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Class Counsel for the Willis Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES

This Pleading Relates to Included Action:
REBECCA LEE WILLIS and DAVID ESTRADA, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40; CITY OF LANCASTER; CITY OF PALMDALE; PALMDALE WATER DISTRICT; LITTLEROCK CREEK IRRIGATION DISTRICT; PALM RANCH IRRIGATION DISTRICT; QUARTZ HILL WATER DISTRICT; ANTELOPE VALLEY WATER CO.; ROSAMOND COMMUNITY SERVICE DISTRICT; PHELAN PINON HILLS COMMUNITY SERVICE DISTRICT; and DOES 1 through 1,000;

Defendants.

RELATED CASE TO JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4408

Case No. BC 364553

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SECOND SUPPLEMENTAL MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CLASS REPRESENTATIVE INCENTIVE AWARD

Date: March 21, 2016
Time: 1:30 P.M.
Place: San Jose Superior Court
191 North First Street
San Jose, CA 95113

Judge: Hon. Jack Komar

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I. INTRODUCTION

In 2011, this Court entered a judgment – the Willis Class Judgment – that approved a Stipulation of Settlement wherein the Settling Parties agreed that the Willis Class had an overlying right to a correlative share of the Basin's Federally Adjusted Native Safe Yield. During the next four years, counsel for the Willis Class devoted thousands of hours and over $100,000 in expenses to enforce this judgment and to participate in the litigation including the Phase VI trial. The end result of these proceedings was the entry of a physical solution that encompasses the claims of all parties. This Court described the Physical Solution as "more than fairly protect[ing]" the Willis Class correlative rights and in which "the average monthly cost for a Willis Class member would be a mere $26 – a monthly amount less than what most Californians are likely paying for that amount of water." Statement of Decision at 27:7-20.

This Court found in 2011 that the entry of a judgment that protected the correlative water rights of the Willis Class warranted an award of costs and fees pursuant to Section 1021.5 of the Code of Civil Procedure. The same is true with respect to the entry of the 2015 judgment. The Willis Class accordingly moves for reimbursement of its costs and fees.

II. HISTORY OF THE WILLIS LITIGATION POST JUDGMENT

The history of this litigation after entry of the Willis Class Judgment and, in particular, the role of Class Counsel is set forth in detail in the accompanying Declaration of Ralph B. Kalfayan in Support of Motion For an Award of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Incentive Award (the "Kalfayan Fee Decl."). The Court is familiar with the facts of the case, the work of Class Counsel, and the procedural complexities of the case. For the benefit of the Court, only a brief summary is provided below.

The Willis Class settled their claims with the Public Water Suppliers ("PWS") in return for an agreement wherein the Settling Parties agreed that the Class members maintained a correlative right to a portion of the Basin's native yield. (See Willis Class Stipulation of Settlement, Exhibit 3 to the NOL[1]). The parties entered into a Stipulation of Settlement and after a fairness hearing, the Court approved this settlement as fair and reasonable and entered the 2011 Willis Class Judgment on September 22, 2011. No party appealed from this judgment. The Public Water Suppliers appealed

[1] All Exhibits in this Motion refer to Exhibits attached to the Notice of Lodgment ("NOL"). The NOL was filed concurrently with this Motion.

the attorneys' fees portion of this judgment, but this appeal was resolved and remittitur issued by the Court of Appeal.[2]

During the past four years, since entry of the 2011 judgment, Krause Kalfayan Benink & Slavens LLP ("KKBS" or the "Firm")[3] has worked diligently on behalf of the Class. KKBS (1) attended numerous hearings in both Los Angeles and San Jose; (2) deposed several expert witnesses offered by the stipulating parties to the Physical Solution and defended three depositions of Willis Class experts; (3) reviewed voluminous documents generated by experts or relied upon by them to support their opinions; (4) prepared and filed at least fifteen (15) significant law and motion matters, which included substantial legal and factual research necessary to properly prepare those documents; (5) reviewed hundreds of filings made by other parties, frequently reviewing cases and other background materials that were cited; (6) had numerous conversations with counsel for opposing parties and expert consultants regarding the technical, economic, and legal issues raised by this matter; and, (7) prepared for, appeared at, and participated in the Phase VI trial, which consumed over 10 court days.

KKBS attorneys have collectively spent over 3,000 hours of professional time on this matter during the past four years, and during this same time, KKBS paralegals and clerks have spent over 400 additional hours as well. KKBS has performed this work since 2011 without being paid a penny for these efforts. To the contrary, KKBS has incurred over $100,000 in expenses during this period. All of this work was done on a contingent basis, without any guarantee of compensation.

Pursuant to Section 1021.5 of the Code of Civil Procedure, Willis Class Counsel now seek an award of fees and expenses to compensate them for their efforts on this matter during the past four years.[4] The participation of the Willis Class was required by this Court's Case Management Order.[5] As a Non-Settling Party, the participation of the Class was also required in order to obtain a

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[2] This Petition does not include any work performed by Class Counsel related to this appeal.

[3] KKBS has worked alongside attorney Greg James in these efforts, and the references to KKBS and the Firm in this motion include the significant efforts of Mr. James.

[4] This petition seeks an award of fees and costs for the period from the entry of the Willis Class Judgment through December 31, 2015. Consistent with the parties' agreement, Plaintiff reserves the right to submit a supplemental petition at a later date.

[5] As a non-stipulating party, the CMO required the Willis Class to: (1) file a written statement of objections to the proposed Stipulated Judgment and Physical Solution, including the assertion of any claims or rights to produce groundwater from the Basin; (2) disclose witnesses and exhibits regarding any such objections; (3) participate in discovery regarding these objections; and (4) participate in the trial and hearings regarding the prove-up by the Stipulating Parties, including a prove-up of the physical solution, as well as proofs of claim to produce groundwater by Non-Stipulating Parties. (Case Management Order, Exhibit 7 to the NOL).

comprehensive physical solution that adjudicated the rights of all landowners in the basin. As the Public Water Suppliers noted:

> A comprehensive determination of the Non-Settling Parties' water rights is necessary for many reasons. First, the McCarran Amendment mandates a comprehensive adjudication of water rights in a case not initiated by the United States. (43 U.S.C. §666.) Second, the Court cannot approve a final physical solution without considering the reasonableness of all parties' water rights. (*City of Barstow v. Mojave Weller Agency* (2000) 23 Cal.4th 1224, 1250 ["In ordering a physical solution, a court may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine."])
>
> It is critical to the Settlement Agreement and its proposed groundwater management (physical solution) that the unresolved claims of Non-Settling Parties be determined as soon as possible and before court approval of the Settlement Agreement. Until such time as the court determines the groundwater claims raised by the Non-Settling Parties, the Settling Parties may be unable to have a comprehensive physical solution to the overdraft conditions. The reason is that the Non-Settling Parties have not agreed to the physical solution and the Court will need to determine their respective water rights before the court can determine how the proposed physical solution impacts Non-Settling Parties. (Underlining added for emphasis.)[6]

The participation the Willis Class Counsel was not only required by this Court's Case Management Orders, but also was a necessary predicate to the Court's entry of the Physical Solution, and was necessary to attempt to ensure that the Physical Solution was consistent with the 2011 Willis Class Judgment. The Willis Class moved on three separate occasions to enforce that judgment; each time, the Court deferred a firm ruling on these motions and denied them without prejudice. Thus, the Willis Class Counsel accordingly had no choice but to appear at the Phase VI trial, oppose the Physical Solution, present their own affirmative contrary evidence, and oppose the evidence submitted by the stipulating parties. The ultimate result was the entry of a judgment that this Court described as consistent with the correlative rights of the Willis Class and in which the Class members would pay less for water than most other Californians. Statement of Decision at 27:7-20.

The participation of the Willis Class Counsel in these matters required an extraordinary amount of time and effort by Mr. Kalfayan and KKBS. During the previous four years, KKBS counsel have collectively spent 3,618.50 hours litigating this matter, and their clerks and paralegals have spent another 437.50 hours. Their collective lodestar is $1,558,080 on a historical lodestar basis and $2,143,340 on a Los Angeles based market rate basis. *See* Exhibit 12 to the NOL. Further, they have incurred $105,107.62 in expenses during that time. *See* Exhibit 13 to the NOL. While significant, these costs and fees pale in comparison to the value of the water rights transferred to the

[6] Public Water Suppliers' Case Management Conference Statement, Exhibit 8 to the NOL.

Settling Parties under the physical solution, which are worth over $1 billion during the next twenty years alone.

III. ARGUMENT

A fee award is appropriate here under Section 1021.5 of the Code of Civil Procedure, which provides:

> 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 if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

A. THIS MATTER SATISFIES THE CRITERIA FOR A FEE AWARD UNDER CCP SECTION 1021.5

This case continues to satisfy the criteria for an award of fees under Section 1021.5 of the California Code of Civil Procedure and such an award should be entered against the PWS and/or the overlying landowners who received a pumping allocation in the final judgment. Specifically, (a) the action has resulted in the enforcement of an important right affecting a large group of people as well as the public interest; (b) the action has conferred a significant benefit on a large class of persons; (c) the necessity and financial burden of private enforcement are such as to make a fee award appropriate; and (d) there is no pecuniary recovery out of which fees can be paid. *See generally Graham v. DaimlerChrysler*, 34 Cal. 4th 553 (2004). The Court so found that each of these elements existed when it ordered the PWS to pay attorney's fees to the Willis Class in 2011. See Order After Hearing, Exhibit 5 to the NOL. The same is true today.

1. The Class Is a Prevailing Party For Purposes of Section 1021.5.

First, the Willis Class was a "prevailing party" pursuant to Section 1021.5. A pragmatic test determines a "prevailing party" under Section 1021.5. Under the test, a key factor is the impact of the action rather than on the manner in which the action is resolved. *Graham v DaimlerChrysler Corp.* (2004) 34 Cal. 4th 553, 565. A plaintiff is a "prevailing party" if it has obtained some relief from "benchmark conditions." The appropriate benchmarks…are (a) the situation immediately prior to the commencement of the suit, and (b) the situation today, and the role if any played by the litigation in effecting any changes between the two. "With the condition taken as a benchmark, inquiry may then turn to whether as a quite practical matter the outcome…is one to which the fee

claimant's efforts contributed in a significant way..." *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 Cal.3d 668, 685.

The benchmark situation prior to the entry of the current judgment was that the Basin was in overdraft, with deleterious consequences to all landowners in the area, including the members of the Class. By contrast, the Court explained that entry of the present judgment "limits groundwater pumping to the safe yield, protects the Basin long-term, and is fair and equitable to all parties. . . . It severely reduces groundwater pumping, provides management structure that will protect the Basin, balances the long-term groundwater supply and demand, and limits future pumping by management rules that are fair, equitable, necessary and equally applied to all overlying landowners." Statement of Decision at 16:3-8. Without the active participation of the Willis Class, however, the Court could not have ordered such a comprehensive physical solution.

Moreover, the Willis Class obtained particularized benefits under the Physical Solution as well. The Non-Settling parties that defaulted lost their water rights to the PWS through prescription. Statement of Decision at 4:7-8:22. By contrast, through the concerted efforts of the Willis Class Counsel which avoided a default, the Willis Class members did not similarly lose their rights through prescription; both the PWS and this Court concur that the Willis Class maintained correlative rights. Statement of Decision at 25:1-27:28.

Further, under the Physical Solution entered by this Court, the defaulting parties have no water rights whatsoever; by contrast, the Physical Solution and the judgment entered by this Court not only provide for particularized remedies for the Willis Class, *see* Physical Solution at ¶ 5.1.2, but also entitle the Willis Class to pump groundwater from the Basin under specified conditions. As the Court explained: "Willis Class members will have the opportunity to prove a claim of right to the Court (Physical Solution, ¶5.1.10) or, like all other pumpers in the Basin, apply to the Water Master for new groundwater production. (¶18.5.13) Thus, the Willis Class' correlative rights are more than fairly protected by the Physical Solution." Statement of Decision at 27:3-8. By contrast, the non-settling parties other than the Willis Class have no possible claim of right, having lost all such rights via prescription, and cannot obtain new groundwater production entitlements. Statement of Decision at 4:7-8:22.

It is true, of course, that the Willis Class did not obtain all the relief that they requested. But a party need not obtain the "primary" or "central" relief sought, see *Lyons v Chinese Hosp Ass'n*

(2006) 136 Cal.App.4th 1331), in order to be entitled to fees under Section 1021.5. A party may instead be deemed to have prevailed so long as results are achieved by judgment, by settlement, or even by the voluntary corrective action of the defendants, as long as the corrective action was attributable to the lawsuit and resulted in a benefit to the party. See, *e.g.*, *Tipton-Whittingham v City of Los Angeles* (2004) 34 Cal.4th 604, 608.

The Willis Class satisfies this standard. The parties could not have reached a physical solution without the participation of the Willis Class as a party. The Court could not have entered a judgment without the participation of the Willis Class. The Willis Class efforts contributed in a significant way to the outcome of the adjudication; thus, the Willis Class is a "prevailing party" for purposes of Section 1021.5. The terms of this Court's judgment reflect this practical reality as well. Other parties lost the right to pump through prescription; the Willis Class did not. Under the judgment, other parties have no correlative rights; the Willis Class retained such rights. *See* Physical Solution at ¶ 5.1.2.

Not only does the Willis Class satisfy the "prevailing party" prong of Section 1021.5 for the reasons discussed above, but for an additional reason. As previously discussed, Willis Class Counsel was required to appear and defend the interests of the Class, not only pursuant to the ethical obligations imposed upon him when this Court appointed him as counsel for the Class, but also as a result of this Court's case management orders. The efforts of Willis Class Counsel were thus not only legally compelled, but also materially advanced this action.

It has been acknowledged that "a prospective private attorney general should not have to rely on the prospect that the court will do the right thing without opposition". *Hull v Rossi* (1993) Cal.App.4th 1763, 1768. For this reason, a party may be awarded fees as the successful party, even if he or she obtains no relief, if the principle on which the lawsuit was brought is vindicated. *Harbor v Deukmejian* (1987) 43 Cal.3d 1078, 1103. Here, a judgment was entered resolving several coordinated and consolidated lawsuits. A primary goal of the judgment was to protect the Basin over the long run through a comprehensive adjudication of the Basin's groundwater rights. The efforts of Willis Class Counsel in connection with the entry of this judgment thus satisfy the requirements of Section 1021.5.

This Court entered a judgment that it found "more than fairly protects" the correlative rights of the Willis Class, Statement of Decision at 27:7-20, and in which "the Court therefore finds that the

Willis Class members have an overlying right that is to be exercised in accordance with the Physical Solution herein." Statement of Decision at 16:22-23. Through its participation in the present action, the Willis Class sought to protect and enforce its correlative rights and to protect the Basin. Without its participation, there would be no Physical Solution, and certainly not the one entered by this Court. The Willis Class thus satisfies the "prevailing party" prong of Section 1021.5.

2. The Action Has Resulted in the Enforcement of an Important Right.

There is no question that the adjudication resulted in a Physical Solution that enforces important public rights. "[T]he Court finds that the Physical Solution is required and appropriate under the unique facts of the Basin. The Physical Solution resolves all groundwater issues in the Basin and provides for a sustainable groundwater supply for all parties now and in the future. The Physical Solution addresses all parties' rights to produce and store groundwater in the Basin while furthering the mandates of the State Constitution and the water policy of the State of California. The Court finds that the Physical Solution is reasonable, fair and beneficial as to all parties, and serves the public interest." Statement of Decision at 28:11-18.

This action has resulted in the enforcement of important groundwater rights affecting a large group of persons. It cannot reasonably be controverted that landowners' ability to make use of the groundwater under their properties is an important right, particularly in an arid environment like the Basin. Moreover, the California Constitution declares the public interest in the proper use of the State's water resources. Absent the involvement of the Class, a comprehensive adjudication of the Basin would not have been possible. Thus, Mr. Estrada and his counsel have not only assisted in the protection of the rights of the 65,000 Class members, their continuing involvement in the litigation has facilitated a resolution of this large Basin's problems.

The California Courts have consistently concluded that cases less significant than this one resulted in the enforcement of an important right affecting the public interest and hence justify a fee award under Section 1021.5. *See, e.g., Graham*, 34 Cal. 4th at 156 ("It is well settled that attorney fees under section 1021.5 may be awarded for consumer class actions benefitting a large number of people."); *Friends of the Trails v. Blasius,* 78 Cal. App. 4th 810 (2000) (fees awarded in case enforcing common law right to easement for public trail); *Beasley v. Wells Fargo Bank,* 235 Cal. App. 3d 1407 (1991) (action challenging credit card overcharges satisfied requirements for fee award). If the preservation of an easement for a trail is enough to warrant a fee award, certainly such an award is warranted here where an entire groundwater basin has been protected.

3. The Case Has Conferred a Significant Benefit on a Large Class of Persons.

The Physical Solution resulting from the litigation has unquestionably conferred a significant benefit on the Basin. In *Graham, supra,* there were fewer than 1,000 California purchasers of the trucks at issue. This case involves hundreds of groundwater users and tens of thousands of landowners, including a class of over 65,000 landowners. There is no doubt that the comprehensive physical solution has advanced the long-term protection of the Basin to the significant benefit of a large class of persons.

4. The Necessity and Financial Burden of Private Enforcement.

The requirements of necessity and financial burden of private enforcement for an award of fees under Section 1021.5 are also satisfied here. This element involves two issues: whether private enforcement was necessary and whether the financial burdens of private enforcement warrant an award of fees to the plaintiffs.

Both elements are satisfied in this case. It is clear that private enforcement was necessary, given the fact that no one else stepped to the plate to represent the interests of the non-pumping small landowners.[7] *See City of Santa Monica v. Stewart,* (2005) 126 Cal. App. 4th 43; *City of Sacramento v. Drew* (1989) 207 Cal. App. 3d 1287. As discussed *supra*, the Court would have been categorically unable to adopt the Physical Solution unless it was able to adjudicate the rights of all parties in the Basin. Private enforcement was accordingly compelled.

As for the financial burden of private enforcement, the governing standard is whether the members of the Willis Class "had an individual stake that was out of proportion to the costs of the litigation." *Citizens against Rent Control v. City of Berkeley* (1986) 181 Cal. App. 3d 213, 231; *City of Sacramento, supra*. That standard is easily met here. The original Class Representative, Rebecca Lee Willis, owned ten acres of land. Although very significant to her, such a plot could not possibly justify the expense involved in this complex and protracted litigation. Indeed, many larger landowners have joined or remained in the Willis Class because of the burdens and expense of getting involved in this complicated case. As was the case with Rebecca Willis, the costs of the litigation were out of proportion to the stake of her successor as Class Representative, Mr. Estrada. As with the Class Representatives, the financial burden on each the individual 65,000 non-pumping landowners of representing themselves in this adjudication was clearly out of proportion to their stake as individual landowners. This requirement of Section 1021.5 is thus satisfied as well.

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[7] Indeed, the Public Water Suppliers initially suggested that the State of California represent the dormant landowner Class, but the State refused to take on that burden.

5. The Court Should Award Fees Here Under § 1021.5.

As discussed above, the various criteria justifying a fee award under Section 1021.5 are met by the Willis Class. Further, although the statute is worded in discretionary terms ("a court *may* award attorneys' fees"), the case law is clear that, where the statutory criteria are met, fees *should* be awarded absent special circumstances that mandate a different result. *See Serrano v. Unruh,* 32 Cal. 3d 621, 633 (1982) (fees should be awarded except where "special circumstances would render such an award unjust"); *City of Sacramento v. Drew,* 207 Cal. App. 3d 1287, 1297 n.3 (1989) (no discretion to deny a fee award if criteria are met); *Schmid v. Lovette,* 154 Cal. App. 3d 466 (1984) (defendant's good faith belief that it was complying with law is not a basis to deny or reduce a fee award).

B. COUNSEL ARE ENTITLED TO A SUBSTANTIAL MULTIPLIER OF THEIR LODESTAR IN THIS CASE

1. The Lodestar Approach is the Proper Means to Determine Counsel's Fees.

Where, as here, attorney's fees are not paid from a common fund, the lodestar method, rather than the "percentage of recovery method," is the appropriate manner to determine the reasonableness of the fee. The lodestar method is also fitting because the benefit bestowed on the class cannot be easily quantified. *See Dunk, supra,* 48 Cal.App.4th at 1809 ("common fund" is useful only when the value of the settlement is easily determined.)

The lodestar method is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. *In re Consumer Privacy Cases* 175 Cal.App.4th at 556 (citations omitted); *see also Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322. "Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative 'multiplier' to take into account a variety of other facts, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented." *In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1052 (citations omitted). Regardless of the method utilized, the goal is to award a reasonable fee to compensate counsel for their efforts. *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1270.

2. Counsel's Lodestar is Reasonable Given the Complexity of the Case.

Plaintiff's Counsel's lodestar is $1,558,080 on historical lodestar basis and $2,143,340, based on prevailing market rates in Los Angeles. (Kalfayan Fee Decl. ¶21 & Summary of Lodestar for KKBS, Exhibit 12 to the NOL). Total hours incurred were 3,618.50 hours.

The number of hours was determined by referencing time records contemporaneously maintained by the attorneys during their prosecution of this case. These hours were reasonably and appropriately devoted to this litigation during the past four years, particularly in light of the complexity of the issues and the number of parties.

After the Court's entry of the Case Management Order, counsel have actively defended the 2011 Willis Class Judgment and prosecuted the action, as detailed in the Kalfayan Fee Decl. Those efforts involved attending numerous hearings, mostly in Los Angeles but also in San Jose on several occasions; attending depositions, mostly in Santa Barbara, but also in Sacramento; conducting document inspections from expert witnesses; reviewing hundreds of documents, many of them highly technical materials relating to the hydrology and geology of the Antelope Valley Basin (the "Basin"); preparing and serving numerous documents, including briefing at least fifteen (15) significant law and motion matters; doing the substantial legal and factual research necessary to properly prepare those documents; reviewing the hundreds of filings made by other parties, including frequently reviewing cases and other background materials that were cited; having hundreds of communications with other counsel and expert consultants regarding the technical, economic, and legal issues raised by this matter, including settlement discussions; having numerous conversations and e-mail exchanges with many hundreds of the approximately 65,000 class members; and actively participating in 10 days of trial. Given the magnitude of these efforts, counsel's expenditure of time has been reasonable.

Although the plaintiff has the burden of proving the reasonable hourly rate in determining the appropriate lodestar, "the moving party may satisfy its burden through its own affidavits, without additional evidence." *Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 902-904 (approving hourly rate based on evidence that attorney had earned the same hourly rate in similar matters.) Counsel's rates here are well within the norms for rates charged by other lawyers in the community for comparable work.

Plaintiff's Counsel's historical lodestar was based on hourly rates of $500 per hour for partner Ralph B. Kalfayan, $500 for Counsel, Lynne Brennan, and lesser amounts for the associates who worked on the case, including $450 per hour for Mr. James. These are the hourly rates the firm charges their hourly-rate clients. (Kalfayan Fee Decl. ¶21.) The firm handles complex securities, antitrust, and consumer litigation, and it has achieved recoveries of more than $500 million in the

various actions it has handled over the past 20 years. Their rates have been approved by a number of Federal and State courts in recent years, including by this Court.

Although Counsel's billing rates are reasonable, generally, an award of attorneys' fee is based upon the prevailing market rates for comparable work in the community where the court is located. *Davis v. Mason County* (9th Cir. 1991) 927 F.2d 1473, 1488. The determination of "market rate" is generally based on the rates prevalent in the community where the court is located. *Altavion, Inc. v. Konica Minolta Sys. Lab., Inc.* (2014) 226 CA4th 26, 71 (the forum rate is "default" rate, even if rates in counsel's nonforum "home" area are lower); *MBNA Am. Bank v. Gorman* (2006) 147 CA4th Supp 1, 13; *Camacho v. Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 979 (reversing award based on rates from nonforum jurisdictions). The prevailing market rate in Los Angeles is over $700 per hour for attorneys with over 20 years of experience. In view of the foregoing, an award of attorneys' fees in this case should be based upon the prevailing rate in Los Angeles. See NLJ Billing Survey attached as Exhibit 15 to the NOL.

In brief, counsel's lodestar is reasonable given the nature and complexity of this litigation and the efforts involved.

2. The Lodestar Multiplier Requested by Plaintiff's Counsel is Reasonable.

California law recognizes the appropriateness of "risk multipliers" in enhancing fee awards under Section 1021.5 (and other statutes). *Ketchum v. Moses,* 24 Cal. 4th 1122 (2001) (expressly rejecting federal rule and holding that contingent risk is a factor that the court should consider in determining an appropriate fee award); *see Mangold, supra,* 67 F.3d at 1479 (applying California law and upholding risk multiple). Obviously, this case raised complex legal issues and involved substantial risks. A risk multiplier is warranted by applicable California law. Moreover, the Willis Class attorneys are entitled to compensation for the delay in payment, particularly after working for over four years without payment. Plaintiff respectfully requests a modest multiple of 1.5 times counsel's lodestar.

The Supreme Court explained the rationale for a contingency multiplier in *Ketchum v. Moses* (2001) 24 Cal.4th 1122:

> The economic rationale for fee enhancement in contingency cases has been explained as follows: "A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans." (Posner, Economic

> *1133 Analysis of Law (4th ed.1992) pp. 534, 567.) "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases."

Id. at 1133; *see also Rade v. Thrasher* (1962) 57 Cal.2d 244, 253 ("'[a] contingent fee contract, since it involves a gamble on the result, may properly provide for a larger compensation than would otherwise be reasonable.'") (citation omitted); *see also Saltron Bay Marina v. Imperial Irrig. Dist.* (1985) 172 Cal.App.3d 914, 955 ("difficulty or contingent nature of the litigation is a relevant factor in determining a reasonable attorney fee award").

In determining an appropriate multiplier, the courts consider factors such as the quality of the representation, the novelty and complexity of the issues, and the results obtained. *See In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1052. This case has indisputably involved novel and challenging issues. Plaintiff's Counsel undertook a high risk that this challenging case could be successfully prosecuted without any promise or guarantee of payment. They spent their own money for the benefit of the Class. Given the investment made by counsel, the risks of the litigation and the delay in obtaining compensation, Counsel deserve the modest multiplier they seek.

3. Public Policy Favors an Award of a Reasonable Fee to Encourage Competent Counsel.

Public policy also supports a substantial fee award in this matter. Awarding a fair fee is favored because it ensures that competent lawyers will be willing to take on high-risk cases, such as this. *See Estate of Stauffer* (1959) 53 Cal.2d 124, 132 (stating that purpose of awarding fees in representative actions is to encourage counsel to undertake and diligently prosecute the action.) The complexity and societal importance required for this type of representation calls for the most able counsel obtainable. This Court will undoubtedly recall the difficulties in getting counsel to represent the classes in this risky matter. Fee awards should be sufficient to encourage capable attorneys to represent plaintiffs on a contingent basis in this type of complex litigation. Awarding counsel a multiplier of 1.5 times their lodestar will help ensure that competent counsel will be willing to take on such difficult matters.

C. PLAINTIFF'S REQUEST FOR REIMBURSEMENT OF EXPENSES IS REASONABLE

As set forth in the Kalfayan Fee Decl, Plaintiff's Counsel have incurred costs of $105,107.62 in connection with their prosecution of this matter. Counsel seeks an award of those costs. Kalfayan Fee Decl at ¶12. The expenses incurred were reasonable and necessary to the prosecution of the

litigation. (Id.) The court required an evidentiary hearing for a prove-up of the physical solution. Class counsel had no choice but to retain experts in order to oppose expert evidence and present its own evidence in response to the evidence submitted by the settling parties.

D. PLAINTIFF'S REQUEST FOR INCENTIVE AWARD IS REASONABLE

Incentive payments are often paid to the lead plaintiffs in class actions in recognition of the results achieved, and the time, risk and expense incurred in assuming the role of lead plaintiff. *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp.294, 299 (awarding $50,000); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.* (S.D. Ohio 1991) 137 F.R.D. 240, 250 (awarding $50,000 to each of six plaintiffs); *In re Dun & Credit Services Customer Lit.* (S.D. Ohio 1990) 130 F.R.D. 366, 374-376 (awarding $35,000 - $55,000 in payments). Here, Class Representative Estrada seeks an incentive award of $5,000 to compensate him in part for the efforts and expenses he has incurred in this matter.

Class Representative Estrada has been in regular communication with Willis Class' Counsel about the status of the case over the years, has testified in Court at the prove-up hearing, and reviewed and commented on various documents. Mr. Estrada was integral in helping Class Counsel analyze the claims and the evidence. He met with Class Counsel frequently, prepared for deposition and trial testimony, searched for and produced documents to forward the litigation, requested and received reports from Class Counsel, communicated with Class Counsel and monitored the status of the case.

Without a lead plaintiff who demonstrated the courage and willingness to challenge Defendants' conduct, no benefits for the Class would have been obtained. A modest incentive award of $5,000 is warranted. Plaintiff's Counsel recognize that there is no statutory authority for assessing such an incentive award against an opposing party and will pay the award to Mr. Estrada from their attorneys' fee award, if approved by the Court.

E. APPORTIONMENT

The PWS may likely request apportionment of the attorneys' fees and cost if the Court is inclined to grant an award. The Court will recall that on March 9, 2011, in connection with the Willis Class' original motion for attorneys' fees and costs, the PWS requested an apportionment of the fees costs among all producing landowners and public parties, except the United States and the Wood Class. (See D40's Brief Re: Equitable Apportionment attached as Exhibit 9 to the NOL).

The Willis Class is not opposed to such an apportionment. There were 140 stipulating parties, PWS and pumping landowners, and other entities who received substantial benefits under the physical solution and judgment entered by this Court.[8] Those rights have incredible value: a permanent water right of one acre-foot per year has a value of approximately $16,000, so the allocation of the native safe yield of the Basin distributed over a billion dollars of net worth. Moreover, for most of the Stipulating Parties, this billion-dollar wealth transfer also consists of transferable water rights: they need not even use the water, but can instead sell it to others.

It is fair and reasonable that those who benefitted from this judgment should shoulder the relatively minimal costs associated with the litigation that necessarily brought all parties (and classes) together for a comprehensive adjudication of these rights. Therefore, it would be fair and reasonable to assess all parties who obtained water rights under the Physical Solution, with the exception of the federal government and the Wood Class, a pro-rata share of the cost and fee award entered on behalf of the Willis Class. The Stipulating Parties, including all of such parties who were not PWS, were adverse to the Willis Class as a result of a physical solution that allocated the entirety of the water rights in the Basin to the Stipulating Parties. The Willis Class at no time waived its overlying correlative rights; therefore, the Class was adverse to all of the Stipulating Parties and there is no barrier to the allocation of a Section 1021.5 award against the non-Public Water Suppliers.

It is true that in the Willis Class Judgment, the Willis Class agreed to not seek a further fee award against the Public Water Suppliers unless one or more of three conditions were satisfied. Three of those conditions are satisfied here. With respect to an allocation of a fee award against the PWS, the settlement agreement provides that "Willis Class Counsel agree that they will not seek any attorneys' fees and/or costs from Settling Defendants for any efforts Willis Class Counsel undertake after the Court's entry of Final Judgment approving the Settlement, except with respect to the following: (a) any reasonable and appropriate efforts by Willis Class Counsel to enforce the terms of this Stipulation against Settling Defendants in the event Settling Defendants fail to comply with a provision of this Stipulation; (b) any reasonable and appropriate efforts by Willis Class Counsel to defend against any new or additional claims or causes of action asserted by Settling Defendants against the Willis Class in pleadings or motions filed in the Consolidated Actions; (c)

[8] These parties also actively participated alongside the Willis Class. For example, an attorney for a producing landowner, Mr. Joyce, cross-examined Willis Class member Kamryn Kamalyan at the hearing. In addition, another attorney for a producing landowner, Mr. Kuhs, cross-examined Willis Class expert Mr. Steve Roach. Further, the stipulating parties frequently conferred regarding their opposition or objections to the Willis Class presentation of evidence.

any reasonable and appropriate efforts by Willis Class Counsel that are undertaken in response to a written Court order stating that, pursuant to this provision, Class counsel may seek additional fees for specified efforts from Settling Defendants pursuant to Code of Civil Procedure section 1021.5." Willis Class Stipulation of Settlement at 17, Exhibit 3 to the NOL. All three paragraphs are applicable here. With respect to paragraph (a), the efforts of the Willis Class were reasonably intended to enforce the terms of the settlement with the PWS; in particular, the agreement by the PWS that the Willis Class in the Willis Class Judgment that the Class members had correlative rights. Concerning paragraph (b), the PWS submitted a motion to the Court requesting approval of a physical solution which modified the rights of the Class to exercise their correlative rights. In regard to paragraph (c), as previously discussed, the participation of the Class in the Phase VI was undertaken pursuant to this Court's case management orders.

The costs and fees awarded to the Willis Class Counsel should be allocated pro rata based upon the water rights obtained by each party under to the Physical Solution. The Willis Class would have no objection to the recovery of such costs and fees pursuant to a production assessment on water produced by the Settling Parties or to a straight pro rata assessment against each of the Settling Parties. But however accomplished, those parties who benefitted from the water rights they obtained under the Physical Solution should be proportionately responsible for the costs and fees incurred by the Willis Class Counsel in this action.

IV. CONCLUSION

For the forgoing reasons, Plaintiff respectfully requests that the Court award the fees, expense reimbursements and incentive payments being requested.

Dated: January 22, 2016

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