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15 Attorneys for Plaintiff

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

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

Judicial Council Coordination
Proceeding No. 4408

20 ANTELOPE VALLEY GROUNDWATER
21 CASES

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

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

Case No.: BC 391869

PLAINTIFF'S:

25 Plaintiff,

(1) **EX PARTE APPLICATION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE RE PRELIMINARY
INJUNCTION;**

26 v.

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

(2) **MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF; and**

Defendants.

(3) **DECLARATION OF MICHAEL D.
McLACHLAN**

Date: April 2, 2009
Time: 2:00 p.m.
Dept.: 17C

1 PLEASE TAKE NOTICE that on April 2, 2009, at 2:00 p.m., or as soon thereafter
2 as this matter may be heard in Department 17C of the above-captioned Court, located at
3 161 North First Street, San Jose, California, Plaintiff Richard Wood will, and hereby
4 does, apply *ex parte* for a Temporary Restraining Order and Order to Show Cause why a
5 preliminary injunction should not issue enjoining the Antelope Ground Water Agreement
6 Association and their attorneys of record from contacting and soliciting class members in
7 this case, and enjoining a meeting set for April 7, 2009.

8 Said hearing shall take place telephonically through Courtcall, pursuant to Exhibit
9 2 hereto.

10 This application is based on this notice of *ex parte* application, the following
11 memorandum of points and authorities and the Declaration of Michael D. McLachlan
12 filed herewith, the file and record in this case, and any additional argument that the Court
13 may consider in connection with this matter.

14 DATED: March 31, 2009

Respectfully submitted,

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

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18 By: _____//s//
19 Michael D. McLachlan
20 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Richard Wood requests that this Court issue an emergency order
4 restraining Antelope Ground Water Agreement Association (“AGWA”) and their
5 attorneys of record from contacting and soliciting class members in this case, and
6 enjoining a meeting set for April 7, 2009.

7 Counsel for the Small Pumper Class was recently given a copy of a flyer for a
8 meeting on April 7, 2009, soliciting class members to a meeting being hosted by AGWA.
9 (McLachlan Decl., Ex. 1.) This flyer was prepared and circulated by Eugene Nebeker,
10 the lead representative for AGWA. Class counsel has also learned that Michael Fife, lead
11 counsel for AGWA will attend and speak at that meeting. (McLachlan Decl., ¶ 3.) Class
12 counsel has requested that Mr. Fife and his firm not speak to the class members on issues
13 related to the classes, and he has declined to do so. (*Ibid.*)

14 Class counsel has also learned that another such meeting occurred on February 17,
15 2009, which was attended by a substantial number of class members. One of the primary
16 messages communicated in this meeting was that those pumping groundwater should join
17 the AGWA group. (McLachlan Decl., ¶ 5.)

18 Due to Mr. Fife’s refusal to refrain from such communications with absent class
19 members or to otherwise resolve this issue in a manner satisfactory to the interests of the
20 class, class counsel believes that further solicitations of absent class members will occur
21 at the April 7, 2009 meeting.

22 Furthermore, the discussion of the boundaries of class membership and responding
23 to the class notice during the class notice period is something that should be strictly
24 governed by the Court and should be conducted pursuant to the existing orders in this
25 case. AGWA’s counsel should not be talking about these issues with the class members,
26 for not only ethical reasons, but because it is likely to add confusion to an already
27 complex process.

1 By this application, Plaintiff is seeking a temporary restraining order (“TRO”) and
2 order to show cause (“OSC”) re preliminary injunction. The TRO is requested to prevent
3 and prohibit AGWA or its counsel from communicating with any class member prior to
4 and during the class notice period in this case.

6 II. ARGUMENT

7 A. The Standard Applicable to Preliminary Injunctions

8 A preliminary injunction should be issued in the following cases, among others:

- 9 (1) When it appears by the complaint that the plaintiff is entitled
10 to the relief demanded, and the relief, or any part thereof,
11 consists in restraining the commission or continuance of the
act complained of, either for a limited period or perpetually.
- 12 (2) When it appears by the complaint or affidavits that the
13 commission or continuance of some act during the litigation
14 would produce waste, or great or irreparable injury, to a party
to the action.
- 15 (3) When it appears, during the litigation, that a party to the
16 action is doing, or threatens, or is about to do so, or is
17 procuring or suffering to be done, some act in violation of the
rights of another party to the action, and tending to render the
18 judgment ineffectual.
- 19 (4) When pecuniary compensation would not afford adequate
relief.
- 20 (5) Where it would be extremely difficult to ascertain the amount of
21 compensation which would afford adequate relief.

22 (Code Civ. Proc. (“C.C.P.”) § 526; *see also*, *Universal Life Church, Inc. v. State* (1984)
23 158 Cal.App.3d 533, 536 (“A preliminary injunction may be granted when the party
24 seeking relief is likely to succeed on the merits of the action, or will suffer irreparable
25 injury if an injunction is not granted.”); *see also* *14859 Moorpark Homeowner’s Ass’n v.*
26 *VRT Corp.* (1998) 63 Cal.App.4th 1396 (“In determining whether to issue a preliminary
27 injunction, the trial court considers two related factors: (1) the likelihood that the plaintiff
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1 will prevail on the merits of its case at trial, and (2) the interim harm that the plaintiff is
2 likely to sustain if the injunction is denied as compared to the harm that the defendant is
3 likely to suffer if the court grants a preliminary injunction.”); *Whyte v. Schlage Lock Co.*
4 (2002) 101 Cal.App.4th 1443, 1449-50.)

5 The decision to issue a preliminary injunction requires that the court weigh two
6 factors: “the likelihood the moving party will prevail on the merits, and the relative
7 interim harm to the parties from the issuance or nonissuance of the injunction.” (*Hunt v.*
8 *Superior Court* (1999) 21 Cal. 4th 984, 999.) “The trial court’s determination must be
9 guided by a ‘mix’ of the potential-merit and interim-harm factors; the greater that
10 plaintiff’s showing on one, the less must be shown on the other to support and
11 injunction.” (*Butt v. State of California*, 4 Cal. 4th (1992) 668, 678; *Cinquegrani v*
12 *Department of Motor Vehicles* (2008) 163 Cal.App.4th 741, 750. The greater the relative
13 hardship to the moving party, the less probability of success must be shown. As
14 explained at length in the Verified Complaint and the declarations filed herewith, San
15 Jose meets these requirements and a TRO and preliminary injunction should issue.

16 **B. Plaintiff is Likely to Prevail on the Merits**

17 **1. AGWA and its Attorneys Should Not be Communicating with Class**
18 **Members**

19 California Rule of Professional Conduct Rule 2-100 provides, in relevant part,
20 that:

21 While representing a client, a member shall not communicate directly or indirectly
22 about the subject of the representation with a party the member knows to be
23 represented by another lawyer in the matter, unless the member has the consent of
24 the other lawyer.

25 In this case, the Small Pumper Class has been certified by the Court and class
26 counsel has been appointed to represent the interests of the approximately 7,500 to 9,000
27 class members. AGWA and its lawyers have recently held a meeting with class members
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1 and have solicited them to join AGWA without the knowledge or consent of counsel.
2 AGWA and its counsel apparently intend to conduct another such meeting on April 7,
3 2009. Class counsel has voiced its objection to this meeting and the discussion of class-
4 related issues with any class members outside the presence of class counsel. Such
5 discussions during the class notice period are sure to lead to confusion, and should not be
6 permitted.

7 Moreover, Class counsel has substantial concern that AGWA may exercise its
8 antagonism toward the Small Pumper Class by endeavoring to undermine the integrity of
9 the class. (McLachlan Decl., ¶ 6.) Improper, confusing, or misleading communications
10 with members of the class are not something that can easily be undone. Consequently,
11 they should be not allowed to occur in the first place.

12 Injunctive relief is appropriate under circumstances where the harm cannot be
13 quantified or remedied by later action. (*Wind v. Hebert* (1960) 186 Cal.App.2d 276, 285;
14 *Regents of Univ. of Cal. V. American Broadcasting Cos.* (9th Cir. 1984) 747 F.2d 511,
15 519-20; *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.* (9th Cir.
16 1991) 944 F2d 597, 603.)

17 **B. The Balance of the Harms Weighs In Favor of an Injunction and the Public is**
18 **Not Harmed by the TRO or Injunction**

19 When evaluating a motion for preliminary injunction or temporary restraining
20 order, Courts sometimes consider the harms to the respective parties and consider
21 whether the public will be harmed by any injunctive relief.

22 Here, these factors overwhelmingly favor Plaintiff. First, without this Court's
23 enjoining AGWA's conduct, the integrity of the class is threatened, and all ready difficult
24 process will likely become more confusing for the class members. Moreover, the
25 solicitation of class members to be represented by other counsel is not acceptable to class
26 counsel, and is unethical.

27 AGWA and its counsel have no vested right or interest in this sort of conduct, and
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1 cannot argue any harm from being duly restrained

2 Second, the public interest in maintaining class actions under strict Court
3 supervision argues strongly against these sorts of ex parte communications with class
4 members by counsel for other parties.

5
6 **III. CONCLUSION**

7 For these reasons, Plaintiff requests that a TRO issue prohibiting AGWA, Eugene
8 Nebeker, and its counsel from attending the April 7, 2009 meeting, from communicating
9 with Small Pumper Class members without the consent of class counsel, and from
10 soliciting class members to join AGWA. Further, the Court should issue an Order to
11 Show Cause why a preliminary injunction should not issue enjoining such conduct in the
12 future.

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14 DATED: March 31, 2009

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

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16
17 By: _____ //s//
18 Michael D. McLachlan
19 Attorneys for Plaintiff
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1 Gene Nebeker and Michael Fife was that it was in the small pumper's best interests to
2 join AGWA. Mr. Nye indicated that it is well known in the community that Mr. Nebeker
3 is soliciting small pumpers to join AGWA.

4 6. Mr. Nebeker and Mr. Fife have on numerous occasions voiced his
5 opposition to the class actions as something he views as playing into the hands of the
6 public water suppliers. I understand why the interests of this agricultural group are at
7 odds with the Small Pumper class, and therefore am concerned that the communications
8 from AGWA may be slanted to indirectly or directly undermine the integrity of the class.
9 There is great confusion in the community about what is going on in this coordinated
10 litigation, and I have serious concerns that communications and solicitations from other
11 counsel will only make matters worse.

12 7. On March 31, 2009, I have Michael Fife notice of this ex parte hearing by
13 electronic mail. The courtcall confirmation is attached hereto as Exhibit 2.

14 I declare under penalty of perjury under the laws of the State of California that the
15 foregoing is true and correct. Executed this 31st day of March, 2009, at Los Angeles,
16 California.

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18 _____
19 //s//
20 Michael D. McLachlan

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1 **PROOF OF SERVICE**

2 I am employed in the County of Los Angeles, State of California. I am over the age of 18
3 and am not a party to the within action. My business address is 523 West Sixth Street, Suite 215,
4 Los Angeles, California 90014.

5 On March 31, 2009, I caused the foregoing document(s) described as **PLAINTIFF'S EX**
PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO
6 **SHOW CAUSE RE PRELIMINARY INJUNCTION** to be served on the parties in this action, as
follows:

- 7 (X) (BY ELECTRONIC SERVICE) by posting the document(s) listed above to the Santa
8 Clara County Superior Court website: www.scefiling.org regarding the Antelope Valley
Groundwater matter.
- 9 () (BY U.S. MAIL) I am readily familiar with the firm's practice of collection and
10 processing of documents for mailing. Under that practice, the above-referenced
11 document(s) were placed in sealed envelope(s) addressed to the parties as noted above,
with postage thereon fully prepaid and deposited such envelope(s) with the United States
12 Postal Service on the same date at Los Angeles, California, addressed to:
- 13 () (BY FEDERAL EXPRESS) I served a true and correct copy by Federal Express or other
14 overnight delivery service, for delivery on the next business day. Each copy was
enclosed in an envelope or package designed by the express service carrier; deposited in a
15 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
16 for; addressed as shown on the accompanying service list.
- 17 () (BY FACSIMILE TRANSMISSION) I am readily familiar with the firm's practice of
18 facsimile transmission of documents. It is transmitted to the recipient on the same day in
the ordinary course of business.
- 19 (X) (STATE) I declare under penalty of perjury under the laws of the State of California that
20 the above is true and correct.
- 21 () (FEDERAL) I declare under penalty of perjury under the laws of the United States of
22 America that the foregoing is true and correct.

23 _____ //s//
24 Carol Delgado