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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES – CENTRAL DISTRICT**
10

11 Coordination Proceeding
12 Special Title (Rule 1550 (b))

Judicial Council Coordination
Proceeding No. 4408

13 **ANTELOPE VALLEY GROUNDWATER**
14 **CASES**

[Assigned to The Honorable Jack Komar, Judge
Santa Clara County Superior Court, Dept. 17]

**Public Water Suppliers’ Opposition to the
Willis Class’s Motion for Court Appointment
of Independent Expert Witness**

Date: July 15, 2010

Time: 9:00 a.m.

Place: Santa Clara County Superior Court

Dept: TBD

21 **1. Introduction**

22 The Willis Class has again made the same motion that the court denied in 2009. The Willis Class
23 has made no attempt to show “new or different facts, circumstances, or law” to justify reconsideration of
24 the motion, as required by California law. The court therefore has no jurisdiction to consider the
25 renewed motion. Even if it did, there is no basis for changing the court’s prior ruling. The court has no
26 authority to appoint an expert for the class, and it has no need for its own expert to assist in deciding the
27 case.
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1 This opposition is filed on behalf of the following Public Water Suppliers: Palmdale Water
2 District, Los Angeles County Waterworks District No. 40, City of Palmdale, Littlerock Creek Irrigation
3 District, Palm Ranch Irrigation District, Rosamond Community Services District, and Quartz Hill Water
4 District.

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6 **2. The Court, Having Denied The Motion, Has No Jurisdiction To Consider The**
7 **Renewed Motion.**

8
9 **A. A Party Renewing A Motion That Has Been Denied Must Submit An Affidavit Showing**
10 **New Or Different Facts, Circumstances, Or Law.**

11 A party who made a motion, which was denied by the court, may make a subsequent application
12 for the same order upon new or different facts, circumstances, or law. (Code Civ. Proc. §1008, subd.
13 (b).) The party must show by affidavit what application was made before, when and to what judge, what
14 order or decisions were made, and what new or different facts, circumstances, or law are claimed to be
15 shown. (*Id.*) Failure to do so subjects the party to sanctions. (*Id.*, subd. (d).)

16 The court has no jurisdiction to consider a motion that does not comply with Code of Civil
17 Procedure section 1008. (*Id.*, subd. (e).) The court exceeds its jurisdiction if it grants a motion to
18 reconsider that is not based upon “new or different facts, circumstances, or law.” (*Gilberd v. AC Transit*
19 (1995) 32 Cal.App.4th 1494, 1500.)

20 In *Gilberd*, the trial court initially granted a motion by the appellant for relief from the
21 governmental claims filing requirement. Respondent filed a motion for reconsideration, but did not
22 allege any new facts, circumstances, or law. Instead, it argued that the trial court misinterpreted
23 California law. (32 Cal.App.4th at 1500.) The trial court agreed, granted reconsideration, and dismissed
24 the lawsuit for failure to file a governmental claim. (*Id.* at 1498.) The court of appeal *vacated the*
25 *judgment* and held that the trial court lacked jurisdiction to hear the reconsideration motion. (*Id.* at
26 1502.)

1 **B. The Motion To Appoint an Independent Expert Was Previously Denied by the Court.**

2 On August 17, 2009, the court heard a motion by Rebecca Willis and the Willis Class for
3 appointment of an independent expert witness under Evidence Code section 730. The court denied the
4 motion without prejudice. A copy of the court’s minute order is attached as Exhibit 1. A copy of the
5 relevant pages of the transcript is attached as Exhibit 2. The court based its denial on two grounds: (1)
6 the court was not authorized under Evidence Code 730 to appoint an expert witness for the class, and (2)
7 the court had no basis for a determination that it could not resolve conflicts in the evidence itself,
8 without the need for a neutral expert.

9 The motion decided by the court then was the same motion being made now. In fact, the
10 memorandum of points and authorities submitted in support of the instant motion is virtually identical to
11 the one in the earlier motion, filed July 23, 2009.

12
13 **C. Nothing Has Changed Since The Denial Of The Earlier Motion.**

14 The Willis Class did not submit the affidavit required by Code of Civil Procedure section 1008,
15 nor any declaration in support of its motion. Nor did it allege any “new or different facts, circumstances,
16 or law.” It didn’t even make reference to the fact that the class had earlier made the same motion and the
17 court denied it. Accordingly, the motion violates section 1008.

18 Moreover, there *are* no new or different facts, circumstances, or law. The posture of the case is
19 the same now as it was then. The issues before the court in the upcoming Phase 3 trial are the same as
20 they were then. The expected testimony, as far as we know, is the same now as it was then.

21 Nor is the fact that the court denied the earlier motion without prejudice an excuse for
22 noncompliance with section 1008. The court clearly left room for the Willis Class to renew its motion if
23 something changed. But nothing has changed.

24
25 **3. Appointing an Expert Now Would Likely Delay the Phase 3 Trial.**

26 This motion is scheduled to be heard the very day that expert witness designations are due. The
27 motion states that the proposed expert, Professor Harter, has done no work and has not formed any
28

1 opinions. Any witness appointed by the court would have to review the data before being able to give a
2 meaningful deposition.

3 The motion contains no indication why it is being brought so late. It gives no indication of any
4 time frame for Professor Harter's work.

5 The court should not allow this last-minute effort to delay the Phase 3 trial.

6
7 **4. Evidence Code Section 730 Does Not Allow the Court To Appoint an Expert**
8 **Witness To Benefit a Particular Party.**

9 The rationale for the motion is that the Willis Class cannot afford to hire its own expert.
10 However, as this court has already determined, Evidence Code section 730 provides only for an expert
11 to assist the court. It does not allow for an expert to benefit a particular party or class.

12 The Willis Class asserts that the court has a fiduciary responsibility to protect the interests of the
13 classes. However, any fiduciary duty the court has to the class is a limited one, and does not extend to
14 presenting evidence on behalf of the class. The court assumes a fiduciary responsibility in connection
15 with the certification of the members of a class (*Cervantez v. Celestica Corp.* (C.D. Cal. 2008) 253
16 F.R.D. 562, 568) and the approval of settlements (*Rodriguez v. West Publ'g Corp.* (9th Cir. 2009) 563
17 F.3d 948, 968; *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129). In all other
18 instances, the court wears the hat of a neutral arbiter. This requires equal and impartial treatment of all
19 parties to an action. The appointment of an expert witness is not within the scope of the court's limited
20 fiduciary obligations owed to class members.

21
22 **5. The Court Is Capable of making Findings on Safe Yield and Overdraft**
23 **Without a Neutral Expert.**

24 No party has made a showing that the court requires an expert witness in order to make findings
25 on basin safe yield and overdraft. For years, the court has heard various matters in these cases without a
26 neutral expert or indicating that a neutral expert would be necessary. The court has made findings on
27 safe yield and overdraft in another groundwater adjudication and did so without a neutral expert.

1 The motion asserts, without any evidentiary support, that the data in the basin are inadequate to
2 develop a clear conclusion on safe yield. (Motion at 4.) The Public Water Suppliers disagree. The data in
3 the basin are extensive, as is admitted elsewhere in the motion. (Motion at 3.) While we do not yet know
4 if other parties will have estimates of yield that differ from the Technical Committee's, if there are such
5 differences they are likely to be based on definite differences in methodology. Both sides have retained
6 experts to present their respective points of view. The issues before the court will be well framed, and
7 the court will be in a position to evaluate those issues based on the experts' testimony presented at trial.

8 The Willis Class claims that the appointment is necessary to ensure the public's perception of a
9 fair and appropriate determination of safe yield. (Motion at 5.) However, the public's perception relative
10 to a finding of safe yield would hardly be influenced by the appointment of an additional expert. To the
11 contrary, the appointment of another expert witness will increase the cost of this action, something not
12 likely to be viewed favorably by the taxpaying public.

13
14 **6. Conclusion**

15 The Willis Class has made no showing of new or different facts, circumstances, or law.
16 Accordingly, the court has no jurisdiction to consider the renewed motion. Even if it did, nothing has
17 changed since the court denied the motion. There has been no showing that the court requires expert
18 assistance to decide the safe yield of the basin.

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20 Dated: July 1, 2010

LAGERLOF, SENEAL, GOSNEY & KRUSE, LLP

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22 By: _____
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