

COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

REBECCA LEE WILLIS, individually and
as a class representative of the Willis Class,

Petitioner

v.

SUPERIOR COURT FOR THE COUNTY
OF LOS ANGELES, STATE OF
CALIFORNIA,

Respondent

LOS ANGELES COUNTY
WATERWORKS DISTRICT NO. 40;
LITTLEROCK CREEK IRRIGATION
DISTRICT; PALM RANCH
IRRIGATION DISTRICT; NORTH
EDWARDS WATER DISTRICT; and
DESERT LAKE COMMUNITY
SERVICES DISTRICT

Real Party In Interest

4th Civil No.
Related to 4th Civil No. EO55412
JCCP No. 4408
LACSC Case No BC 364553

Hon. Jack Komar

**PETITION FOR WRIT OF MANDATE;
MEMORANDUM OF POINTS AND AUTHORITIES;
DECLARATION OF RALPH B. KALFAYAN**

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TO: THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO:

INTRODUCTION

In recently ruling on the Willis Class' motion to dismiss the appeal filed by Los Angeles County Water Works District Number 40 (District 40) as untimely, this Court unequivocally stated: "*No timely appeal was filed either from the May 6, 2011, order, or the May 13, 2011, judgment. Appellants therefore may not challenge any rulings encompassed in the May 6, 2011, order, or the May 13, 2011, judgment.*" Declaration of Ralph B. Kalfayan ("Kalfayan Decl") at ¶ 16, Exhibit 11.

Given this Court's edict, counsel for the Class demanded District 40 pay the fees awarded by the Superior Court in the May 6, 2011 Order. Despite the clear language of this Court's ruling finding that any appeal from the May 6, 2011 Order and May 13, 2011 Judgment was untimely and limiting the issues on appeal to those relating to the September 6, 2011 supplemental attorneys' fees award, District 40 refused to commence payments and the Class was forced to file a motion with the trial court to enforce its rights.

The trial court ruled that it lacked subject matter jurisdiction to order payments under the May 6, 2011 Order and the May 13, 2011 judgment because of the pending appeal. In so ruling, the trial court misinterpreted this Court's ruling on the motion to dismiss, stating, "*The stay of trial court proceedings is mandatory*

and the court has no jurisdiction to proceed on the issues reflected in the amended judgment.” Kalfayan Decl. at ¶ 17 and Ex 12.

A writ of mandate is required to obtain compliance with this Court's limitation of the issues on appeal and secure the Class's right to payments from District 40 under the May 6, 2011 Order and May 13, 2011 Judgment. The trial court erroneously concluded that it lacks subject matter jurisdiction to consider matters related to the May 6, 2011 Order or the May 13, 2011 judgment despite this Court's ruling that any appeal from the May Order and Judgment would be untimely and, hence, that those matters are not at issue in this appeal. A writ of mandate is necessary to direct the trial court to consider and rule on the Class' motions related to the May 6, 2011 Order and May 13, 2011 Judgment.

Without this Court's intervention, appellants will improperly complicate and prolong this appeal in order to delay payment due to Class counsel. Appellants have already demonstrated an intent to improperly delay this matter by (1) filing the appeal in the wrong District, the Second Appellate District, despite a coordination order designating the Fourth Appellate District as the reviewing court; (2) greatly over designating the clerk's transcript on appeal by including virtually every pleading filed over the past five years of litigation, totaling hundreds of filings; and, (3) greatly over designating the reporter's transcript on appeal by including almost all transcripts from every hearing over the history of this complex litigation. See Kalfayan Decl at ¶ 18. A writ of mandate is legally

warranted and important under these circumstances and will greatly simplify the issues on appeal. The Court of Appeal should clarify that the Superior Court has jurisdiction to enforce the May Order and Judgment and that there is no stay as to those matters and should direct that court to consider class counsel's motions on any matters related to the May 6, 2011 Order or the May 13, 2011 judgment.

PETITION

A. Interested Parties.

Petitioner Rebecca Lee Willis ("Willis") is an individual residing in the County of Los Angeles, State of California. Willis was the plaintiff and class representative of a class that comprises approximately 65,000 landowners in the Antelope Valley. Class counsel at the firm of Krause Kalfayan Benink & Slavens is also a real party in interest.

The Respondent Court – the Superior Court of the State of California for the County of Los Angeles – is now, and at all times mentioned in this petition, was a duly constituted court exercising judicial functions in connection with the underlying action.

Appellants /Real Parties In Interest include Los Angeles County Waterworks District No. 40 ("District 40"), a public agency governed by the Los Angeles County Board of Supervisors, and four other public entities located in the County of Los Angeles: (1) Littlerock Creek Irrigation District, (2) Palm Ranch Irrigation

District, (3) North Edwards Water District, and (4) Desert Lake Community Services District.

B. Statement of Facts and Procedural History.

1. Background Facts

This groundwater rights class action has been complicated and protracted, as is illustrated by the voluminous record designation submitted by District 40. For purposes of this Petition, however, the relevant facts can be readily summarized.

Plaintiff Willis brought this action on behalf of herself and a class of certain private landowners in the Antelope Valley seeking a judicial determination of their rights to use groundwater in the Antelope Valley Groundwater Basin. The class consists entirely of dormant overlying landowners who have not pumped water on their properties. Defendants are public water suppliers who claimed superior rights to the groundwater under the doctrine of prescription.

After almost four years of litigation, in late 2010, all parties to the Willis case entered into a Stipulation of Settlement (the “Stipulation”) of the underlying claims. The parties negotiated the terms of and attached to the Stipulation various related documents, including a proposed form of Final Judgment to be entered by the Court. See Kalfayan Decl at ¶ 2 and Exhibits 1 and 2. The Stipulation did not include an award of attorneys’ fees for Class counsel, but expressly provided that, in the event the parties could not agree upon an appropriate fee, Plaintiff would seek an award of fees from the Superior Court; and the Settling Defendants,

including District 40, expressly agreed “to exercise their best efforts to pay any fee award within a reasonable period of time or as required pursuant to Court order.” See Exhibit 1 (Stip. at p. 17, ¶ VIII.D.)

On November 18, 2010, the Superior Court granted preliminary approval of the proposed settlement and directed that notice be sent to the Class in the form and language negotiated by the parties and approved by the court. Kalfayan Decl. at ¶ 3. On March 1, 2011, following a final settlement hearing at which District 40 supported approval of the settlement; the Court entered an Order granting approval of the Settlement. Kalfayan Decl. at ¶ 4. At Plaintiff’s request, the Superior Court deferred entry of Judgment at that time, so that Plaintiff’s motion for an award of attorneys’ fee could be decided prior to entry of Judgment.¹ *Id.*

On January 24, 2011, Plaintiff moved for an award of attorneys’ fees pursuant to Section 1021.5 of the Civil Code. Plaintiff sought a fee award of \$3,450,927 (1.5 times counsel’s lodestar of \$2,300,618) plus a portion of the costs incurred on behalf of the class. The parties engaged in substantial briefing and evidentiary submissions to the Court in connection with the fee petition. On May 6, 2011, the Court issued a thoughtful opinion awarding Plaintiff fees and costs of some \$1,904,551.68 (approximately 55% of the total amount Plaintiff had requested) for counsel’s four years of efforts on this complex matter. See Kalfayan

¹ This delay was necessitated by District 40’s insistence on a provision in the settlement stipulation that drastically limited Plaintiff’s ability to seek fees for

Decl. at ¶ 5 and Ex 3. Subsequently, on May 13, 2011, the Court entered the Final Judgment approving the settlement in the form that the parties had agreed upon. Kalfayan Decl. at ¶ 5 and Ex 4. Plaintiff served Notice of Entry of the Judgment on May 19, 2011. Kalfayan Decl. at ¶ 5. Defendant did not file a timely appeal from either the May 6, 2011 fee award or the Final Judgment. See Exhibit 11.

On July 12, 2011, Plaintiff filed a Motion for a Supplemental Fee Award with respect to the efforts counsel had engaged in during the period from January 1, 2011 through the May 13, 2011 entry of Final Judgment. By Order dated September 7, 2011, the Court awarded supplemental fees of \$160,622.50, 77 percent of the amount sought by Plaintiff's counsel. See Kalfayan Decl at ¶ 6 and Ex 5.

Notwithstanding the language of the Settlement Stipulation, Defendants refused to pay the foregoing fee awards unless those awards were included in an Amended Judgment. District 40 submitted a proposed Amended Judgment on September 21, 2011, which the Court entered on September 26, 2011. The sole change from the original Final Judgment was the addition of a final paragraph (21) which stated as follows:

“The Court after considering the pleadings on file herein, and the arguments of counsel, awards the Willis Class attorneys fees in the amount of \$1,839,494, an incentive award for Ms. Rebecca Willis in

any efforts rendered after entry of Judgment. See Kalfayan Dec., Exhibit 1.

the amount of \$10,000, costs in the amount of \$65,057.68, and supplemental attorneys' fees in the amount of \$160,622.50. Judgment in the amount of \$2,075,174.18 is hereby entered for the Willis Class against Los Angeles County Waterworks District No 40”

Plaintiff served a Notice of Entry of the Amended Judgment on September 27, 2011. Kalfayan Decl at ¶ 9. Thereafter, Plaintiff settled the fee award with several Defendants, including Palmdale Water District, which filed an Acknowledgement of Partial Satisfaction of Judgment on October 11, 2011 in the amount of \$567,165. *Id.* On October 27, 2011, District 40 filed an Election to make Periodic Payments of the Judgment pursuant to Government Code section 984. As District 40 conceded in its filing, such an Election is only available when a judgment exceeds \$1,507,222.94. Kalfayan Decl. at ¶ 10. District 40's filing stated that the Judgment was in the amount of \$2,075,174.18, ignoring the fact that the Judgment at issue had been partially satisfied. *Id.*

2. Pending Appeal

Defendant filed a Notice of Appeal to the Second Appellate District on November 28, 2011, but the Notice of Appeal was not entered into the docket until November 29, 2011. *Id.*, at 11. The notice of appeal was filed in the wrong district in direct contravention of the order of coordination. Kalfayan Decl. at ¶ 11. In connection with its appeal, the District designated virtually *all* pleadings filed in and *all* hearings held in the underlying matter. Kalfayan Decl. at ¶s 18 and 19.

On December 21, 2011, the clerk of the Second Appellate District sua sponte notified appellant that its appeal appeared untimely and issued an order to show cause. See Exhibit 8. The matter was briefed by both parties and submitted.

On or about January 11, 2012, the Second Appellate District transferred the appeal to the Fourth Appellate District noting that the appropriate reviewing court is the Fourth Appellate District under the JCCP 4408 order of coordination. See Exhibit 9.

On January 20, 2012, this Court of Appeal notified the parties that it had deemed the Willis Class's response to the Order to Show Cause as a Motion to Dismiss and requested further briefing. The Court of Appeal stated: "Willis asserts that the amended judgment filed September 22, 2011, from which appellants purport to appeal was merely a clerical and ministerial adjustment to add a supplemental attorneys' fees award that did not, therefore, re-commence the time for filing a notice of appeal. Insofar as the appellants intend to challenge any rulings encompassed in the May 13, 2011 judgment, this assertion appears to be valid." See Exhibit 10.

On February 15, 2012, the Court of Appeal denied the motion to dismiss. However, in so ruling, the Court expressly limited the issues to be considered on appeal to *only* those arising from the supplemental fee award issued on September 22, 2011, stating:

“It is true that the May 6, 2011 order granting attorney fees, costs and class representative award was either a separately appealable collateral order, or was made appealable by the May 13, 2011, judgment. [Citations] No timely appeal was filed either from the May 6, 2011, order, or the May 13, 2011, judgment. Appellants therefore may not challenge any rulings encompassed in the May 6, 2011, order, or the May 13, 2011, judgment. [Citations] However, in its opposition to the motion to dismiss the appeal, LACWD expressly disclaims any intention to challenge the May 13, 2011, judgment, from which it did not file an appeal.”

See Exhibit 11.

3. Trial court ruling being challenged.

On March 14, 2012, class counsel filed a motion requesting that the Respondent Court revise its order granting Defendants’ election to make periodic payments of the fee award insofar as such payments related to the May 13, 2011 judgment or, in the alternative, modify the periodic payment order pursuant to Government Code section 984(e)(4). The request related solely to the attorneys’ fees awarded under the May 6, 2011 Order and the May 13, 2011 judgment, not the September 6, 2011 supplemental fee order. See Exhibit 12. The trial court denied the motion based on the mistaken assumption that District 40’s pending appeal deprived the court of subject matter jurisdiction to grant the Class’s request, stating as follows:

ORDER: The Willis Class moves pursuant to Code of Civil Procedure Section 1008 for reconsideration of the Court's Order of November 16, 2011, which approved the election by Los Angeles County Water Works District Number 40 (District 40) to make periodic payments pursuant to Government Code Section 984. In the alternative the Class seeks relief pursuant to Government Code Section 984 (e) (4). The motion was heard on April 17, 2012. Ralph B. Kalfayan, Esquire, appeared for the class and Jeffrey V. Dunn, Esquire, appeared for District 40.

The Court considered the briefs and oral argument of counsel. The matter having been submitted to the court made the following order denying the motion without prejudice: District 40 filed a notice of appeal from the amended judgment, which judgment adopted and incorporated and set forth the original and supplemental orders for attorneys' fees and costs and a class representative incentive award. The Willis class filed a motion to dismiss the appeal on the grounds that it was not timely filed. **The court of appeal denied the motion to dismiss by written order and found the notice of appeal from the amended judgment to have been timely filed.**

An appeal from a judgment by its nature confers jurisdiction on the appellate court to consider and rule upon all issues that underlie the judgment, including the jurisdiction to reverse the judgment in its entirety, and correlatively divests the trial court of jurisdiction to modify any provisions in the judgment, or "matters embraced therein, or affected thereby." Code of Civil Procedure Section 916. The stay of trial court proceedings is mandatory and the court has no jurisdiction

to proceed on the issues reflected in the amended judgment. *See Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal. 4th 180.

While some of the language in the Order of the appellate court denying the motion to dismiss may raise questions concerning which issues will be considered on appeal, the mere fact that the appeal is from the amended judgment itself precludes the trial court from making any orders with regard to any provisions in the amended judgment. The court does not have jurisdiction to consider the motions under Government Code Section 984 or Code of Civil Procedure Section 1008. The Amended Judgment was filed on September 22, 2012. The order approving the election to make periodic payments was made thereafter on November 16, 2012.

Since on its face the appeal is from the amended judgment in its entirety, should the court reverse any part of the judgment for fees, the reversal may affect the periodic payments election as well.

Motion denied without prejudice.

Exhibit 13 (emphasis added).

C. Absence of Other Remedies.

The Class unsuccessfully sought reconsideration of the Respondent Court's ruling allowing District 40 to make periodic payments of the May 6, 2011 fee award. There is no other adequate trial court remedy available to the Class at this juncture. This Court's intervention is therefore necessary to secure the Class's right to payment from District 40 under the May 13, 2011 judgment and prevent

the Real Party from complicating and dragging out the appellate process to avoid payment of the sums due by as long as possible.

D. Timeliness of Petition.

The Respondent Court denied the Class's motion on April 17, 2012. There are no absolute deadlines on petitioning for a nonstatutory writ. *Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695, 701 ["an appellate court may consider a petition for an extraordinary writ at any time"]. However, since the writs are equitable in nature, relief may be barred by laches if the petitioner has unreasonably delayed filing the petition to the real party in interest's prejudice. *H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368.

Prejudice from delay will not be presumed. *Conti v. Board of Civil Service Comm'rs* (1969) 1 Cal.3d 351, 357-360. Nevertheless, the appellate courts have retained their discretion to deny common-law writ relief where (absent good reason for the delay) the petition is not filed within the 60-day period that is applicable to appeals. *Volkswagen of America, Inc. v. Superior Court, supra*, 94 Cal.App.4th at 701.

This petition has been filed well within 60 days of the Respondent Court's order. Petitioners are aware of no prejudice to Real Parties as a result of the short

delay required by the preparation of this request for relief. The Petition is therefore timely.

E. Authenticity of Exhibits.

Pursuant to California Rules of Court, rule 8.490(c)(2), the exhibits to this Petition and accompanying Memorandum of Points and Authorities include true and correct copies of the relevant documents and exhibits submitted to Respondent Court. The exhibits are attached to the declaration of Ralph B. Kalfayan and are separated by numbered side tabs.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for the following relief:

1. Direct the trial court to consider and rule on any matters related to the May 6, 2011 Order awarding attorneys' fees and the May 13, 2011 judgment;
2. Lift the stay on enforcement of the May 6, 2011 Order awarding fees and the May 13, 2011 judgment to the extent there is one;
3. For costs incurred by Petitioner in connection with this proceeding;
4. For such other and further relief as this Court may deem just and proper.

DATED: June 4, 2012

Respectfully submitted,

By: 
Attorneys for Petitioner

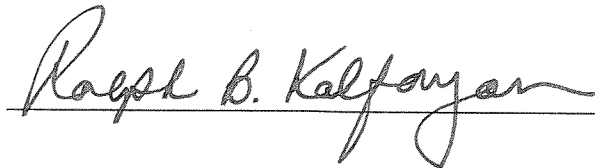
VERIFICATION

I, the undersigned, state:

I am the attorney for the Plaintiff Class. I am personally familiar with the facts stated herein. I was present for most, if not all, of the litigation proceedings before the Respondent Court discussed in the attached Petition For Writ of Mandate. I have read the Petition and can competently state that all facts alleged in the document, and not otherwise supported by citations to the record, exhibits or other documents, are true to my personal knowledge.

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

Executed this 4TH day of JUNE 2012 at San Diego, California.



MEMORANDUM OF POINTS AND AUTHORITIES

I.

WRIT RELIEF IS APPROPRIATE

A writ is an appropriate method to obtain compliance with the Court of Appeal's prior opinion. *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 211. Contrary to the Respondent Court's assumption, District 40 has been precluded from challenging any rulings encompassed in the May 6, 2011 order, or the May 13, 2011 judgment, and has, in fact, expressly disclaimed any intention to challenge the May 13, 2011, judgment, from which it did not file an appeal.

Since "enforcement of a judgment or order is not stayed against a party who did not appeal" [*Kentfield v. Kentfield* (1935) 4 Cal.2d 585, 58], "the respondent court has jurisdiction to take such steps and proceedings as may be appropriate to the enforcement and carrying out of the unappealed portions of the decree." *Dow v. Superior Court* (1956) 140 Cal.App.2d 399, 405; see also *Trees Enter., Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 787.

The Court of Appeal should direct the trial court to consider class counsel's motion for reconsideration or any other matter that is not embraced or affected by the appeal. An order from the Court of Appeal that the matter on appeal is "untimely" is the equivalent to a final disposition and the matter is therefore

dismissed. The trial court resumes its jurisdiction and may rule on the subject matter of the motion.

II.

SINCE THE JUDGMENT IS NOW FINAL, THE WILLIS CLASS IS ENTITLED TO RELIEF FROM THE TRIAL COURT AND PAYMENT OF THE MAY 2011 FEE AWARD.

A. The District Did Not Timely Appeal the Underlying Judgment.

The Judgment entered in this case on May 13, 2011 was a final, appealable judgment. Likewise, the Court's original fee award was either (1) appealable in its own right as a collateral order or (2) subsumed in the judgment and therefore appealable when the Court entered its Final Judgment. District 40 did not appeal either the judgment or fee award within 60 (or even 180 days) of the notice of entry of the judgment/order. Instead, District 40 attempted to bootstrap an appeal from the amended judgment (adding additional fees) into an appeal from all three appealable rulings. The court's entry of an amended final judgment, which did not make any substantive changes to the court's prior rulings, did not restart the time to appeal those prior rulings. The filing of an Amended Judgment that does not make substantive changes to a prior Final Judgment cannot restart the appeal period as to matters that were determined in earlier appealable rulings. See *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222. An amended judgment adding costs, attorneys' fees, or interest does not constitute a "substantial modification" in the terms of a judgment that will restart the time for appeal. *Id.* As the Court of

Appeal explained in *Dakota Payphone LLC v. Alcaarez* (2011) 192 Cal.App.4th 493, a party who fails to take a timely appeal from a decision or order from which an appeal could have been taken cannot obtain review of that ruling on appeal from a subsequent judgment or order. *Id.* at 509.

The Court of Appeal ruled on January 20, 2012, as follows: “Willis asserts that the amended judgment filed September 22, 2011, from which appellants purport to appeal was merely clerical and ministerial adjustment to add a supplemental attorneys’ fees award that did not, therefore, recommence the time for filing a notice of appeal. Insofar as the appellants intend to challenge any rulings encompassed in the May 13, 2011, judgment, this assertion appears valid.” See Exhibit 10.

This Court of Appeal again ruled in its February 15, 2012 order denying the motion to dismiss: “It is true that the May 6, 2011 order granting attorney fees, costs and class representative award was either a separately appealable collateral order, or was made appealable by the May 13, 2011, judgment. [citations] No timely appeal was filed either from the May 6, 2011, order, or the May 13, 2011, judgment. Appellants therefore may not challenge any rulings encompassed in the May 6, 2011, order, or the May 13, 2011, judgment. [Citations] *However, in its opposition to the motion to dismiss the appeal LACWD expressly disclaims any intention to challenge the May 13, 2011, judgment, from which it did not file an appeal.*” [Emphasis added] See Exhibit 11.

B. A Judgment from Which There Is No Timely Appeal Is Final, Immediately Enforceable, and the Trial Court has Jurisdiction to Enforce It.

As this Court noted, District 40 did not file an appeal from the May 13, 2011 Judgment. Enforcement of a judgment or order is not stayed against a party who did not appeal. *Kentfield, supra*, at 587. Contrary to Judge Komar's assumption, "the respondent court has jurisdiction to take such steps and proceedings as may be appropriate to the enforcement and carrying out of the unappealed portions of the decree." *Dow v. Superior Court* (1956)140 Cal.App.2d 399, 405; see also *Trees Enter., Inc. v. Palm Springs Alpine Estates, Inc.*, *supra*, at 787.

Under CCP Section 916(a), an appeal stays the trial court proceedings only for matters "embraced" or "affected" by the appeal. Code. Civ. Proc. § 916(a). If the matter before the trial court is not embraced in or affected by the appeal, then the trial court continues to have jurisdiction over that matter. For instance, an appeal does not stay proceedings on matters ancillary or collateral to the judgment or order on appeal. *Betz v Pankow* (1993) 16 Cal.App.4th 931, 938. Those matters are by definition not "embraced [in] or affected [by]" the order appealed from, within the meaning of CCP 916(a).

The purpose of Code. Civ. Proc. § 916(a) is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. *Varian Med. Sys., Inc. v. Delfino* (2005) 35 Cal.4th 180,189. The trial court is deprived of subject matter jurisdiction and thus lacks power to proceed on any matter that is

“embraced in” or “affected by” the appeal during its pendency. *Id.* at 196. A matter is embraced in or affected by a judgment or appealable order when an action on the matter would influence the “effectiveness” of the appeal. *Id.* at 189. If it does not then the proceeding is permitted; if it does then the proceeding is stayed. A trial court proceeding affects the effectiveness of the appeal if the possible outcomes on appeal and the actual or possible results of the proceeding are *irreconcilable*, or if the very purpose of the appeal is to avoid the need for the proceeding and the risk of *substantial inconsistency* would exist, or if the proceeding would *substantially interfere* with the appellate court’s ability to conduct the appeal. *Id.* at 190. Absent any such circumstance the trial court has jurisdiction.

In this case, this Court has ruled that any purported appeal from the May 6, 2012, Order or the May 13, 2012 Judgment would be untimely. Since any appeal from the May 13, 2012 Judgment would be untimely, any rulings by the trial court which relate to the May 13, 2012 Judgment are no longer “embraced in” or “affected by” the pending appeal. The trial court has been re-invested with jurisdiction and the stay is no longer in effect for those matters that relate to the May 13, 2011 judgment. Having regained jurisdiction, the court should have considered and ruled on the Class’ Motion to Reconsider or Enter an Order under Government Code section 984(e)(4) since the motion related solely to the May 13, 2011 judgment. Stated differently, any ruling by the trial court would not cause an irreconcilable conflict, create any inconsistency, or interfere with the appellate

court's ability to conduct the appeal. Whether the reviewing court affirms or reverses, it will not have any effect on the May 6, 2011, Order or the May 13, 2011, Judgment.

The matters that do remain on appeal and which are indeed embraced or affected by the appeal are those relevant to the September 6, 2011, Order, that deals with the Supplemental attorneys' fees award. All post judgment proceedings related to the September 6, 2011, Order are and should be stayed.

III.

REAL PARTY'S DESIGNATION OF VIRTUALLY EVERY PLEADING AND EVERY HEARING IN THIS CASE IS UNREASONABLE UNDER ANY CIRCUMSTANCES, BUT IS ESPECIALLY EGREGIOUS GIVEN THE LIMITATIONS IMPOSED BY THIS COURT ON THE PENDING APPEAL.

While great care must be taken to furnish an adequate record on appeal, it is also important to avoid including unnecessary material in the record. Eisenberg, California Practice Guide: Civil Appeals and Writs (TRG 2012) ¶ 4:55; *People v. Carter* (2010) 182 Cal.App.4th 522, 530, fn. 6 [saving the cost and time of preparing unnecessary transcripts is an important consideration].

As a general rule, it is unnecessary to have all of the testimony incorporated in a record on appeal." *Conlin v. Coyne* (1937) 19 Cal.App.2d 78, 82. The record on appeal should be limited to "only those documents and oral proceedings that are essential to determination of the issues on appeal." Eisenberg, *supra*, 4:34. For the sake of the parties and the courts, optional contents that are wholly irrelevant to

the issues on appeal should be avoided to reduce the cost and delay associated with preparation and use of the record. *Id.*

California Rules of Court, rule 8.276(a)(2) states that “a Court of Appeal may impose sanctions... on a party or an attorney for ... [i]ncluding in the record any matter not reasonably material to the appeal’s determination ...” See *Garcia v. Lucido* (1961) 191 Cal.App.2d 303, 308. One of the primary objectives of the rules is the avoidance of inclusion in the record of irrelevant and unnecessary matters. *Alkus v. Johnson-Pacific Co.* (1947) 80 Cal.App.2d 1, 11; CAJUR, Appellate § 500. This tactic makes appeals in California unwieldy, overburdensome, too long and unreasonably expensive. *Id.* at 11. The stacking up of massive transcripts containing thousands of pages of testimony and exhibits, much of it completely irrelevant to the points raised on appeal, has long been the target of criticism by courts and lawyers alike. *Id.* at 11-12.

Here, appellants have deliberately embarked on a plan to delay enforcement of the Order for attorneys’ fees and payment to class counsel. Appellants have (1) initially filed the appeal in the wrong District, the Second Appellate District, despite a coordination order designating the Fourth Appellate District as the reviewing court; (2) over designated the record by including virtually every pleading filed over the past five years of litigation; and, (3) over designated the reporter’s transcript by including almost all transcripts from every hearing over the history of the litigation. Now, they continue to refuse to pay a fee award and

judgment that this court has already ordered is not subject to appeal, merely complicating further the issues on appeal.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court of Appeal (1) grant this Petition; (2) direct the Superior Court to decide any and all matters pertaining to the May 2011 fee award and Final judgment; and (3) lift the stay on enforcement of the May 6, 2011 Order awarding fees and the May 13, 2011 judgment to the extent there is one.

DATED: June 4, 2012

Respectfully submitted,

By: Ralph B. Kalfayan
Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the accompanying petition for writ of mandate contains 5,146 words (including footnotes) according to the word count provided by Microsoft Word 2007 word processing software.

DATED: June 4, 2012

By: Ralph B. Kalfay