COURT OF APPEAL, STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

F075451

ANTELOPE VALLEY GROUNDWATER CASES

Appeal from the Superior Court of Los Angeles

Superior Court No. JCCP4408

Hon. Jack Komar

APPELLANTS' REPLY TO PUBLIC WATER SUPPLIERS' RESPONDENT'S BRIEF

(Willis Class Fee Appeal)

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INTRODUCTION

The sole question in this appeal of the trial court's 2016 Fee Order is whether the trial court erred in denying any attorneys' fees and costs award to Willis' Class Counsel for the significant work performed related to the Phase Six trial of the Antelope Valley Adjudication where the Class's presence was mandated by the trial court's Case Management Order and the participation of the Class was necessary to protect the Class members' groundwater rights and for the trial court to enter a Physical Solution.

The trial court's denial of fees and costs to the Class was error. This Court should reverse the trial court's wholesale denial of Willis Class Counsel's fee petition.

MATERIAL FACTUAL STATEMENTS IN REPLY

Willis Class counsel incurred 3,618.50 hours and a collective lodestar of $2,143,340 and $105,107.62 of costs to defend the interests of the Willis class in the Phase 6 trial proceedings. (1AA248:26-28.)

The Public Water Suppliers ("Purveyors") do not dispute the work of Class counsel. In fact, they confirm that:

(1) "The trial court scheduled a final phase of trial for all remaining unresolved groundwater rights claims" (Purveyors Response Brief in the Main Appeal ("PRB Main") p. 44);

(2) Class Counsel (a) "deposed several expert witnesses offered by the settling parties proposing a physical solution," (b) "defended three depositions of Willis Class experts." (c) filed motions, and (d) called their own witnesses at trial (PRB Main at. p.45); and

(3) the language of the trial court's Statement of Decision recognized the presence and obligation of Class counsel to appear at trial. (PRB Main p.88, citing 176JA157484) (REPLYEXCT2348:7-9 ["Because the Willis Class objected to the Physical Solution, it is entitled to have its rights tried as if there were no stipulated physical solution"]) (176JA157472:7-9.)

Therefore, the reasonableness of the work is not in dispute. The sole basis for the Purveyors' opposition is their contention that the Class is simply not entitled to any fees and costs.

ARGUMENT

I. THE TRIAL COURT'S RESORT TO A WRONG STANDARD IN ADDRESSING THE FEE PETITION WAS AN ABUSE OF DISCRETION REQUIRING REVERSAL.

The Willis Class Settlement Agreement with the Purveyors ("Willis Class Settlement") set forth the following precise and

carefully crafted conditions under which Class counsel could pursue attorneys' fees after entry of the 2011 Judgment:

> (a) any reasonable and appropriate efforts by Willis Class Counsel to enforce the terms of the 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 Action;
>
> (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;
>
> (d) any reasonable and appropriate efforts by Willis Class Counsel that are undertaken in response to a written request by Settling Defendants executed by counsel for all Settling Defendants that Class Counsel participate in future aspects of the Consolidated Actions (e.g., the negotiation of a
> Physical Solution); or,
>
> (e) any reasonable and appropriate efforts that the Willis Class Counsel render to defend a fee award in their favor in the event the Settling Defendants appeal such a fee award and the Court of Appeal affirms the fee award in the amount of 75 percent or more of the fees awarded by the Superior Court. Willis Class Counsel remain free to seek an award of fees from other parties to the litigation.

(3REPLYEXCT2548:8-24)(176JA157691:8-24.)

Instead of applying those standards, the trial court applied a wholly different set of criteria to deny the Class's petition for attorneys' fees and costs after the Phase Six trial, stating:

> [B]y the terms of the stipulation, the class agreed not to seek further fees or costs from the [Purveyors] except under three very specific circumstances ... none of which are applicable here:
>
> > a) If counsel was ordered to participate in the proceedings;
> >
> > b) If counsel engaged in reasonable efforts to defend against new claims or causes of action made against the class;
> >
> > c) Enforcement of a public right under CCP 1021.5.

(3AA2077,¶10 [quoted in Willis Fee AOB, p. 40].)

A. The Court's 2016 Fee Order Relied on Standards That Were Different Than The Governing Legal Standards Set Forth In The 2011 Judgment.

The trial court failed to apply the carefully-negotiated criteria under which Willis' Class counsel could seek fees and costs, as descried above. (3REPLYEXCT2548:8-24)(176JA157691:8-24.) When Willis' Class Counsel filed their fee petition to account for the work done related to the Phase Six trial, the court inexplicably

abandoned these criteria and instead fashioned a whole new set of standards and denied all fees and costs based on its interpretation of a new inapplicable set of standards. (3AA2077 2078-2079.)

Purveyors do not address this decisive argument in their brief. This omission is fatal because the court's use of the wrong standard is abuse of discretion *per se* reversable error. (*Conservatorship of Bower v. Bower* (2016) 247 Cal.App.4th 495, 506 ["getting the legal standard wrong means that a subsequent decision becomes *itself* a *per se* abuse of discretion even if, assuming the wrong standard, the decision is otherwise reasonable"]; *see Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 634 ["reversal *is required* where there is no reasonable basis for the ruling *or* when the trial court has applied the wrong test to determine if the statutory requirements were satisfied"]; *Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1272 ["A trial court's application of the wrong legal standard is an abuse of discretion"].

Here, the trial court's use of the wrong standard is obvious by even a cursory comparison of the 2011 Judgment's itemization of fee award standards for future work and the 2016 Fee Order denying Willis Class Counsel's fee petition.

As discussed in Appellants' Opening Brief, the trial court wholly ignored the first condition (criteria (a)) proclaimed in the 2011 Judgment under which counsel could seek fees and costs for future work. It is not even mentioned in the trial court's order. That criteria allowed for an award of fees for any subsequent work "to enforce the terms of the Stipulation against Settling Defendants in the event Settling Defendants fail to comply with a provision of this Stipulation" (3REPLYEXCT2548:8-10) (176JA 157691:8-10.) Purveyors – by stipulating and later advocating at a prove-up trial for a Physical Solution that contravene the agreed to terms of the 2011 Wilis Class Settlement – "failed to comply" with their promise to "not take any positions or enter into any agreements that are inconsistent with the Willis Class Members' Overlying Right to produce and use their correlative share of 85% of the Basin's Federally Adjusted Native Safe Yield free of any Replacement Assessment." (3REPLYEXCT2541:13-16; *see also*, Appellants' Reply Brief to Purveyor Respondents' Brief to the Main Appeal [Brief 2 of 3])(176JA157684:13-16.) The Willis Class was therefore required to "enforce the terms of the Stipulation." (*Id.*; *see also* Willis Fee AOB, at 42-45 [discussing how Willis Class met criteria (a) for fee award].)

The Willis Class was prejudiced by the trial court's error. If the trial court had properly applied criteria (a) of the 2011 Judgment in evaluating the fee petition, the Willis Class would have prevailed in seeking its fees and costs. (*See*, Appellants' Reply Brief to Purveyor Respondents' Brief to the Main Appeal [Brief 2 of 3].) Instead, the trial court completely ignored criteria (a) and introduced a wholly new requirement for Class Counsel to seek attorneys' fees for services provided after entry of the 2011 Judgment: "[T]he [C]lass agreed not to seek further fees and or costs from the [Purveyors] except ... [i]f counsel was ordered to participate in the proceedings." (3AA2077,¶10(a)). But that requirement was never included and is not to be found anywhere in the 2011 Judgment. Even under this newly minted requirement, Class counsel is entitled to its fees and costs. The Case Management Order from November 4, 2014, ordered Class counsel to appear, oppose, and present a proof of claim to produce groundwater. (1REPLYEXCT422-424) (127JA123889-123891) Purveyors do not even address the trial court's change of legal standards.

Again, the trial court resorted to the incorrect, newly-crafted legal standards of its own making to judge and ultimately deny Willis Class's fee petition. In doing so, it abused its discretion, thereby mandating reversal.

B. The Court's Application of Its Newly-Created Standards Was Also Riddled With Unsupportable Findings That Contradicted Its Prior Rulings.

Even setting aside the trial court's resort to the wrong legal standards, it further erred because it purported to make "findings" that had no support in the record. Indeed, the trial court's findings flatly contradicted its prior rulings.

For example, the trial court found the Willis Class' presence at the Phase Six trial resulting in the Physical Solution was wholly superfluous and unnecessary. (*See*, 3AA2076,¶6 ["Willis Class participation was neither mandatory nor appropriate ***beyond*** ensuring that its stipulation and judgment would be incorporated into the final judgment."]; *Id.*, at 20177,¶7 ["There was no need for the class to be present for the court to make reasonable and beneficial use findings."].) Those findings cannot be squared with the trial court's prior rulings and recognition that:

> The Willis Class are property owners in the Basin who have never exercised their overlying rights. Because the Willis Class objected to the Physical Solution, it is entitled to have its rights tried as if there was no stipulated physical solution.

(13JA157472.)

Because the court's 2016 Fee Order applied the wrong standards grounded on unsupportable factual findings, the order must be reversed.

II. INSTEAD OF ADDRESSING THE FEE AWARD STANDARDS PURSUANT TO THE 2011 JUDGMENT, RESPONDENTS ERRONEOUSLY TREAT THE FEE PETITION AS ARISING UNDER A CONTRACTUAL TERM.

Willis Class's 2016 Motion for Attorneys' Fees and Costs ("2016 Fee Motion") should have been governed by the terms of the 2011 Judgment. The trial court did not address those standards in denying the Class's fee petition. Respondents now compound that error by ignoring those standards and instead arguing why a fee award to Willis Class Counsel is unavailable under California Civil Code section 1717 pertaining to attorney fee awards allocated in a contract to a prevailing party. (*See,* Purveyors Respondents' Fee Brief ("PRB Fee") at 46-48.) But the standards and law governing

fee awards under Civil Code section 1717 are irrelevant to the Willis Class's right to fees under the 2011 Judgment.

Respondents' reliance on Civil Code section 1717 is plainly inappropriate. (PRB Fee, ¶IV.A.1, at pp. 46-47.) The Willis Class did not bring "an action on the contract" against the Purveyors, but instead sought to enforce the 2011 ***Judgment***. Section 1717 does not apply to proceedings to enforce a judgment. (*Hambrose Reserve, Ltd. v. Faitz* (1992) 9 Cal.App.4th 129, 132 ["Once there is a judgment, contractual rights are merged into and extinguished by the terms of the judgment. At that point there is no subsisting contractual attorney fees provision on which section 1717 may operate"]; disapproved on unrelated grounds in *Trope v. Katz* (1995) 11Cal.4th 274, 292; *see also, Chelios v. Kaye* (1990) 219 Cal.App.3d 75, 79-80; *superseded by statute*, C.C.P. §685.040, Cal. Legis. 1348 (1992) (A.B. 2616).)

As the Willis Class sought to enforce the 2011 **Judgment** in this proceeding and did not bring a new action to enforce the 2011 Willis Class Settlement, the Willis Class did not have to establish they were the "prevailing party" as part of its 2016 Fee Motion.

III. IN ANY EVENT, THE TRIAL COURT'S DENIAL OF WILLIS CLASS'S 2016 FEE MOTION SHOULD BE REVERSED IF THE WILLIS CLASS PREVAILS ON ITS APPEAL FROM THE 2015 JUDGMENT.

Although the Willis Class's fees appeal is considered separately from the Class's appeal from the 2015 Judgment that approved the Physical Solution, the two appeals are related. If the Class's appeal from the 2015 Judgment and Physical Solution results in reversal (as it should), the trial court's denial of Willis Class's fee petition cannot stand. In such case, Willis Class will have, *a fortiori*, successfully "enforce[d] the terms of the Stipulation against Settling Defendants" (3REPLYEXCT2548:8-11[criteria (a)])(176JA157691:8-11) and also will have "defend[ed] 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 Action." (2REPLYEXCT:11-13 [criteria (b)]; see also, Appellants' Reply brief to the United States [Brief 3 of 3], section V.B)(176JA157691:11-13) .

If the 2015 Judgment and Physical Solution are overturned, the court's erroneous order denying fees and costs to the Wills Class should also be reversed.

IV. THE WILLIS CLASS ALSO IS ELIGIBLE FOR AN ATTORNEY'S FEES AWARD UNDER THE PRIVATE ATTORNEY GENERAL STATUTE.

Subpart C of the above-quoted provision of the 2011 Judgment also recognized that since this case involves a matter of public interest, the Willis Class could pursue fees under the Private Attorney General Statute (*i.e.* Code of Civil Procedure section 1021.5).

A. A Court Order Was Not Necessary.

Purveyors argue the Class cannot pursue attorneys' fees under Section 1021.5 because subsection (c) of the 2011 Judgment requires that the fees be incurred for an action 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. (PRB Fee at p. 61-63.)

Purveyors are incorrect. The Class attempted to comply with sub-section c by filing a Motion to Obtain Court Order Permitting Willis Class Counsel to Seek Additional Attorneys' Fees (1AA23-29), but the trial court misunderstood the import of subpart c and instead instructed Class counsel to come back to seek fees under Section

1021.5. (42RT23241:12-13;23557:4-8 ["one of the things that you're asking for is to - - the court to authorize you to go out and spend attorney's fees"]; 23557:14-18; 21-24 [""it's not in the agreement...It does not so provide that you come to the court and ask. But even if it did, the court is not going to authorize the expenditure of attorney's fees and costs in advance"].) In response to the motion, even Purveyors argued the motion was premature. (*Id.* at 23561:28-23562:2.)

Thus, the Purveyors and the trial court essentially waived the need to obtain "a written Court order stating that, pursuant to this provision [subpart c], the Class may seek additional fees for specified efforts from [Purveyors] pursuant to Code of Civil Procedure section 1021.5." (3REPLYEXCT2548:13-16)(176JA157691:13-16.)

B. "Adversity" Was Unnecessary, and In Any Event, Was Present.

Purveyors also argue there was no adversity between the Willis Class and Purveyors. In support, they misleadingly cite to Willis Class's December 15, 2014 Reply in Support of its Motion to Add Lead Plaintiff. (PRB Fee, pp. 66-67.) The relevant language of the Reply is as follows:

> In fact, the interests of the Archdiocese and the Willis Class members are completely aligned at **this stage** of the adjudication. The Defendant Public Water Suppliers and the Willis Class entered into a binding Stipulation of Settlement that ultimately became a Judgment of this Court on September 22, 2011. The Archdiocese has precisely the same interest in enforcing the terms of the Stipulation as the other members of the Class. That fundamental fact negates any alleged "adversity" between the Archdiocese and other class members. Moreover, the fact that certain members of the Archdiocese may obtain water from the Public Water Suppliers does not create any conflict, especially here where the Class and the Suppliers have settled all claims between and among them.

(20 WOOD FEES AA9316:4-15, emphasis added.)

This reply was filed on December 15, 2014, well before the final Stipulated Physical Solution, was filed by the stipulating parties on March 4, 2015 as part of Wood Class Stipulated Settlement. (1REPLYEXCT447-769) (129JA126125-126447) In December 2014, the Willis Class believed Purveyors would honor the 2011 Judgment and the stipulated terms of the Willis Class Settlement. It was not until the Physical Solution was filed with the Wood Class Stipulated Settlement that it was clear Purveyors had violated the 2011 Judgment.

Prior to the Wood Class Stipulated Settlement, the interests of the Class and Purveyors were aligned under the terms of the 2011

Judgment. Purveyors reneged on the 2011 Judgment and their promise not to "take positions or enter into any agreements that are inconsistent with the exercise of the Willis Class Members' Overlying Right to produce and use their correlative share of 85% of the Basin's Federally Adjusted Native Safe Yield" (3REPLYEXCT2541:13-16)(176JA 157684:13-16.)

Purveyors' discussion regarding the inconsistencies between the 2015 Judgment and the 2011 Judgment is nearly identical to that in their Respondents' Brief in the main appeal of the 2015 Judgment. The Class therefore refers to the counterpoints made in Appellants' Reply to the Purveyors' Brief (Brief 2 of 3), and hereby incorporates that discussion in response to Purveyors' incorrect argument that the two Judgments are consistent.

To further support their claim that no adversity existed, the Purveyors also rely on statements purportedly made by the trial court. (PRB Fee at p. 67.) However, Purveyors' assertions lack factual citations or any additional coherent argument. (*Ibid.*) Purveyors' reliance on the court's statements to justify its actions is a theme in their brief. However, a trial court's statements are not evidence. (*Orange County Water Dist. v. The Arnold Engineering Co.*

(2018) 31 Cal.App.5th 96, 124, fn. 10.) Purveyors must properly cite the evidence supporting factual assertions in its briefing.

Additionally, Purveyors now confirm that the Physical Solution did in fact present new claims against the Willis Class – "self-help pumping by non-stipulating overlier parties ... divested Appellants of their unexercised overlying rights." (PRB Main at p.89; *See*, Appellants' Reply to Purveyors' Respondents' Brief [Brief 2 of 3], section I.C.)

In any event, there certainly was adversity between the Purveyors and Willis Class after March 4, 2015 when the Physical Solution was presented for preliminary approval. Detailed in Appellants' Reply to Purveyors' Brief in the main appeal, Purveyors reneged on their agreements embodied in the 2011 Judgment forcing the Willis Class to actively oppose the inconsistent Physical Solution which also presented new claims by other landowners.

C. The Willis Class was a "Successful Party" for Purposes of Section 1021.5.

In its Opening Brief, the Class argued it meets Section 1021.5's definition of "successful party" because without the Class's participation, the trial court could not impose a Physical Solution in

the comprehensive Adjudication per the McCarren Amendment.[1] (AOB pp. 51-58.)

Purveyors do not address the McCarren Amendment, or the arguments presented in the Class's Opening Brief. Instead, Purveyors posit it was solely Purveyors' efforts, not those of the Willis Class, that brought about the Physical Solution.

Purveyors' position misses the mark as they conflate the "prevailing party" standard under Civil Code section 1717 with the "successful party" criteria for Code of Civil Procedure section 1021.5. (PRB Fee at p. 70 ["Rather, the [Purveyors] ***prevailed*** by accomplish-ing a physical solution to protect the Basin"], emphasis added.) As explained in the Class's Opening Brief, a "successful party" determination for purposes of Section 1021.5 hinges on the impact of the *action as a whole* and is determined if the party obtained some relief from benchmark conditions. (AOB at pp. 50-51.)

Beyond the ability for the court to enter a Physical Solution in the comprehensive Adjudication, the Willis Class also achieved relief

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1 The McCarran Amendment [43 U.S.C. § 666] is a federal law which waives the United States' sovereign immunity in suits concerning ownership or management of water rights.

that would not have been available had the Willis Class not participated in the Phase Six trial – the ability to apply to the Watermaster for discretionary permission to pump water. (3REPLYEXCT2411:27-2412:2) (176JA157554:27-157555:2.) If the Willis Class had not participated, there was a real threat that a default would have been entered against the entire Class of over 18,000 landowners and their groundwater rights prescribed by the Purveyors. At the end of Phase Six, the trial court found:

> Parties who failed to appear at trial failed to meet their burden to produce evidence of ownership, reasonable and beneficial use, and self-help. The Court finds that the [Purveyors] have established prescriptive rights claims as against these parties. They are bound by the Physical Solution and their overlying rights are subject to the prescriptive rights of the [Purveyors].

(3REPLYEXCT2350:25-2412:2)(176JA157474:25-157475:2.)

Since the Physical Solution states "a defaulted Party has **no right to Produce Groundwater from the Basin**," any party who did not appear cannot even apply for the ability to purchase and pump imported water through the New Production Application Procedures. (3REPLYEXCT2382:17-18)(176JA157525:17-18.) The ability for the Willis Class to, at least, seek discretionary approval to produce groundwater is a relief that would not have been available

had the Class not appeared and defended its rights in the Phase Six trial.

Even Purveyors admit that "not only did the trial court find Appellants have overlying rights but those rights can be exercised without limitation as to the amount of groundwater used..." and "in the absence of the physical solution, Appellants would have no right to pump." (PRB Main, pp. 52-53; 91.) Certainly, the outcome could have been much worse for the Willis Class had they not participated to defend their overlying groundwater rights, defend against new claims, and enforce the 2011 Judgment.

D. The Antelope Valley Adjudication Resulted in the Enforcement of Important Rights Affecting the Public Interest.

In its Opening Brief, the Class also explained how the Antelope Valley consolidated, comprehensive adjudication resulted in the enforce- ment of the Physical Solution that curbs the deleterious effects of overdraft in the Basin. (AOB pp. 58-59.) Purveyors' brief is silent as to the enforcement of this important public interest.

E. The Adjudication Conferred a "Significant Benefit on a Large Class of Persons."

In its Opening Brief, the Class argued the Physical Solution ultimately adopted by the trial court conferred a significant benefit on the Basin, including the Willis Class who secured the ability to seek discretionary authority from the Watermaster to pump groundwater. (AOB pp. 59-60.) Purveyors argue in response that they cannot be liable because "the lower court found that the [Purveyors] benefitted the public interest – they did not harm it." (PRB Fee at p. 71.)

Despite expressly agreeing to "not take any positions or enter into any agreements that are inconsistent with the exercise of the Willis Class Members' Overlying Right to produce and use their correlative share of 85% of the Basin's Federally Adjusted Native Safe Yield," Purveyors argue that if there were no physical solution, the Willis Class "would have no right to pump." (3REPLYEXCT2541:4-11; PRB Main, p. 91) (1767JA157684:11-13.)

Purveyors were bound by the 2011 Judgment and Willis Class Settlement but opted to wholly disregard those terms by stipulating to an inconsistent Physical Solution that extinguishes the overlying

groundwater right of the Willis Class to pump from the NSY. Purveyors did negotiate, advocate for, and stipulate to the unlawful Physical Solution and therefore are responsible for "initiat[ing] actions or policies" harmful to the public interest of overlying landowners in the Basin. (PRB Fee at p. 70 [citing *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1176-1177]; see also,

Moreover, Purveyors concede that "in the absence of the physical solution, Appellants would have no right to pump." (PRB Main at p. 91.) They argue, "[s]tated simply, the physical solution puts Appellants in a better position than if they had been subject to the self-help rights of other overlying parties." (*Id.* at 91.) Had the Willis Class failed to appear at the Phase Six prove-up trial, the trial court would have taken Willis Class members' default and, like other defaulted parties under the judgment, the Class over 18,000 landowners would have had "no right to Produce Groundwater from the Basin." (3REPLYEXCT 2382:17-18)(176JA157525:17-18.) Given their position in this appeal, Purveyors cannot now argue the Willis Class members' participation in the trial leading to the Physical Solution failed to confer any public benefit.

F. Necessity and Financial Burden

Appellants discussed in their Opening Brief that they met the necessity and financial burden requirement of 1021.5. (AOB pp. 60-62.) Purveyors do not address or dispute the necessity and financial burden element of Section 1021.5. (*See, Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 ["Appellate briefs must provide argument and legal authority for the positions taken"]; *Estate of Neilson* (1962) 57 Cal.2d 733, 746 [silence, evasion, or equivocation in response to a statement may be considered a tacit admission statement is true].)

G. The Willis Class Did Not Waive and Is Not Otherwise Barred From Seeking Fees Under Section 1021.5.

Purveyors next argue the Willis Class waived or are otherwise barred from seeking an award of attorneys' fees or costs under Section 1021.5 because the sole criteria for a future award of fees was governed exclusively by the terms of the 2011 settlement. (PRB Fee at 65-66.) In Purveyors' view, "the Willis Class is bound by the Settlement. In the Settlement, the Willis Class contracted away its

right to seek attorneys' fees except under the specific conditions of its settlement agreement." (PRB Fee at 65.)

Purveyors are wrong. The fatal flaw dooming Purveyors' waiver argument is that it ignores that the Willis Class Settlement expressly identified Section 1021.5 as a basis for which a future fee award could be sought. (3REPLYEXCT2548:13-16)(176JA157691:13-16.) Further, the trial court's 2016 Fee Order also identified Section 1021.5 as an available means by which Willis Class Counsel could seek an award for fees and costs. (3AA2077,¶10(c) [noting the Willis Class could seek a fee award for post-2011 work for "Enforcement of a public right under CCP 1021.5"].)[2]

There is no basis for arguing that the Willis Class Settlement or 2011 Judgment somehow waived or otherwise barred Willis Class's reliance on Section 1021.5. Purveyors' argument to the contrary is without merit and should be rejected out of hand.

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[2] As noted above, the trial court's order erred in analyzing Section 1021.5's requirements, but the court never found Section 1021.5 was waived or otherwise barred.

H. Purveyors Omit Any Reference or Discussion of the Free Groundwater They Received in Exchange for Their Payment Attorneys' Fees to Wood Class Counsel.

Purveyors received **free** groundwater for their payment of Wood Class's attorneys' fees. (2REPLYEXCT808:22-25)(128JA125757:22-25.) The provision reflecting this trade off provides as follows:

> In consideration for the agreement to pay Small Pumper Class [Wood Class] attorneys' fees and costs as provided in Paragraph 11 above, the other Stipulating Parties agree that during the Rampdown established in the Judgment, a drought water management program ("Drought Program") shall be implemented as provided in Paragraphs 8.3, 8.4, 9.2 and 9.3 of the Judgment.

(*Id.*)

The Drought Provision of the Physical Solution provides Purveyors with the ability to produce an additional 40,000 acre-feet of water free of replacement assessment fees. (3REPLYEXCT 2409:5-10) (176JA 157552:5-10.) The value of this water right, as of December 2015, is **$12.4 million** (40,000 acre-feet times $310 per acre-foot). (3REPLYEXCT 2354:14-15) (176JA157478:14-15.)

Purveyors completely ignore the $12.4 million in value they received for the 40,000 acre-feet of **free water**. Wood Class counsel

was awarded $2,269,400 in fees and costs. (3AA2074.) To be sure, the value of free water Purveyors received clearly exceeds the obligation they paid to Wood Class counsel in attorneys' fees and costs.

CONCLUSION

For all the foregoing reasons the trial court's 2016 Fee Order denying the Willis Class Counsel's motion for an award of attorneys' fees and costs for work perform after entry of the 2011 Judgment should be reversed.

DATED: 10/5/20 THE KALFAYAN LAW FIRM, APC

By: */s/ Ralph B. Kalfayan*
Ralph B. Kalfayan

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the accompanying **APPELLANTS' REPLY TO PUBLIC WATER SUPPLIERS' RESPONDENT'S BRIEF (Willis Class Fee Appeal)** contains 4,685 (including footnotes) as counted by the Corel Word 11 Program.

DATED: 10/5/20 THE KALFAYAN LAW FIRM, APC

By: */s/ Ralph B. Kalfayan*
Ralph B. Kalfayan

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 2262 Carmel Valley Road, Suite 200, Del Mar, California 92014.

October 5, 2020, I served true copies of the following document(s) described as APPELLANTS' REPLY TO PUBLIC WATER SUPPLIERS' RESPONDENT'S BRIEF (Willis Class Fee Appeal) on the interested parties in this action as follows:

BY TRUEFILING (EFS): I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling portal operated by ImageSoft, Inc. Participants in the case who are registered EFS users will be served by the TrueFiling EFS system. Participants in the case who are not registered TrueFiling EFS users will be served by mail or by other means permitted by the court rules.

BY ELECTRONIC SERVICE: By posting the document(s) to the Antelope Valley Watermaster website regarding the Antelope Valley Groundwater matter with e-service to all parties listed on the website Service List. Electronic service and electronic posting completed through www.avwatermaster.org via Glotrans.

BY FEDERAL EXPRESS: I served a true and correct copy by Federal Express or other overnight delivery service, for the delivery on the next business day. Each copy was enclosed in an envelope or package designed by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown below.

Honorable Jack Komar
c/o Rowena Walker
Complex Civil Case Coordinator
Superior Court of California, County of Santa Clara
191 N. 1st Street, Departments 1 and 5
San Jose, CA 95113

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

Executed on October 5, 2020, at Del Mar, California.

s/ Ralph B. Kalfayan

Ralph B. Kalfayan