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EXEMPT FROM FILING FEES UNDER GOVERNMENT CODE SECTION 6103

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:
Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Los Angeles, Case No. BC 325201;

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. v. City of Lancaster, Diamond Farming Co. v. City of Lancaster, Diamond Farming Co. v. Palmdale Water Dist., Superior Court of California, County of Riverside, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668

Judicial Council Coordination No. 4408

CLASS ACTION

Santa Clara Case No. 1-05-CV-049053
Assigned to The Honorable Jack Komar

OPPOSITION TO CLASS COUNSEL'S MOTION FOR A SUPPLEMENTAL AWARD OF ATTORNEYS FEES

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I. INTRODUCTION

The Court awarded a total of $1,914,551.68[1] only four months ago, to Willis Class Counsel for their representation of the Willis Class in this Adjudication. (See Order (Doc. 4431).) This order has not yet been reduced to an appealable judgment.

Apparently emboldened by the large award of attorney fees, the Willis Class Counsel is back with another motion for "supplemental fees" this time seeking an additional quarter-million dollar fee award from the Public Water Suppliers. Even a cursory review of the "supplemental fee request" reveals the request is based on nothing more than matters akin to mundane housekeeping efforts—i.e., assisting District 40 in reviewing already agreed upon terms in the Willis Class Stipulation of Settlement. Furthermore, several of the tasks that Willis Class Counsel now seek fees for, are tasks performed by counsel for the Public Water Suppliers.

Los Angeles County Waterworks District No. 40 ("District 40") opposes Willis Class Counsel's Supplemental Fee Motion and asks that the Court deny fees in their entirety, or alternatively, significantly reduce the fee request.

II. CLASS COUNSEL'S LODESTAR FIGURE IS BASED ON UNREASONABLE AND UNNECESSARY FEES.

Even if this Court imposes another fee award, equitable considerations demand a reduction in the lodestar amount on the basis that the fees were both unnecessary and unreasonable. A trial court has broad discretion to determine the amount of a reasonable fee, and the award of such fees is governed by equitable principles. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1094–1095 ["*PLCM*"].) The first step involves the lodestar figure—a calculation based on the number of hours reasonably expended, multiplied by the lawyer's hourly rate. (*Palm, LLC v. Teitler* (2008) 162 Cal. App.4th 770, 774.) The lodestar figure may then be adjusted, based on consideration of factors specific to the case, including: the nature and difficulty of the litigation, the amount of money involved, the skill required and employed to handle the case, the attention given, the success or failure, as well as the necessity for and nature of the litigation. (*PLCM, supra,* at 1096.) The court considers whether the total award so

[1] This total represents $1,839,434 in fees, a $10,000 incentive award to Plaintiff Rebecca Lee Willis, and $65,057.68 in costs.

calculated under all of the circumstances of the case is more than a reasonable amount and, if so, the court must reduce the award to make it a reasonable figure. (*Id.* at 1095-96.)

A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether. (*Serrano v. Unruh, supra,* at 635; accord *Meister v. Regents of Univ. of Cal.* (1998) 67 Cal.App.4th 437, 455 ["*Meister*"]; see also *EnPalm, LLC v. Teitler* (2008) 162 Cal. App.4th 770, 775 [fee reduction appropriate for conduct that makes much of the litigation unnecessary and yields fees unreasonably inflated].) The court in *Meister,* as one example, denied plaintiffs' request for almost $100,000 in supplemental fees incurred in fee litigation for a case that largely effectuated a stipulation to injunctive relief, which merely mandated that defendants do little more than obey the law in the future. The court questioned whether all the hours charged were actually spent on the tasks for which they were billed, and ultimately declared the fees incurred in attempting to justify the supplemental fee request were not hours "reasonably spent" to warrant an award against defendants.

So that a court may properly discern hours "reasonably spent" in fee litigation from excessive hours incurred in cases churned by avaricious plaintiffs, the fee applicant bears the burden of providing detailed time records that meticulously itemize the tasks completed and the amount of time spent on each one. (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 424 ["*Hensley*"]; *Welch v. Metropolitan Life Ins. Co.* (9th Cir.) 480 F.3d 942, 945-46.) "Where the documentation of hours is inadequate, the [] court may reduce hours accordingly." (*Hensley, supra,* at 433.) The court may also exclude any hours that are excessive, redundant, or otherwise unnecessary. (*Id.* at 434.)

Class Counsel seek to recover $209,624.50 for fees incurred during a relatively brief four and a half month period—an amount that represents more than ten percent of the total fees incurred over the four years that Willis Class Counsel was involved in the Adjudication. Class Counsel attempts to justify the fees by claiming they represent time expended on the Motion for Final Approval of the Willis Stipulation of Settlement and the Fee Motion (including the work expended relative to the discovery requests). By the end of last year, however, (when fees were last sought), the terms and conditions of the Settlement had been largely decided and the

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Stipulation was close to the final version approved by this Court.

Apart from the Motion for Final Approval of the Stipulation of Settlement and two Notices—all of which District 40 prepared, there is no discernible basis for the excessive fee request sought here. Mr. Kalfayan himself vaguely attributes the fees to the "substantial amount of work" performed by many attorneys in readying the Stipulation for final approval and attending to questions and objections by the Willis Class regarding the same. (See R. Kalfayan Decl. (Doc. 4516) ¶¶ 6-11.) The time entries do not corroborate the fees claimed.

Indeed, the timekeepers merely describe, as block billed entries[2], multiple tasks as one line item (see, e.g., Ex. 4, Entry on 1/14/2011: "Spoke with class members and answered questions regarding the notice that was sent out. Continued working on charts for time and expense reports" at 7.30 hours), leaving the Court and the Public Water Suppliers wholly in the dark on the number of hours expended and the dollars incurred on these discrete tasks. Entries such as these appear countless times throughout the time records and make it impossible to evaluate the reasonableness and necessity of such fees relative to the settlement.

Courts generally disfavor block billing; where time documentation proves inadequate, as is the case here, a fee award will be lowered accordingly. (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 689; *Hensley, supra,* 461 U.S. at 433.) Thus, for example, in *Welch v. Metropolitan Life Ins. Co.* (9th Cir.) 480 F.3d 942, 945-46, the Ninth Circuit affirmed a 20 percent across-the-board reduction of a fee award based on block billed entries, deferring to a State Bar Committee report, which found suspect the practice of block billing, given its tendency to mask inflated billing entries by as much as 30 percent. The justice system did not intend that fees would be blindly paid by opposing counsel. The courts are thus vested with the discretion and authority, as the proverbial gatekeepers and arbiters of fee awards and disputes, to carefully screen a fee application and ferret out reasonable from unreasonable charges, disallowing the latter. (See *Graham, supra,* 34 Cal.4th at 581-82.) Counsel's block billing practice renders it impossible for the Court to accomplish this important task.

Moreover, many of the fee entries, as presented to this Court, blur one task into the next

[2] Only Mr. Kalfayan billed for each task but even he did not begin this practice until February 2011.

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and even round up to whole number allotments of time. Overall, the entries demonstrate little effort on the part of the timekeepers to accurately capture and account for every minute attended to billable matters on this case. A different result would likely ensue had Messrs. Kalfayan and Zlotnick's anticipated that their clients, and not the Public Water Suppliers, would be responsible for paying their fees.

Although some of the entries are not block billed, however, other issues abound. Turning first to Mmes. Polyascko and Stewart, the two lowest billing timekeepers, their entries reflect a disquieting number of hours spent generating so-called expense reports and charts. Understanding the role of technological in producing such reports—software equipped with options that filter entries by task, timekeeper, and matter number, it begs questioning just what required so many hours on this single task?

Even more curious are the duplicative entries their times reflect:

- 1.0 hour for Ms. Polyascko / 1.0 hour for Ms. Stewart: spoke with Class re Notice (January 11)
- 1.0 hour for Ms. Polyascko / 1.0 hour for Ms. Stewart: spoke with Class re Notice (January 12)
- 1.0 hour for Ms. Polyascko / 1.0 hour for Ms. Stewart: spoke with Class re Notice (January 13)
- 5.3 hours for Ms. Polyascko / 5.3 hours for Ms. Stewart: worked on expense chart for declaration (January 17)
- 4.0 hours for Ms. Polyascko / 4.0 hours for Ms. Stewart: worked on time and expense reports and spoke with Class re Notice (January 20)
- 1.0 hour for Ms. Polyascko / 1.0 hour for Ms. Stewart: spoke with Class re Notice (January 28)

This practice continues throughout their entries. Though not the highest hourly rate billers, at a rate of $125 per hour and fees over $14,000, such questionable timekeeping should not go unnoticed.

The two highest hourly rate billers, Messrs. Kalfayan and Zlotnick, who together billed some

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405.58 hours, or $175,507 in fees (roughly 84 percent of the total fee award sought) had Mr. James, their water law consultant, to do most of the work on the matters relevant here. From Mr. James' travel to and attendance at ex parte hearings, review of pleadings prepared by opposing counsel, research of procedural and substantive matters on issues raised in such pleadings, advisement on discovery requests, preparation of the mediation brief, attendance at mediation, attendance at court hearings on the fee motion, attendance at the hearing regarding the Final Approval of the Settlement, and review of briefs opposing the fee motion, to name just a few of the many tasks for which Mr. James was responsible, it is difficult to understand how Mr. James billed just 67.20 hours and $19,630—only 11 percent of the total fee award now sought.[3] Based on the narrative accompanying the time entries of Messrs. Kalfayan and Zlotnick alone, one would expect their bills would be far lower, but that is simply not the case. Even more egregious is that Mr. James was tasked with junior-level research assignments:

- researching the right of a party opposing a motion for attorneys fees;
- researching cases cited in a motion continuing the attorneys fee motion;
- researching the Public Records Act relative to discovery objections;
- researching discoverability of billing records,

at a senior level billing rate of $400 per hour. Courts do not authorize the reimbursement of low level work performed at partner-based rates, and any entries reflecting these inflated sums should be stricken or appropriately reduced. (See, e.g., *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 64.)

The above exemplify some of the multiple improper billing entries produced by Class Counsel in their supplemental fee request, and, at a minimum, an across-the-board reduction is warranted.

[3] It is also circumspect why Mr. James, an attorney hired in the capacity of special counsel on water matters, is advising on procedural matters related to the fee motions and discovery requests, when his area of expertise—the pretense for his involvement in this case—concerns substantive issues related to water law. (See, e.g., Ex. 6, 2/01/11 "Research right of a party opposing a motion for attorney fees to conduct discovery. . . .")

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III. THE FEES SOUGHT FOR FEE-RELATED LITIGATION ARE NEITHER REASONABLE NOR NECESSARY AND THE AWARD SHOULD BE SIGNIFICANTLY REDUCED.

Class Counsel moves to recover attorneys fees against the Public Water Suppliers for fees generated in bringing its original Fee Motion. Section 1021.5 recognizes that attorneys may be compensated for fees incurred from fee-related litigation. (*Graham et al. v. DaimlerChrysler Corporation* (2004) 34 Cal.4th 553.) Fee litigation, however, is tangential to the primary litigation underlying the original fee request and, consequently, bears less social value relative to Section 1021.5 objectives. Fees for fee litigation are generally discounted for this reason.

A fee award for fee litigation includes only the reasonable expenses of preparing the fee application. (*Estate of Trynin* (1989) 49 Cal. 3d 868, 875.) The trial court may thus reduce the award, or deny one altogether, if the hours or rates appear excessive. (*Serrano v. Unruh* (1982) 32 Cal. 3d 621, 639, 639 n.28.) Here, Willis Class Counsel's block billed entries makes it difficult to discern the reasonableness of the supplemental fee award, and their fees should be denied, or significantly reduced.

IV. CLASS COUNSEL'S SUPPLEMENTAL FEE REQUEST IS BEYOND THE SCOPE OF THE PRIVATE ATTORNEY GENERAL STATUTE.

Code of Civil Procedure section 1021.5 is a fee shifting statute rooted in the private attorney general theory. The statute is designed to encourage private litigants to undertake true public interest litigation—that is, litigation aimed at enforcing local governmental compliance with important constitutional and statutory provisions. (See *Adoption of Joshua S. v. Sharon S.* (2008) 42 Cal.4th 945 ["*Joshua*"].) There are four elements that must be satisfied before a court may award fees against the unsuccessful party: (1) the moving party must be a successful party in the litigation; (2) the litigation must have vindicated an important public right; (3) the litigation must have conferred a significant benefit on the general public or a large class of persons; and, (4) the financial burden (or personal interest) borne by the moving party must have surpassed its individual stake in the matter. (Code Civ. Proc., § 1021.5; *Pacific Legal Foundation v. California Coastal Commission* (1985) 33 Cal.3d 158, 166; *Woodland Hills Residents Association, Inc. v. City Council* (1979) 23 Cal.3d 917, 933.) All four elements must be met, or

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the fee application must be denied. (*Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 246.)

Although this Court found a fee award appropriate relative to Class Counsel's original fee motion, the purported basis for seeking supplemental fees is beyond the scope of the Section 1021.5. Importantly, the California Supreme Court in *Joshua, supra,* 42 Cal.4th 945, excluded "private interest litigation" from Section 1021.5. Private interest litigation is litigation that has "done nothing to curtail a public right other than raise an issue in the context of private litigation that results in important legal precedent." (*Id.* at 952-58.)

Joshua involved a private litigant, Sharon, who sought a declaration that certain second parent adoptions were unlawful. The defendant, Sharon's former partner, Annette, sought for attorney fees under Section 1021.5 against Sharon, after the California Supreme Court declared second parent adoption lawful. Despite Annette's victory, the Court denied her fee request. Although the litigation yielded a substantial benefit (indeed, some 10,000 to 20,000 second parent adoptions would have been in jeopardy had the appellate court's contrary ruling been allowed to stand), Sharon was not the type of party against whom private attorney general fees were intended. (*Joshua, supra,* 42 Cal.4th at 953.) According to the high court, Sharon was a private litigant and the judgment she sought would have settled only her private rights and those of Joshua's and Annette's. Following *Joshua,* "the party against whom [1021.5] fees are sought must have done or failed to do something, in good faith or not, that compromised public rights." (*Id.* at 958.)

Indeed, as the *Joshua* Court observed, in all of the published cases where attorneys fees have been awarded under Section 1021.5, the litigation effectuated a change in the defendant's behavior, whose actions were otherwise impairing or violating statutory or constitutional rights of the public or a large class of persons. (*Id.* at 954-955.) In this way, the cases exemplified actual public interest litigation. (See, e.g., *Wilson v. San Luis Obispo County Democratic Central Committee* (2011) 192 Cal.App.4th 918 ["*Wilson*"] [fees awarded for defending right of political parties and their members to choose their leaders]; *Wal-Mart Real Estate Business Trust v. City Council of the City of San Marcos* (2005) 192 Cal.App.4th 918 [fees awarded for vindicating

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electorate's constitutional right to a referendum vote—one of the most precious rights in our democratic process]; *Hull v. Rossi* (1993) 13 Cal.App.4th 1763 [fees awarded for championing right to an accurate impartial analysis under the Elections Code].)

Similar to the parties in *Joshua,* the Willis Class settlement decided important *private* rights relative to the Willis Class' ability to pump groundwater, as landowners and as overlying rights holders in the Antelope Valley Groundwater Basin. The water rights, which have been and continue to be the focus of the settlement, exemplify a category of self-serving property interests beyond the scope of this fee-shifting statute. Although a large class of persons has been impacted by the settlement, and without belittling the importance of water rights in this State, the fact remains that an important right within the meaning of Section 1021.5 was not vindicated to warrant fees relative to the Settlement.

None of the parties adverse to the Willis Class' interests in this Adjudication interfered with the public's right to water. If anything, the controversy surrounded private individuals' private rights to water in the Basin. According to *Joshua,* therefore, a fee award is not appropriate. (See also *Wilson, supra,* 192 Cal.App.4th 918 [denying fees for portion of award regarding Wilson's private right to reinstatement on Committee and awarding fees for portion of award regarding claims interfering with public's right to choose leaders of political parties.].)

Nonetheless, to the extent the first fee motion was granted relative to the class settlement, a fee award of the kind sought in this second motion would constitute a serious departure from the Legislative intent. The settlement had largely been completed by the end of 2010 and most of the work in the months that followed related to ancillary matters that brought little to no value to the public at large.

No fees should be awarded because any success on the part of the Willis Class in preserving their private rights to water is a private right for which the public at large gains no benefit, and, thus, extending Section 1021.5 to encompass the supplemental fee request does not advance public interest litigation. Rather, it is the taxpaying public (i.e., customers of the Public Water Suppliers) who will unfairly bear the economic consequences should the supplemental fee request be granted.

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V. CONCLUSION

For the reasons set forth above, Los Angeles County Waterworks District 40 respectfully requests the Court deny Class Counsel's Supplemental Fee Request, or reduce the fee award significantly in light of the many deficiencies in the supplemental fee request.

Dated: August 17, 2011

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PROOF OF SERVICE

I, Kerry V. Keefe, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 5 Park Plaza, Suite 1500, Irvine, California, 92614. On August 17, 2011, I served the within document(s):

OPPOSITION TO CLASS COUNSEL'S MOTION FOR A SUPPLEMENTAL AWARD OF ATTORNEYS FEES

☒ by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.

☐ by causing personal delivery by ASAP Corporate Services of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery by Federal Express following the firm's ordinary business practices.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on August 17, 2011, at Irvine, California.

Kerry V. Keefe