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



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 AND CITY OF PALMDALE'S JOINT OPPOSITION TO PLAINTIFF RICHARD WOOD'S MOTION FOR ATTORNEY FEES, COSTS AND INCENTIVE AWARD**

**[***Filed Concurrently with Declarations of Jeffrey V. Dunn, Wendy Y. Wang, and Adam Ariki*]

Date: April 1, 2016
Time: 1:30 p.m.
Dept.: 1

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## I. INTRODUCTION

The Wood Class counsel attorney fees motion fails to meet each requisite element of Code of Civil Procedure section 1021.5 and applicable case law.[1] Nonetheless, if the Court decides to award fees and costs, the over $8 million requested must be reduced significantly under applicable law. If not, the ratepayer customers of the Los Angeles County Waterworks District No. 40 ("District No. 40") and the small public water suppliers and the taxpayers of the City of Palmdale will be severely penalized with attorney fees and costs that should not be charged to them.[2]

## II. FACTS

### A. District No. 40 And Other Public Water Suppliers Filed and Vigorously Prosecuted Complaints and Cross-Complaints For A Physical Solution to the Basin's Long-term Overdraft Conditions.

Contrary to the Wood Class' assertion, District No. 40 and other public water suppliers took on the primary laboring oar of adjudicating the Antelope Valley Groundwater Basin ("Basin"), and successfully pled and proved the need for a court-approved physical solution based upon findings on safe yield and chronic overdraft conditions. The court-approved physical solution will ensure a sustainable water supply for all groundwater users in the Basin.

As a special district formed in accordance with Water Code Section 55000 *et seq.*, District No. 40 is responsible for supplying drinking water for approximately 207,654 people in the Antelope Valley through approximately 56,510 metered connections, of which 93.7 percent are residential connections. (Declaration of Adam Ariki ("Ariki Decl.") at ¶2.) To supply water to its residential and commercial customers, District No. 40 pumps groundwater water from the Basin and purchases imported State Water Project water from Antelope Valley East-Kern Water

[1] All section references are to the Code of Civil Procedure unless otherwise indicated.

[2] The small public water suppliers are the parties represented by the law firm of Lemieux & O'Neill: Quartz Hill Water District, Littlerock Creek Irrigation District, Palm Ranch Irrigation District, Defendants North Edwards Water District, Desert Lake Community Services District. As used herein, "Public Water Suppliers" or ("PWS") refers to those parties, the City of Palmdale and Los Angeles County Waterworks District No. 40. Los Angeles County Waterworks District No. 40 and the City of Palmdale join the opposition filed by the small public water supplier parties and incorporate their arguments by reference herein.

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Agency in an effort to alleviate stress on the overdrafted Basin. (*Id*. at ¶3.) The average annual cost that District No. 40 incurs to purchase State Water Project water for the last five years is approximately $10,273,581. (*Id*.) District No. 40 also actively engages in expensive groundwater banking operations to store water in the Basin. (*Id*. at ¶4.)

As the primary urban water supplier in the Antelope Valley region, District No. 40 has a crucial interest in ensuring that the Basin is sustainably managed and remains a reliable water supply source, and has expended great financial resources in this litigation to protect the Basin for the benefit of not only its customers, but all existing and future water users in the region. (*Id*. at ¶5.)

District No. 40 has actively participated in the proceedings that later became the Antelope Valley adjudication proceeding since it was named as a defendant in quiet title actions filed in 2001. In fact, District No. 40 initiated the adjudication process and petitioned the Judicial Council of California for coordination of the adjudication actions with the various quiet title actions in 2004 – four years before Richard Wood filed a class action lawsuit against the Public Water Suppliers. (Dunn Decl. at ¶18, Ex. I at pp. 1-3 & ¶19, Ex. J.) District No. 40 's complaint alleged that the Basin has been in a state of overdraft and sought a physical solution that restrains overproduction of Basin groundwater. (Dunn Decl. at ¶19, Ex. J.)

For procedural reasons, the Court requested that District No. 40 refile its complaint as a first amended cross-complaint. (Dunn Decl. at ¶ 18, Ex. I at pp. 2-3.) Joined by the other Public Water Suppliers, District No. 40 filed a first amended cross-complaint seeking a court physical solution to the overdraft condition by declaratory and injunctive relief and an adjudication of rights to all groundwater within the Basin. (*Id.*) The cross-complaint named the United States as a cross-defendant which triggered a comprehensive adjudication requirement under the McCarran Amendment, 43 U.S.C. §666. (*Id.* at p. 4.) The Public Water Suppliers proceeded to identify every property owner in the Basin, created the initial potential class membership lists, and individually named and effected service of process upon all Basin property owners not identified as a potential class member. (Dunn Decl. at ¶ 20.) District No. 40 also undertook the significant effort of defaulting against non-appearing parties. (Dunn Decl. at ¶ 21.)

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Moreover, District No. 40 assumed the primary role in every trial in these proceedings except the limited phase involving the federal reserved right. During the first and second phases of trial concerning basin boundaries, District No. 40 introduced evidence and expert testimony of Mr. Joseph C. Scalmanini. (See http://www.scefiling.org/document/document.jsp?documentId=777; http://www.scefiling.org/filingdocs/214/13399/25565_AvalleyxPWSxExhibitxList.pdf.)

For the multi-week Phase 3 trial, District No. 40 along with other Public Water Suppliers once again presented evidence establishing safe yield and overdraft. (Dunn Decl. at ¶22, Ex. K at p. 2 & Ex. I at p. 5.) Establishing overdraft and safe yield were necessary steps towards establishing a physical solution and restraining future pumping over the safe yield – steps that the Wood Class opposed. (See Dunn Decl. at ¶23, Ex. L; Declarations of O'Leary and McLachlan, billing entries from January to April 2011.) Despite the Wood Class and other landowners' opposition , the Court found in favor of the Public Water Suppliers in the Phase 3 trial, which led to the eventual physical solution to the Basin's long term overdraft condition.

The physical solution that allocated overlying production rights could not have occurred without evidence of the parties' respective groundwater pumping, to which most parties were able to stipulate in Phase 4; such stipulations were the result of hundreds of hours spent by District No. 40, its counsel, and its experts in reviewing the parties' voluminous discovery responses and data to verify the alleged pumping. (Dunn Decl. at ¶24.) Such labor intensive efforts included the use of aerial photography analysis, LandSat analysis, well test analysis, and crop duty calculations. (*Id.*)

District No. 40's efforts during the initial phases of trial were essential in the Phase 6 trial, during which the Court ultimately determined the parties' respective water rights and imposed the Court's physical solution that stops unlimited pumping. As in earlier phases of trial (except for the trial on the federal reserve right), District No. 40 introduced testimony (Dr. Dennis Williams and Mr. Robert Beeby) in the Phase 6 trial; and established that the proposed physical solution would sustainably manage the Basin for the benefit of all parties. (*Id.*) Contrary to the Wood Class' contention, it is the decade-long effort by District No. 40 and other public water suppliers

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that led to the Court's physical solution which could not be imposed absent prior safe yield and overdraft findings.

**B. <u>The Wood Class Complaint Was Not Filed Until Years After District No. 40 and Other Public Water Suppliers Had Not Only Filed Their Adjudication Actions But Were Already Prosecuting the Actions for the Benefit of the General Public.</u>**

The Wood Class did not file its class action complaint against the Public Water Suppliers (and others) until June, 2008. (Dunn Decl., ¶ 2.) By that time, the Public Water Suppliers had filed their complaints and cross-complaints for a physical solution to the overdraft conditions including a request that the Basin be found in a state of overdraft so that the court could impose the physical solution.

Here, the Wood Class complaint was filed on behalf of only the private property owner class members, not the general public in the Antelope Valley. Seeking to benefit the Wood Class members' private interests, the Wood Class complaint sought (1) economic and compensatory damages according to proof at trial; (2) a judicial declaration that the Wood Class' overlying rights to use groundwater from the Basin are superior and have priority vis-à-vis all non-overlying users and public agency appropriators; (3) the apportionment of water rights from the Basin in a fair and equitable manner and enjoinment of inconsistent use; (4) damages against the Public Water Suppliers to compensate for alleged takings and property infringement; and (5) an award of class counsel's fees and costs. (See Dunn Decl., ¶ 2, **Exhibit A** at pp. 15:18 – 16:3.)

**C. <u>The Wood Class Unsuccessfully Opposed The Public Water Suppliers Case For A Basin Safe Yield and Overdraft Condition Findings In the Phase 3 Trial.</u>**

The Wood Class lost in the Phase 3 trial on safe yield and overdraft. As shown below, Wood Class counsel cannot recover fees for unsuccessfully opposing the basin safe yield and overdraft findings. Under no reasonable interpretation of Section 1021.5 could such unsuccessful opposition be considered a "public benefit" and the motion for attorney fees must be denied.

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**D. The Wood Class Filed Another Complaint But This Time Against Other Landowner Parties Who Were Adverse To the Wood Class Because They All Claimed A Correlative Right.**

Wood Class also filed a class action complaint against numerous private landowners and farming entities in 2013. (Dunn Decl. ¶ 3.) The bills attached to the Declarations of Michael D. McLachlan ("McLachlan Decl.") and Daniel M. O'Leary ("O'Leary Decl.") fail to differentiate between time spent on the complaint against the Public Water Suppliers and the time spent on the Wood Class complaint against the other landowner parties. (Dunn Decl. ¶5.) On this basis alone, the motion should be denied.

**E. The Wood Class Had Lengthy Settlement Discussions With All The Other Overlier Parties.**

The Wood Class counsel indicated that it was the other landowner parties—not the Public Water Suppliers—who were impediments to a Wood Class settlement. (Dunn Decl., ¶ 14, Ex. E at pp. 46-53.) Specifically Mr. McLachlan stated at a case management conference on November 9, 2012 "we're being held hostage on one side by the landowners. And I don't really fault the Public Water suppliers because in some sense, as long as the landowners want to use as a hostage, Public Water Suppliers are a little bit stuck … I'm dead in the water and I can't do anything. And this case is not going to settle" due to the difficulty of the landowner group (*Id.*)

**F. Public Water Suppliers and Wood Class Entered Into Settlements that Recognized Their Joint Domestic Use Priorities And The Need For A Physical Solution To The Basin Overdraft Conditions.**

The Wood Class action settlement agreement was submitted to the Court for its approval on March 4, 2015. The Court approved the Wood Class settlement agreement on April 10, 2015. Plaintiff settled with the Public Water Suppliers in 2015 as memorialized in the Judgment and Physical Solution entered by the Court in December 2015. (Dunn Decl. ¶ 4.) Wood Class counsel has submitted fees for work performed after the March 4, 2015 settlement, when his interests became aligned with the Public Water Suppliers. (Dunn Decl. at ¶12.) This amounts to

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1002.3 attorney hours and 208.7 paralegal hours, for a total $746,178. (See Mr. McLachlan's and Mr. O'Leary's bills, generally.)

Additionally, the 2015 settlement between Wood Class and the Public Water Suppliers is nearly identical to the proposed 2011 settlement filed on May 2, 2011. (Dunn Decl. at ¶12.) Indeed on July 7, 2013, Wood Class counsel billed for the review and modification of a "prior BBK settlement." (McLachlan Decl., at Ex. 3.) The bills for work performed between the 2011 and 2015 settlements amount to 2,195.5 attorney hours and 264.7 paralegal hours, for a total of approximately $1,611,862. (See Mr. McLachlan's and Mr. O'Leary's bills, generally.) As explained herein, Wood Class counsel cannot recover fees and costs *after* the first settlement agreement was submitted to the Court because the parties' interests were aligned by settlement. (*McGuigan v. City of San Diego* (2010) 183 Cal.App.4th 610 (*McGuigan*).)

**G. <u>The Wood Class Did Not Prove Its Causes of Action In the Litigation While The Public Water Suppliers Achieved Their Complaints' and Cross-Complaints' Objectives.</u>**

The Court's physical solution allocates groundwater to all parties including the Wood Class members. The physical solution imposes restrictions (e.g., pumping limits, restrictions on transfers). (Dunn Decl. ¶6.) Pursuant to the Judgment, the Wood Class's aggregate production right is 3,806.4 acre-feet per year (afy), and each class member may produce up to and including 3 afy per existing household for reasonable and beneficial use on their overlying land. (*Id.*) This result coincides with what District No. 40 and the other public water suppliers sought in their complaints and cross-complaints for domestic use. Pursuant to evidence admitted in Phase 6 trial, the Wood Class's aggregate production right is worth $1,179,984 *per year*. (Dunn Decl. ¶8.) This constitutes over $8.2 million over the rampdown period, and over $11.7 million over a ten year period. (*Id.*)

Under the Judgment, the Wood Class did not receive economic or compensatory damages, failed to obtain any declaration of a superior priority to groundwater water, or any award of damages against the Public Water Suppliers to compensate for alleged takings and property infringement. (Dunn Decl., ¶9.) Yet, the Wood Class counsel motion for attorney fees is directed

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at only District No. 40 and the relatively small public water suppliers, which represent a small fraction of the actual groundwater users and potential users in the Basin. (Dunn Decl., ¶10.) Indeed, out of the 82,300 afy of native yield, the Wood Class members obtained 3,806.4 afy, less than 5 percent of the overall native yield, for the approximately 3,172 class members.

## III. ARGUMENT

### A. The Wood Class Bears The Burden of Proof To Meet Each Section 1021 5 Requirement

"Although 'the decision whether to award attorney fees under section 1021.5 rests initially with the trial court, the court does not have the discretion to award such fees unless the statutory criteria have been met as a matter of law." (*McGuigan v. City of San Diego* (2010) 183 Cal.App.4th 610 (*McGuigan*) quoting *RiverWatch v. County of San Diego Dept. of Environmental Health* (2009) 175 Cal.App.4th 768, 775 (*RiverWatch*).) If the moving party fails to establish even one requisite element, the motion must be denied. (*Children & Families Com. Of Fresno County v. Brown* (2014) 288 Cal.App.4th 45, 55 (*Brown*) citing *City of Maywood v. Los Angeles Unified School Dist*. (2012) 208 Cal.App.4th 362, 429.)

"[A]n award under Section 1021.5 requires a showing that (1) the litigation enforced an important an important right affecting the public interest; (2) it conferred a significant benefit on the general public or a large class of persons; and (3) the necessity and financial burden of private enforcement (or enforcement of by one public entity against another) were such to make the award appropriate." (*Brown*, 288 Cal.App.4th at 55 quoting *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214 (*Whitley*).) As shown herein, the Wood Class counsel's motion must be denied because it fails to establish each requisite element including the preliminary requirement of successful enforcement of a fundamental constitutional or statutory policy.

### B. The Wood Class Did Not Successfully Enforce A Fundamental Constitutional Or Statutory Policy.

In *McGuigan*, the Court of Appeal held that there is a preliminary requirement in addition to the stated criteria in section 1021.5: "This statute [section 1021.5] includes not only three enumerated criteria for the court to consider, but also certain introductory language, as follows:

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"Upon motion, a court may award attorneys' fees to a successful party *against one or more opposing parties in any action* which has resulted in the enforcement of an important right affecting the public interest. . . ." (Emphasis in original.)

"Section 1021.5 codifies the private attorney general doctrine enunciated in *Serrano v. Priest* (1977) 20 Cal.3d 25 which 'rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the *fundamental policies embodied in constitutional or statutory provisions*, and that, without some mechanism authorizing the award of attorney fees, private actions *to enforce such public policies* will as a practical matter frequently be infeasible.'" (*Brown*, 288 Cal.App.4th at 54-55 quoting *Healdsburg Citizens for Sustainable Solutions v. City of Healdsburg* (2012) 206 Cal.App.4th 988, 992 [emphasis added].) "The doctrine's purpose 'is to encourage suits *enforcing important public policies*. . . .'" (*Id.*, quoting *Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 382, 390 [emphasis added].)

Here, there were no "fundamental" or "important public policies" alleged in the Wood Class complaint, only the class members' private property interests. The Wood Class action did not achieve a fundamental or important public policy. Whereas, in contrast, the Public Water Suppliers filed and successfully prosecuted their complaints and cross-complaints for a physical solution to the chronic overdraft pumping by groundwater users—including the Wood Class members—and did so years before the Wood Class complaint seeking to protect the financial interests of the small pumpers. On this basis alone, there can be no legal entitlement to attorney fees under Section 1021.5.

**C. <u>The Wood Class Did Not Successfully "Enforce [An] Important Right Affecting The Public's Interest."</u>**

Section 1021.5 requires that the lawsuit enforce "an important right affecting the public's interest." The Wood Class did not plead or prove an enforcement of an important right affecting the public's interest but only the Wood Class members seeking to advance their private property interests. Thus, the Wood Class cannot recover attorney fees under section 1021.5.

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**D. The Wood Class Did Not Obtain "a Benefit for the General Public or a Large Number of People" But The Public Benefit Was The Court-Approved Physical Solution Obtained By The Public Water Suppliers' Complaints And Cross-Complaints.**

Section 1021.5 mandates that the lawsuit confer a significant benefit on the general public or a large class of persons. (*Roybal v. Governing Bd.* (2008) 159 Cal.App.4th 1143, 1149-50 [no significant public benefit where "[r]ealistically assessed, the gains achieved by petitioners were personal."] The benefit can be either pecuniary or nonpecuniary in nature, but the public must be primarily benefited. (*Id*. at 1149-53.) The moving party must establish that it obtained a result with ramifications beyond the private interests of the parties directly before the court. (*Id.* at 1149-50.)

Here, the actual public benefit was a court physical solution to sustainably preserve the groundwater resources of the Basin. It was District No. 40 and the other Public Water Suppliers who are largely responsible for achieving this public benefit—not the Wood Class. It merely secured private water rights for a limited group, a relatively small number of private property owners given the number of parties in these coordinated proceedings. The physical solution would have occurred regardless of the Wood Class counsel's participation in these proceedings once the Court made its findings of overdraft and safe yield.

**E. The Necessity and Financial Burden of Private Enforcement By The Wood Class Was For Its Own Private Property Interests and Cannot Justify An Award of Attorney Fees Against the Public Water Suppliers Who Successfully Prosecuted Their Adjudication Actions for the Public's Benefit.**

Our Supreme Court has repeatedly held that "[a]n award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit is placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.'" (*Serrano v. Stefan Merli Plastering Co., Inc.* (2010) 52 Cal.4th 1018, 1026, fn. 9 (*Stefan*) quoting *Woodland Hills, supra*, 23 Cal.3d at p. 941; *Whitley, supra,* 50 Cal.4th at 1206; *In Adoption of Joshua S.* (2008) 42 Cal.4th 945, 952 (*Joshua*

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*S.*)) If this requisite is not met by the moving party, the section 1021.5 motion must be denied. (*Whitley,* 50 Cal.4th at 1214; *Ebbetts Pass Forest Watch v. Dept. of Forestry & Fire Prot.* (2010) 187 Cal.App.4th 376, 381 (*Ebbetts Pass*).)

"A court generally determines whether the litigation places a disproportionate burden on the individual by comparing the expected value of the litigation at the time it was commenced with the costs of litigation." (*Stefan,* 42 Cal.4th at 952 quoting *Joshua S.*, 42 Cal.4th at 952, fn 9.)

The *Brown* court's decision is both instructive and persuasive here. (288 Cal.App.4th 45.) In *Brown,* the Court of Appeal affirmed the trial court's decision to deny an award of attorney fees and costs under Section 1021.5. The court focused on the "second prong" of "the necessity and financial burden requirement" and provided the applicable test

> The third element, the necessity and financial burden requirement, involves two issues: " ' "whether private enforcement was necessary and whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys." ' " (*Whitley, supra*, 50 Cal.4th at p. 1214.) It is the second prong that is at issue here. Our Supreme Court has explained this prong as follows: "In determining the financial burden on litigants, courts have quite logically focused not only on the costs of the litigation but also any offsetting financial benefits that the litigation yields or reasonably could have been expected to yield. ' "An award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.' [Citation.]"' [Citation.] 'This requirement focuses on the financial burdens and incentives involved in bringing the lawsuit.' " (*Whitley, supra*, 50 Cal.4th at p. 1215.) **A party seeking fees under section 1021.5 has the burden of establishing its litigation costs transcend its personal interests**. [Citations omitted].
>
> . . .
>
> First, the trial court fixes or estimates " 'the monetary value of the benefits obtained by the successful litigants themselves,'" discounted by " 'some estimate of the probability of success at the time the vital litigation decisions were made which eventually produced the successful outcome.' " (*Whitley, supra*, 50 Cal.4th at p. 1215.) Next, the trial court turns to the costs of the litigation that may have been required to bring the case to fruition. (*Id.* at pp. 1215–1216.) Finally, the trial court " 'place[s] the estimated value of the case beside the actual cost and make[s] the value judgment whether it is desirable to offer the bounty of a court-awarded fee in order to encourage litigation of the sort involved in this case. … [A] bounty will be appropriate except where the expected value of the

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> litigant's own monetary award exceeds by a substantial margin the actual litigation costs.' " (*Id*. at p. 1216, quoting *Police Protective League, supra*, 188 Cal.App.3d at pp. 9–10.)
> (*Id*., at 55 [emphasis added.].)

In deciding whether a claimant's litigation costs transcended its personal interest, the court must consider the claimant's personal pecuniary/economic interests and its personal/non-pecuniary interests in pursuing the litigation. (*Whitley*, 50 Cal.4th at 1226.) The focus of the inquiry is whether the private interests are the real basis for the action, and the Court may legitimately restrict the award, if any, to only that portion of the attorneys' efforts that furthered the litigation of issues of public importance. (*Ibid.*)

The cost of litigation is the reasonable cost, not the claimed cost. As stated *infra* in Section H, the Wood Class fees are manifestly unreasonable. The Wood Class's aggregate production right is worth $1,179,984 *per year*. This constitutes over $8.2 million over the 'rampdown" period, and over $11.7 million over a ten year period. (Dunn Decl. ¶8.) Thus, there was no disproportionate burden on the Wood Class in litigating this case.

The Wood Class filed their lawsuits to get groundwater production rights. The public benefit (the court-approved physical solution) was merely incidental to the Wood Class private financial interests in their securing water for the Wood Class members. Despite the motion's vainly-attempted characterization of a public benefit, the financial interest of the Wood Class far outweighs its cost of litigation.

Additionally, the Wood Class motion fails to meet the "first prong" of the same element, that is "whether private enforcement was necessary" by the Wood Class. The *McGuigan* court summarized its detailed analysis of the California Supreme Court cases on the first prong as a straightforward question: "An important question in determining whether the services of the private party were necessary is, 'Did the private party advance significant factual or legal theories adopted by the court, thereby providing a material non de minimis contribution to its judgment, which were nonduplicative of those advanced by the governmental entity?'" (*McGuigan*, 183 Cal.App.4th at 635 quoting *Committee to Defend Reproductive Rights, supra*, at pp. 642–643.)

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Here, there is no showing that the Wood Class participation in the court process leading to its approval of the physical solution was anything but de minimis. It even opposed the court's findings of safe yield and overdraft which are critical to the court's physical solution. Stated simply, the Wood Class motion utterly fails to meet the analytical requirement for the third element of section 1021.5 and the motion must be denied.

**F. The California Supreme Court Has Held That Even If A Party Meets Each Of The Three Requirements Under Section 1021.5, There Still Can Be No Award Of Attorney Fees Unless Defendant Adversely Affected The Public Interest – Which The Public Water Suppliers Did *Not* Do In These Proceedings.**

In *In Adoption of Joshua S.* (2008) 42 Cal.4th 945, the California Supreme Court held that a party can meet the requirements of section 1021.5 but still not be entitled to attorney fees because the party against whom the fees are sought did not adversely impact the public interest. In *Serrano v. Stefan Merli Plastering Co., Inc.* (2011) 52 Cal. 4th 1018, the California Supreme Court explained its holding in *Joshua S.* that there must be a showing that the party against whom the attorney fees are sought must have initiated and maintained conduct that compromised the rights of the public or a large group of persons:

> We reasoned that the terms of the statute [section 1021.5] reflect an implicit understanding by the Legislature that fee awards are to be imposed only on parties whose conduct adversely affected the public interest. "Section 1021.5 authorizes fees for 'any action which has resulted in the *enforcement* of an important right affecting the public interest … .' (Italics added.) The enforcement of an important right affecting the public interest implies that those on whom attorney fees are imposed have acted, or failed to act, in such a way as to violate or compromise that right, thereby requiring its enforcement through litigation. It does not appear to encompass the award of attorney fees against an individual who has done nothing to curtail a public right other than raise an issue in the context of private litigation that results in important legal precedent." (*Stefan*, 52 Cal. 4th at 1026 quoting *Joshua S.*, *supra*, 42 Cal.4th at p. 956.)

The *Joshua S.* court explained that no attorney fees can be awarded unless the party was responsible for "initiating and maintaining actions or policies that are deemed harmful to the public interest" and that:

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> This conclusion is also consistent with our recent holding in *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169 [39 Cal. Rptr. 3d 788, 129 P.3d 1]. In refusing to impose section 1021.5 attorney fees on amici curiae that had unsuccessfully argued in favor of state affirmative action policies, we noted that [g]enerally speaking, the opposing party liable for attorney fees under section 1021.5 has been the defendant person or agency sued, *which is responsible for initiating and maintaining actions or policies that are deemed harmful to the public interest and that gave rise to the litigation*." (37 Cal.4th at pp. 1176–1177, italics added.) We noted also that case law has recognized that attorney fees may sometimes be assessed against "real parties in interest that had a direct interest in the litigation, the furtherance of which was generally at least partly responsible *for the policy or practice that gave rise to the litigation* … ." (*Id.* at p. 1181, italics added.) . . .Thus, in *Connerly* we acknowledged that the parties against whom attorney fees should be assessed should be those responsible for the policy or practice adjudged to be harmful to the public interest.

(*Joshua S.*,42 Cal.4th at 956-957 [emphasis in original].)

Again, there can be no reasonable dispute that the Public Water Suppliers were pursuing the public's benefit and that they did not initiate or maintain actions or policies that the Court deemed harmful to the public interest. Thus, there can be no recovery of attorney fees for the Wood Class under section 1021.5 as a matter of both law and fact. (See *Azure Limited v. I-Flow Corporation* (2012) 207 Cal.App.4th 260 [no recovery for attorney fees under Section 1021.5 where there is no conduct adversely impacting the public interest or that of a significant group of persons].)

**G. <u>The Wood Class Does Not Meet Section 1021.5's Requirement that the Wood Class Prevailed On The Merits Of Its Class Action Complaint</u>**

Private attorney general fees are available under Section 1021.5 only to a "successful" party. (*Woodbury v. Brown-Dempsey* (2003) 108 Cal.App.4th 421, 439.) "[W]hether a party has been successful is measured by the resolution of the action. . . ." (*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 402.) A "prevailing" or "successful" party[3] is generally one who obtains a favorable judicial resolution, "i.e., a judicially sanctioned or recognized change in the legal relationship of the parties," such as a favorable final

[3] The terms "prevailing party" and "successful party" as used in relation to Section 1021.5 are synonymous. (*Graham, supra*, 34 Cal.4th at 571.)

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judgment.[4] (*Marine Forests Society v. Cal. Coastal Com.* (2008) 160 Cal.App.4th 867, 877.) Prevailing on limited technical or procedural issues only is not sufficient to warrant an award of attorney fees. (*See Concerned Citizens of La Habra v. City of La Habra* (2005) 131 Cal.App.4th 329, 333 [fees denied because petitioners "were only successful in one small regard and were unsuccessful on all significant issues"]; *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd.* (2010) 183 Cal.App.4th 330, 334-35 [petitioners were not successful parties because they did not achieve their strategic objective].)

Even if the Wood Class had otherwise met the requirements for fees under section 1021.5—and it did not do so—the Public Water Suppliers cannot be assessed the Wood Class attorney fees because the Wood Class is not a prevailing party. Section 1032 includes four categories of prevailing parties, and the court generally lacks discretion "to deny prevailing party status to a litigant who falls within one of the[se] four statutory categories." (*Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 975-977.) In cases with multiple parties, one defendant may be the "prevailing party" while another defendant in the same case may not. (Cf. *id.* at 985.) However, an "opposing party" within the meaning of Section 1021.5 is the losing party. (*Nestande, supra*, 111 Cal.App.4th 232, 241; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1300-1301.) "Liability on the merits and responsibility for fees go hand in hand; *where a defendant has not been prevailed against, either because of legal immunity or on the merits, . . . [no] fee award [is authorized] against that defendant*" because "fees and merits liability run together." (*Nestande, supra*, at p. 241 [emphasis added].)

The *McGuigan* court provides an exhaustive analysis of what it means to be a "prevailing party" under section 1021.5:

> "The term 'successful party,' as ordinarily understood, means the party to litigation that achieves its objectives." (*Graham, supra*, 34 Cal.4th at p. 571.) " ' "A lawsuit's ultimate purpose is to achieve actual relief from an opponent. … On this common understanding, if a party reaches the 'sought-after destination,' then the party 'prevails' regardless of the 'route taken.' [Citation.]" ' " (*Wal-Mart Real Estate Business Trust v. City Council of San Marcos* (2005)

[4] Where there is no final judgment but a plaintiff has achieved its litigation objectives through settlement or via other mechanisms, that plaintiff may be considered a "successful" party. (*Graham, supra*, 34 Cal.4th at 570-571.)



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> 132 Cal.App.4th 614, 621 [33 Cal.Rptr.3d 817] (*Wal-Mart Real Estate*).) In a determination of whether a party is "successful" for purposes of section 1021.5, "[t]he critical fact is the impact of the action, not the manner of its resolution." (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 685 [186 Cal.Rptr. 589, 652 P.2d 437].)
>
> Next, we look at the role of the opposing party, against whom fees may be awarded. In *Nestande v. Watson* (2003) 111 Cal.App.4th 232 [4 Cal.Rptr.3d 18] (*Nestande*) we noted: "The dictionary definition of 'opposing' is 'opposite in position' or 'active in or offering opposition.' [Citation.] An 'opposite party' means '[a]n adversary in litigation.' [Citation.] Thus, we construe the term 'opposing party' as used in section 1021.5 to mean a party whose position in the litigation was adverse to that of the prevailing party. Simply put, an 'opposing party' within the meaning of section 1021.5 *is a losing party*." (*Nestande, supra*, at pp. 240–241, italics added.)

Here, the Wood Class cannot qualify under any definition of prevailing party. The only phase of trial actually litigated by the Wood Class was the Phase 3 trial on safe yield and overdraft in which the Public Water Suppliers prevailed over the opposition of the Wood Class and that of other landowner parties. The Public Water Suppliers are prevailing parties because the Wood Class did not obtain relief as against them. (See Code Civ. Proc., § 1032).

Moreover, when the defendant is a governmental entity, that "governmental entity is not liable for attorney fees unless it has lost on the merits." (*Nestande, supra*, 111 Cal.App.4th at 241.) As prevailing parties against whom the Wood Class did not recover relief and who did not lose on the merits, the Public Water Suppliers cannot be liable for fees here.

The Wood Class achieved no litigation success let alone success on any significant issues. As in *La Habra* and *Karuk Tribe, supra*, the practical effect and success of the Wood Class lawsuit was *de minimis* because the Public Water Suppliers had already filed their complaints and cross-complaints for a physical solution to the basin's overdraft conditions. The court-approved physical solution requires the Wood Class and all other groundwater users to reduce or limit their previous unfettered ability to pump whatever they wanted and whenever they wanted. For the Wood Class counsel to argue that they achieved an excellent result for their clients, namely a water rights allocation, ignores the reality that there was always going to be a water rights

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allocation for the Wood Class members' domestic uses as a result of the Public Water Suppliers complaints and cross-complaints seeking a domestic use priority.

The Wood Class did not prevail on any of their causes of action. There was an allocation of the native yield but that was *not* done by an equitable apportionment as sought for in the Wood Class complaint; instead, the court determined the groundwater rights for each party based on the evidence including present and historical groundwater uses under the Public Water Suppliers' complaints and cross-complaints. The Wood Class sought but did not receive any damages award against the Public Water Suppliers. The Wood Class sought but did not receive a declaration of superior water rights priority over the Public Water Suppliers.

The Wood Class, therefore, cannot claim to be the prevailing party as against the Public Water Suppliers because they achieved their litigation objective: namely a physical solution that has a basin safe yield, findings of overdraft conditions, established current groundwater production for subsequent court-determined reductions in groundwater use together with groundwater management plans.

**H. <u>Alternatively, The Wood Class Fees Should be Significantly Reduced For Multiple Independent Reasons.</u>**

If the Court decides to award attorney fees against the Public Water Suppliers, the award must be significantly reduced. Whether a fee award is justified under section 1021.5 and what amount that award should be are two distinct questions. (*Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 647.) Once the court determines all Section 1021.5 criteria have been met, it must then determine the amount of the award. A lodestar must be limited to reasonable attorneys' fees based on a careful compilation of time reasonably spent multiplied by a reasonable hourly rate. (See, e.g., *Serrano v. Priest* (1977) 20 Cal.3d 25, 48-49 ("*Serrano III*"); *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 833.) For the reasons set forth below, neither the hours nor the hourly rate used to calculate the stipulated attorneys' fees are reasonable.

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**1. Inflated Bills[5].**

"A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to . . . deny [the award] altogether." (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 635 ("*Serrano IV*"); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1137.) Fee petitions that "overreach" are properly denied. (*Serrano IV*, *supra*, at 635, citing approvingly *Lund v. Affleck* (1st Cir. 1978) 587 F.2d 75, 77 [if attorneys' fees claims are "exorbitant," court should refuse compensation].) "If . . . the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked in the first place. To discourage such greed, a severer reaction is needful. . . .'" (*Serrano IV*, *supra*, 32 Cal.3d at 635.) Class counsel bills are significantly inflated and overreaching for many reasons, including the following examples.

**a. Mr. McLachlan billed for work he simply did not perform.**

- 2/10/2014: Mr. McLachlan billed 8.8 hours for traveling to and attending Phase 5 trial. However, Mr. McLachlan arrived at 9:30 a.m. and did not attend trial in the afternoon. (Dunn Decl. at ¶13.)
- 2/18/2014: Mr. McLachlan billed 9.3 hours for traveling to and attending Phase 5 trial. On February 18, 2014, trial concluded early to allow parties to engage in settlement discussions in the afternoon. (Declaration of Wendy Wang at ¶ 2.) Mr. McLachlan did not participate in the afternoon's settlement proceedings, which took place at Best Best & Krieger's Los Angeles office. (*Id.*)
- In his reply brief dated 12/31/2013, Mr. McLachlan argued that "there was no simultaneous negotiation of legal fees in this settlement." (Dunn Decl., ¶17, Ex. H, at p. 3:11.) But his billing entries for 6/26/2013 contradict this argument and include "emails to and from defense counsel on billing" (0.1) and "emails to defense counsel re partial settlement" (0.2). So, he either misled the Court in his

[5] All references to attorney bills in this section are contained in Exhibit 3 to Mr. McLachlan's Declaration and Exhibit 1 to Mr. O'Leary's Declaration.

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reply brief, for which he billed at least 25.3 hours in December 2013, or is misleading the Court now with his invoices.

**b. Time Spent on Other Claims.[6]**

Wood Class counsel do not differentiate their fees incurred in prosecuting the class' claims against the Public Water Suppliers from claims against other landowners and other parties. The Public Water Suppliers have reviewed Mr. McLachlan's and Mr. O'Leary's bills in an attempt to apportion them, but this task is impossible due to the bills' vagueness. At the very least, the Court should order that the Wood Class separate time spent related to prosecuting the Class's rights vis-à-vis other landowners and parties from his Public Water Supplier complaint and re-calculate his fees. Wood Class counsel demand that the Public Water Suppliers pay for their work related to other landowner parties in the class's landowner lawsuit as well as the Willis Class and unrelated partial settlements, including but not limited to the examples below. These examples are not exhaustive due to vagueness of the bills. Additionally, Mr. McLachlan stated in open court that it was the landowner parties, not the Public Water Suppliers, who were the biggest impediment to settlement. (Dunn Decl., ¶ 14, Ex. E at pp. 46-53.)

- Mr. McLachlan and Mr. O'Leary spent at least 13.7 hours on the Wood Class complaint against the landowners. (Dunn Decl. ¶ 25, Ex. M.)
- Mr. McLachlan spent at least 145 hours on work regarding settlement with non-stipulating landowners, including Tapia, Robar, Leisure Lake, Eyherabide and the subsequent prove-up and participation in liaison settlement committee with non-stipulating landowners (including copious entries subsequent to settlement with Public Water Suppliers). (*Id.*)
- Mr. McLachlan spent at least 66 hours on non-Public Water Suppliers discovery work. (*Id.*)

[6] Both Mr. McLachlan and Mr. O'Leary identify telephone conversations without describing to what the calls are in reference, so it is impossible to fully discern time spent pursuing PWS claims versus pursuing claims against other parties. Regardless, the PWS should not be responsible for any bills with respect to other parties.

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- Mr. McLachlan and Mr. O'Leary spent at least 37 hours on work related to the Ritter Trust claims. (*Id.*)
- Mr. McLachlan spent *at least* 42 hours (and likely countless undiscernible others due to bill vagueness) on work concerning the Willis Class. (*Id.*)
- Mr. O'Leary spent at least 24 hours on work concerning Willis Class. (*Id.*)
- Mr. McLachlan and Mr. O'Leary spent at least 206 hours on work concerning the partial settlement (i.e., NOT with respect to the Public Water Suppliers from whom the Wood Class is currently seeking fees). (*Id.*)
- Mr. O'Leary spent at least 6 hours working on unspecified landowner issues. (*Id.*)
- Mr. McLachlan has countless other time entries for unspecified landowner work such as email correspondence, phone calls, meetings, and drafting summaries regarding the same that likely constitute hundreds of additional hours.

Due to the vagueness of the billing, the Public Water Suppliers have likely not captured all non-Public Water Suppliers work via these exemplars. All of these example bills should be excluded, but this further highlights the need for the Wood Class to re-calculate the bills to specifically identify items directly related to its claims against the Public Water Suppliers.

**c. Double Billing.**

Messrs. McLachlan and O'Leary routinely attended meetings, depositions, and status hearings together, resulting in unjustified double billing, including but not limited to the following examples.

- 3/8/2010: Both Mr. O'Leary and Mr. McLachlan attended CMC hearing, motions on disqualification, expert fees. (3.7) and (3.5).
- 1/10/2011-1/13/2011, 1/17/2011, and 1/20/2011: Both attended the deposition of Joseph Scalmanini. (4.5), (4.5), (4.5), (4.5), (4.5), (4.5) and (3.3), (3.0), (3.0), (4.0), (4.0), (10.4).
- 1/4/2011-1/5/2011, 1/31/2011-2/1/2011: Both attended Phase 3 trial with minimal participation. (9.4), (8.6), (9.2), (10.2) and (5.5), (9.5), (7.5), (7.5).
- 8/3/2015: Both attended hearings (8.9), (4.0) and (7.5), (3.0).

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- 8/31/2011: Both attended mediation hosted by Justice Robie. (10.4) and (10.0).
- 9/21/2015: Both attended status conference. (0.9) and (0.6).
- 9/28/2015-9/29/2015: Both attended settlement meetings and trial, (10.2), (10.9) and (4.5), (0.8).
- 11/04/2015: Both attended closing arguments in San Jose. (13.6) and (12.0).
- 12/23/2015: Both attended a CMC and hearing on objections to Statement of Decision. (3.8) and (3.2).

**d. Basic Research**

Revealing a lack of experience and expertise in groundwater rights, Class Counsel spent an unreasonable amount of time researching basic propositions of water law. While some time may be needed at the outset of any case in researching legal issues, the amount billed by Mr. McLachlan is excessive, particularly given his claimed expertise in water law. For example, in September of 2011, about four years into his representation of the class, Mr. McLachlan billed 21.9 hours researching rural residential use of water. (McLachlan Decl., Ex. 3.) All of this time is included in the Wood Class's lodestar at the leading expert rate of $720 per hour with a 2.5 multiplier for an effective rate of $1,800 per hour.

**e. Junior and Clerical Work**

Mr. McLachlan spent considerable time performing associate-, paralegal-, and even secretarial-level work. Activities, such as document review, are not properly billed by partner-level attorneys or at partner-level rates. (See *Chavez v. Netflix, Inc*. (2008) 162 Cal.App.4th 43 [holding that activities, such as document review, that could have been done by associates or paralegals were properly excluded from the lodestar at partners' rates of $450 and $425].) Mr. McLachlan has been practicing law for twenty years and running his own firm for the last thirteen years. (McLachlan Decl., ¶¶ 4-5.) He claims to specialize in complex civil litigation, class actions, and groundwater cases, and on this basis of this expertise, claims a top-of-the-market billing rate of $720 per hour. (*Id*. at ¶¶ 4, 7; Motion at section III.B.2.) Nonetheless, the 4,184.9 hours of work claimed by Mr. McLachlan in this case include copious entries for "review and

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summary" of discovery documents, reports, and transcripts. Mr. McLachlan's billing invoices contain many other "review" and "summarize" entries, including:

- 2/1/2013: review 24 Davis mutual sup responses and attached exhibits, and supplement master memo re: trial notes (4.1) (Dunn Decl. at ¶;
- 2/9/2013: review 11 CA entity declarations and voluminous exhibits, summarize same (2.3);
- 12/22/2012: Commence review, analysis and summary of voluminous discovery filings … including summary memo (4.6);
- 7/5/2011: review and analysis of Phase 3 transcripts on 5 points, and prepare summary memo re same (5.7);
- 2/4/2011: review Beebe depo and commence prep of outline for same (4.6);
- 2/5/2011: Summarize Durbin deposition, vol. 2 (5.1).
- Wood Class has also submitted copious bills for clerical work performed by paralegals that should have been performed by an administrative assistant:
- 34 hours for preparation of binders and indices;[7]
- 5.8 hours for work on master settling party contact spreadsheet. [8]

Additionally, Mr. McLachlan spent many hours contacting the Court's clerk, Ms. Rowena Walker, all at his claimed rate of $720, with a 2.5 multiplier. This work could have and should have been performed by an administrative assistant and certainly should not be billed to the Public Water Suppliers' ratepayers at an effective rate of $1,800 per hour that amounts to over $21,000 in fees. (Dunn Decl. ¶ 25, Ex. M.)

**f. Unnecessary and Post-Settlement Work.**

Wood Class cannot recover any fees for work performed after the March 4, 2015 settlement, when his interests became aligned with the Public Water Suppliers. (Dunn Decl. at ¶12; see also *McGuigan*, *supra*, 183 Cal.App.4th 610.) This amounts to 1,002.3 attorney hours

[7] See, e.g., billing entries for: 8/29/2011 (0.8); 11/21/2013 (2.8); 1/31/2014 (8.3); 2/4/2014 (4.6); 2/6/2014 (2.8); 2/7/2014 (2.1); 2/10/2014 (1.7); 2/14/2014 (2.2); 2/17/2014 (1.3); 3/16/2015 (1.2); 3/17/2015 (1.1); 8/24/2015 (1.1); 9/26/2015 (4.0)

[8] See, e.g., billing entries for: 2/25/2015; 3/13/2015

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and 208.7 paralegal hours, for a total of $746,178, not including a multiplier. (See Mr. McLachlan's and Mr. O'Leary's bills, generally.)

Finally, the 2015 settlement between Wood Class and the Public Water Suppliers is nearly identical to the proposed 2011 settlement, rendering most of the work that Wood Class 's counsel performed between 2011 and 2015 unnecessary. (Dunn Decl. at ¶12.) Indeed on July 2, 2013, Mr. McLachlan billed for the review and modification of a "prior BBK settlement." (McLachlan Decl. at Ex. 3.) Wood Class should not recover for these needless bills, which amount to 2,195.5 attorney hours and 264.7 paralegal hours, for a total of approximately $1,611,862, not including a multiplier.

The totality of this amount and type of billing is excessive, particularly at a leading expert rate, and Wood Class should not recover for any of these fees due to their inflation and overreach. At the very least, Wood Class should be required to re-calculate and submit bills only as they apply to pursuing its claims against the Public Water Suppliers.

**2. Unreasonable Rates.**

Wood Class 's lodestar must be recalculated using a reasonable rates for attorneys' fees. Wood Class 's claimed rate of $720 is unreasonably high because, *inter alia*, class counsel are not water law experts, lack groundwater rights experience, and the rates do not reflect the prevailing rates in the Antelope Valley community. Generally, the rate used to calculate a lodestar is "that [rate] prevailing in the community for similar work" performed by attorneys with comparable skills and experience. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 [emphasis added]; *Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 783.) A party can claim a higher "out-of-town" rate only "in the 'unusual circumstance' that local counsel is unavailable." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 399.)

Despite claiming high hourly rates, the Wood Class makes absolutely no claim or showing that their counsel, Daniel M. O'Leary, has any skills as a water law attorney or even had any experience in contested groundwater rights cases. (See O'Leary Decl.) While the Wood Class's other counsel, Michael D. McLachlan, claims to have "extensive experience litigating complex

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cases involving groundwater," he cites as evidence only toxic waste cases, including one he worked on prior to law school. (McLachlan Decl. ¶ 7.) Mr. McLachlan's experience in Superfund cases cannot make him an expert in the specialized field of water rights and, in particular, the area of groundwater adjudications. Notwithstanding hiitss counsel's lack of expertise and experience in the issues in this case, the rate requested by the Wood Class is beyond the very top of the scale found to be reasonable for leading experts. (*Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 871-872 [finding rates of $200 to 250 per hour for associates and $500-550 per hour for partners reasonable for Los Angeles market but noting that lead counsel was a "leading expert in the field" and the rates were "at the 'high end' of the scale," emphasis added].) The lack of experience, skill, and success of the Wood Class counsel requires using a reduced hourly rate.

The rate claimed by counsel for the Wood Class is also unreasonable for the local community as shown in the small public water suppliers' opposition. The Wood Class' parcels and the Antelope Valley Groundwater Basin are located in the Mojave Desert in northern Los Angeles County and southeastern Kern County. Though the region contains two mid-sized cities, the majority of the region is characterized by sparsely populated rural communities. Nonetheless, the only support that the Wood Class provides for the claimed hourly rate of $720 pertains to two of the country's most expensive urban markets: a Laffey fee matrix formulated for the Washington D.C. metro area and firms in Los Angeles. (Motion at section III.B.2.) Before relying upon non-local rates, the party claiming fees bears the burden of demonstrating that hiring local counsel was impracticable, including, at least, a showing that the party made a good-faith effort to find local counsel. (*Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1241 citing *Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1244 and *Horsford, supra,*132 Cal.App.4th at p. 399.) No such showing has been made by the Wood Class and its motion for attorney fees must be denied.

Furthermore, the Court has already determined reasonable rates for class counsel in this matter in ruling on a prior fee motion for the Willis Class. (See Document #4431, Order After Hearing on Motion by Plaintiff Rebecca Lee Willis and the Class for Attorneys' Fees,

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Reimbursement of Expenses and Class Representative Incentive Award, attached as **Exhibit B** to the Dunn Decl.) There, this Court determined class counsel fees of $400 and $450 to be reasonable. (*Id.* at pp. 9:23-10:1.) Those same rates should apply to the Wood Class motion, with an upward adjustment to $500 per hour to account for inflation starting in 2012 and as requested in the concurrently filed Willis Class motion for fees.

**3. Block Billing.**

The entirety of Mr. O'Leary's bills are block billed and should be reduced. Courts generally disfavor block billing; where time documentation proves inadequate, as is the case here, a fee award will be lowered accordingly. (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 689; *Hensley, supra,* 461 U.S. at 433.) Thus, for example, in *Welch v. Metropolitan Life Ins. Co.* (9th Cir. 2007) 480 F.3d 942, 945-46, the Ninth Circuit affirmed a twenty (20) percent across-the-board reduction of a fee award based on block billed entries, deferring to a State Bar Committee report, which found suspect the practice of block billing, given its tendency to mask inflated billing entries by as much as thirty (30) percent. The justice system did not intend that fees would be blindly paid by opposing counsel. The courts are thus vested with the discretion and authority, as the proverbial gatekeepers and arbiters of fee awards and disputes, to carefully screen a fee application and ferret out reasonable from unreasonable charges, disallowing the latter. (See *Graham, supra,* 34 Cal.4th at 581-82.) Counsel's block billing practice renders it impossible for the Court to accomplish this important task. Thus, Mr. O'Leary's block bills should be eliminated from any fee award.

**I. The Court Should Apply a Negative Multiplier.**

The lodestar and its requested positive multiplier are neither sufficiently apportioned nor supported in the Wood Class motion. The Court should not impose a positive multiplier due to the Class' lack of success on the merits and because the Public Water Suppliers achieved the public benefit sought for in their complaints. The requested positive multiplier should be eliminated and the lodestar reduced because: (1) the hourly rate is higher than the $500 an hour approved by the Court for the Willis Class counsel; (2) Wood Class counsel's claimed hourly rates do not reflect the experience or skill other counsel displayed in arguing case; (3) Wood

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Class counsel assumed risk in undertaking the case on a contingent basis but received over $730,000 in attorney fees from Palmdale Water District, City of Lancaster and Phelan Piñion Hills Community Services District; (4) the Wood Class did not prevail on any one of its primary claims; and (5) the case was settled before trial between the Wood Class and the Public Water Suppliers, yet the Wood Class attempts to recover fees from the Public Water Suppliers for the litigation involving other parties, i.e., Willis Class's objections to the physical solution, Phelan's claims to groundwater rights, and the Tapia parties' claim to an overlying right as against the Wood Class and other overlying landowner parties. (See *McGuigan*, 183 Cal.App.4th 610 [court of appeal did not allow attorney fees under section 1021.5 after the parties entered into a settlement agreement].) For these and other reasons herein, the Court should eliminate the positive multiplier and decrease the merits lodestar to account for the Wood Class complaint's lack of success and because the Public Water Suppliers prevailed on their complaints and cross-complaints to have a physical solution approved by the Court to benefit all parties including the Wood Class. Stated simply, the Public Water Suppliers prevailed on their complaints and cross-complaints to obtain a physical solution to a chronic groundwater basin overdraft and that success benefitted all parties including the Wood Class.

There is ample authority for the Court to reduce the lodestar here. (E.g. In *State Water Resources Control Bd. Cases* (2008) 161 Cal.App.4th 304 [reduced lodestar].) In *San Diego Police Officers Assn. v. San Diego Police Department* (1999) 76 Cal.App.4th 19 (*San Diego POA*), the appellate court affirmed the trial court's application of a negative multiplier based on a variety of factors. In *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819 (*Thayer*), the appellate court affirmed the application of a negative multiplier because the record demonstrated the prevailing parties' lawyers did little more than duplicate pleadings filed in other, related cases.

The Wood Class counsel received more than $730,000 from Palmdale Water District, Phelan, and Lancaster. Certainly, the payment removes the need for a positive multiplier and the more than $730,000 payment diminished any contingency risk for the award of a positive multiplier. The Court is aware that Wood Class counsel, Mr. McLachlan, has in fact, worked on other cases during the last several years because Mr. McLachlan has so informed the Court upon

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scheduling various matters including the hearing on this motion. As to any other matter that might have been accepted by the Wood Class counsel but for these proceedings, it is pure speculation as to whether any one of the matters would have generated attorney fee income for Wood Class counsel and, in any event, is not sufficiently established in the moving papers. What is not speculation is that the Wood Class counsel received a fee payment of over $730,000 from other public water suppliers.

Here, the Court of Appeal decisions in *Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841 (*Northwest*) and *San Diego POA, supra*, 76 Cal.App.4th 19 are helpful. In *Northwest*, the trial court adjusted a section 1021.5 lodestar upward but the court of appeal reversed, in part, because the factors the trial court listed did "not provide a persuasive justification for adjusting the lodestar upward." (*Northwest, supra*, 159 Cal.App.4th at p. 880.) The *Northwest* court determined each factor listed by the trial court was unpersuasive, and noted "other factors suggest that an upward adjustment of the lodestar is inappropriate. One such factor . . . is the *source* from which an attorney fee award would be paid. [Citation.] Here, it is obvious that any attorney fees award would not be paid out of a common fund or be borne by a private wrongdoer, but would ultimately fall upon the shoulders of California taxpayers." (*Id.* at p. 881.)

In *San Diego POA*, the trial court applied a negative multiplier because the police officers association "had achieved very limited success; the portion of its writ petition on which it prevailed . . . did not involve complex issues of law; the case did not preclude [the police officers association] attorneys from working on other matters and did not involve a contingency fee; and the award of fees would ultimately be borne by the taxpayers." (*San Diego POA, supra*, 76 Cal.App.4th at p. 24.) The appellate court concluded the trial court did not abuse its discretion in applying a negative multiplier, stating: "[t]he court's reasons for reducing the award were based on the proper criteria and are amply supported by the record. [Citations.] The vast majority of [the officers association's] time and effort was clearly spent on issues upon which the Police Department prevailed. The award of attorney fees was well within the trial court's discretion, and we affirm it." (*Ibid.*)

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**J. Any Fee Award Should be Equitably Apportioned.**

Any fees awarded should be reduced so that the Public Water Suppliers pay only those fees that are attributable to them and not to Phelan and other landowner parties including the Willis Class and the Tapia parties. The reduction should also take into account each party's pro rata share of the groundwater allocations. Many other landowner pumpers have profited significantly by delaying the outcome of this case in order to pump groundwater without restriction or regard for the overdraft conditions of the Basin. Equity dictates that the Public Water Suppliers not be assessed Wood Class attorney fees attributed to the other landowner parties including the Willis Class and Tapia parties, or attributed to Phelan.

Other landowner parties and Phelan have actively litigated their groundwater right claims. Their positions are well documented in the file of these coordinated and consolidated cases and even in the Wood Class counsel's time entries for their attorney fees motion. Additionally, the other landowners participated in settlement discussions with the Wood Class, filed briefs and made arguments regarding matters concerning the Wood Class.

The decision to apportion an award of attorneys' fees is addressed to the sound discretion of the trial court. (*Sundance v. Municipal Court for the Los Angeles Judicial District of Los Angeles County* (1987) 192 Cal.App.3d 268, 272.) In actions involving multiple defendants, courts have apportioned Section 1021.5 attorneys' fees equally among co-defendants, based on the defendants' mere contribution to the dispute that gave rise to the fee request and independent of the degree of liability/responsibility borne on the part of each defendant individually. (See, *e.g., Sundance, supra,* 192 Cal.App.3d at p. 272; see also *Friends of the Trails et al. v. Blasius et al.* (2000) 78 Cal.App.4th 810, 837-38.)

Thus, for example, in *Sundance*, the court apportioned fees equally between a city and a county, even though the fee award largely addressed the city's abusive practices, over and above that of the county's. (*Sundance, supra,* 192 Cal.App.3d at 272.) As the court explained, "the County took an active part in opposing the litigation and thus in generating the expenses [] compensated by the award of attorneys' fees" and thus an equal division of the fee award was appropriate. (*Ibid*.) Here, like in *Sundance*, the pumping landowners, the Willis Class and

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Phelan all played a role in generating the attorney fees that the Wood Class now seeks to recover from the Public Water Suppliers' rate paying customers.

Finally, if the Wood Class has conferred a significant public benefit (which it has not), the benefit is to all who pump from the Adjudication Area and it would be inequitable for the Court to place the burden of attorney's fees solely on the Public Water Suppliers. Any fee award against the Public Water Suppliers should not exceed apportionment pursuant to each producer's percentage share the Adjusted Native Safe Yield as set forth in Exhibit 3 to the Judgment. (Dunn Decl., ¶ 16, Ex. G.)

**K. Wood Class Cannot Seek Fees Against City of Palmdale**

The Wood Class' motion appears to seek recovery against Palmdale by including Palmdale within the definition of "Settling Defendants" (See Wood Class' Motion, p. 3) even though Palmdale produces no water, and asserted no prescriptive rights claim in this case. Palmdale is in a unique position vis-à-vis the other Public Water Suppliers. While the other Public Water Suppliers produce water for retail uses, Palmdale does not. Palmdale's retail water is served by other parties, and is subject to the fees of Los Angeles County Waterworks District No. 40 and the Palmdale Water District. Should Palmdale also have to pay the Wood Class' attorneys' fees and costs, this would result in a double-penalty against its residents.

The Wood Class' Motion recognizes that "Per the terms of the 2015 Settlement, the City of Palmdale is not subject to attorneys' fees or costs because it dropped its prescription claims in 2008." (Wood Class' Motion, at p. 3, fn. 1.) By including Palmdale within the definition of "Settling Defendants", the motion does not clearly establish that the Wood Class is not seeking recovery against Palmdale.[9] Accordingly, if the Court awards any recovery for attorneys' fees, costs, and incentive award to the Wood Class, such award should exclude Palmdale consistent with the terms of the 2015 Settlement.

[9] The Wood Class Motion identifies eight settling defendants, including Palmdale, but articulates that it seeks recovery against only seven defendants, which "could be awarded jointly and severally as to the seven defendants in question, or the Court could allocate them." (Wood Class' Motion, at p. 15, lns. 20-21.)

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**L. Costs and Incentive Award.**

The private attorney general doctrine only provides for the potential recovery of attorneys' fees, not costs. (§ 1021.5; *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1283.) In California, a "prevailing party" in litigation may recover costs of suit, but only to the extent that there is a statutory right to such costs. (Code Civ. Proc. § 1033.5; *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 989.)

The Wood Class seeks to recover $75,242.06 in costs. (Motion, pp. 3:13, 6:18-22.) The Wood Class counsel cannot recover such costs. In *Benson, supra*, 152 Cal.App.4th 1254, plaintiff sought to recover costs and expert fees, as well as attorneys' fees, under the private attorney general doctrine. The court rejected the request, noting that the statute only provided for the recovery of "attorneys' fees," and that there was no statute authorizing the costs that plaintiff sought to recover. (*Id.*) As explained above, the Wood Class is not a "prevailing party" who would be entitled to any costs because the case settled and the Wood Class obtained no monetary recovery. (*See* § 1032, subd.(a)(4).)

Even if the Wood Class were somehow deemed to be a "prevailing party," which it is not, the Wood Class still cannot recover the requested costs because there is no statutory authorization for such costs. Wood Class also seeks costs for travel expenses, messenger fees, postage, and copy costs, which are not recoverable costs. (Code Civ. Proc. § 1033.5.) The Court should follow *Benson* and should deny the Wood Class counsel's request.

The Public Water Suppliers do not oppose an incentive award water right of (five) 5 acre-feet per year for Richard Wood as it was negotiated as part of the settlement and judgment. The Public Water Suppliers do oppose the alternative request for a monetary payment of $25,000. Monetary incentive awards are not authorized by the private attorney general statute, and the request is inappropriate. The Wood Class motion cites no applicable authority to support the monetary incentive request.

**IV. CONCLUSION**

For the reasons stated herein, the Wood Class motion for attorneys' fees should be denied. If the Court is inclined to award any fees and costs, they should be adjusted downward to an

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amount that reflects the lack of significant success, the local market value of class counsel's services, the hours reasonably expended in achieving that result, and the fact that public agencies and their customers will be paying the award. Additionally, the Court should reduce the fees and costs according so that the Public Water Suppliers and their customers do not pay for Wood Class fees incurred due to the other landowner parties and non-settling parties, the Willis Class, Phelan and the Tapia parties.

Dated: March 15, 2016

BEST BEST & KRIEGER LLP

By: _____

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**PROOF OF SERVICE**

I, Sandra Rosales, 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 S. Grand Avenue, 25th Floor, Los Angeles, California 90071. On March 15, 2016, I served the following document(s):

**LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40 AND CITY OF PALMDALE'S JOINT OPPOSITION TO PLAINTIFF RICHARD WOOD'S MOTION FOR ATTORNEY FEES, COSTS AND INCENTIVE AWARD**

☒ by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 15, 2016, at Los Angeles, California.

Sandra Rosales