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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 1550(b)) ANTELOPE VALLEY GROUNDWATER CASES _____ RICHARD A. WOOD, an individual, on behalf of himself and all others similarly situated, Plaintiff, v. LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40; et al. Defendants.	Judicial Council Coordination Proceeding No. 4408 (Honorable Jack Komar) Lead Case No. BC 325201 Case No.: BC 391869 **REPLY BRIEF IN SUPPORT OF MOTION FOR AWARD OF ATTORNEY FEES, COSTS AND INCENTIVE AWARD** **[filed concurrently with Second Supplemental Declaration of Michael D. McLachlan.]** Location: Dept. TBA Santa Clara Superior Court 191 N. First Street San Jose, California Date: April 1, 2016 Time: 1:30 p.m.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

The Small Pumper Class (the "Class") played a crucial role this this action. It secured permanent domestic pumping rights for over 4,100 residents of the Antelope Valley. It allowed the federal government—the Valley's largest landowner—to participate in the groundwater basin's management plan. And it spearheaded the efforts to get all claims resolved, either by way of agreement or proof. Plaintiff now seeks approval of an award of attorneys' fees at a lodestar of $3,348,160, with a multiplier of 2.5, and costs of $76,639.48. (Supp. McLachlan Decl., ¶ 4.) Plaintiff also seeks an incentive award in the form of a more complete water right of 5 acre-feet per year or, alternatively, a monetary payment of $25,000.

The Public Water Suppliers ("PWS") contest the fee claim. They do this despite having previously acknowledged, in writing to the Court, that "the Class will benefit substantially" by way of the settlement. And they do this despite agreeing in the Stipulation for Judgment and Physical Solution to pay all reasonable fees and costs incurred by the Small Pumper class. The opposition arguments all fail. California law requires that class counsel be awarded "full and fair" compensation, not just for their time but for the contingent risk and delay that goes along with over eight years of heavily contested litigation. The case law on point is overwhelming. (*See* FN 13, supra.)

II. THE ACTUAL HISTORY OF THE SMALL PUMPER CLASS.

The PWS spend the first six pages of their brief detailing all of the work they did in this litigation – facts not relevant to this Motion – and recasting the Small Pumper Class as unnecessary, non-beneficial, and unsuccessful. The fact that Los Angeles County Waterworks District No. 40 ("D40") and some of the other PWS did significant work in this coordinated litigation is not in dispute, nor is it germane to this Motion beyond the well-established fact that after supporting the formation of the Classes, the PWS fought the Classes tooth and nail for seven years.

A. The PWS Cross-Complaint Initiates a Comprehensive Adjudication and Asserts Claims Against the Class Members.

In 1999 two sets of large agricultural interests filed suit against D40 and other PWS. For six years, the matter was litigated. On October 17, 2005, the PWS filed their first Doe Amendments, naming the United States and Edwards Air Force Base [D.E. 9.] On January 18, 2oo6, the PWS filed their Cross-complaint, which expressly named the United States and a number of other new parties. [D.E. 134.]

On January 10, 2007, the PWS filed their First Amended Cross-Complaint, which included 100,000 Roe Defendants, many thousands of which would be identified over the succeeding years. This First Amended Cross-Complaint included, for the first time, class allegations against approximately 65,000 landowners in the area of adjudication (the "AVAA"). This cross-complaint also asserted that PWS were intending to create a comprehensive adjudication and that the United States was a "necessary party to this action." (Dunn. Decl., Ex. O ("First Amended Cross-Complaint"), 8:9-26 [D.E. 422].) The First Cause of Action in this cross-complaint was a prescription claim against all overlying landowners, including Class members. It also contained claims for a "municipal priority," physical solution, and "unreasonable use of water," among others, all of which were asserted against every private landowner. (*Id.*) This filing made clear that the PWS were pursing claims hostile to the rights of the Class members, and until the 2015 settlement, the PWS did not surrender these adverse claims.

B. The PWS' Failed Attempt to Certify a Defense Class.

On the same day they filed the First Amended Cross-Complaint, the PWS filed a Motion for Class Certification, seeking to certify a defense class of "over 65,000" landowner parcels. [D.E. 420, 5:7-8.] That motion stated that "[t]he individual litigation cost for each parcel would be unduly burdensome . . ." (*Id.* at 5:10-11.) In that motion, the PWS sought to have the State of California as the representative for this defense class (*id.* at 14.), which the State of California opposed. [D.E. 461.] The State did "not have funds for extensive litigation." (Dingman Decl., ¶ 7 [D.E. 460].) Notwithstanding this, and in the face of opposition from the United States and many

other parties, the PWS continued to vigorously advocate for the formation of Classes.

The fundamental problem facing the PWS was the inability to find a representative for the defense class they proposed. Numerous hearings occurred in 2007 without a resolution to this problem, which persisted well into 2008. (McLachlan Second Supp. Decl. ("2nd Supp. Decl.") Ex. 13 (Hearing Transcript, March 12, 2007) 9:6-10:15; Ex. 14 (Hearing Transcript, April 16, 2007), 38:25-39:26; Ex. 16 (Hearing Transcript, May 21, 2007), 19:26-21:20; Ex. 15 (Hearing Transcript, August 11, 2008), 43:12-44:15.) It was acknowledged by all that the case could not be litigated without the Class mechanism. (2nd Supp. Decl., ¶ 7, Ex. 16 28:17-28, 41:3-12.)

C. The Plaintiff Classes Solve the Jurisdictional Problems.

Shortly after the PWS filed their class complaint, Rebecca Willis filed her class action. [D.E. 445.] The PWS quickly acknowledged that a plaintiff class represented by Willis was a far superior way to proceed:

> MR. DUNN: . . . The other part of the problem is if we are in fact looking at the Zlotnick slash Willis class action complaint as a mechanism for bringing in all of these parties, then it does in fact, I would have to concede, it takes the county and my client out of the position of sort of suing them . . .
>
> So if the Court is sort of heading in that direction, of sort of looking at the existing Willis cross – class action complaint, as being sort of the mechanism as opposed to, say, the one that has been filed by the public water suppliers, **then that procedurally puts us in probably a slightly better – or maybe significantly better situation.**

(Ex. 14 (Hearing Transcript, April 16, 2007), 8:21-10:1 (emphasis added).)

Early in 2007, the Court and counsel acknowledged the conflict of interest between the dormant landowners and the small pumpers, and the need for separate counsel. (Ex. 16 (Hearing Transcript, May 21, 2007), 29:16-28.)

The Willis Class was certified on September 11, 2007, with the support of the PWS. [D.E. 841 & 802.] It took another full year until a Small Pumper class representative and counsel appeared and the Small Pumper Class was certified. [D.E. 1865.] As with the Willis Class, the PWS supported the certification of the Small Pumper Class. [D.E. 1519, 4:2.] The only modest opposition the PWS made was to

request that the size of the Small Pumper Class be larger. (*Id.* at 6:6-15.)

The PWS were fully aware that they would be exposed to attorneys' fees at the outset, and that the Classes were brought as essentially defensive cases to defeat the PWS' prescription claims. (Ex. 15, 41:13-20.) If the Classes were not critical to this litigation – as the PWS now argue to be the case – then why would they so vigorously support the formation of the classes? The obvious answer is that it would have cost the PWS a lot of money to prosecute this comprehensive adjudication, assuming that was even possible without the Classes. If the cost of personally serving 65,000 parties is assumed to be only $100 on average per person, the PWS would have spent $6,500,000; if it were $200, the cost would have been $13,000,000 (assuming could even be done). (2nd Supp. Decl., ¶ 8.) This of course ignores the added litigation cost and time spent dealing with thousands of litigants. For example, if each of the known 3,172 Small Pumper Class parcel owners took 15 minutes to establish their cases, including pumping and self-help, nearly 800 hours of trial time would be consumed. This would have consumed the better part of year in trial, and the PWS would have spent millions of dollars in attorneys' fees.

Beyond the procedural value, the Small Pumper Class played a critical substantive role in the litigation at all stages. For example, as the PWS admit, "the physical solution . . . could not have occurred without evidence of the parties respective groundwater pumping . . ." (D40 Opp., 3:15-16.) With regard to the Small Pumper Class, Class counsel spent a massive amount of time tackling this problem over many years, including extensive litigation with the PWS over the Court-appointed expert.

D. For Years, The PWS Intentionally Chose to Perpetuate this Litigation in Favor of Pursing Their Prescription Claims

Throughout their briefs, the PWS state or imply that all or most of the latter portions of the Small Pumper Class litigation was not necessary, and that Class Counsel somehow over-worked and over-billed the case for many years. What actually occurred is that the non-settling PWS defendants intentionally chose not to settle with the Class for many years, and instead persisted to litigate their adverse claims.

After the failed settlement hearing on June 16, 2011, at the Court's encouragement, counsel for D40 and Class counsel agreed to revise the settlement agreement in accord with the Court's reservations, and resubmit it. (2nd Supp. Decl., ¶ 9.)[1] Class counsel revised the agreement accordingly, but D40 changed its mind and refused to settle (in contrast to several other PWS who continued to prefer settlement). (*Id.*, ¶ 10.)

In the Spring of 2013, Class counsel had discussions with counsel for D40 in Court about a settlement, including using a class complaint against the landowners as leverage. D40 agreed to proceed. (*Id.* at ¶ 11.) The AV Materials case was filed on May 23, 2013. That day, Class Counsel emailed all PWS to advise them of the settlement plans. (*Ibid.*, Ex. 18, p. 1) Counsel for BBK continued to express interest in the settlement plan. (*Ibid.*,Ex. 18, p. 2.) On June 18, Mr. Wellen reneged on D40's agreement to settle. (*Id.*, Ex. 18, p. 5.) On June 26, Class Counsel wrote to all the other PWS counsel on settlement, which correspondence also including a discussion of legal fees. (*Id.* at ¶ 12, Ex. 18, p. 6.) By August 15, the following had agreed to settle: Quartz Hill; Rosamond CSD; Palmdale Water District; Phelan; and the City of Lancaster. In an e-mail of that same day, Class Counsel again warned of future fee exposure. (Ex. 18, p.8.) On August 19, Cal Water agreed to settle. (*Id.* at ¶ 12, Ex. 18, p. 9.)

On October 17, Quartz Hill took the matter to their Board (after the preliminary approval motion was filed), and voted to pull out under pressure from D40. (*Id.* at ¶ 13, Ex. 18, p. 12.) On October 23, 2013, after the motion for preliminary approval had been

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[1] None of the documents relevant to this section are identified as settlement communications, and some in fact are expressly identified not being settlement communications. In this circumstance, where not offered to prove liability, Courts can consider informal settlement communications made outside of mediation. (*Meister v. Regents of Univ. of Cal.* (1998) 67 Cal.App.4th 437, 452; *Lofton v. Wells Fargo Home Mortgage* (2014) 230 Cal.App.4th 1050, 1069 (Evid. Code section 1152 does not bar use of documents for purposes other than to prove liability); *Robertson v. Fleetwood Travel Trailers of Cal., Inc.* (2006) 144 Cal.App.4th 785, 823 n.25 (same); *A.D. v. State of Cal. Highway Partrol* (9th Cir. 2012) 712 F.3d 446, 460-61 (settlement offers may be considered as evidence of the plaintiff's success in considering award of fees).)

filed, Cal Water pulled out via a formal notice filed with the Court. (*Id.* at ¶ 13.)

And so, all of the non-setting PWS defendants had multiple and continuing opportunities to settle, yet chose instead to litigate against the Class.[2] They should not now be heard to complain about the costs of their decisions – certainly not if the strong public policies favoring settlement are to be honored.

III. AN AWARD OF FEES AND COSTS IS PROPER UNDER C.C.P § 1021.5

A. The Small Pumper Class Enforced An Important Right Affecting the Public Interest.

The PWS argue that the Class did not enforce an important right affecting public policy. As a threshold matter, in their argument on the three pertinent factors, the PWS ignore the fact that the analysis is not separate but rather, overlapping and interrelated. For example, the Supreme Court has held that the larger the class of persons affected, the less important the fundamental right must be. (*Press v. Lucky Store, Inc.* (1983) 34 Cal.3d 311, 320-21 (3,000 people obtaining access to one.) The reverse is also true. (*Ibid.*)

Setting aside the rights cited in the Motion, which the PWS ignore, it is difficult to imagine a right – excluding perhaps of personal freedom from imprisonment or free speech – more important than the right to access water. The Court can certainly take notice of the scientific fact that humans cannot survive without water, and that this right is so important that it takes up an entire section of the California Constitution (Section X).[3] The Small Pumper Class vindicated and preserved their own rights to access

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[2] The adversity of D40 to settlement ultimately caused a small group of parties to meet privately for settlement for many months. These efforts produced the global Judgment and Physical Solution that would later be approved by the Court. (2nd Supp. Decl., ¶ 15.)

[3] The public policy is embodied, in part, at Article 10, Sec. 2:
"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that

groundwater, in perpetuity, and more broadly, vindicated the state mandate and public policy that water resources not be wasted, i.e. as the Court has observed, without the Small Pumper Class, it would not have been possible to conduct a comprehensive adjudication and to impose a global physical solution that will, according to the experts, preserve the groundwater basin for generations to come.

Plaintiff could cite a hundred or more cases awarding attorneys' fees that involve public rights which any reasonable person would agree are of lesser import and magnitude than those at issue here. Because the Court has previously ruled favorably on this element, Plaintiff will just cite a few analogous cases. In *Environmental Protection Information Center v. Dept. of Forestry*, the Court held that the creation of a "single, integrated [sustained yield plan]" for logging was an important right. ((2010) 190 Ca.App.4th 217, 233-34.) There are many CEQA cases with similar, but less widespread impacts as the instant action. (*See, e.g., Center For Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 895 (enforcing air quality and water supply is important right); *RiverWatch v. County of San Diego* (2009) 175 Cal.App.4th 768, 782 ("With drought a persistent threat in California," forcing the County to secure a water supply involves an important right).)

The Class itself achieved its primary goal: preventing the PWS from taking its water through prescription. Certainly, it is in the larger interest of all public citizens to vindicate the right from having one's property interest invaded by the government (principles that are reflected in both the state and federal Constitutions). (*Pacific Legal Foundation v. Cal. Coastal Comm'n* (1982) 33 Cal.3rd 158, 167 ("we have no doubt that the right to be free from the deprivation of private property interests in an arbitrary manner may rise to the level of an "important right affecting public interest'").)

> the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. . . ."

One important thing that the PWS ignore in all of their 1021.5 arguments is the very broad spectrum of rights and interests that can form the basis of a successful 1021.5 action. Such rights can be Constitutional, statutory, or common law – as is the case with the Class' self-help rights against the PWS prescription claims (among other rights endowed upon overlying landowners by the courts). (*Woodland Hills Residents Ass'n v. City Council* (1979) 23 Cal.3d 917, 925; *Notrica v. State Compensation Ins. Fund* (1999) 70 Cal.App.4th 911, 954 (fees awarded for enforcing common law rights to easement).)

B. The Small Pumper Class Conferred A Significant Benefit on the General Public or a Large Class of Persons.

The PWS next claim that the Class did not obtain a benefit for the general public or a large number of people. (D40 Opp., 9:1-18.) The PWS, who encouraged the formation of the Classes so they could achieve a comprehensive adjudication, seem to base their position on this issue depending on which way the wind blows on any given day. In 2011, the PWS argued to the Court on a settlement involving substantially identical terms that "the Class will benefit substantially." (Mot. For Prelim. Approval of Class Settlement, 7:16-17 (May 2, 2011) [D.E. 4422] (each class member may pump up to 3 acre-feet per year).) Today, the Class did not benefit.

Among the many fantastic statements D40 offers is that "[t] the physical solution would have occurred regardless of the Wood Class Counsel's participation in these proceedings . . . ." (D40 Opp., 9:16-18.) D40 suggests that, in absence of the Class, the Court somehow would have obtained McCarran jurisdiction over the United States, [4] would have determined the rights of over 4,100 small pumpers representing the vast majority of groundwater wells in the AVAA, and that the Judgment and Physical

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[4] As noted in the Motion and the Declaration of David Zlotnick, this case sat 'dead in the water' for over a year because the PWS could not certify a defense class, and refused to otherwise spend the many millions of dollars required to personally serve more than 65,000 landowners who eventually became members of the Willis and Small Pumper Classes. There can be no dispute that without the classes, there would be no comprehensive adjudication, and certainly no jurisdiction over the United States. The value of a physical solution in absence of the Classes is highly dubious.

Solution – initially developed in large part by Class Counsel with the express exclusion of D40 (2nd Supp. Decl., ¶ 15) – would have somehow occurred after D40 spent years trying to kill settlement efforts. (2nd Supp. Decl., ¶ 15.) To the contrary, the benefits conferred on the general public, the class members, and even the PWS themselves, are enormous.

The benefit to the public has been addressed by this Court in formal orders (Dunn Decl., Ex. B, 5:25-6:5; McLachlan Decl., Ex. 4, 1:20-22), and in the Motion, so Plaintiff will not address that further. In addition, a benefit to only the Class members would be *is* sufficient to establish a benefit to "a large number of people." The record reflects that there are over 4,100 members of the Class – a large number of people under any definition. (*Monterey/Santa Cruz County Bldg. & Constr. Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500, 1523 ("hundreds of construction workers is a 'large class of persons.'"); *Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 382, 396 (1400 police chiefs is a large class of persons); *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d. 311, 321 n.10 (action affecting 3,000 persons).)

C. The Necessity and Financial Burden of Private Enforcement Supports a Fee Award.

The PWS cite valid law on this issue, but then ignore it by analyzing the benefits improperly. First, they attempt to monetize water rights that the Class Members, by Court Order, cannot transfer or sell. While the rights have substantial value, this is not a situation where the class action created a common fund.

Second, the PWS analysis of the classwide benefit is misplaced. The PWS view the Class as if it were an individual or some organization from which Class Counsel could collect attorneys' fees. (D40 Opp., 11:10-19.) The Class is not a legal entity, and the absent Class members are not parties to the lawsuit. (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 99.) While the Court may obtain jurisdiction over the absent class members to adjudicate their rights, not even that is certain at the outset of any class litigation because an order certifying the class must be secured.

The cases define the burden as that of the "individual" plaintiff. Indeed, the legal test itself is specifically structured as such:

> 'An award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends **his personal interest**, that is when the necessity of pursuing the lawsuit placed a burden on the plaintiff '**out of proportion to his individual stake** in the matter.'

(*Conservatorship of Whitley* (2010) 50 Cal.5th 1206, 1215 (emphasis added).) California Courts are careful to distinguish between individuals and entities when assessing this element. In *Police Protective League*, the court noted that while a union could afford to bring the litigation on behalf of its members, the individual members themselves could not afford to do so. (*Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 29.) Further, the PWS have not cited any cases suggesting that the Court should conduct this analysis on a classwide basis.

In short, the question is whether the burden on Richard Wood was out of proportion to the benefits he received. Clearly, with potential legal fees ranging in excess of $7 million dollars (and still climbing with the appeals), the value of Richard Wood's property in its entirety is eclipsed many times over. Further, whatever monetary value could be assigned to Richard Wood's individual benefit, or that of the Class for that matter, must be substantially discounted due to the probability of success at the outset. (*Whitley* at 1215.) And, the balancing of the individual benefits with the costs in not proportional; it must reflect the magnitude of the public benefits:

> Accordingly, it will be more important to offer the bounty of a court-awarded fee than where the public benefits are less significant. Thus, the courts should be willing to authorize fees on a lesser showing of need than they might where the public benefits are less dramatic. **This means the court sometimes should award fees even in situations where the litigant's own expected benefits exceed its actual costs by a substantial margin**.

(*Police Protective League*, 188 Cal.App.3d at 10 (emphasis added).) As noted below, the rather massive public benefits accrued from the Small Pumper Class would require an individual benefit substantially in excess of the costs of pursing this action. For these reasons, this third element is satisfied.

D. The PWS Did Initiate an Action That Compromised the Rights of a Large Group of Persons – The Class.

It is undisputed that the PWS asserted numerous claims adverse to the interests of the more than 4,100 Class Members, including prescriptive rights. The PWS maintained those claims, and actively litigated against the interests of the Class until they released those adverse claims by settlement in 2015. Had the Class not been formed to defend against these adverse claims, the right of the Class Members would have been adversely impacted by prescription, and potentially worse outcomes. Any such adverse impact to the rights of the Class could only have occurred under the PWS initiation – no other party filed claims against the Class or any of its members.

E. The Class Is a Prevailing Party.

The Supreme Court has held that the definition of a "prevailing party" for purposes of fee-shifting statutes is pragmatic and flexible, depending more on the impact of the action that on the manner in which it is resolved. (*Graham v. DiamlerChrysler Corp.* (2004) 34 Cal.4th 553, 565; *Folsom v. Butte County Ass'n of Gov'ts* (1982) 32 Cal.3d 668, 685 (if party has obtained some relief from "benchmark conditions" challenged in lawsuit and that relief is attributable in some way to the lawsuit, then the party is a prevailing party).) "It is settled that 'plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on *any significant issue* in litigation which achieves *some of the benefit* the parties sought in bringing suit.'" (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 153 (emphasis original).)

The success the Class has achieved is discussed at length in this brief and the Motion. For purposes of this argument, the fact that Plaintiff and Class defeated the PWS' prescription claims is more than sufficient to confer prevailing party status.

IV. THE COURT SHOULD APPROVE THE REQUESTED LODESTAR.

A. The Requested Hourly Rate Is Within or Below Applicable Market Rates.

The PWS argues that Class counsel should not be compensated at market rates because they are not water lawyers. (Opp. 22:15-17.) The authority they cite does not

stand for the proposition that in evaluating an hourly rate, "similar work" means the specific subject matter at issue, e.g. water adjudications. "[R]ates are generally not limited to those charged or awarded in cases involving the same subject matter." (Richard M. Pearl, *Cal. Attorney Fee Awards, 3rd Ed.* (CEB, 2016) § 9.106, *citing* (among more than twelve other cases) *Prison Legal News v. Schwarzenegger* (9th Cir. 2010) 608 F.3d 446, 454 (applicable comparison is to rates charged in relevant community for equally complex litigation); *see also Utility Reform Network v. PUC* (2008) 166 Cal.App.4th 522, 535 (in determining market rates for similar services, PUC may not limit rates to those awarded PUC practitioners); *Camacho v. Bridgeport Fin., Inc.* (9th Cir. 2008) 523 F.3d 973, 979 (consumer attorneys not limited to rates charged by or awarded to other consumer attorneys). [5]

To the contrary, California and Federal Courts look to the fees charged by attorneys of reasonably comparable experience, skill and expertise for cases requiring similar skills. (*Blum v. Stenson* (1984) 465 U.S. 886 (rates that prevail are for other types of equally complex litigation).) And, while D40 tries to minimize the extensive groundwater litigation experience of Mr. McLachlan (McLachlan Decl. ¶ 7), that experience should properly be considered as a factor supporting a higher rate. (*Building*

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[5] As has been demonstrated by the work performed by Class Counsel to date, what is far more important for Class counsel in this matter is experience and ability to litigate complex class actions matters, as that has been the bulk of the work performed. In any event, there is in fact no market for class action water lawyers – there is no evidence that any even existed (two may have been since created during this litigation). (Zlotnick Decl., ¶¶ 7-8 and McLachlan Decl. ¶¶ 44-45.)

While Mr. Dunn is not a water lawyer per se, he is an accomplished general land use litigator who himself litigates a wide variety of matters across a very broad spectrum. However, the litany of mistakes he and his co-counsel have made when trying to venture into the class action arena strongly suggests that is it far more important to have the class action and complex litigation experience than it is to have read a handful of water law cases. The failed attempt at pursuing a defense class action within the water suppliers' the First Amended Cross-complaint is perhaps the most notable example. If the numerous misstatements of law and inapposite arguments contained in the Opposition brief to the instant motion are not intentional, then that brief provides further testament to the difficulty class litigation can pose to those unfamiliar with it.

a Better Redondo Beach, Inc. v. City of Redondo Beach (2012) 203 Cal.App.4th 852, 870-71.) This extensive experience in groundwater litigation has been directly relevant and indeed has been essential to litigating this matter over a nearly five year period in which Class Counsel was deprived of a groundwater expert to consult with on technical hydrologic issues. (2nd Supp. Decl. ¶ 16.)

The PWS next argue, incorrectly, that the applicable legal market is the Antelope Valley.[6] "The determination of 'market rate' is generally based on the rates prevalent in the community where the court is located." (Pearl, *Cal. Attorney Fee Awards* § 9.114, *citing MBNA Am. Bank v. Gorman* (2006) 147 Cal.App.4th Supp. 1, 13.) The Supreme Court has also affirmed the use of rates prevailing in the market where counsel's office is located. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096 (office in San Francisco, litigation in Los Angeles). In this case, the litigation has occurred in Los Angeles and the Bay Area, and hence the rates in those communities are relevant.[7]

The PWS submit no viable evidence to rebut Plaintiff's substantial evidence of market rates. They merely attempt to advance the rates of *some* of their own counsel – notably omitting Mr. Dunn's rates. (Lemieux Opp., 8:16-24.) "[B]ecause government and insurance defense counsel generally charge lower rates than plaintiffs' attorneys for complex litigation, such attorneys' rates reflect a different market . . ." (*Cal. Attorney Fee Awards, 3rd Ed.* § 9.121, *citing* 12 cases, including (*Building a Better Redondo Beach, infra*, 203 Cal.App.4th at 873 ("reliance on the rate [defendants] paid their own attroneys, however, is akin to the cost-based approach rejected by the Supreme Court in

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[6] None of the PWS counsel are currently from the Antelope Valley, and indeed, none of the lawyers primarily litigating this case are officed in the AVAA – a rather small and remote legal market. All of the litigation occurred in Los Angeles or San Jose.

[7] Similarly, it is of no relevance that Ralph Kalfayan and David Zlotnick did not request market rates, and instead opted to pursue their own discounted hourly rates for the San Diego market (rates that are now five years out of date). (*PLCM Group, infra*, 22 Cal.4th at 1098; *Nemecek and Cole v. Horn* (2012) 208 Cal.App.4th 641, 651.)

Serrano IV.").)[8]

B. The Bills Are Not Inflated.

D40 spends several pages arguing that class counsel's bills are inflated. In actual fact, the bills understate the amount of time spent on behalf of the class. (*See* McLachlan Decl., ¶¶ 37-38; O'Leary Decl., ¶ 5.)

As is clear from the motion, McLachlan and O'Leary are not seeking fees for attorney time paid following the 2013 partial settlement. They received payment for approximately 34% of the hours they had put into the case prior to the partial settlement (at a reduced rate). Those hours are not part of the lodestar calculation in this motion. This motion only seeks compensation for unpaid time and unreimbursed costs.

C. All Small Pumper Class Work Directly Related to Its Claims Against the Public Water Suppliers.

All of Class counsel's time was incurred in obtaining and securing pumping rights, free from prescriptive claims, for the class. The complaint that counsel spent time on "other claims" is false. There were no other claims.

The class initially came into existence as a defense class intended to consolidate the claims of thousands of small pumpers. When that proved procedurally impossible, the Court and water districts involved themselves in locating counsel to represent a

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[8] Among the various factors that can be considered in setting the hourly rate is the "undesirability of the case." (Pearl, *Cal. Attorney Fee Awards*, at § 10.48; *Camacho v. Bridgeport Fin., Inc.* (9th Cir. 2008) 523 F.3d 973, 982, n.1 (listing "the 'undesirability' of the case" as relevant lodestar adjustment factor); *Horsford v. Board of Trustees* (2005) 132 Cal.App.4th 359, 399 (upward fee adjustment or lodestar enhancement).) Here, there is ample evidence of the undesirability of this case, as set forth in the Motion, this Reply, and the supporting declarations.

Ultimately, [t]he experienced trial judge is the best judge of the value of professional services rendered in his court." (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) The Court's expressed view of Class Counsel's work has been consistently favorable over the years, e.g.: "I think that what you have done here is admirable. And it the – as far as I'm concerned, in the highest standards of the profession stepping forward . . . representing these people . . ." (McLachlan Decl., Ex. 8 (Hearing Transcript, April 24, 2009) 21:22-26.)

plaintiff class that existed solely to defend against the prescriptive claims of the public water suppliers. Class counsel, once they were found, filed a complaint. The class complaint includes claims for monetary damages as a remedy for the taking of property rights, but under the Judgment, the water suppliers did not take any property rights from the class. Thus there is no monetary damage issue to try.

When the class reached a settlement with the public water suppliers in 2011, the Court rejected the settlement based on opposition from landowner parties to the effect that the class did not have evidence to support its claimed pumping volume. So the class filed a complaint against private landowners in order to create the potential for fee and/or damage claims against the landowners. The class did not pursue that complaint, but its purpose was to remove opposition to the class's settlement with the public water suppliers and thereby secure the class's pumping rights. (2nd Supp. Decl., ¶ 11.)

Similarly, class counsel's work litigating the claims of the non-stipulating parties in 2015 and 2016 was always and only intended to preserve the class's pumping rights under the Judgment and Physical Solution. The class's interest in Tapia, Robar, Ritter, and the other non-stipulators extends only so far as their claims might dilute the allocations provided in the Stipulation. Thus, all this work was done because, in counsels' professional judgment, it was necessary in order to protect the class's ability to pump water as they did before getting sucked into this action. In other words, all the work has been done to prevent prescriptive claims affecting the class's cumulative pumping. In this, class counsel was wholly successful and must be paid for that work. (*Serrano v. Unruh (Serrano IV)* (1982) 32 Cal.3d 621, 639 ("Absent circumstances rendering the award unjust, fees recoverable under [Section 1021.5] ordinarily include compensation for all hours reasonably spent . . ."); *Center For Biological* Diversity, 185 Cal.App.4th at 897 (same).)

However, even if some part of the work was unrelated to the class's essential purpose, it would still be compensable on the fee motion. If services on the fee and nonfee claims are intertwined and cannot be segregated, a reduction for work on the nonfee claim is not required. (*Hill v. Affirmed Housing Group* (2014) 226 Cal.App.4th 1192, 1997.)

If the class were a paying private party who had the same litigation goals as the class did, all this time would clearly be compensable. The same analysis applies in a fee motion. Generally speaking, hours are reasonable if they were "reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter. (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 431.) Put another way, "[t]he number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client." (*Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1111.)

D. "Double Billing" Is a Misnomer. The Billed Work Is All Recoverable.

Small Pumper class counsel staffed the case in the manner that made sense when tasks were performed. (McLachlan Decl., ¶¶ 36-41.) In some instances, both McLachlan and O'Leary both attended a deposition or court hearings. These decisions were justified when made. They are justified now. But even if they were not, the Court should not use hindsight to second guess these decisions.

By way of example, D40 – who itself always has two or three attorneys at every hearing – complains that both attorneys attended the March 8, 2010 CMC at which the Court ruled on a motion to disqualify the Lemieux & O'Neill firm (for representing parties on both sides of the public water suppliers' cross-complaint) and the scope of the court-appointed expert work. This last issue bore directly on the ability of the Small Pumper class to participate in what the parties then believed would be determined in the Phase III trial. At that point in time, the disqualification motion had been pending

for almost a year. These were significant issues in which both McLachlan and O'Leary had done the underlying work.

As another example, D40 complains that both McLachlan and O'Leary attended the Phase III trial and the deposition of Joseph Scalmanini (which was done telephonically). The Court should recall that the Scalmanini deposition was taken to preserve his testimony for the Phase III trial due to his health problems (and, in fact, the deposition occurred during a break in the trial). It appeared that there would have been no opportunity to wait for the transcripts and review them before the trial recommenced. So both attorneys appeared at the deposition. (2nd Supp. Decl., ¶ 17.) And while the PWS find it material that the Small Pumper class participation at the Phase III trial was "minimal," class counsel cannot guess at what may unfold at a trial in advance. They had to attend.

Similarly, the fact that both attorneys attended the Justice Robie mediation, or closing argument, or a hearing on objections to the Statement of Decision is all true. They did because the representation required it. California law allows for the use of multiple counsel when the demands of a case so warrant. (*Balsam v. Trancos, Inc.* (2012) 203 Cal.App.4th 1083.) Courts will not mechanically apply rules against duplication of effort to thwart legitimate and reasonable fee requests. For example, in *Citizens Against Rent Control v. Berkeley* (1986) 181 Cal.App.3d 213,234, the Court of Appeal approved fees for two attorneys who spent ten hours a day for three days preparing a third attorney for oral argument. In *Margolin v. Regional Planning Commission* (1982) 134 Cal.App.3d 99, 1007, the Court of Appeal found that some duplication of effort among multiple attorneys was justified "considering the importance of preparation for trial." Having two attorneys appear at trial is reasonable. (*See Horsford*, 132 Cal.App.4th at 396.)

McLachlan and O'Leary utilized a teamwork approach based on workload, scheduling, anticipated class issues, and the like. Counsel should not be penalized for this approach.

E. The Post-Settlement Work Is Recoverable.

D40 argues that "Wood Class cannot recover any fees for work performed after the March 4, 2015 settlement, which his (sic) interests became aligned with the Public Water Suppliers." (Opp., p. 21:23-24.) Then, in an exercise of Soviet-style revisionism, D40 goes on to argue that since the settlement is "nearly identical" to the 2011 settlement (that the Court rejected), no work done since 2011 should be compensable.

The short response to this is to point out that in the Stipulation for Judgment and Physical Solution, the Public Water Suppliers agreed to pay all reasonable fees and costs for the Wood class through "the date of the final judgment." (Exhibit 19, ¶ 11.) The "final judgment" is, obviously, not the date of the 2011 settlement that the Court rejected, or the date of the 2015 settlement when D40 thinks interests became aligned. It is the date of the final judgment.

The long response is that following the Court's rejection of the 2011 settlement, various public water suppliers disengaged from any settlement discussions. (2nd Supp. Decl., ¶¶ 9-14.) The Small Pumper class needed evidence to support its water usage, which led to the Court appointing Timothy Thompson (which appointment led to years of law-and-motion practice to get the scope of work approved and paid). Mr. Thompson did not testify until August 3, 2015. The Court did not accept the evidence of Small Pumper water usage until after Mr. Thompson's testimony. These events were absolute prerequisites to the current settlement and physical solution.

Counsel find it breathtaking that D40 would argue—in apparent seriousness—that the Small Pumper class's work was accomplished by 2011 when D40 itself did not participate in the partial settlement in 2013. Class counsel could not have stopped working in 2011 without abandoning the case (which the Court would not have tolerated). Class counsel could not have stopped working in 2013 (which also would not have been tolerated). The idea that the thousands of hours of work performed for the class's benefit after the Court rejected the 2011 settlement should be considered pro bono is offensive. At all times prior to entry of the final judgment, the Small Pumper

class stood to lose some or all of its cumulative pumping rights. Thus, the class required vigorous representation.

F. Mr. McLachlan Performed the Work for Which He Billed.

As a threshold matter, in the context of a fee motion, attorney bills enjoy a presumption of credibility. (*Horsford*, 132 Cal.App.4th at 396.) Nevertheless, D40 takes exception to two of Mr. McLachlan's billing entries, dated February 10, 2014 and February 18, 2014. The billing entries are correct. (2nd Supp. Decl., ¶ 19.)

D40 also claims that Mr. McLachlan misled the Court in 2013 by stating that the "there was no simultaneous negotiation of legal fees" in connection with the partial settlement. (Opp., 17:22-26.) In support of this (defamatory) claim, D40 cites to two emails, without attaching either.[9] No wonder. The emails make the point that by settling with the Small Pumper class, the public water suppliers would cut off their exposure to fees. The fees were not negotiated in connection with the partial settlement. (*See* Exhibit 18, p. 8.)

Continuing with the kitchen sink approach, D40 complains that McLachlan billed for work that it think he should not have done. This includes what it characterizes as "basic research," and junior and clerical work. When one examines the specific time entries behind these complaints, they fall short.

D40's complaint about "basic research" boils down to billing entries in which McLachlan researched rural residential use of water. This is not a basic issue of water law, but an issue that was (1) central to the Small Pumper class's rights and (2) not covered in other adjudications because small pumpers have generally been excluded as

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[9] The PWS also ignore the fact that in asserting that Mr. McLachlan is perpetrating a fraud on the Court with regard to this issue, they are also accusing their PWS co-counsel, the actual eyewitness to the 2013 settlement negotiations, of perjury. Thomas Bunn, Douglas Evertz, and Wesley Milliband, all esteemed members of the bar, declared under oath: "I did not negotiate with the Wood Class (including its legal counsel) about the Wood Class' attorneys' fees or costs that are included within the Settlement Agreement until and after I came to agreement with the Wood Class on the

de minimis users. Counsel would have been derelict not to have researched this issue from all reasonably available sources.

The complaints about document review and clerical work are equally feeble. The case involved gigantic amounts of filings, all of which required some review and much of which required analysis. Some of the analysis resulted in the preparation of memos. The analysis and preparation of memos is not automatically work for a paralegal or junior attorney. In fact, class counsel had every incentive to work this case as efficiently as possible: every hour of work was work for which there would be no payment for an indefinite future period. (McLachlan Decl., ¶¶ 41, 51-58.) Similarly, every project farmed out to paralegals or clerical personnel was lost time for which counsel incurred costs with no current opportunity for reimbursement. The idea that class counsel overworked the case makes no sense.

The incredible amount of time and effort that has passed since the beginning of this case requires compensation at the full requested amount. (*Serrano IV*, *infra,* 32 Cal.3d 621, 639 ("Absent circumstances rendering the award unjust, fees recoverable under [Section 1021.5] ordinarily include compensation for all hours reasonably spent . . ."); *Center For Biological* Diversity, 185 Cal.App.4th at 897 (same).)

G. The Block Billing Argument Fails.

D40 attempts to criticize the O'Leary bills as "block billed." (Opp., p. 24:7.) D40 provides no citation to any billing entry. This failure makes sense when one actually looks at the billing. They are not block billed. The overwhelming majority of the daily time entries involve a single task. Where there are multiple tasks, time entries are broken out by task.[10]

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substantive terms of the Settlement Agreement that do not relate to payment of the Wood Class' attorneys' fees and costs. (2nd Supp. Decl., Ex. 20.)

[10] The billing through October 2, 2013 has been previously reviewed by the Court in connection with the fees awarded following 2013 partial settlement (which, not incidentally, D40 unsuccessfully opposed. At least 75% of that opposition was cut-and-pasted into the current opposition). For the post-10/02/2013 entries, examples of task

Assuming for the sake of argument that D40 meant to limit its block billing argument to some pre-2013 billing entries (although it cited to none), the Court should recognize that block billing is "not a prohibited practice." (*Farfaras v. Citizens Bank and Trust* (7th Cir. 2006) 433 F.3d 558, 569.) In fact, "In challenging attorney fees as excessive because too many hours of work are claimed, it is the burden on the challenging party to point to the specific items challenged, with a sufficient argument and citations to the evidence. General arguments that fees claimed are excessive, duplicative, or unrelated do not suffice." (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.) Here, the block billing argument in the opposition cites to no specific entries, is obviously not based on an actual review of the records, and contains only general arguments. Thus, it does not meet D40's burden in challenging any of O'Leary's bills.

H. The Alleged Indigency Of The "Small Districts" Is Not Grounds To Reduce Prevailing Party Fees.

The water districts represented by the Lemieux & O'Neill firm – newly re-branded as the "Small Districts" for the purpose of this Motion — plead poverty as a defense to this fee motion. They make this plea notwithstanding that they have paid their own attorneys $3.1 million in the course of this case.[11] . They make this plea even though they chose to litigate the Small Pumper Class claims actively until the very end,

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billing occur on 02/18/2014; 04/02/2014; 04/03/2014; 06/10/2014; 11/03/2014; 12/09/2014; 06/30/2014; 07/10/2014; 07/27/2014; 08/02/2014; 08/20/2014; 08/21/2014; 01/06/2016; 01/14/2016; 01/15/2016; 01/18/2016; 01/21/2016; 01/24/2016; 01/25/2016; and 01/26/2016. The remainder of the entries all related to a single task.

[11] Specifically, according to the Opposition, North Edwards Water District paid $194,698 in attorney's fees; Desert Lake Community Service District paid $213,123; Palm Ranch Irrigation District paid $426,213; Littlerock Creek Irrigation District paid $435,459; and Quartz Hill Water District paid $1,829,939. When allocated, these amounts far surpass each of these entities' shares of fees at issue here. (*See* 2nd Supp. Decl., ¶ 21.) If a Government Code election is made for payment over ten years, the "Small Districts" each pay between $1,800 and $29,000 per year.

even though they had opportunities to settle with the Class well before 2015. And they make this plea notwithstanding that the physical solution allocates to them over 1,949 acre-feet of water annually, which can be conservatively valued at $31,000,000.

They largely base their argument on *Garcia v. Santana* (2009) 174 Cal.App.4th 464, which does, in fact, stand for the proposition that the financial condition of a defendant is a consideration when awarding attorney's fees. But *Garcia* involved an indigent pro per litigant for whom fee waivers had been granted. Even there, the Court of Appeal reversed a trial court order awarding no fees based on the defendant's financial status. The Court balanced the need to provide access to the courts for parties of limited means against the Legislative intent behind fee shifting statutes. The Court expressed a concern that large fee awards could effectively deprive indigent pro per parties of court access. That concern is clearly not present here: public entities always have access to the courts (and never pay filing fees). There is no legitimate comparison between an indigent pro per private party (as in *Garcia*) and public entities that have spent over $3 million on their attorneys. The argument that a fee award in favor of class counsel would somehow deprive the small water districts of access to the courts is a non-starter.

The small districts also cite, misleadingly, to *Connerly v. State Personnel Board* (2006) 37 Cal.4th 1169, for the proposition that "a fee award is only properly assessed against a defendant who had the power to provide the relief requested." *Connerly* involved a fee motion directed against an amicus curiae that defended an affirmative action program that the State itself refused to defend. The Supreme Court held that amicus parties generally did not have exposure to fees: "[in all prior cases] those found liable for section 1021.5 fees were either real parties in interest that had a direct interest in the litigation, the furtherance of which was generally at least partly responsible for the policy or practice that gave rise to the litigation, or were codefendants with a direct interest intertwined with that of the principal defendant." (*Connerly*, 37 Cal.4th at 1181.)

Here, the small districts are directly intertwined with the large water districts; they all decided to pursue this litigation to the end. They clearly are and have always been directly interested in the outcome. Thus, they can, and should be, liable for fees.

Moreover, the small districts ignore the fact that the varying sizes of the water districts against whom the Small Pumper class is seeking fees was an issue specifically contemplated by the Stipulation for Entry of Judgment and Physical Solution. That stipulation gave the water districts the right of contribution against one another for the Small Pumper class fees:

> 11. The Public Water Suppliers and no other Parties to this Stipulation shall pay all reasonable Small Pumper Class attorneys' fees and costs through the date of the final Judgment in the Action, in an amount either pursuant to an agreement reached between the Public Water Suppliers and the Small Pumper Class or as determined by the Court. The Public Water Suppliers reserve the right to seek contribution for reasonable Small Pumper Class attorneys'' fees and costs through the date of the final Judgment in this action from each other and Non-Stipulating Parties. . .

(2nd Supp. Decl., Ex. 19.)

At a basic level, the small districts would have the Court reward them for their own irresponsibility. Government Code section 970.8 requires local public entities to "include in its budget a provision to provide funds in an amount sufficient to pay all judgments in accordance with this article." Here, the small districts seem to have budgeted sufficiently to pay their attorneys (over $3,000,000) but not to have followed the requirement of section 970.8. That failure should not be borne by class counsel, particularly since the districts have the ability to raise money from their ratepayers, or through a bond (*see* Gov't Code § 971). As the districts make blindingly clear in District 40's opposition, they initiated this litigation and they decided to make it comprehensive.

Consider: the PWS made a decision to bring the United States into this adjudication, but that required that they comply with the McCarran Amendment and make this a comprehensive adjudication. There are many good reasons to pursue a comprehensive adjudication but there are also costs. One cost is that small domestic pumpers, who would prefer not to have their water rights adjudicated (and in other

cases, for example, the Mojave basin, were left out as *de minimis* users) required representation.[12] After many years of litigation, the small pumpers, have secured water rights that will allow them to continue their domestic pumping. This is a benefit to over 3,100 Antelope Valley households that rely on individual groundwater pumps for their daily water. And bringing the basin into hydrological balance benefits not just them, but all residents of the Antelope Valley and, indeed, the entire State. That benefit, though, carries with it the cost of paying the lawyers who represented the class's interests over the past eight years.

V. THIS CASE REQUIRES THE APPLICATION OF A MULTIPLIER.

A. California Law Requires a Positive Multiplier Here.

Fee awards under section 1021.5 "should be fully compensatory," and absent "circumstances rendering the award unjust, an . . . award should ordinarily include compensation for all the hours reasonably spent. " (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133.) Additionally, while the lodestar method is typically used by courts in section 1021.5 cases, "a contingent fee **must** be higher than a fee for the same legal services paid as they are performed.[13] The contingent fee compensates the lawyer not

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[12] Class counsel would submit that individually naming, serving, and litigating the claims of over 4,100 class members would have been economically prohibitive, both for the public water suppliers and the class members. (Dunn Decl., Ex. B, 5:25-6:5.)

[13] Courts in California routinely approve fee multipliers in cases with contingent risk and delay, most often, against public agencies. An incomplete list: *Craft v. County of San Bernardino* (C.D.Cal. 2008) 624 F.Supp.2d 1113, 1125 (5.2 multiplier; public agency); *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495 (2.52 multiplier); *Chavez v. Netflix* (2008) 162 Cal.App.4th 43 (2.5 multiplier); *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78 (2.34 multiplier; public agency defendant); *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 584 (2.25 multiplier; 1021.5); *Laffitte v. Robert Half Int'l* (2014) 231 Cal.App.4th 860, 881 (2.13 multiplier); *Coalition for LA County Planning v. Board of Supervisors* (1977) 76 Cal.App.3d 241 (2.1 multiplier; public agency; 1021.5); *Paulson v. City of San Diego* (S.D.Cal. 2007) 2007 U.S. Dist. Lexis 43587 *14 (2.0 multiplier; public agency; 1021.5); *Crommie v. PUC* (N.D.Cal. 1994) 840 F.Supp. 719, 726 (2.0 multiplier; public agency; 1021.5); *Leuzinger v. County of Lake* (2009) 2009 U.S.Dist.Lexis 29843 *31 (2.0 multiplier; public agency); *Chabner v. United of Omaha Life Ins. Co.* (N.D.Cal. 1999) 1999 US Dist Lexis 16552 *21 (2.0 multiplier; 1021.5); *Gutierrez v. Wells Fargo Bank* (N.D.Cal. 2015) 2015 US Dist Lexis 67298 *23 (2.0 and 5.5 multiplier); *Cates v. Chiang*

only for the legal services he renders but for the loan of those services. . . . 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." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579-580.) Here, services were loaned for over eight years for the benefit of the class and all of the attorney hours are at risk. Indeed, the oppositions both urge the Court to deny all fees to class counsel.

As one court wrote, "the market value of the services provided by [respondent's] counsel in a case of this magnitude must take into consideration that any compensation

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(2013) 213 Cal.App.4th 791, 805 (1.85 multiplier; public agency; 1021.5); *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545 (1.75 multiplier; 1021.5); *Pellegrino v. Robert Half Int'l* (2010) 182 Cal.App.4th 278, 290 (1.75 multiplier); *Amaral v. Cintas* (2008) 163 Cal.App.4th 1157 (1.65 multiplier; 1021.5); *Healdsburg Citizens for Sustainable Solutions v. City of Healdsburg* (2016) 206 Cal.App.4th 988 (1.5 multiplier; public agency defendant; 1021.5); *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866 (1.5 multiplier; public agency; 1021.5); *Edgerton v. State Personnel Board* (2000) 83 Cal.App.4th 1350 (same); *Animal Protection & Rescue League v. City of San Diego* (2015) 237 Cal.App.4th 99 (same); *Downey Cares v. Downey Comm. Dev. Comm'n* (1987) 196 Cal.App.3d 983, 994 (1.5 multiplier; public agency; 1021.5); *Kern River Pub. Access Comm. v. City of Bakersfield* (1985) 170 Cal.App.3d 1205 (1.5 multiplier; public agency; 1021.5); *In re Lugo* (2008) 164 Cal.App.4th 1522 (1.5 multiplier; public agency; approving with the comment that 1.5 is "not large" by comparison to typical awards); *Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 947 (1.5 multiplier; 1021.5); *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1418-19 (1.5 multiplier; 1021.5); *Jutkowitz v. Bourns, Inc.* (1981) 118 Cal.App.3d 102, 108 (1.5 multiplier; 1021.5); *Taylor v. Nabors Drilling USA* (2014) 222 Cal.App.4th 1228 (1.5 multiplier); *see also Chau v. CVS RS Services* (2008) Los Angeles County Superior Court No. BC349224, Pearl Decl. Ex. F, 5:7 (3.8 multiplier); *Thompson v. Santa Clara County Open Space Auth.* (2009) Santa Clara County Superior Court No. 1-02-CV-804474, Pearl Decl. Exs. G, 4:9-20, & H, 5:23 (2.85 multiplier; public agency; 1021.5); *Sierra Club v. County of San Diego* (2015) San Diego County Superior Court No. 37-2012-00101054-CU-TT-CTL, Pearl Decl. Ex. L, p. 5 (2.0 multiplier; public agency; 1021.5); *Uphold Our Heritage v. Town of Woodside* (2008) San Mateo Superior Court No. 444270, *aff'd by unpublished decision*, 2008 Cal.App.Unpub. LEXIS 8875, Pearl Decl. Ex. J, p.4 (same); EPIC v. Cal. Dept. of Fire & Forestry (2004) Humboldt County Superior Court Nos. CV990445 and CV990452, Pearl Decl. Ex. K, p. 14 (same); *Hope v. State of California* (2006) Los Angeles County Superior Court No. BC 258985, Pearl Decl. Ex. I, 2:12 (2.0 multiplier; public agency).

has been deferred . . . from the time an hourly fee attorney would begin collecting fees from his or her client; that the demands of the present case substantially precluded other work during that extended [deferral] period, which makes the ultimate risk of not obtaining fees all the greater . . .; and that a failure to fully compensate for the enormous risk in bringing even a wholly meritorious case would effectively immunize large or politically powerful defendants from being held to answer for constitutional deprivations or deprivations of statutory rights, resulting in harm to the public." (*Horsford*, 132 Cal.App.4th at 399-400.)

That tracks closely with the circumstances here. Counsel for the Small Pumper Class has worked on this case for over eight years. They have passed on other work, they have advanced many thousands of hours of time and tens of thousands of dollars, none of which has been available for their other clients. (The partial settlement in 2013 compensated class counsel for 34% of the hours expended through that time, but at a reduced rate.) They took enormous risk; their fees and costs are still at risk as none of the settling parties acknowledge any exposure to fees, despite agreeing to pay reasonable fees in the Stipulation for Judgment.

Class counsel cannot be fully compensated for their time and risk without the use of a multiplier. Merely paying the time spent over an eight year period at current rates does not compensate counsel for effectively lending over 5,000 hours of attorney time for the benefit of the Class. As the Court knows, the class had great difficulty locating counsel at the beginning of the case, because of the complexity and effort that all parties to this action knew would be required. The reality was, if anything, worse that anyone anticipated back in 2008. The amount of time and effort required to secure pumping rights for the class vastly exceeded what anyone would have undertaken on a straight contingency basis.

Both Class Counsel have indicated that, with hindsight, they would have rejected

this representation. But, luckily for the Class and the basin as a whole, they did not. Now that the judgment has been entered, they should be fully and fairly compensated. Full and fair compensation requires the Court to apply a multiplier to the lodestar. (*See FN 13, infra*.)

B. The Negative Multiplier Urged by the PWS Is Unsupported and Should Be Rejected.

D40 argues that the Court should apply a negative multiplier, going so far as the claim that "There is ample authority for the Court to reduce the lodestar here." (D40 Opp., p. 25:17-18.) D40 cites three cases as the "ample authority." The first, *State Water Resources Control Board Cases* (2008) 161 Cal.App.4th 304, is a complete mis-cite. That case reversed a trial court's denial of a fee application filed by The Audubon Society in a case in which several public entities also sued the State Water Resources Control Board for failure to implement rules aimed at protecting Delta wildlife. The public entities were successful (and were awarded fees). Thus, the trial court concluded that private attorney general fees were not warranted because private enforcement was not necessary. The Court of Appeal reversed, holding that the necessity criterion in Code of Civil Procedure section 1021.5 cannot be applied with hindsight without undermining "the very purpose of the statutes, which is 'to induce persons to shoulder a burden disproportionate to their personal financial state in order to ensure the vindication of important public rights." (*Id.*, 161 Cal.App.4th at 318.) The case contains no discussion of a reduced lodestar.

The second case, *San Diego Police Officers Assn v. San Diego Police Dept.* (1999) 76 Cal.App.4th 19, contains a one-paragraph discussion in which the Court of Appeal affirms the reduction of a fee award from the $9,300 requested to $1,875 (a reduction of 80%) because of the apparently small amount of actual work done and for unspecified reasons that "are amply supported by the record" but not disclosed in the opinion. (*Id.*, 76 Cal.App.4th at 24.) The case includes no analysis.

The third case, *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, supports class counsel's position. In *Thayer*, several lawsuits were filed in response to Wells

Fargo's attempts to charge fees on no-fee checking accounts. Almost immediately, Wells Fargo undid the charges and agreed to provide free checking for the life of all the effected accounts. It also agreed to pay reasonable attorney's fees in each of the lawsuits. With one exception, each attorney resolved their fee claims with Wells Fargo. The trial court awarded the one holdout his full lodestar with a multiplier applied to some, but not all, of the holdout attorney's hours. Wells Fargo appealed, arguing that while the attorney deserved some fees, he should have his lodestar decreased to avoid an unjust award. The court of appeal summarized the context in which the fees were awarded. In sharp contrast to this case, "the Bank never contested plaintiffs' legal claims or their right to reasonable fees under Code of Civil Procedure section 1021.5, and communicated a desire to settle the cases and pay reasonable attorney's fees almost immediately after the complaints were filed." (*Id.*, 92 Cal.App.4th at 835.)

The *Thayer* court ultimately agreed that the holdout lawyer should not get paid for what amounted to unnecessary busywork. But the court limited its holding to the circumstances it found in that particular case:

> Nothing we have said in this opinion signals any retreat from our firm and continuing commitment to the settled principle that attorneys entitled to fee awards for advancing important pubic interests **must** be fully and fairly compensated, so as to encourage the provision of such legal assistance.

(*Id.*, 92 Cal.App.4th at 846 (emphasis added).)

Thus, under *Thayer*, class counsel should receive their full lodestar with a positive multiplier. No other result provides full and fair compensation.

C. The Public Entity Status of Some of the PWS Is Not Relevant to the Multiplier.

The PWS argue that the Court should consider their status as public entities in denying a multiplier to the lodestar. They base this argument in language in *Serrano v. Priest* (1977) 20 Cal.3d 25 indicating that a trial court could consider this factor in determining an amount of fees. (*Serrano*, 20 Cal.3d at 49.) But just because a court can do something does not mean that it should. Or that it can under all circumstances.

Horsford v. Board of Trustees (2005) 132 Cal.App.4th 359 makes this clear. In

Horsford, the Court of Appeal rejected, as an abuse of discretion, a trial court's refusal to apply a multiplier to counsel's lodestar after counsel successfully handled a FEHA claim against the State University system. The *Horsford* court noted that *Serrano* involved the constitutionality of a school district funding scheme over which the public entity defendants had no control and were required to defend. In *Horsford*, by comparison, the public entity defendant engaged in improper conduct that it strenuously defended. (*Horsford*, 132 Cal.App.4th at 400-401.)

Here, the public entity defendants created and perpetuated the litigation. (2nd Supp. Decl., ¶¶ 9-15.) Consider: the Small Pumper class was initially a defendant-class, named in the PWS's cross-complaint. When a defendant-class proved unworkable, the PWS and the Court involved themselves in locating counsel to represent the Small Pumper class, as detailed in the Declarations of Michael McLachlan and David Zlotnick. If counsel had not been found, the entire litigation would have failed because the McCarran Amendment comprehensiveness would have been missing. Without the Small Pumper class, there would have been no comprehensive physical solution.

The Small Pumper Class, which is nominally a plaintiff-class, actually existed to defend existing rights against prescription claims. (Dunn Decl., Ex. B, 5:1-4.) The class members, for the most part, wanted to maintain the status quo: they wanted to pump for domestic use without paying any assessments, fines, or fees. The PWS challenged that status quo for year-after-year of litigation. The Small Pumper Class's involvement in this litigation was driven be decisions made by the PWS. The *Horsford* court additionally held that trial courts lack the discretion to deny a multiplier as against a public entity when the counsel seeking fees undertook actual risk and delay in obtaining compensation. In comparing the *Serrano* situation, where the public entity was required to defend a statutory scheme with which it may not have agreed with *Horsford*, where the public entity engaged in wrongdoing, the court wrote:

> [I]n neither event is a trial court permitted to use the 'public entity' factor to wholly negate the enhancement of a lodestar that otherwise would be appropriate after consideration of the contingency and delay factors.

(*Horsford*, 132 Cal.App.4th at 401.) Thus, California law **requires** the Court to use a multiplier to class counsel's lodestar. And while the Court has discretion in setting the amount of the multiplier, the requested multiplier of 2.5 is within the range routinely granted by courts, particularly considering that this case took many years longer than is typical. (*See* cases cited at *FN* 13, *infra*.)

VI. ALL OF PLAINTIFFS COSTS ARE RECOVERABLE.

Finally, D40 argues that Plaintiff cannot recovery any costs. (Opp., 29:2-3.) This is of course a complete misstatement of the law. In an action brought under Section 1021.5, costs are recoverable, as with any other prevailing party, under Section 1033.5. (*Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1283 (C.C.P. § 1033.5 applies to § 1021.5 action);[14] *Olsen v. Automobile Club of Southern Cal.* (2008) 42 Cal.4th 1142, 1149-50 (discussing applicability of Section 1033.5 to action under Section 1021.5).)

Section 1033.5 lists various categories of recoverable costs, e.g. filing and motion fees, court reporting fees for depositions, among others. (C.C.P. § 1033.5(a)(1)-(3).) More importantly, 1033.5 provides that "[i]tems not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion. (§ 1033.5((c)(4).) The range of such recoverable costs is very broad, "includ[ing] legislative history material, arbitrator's fees, and the fees of a special master." (*City of Anaheim v. Dept. of Transportation* (2005) 135 Cal.App.4th 526, 534.) Essentially, the Court can approve any costs "reasonably necessary to the conduct of the litigation." (*Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, 364 (approving photographs and blueprints); *see also Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1099 (holding that computerized legal research is recoverable under

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[14] D40 mis-cites the *Benson* case several times for the proposition that no costs are recoverable in an action brought under Section 1021.5. *Benson* only held that expert costs are not recoverable; nowhere does it state that recovery of all costs are barred under Section 1021.5. (*Id.* at 1283.)

Section 1021.5.)[15] "[T]he prevailing party is entitled to all o fhis costs unless another statute provides otherwise. [Citation.] Absent such statutory authority, the court has no discretion to deny costs to the prevailing party." (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 129.)

In addition, because the PWS do not challenge any specific costs they have waived the right to do so. (*Nelson*, at 131 (burden is on losing party to properly challenge a particular cost item).)

VII. PLAINTIFF SHOULD BE GRANTED AN INCENITVE AWARD.

The Court should grant the incentive award in the form of two additional acre-feet. For reasons stated in the Motion, Plaintiff can actually establish such a right, and should not be penalized for volunteering – he should be rewarded. Otherwise, the adoption of a monetary award is entirely appropriate here:

> While there has been scholarly debate about the propriety of individual awards to named plaintiffs, "[i]ncentive *awards* are fairly typical in class action cases." [citation omitted]; 4 Newberg on Class Actions (4th ed. 2002) § 11:38, p. 81; Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study* (2006) 53 UCLA L.Rev. 1303.) These awards "are discretionary, [citation], and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.

(*In re Cellphone Termination Cases* (2010) 186 Cal.App.4th 1380, 1394.)

VIII. CONCLUSION.

For all of the foregoing reasons, Plaintiff Richard Wood requests that the Court approve a lodestar rate of $3,348,160, with a multiplier of 2.5, and costs of $76,639.48.

Further, Richard Wood should be awarded water right of up to 5 acre-feet per year, or alternatively, $25,000.

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[15] Indeed, the Court has discretion to apply a multiplier to the costs. (*Downey Cares v. Downey Comm. Dev'l Commission* (1987) 196 Cal.App.3d 983, 998 (upholding 1.5 multiplier applied to costs).) If the Court were to deny any item of costs in this matter, it should exercise its discretion to make up for such items by applying a multiplier to the remaining costs. This would be warranted given the eight year

DATED: March 25, 2016

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

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By:_____
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timeframe at issue, as well as the sizeable amount of interest incurred. (McLachlan Decl., ¶ 35.)