.) As discussed at length during
14 the October 25th hearing, all motions related to the final approval of the Settlement were
15 statutorily mandated to be filed by November 15, 2013 to comply with the minimal notice period.
16 (*Id.* at 55:7-27.) Despite having more than twenty days to prepare for its Motion for Approval of
17 Award of Attorneys Fees and Costs (“Fees Motion”), class counsel did not post the Fees Motion
18 and supporting documents until 11:58 p.m. on Sunday, November 17, 2013 – two days past the
19 minimal notice period. (Code Civ. Proc. § 1005(b); Dunn Decl., Ex. D.)

20 The belated Fees Motion was accompanied by 148 pages of billing records. On
21 November 21, 2013, counsel for District No. 40 informed Mr. McLachlan that District No. 40
22 needs additional time to review the belated motion and accompanying documents and sought a
23 stipulation to continue the final fairness hearing to a mutually agreeable date. However, Mr.
24 McLachlan refused. (Dunn Decl., ¶¶ 3 & 4.) Mr. McLachlan’s refusal necessitates this
25 application to allow District No. 40 sufficient time to examine the evidentiary basis for the Fees
26 Motion and the appropriateness of the Settlement prior to the Final Fairness Hearing. (*Id.* at ¶ 5.)
27 Mr. Tom Bunn, counsel for Palmdale Water District, does not oppose District No. 40’s request
28 for additional time. (Dunn Decl., ¶ 9.)

1 Moreover, as the Court is aware, Phase 5 trial is currently scheduled to commence on
2 February 10, 2014 and the parties are actively engaged in discovery and trial preparation. It is
3 therefore not practical for District No. 40 to *simultaneously* address both Phase 5, review the
4 voluminous billing records, oppose all four motions concerning the Settlement, and conduct
5 discovery regarding the reasonableness of the requested attorney’s fees.

6 **III. LEGAL ARGUMENT**

7 **A. The Fees Motion Was Not Timely Filed**

8 Section 1005, subdivision (b), of the Code of Civil Procedure provides: “all moving and
9 supporting papers shall be served and filed at least 16 court days before the hearing.” During the
10 October 25, 2013 hearing, the Court was concerned with whether the settling parties had
11 sufficient time to gather all the required evidence to support the Settlement for timely file its
12 motions for a final fairness hearing on December 11, 2013. (See Dunn Decl., Ex. C at 51:12-
13 54:3.) In response to the Court’s inquiry, Mr. Michael McLachlan stated, “We plan to file all this
14 paperwork [including back up on the attorney’s fees], which will be considerable on a statutory
15 notice.” (*Id.* at 54:1-3.) However, the Wood Class did not post the Fees Motion and the
16 voluminous supporting papers until 11:58 p.m. on Sunday, November 17, 2013 – two days past
17 the minimal notice period. (See Dunn Decl., Ex. D.)

18 Class counsel’s failure to timely file the Fees Motion is sufficient ground alone for the
19 Court to continue the final fairness hearing. (See Code of Civ. Proc., § 128(a) [courts can
20 “compel obedience to its . . . orders, and process . . . in an action or proceeding pending therein”
21 and “amend and control its process and orders so as to make them conform to law and justice.”].)

22 **B. The Current Briefing and Hearing Schedule Deprives District No. 40 an**
23 **Opportunity to Review and Object to the Reasonableness of the Fees**

24 Despite its failure to gather the necessary billings records and submit the Fees Motion in a
25 timely manner or within 20 days after the Court granted its Preliminary Motion, the Wood Class
26 nonetheless expects District No. 40 to comb through the lengthy records and prepare oppositions
27 in less time than the class counsel took to gather its own billing records. Without an adequate
28 opportunity to review the billing records and an opportunity to conduct discovery, District No. 40

1 would be deprived of an opportunity to object to the fees, by which it may later be bound.

2 Mr. McLachlan indicated that the settling parties stipulated that the settling defendants are
3 responsible for 34.16% of total fees and costs claimed by the class counsel at an allegedly
4 reduced hourly rate of \$550 per hour of attorney time and \$110 per hour for paralegal time.
5 (Declaration of Mr. McLachlan in Support of Fees Motion, ¶¶ 15 & 16.) If the Court approves
6 the settlement, the Court will effectively deem the negotiated fees, rates and percentages to be
7 reasonable and such a determination will have a binding effect on non-settling parties. This is
8 especially troubling as the Wood Class Stipulation of Settlement provides:

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

18 ...

19 (Declaration of Mr. McLachlan in Support of Motion for Final Approval of Partial Class
20 Settlement, Ex. 1 at p. 20 [emphasis added].) In other words, even after getting paid \$736,930.43
21 in fees and costs, the Wood Class and class counsel can seek an award of fees from non-settling
22 parties for amounts that class counsel will no doubt argue had already been determined by the
23 Court (e.g, the remaining 65.84% of the fees and costs to date). (Declaration of Mr. McLachlan
24 in Support of Fees Motion, ¶ 15.)

25 Moreover, the above quoted provision allows the settling defendants to seek
26 reimbursement from non-settling parties. However, the non-settling parties cannot seek to
27 reimbursement from the settling defendants. This provision unfairly attempts to bind non-parties
28 to the Settlement. In fact, the settling defendants are seeking a court order to bind the non-settling
parties to the fees and costs that settling parties negotiated. (See Motion for Determination of
Good Faith Settlement at p. 1 [settling defendants "request an order that they will have no
continuing exposure to any and all fees and costs associated with the efforts of Wood Class
Counsel, including subsequent claims for indemnity or contribution by other parties."].)

1 **C. The Current Hearing Schedule Does Not Permit District No. 40 to Conduct**
2 **Discovery for Purposes of Challenging Section 1021.5 Attorneys' Fees**

3 The Court has authority to grant discovery to a party opposing section 1021.5 attorneys'
4 fees for purposes of contesting the fees sought. (See *Save Open Space Santa Monica Mountains v.*
5 *Superior Court* (2000) 84 Cal.App.4th 235, 246 (“*Save Open Space*”).) A party may obtain
6 discovery regarding unprivileged matters that “[are] relevant to the subject matter involved in the
7 pending action or to the determination of *any motion made in that action*, if the matter either is
8 itself admissible in evidence or appears reasonably calculated to lead to the discovery of
9 admissible evidence.” (Code Civ. Proc., § 2017.010; *Save Open Space, supra*, at 246.)

10 Management of discovery lies within the sound discretion of the trial court. (*Save Open*
11 *Space, supra*, 84 Cal.App.4th at 245.) It is for the trial court in its discretion to decide the scope
12 of permissible discovery, and its decisions as to the types of discovery appropriate or necessary
13 for the section 1021.5 attorneys’ fee inquiry should be made on a case-by-case basis. (*Id.* at 250.)

14 The court also has the authority to order evidentiary hearings to determine the
15 applicability of section 1021.5 attorneys’ fees. (See *Graham et al. v. DaimlerChrysler Corp.*
16 (2004) 34 Cal.4th 553, 576 (“*Graham*”) [holding that “[w]hen the suit is mooted early in its
17 prosecution ... it may generally be established during the attorney fee proceeding by declarations,
18 or, at the discretion of the trial court, by *an abbreviated evidentiary hearing*”] [emphasis added].)
19 Like a trial, the purpose of an evidentiary hearing is to resolve disputed issues of fact, or to
20 provide the court with a sufficient factual basis for deciding an issue. (See *Sablan v. Department*
21 *of Finance* (9th Cir. 1988) 856 F.2d 1317, 1322 (“*Sablan*”), a federal court decision cited with
22 approval in *Graham, supra*, at 576.)

23 A defendant may also move to continue a scheduled hearing date on a plaintiff’s motion
24 for attorneys’ fees in order to allow the defendant time to engage in discovery or analysis
25 regarding the request for fees. (*Sablan, supra*, 856 F.2d at 1320-1321.)

26 For example, in *Save Open Space*, the court concluded that where the party opposing a
27 section 1021.5 attorneys’ fee award had produced evidence suggesting that a public interest
28 organization was litigating an action primarily for the benefit of non-litigants, “the court should,

1 in order to resolve the issue, allow the opposing party to conduct limited discovery.” (84
2 Cal.App.4th at 245.) This discovery includes the use of depositions. (*Id.* at 244 [where the court
3 allowed post-judgment deposition of plaintiff to determine applicability of section 1021.5].)


4 In this case, District No. 40 needs additional time to evaluate the substantive claims raised
5 in the Fees Motion, and will most likely conduct discovery as to the request for fees.

6 **IV. CONCLUSION**

7 For the reasons discussed herein, and for good cause having been shown, District No. 40
8 respectfully requests that this application be granted.

9
10 Dated: November 25, 2013

BEST BEST & KRIEGER LLP

11
12 By 
13 ERIC L. GARNER
14 JEFFREY V. DUNN
15 Attorneys for LOS ANGELES COUNTY
16 WATERWORKS DISTRICT NO. 40

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1 location and time, the specific relief to be requested, and asked whether counsel would appear and
2 object. A true and correct copy of the letter is attached as Exhibit "B".

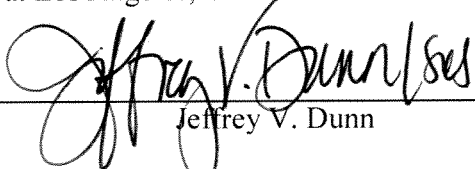
3 7. Attached as Exhibit "C" are true and correct excerpts of transcript for the October
4 25, 2013 hearing before Honorable Judge Jack Komar for the Antelope Valley Groundwater
5 Cases, Judicial Council Coordination Proceeding No. 4408.

6 8. Attached as Exhibit "D" are true and correct copies of the Electronic Proofs of
7 Service for: (a) the Fees Motion; (b) Declaration of Michael D. McLachlan in Support of Motion
8 for Approval of award of Attorney Fees and Costs; and (c) Declaration of Daniel M. O'Leary in
9 Support of Motion of Approval of Award of Attorney Fees and Costs.

10 9. On November 22, 2013, Mr. Tom Bunn informed me that he does not oppose
11 District No. 40's request for additional time to review the Fees Motion.

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

14 Executed this 25th day of November, 2013, at Los Angeles, California.

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16 _____
17 Jeffrey V. Dunn

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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 November 25, 2013, I served the within document(s):

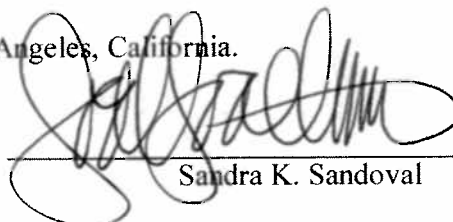
LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40'S EX PARTE APPLICATION TO CONTINUE THE FINAL FAIRNESS HEARING RE PARTIAL WOOD CLASS SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JEFFREY V. DUNN

- 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 November 25, 2013, at Los Angeles, California.



Sandra K. Sandoval

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