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**SUPERIOR COURT FOR THE STATE OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

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| Coordination Proceeding<br>Special Title (Rule 1550(b))<br><br>ANTELOPE VALLEY GROUNDWATER CASES<br>_____<br>RICHARD A. WOOD, an individual, on behalf of himself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40; et al.<br><br>Defendants. | Judicial Council Coordination Proceeding No. 4408<br>(Honorable Jack Komar)<br><br>Case No.: BC 391869<br><br>**REPLY BRIEF IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT; SUPPLEMENTAL DECLARATION OF MICHAEL D. MCLACHLAN**<br><br>Date: August 3, 2015<br>Time: 10:00 a.m.<br>Dept: Room 222 |

## MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff Richard Wood and the Small Pumper Class submit the following reply brief in response to objections to the Small Pumper Class Settlement filed by the Willis Class and Phelan Pinon Hills Community Services District ("Phelan").

### I. The Willis Class Objections Should be Overruled

The primary question before the Court on the Motion for Final Approval is whether the settlement is fair to the class members. Willis Class has not raised any objections that the settlement is unfair to the Small Pumper Class Members, nor does it have standing to do so. Indeed, Plaintiff contends that Willis has no standing here at all. This procedural objection notwithstanding, Plaintiff addresses the various Willis arguments in the following sections.

#### A. There is a Small Pumper Class Settlement Agreement, and No Conflict of Interest Exists

The first argument Willis offers is that there is no Small Pumper Class Settlement at all – an obvious tribute to the adage "when desperate, throw everything up on the wall and see what sticks." (Opp., 3:5-12 ("The failure to provide a separate settlement between the Wood Class and the Public Water Suppliers is a fatal defect that cannot be ignored by this Court.").) On March 4, 2015, the Small Pumper Class filed the Declaration of Michael D. McLachlan, to which is attached as Exhibit 1 a fully executed copy of the "Small Pumper Class Stipulation of Settlement," a seventeen page Settlement Agreement between Richard Wood, on behalf of the Class, and all of the remaining defendants that he has sued but not previously settled with. (Dkt. No. 9623.) This argument does not stick.

Willis next launches into several pages of arguments arising out of the purported conflict of interest between "dual" class members – those people who are in both the Willis and Small Pumper Classes by virtue of owing dormant and

pumping properties. The Court has deferred the hearing of the Motion to Withdraw to August 25, 2015, and Richard Wood has addressed that motion in a separate written Opposition. For that reason, he will not retread that ground here, but will address one point that is not squarely raised in the Motion to Withdraw. Willis now claims that counsel for the Small Pumper Class had a duty to "protect their Class Members' water rights for their non-pumping parcels."

This proposition is even more absurd than Willis' first argument. The inherent conflicts between the pumping and non-pumping classes has been recognized from the outset of this litigation and were, at the instance of Willis Class counsel for more than a year, the reason Willis Class counsel refused to represent the Small Pumper Class members. (*See* Mclachlan Declaration in Support of Opposition to Motion to Withdraw, ¶¶ 17, 20-21 , Exs. 11, 14-15.) So that these disparate interests could be vigorously represented in accord with basic principles of legal ethics, the Court appointed separate counsel: the Willis Class counsel was charged with solely representing the interest arising from ownership of dormant property, and the Small Pumper Class counsel was charged with representing water rights arising from ownership of groundwater producing properties.

It is patently absurd for Willis to argue that the Small Pumper Settlement is invalid because the Small Pumper Class counsel failed negotiate acceptable terms for the Willis Class. Willis Class counsel alone has the job of advocating for the dormant landowners, as it must be given these groups' conflicting interests.

### B. The Public Water Suppliers are Not Estopped From Entering Into this Settlement

Willis contends that the Small Pumper Settlement is inconsistent with the earlier Willis Class Settlement and that such inconsistency estops the Water Suppliers from entering into the Small Pumper Settlement. (Motion, 6:10-7:11.) These issues are addressed more completely in the Willis' Second Motion to

Enforce Settlement Agreement with Public Water Suppliers, and the Opposition papers filed by the Water Suppliers to that motion. Plaintiff will refer the Court to that briefing, which is set to be heard at the same time as the instant Motion, and will not repeat those arguments again here.

### C. The Class Notice Was Adequate

Again, Willis has no standing to challenge the Court-approved notice to the Small Pumper Class members, and such a challenge is now untimely because it should have been made on or before the hearing on the motion for approval of that notice, i.e. in opposition for the Motion for Preliminary Approval.

Nevertheless, Willis now argues that the Class Notice should have detailed provisions regarding the potential impact of the Settlement on the Willis Class members' dormant parcels. (Opp. 7:25-27.) Willis contends that the Small Pumpers who are dual class members would have objected to the Settlement if informed of the provisions relating to their dormant parcels. This suggest necessarily assumes that none of the Small Pumper Class members bothered to read the Settlement Agreement, which was of course referenced in the Notice, posted on the Court website, and posted on the Class website, www.avgroundwater.com. The fact is, many Small Pumpers did in fact read the full agreement, and none have objected to the Settlement. (Supp. McLachlan Decl., ¶ .) Willis is even incorrect as to Olaf Landsgaard having objected, which he never did. (*Id*. at ¶ .)

It should also be noted that, among the numerous mis-readings and misrepresentations of the Stipulation of Settlement is the statement that the Small Pumper Class is entitled to 9,516 acre-feet of water per year. (Opp., 8:20-22.) With the exception of the potential for "unknown class members," whose potential use is deemed *di minimis* (Sections 5.1.3.6 & 5.1.3.7), the Class' water allocation is set as follows: "Subject only to the closure of the Small Pumper Class membership, the Small Pumper Class's aggregate Production Right is

3806.4 acre-feet per Year." The fact that an individual Class member may pump up to three acre-feet per year does not alter that, it simply recognizes the fact that there is a substantial variance in water use between and among Class members.

**D. Additional Willis Objections**

Willis next states that there are no metering provisions relevant to the Small Pumper Class in the Settlement. This is also false. Section 5.1.3.2 provides for metering at the discretion of the Watermaster for Class members reasonably believed to be using in excess of three acre-feet per year. Given the structure of the water rights allocation for the Small Pumpers, there is no need to meter the smaller users. Installing meters on more than 3200 households would necessarily mean that the watermaster would have to hire dedicated personnel just to read these meters, which would be spread across an area of 1,000 square miles. This would involve very large transaction costs for little or no benefit to the Basin. One of the primary purposes of having a Court-appointed expert was to assess the Class' water use so the Watermaster does not have to monitor every single small user, as is typically the case in California groundwater adjudications.

In its Opposition, Willis incorporates by reference more than 100 pages of briefs and related filings: Footnote 1, Opposition to Motion for Preliminary Approval (15 page brief, a 16 page single-paged "Separate Statement" (that is not authorized by Code), among others); Footnote 3, Motion to Withdraw; and Footnote 7, Second Motion to Enforce Settlement Agreement with Public Water Suppliers. This tactic is clearly not proper or authorized by Code or the California Rules of Court. It is simply an attempt to get around the page limitations for briefs without making the necessary application for relief from the Court. The Court should strike these three footnotes.

Plaintiff Richard Wood believes that most of the Willis Class' voluminous technical and substantive objections will be dealt with through other motions or at the various hearings in the course of the prove-up of this Settlement and the

Physical Solution. If the Court requires further briefing on certain points raised by Willis in its sea of objecting papers, the Small Pumper Class is certainly willing to address them in that fashion. As for the Motion to Withdraw, the Court has ordered those arguments deferred to a hearing on August 25, 2015. Plaintiff has filed papers in Opposition to that motion, and do not believe it appropriate to re-argue those points here. As to the Second Motion to Enforce the Settlement, the Public Water Suppliers have filed a detailed brief on those points, which comprehensively addresses the arguments raised by Willis regarding its 2011 Settlement.

## II. Phelan's Objections Are Not Well Taken

Phelan argues that terms of its 2013 settlement agreement with the Small Pumper Class prevent the Class from pursing the current settlement. However, the very language that Phelan cites defeats this assertion:

> The Wood Class agrees not to contest each Settling Defendant's right to pump the following amounts annually from the Native Safe Yield free of any replacement water Assessment, but only if competent evidence is presented to and incorporated by the Court in the Final Judgment . . ."

(Hogan Decl., Ex. A (Wood Class Stipulation of Settlement, October 17, 2013) at 8:16-19.)

The second clause of this sentence makes clear that the first clause is only valid if the Court incorporates Phelan's water rights in the Final Judgment. The Court has not done so. Hence, there is nothing in this language that prevents the Small Pumper Class from pursuing the current settlement. It should also be noted that the Small Pumper Class did not contest Phelan's position at its trial in 2014, and Phelan lost its claims.

Phelan also suggests that the 2013 Small Pumper Class Settlement in insulates it from having to pay a replacement assessment. Again, that is wrong. That earlier settlement agreement states that "[t]he Settling Defendants agree to

provide or purchase Imported Water for all groundwater pumping that exceeds a Settling Defendant's share of the Native Safe Yield, or pay a Replacement Assessment to the Watermaster so that the Watermaster may purchase Imported Water to recharge the Basin." (Hogan Decl., Ex. A (Wood Class Stipulation of Settlement, October 17, 2013), at 12:23-26.) And so, if Judgment is entered stating that Phelan has no right to pump from the native safe yield, the Court can require Phelan to pay a replacement assessment.[1]

In the 2013 Settlement, Phelan also recognized that it's claimed water right was in no way binding on the Court. (*Id.* at 10:25-26.) And, Phelan specifically acknowledged that the 2013 settlement would be incorporated into a physical solution by the Court. (*Id.* at 11:23-26.) Finally, Phelan contends, without any legal support, that the 2013 Settlement entitles it to return flows from *native* groundwater. Neither that Settlement Agreement, nor California law, permit Phelan to obtain a right from pumping native groundwater. This must be particularly true for native groundwater for which Phelan did not have the right to produce as a threshold matter.

In sum, there is nothing in the 2013 Settlement that acts as a bar to the current settlement, or impairs this Court's ability to enter a physical solution.

## III. Conclusion

Since there are no objections from the Small Pumper Class members, there is a strong presumption that the Settlement is fair and reasonable as to them, and should be approved as to those Class members. The Court should overrule the

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[1] Phelan seems to imply that the quantity of the water right it seeks, as reflected in the 2013 settlement, was in some fashion binding. The 2013 Agreement states: "In the event that the Court enters findings of fact that vary from the estimated amounts that the Settling Parties have agreed to for purposes of this Stipulation the Court's findings will be determinative and will supplant the amounts set forth in this Stipulation." (Hogan Decl., Ex. A (2013 Small Pumper Partial Settlement), 18:26-28.)

objections of both the Willis Class and Phelan. The Court should then proceed with its plan for hearing evidence regarding the stipulated physical solution. The final approval of the Small Pumper Settlement is dependent upon the Court's approval of the physical solution, but Plaintiff believes that will occur.

DATED: July 27, 2015

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

Michael D. McLachlan

Digitally signed by Michael D. McLachlan
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Date: 2015.07.27 16:57:38 -07'00'

By:_____
MICHAEL D. MCLACHLAN
Attorneys for Plaintiff and the Class

## SUPPLEMENTAL DECLARATION OF MICHAEL D. MCLACHLAN

I, Michael D. McLachlan, declare:

1. I make this declaration of my own personal knowledge, except where stated on information and belief, and if called to testify in Court on these matters, I could do so competently.

2. I am co-counsel of record of record for Plaintiff Richard Wood and the Class, and am duly licensed to practice law in California. I make this declaration in support of the motion for final approval of the settlement agreement.

3. I have spoken to numerous (many dozens) of Small Pumper Class members since the Settlement Agreement was published. At least twenty of them have indicated that they reviewed at least portions of the Settlement Agreement, and many of them had specific questions about specific language in the agreement, indicating they did in fact read the agreement.

4. Olaf Landsgaard did not file or serve an objection to the Small Pumper Class settlement.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 27th day of July 2015, at Hermosa Beach, California.

Michael D. McLachlan

Digitally signed by Michael D. McLachlan
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