

EXHIBIT C

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16 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
17 **COUNTY OF LOS ANGELES**

18 Coordination Proceeding
19 Special Title (Rule 1550(b))

20 ANTELOPE VALLEY GROUNDWATER
21 CASES

22 RICHARD A. WOOD, an individual, on
23 behalf of himself and all others similarly
24 situated,

25 Plaintiff,

26 v.

27 LOS ANGELES COUNTY
28 WATERWORKS DISTRICT NO. 40; et al.

Defendants.

Judicial Council Coordination
Proceeding No. 4408.

(Santa Clara Case No. 1-05-CV-049053,
Honorable Jack Komar)

Case No.: BC 391869

**RICHARD WOOD'S NOTICE OF
MOTION AND MOTION FOR
ORDER AUTHORIZING COURT-
APPOINTED EXPERT WITNESS
WORK**

Date: August 3, 2011
Time: 10:00 a.m.
Dept.: 316 (Room 1515)

1 TO THE COURT AND ALL INTERESTED PARTIES:

2 PLEASE TAKE NOTICE that on August 3, 2011, at 10:00 a.m., in Department
3 316 of the Los Angeles Superior Court, located at 600 S. Commonwealth Avenue, Los
4 Angeles, California, a hearing will be held on plaintiff Richard A. Wood's Motion for
5 Order Authorizing Court-Appointed Expert Work.

6 The motion is based on this Notice, the attached Memorandum of Points and
7 Authorities, the attached exhibits, Evidence Code sections 730 and 731, and such other
8 and further evidence as the Court adduces at the hearing.

9
10 DATED: July 12, 2011

LAW OFFICES OF MICHAEL D. McLACHLAN
LAW OFFICE OF DANIEL M. O'LEARY

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13 By: _____ //s//
14 Michael D. McLachlan
15 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. Prior History Relevant to Allocation of Court-Appointed Expert**
3 **Witness Fees.**

4 On April 24, 2009, the Court granted Plaintiff's motion for a court-appointed
5 expert, thereby designating Timothy Thompson of Entrix to perform expert services
6 relative to the assessment of water use of the Small Pumpers' class. (Exhibit 1.) At that
7 time, the Court stayed the order pending allocation of the expert expenses. (*Ibid.*)
8 However, on May 6, 2009, by Stipulation of the parties, the Court ordered the stay lifted.
9 (Exhibit 2.) Mr. Thompson has conducted limited preliminary work, and has been paid
10 for that work, but has not commenced the substantive work regarding the quantification
11 of the class members' water use. The Court allocated these costs *pro rata* to the ten
12 water suppliers. (Exhibit 3, at p. 4.)

13 The Court did not authorize this work prior to the Phase 3 trial. On June 16, 2011,
14 the Court denied Plaintiff's motion for preliminary approval, in part because of the lack
15 of evidence or the pumping of the class, which the Court felt would be necessary to
16 establish the di minimis exemption and the water rights of the class members.

17 **B. The Legal Necessity for the Court-Appointed Expert Work**

18 Upon a showing of public benefit C.C.P. section 1021.5, the class counsel in this
19 matter will ultimately seek compensation for their time and costs in this action as against
20 the public water purveyors. An award under Section 1021.5, however, cannot include
21 expert witness fees.

22 In 2008, the California Supreme Court issued its opinion in *Olson v. Automobile*
23 *Club of Southern California*, holding that expert witness fees may not be awarded under
24 Section 1021.5, unless expressly ordered by the court. 42 Cal.4th 1142, 1150-51 (*citing*
25 *C.C.P. § 1033.5(b)(1).*) This opinion expressly overruled *Beasley v. Wells Fargo Bank*,
26 (1991) 235 Cal.App.3d 1407, which had previously held that experts witness fees were
27 recoverable under Section 1021.5. (*Id.* at 1151.)

1 The result of the *Olsen* case is that, assuming class counsel were willing to
2 advance substantial funds to cover expert witness fees, they could not recover those fees
3 at the end of the case. In other words, if class counsel were to expend funds toward
4 expert witness fees, they would be doing so on a *pro bono* basis.

5
6 The primary reasons the Court-appointed expert is necessary is to gather evidence
7 of the Class' water use for both settlement and litigation purposes, i.e. establishing the
8 self-help defense, under which an overlying landowner may defeat a claim of prescription
9 by pumping water on his property during the prescriptive period. (*City of Pasadena v.*
10 *City of Alhambra* (1949) 33 Cal.2d 908, 931-32.) In *City of Los Angeles v. City of San*
11 *Fernando*, the California Supreme Court held that such rights of self-help persist in an
12 overdrafted groundwater basin. ((1975) Cal.3d 199, 293, fn.101; *Hi-Desert County*
13 *Water District v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723, 1731.)

14 In the case at hand, the public water suppliers have alleged in their pleadings and
15 asserted in Court that the basin at issue has been in continuous overdraft since 1946 and
16 that the prescriptive period runs from that date to the present (the filing of the various
17 complaints). (See, e.g., First Amended Cross-Complaint of Public Water Suppliers
18 (March 13, 2007), Santa Clara Sup. Ct. E-Filed Docket No. 503.)

19 By definition, all members of the Small Pumpers Class will be overlying
20 landowners who have pumped groundwater on their property during the prescriptive
21 period in question. (Order Certifying Small Pumpers Class Action, S.C. Sup. Ct. E-Filed
22 Docket No. 1865.) There is no dispute that the vast majority of the Small Pumper Class
23 members are single family residential users who are outside the available public water
24 supply network, and hence must rely upon their own pumping of groundwater to exist on
25 their land.

1 The court-appointed expert work may also be used to establish that the Class
2 members were engaged in a "reasonable beneficial use," a threshold requirement to
3 establishing their overlying rights and an issue that other overlying landowners have
4 disputed as the Class. (*City of Los Angeles v. City of San Fernando*, Cal.3d at 293.)

5 **C. The Expert Work Should Commence Now**

6 As the Court may recall, prior to filing the complaint in this matter, class counsel
7 had several conversations with the Court at hearings and through written correspondence
8 in May of 2008, concerning this fundamental problem confronting class counsel in the
9 representation of the class. (Exhibit 4.)

10 Now that the Phase 3 trial is completed, any future phases of trial necessarily
11 require evidence of water use by the class (prescription, allocation of water rights, and
12 physical solution). It will likely take three or four months at least for this work to be
13 completed.

14 While the Court has expressed optimism about the prospect of settlement, it is
15 simply not realistic given the history of failed settlement talks in this case, nor is it fair to
16 use the ephemeral prospect of settlement as a justification to continue to keep class
17 counsel in the untenable position of potential malpractice on the one hand, or the
18 payment of substantial unrecoverable expert fees on the other hand. A staggering amount
19 of settlement talks have occurred over the last four years, all of which have failed to date
20 (but for the Willis class).

21 The water suppliers are again showing little interest of revising and re-submitting
22 the Wood Class Settlement, leaving the prescription claims hanging over the Class'
23 proverbial heads. Within a few days after the Wood Class Settlement was not approved,
24 class counsel circulated a revised settlement agreement, with very limited modifications
25 tracking the Court's comments at the June 16 hearing. In the month that has passed, the
26 water suppliers' continue to drag their feet, apparently sensing some sort of leverage to
27 force the Class to accept a very unfair deal they have hatched up with the farmers. The

1 lack of a report from the court-appointed expert puts class counsel in a very difficult
2 negotiating position with respect to proper and fair allocation of the available water for
3 overlying use. The issue of the Class' water use thus presents a serious obstacle to
4 settlement talks.

5 Furthermore, even if there was a settlement, the court has repeatedly made note
6 that an evidentiary prove-up hearing would be necessary. The testimony or report of the
7 court-appointed expert would be needed at such a hearing.

8 The proposed scope of work is attached as Exhibit 5. Mr. Thompson remains
9 ready and able to conduct the work at issue, and should be allowed to proceed. (Exhibit
10 6.)

11 **D. Allocation of Expert Costs**

12 The Court should allocate these expenses among the same ten Public Water
13 Suppliers that paid the prior court-appointed expert bill, as set forth in the Court's order
14 of May 25, 2010. (Exhibit 3, at p. 4.)

15
16 DATED: July 12, 2011

LAW OFFICES OF MICHAEL D. McLACHLAN
LAW OFFICE OF DANIEL M. O'LEARY

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By: _____ //s//

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Michael D. McLachlan
Attorneys for Plaintiff

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