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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 – 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.

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 OF WOOD CLASS FOR APPROVAL OF AWARD OF ATTORNEY FEES AND COSTS

[Filed concurrently with Declaration of Jeffrey V. Dunn]

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I. INTRODUCTION

Defendant Los Angeles County Waterworks District No. 40 ("District No. 40") opposes the Wood Class's Motion for Approval of Award of Attorney Fees and Costs ("Motion"). District No. 40 requests that the Court deny the motion in its entirety because the Wood Class has failed to establish entitlement to attorneys' fees pursuant to Code of Civil Procedure section 1021.5 because only speculative benefits have been conferred upon the Wood Class. Alternatively, District No. 40 requests the Court use its "equitable discretion" to reduce the award to an amount that is "fair and reasonable" under the circumstances of this case, considering the excessive rates and hours claimed by Wood Class counsel and the fact that taxpayers will ultimately pay the award.

The Wood Class seeks approval of the attorneys' fees set forth in the Stipulation of Settlement ("Partial Settlement") in the total amount of $719, 829 and costs in the amount of $17,038. The Wood Class claims that the fees amount represents the total attorney hours incurred on the case, multiplied by an hourly rate of $550 for attorney time and $110 for paralegal time. The Wood Class allocated the total fees amount on the basis of "relative groundwater production numbers as compared to the total production of all ten water supplier defendants." (Motion at 7:2-8; Declaration of Michael D. McLachlan in Support of Motion for Approval of Award of Attorney Fees and Costs ("McLachlan Decl."), ¶¶ 13-16.) Combined, the three settling defendants ("Settling Defendants") account for 34.16 percent of the water supplier defendants' total groundwater production. (McLachlan Decl., ¶ 16.) Thus, while the Wood Class is currently seeking an attorneys' fees award of $719, 826 from the Settling Defendants, the total value of the attorneys' fees that the Wood Class asks this court to find reasonable is more than $2 million.[1]

[1] The four Settling Defendants are Rosamond Community Services District, Phelan Pinion Hills Community Services District, Palmdale Water District and City of Lancaster. They have stated, on the record, that the Partial Settlement does not bind the non-settling parties. District No. 40 understands this to be the Court's view of the Partial Settlement as well. In the event that an award for attorneys' fees is sought against non-settling parties in the future, District No. 40 expressly reserves its right to raise any and all arguments in opposition to that application, which may include but is not limited to the arguments contained herein.

II. ARGUMENT

A. The Court Should Not Defer to the Attorneys' Fees Terms Set Forth in the Partial Settlement

"[T]he court ha[s] an independent right and responsibility to review the attorney fee provision of the settlement agreement and award only so much as it determine[s] reasonable. The parties c[an]not, by their own accord, take away that duty. An agreement of the parties does not bind the court if it is contrary to law or public policy." (*Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 128 [citations omitted].) Consequently, even though the Settling Defendants agreed to pay a specified amount in the Partial Settlement, "[t]horough judicial review of fee applications is required" and the agreed-upon fees are properly modified if the amount is not "fair and reasonable." (*Id.* at p. 127 [internal quotation and citation omitted]; see also *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1808.)

Furthermore, the stipulated attorneys' fees here should be subject to heightened scrutiny because there is increased potential for conflicts between the class and their counsel when attorneys' fees provisions are set forth in a class action settlement agreement, such as they are here. While the contemporaneous negotiation of fees and settlement terms is not strictly prohibited, it is not favored and courts have held that it raises doubts about the fair, arms-length nature of the agreement.[2] (*Acosta v. Trans Union, LLC* (C.D. Cal. 2007) 243 F.R.D. 377, 398; see also *In re GMC Pick-Up Truck Tank Prods. Liab. Litig.* (3rd Cir. Pa. 1995) 55 F.3d 768, 803-804 [recognizing "the potential for attorney-class conflicts where the fees . . . were negotiated simultaneously" with the settlement of the claims [emphasis omitted]][3]; *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1158-59.)

In accordance with this duty, when the Court approved the Wood Class's Partial Settlement it specified that its approval was "subject to the final determination on the issue of

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[2] In fact, here, Class counsel negotiated its fees and represented to the Court that the entire settlement was done before getting approval from Settling Defendants' boards on any part of the Partial Settlement.

[3] 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 v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 230-240; see also *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1264; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 38.)

attorneys' fees and costs." (Declaration of Jeffrey V. Dunn ("Dunn Decl."), Ex. E, p. 2.) The Court should thoroughly review the attorneys' fees provisions set forth in the Partial Settlement and requested by the Wood Class's Motion and ensure that an award is warranted and the amount approved, if any, is "fair and reasonable."

B. The Award of Fees and Costs Is Not Allowable Under Section 1021.5 Because the Benefit of the Partial Settlement to the Wood Class Is Uncertain and De Minimis at Best

The Wood Class claims an award of fees and costs under the "private attorney general" theory pursuant to Code of Civil Procedure section 1021.5, which states:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one 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.

(Code Civ. Proc., § 1021.5; see Motion at 4:12.) The burden is on the Wood Class, as claimant, to establish that every one of the statutory criteria set forth in section 1021.5 has been met. (*Ebbetts Pass Forest Watch v. Dept. of Forestry & Fire Protection* (2010) 187 Cal.App.4th 376, 381; see also *Concerned Citizens of La Habra v. City of La Habra* (2005) 131 Cal.App.4th 329, 334 ["The award of fees under section 1021.5 is an equitable function, and the trial court must realistically and pragmatically evaluate the impact of the litigation to determine if the statutory requirements have been met."].)

A fee award is not appropriate under section 1021.5 because the Wood Class has failed to show that it conferred a "significant benefit . . . on the general public or a large class of persons." The Wood Class claims that an award pursuant to section 1021.5 is appropriate because "the action and the Partial Settlement have vindicated important rights to the use of water." (Motion at 5:9-10.) The benefit procured for the Wood Class by the Partial Settlement is speculative, at best, and harmful to the public represented by the non-settling Public Water Suppliers as well as the

numerous large and small private property owners who are defendants in a class action lawsuit by the Wood Class.

A trial court should "determine the significance of the benefit, as well as the size of the class receiving benefit, from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case." (*Woodland Hills Residential Association, Inc. v. City Council of Los Angeles* (1979) 23 Cal.3d 917, 939; see also *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321 fn. 10.) "[T]he Legislature did not intend to authorize an award of attorney fees in every case involving a statutory violation." (*Woodland Hills, supra*, 23 Cal.3d at p. 939.) In addition, courts have denied fees for failure to confer an important benefit when success is only minimal or technical. (*Miller v. Cal. Com. On Status of Women* (1985) 176 Cal.App.3d 454, 458 ["procedural success" defeating motion for summary judgment on appeal did not change plaintiffs' position and did not confer a substantial benefit]; see also *Balch Enters. v. New Haven United Sch. Dist.* (1990) 219 Cal.App.3d 783, 795; Pearl, Cal. Attorney Fee Awards (Cont. Ed. Bar, 3d ed. 2013 Supp.), § 3.44.)

Here, an examination of the Partial Settlement and the other pertinent circumstances of the coordinated proceedings reveals that the Partial Settlement confers little benefit on the Wood Class. There can be no reasonable dispute that the Partial Settlement does not confer on the Wood Class any water rights. As if that alone is not cause to deny the Motion, there are additional reasons why it should be denied.

The Partial Settlement fails to resolve the Wood Class's duty to establish its reasonable and beneficial use of water. The Partial Settlement fails to defend the Wood Class from the water rights claims by non-settling parties in either pending Wood Class action lawsuit. Even if the Partial Settlement does obtain "the surrender" of the Settling Defendants' prescriptive rights and "limits Settling Defendants' right to challenge the Class' assertion of a right to produce up to three-acre feet of groundwater per annum free of replacement assessment," those questionable concessions do nothing to establish any water right whatsoever. (Motion at 4:7-9, 5:10-11.)

Class counsel has repeatedly acknowledged that the Partial Settlement does not establish or confer any water rights. For example, the Notice of Partial Class Action Settlement for the

"Small Pumper" Class Action clearly notified potential class members that "[t]his settlement does not provide you with a Court-determined water right.... [T]his settlement may impact the determination of your water right at a future date." (Declaration of Michael McLachlan in Support of Motion for Final Approval of Partial Class Settlement (Nov. 15, 2013), Ex. 2 at p. 2 [emphasis added].) Similarly, at the October 25, 2013 hearing on the Wood Class's motion for preliminary approval of its partial settlement, the Court asked: "Well, you're – your're asking the Court to approve a number, an allocation number, of – of three acre feet a year per person as being reasonable, aren't you?" Mr. McLachlan responded: "No, we're not." (Dunn Decl., Ex. A at 52:12-16.) At the same hearing, Mr. Thomas Bunn, counsel for Settling Defendant Palmdale Water District assured the Court that "[t]he class members are being adequately advised that they're not getting a water right out of this and that the Court will be making that determination in the future." (Dunn Decl., Ex. A at 40:24-27.)

In fact, water rights cannot be determined without evidence of their reasonable and beneficial use, which the Wood Class has not yet presented 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; see also First-Amended Cross-Complaint of Public Water Suppliers, ¶¶ 76-80 [alleging unreasonable use against all cross-defendants].) Furthermore, even if the Wood Class reasonable and beneficial use can be established in Phase 6, the Wood Class rights will be subject to the water rights claims by all non-settling defendants in both Wood Class action lawsuits against all public and private landowners. (See First-Amended Cross-Complaint of Public Water Suppliers, ¶¶41-45.)[4]

Thus, the Partial Settlement fails to establish Wood Class water rights, fails to establish Wood Class reasonable or beneficial use of water, and fails to resolve whether any such rights

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[4] Also, the Partial Settlement, which only provides that Settling Defendants "will not contest" the Wood Class's right and that any prescriptive rights established by Settling Defendants "shall not be exercised to reduce the [Wood Class's rights]" (Wood Class Stipulation of Settlement at 9:20-23, 11:4-5), cannot be said to confer a benefit to the public. (*Morrison v. Vineyard Creek L.P.*, 193 Cal.App.4th 1254, 1262 n. 4 [upholding trial court's conclusion that a settlement failed to confer a significant benefit on the general public because "[t]he settlement had no precedential value. It did not result in legal findings or even acknowledgement of liability or any statutory violation. Nor did it resolve anything as to anybody other than [the plaintiff]...."]; *Norberg v. California Coastal Com.* (2013) 221 Cal.App.4th 535, 543 [action was not initiated in the interest of the general public, but for personal purposes].)

would be subordinate to the numerous non-settling defendants' water rights. For these reasons, the benefits conferred on the Wood Class are minimal at best and do not support a section 1021.5 atttorneys' fees motion.

C. The Claimed Lodestar Is Not Reasonable

The Wood Class argues that the stipulated attorneys' fees are reasonably based on the lodestar method. (Motion at 5:20-22, 7:2-6.) A lodestar must be limited to reasonable attorneys' fees based on a careful compilation of time reasonably spent multiplied by a reasonable hourly rate. (See, e.g., *Serrano v. Priest* (1977) 20 Cal.3d 25, 48-49 ("*Serrano III*"); *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 833.) For the reasons set forth below, neither the hours nor the hourly rate used to calculate the stipulated attorneys' fee is reasonable.

1. The Claimed Rate Is Unreasonable

The Wood Class asks the Court to approve attorneys' fees calculated using a "reduced hourly rate" of $550[5] per hour for all attorney time. (Motion at 7:3; McLachlan Decl., ¶ 16.) This rate is unreasonably high because, inter alia, class counsel are not water law experts, lack groundwater rights experience, and the rates do not reflect the prevailing rates in the Antelope Valley community.

Generally, the rate used to calculate a lodestar is "that [rate] prevailing in the community for similar work" performed by attorneys with comparable skills and experience. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 [emphasis added]; *Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 783.) A party can claim a higher "out-of-town" rate only "in the 'unusual circumstance' that local counsel is unavailable." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 399.) The moving party bears the burden of supporting the rates claimed. (*Welch v. Metro. Life Ins. Co.* (2007) 480 F.3d 942, 945-946.)

Despite claiming high hourly rates, the Wood Class makes absolutely no claim or showing that their counsel, Daniel M. O'Leary, has any skills as a water law attorney or even had any

[5] According to the Wood Class and its counsel, this rate reflects a "negotiated discount." (Mot. at 8:10; McLachlan Decl., ¶ 16.)

experience in contested groundwater rights cases. (See Declaration of Daniel M. O'Leary.) While the Wood Class's other counsel, Michael D. McLachlan, claims to have "extensive experience litigating complex cases involving groundwater," he cites as evidence only toxic waste cases, including one he worked on prior to law school. (McLachlan Decl., ¶ 7.) Mr. McLachlan's experience in Superfund cases cannot make him an expert in the specialized field of water rights and, in particular, the area of groundwater adjudications. Notwithstanding its counsel's lack of expertise and experience in the issues in this case, the rate requested by the Wood Class is at the very top of the scale found to be reasonable for leading experts. (*Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 871-872 [finding rates of $200 to 250 per hour for associates and $500-550 per hour for partners reasonable for Los Angeles market but noting that lead counsel was a "leading expert in the field" and the rates were "at the 'high end' of the scale" [emphasis added]].)

The lack of experience, skill, and success of the Wood Class's counsel requires using an hourly rate more closely aligned with the hourly rates of $200 to $250. Even the Willis Class counsel lodestar for the Willis Class award was based on hourly rates of $400 for Ralph B. Kalfayan, $450 for David B. Zlotnick and lesser amounts for associates. (Dunn Decl., Ex. F at 9:24-10:4.) Then, the lodestar was reduced due to the Willis Class counsels' lack of expertise in water law. (*Id.* at 10:14-19.)[6]

The rate claimed by counsel for the Wood Class is also unreasonable for the local community. The Wood Class and the Antelope Valley Groundwater Basin are located in the Mojave Desert in northern Los Angeles County and southeastern Kern County. Though the region contains two mid-sized cities, the majority of the region is characterized by sparsely populated rural communities. Nonetheless, the only support that the Wood Class provides for the claimed hourly rate of $550 pertains to two of the country's most expensive urban markets: a Laffey fee matrix formulated by Dr. Michael Kavanaugh for the Washington D.C. metro area

[6] Furthermore, Gregory L. James, the water law expert retained by the Willis Class in this coordinated proceeding, declared that he has been awarded an hourly rate of $435 when serving as counsel in a contingent, public interest water law litigation. (See Supp. Decl of James (Mar. 15, 2011), ¶ 12.)

(hereafter, "Kavanaugh Laffey Matrix") and Mr. McLachlan's declaration regarding Los Angeles market rates. (McLachlan Decl. ¶¶ 17-18, Ex. 3.) Before relying upon non-local rates, the party claiming fees bears the burden of demonstrating that hiring local counsel was impracticable, including, at least, a showing that the party made a good-faith effort to find local counsel. (*Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1241 citing *Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1244 and *Horsford, supra*,132 Cal.App.4th at p. 399.) No such showing has been made by the Wood Class.

The Wood Class's reliance on the Kavanaugh Laffey Matrix is unreasonable for a number of other reasons. First, the Wood Counsel relies exclusively on the Kavanaugh Laffey Matrix without mention of the original Laffey Matrix, created and maintained by the Civil Division of the United States Attorney's Office of the District of Columbia also for the Washington D.C. metro area. (Dunn Decl., Ex. G.) While the Kavanaugh Laffey Matrix lists $640 per hour as the 2013-2014 market rate for attorneys with 11to 19 years of experience in Washington D.C., the original Laffey Matrix lists $450 per hour in the same category. (*Ibid.*) The Wood Class offers no support for its choice to rely upon the Kavanaugh Laffey Matrix without consideration of the original Laffey Matrix.

Second, the Wood Class only cites the current, 2013-2014 Kavanaugh Laffey Matrix rate even though the Class claims fees for work dating back to August of 2007. (Motion at 8:8-9.) The hourly rates listed in the Kavanaugh Laffey Matrix for the entire duration of the period billed are $536 (2007-2008), $557 (2008-2009), $569 (2009-2010), $589 (2010-2011), $609 (2011-2012), $625 (2012-2013) and $640 (2013-2014). (McLachlan Decl., Ex. 3.) Averaging the Kavanaugh Laffey Matrix rates based on the timing of counsel's work produces an average (Washington D.C.) market rate of $590 per hour (not $640), or $507 per hour after the 14 percent discount negotiated in the Partial Settlement. (See Motion at 8:8-11, 15-16 [market rate of $668-640 was discounted to $550 in the Partial Settlement, an adjustment of more than 14 percent]; see also McLachlan Decl., ¶ 16 [discount was the result of negotiations].) Furthermore, doing the same analysis using the original Laffey Matrix rates ($390, $410, $410, $420, $435, $445 and $450 during the duration of the Wood Class representation) produces an average hourly rate of

$423 (also for Washington D.C.), or $364 after applying the negotiated discount.

Third, the Wood Class failed to properly adjust Laffey Matrix rates for the local Antelope Valley community. While the Wood Class notes that the rates should be adjusted for the local market, it increased the rates under the (unsupported) assumption that the cost of living in Los Angeles is higher than Washington D.C. but completely ignored the cost of living in the local community, viz., Antelope Valley. (Motion at 8:12-16.)

2. The Hours Billed by the Wood Class Counsel and Claimed in the Wood Class's Motion Are Unreasonable and Excessive

A fee request may be denied outright if it appears that the requested fee is unreasonable and inflated. (See *Serrano v. Unruh* (1982) 32 Cal.3d 621, 635 ("*Serrano IV*").) In *Serrano IV*, the Supreme Court recognized the importance of reducing awards to counsel who unreasonably inflate their applications, stating: "If … the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimant would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be a reduction of their fee to what they should have asked for in the first place." (*Id.* at p. 635.) Here, the Wood Class is asking for an award of attorneys' fee based on 3,766.2 hours of work, all billed at a leading expert rate. (Motion at 7:2-8.) The Court should deny or significantly reduce any award to Wood Class counsel because the time spent was unreasonable and the request is excessive for, inter alia, the following reasons.[7]

a. Despite Claiming to Be a Water Law Expert, Wood Class Counsel Spent Significant Time Studying and Researching Water Law

Showing a lack of experience and expertise in groundwater rights, Counsel for the Wood Class spent an unreasonable amount of time researching basic propositions of water law. While some time may be needed at the outset of any case in researching legal issues, the amount billed by Mr. McLachlan is excessive, particularly given his claimed expertise in water law. For

[7] Due to the Wood Class's insistence on rushing this motion to hearing, an exhaustive examination of the Wood Class counsel's bills was not possible. The following is non-exhaustive list of some of the most readily apparent examples of counsel's unreasonable and inflated billing practices.

example, in September of 2011, about four years into his representation of the class, Mr. McLachlan billed 21.9 hours researching rural residential use of water. (McLachlan Decl., Ex. 2.) All of this time is included in the Wood Class's lodestar at the leading expert rate of $550 per hour.

b. Mr. McLachlan Spent Considerable Time Performing Associate- and Paralegal-Level Tasks

Activities, such as document review, are not properly billed by partner-level attorneys or at partner-level rates. (See *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43 [holding that activities, such as document review, that could have been done by associates or paralegals were properly excluded from the lodestar at partners' rates of $450 and $425].) Mr. McLachlan has been practicing law for nineteen years and running his own firm for the last ten years. (McLachlan Decl., ¶¶ 4-5.) He claims to specialize in complex civil litigation, class actions, and groundwater cases, and on this basis of this expertise, claims a top-of-the-market billing rate of $600 or more per hour, discounted to $550 per hour in the Partial Settlement. (*Id.* at ¶¶ 4, 7, 17; Motion at 8:15-16.) Nonetheless, the 3,326.6 hours of work claimed by Mr. McLachlan in this case include copious entries for "review and summary" of discovery documents, reports, and transcripts, including, for example, (1) 30 hours spent summarizing deposition testimony over a 10 day period in January 2011 (see *Id.* at Ex. 3 [entries for 1/8/11-1/13/11 and 1/17/11].), and (2) nearly 70 hours spent reviewing data production from public water suppliers and creating a master summary memorandum of the same over an 11-day period in November 2011 (see *Ibid.* [entries for 11/3/11 and 11/5/11-11/13/11].) Mr. McLachlan's billing invoices contain many other "review" and "summarize" entries, including:

- 2/1/2013: "review 24 Davis mutual sup responses and attached exhibits, and supplement master memo re: trail notes 4.1";
- 2/9/13:"review 11 CA entity declarations and voluminous exhibits, summarize same 2.3";
- 12/22/2012: "Commence review, analysis and summary of voluminous discovery filings … including summary memo 4.6";

- 12/13/2012: "Continue review of voluminous discovery responses … 7.1";
- 7/5/2011: "review and analysis of Phase 3 transcripts on 5 points, and prepare summary memo re same 5.7";
- 2/4/2011: "review Beebe depo and commence prep of outline for same 4.6";
- 2/5/2011: "Summarize Durbin depo vol 2 5.1"; and
- 6/11/2010: "Receive and review new class database and analysis of same, class water use reporting data, and memo summarizing same 4.8".

(*Ibid.* [emphasis added] [see also entries for 1/13/13, 1/19/13, 7/6/11, and 7/12/11].) This amount and type of billing is excessive, particularly at a leading expert rate, and Mr. McLachlan should not recover for it.

D. The Lodestar Should be Reduced Due to the Limited Success Achieved by the Partial Settlement and the Fact that Taxpayers Will Ultimately Pay the Award

While the Wood Class does not request a multiplier, it suggests that the "high level of skill … required to prosecute this action" would justify a multiplier of "at least two times the lodestar." (Motion at 8:24-9:2.) The Wood Class also maintains that "[t]he sacrifices and hardships presented by this litigation have been uniquely high, and would justify a much higher multiplier." (*Id.* at 9:7-9; McLachlan Decl., ¶¶ 20-21.) In fact, the limited and speculative nature of the benefit conferred by the Partial Settlement and the fact that public agencies—and eventually, taxpayers—will pay the attorneys' fees award support reducing the lodestar with a negative multiplier.

The multiplier (positive or negative) is an independent determination from the lodestar. Factors to be considered in determining whether to adjust the lodestar figure with a multiplier include:

> (1) the novelty and difficulty of the question involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall upon the taxpayers; … [and] (6) the fact that

> the monies awarded would inure not to the individual benefit of the attorneys involved but the organizations by which they are employed....

(*Serrano III, supra,* 20 Cal.3d at p.49.) However, factors that are encompassed in the reasonable hourly rate used to calculate the lodestar, including the level of skill, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case, should not be the basis of any multiplier. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138-1139 [when determining the multiplier, a court "should not consider these factors to the extent they are already encompassed within the lodestar"].) Indeed, "a trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation." (*Id.* at p.1139) "Otherwise, the fee award will result in unfair double counting and be unreasonable." (*Ibid.*)

In light of the top of the market hourly rate and the expertise claimed by the Wood Class for their counsel, a multiplier based on the "high level of skill ... required to prosecute this action" would be the definition of double counting. (Motion at 8:25.) Even if the hourly rate of the Wood Class counsel is adjusted to reflect a "fair and reasonable" rate for the local market and the counsel's verifiable level of expertise, a multiplier is not warranted. The Wood Class has failed to show that Mr. McLachlan or Mr. O'Leary have "exceed[ed] the quality of representation that would have been provided by an attorney of comparable skill and experience." (*Ketchum, supra*, 24 Cal.4th at p. 1139.) In fact, what they have achieved in this Partial Settlement is far from a resounding victory for the Wood Class at all because the Wood Class counsel has not secured the Class any rights, has not proven that the Class's reasonable and beneficial use supports any claim to rights, and does not resolve outstanding prescriptive claims that threaten to subordinate any such rights should they be established. (Cf. *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 582 [noting "exceptional effort" producing an "exceptional benefit" can be the basis for a lodestar enhancement].)

The fact that the Settling Defendants are public agencies also militates against a positive multiplier and supports a reduction of the lodestar because any attorneys' fee award will

ultimately fall upon the taxpayers. (See *Northwest Energetic Servs., LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 881 ["upward adjustment of lodestar is inappropriate" where award will "fall upon the shoulders of California taxpayers"]; see also *San Diego Police Officers Ass'n v. San Diego Police Dep't* (1999) 76 Cal.App.4th 19, 24 [affirming a negative multiplier when fee award would be borne by the taxpayers].)

Furthermore, "a reduced fee award is appropriate when a claimant achieves only limited success." (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 989, 990 ["the trial court reasonably could and presumably did conclude that plaintiff was not entitled to attorney fees for time spent litigating [] unsuccessful claims"]; see also *Harman v. City & County of San Francisco* (2007) 158 Cal.App.4th 407, 426.) Here, as explained above, the Partial Settlement confers minimal benefit to the Wood Class – they have been granted no water rights, they have not proven reasonable or beneficial use of water, and they have not resolved claims to water rights alleged to be superior to any right they might establish in the future. In addition, despite including claims in their Complaint for monetary damages, the Partial Settlement has no monetary value. (Wood Class's First Amended Complaint, ¶¶ 34-60.) Finally, the Partial Settlement is not relevant to most of the causes of action in the Wood Class Complaint, yet the lodestar is calculated using all hours expended on the litigation of class counsel up until a fee settlement was reached on October 6, 2013. (Motion at 7:6-8; McLachlan Decl., ¶ 13.) For these reasons, the lodestar should be decreased to reflect the counsel's level of success. (See, e.g., Dunn Decl., Ex. F, p. 10:14-19.)

III. CONCLUSION

For the reasons stated herein, the Wood Class's motion for attorneys' fees should be denied, and no fees should be awarded. If the Court is inclined to grant any fees, such fees should be adjusted to an amount that reflects the limited success achieved in the Partial Settlement, the local market value of Class counsel's services, the hours reasonably expended in achieving that result, and the fact that public agencies and taxpayers will be paying the award.

Dated: December 23, 2013

BEST BEST & KRIEGER LLP

By _____
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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 December 23, 2013, I served the within document(s):

LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40'S OPPOSITION TO MOTION FOR APPROVAL OF AWARD OF ATTORNEY FEES AND COSTS

☒ 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 December 23, 2013, at Irvine, California.

Kerry V. Keefe