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WATERWORKS DISTRICT NO. 40

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES – CENTRAL DISTRICT

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;

RICHARD WOOD, on behalf of himself and  
all other similarly situated v. A.V. Materials,  
Inc., et al., Superior Court of California,  
County of Los Angeles, Case No. BC509546.

EXEMPT FROM FILING FEES  
UNDER GOVERNMENT CODE  
SECTION 6103

Judicial Council Coordination Proceeding  
No. 4408

CLASS ACTION

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

LOS ANGELES COUNTY  
WATERWORKS DISTRICT NO. 40'S  
OPPOSITION TO MOTION FOR FINAL  
APPROVAL OF PARTIAL CLASS  
SETTLEMENT

*[Filed concurrently with Declaration of  
Wendy Y. Wang]*

Hearing

Date: December 11, 2013

Time: 9:00 a.m.

Dept.: Santa Clara Superior Court, Dept.  
TBD

1     **I.       INTRODUCTION**

2             Defendant Los Angeles County Waterworks District No. 40 (“District No. 40”) opposes  
3     the Wood Class’s Motion for Final Approval of Partial Class Settlement (“Motion”) because the  
4     Motion, which seeks the Court’s approval of the Stipulation of Settlement (“Proposed  
5     Settlement”), is an attempt to recover and limit attorneys’ fees without conferring significant  
6     benefits to the class. As such, the moving parties fail to demonstrate that the Proposed Settlement  
7     is fair, adequate and reasonable. Moreover, the Proposed Settlement has inappropriate and  
8     unenforceable provisions concerning attorneys’ fees and costs, seeks to bind non-settling parties,  
9     and inappropriately intertwines fees and substantive provisions so that the settling parties may  
10    withdraw from the Proposed Settlement if the fees and costs provisions are not approved.

11    **II.     THE SETTLING PARTIES FAILED TO DEMONSTRATE THAT THE**  
12    **PROPOSED SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE**

13             In deciding whether to approve a proposed class action settlement, the Court must find  
14    that “the settlement is fair, adequate, and reasonable” to “prevent fraud, collusion or unfairness to  
15    the class.” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1801.) Here, the settling  
16    parties have failed to provide any evidentiary support that the settlement is fair, adequate or  
17    reasonable. (See Motion at pp. 6-7.)

18             **A.     A Presumption of Fairness Does Not Exist Here**

19             A presumption of fairness exists only if the settlement proponent proves that: “(1) the  
20    settlement is reached through arm’s-length bargaining; (2) investigation and discovery are  
21    sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar  
22    litigation; and (4) the percentage of objectors is small.” (*Wershba v. Apple Computer, Inc.* (2001)  
23    91 Cal.App.4th 224, 245.) In the Proposed Settlement, the settling parties have negotiated the  
24    fees of the Wood Class counsel. (Declaration of Michael McLachlan (“McLachlan Decl.”), Ex. 1  
25    at p. 19 [“the Settling Defendants hereby stipulate and agree to each pay the following amounts of  
26    fees and costs, as well as the entire cost of the class notice in pro rata shares”].)

27             While contemporaneous negotiation of fees and settlement terms are not strictly  
28    prohibited, courts have considered it as a factor in evaluating the adequacy of a class settlement.

(7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal. App. 4th 1135, 1158-59 [citing *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.* (3d Cir. Pa. 1995) 55 F.3d 768, 804].) Simultaneous negotiation of fees and settlement creates a fundamental conflict of interest between the class counsel and the class, and has been held to be a “damning indictment of Plaintiffs’ counsel’s [lack of] commitment to pursuing a fair, arms-length settlement on behalf of the plaintiff class.” (*Acosta v. Trans Union, LLC* (C.D. Cal. 2007) 243 F.R.D. 377, 398; see also, *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, *supra*, 55 F.3d at 804 [“the likelihood that the parties did negotiate the fees concurrently with the settlement in this case increases our concern about the adequacy of representation”].)<sup>1</sup>

The settlement fees and costs are the only payments to be made by the settling defendants. Because the Court has not determined the reasonableness of those fees and costs, the presumption of fairness cannot apply. In the absence of evidence that arms-length negotiations took place, the Court should reject the Proposed Settlement, which seeks \$736,930.43 in fees and costs without resolving any substantive water rights issues.

**B. The Proposed Settlement Confers Very Little Benefit to the Class**

The Proposed Settlement does not provide the Wood Class with any water rights. (McLachlan Decl., Ex. 2 at p. 2 [“Does this settlement give me a water right? No.”]; see Declaration of Wendy Y. Wang (“Wang Decl.”), Ex. A at 52:12-16 [Class counsel represented at the October 25, 2013 hearing that the class is not asking the Court to approve an allocation number as being reasonable].)

Water rights cannot be determined without presenting evidence as to their reasonable and beneficial use, which the Wood Class has not yet done in these coordinated proceedings. (See *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 524-525; Cal. Const., art. X, § 2.) The Proposed Settlement purports to finally resolve water rights between the

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<sup>1</sup> California courts may look to federal rules of procedure regarding class actions and the federal cases interpreting them for guidance or “where California precedent is lacking.” (*Wershba*, *supra*, 91 Cal. App. 4th at 239-240; see also, *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal. App. 4th 1253, 1264 [“California courts may look to federal authority for guidance on matters involving class action procedures.”] [citation and quotation marks omitted]; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19, 38 [“when there is no relevant California precedent on point [regarding attorney fees in class action], federal precedent should be consulted.”].)

1 parties to the Proposed Settlement while not binding non-parties. (Motion at p. 5 [the Proposed  
2 Settlement “only impacts the rights existing between the Settling Parties”]). It is not possible to  
3 determine water rights for some pumpers and not others because the reasonableness of a water  
4 use depends upon the uses of all other parties and cannot be resolved without the Court  
5 considering the reasonableness of all water uses.

6 Finally, the Proposed Settlement confers little benefit on the Wood Class because even if  
7 it is approved, the Wood Class still must prove its reasonable and beneficial use and defend  
8 against the prescription claims of non-settling parties in the Phase 6 trial. (*See* McLachlan Decl.,  
9 Ex. 2 at p. 1 [“Mr. Wood will continue to litigate all of the claim against the non-settling  
10 defendants.”]; Motion at p. 5 [Proposed Settlement “does not limit the Court’s ability to rule on  
11 the Class’ ultimate water rights, the Settling Defendants’ water rights . . .”].)

12 Thus, the Proposed Settlement gives the Wood Class no water rights and does not fully  
13 resolve any claim against the Wood Class. For these reasons the benefits conferred on the Wood  
14 Class are minimal at best.

15 **III. THE COURT CANNOT APPROVE THE PROPOSED SETTLEMENT WITHOUT**  
16 **APPROVING THE INAPPROPRIATE AND UNENFORCEABLE ATTORNEYS’**  
**FEES PROVISIONS**

17 **A. The Fees Provisions Are Inseparable From the Proposed Settlement**

18 By interweaving the attorneys’ fees provisions with the substance of the Proposed  
19 Settlement, the settling parties have made the fees provisions an essential part of settlement. In  
20 fact, the Motion specifically asks the Court to “adopt the Order Granting Final Approval of Class  
21 Actions Settlement, including approval of the legal fees and costs of Class Counsel.” (Motion at  
22 p. 3 [emphasis added].)

23 The Proposed Settlement describes in detail the payment to class counsel and limits  
24 further fees and costs contributions from settling defendants. However, the Proposed Settlement  
25 is notably silent as to whether the Proposed Settlement is enforceable if the Court rejects class  
26 counsel’s motion for award of fees and costs (“Fees Motion”). (*See* McLachlan Decl., Ex. 1 at p.  
27 19 [“In consideration of [class counsel’s intent to seek fees and costs at the time set for final  
28 approval hearing], the Settling Defendants hereby stipulate and agree to each pay the following

1 amounts of fees and costs, as well as the entire cost of the class notice in pro rata shares.”].) This  
2 provision raises serious doubts as to whether the parties will proceed with the remaining terms of  
3 the settlement if the Fees Motion is denied. For this reason alone the Proposed Settlement and  
4 fees are inextricably intertwined and must be decided together.

5 Other provisions of the Proposed Settlement demonstrate that unless the Court approves  
6 the negotiated settlement “as is”, the settling defendants may withdraw from the settlement.  
7 Section VIII.D.4 of the Proposed Settlement provides that unless the Court approves settling  
8 defendants’ motion to relieve them from existing orders for payment of the Court-appointed  
9 expert fees, “any Settling Defendant may declare this Stipulation null and void as to that Settling  
10 Defendant.” (McLachlan Decl., Ex. 1 at p. 20.) In short, any settling defendant has the ability to  
11 terminate its participation in the settlement unless the Court grants settling defendants’ motion  
12 regarding expert fees, which will not be heard until after the final fairness hearing. Such  
13 provisions make it impractical, if not impossible, for the Court to grant the Motion without  
14 making a determination on all related motions to the Proposed Settlement, which are currently  
15 scheduled to be heard on January 7, 2014. For this reason, the Court should continue the final  
16 fairness hearing until the other related motions have been decided.

17 **B. The Fees Provisions Are Unenforceable as They Seek to Bind Non-Parties to**  
18 **the Proposed Settlement**

19 1. The Fees and Costs Award and Determination May Be Binding on Non-  
20 Settling Parties

21 It is well-established that the court has “an independent right and responsibility to review  
22 the attorney fee provision of the settlement agreement and award only so much as it determined  
23 reasonable. The parties to the Proposed Settlement [cannot], by their accord, take away that duty.  
24 An agreement of the parties does not bind the court if it is contrary to law or public policy.”  
25 (*Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal. App. 4th 123, 128 [citations  
omitted].)

26 Consequently, even though the settling defendants agreed to pay the class counsel, the  
27 Court still must make a determination on the reasonableness of the agreed upon attorneys’ fees  
28 and may reduce such fees as it deems to be “fair and proper.” (*Id.* at pp. 127-28.)

1 In his declaration in support of the Fees Motion, class counsel indicates that the settling  
2 parties stipulated that the settling defendants are responsible for 34.16% of total fees and costs  
3 claimed by the class counsel at an allegedly reduced hourly rate of \$550 per hour of attorney time  
4 and \$110 per hour for paralegal time. (Declaration of Mr. McLachlan in Support of Fees Motion,  
5 ¶¶ 15 & 16.) If the Court approves the Proposed Settlement, which sets forth the negotiated fees  
6 and costs, the Court will effectively deem the negotiated fees, rates and percentages to be  
7 reasonable and such a determination will likely have a binding effect on non-settling parties. (See  
8 McLachlan Decl., Ex. 1 at p. 20.) The Court should not approve a settlement that binds non-  
9 settling parties.

10 2. The Proposed Settlement Prohibits Non-Settling Parties From Seeking  
11 Contribution From Settling Defendants For Attorneys' Fees

12 If the Court approves the proposed stipulation, non-settling parties will be bound by the  
13 stipulated settlement and prohibited from seeking contribution from the settling defendants for  
14 attorneys' fees. Pursuant to the proposed stipulation:

15 Wood and Wood Class Counsel remain free to seek an award of  
16 fees from other parties to this litigation, and no portion of this  
17 Section VIII.D will apply to other Non-Settling parties. Settling  
18 Defendants reserve all rights and remedies to seek  
19 payment/reimbursement of attorneys' fees, costs and expenses paid  
to Wood Class counsel from Non-Settling parties who are not  
defendants in the Wood Action. By approving this settlement, the  
Court finds and determines that the Settling Defendants have no  
further liability for payment of attorneys' fees, costs and expenses .

... .

20 (McLachlan Decl., Ex. 1 at p. 20 [emphasis added].)

21 Pursuant to these provisions, the Wood Class and class counsel can seek an award of fees  
22 from non-settling parties; and the settling defendants may also seek reimbursement from non-  
23 settling parties who are not defendants. However, the non-settling parties, who are not parties to  
24 this proposed stipulation, cannot seek to reimbursement from the settling defendants. This  
25 provision unfairly attempts to bind non-parties to the Proposed Settlement. (See Motion for  
26 Determination of Good Faith Settlement at p. 1 [settling defendants "request an order that they  
27 will have no continuing exposure to any and all fees and costs associated with the efforts of Wood  
28 Class Counsel, including subsequent claims for indemnity or contribution by other parties."].)

1 The Court should not approve a settlement that binds non-settling parties.

2 **C. The Stipulated Attorneys' Fees Are Not Justified Under Code of Civil**  
3 **Procedure Section 1021.5**

4 Section 1021.5 of the Code of Civil Procedure permits an award of:

5 attorneys' fees to a successful party against one or more opposing  
6 parties in any action which has resulted in the enforcement of an  
7 important right affecting the public interest if: (a) a significant  
8 benefit, whether pecuniary or nonpecuniary, has been conferred on  
9 the general public or a large class of persons, (b) the necessity and  
10 financial burden of private enforcement, or of enforcement by one  
11 public entity against another public entity, are such as to make the  
award appropriate, and (c) such fees should not in the interest of  
justice be paid out of the recovery, if any. With respect to actions  
involving public entities, this section applies to allowances against,  
but not in favor of, public entities, and no claim shall be required to  
be filed therefor, unless one or more successful parties and one or  
more opposing parties are public entities . . . .

12 (Code Civ. Proc. § 1021.5 [emphasis added].) As discussed in Section II.B above, the Proposed  
13 Settlement confer little, if any benefit, to the Wood Class because it does not provide the Wood  
14 Class with any water rights and does not fully resolve any claims against the Wood Class,  
15 including prescription by non-settling parties. Furthermore, the Wood Class still must prove its  
16 reasonable and beneficial use of water. For these reasons the Proposed Settlement fails the test of  
17 Code of Civil Procedure Section 1021.5. No significant benefit is conferred on the Wood Class  
18 and there is no basis for a valid fee award pursuant to Section 1021.5.

19 The lack of any significant benefit conferred on the Wood Class by the Proposed  
20 Settlement must also be weighed against the amount offered in settlement to the class counsel.  
21 (*Dunk, supra*, 48 Cal.App.4th at 1801 [in considering whether the settlement is fair, the trial court  
22 should consider relevant factors “such as the strength of plaintiffs’ case, the risk, expense,  
23 complexity and likely duration of further litigation, the risk of maintaining class action status  
24 through trial, the amount offered in settlement, the extent of discovery completed and the stage of  
25 the proceedings, the experience and views of counsel, the presence of a governmental participant,  
26 and the reaction of the class members to the proposed settlement.”] [emphasis added].) If  
27 approved, the Proposed Settlement will not shorten the Phase 6 trial or decrease the amount of  
28 work the class counsel will have to do during the Phase 6 trial. The Court should deny the

1 Motion because the amount of fees that class counsel is requesting under the Proposed Settlement  
2 is disproportionally high compared to the benefits that will be conferred to the class.

3 **IV. THE PROPOSED SETTLEMENT DOES NOT ESTABLISH A MECHANISM FOR**  
4 **THE WOOD CLASS TO PROVE REASONABLE AND BENEFICIAL USE OF ITS**  
5 **WATER**

6 During the October 25, 2013 hearing on the Wood Class' Motion for Preliminary  
7 Approval of Partial Class Settlement ("Motion for Preliminary Approval"), District No. 40  
8 expressed its concerns that the Proposed Settlement does not require the Wood Class to "prove  
9 up" its claimed reasonable and beneficial use of three acre-feet per year and violates the  
10 McCarran Amendment. In response, the settling parties indicated that the Proposed Settlement  
11 does not allocate any water rights, which will be determined at a later phase, and as such, the  
12 Proposed Settlement does not violate the McCarran Amendment. Specifically, class counsel  
13 represented that the Wood Class will prove its claimed water rights during the Phase 6 trial:

14 THE COURT: Well, before we do that, I want to know if -- if that's  
15 a sufficient period of time for you to -- to get evidence together to  
16 support the settlement?

17 MR. MC LACHLAN: I'm not sure exactly what Your Honor's  
18 alluding to.

19 THE COURT: Well, I'm concerned with technical evidence.

20 MR. MC LACHLAN: Well, we anticipate, I believe, that the Court  
21 appointed expert -- well, technical evidence -- I'm having -- I'm  
22 struggling with what you mean by technical evidence.

23 THE COURT: Well, you're -- you're asking the Court to approve a  
24 number, an allocation number, of -- of three acre feet a year per  
25 person as being reasonable, aren't you?

26 MR. MC LACHLAN: No, we're not.

27 ...

28 MR. MC LACHLAN: I'm not going to try phase six in December  
because that's not part of the settlement.

(Wang Decl., Ex. A at 52:1-16; 53:5-6 [emphasis added].) Similarly, Mr. Thomas Bunn, counsel  
for Settling Defendant Palmdale Water District, stated during the October 25, 2013 hearing:

Mr. Leininger did talk about the notice to the class and how it  
should reflect that the reasonable and beneficial use in the water  
rights would be determined later. I believe that the existing notice



1 form does that. It says here: The settling defendants are agreeing  
2 not to challenge the class' assertion of the right of class members to  
3 pump up to three acre[] feet of water per year for domestic purposes  
4 without having to pay a fee for doing so. Other parties remain free  
5 to challenge that water right, which will be determined in the future.  
6 And then there's another question, this is in the frequently asked  
7 questions format: Does this settlement give me a water right? And  
8 the answer is, I'm quoting here: No, this settlement does not  
9 provide you with Court determined water rights. The Court has not  
10 yet determined the water rights of any party. But those  
11 determinations are expected to be made in the future phases of the  
12 proceeding.

13 I believe that covers it, Your Honor. The class members are being  
14 adequately advised that they're not getting a water right out of this  
15 and that the Court will be making that determination in the future.

16 (Wang Decl., Ex. A at 40:6-27 [emphasis added].) The moving parties also stated in the Motion  
17 that the Proposed Settlement "does not in any way limit the Court's ability to rule on the Class'  
18 ultimate water rights, the Settling Defendants' water rights, or any element of a potential physical  
19 solution." (Motion at p. 5.)

20 Given the settling parties' clear statements on the record that the Proposed Settlement  
21 does not seek the Court's approval of three acre-feet of water for each Wood Class member, that  
22 the Court will ultimately determine the Wood Class' water rights after submission of evidence of  
23 beneficial and reasonable use by the Wood Class, and that the Proposed Settlement does not  
24 permit the settling parties to opt out of a physical solution, District No. 40 is not reasserting at this  
25 time the objections it raised in its Opposition to Motion for Preliminary Approval regarding the  
26 Wood Class' failure to present evidence substantiating its water rights claims and the Proposed  
27 Settlement's failure to comply with the McCarran Amendment. However, District No. 40  
28 reserves its rights to reassert those objections if the Wood Class fails to prove its water rights later  
in these coordinated actions.

29 **V. NO EVIDENCE HAS BEEN SUBMITTED THAT THE REQUIRED**  
30 **DISSEMINATION OF NOTICE HAS BEEN SATISFIED**

31 The Proposed Settlement set forth the manner in which notice of the settlement will be  
32 disseminated to all class members. Specifically, Section VI.B. provides: "If the class member  
33 database contains an electronic mail address for a Class Member, the Administrator shall send the  
34 notice as a Portable Document Format ("PDF") document in an electronic mail sent to the

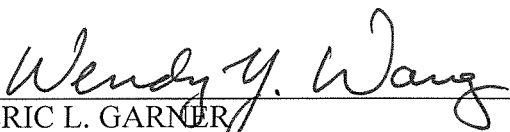
1 foregoing address.” To date, no evidence has been provided demonstrating that the required  
2 electronic service was performed. (See McLachlan Decl., Ex. 1 at p. 14.)

3 **VI. CONCLUSION**

4 For the reasons stated above, District No. 40 respectfully requests the Court to deny the  
5 Motion, or in the alternative, continue the hearing on final approval of the Proposed Settlement,  
6 until after the Court makes a determination as to the motions being heard on January 7, 2014.

7  
8 Dated: December 1, 2013

BEST BEST & KRIEGER LLP

9 By   
10 ERIC L. GARNER  
11 JEFFREY V. DUNN  
12 WENDY Y. WANG  
13 Attorneys for LOS ANGELES COUNTY  
14 WATERWORKS DISTRICT NO. 40  
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1 **PROOF OF SERVICE**

2 I, Wendy Y. Wang, declare:

3 I am a resident of the State of California and over the age of eighteen years, and not a  
4 party to the within action; my business address is Best Best & Krieger LLP, 300 South Grand  
5 Avenue, 25th Floor, Los Angeles, CA 90071. On December 1, 2013, I served the within  
6 document(s):

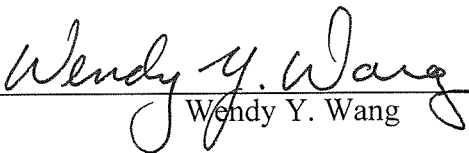
7 **LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40'S**  
8 **OPPOSITION TO MOTION FOR FINAL APPROVAL OF PARTIAL**  
**CLASS SETTLEMENT**

- 9 ☒ by posting the document(s) listed above to the Santa Clara County Superior Court  
10 website in regard to the Antelope Valley Groundwater matter.  
11 ☐ by placing the document(s) listed above in a sealed envelope with postage thereon  
12 fully prepaid, in the United States mail at Irvine, California addressed as set forth  
13 below.  
14 ☐ by causing personal delivery by ASAP Corporate Services of the document(s)  
15 listed above to the person(s) at the address(es) set forth below.  
16 ☐ by personally delivering the document(s) listed above to the person(s) at the  
17 address(es) set forth below.

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

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

25 Executed on December 1, 2013, at Los Angeles, California.

26   
27 Wendy Y. Wang

28 26345.00000\8448307.3