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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

REPLY BRIEF BY WILLIS CLASS TO THE OPPOSITION FILED BY PUBLIC WATER SUPPLIERS TO SECOND SUPPLEMENTAL MOTION FOR ATTORNEYS FEES, COSTS, AND INCENTIVE AWARD

Date: April 1, 2016
Time: 1:30 p.m.
Dept.: 1
Place: San Jose Superior Court
191 N. First Street
San Jose, CA 95113
Judge: Hon. Jack Komar

I. INTRODUCTION

Over the last four years, counsel for the Willis Class has worked tirelessly to enforce the rights of the Willis Class under Willis Class Judgment, and to comply with the Court's Case Management Orders ("CMOs") in opposing the proposed physical solution and the stipulating parties' groundwater allocations. On March 4, 2015, over one hundred stipulating parties -- including twelve public water suppliers ("PWS"), various governmental entities, and numerous private parties submitted a Stipulation for Entry of Judgment and Physical Solution (the "Judgment" or "SPPS"). Class Counsel participated, as required, in the litigation that preceded and that followed the filing of the Stipulation, and spent a substantial amount of time (3,618.50 hours) and incurred significant costs ($105,107.62) in this action.[1] This work included, among other things, preparation of dozens of law and motion matters, preparation of several opposition briefs, multiple status conferences, settlement conferences, engagement of experts, expert depositions, substantial document review, and over two weeks of trial. Class Counsel performed this work under its enforcement obligations of the Willis Class Judgment and its obligations under the CMOs.

The PWS oppose the fee motion and suggest Class Counsel be awarded nothing at all for these efforts. In their opposition brief, the PWS argue that the Willis Class Counsel is not entitled to recover fees and expenses from the PWS because: (1) such recovery is prohibited under the settlement between the Willis Class and the PWS; and (2) the Willis Class has not met its burden under Code of Civil Procedure Code Section 1021.5. Neither of these arguments are persuasive.

II. ALL OF THE ELEMENTS OF CCP 1021.5 HAVE BEEN MET

The PWS opposition does not dispute three of the requisite elements of CCP Section 1021.5: (a) whether a significant benefit was conferred on the general public or a large class of persons; (b) whether the necessity and financial burden of private enforcement are such as to make the award

[1] The Willis Class incorporates as though fully set forth herein the Reply brief to the Overliers Joint Opposition.

appropriate; or (c) whether the action has resulted in the enforcement of an important right affecting public interest. Those elements are not in dispute. Rather, the PWS opposition focuses instead on whether the Willis Class was a "successful party." The PWS advance three arguments regarding lack of success: (A) no legal adversity between the Willis Class and the PWS; (B) the law and motion work and trial did not change the terms of the SPPS; and, (C) the Court found the SPPS consistent with the Willis Judgment and therefore subsequent participation by the Willis Class was unnecessary. The PWS are mistaken.

A. The parties were adverse to one another

The Willis Class and the PWS were always adverse; they were opposing parties in the lawsuit between them. Moreover, the SPPS created further adversity between the Willis Class and the PWS, as the SPPS proposed to allocate the entire native safe yield to the PWS and the other Stipulating Parties with no allocation to the Willis Class. The Willis Class and the PWS were directly and materially adverse in this comprehensive, zero-sum adjudication.

The adversity between the PWS and the Willis Class was also reflected in the conduct of the actual litigation. After years of contested law and motion matters and fourteen (14) days of trial, it is hard to believe that the PWS can now argue lack of adversity. Indeed, almost every motion filed by the Class was opposed by the PWS and/or other stipulating parties. Every witness proffered by the Class was cross-examined by the PWS or the Overliers. Every item of evidence offered by the class was objected to by the PWS or the Overliers. No reasonable lawyer participating in these proceedings would imagine that the Willis Class and the PWS were not adverse to one another.

It is true that one sentence from a Willis Class reply brief filed on December 15, 2014 stated that "the interests of the Willis Class Members are in fact completely aligned" with the PWS. But while this fact may have been true for a short period after the Willis Class Judgment, that relationship completely changed once the PWS stipulated to the entry of the SPPS. By entering into the

Stipulation for entry of the Judgment and Physical Solution, the PWS acted to modify the Willis Class' right to a portion of the native safe yield free of replacement assessment. Those were the issues that were debated, argued, and presented to the Court for resolution. It cannot be said now that the parties were not adverse to one another. They were.

B. The Class is a "prevailing" or successful party under CCP Section 1021.5

The PWS argue that the Willis Class was not a successful or "prevailing" party under Section 1021.5 and thus is not entitled to attorneys' fees. As presented in the motion for an award of fees, the definition of "prevailing party" is pragmatic and flexible and depends on the impact of the action rather than on the manner in which it 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 benchmark conditions were identified in *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, at 685, which states:

> 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 on to which the fee claimant's efforts contributed in a significant way…

In this case, the benchmark situation prior to the commencement of the adjudication was that the Basin was in overdraft and all properties overlying the Basin had unrestricted rights to pump groundwater from the Basin. Today, the situation in the Basin has vastly improved as a result of the litigation. As the Court noted on page 16, lines 4 to 9 of its Statement of Decision (Exh. 11 to the NOL),

> …the Court must impose a physical solution that limits groundwater pumping to the safe yield, protects the Basin long-term, and is fair and equitable to all parties. The Court's Physical Solution meets these requirements. 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.

Without the efforts and participation of the Willis Class, the Court could not have ordered the physical solution. Further, in order to be a "prevailing party," a party need not obtain the "primary" or "central" relief sought (*Lyons v Chinese Hosp Ass'n* (2006) 136 Cal.App.4th 1331), nor even a "judgment" (*Wohlgemuth v Caterpillar Inc.* (2012) 207 Cal.App.4th 1242, 1259). A party may be deemed to have prevailed if the 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. See, *e.g., Tipton-Whittingham v City of Los Angeles* (2004) 34 Cal.4th 604, 608. The parties could not have reached a physical solution without the participation of the Willis Class as a party in the litigation. The Court could not have entered a judgment without the participation of the Willis Class. Even though the Court ruled against various motions and arguments of the 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.

C. Willis Class participation was necessary

Like the PWS, the Overliers argue in their Joint Opposition that the participation of the Willis Class in the litigation was not necessary. For brevity, the reasons why the Willis Class participation was necessary will not be repeated in this brief. The companion reply brief filed in connection with the Overliers Joint Opposition addresses this point and is incorporated as though set forth fully herein.

III. THE WILLIS STIPULATION OF SETTLEMENT IS NOT AN OBSTACLE TO AN AWARD OF FEES AND COSTS

Three (3) circumstances address Class Counsel's ability to seek attorneys' fees and costs from the PWS under paragraph VIII.D of the Willis Class Stipulation of Settlement (Exh. 3 to the NOL):

> (a) Any reasonable and appropriate efforts by Willis Class Counsel to enforcement 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) 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.

Initially, it should be emphasized that the existence of any one of the circumstances on this list is sufficient to permit Class Counsel to seek fees and costs from the PWS. The PWS argue that the work of Class Counsel is not enforcement work under subpart (a) of the Willis Class Settlement. Despite the PWS' contentions, however, all of Class Counsel's work was enforcement under the Willis Judgment and compliance work related to the Court's CMOs.

The Willis Class Judgment expressly preserved the correlative water rights of the Willis Class to the native safe yield free of replacement assessment and extinguished the claims of the PWS to prescription against the Willis Class. In the Willis Class Judgment, the PWS promised and guaranteed not to impair or take a position or enter into any agreement that is inconsistent with the exercise of the Willis Class' right to produce the correlative share of the native safe yield free of replacement assessment. The Willis Class Stipulation of Settlement (Exh. 3 to the NOL) provides:

> The Settling Parties agree that the Willis Class Members have an Overlying Right to a correlative share to produce up to 85% of the Basin's Federally Adjusted Native Safe Yield *free of Replacement Assessment*. **The Settling Defendants will not take any positions or enter into any agreements that are inconsistent with the exercise of the Willis Class Members' right to produce and use their correlative share of 85% of the Basin's Federally Adjusted Native Safe Yield.** Section IV.D.2**.**
>
> The Settling Parties agree to be part of such a Physical Solution to the extent it is consistent with the terms of this Stipulation…Section V.B.

Despite their covenant in the Willis Class Judgement, the PWS stipulated to the entry of an SPPS which directly modified the rights of the Class to a portion of the Federally Adjusted Native Safe Yield free of replacement assessment. *See* paragraph 9.2.2 of the SPPS (Exh. 33 to the NOL).

The stipulation by the PWS supported a modification of the Willis Class' exercise of its right to the native safe yield free of replacement assessment and was a violation of subpart (a) because it was a failure by the PWS to comply with the provisions of the Willis Class Stipulation. The PWS' actions (and the Court's CMOs) left the Willis Class and its counsel with no choice but to mount an opposition to the SPPS and to seek to enforce the terms of the Willis Class Settlement.

The PWS' argument assumes that the Court made a preliminary finding that the SPPS was consistent with the Willis Class Judgment prior to the Phase 6 Trial. The assumption is false. The consistency determination was not made by the Court until after the close of evidence in the case. Up until the court made its decision, Class Counsel was enforcing the terms of Willis Class Settlement and complying with the Court's CMOs. This work included opposing the physical solution, opposing the prove-up by the stipulating parties, and proposing alternative physical solutions. Class Counsel moved the Court several times to determine consistency between the Willis Class Judgment and the SPPS. (See, Exh. 23, 29 and 30 to the NOL). The PWS opposed each such motion and argued that the consistency determination was premature and must instead be done after the Phase 6 physical solution trial.[2] The PWS several times suggested that the water rights of the Willis Class be determined in the Phase VI trial. Indeed, the Court made that determination. (Exh. 11 to the NOL at 14:1 – 16:22).

The PWS argue that they never presented new or additional claims or causes of action under subpart (b) of the Willis Class Settlement because the Willis Class agreed to be part of a physical solution and the court ultimately adopted the stipulated proposed physical solution as its own physical solution. This argument reads narrowly the language in subpart (b). Subpart (b) includes efforts expended in defending *additional claims* in pleadings *or motions filed in the Consolidated*

[2] "Now is not the time to hear Willis Class objections...Paragraph 5.1.2 of the Proposed Solution provides, This Judgment is consistent with the Non-Pumper Class Stipulation of Settlement and Judgment…For the Court to make that finding, the Settling Parties will have to establish during the prove-up trial that, contrary to the Willis Class' contentions, the Public Water Suppliers did not breach the Willis Settlement" (Exh. 24 to the NOL).

Actions." For the reasons presented above, the Stipulation for Entry of Judgment and Physical Solution by PWS modifying the Willis Class' right to the native safe yield free of replacement assessment was in effect a motion asserting a new claim against the Willis Class. Moreover, the SPPS raised many other new claims that were adverse to the Willis Class including language related to claims of prescription. Specifically, Section 9.2.1 and 9.2.2 provides: "This Judgment is consistent with the Non-Pumper Class Stipulation of Settlement and Judgment…Evidence presented to the Court demonstrates that Production by one or more Public Water Suppliers satisfies the elements of prescription…" (Exh. 33 to the NOL). The Willis Class contested this provision among many others. The fact that Class Counsel did not prevail in its arguments does not mean that the PWS did not raise the additional claims. Class Counsel had an obligation to review, consider, and oppose those claims. The court's resolution of those claims, in favor or against the Willis Class, does not negate Class Counsel's entitlement to a fee award.

The PWS argue that exception (c) of the Settlement does not apply unless there is a specific written Court order stating that pursuant to the Settlement, Willis Class Counsel may seek additional fees for specified efforts from Settling Defendants pursuant to Code of Civil Procedure 1021.5. The PWS also argue that the Class' participation was not necessary. These arguments are without merit.

First, Class Counsel moved the court for an order under subpart (c) of the Stipulation of Settlement, i.e. an order stating that pursuant to the Settlement, Willis Class Counsel may seek additional fees. (Exh. 18 and 20 to the NOL). The PWS opposed the Willis Class motion and argued that such an order was premature, called for an advisory opinion, and did not apply to the physical solution proceeding. (See Exh. 19 to the NOL). The Court agreed and denied the motion on those specific grounds raised by the PWS. During oral argument the Court said:

> "The court does not render advisory opinions, notwithstanding some of the things I've said here over the years. And one of the things that you're asking for is to – the Court to authorize you to go out and spend attorney's fees. You have an agreement that provides as to what attorney's fees you might seek to recover from your adverse party, but that does

not authorize the court to render an opinion as to the validity of your spending particular time on particular pursuits and then recovering from some other party." (Exh. 21 at page 64 lines 4 to 13 and Exh. 22).

However, the court did recognize that Class Counsel may in the future come back and seek attorneys' fees and costs under this provision. Mr. Dunn, counsel for District 40, agreed:

> The Court: "But I don't understand that the—either the agreement or the law authorizes the Court to preapprove attorney's fees in a situation like this. I mean, it may well be that at some point, depending on what happens with this process, that Mr. Kalfayan is going to come back to the Court and say we sought to enforce our client's rights, we had to do that, it was reasonable under the circumstances, we're entitled to be compensated for that in accordance with the agreement. That's a different issue."
>
> Mr. Dunn: "It's a different issue. It's certainly not before us today. And, again, as I would agree, I don't think—I certainly could not stop, as much as I probably would like to, that motion from coming through. But, no, in all seriousness, that's how—this concept of pre-authorization, it's not—there's a way to deal with this. I don't particularly want to stand here and educate counsel on this issue, but I can safely say that this is not the time or the place to get a pre-authorization. Thank you."
>
> The Court: "Okay. Well, I agree at this point. But, I—I am certainly not denying it with prejudice" (Id at 68:11-28 and 69:1-4)

Second, it cannot be disputed that under the CMO, submitted by the PWS for the court's approval, the Willis Class was a non-stipulating party subject to the Phase 6 physical solution trial proceedings. Willis Class Counsel filed a brief requesting relief or an exemption from the CMO and the Class' participation in a physical solution trial. (See Exh. 16 to the NOL). The PWS opposed. Both Mr. Dunn and Mr. Bunn indicated that the Willis Class should follow the schedule proposed in the CMO by conducting discovery, opposing the physical solution, and opposing the Wood Class settlement. (Exh. 17 to the NOL pages 44- 46). These statements were repeated several times (over many months) by the PWS in their status conference statements.[3] On November 4, 2014, the Court agreed and encouraged Class Counsel to participate in the proceedings.

> The Court: "Well, the issues that are going to come up are with regard to those issued stated in Paragraph 6 of this proposed brief. Obviously the question of

[3] August 8, 2014, after identifying the Willis Class as being a "Non-Settling Party", the PWS CMS said, "A comprehensive determination of the Non-Settling Parties' water rights is necessary for many reasons [first the McCarran Amendment and second the "Court cannot approve a final physical solution without considering the reasonableness of all parties' water rights"] (Exh. 8 to the NOL). See also, Exh. 25 to the NOL, Exh. 27 to the NOL, and Exh. 31 to the NOL.

> prescription, is by the public water supplies against the Willis Class, is not going to come up because that issue has been settled for far as they are concerned. The prove-up by the Stipulating Parties is something that I suspect that Mr. Kalfayan might want to appear and address. Whether he needs to do discovery or not, I would be surprised, but maybe he does. The proof of the claim to produce by the non-stipulating parties, those are third parties and at this point who are not members of the class—of either class or one of the stipulating land owners. Likewise, the default prove ups, I don't think that is anything that Mr. Kalfayan will be concerned about. The prove up of the physical solution might be, because that is going to be something that could impact on his client as well as everybody else that resides in the Antelope Valley Jurisdiction Area and, likewise, the final approval of the Wood Class Settlement." (Exh.17 to the NOL page 41 lines 10-28 and page 42 lines 1-4).

In view of the foregoing, it can be seen that paragraph VIII.D of the Willis Class Stipulation of Settlement, nor any other provision of the Settlement, does not preclude the Willis Class Counsel from seeking an award of attorneys' fees, costs and an incentive award.

IV. THE FEES, COSTS, AND INCENTIVE AWARD ARE REASONABLE

The PWS argue that Willis Class Counsel filed "numerous redundant, unnecessary and unsuccessful motions" as one of the reasons Class Counsel should not be compensated for his time and efforts. However, Rule 3-110(A) and (B) of the Rules of Professional Conduct of the State Bar of California require counsel to "perform legal services with competence" where "competence shall mean to apply (1) diligence, (2) learning and skill, and (3) mental, emotional, and physical ability reasonably necessary for the performance of such service." Attorneys in general, and Class Counsel in particular, must zealously represent the interests of their clients. As previously discussed, Class Counsel believed that the SPPS as offered by the Stipulating Parties, including the PWS, was inconsistent with the Willis Class Judgment. The Court did not decide it was consistent until the Final Judgment was rendered. Under the PWS' argument, Willis Class Counsel should have done nothing in the face of the actions of opposing parties in the prove-up trial proceeding. That was not an available option for Class Counsel. Further, prior to the conclusion of the Phase 6 trial, most if not all, of the motions that Class Counsel filed were denied by the Court without prejudice. This left Counsel with the option of either not refiling the motions or filing them at a later date (which is what Counsel did).

The PWS then argue that Class Counsel attempted to have multiple experts witnesses testify. Notwithstanding the Willis Class' arguments that the trial court impermissibly denied the substantive testimony of expert Rod Smith, the Willis Class was able to present the testimony of expert Dr. Stephen Roach, who testified regarding the expected value decline of Willis Class' properties after the implementation of the SPPS. The PWS' contention that this evidence was unnecessary can only be true if the Willis Class was a stipulating party to the SPPS—which was clearly not the case. The Court admitted and considered the testimony of Mr. Roach during the Phase VI trial.

Finally, the PWS argue that an incentive award is not warranted here because there was no benefit to the class obtained by Mr. Estrada. As the Court will recall, Ms. Willis sold her property. This left 65,000 absent class members without a Class representative. Mr. Estrada stepped forward and devoted his time and energy to this case. He was involved at all stages of the litigation after his appointment by the Court – including trial. His participation was important, necessary, and beneficial.

IV. CONCLUSION

This second supplemental request for attorneys' fees and costs is based upon the continuation of Class Counsel's efforts in defending the interests of the Willis Class. For the same reasons the Court has twice awarded attorneys' fees and costs, this motion should similarly be granted and attorneys' fees, costs and an incentive award be awarded to the Willis Class and against the Public Water Suppliers and the Overlier parties who received a fixed and free production allocation under the Judgment and Physical Solution.

Dated: March 25, 2016

Respectfully submitted,
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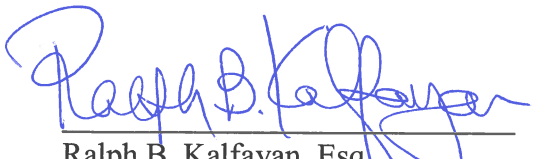

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