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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES

This Pleading Relates to Included Action: REBECCA LEE WILLIS and DAVID ESTRADA, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40; CITY OF LANCASTER; CITY OF PALMDALE; PALMDALE WATER DISTRICT; LITTLEROCK CREEK IRRIGATION DISTRICT; PALM RANCH IRRIGATION DISTRICT; QUARTZ HILL WATER DISTRICT; ANTELOPE VALLEY WATER CO.; ROSAMOND COMMUNITY SERVICE DISTRICT; PHELAN PINON HILL COMMUNITY SERVICE DISTRICT; and DOES 1 through 1,000;

Defendants.

RELATED CASE TO JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4408

WILLIS CLASS' OPPOSITION TO WOOD CLASS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

Date: August 3, 2015
Time: 10:00 A.M.
Place: Los Angeles Superior Court
111 North Hill Street, Room 222
Los Angeles, CA 90012
Judge: Hon. Jack Komar

I.
INTRODUCTION

The "Wood Class Settlement" is a misnomer. California law governing class actions requires settling parties to present the court and absent class members with a settlement agreement between the parties to the class action. In this case, the Wood Class and the Public Water Suppliers -- the **only** parties in the underlying class action -- failed to do so. Instead, the Wood Class and the Public Water Suppliers presented the Court with a 61-page agreement amongst 140 Parties with differing interests, rights, and water usage and that also illegally includes extensive terms that purport to bind a Non-Stipulating Party, *i.e.*, the Willis Class. In short, there is no "Wood Class Settlement" for this Court to finally approve or to which the Willis Class can properly object. Therefore, this Court cannot give Final Approval to the "Wood Class Settlement" because there is no such legal document in existence.

To make matters worse, there is a provision signed by all 140 Parties to the stipulated agreement that states, in unequivocal language, that if the trial court or **even the appellate court** changes even one term in the 61-page agreement, then the entire agreement becomes *void ab initio*. Stipulation, ¶ 4. Without question, this very real "dynamite" provision is illegal and provides just one of the many bases for this Court's denial of Final Approval "as is" for the 61-page agreement improperly submitted to the Court as the "Wood Settlement Agreement."

Assuming *arguendo* that the Court looks past these fatal defects and accepts the entire 61-page agreement as the "Wood Class Settlement," then this Court must deny Final Approval for the 61-page agreement because the Wood Class would then be mired in an irreconcilable conflict of interest for Wood Class Counsel and between the Class Representative Richard Wood and absent class members. As explained in detail in recent filings with the Court, the Wood Class includes overlying landowners with many dormant unexercised parcels -- resulting in "Dual" Nonpumpers and Small Pumpers constituting over 70% of the Wood Class. Because the 61-page agreement

extinguishes the right of Nonpumpers to pump groundwater in the future and renders their unimproved parcels "basically worthless," the thousands of overlying landowners with dormant parcels have either objected already to their **very own settlement agreement** (if they also are deemed Members of the Willis Class, which they are not) or they heretofore have been inadequately represented by Wood Class Counsel and must be permitted to acquire adequate representation to protect their property rights for their unimproved parcels (if they are deemed not to be Members of the Willis Class). Either way, the irreconcilable conflict of interest within the Wood Class created by the 61-page agreement absolutely destroys the Wood Class as a viable class.

Finally, there are myriad number of additional reasons why this Court cannot grant Final Approval for the "Wood Class Settlement." These reasons include the breach of the Willis Settlement Agreement by the Public Water Suppliers in entering into a settlement agreement with the Wood Class (and 140 other Parties) that violates their duties and obligations under their prior Settlement Agreement with the Willis Class; the collateral estoppel and res judicata effect of the Willis Judgment that precludes the Public Water Suppliers from entering into the 61-page agreement with the Wood Class and 140 other Parties; and the inequities and unfair advantage given to Wood Class Members regarding their water rights, including the lack of metering, excessive amount of water promised from the Native Safe Yield and "undocumented" water sources; the presumptive application of the Water Code 106 priority when a large number of Wood Class Members pump groundwater for other than domestic purposes; and, as the Court repeatedly emphasized, a settlement cannot bind or prejudice the interests of a nonsettling party.[1]

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[1] The Willis Class hereby incorporates the Willis Class' Opposition to Wood Class' Motion for Preliminary Approval filed on March 13, 2015, and all related filings, as though fully set forth herein.

II.
THIS COURT CANNOT GIVE FINAL APPROVAL TO THE "WOOD CLASS SETTLEMENT"

A. No Separate Settlement Agreement Between the Wood Class and the Public Water Suppliers is a Fatal Defect of the "Wood Class Settlement" Based on the Resulting Irreconcilable and Massive Conflict of Interest Created Within the Wood Class

There is no "Wood Class Settlement" for this Court and absent class members to review and analyze. The Wood Class and the Public Water Suppliers have admitted that their "settlement agreement" is inextricably intertwined with a stipulated proposed physical solution that includes 140 other parties to this adjudication who were **not** parties to the underlying class action lawsuit between the Wood Class and the Public Water Suppliers. The failure to provide a separate settlement agreement between the Wood Class and the Public Water Suppliers is a fatal defect that cannot be ignored by this Court.

One of the catastrophic results of this failure to provide an actual "Wood Class Settlement" is the creation of a legal document that has caused a massive and irreconcilable conflict of interest within the Wood Class. The Stipulated Judgment and Proposed Physical Solution ("SPPS") filed by 140 Stipulating Parties on March 4, 2015, creates a "haves" and "have nots" situation between the Small Pumper Wood Class and the Nonpumper Willis Class; the Wood Class is the "haves" based on the valuable water rights guaranteed for Small Pumpers in the SPPS, while the Willis Class is the "have nots" based on the illegal extinguishment of their water rights as Nonpumpers in the SPPS. As discovered through diligent investigation by Willis Class Counsel during the past few weeks, however, the problem for Wood Class Counsel and for this Court is that the **Wood Class itself** in fact includes **thousands of landowners that have not pumped**. In other words, **at least 73% or over 2,400 Members of the Wood Class** own parcels in the Basin on which they

have pumped water in the past (Small Pumper) **and parcels on which they have never pumped water (Nonpumper)**.[2]

Regardless of the outcome of the Willis Class' Motion to Withdraw Based on Conflict of Interest or, Alternatively, Motion to Continue the Phase VI/Physical Solution Trial[3], the undeniable fact remains that the **vast majority** of Wood Class Members also own parcels in the Basin on which they have never pumped water. This places Wood Class Counsel and Class Representative Richard Wood in an irreconcilable conflict of interest with the 2,400-plus absent class members who also are Nonpumpers.[4] As Wood Class Counsel, Wood Class Member Olaf Landsgaard[5], and Willis Class Counsel have all recognized, the SPPS protects the rights of Small Pumpers, but fails to protect the rights of Nonpumpers.[6] The result is 2,400 Members of the Wood Class, or 73%, have either formally objected to the SPPS (if they are deemed to be Willis Class Members, which they are not) or would have formally objected to the SPPS if they had been informed of the actual scope of the "Wood Class Settlement" or SPPS and its extremely negative impact on their water rights as

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[2] *See* Declarations of Cindy Barba, Robin Griffin, Brian Brennan, and Jade Bowman, filed concurrently herewith, for complete results of the comparision between the Wood Class List of Small Pumpers and the Willis Class List of Nonpumpers. Overall, there were 4,356 names on the Wood Class List and 3,438 or 79% of those names were also on the Willis Class List. Substracting 950 names from both categories to arrive at a Wood Class Member count of 3,400 (removing "overlaps" such as husband/wives, etc.), there are 2,488 or 73% of Wood Class Members who are also Nonpumpers.

[3] The Willis Class hereby incorporates the Willis Class' Motion to Withdraw Based on Conflict of Interest or, Alternatively, Motion to Continue Phase VI/Physical Solution Trial and all related filings, as though fully set forth herein.

[4] As provided by the California Rules of Professional Conduct:Under California Rules of Professional Conduct, Rule 3–310 (Rule 3–310) **an attorney . . . must *withdraw* from an existing representation of multiple clients when an *actual* conflict of interest arises among those existing clients. (Rule 3–310, subds. (C)(1), (2)**.). *Carroll v. Superior Court*, 101 Cal.App.4th 1423, 1425 (2002) (emphasis supplied). Whether or not Wood Class Counsel seeks to withdraw from its representation based on the actual (and massive) conflict of interest within the Wood Class, an actual (and massive) conflict of interest clearly exists within the Wood Class.

[5] *See* Declaration of Olaf Landsgaard filed concurrently herewith.

[6] Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed. *See* 2 Newberg & Conte § 11.65, at 11–183; *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 (3d.Cir.1973). *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995). Thus, Wood Class Counsel owe a fiduciary duty to the more than 2,400 Wood Class Members who also are Nonpumpers, in addition to the fiduciary duty they owe to the 1,000 or so "pure" Small Pumper Wood Class Members such as Class Representative Richard Wood.

Nonpumpers (if they are deemed not to be Willis Class Members). Either way, the SPPS is not "fair and reasonable" as required for Final Approval because the percentage of objectors in the Wood Class to the SPPS – **73%** -- is not "small," by any measure. *See, e.g., Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 245 (2001) (burden is on proponent of class action settlement agreement to demonstrate that it is "fair and reasonable"; presumption that it is "fair and reasonable" does not exist where percentage of objectors is not small).

This irreconcilable conflict of interest did not exist within the Wood Class when Wood Class Counsel approved the Waldo Accord as a global settlement because the water rights of both Small Pumpers and Nonpumpers were adequately protected under the Waldo Accord. However, District 40's refusal to join the Waldo Accord prevented its adoption by this Court. Thereafter, the Wood Class and the other 140 Stipulating Parties, including the Public Water Suppliers, intentionally excluded the Nonpumper Willis Class from settlement negotiations that led to the SPPS. Thus, not surprisingly, the water and property rights of Nonpumpers are not protected in the SPPS. The problem for Wood Class Counsel is that in approving the SPPS as the "Wood Class Settlement," Wood Class Counsel failed to protect their Class Members' water rights for their non-pumping parcels.

Even assuming this breach was unintentional (as is likely), Wood Class Counsel can only rectify this problem by withdrawing their Motion for Final Approval and by taking affirmative steps to create a modified SPPS that fairly and reasonably incorporates the rights of Nonpumpers (as proposed, for example, by Professor Gray in his Expert Report – Docket No. 10172, Exh. E). Of course, Wood Class Counsel must also denounce the "Dynamite Provision" contained in the Stipulation for Entry of Judgment ("Stipulation") that provides that any change to the terms of the SPPS will result in the SPPS being *void ab initio*. Stipulation, ¶ 4. Even the Willis Class' Expert Professor Brian E. Gray has recognized the otherwise "salutary benefits" to the Basin of the SPPS,

as long as the SPPS is modified to incorporate the rights of the Nonpumpers (and to remove other illegal provisions such as the exportation of groundwater from the Basin). In other words, there is no need to "blow up" the SPPS in its entirety and start from scratch. Rather, as shown by Professor Gray's Expert Report, the SPPS can be modified to incorporate the rights of Nonpumpers, which includes 2,400 Members of the Wood Class, and still protect the rights of the Small Pumpers in the Wood Class.

B. The Public Water Suppliers Are Collaterally Estopped From Entering Into The Wood Class Settlement Agreement

The doctrine of *res judicata* gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy. It seeks to curtail multiple litigation causing vexation and expense to the parties and wasted efforts and expenses in judicial administration. It is well established in common law and civil law jurisdictions and is frequently declared by statute. *See* C.C.P. §§ 1908, 1908.5, 1911. Similarly, collateral estoppel bars a party from re-litigating an issue of ultimate fact that a court already has adjudicated. It deals with the finality of judgment on factual matters that were fully considered and decided. Collateral estoppel deprives a party of the right to re-litigate an issue. The rationale is to conserve judicial resources by preventing repetitive litigation.

Here, the Public Water Suppliers are barred and estopped from entering into a settlement which contradicts the terms of the Willis Class Judgment and related Stipulation of Settlement. The "Wood Class Settlement" or SPPS directly contravenes the Willis Class Judgment and the Public Water Suppliers are forbidden from entering into an agreement which abrogates the rights of Willis Class Members to share in the Native Safe Yield.[7] The Willis Class Judgment provides: "The Settling Parties agree that the Willis Class Members have an Overlying Right to a correlative share

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[7] The Willis Class hereby incorporates the Willis Class' Second Motion to Enforce Settlement Agreement with Public Water Suppliers and all related filings, as though fully set forth herein. (Docket No. 10172)

of 85% of the Federally Adjusted Native Safe Yield for reasonable and beneficial uses on their overlying land free of Replacement Assessment." ¶IV.D.2 of Willis Class Stipulation of Settlement. In addition, the Public Water Suppliers agreed not to take any positions or enter into any agreements that were inconsistent with the exercise of the Willis Class Members' Overlying Right to produce and use their correlative share of 85% of the Basin's Federally Adjusted Native Safe Yield. ¶IV.D.2 of Willis Class Stipulation of Settlement. In clear violation of the Willis Settlement Agreement, the "Wood Class Settlement" or SPPS expressly denies a free production right to Willis Class Members and effectively extinguishes their right to pump. The Willis Judgment conflicts with the "Wood Class Settlement" or SPPS and the Public Water Suppliers, the common defendants, are estopped from entering into the SPPS.

C. The Wood Class Notice is Inadequate

When giving notice to class members in a class action of a proposed settlement, the notice must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members. *Wershba v Apple Computer, Inc.* 91 Cal.App.4th 224, 252 (2001); *Trotsly v. Los Angeles Fed. Sav. & Loan Assn.*, 48 Cal.App.3d 134, 151-152 (1975). The notice must be structured to enable class members rationally to decide whether to intervene, object, opt-out, or accept the settlement. *Id.* While the notice should be brief and reasonably clear to the minimally sophisticated layperson, the terms of the settlement and the course of litigation should not be oversimplified to increase readability at the expense of *accuracy* and *completeness*. *Rodgers v U. S. Steel Corp.*, 70 F.R.D. 639 (W.D. Pa. 1976). Failure to give adequate notice is a denial of due process.

Here, the Small Pumper Class Settlement Notice failed to disclose many of the material terms contained in the "settlement" between the Public Water Suppliers and the Wood Class as it relates to owners of Nonpumping parcels, *i.e.* 73% of the Wood Class. For example, the Notice

omits any reference to New Pumping Application Procedures that foreclose any new pumping on dormant parcels absent discretionary and unanimous approval from the PWS-controlled Watermaster. Further, the Nonpumper must complete lengthy and expensive application procedures and must agree to pay a replacement water assessment without any guarantee that approval to pump will be granted. If Wood Class Members were made aware of these provisions in the SPPS, the Nonpumper Wood Class Members – or 73% of the Class – would have objected to the SPPS. One Wood Class Member, Mr. Olaf Landsguaard, learned of the proposed physical solution and did object to the Wood Class Settlement or SPPS. *See* Declaration of Olaf Landsguaard. Mr. Landsgaard is simply a specific example of the other 2,400 Wood Class Members who would have objected (or have objected if they are deemed to be Willis Class Members as well) had they been provided with an adequate Notice.

The Notice also overstates the rights of Wood Class Members to pump free of replacement assessment from the Native Safe Yield. Under the terms of the SPPS, the Small Pumper Class was allocated a total of 3,806.4 AFY for reasonable and beneficial use. The Notice, however, provides that each class member "of the Small Pumper Class will have the right to pump up to 3 acre-feet of groundwater per year for reasonable and beneficial use without having to pay any replacement water assessment." Should each Wood Class Member exercise the right to pump up to 3 AFY without paying a water replacement assessment, then up to 9,516 AFY of the Native Safe Yield will be used by the Small Pumper Class free of replacement assessment. This amount would exceed the total allocation made available to the Small Pumper Class in the SPPS. The excess amount imposes a burden on the Native Safe Yield that is unaccounted for in the SPPS and renders the Notice defective.

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D. The "Wood Class Settlement" is Not Fair, Adequate, or Reasonable

In deciding whether to approve a proposed class action settlement under California Code of Civil Procedure Section 382, the court must find that the proposed settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co.,* 48 Cal.App.4th 1794, 1801 (1996) *quoting Officers for Justice v. Civil Serv. Commissioner,* 688 F.2d 615 (9th Cir. 1982), *cert. denied* 459 U.S. 1217 (1983). In this case, there is no settlement between the Wood Class and the Public Water Suppliers. Instead, the Wood Class offers a proposed judgment that binds the water rights of the stipulating parties and the water rights of the Nonpumper Willis Class. This is not a settlement that can be evaluated by the Court on a Motion for Final Approval. Thus, the Motion for Final Approval is improper and must be denied.

Furthermore, the SPPS elevates the rights of Small Pumper Wood Class Members and subordinates or extinguishes the rights of Nonpumper Wood Class Members. Small Pumper Wood Class Member benefits include: (1) a permanent allocation of up to 3 AFY per year for domestic and agricultural use per household or parcel; (2) no metering or reporting requirements; and (3) Water Code section 106 preference. Nonpumper Wood Class Members (as well as Willis Class Members), on the other hand, (1) do not have a guaranteed right to pump groundwater; (2) must ensure there is imported water available for use; (3) must meet expensive and burdensome regulatory requirements; (4) must agree to pay for water, which may be prohibitively expensive; and (5) must make sure a PWS-controlled (biased) Watermaster Board unanimously approves the requested use.

E. Metering Should Be Required for All Pumpers in the Basin

The "Wood Class Settlement" or SPPS permits Wood Class Members to pump groundwater without metering their water use or reporting the use to the Watermaster. All other parties under the SPPS, including Nonpumper Wood Class Members and Willis Class Members who may be

permitted to pump in the future, are required to meter and report their water use. This exclusive benefit to Small Pumper Wood Class Members is unreasonable as it promotes waste and inefficiency. Per the Expert Report of Mr. Jordan Kear:

> . . . the flow metering of each well within the basin is the optimal means to quantify groundwater production from the Basin. The use of other means and methodologies to estimate groundwater use appear to be based on several assumptions and provide significant error. Four data types were presented for evaluation by GSI: 1) utility electrical records, 2) flow meter data, 3) generator or solar power usage, and 4) crop irrigation; the simplest, most direct, most accurate, and most reliable method is the use of flow meter data.

Kear Expert Report, p. 2, filed concurrently herewith.

> The cost of metering is not material and is an obligation that should be imposed on water users in the Basin. Per Mr. Kear, "flow meter data provide the most accurate and reliable data for pumping quantification. Given the reported sizes of pumps in class wells, a typical meter would likely cost between $300 and $600 to furnish and install. In addition to providing quality data, the self-reporting nature of the method can increase water use awareness and provide key insight into well performance, alerting well owners to potential problems or other well issues before becoming unpreventable. While calibration and upkeep are potential issues, the simplicity of the direct measurement is usually worth the need to spot-check and maintain meter recordation.

Kear Expert Report, p. 2.

Unmeasured usage combined with the ability to pump groundwater free of water replacement assessment provides a perverse incentive for the Wood Class to waste water. Thirty percent of the Wood Class Members pump in excess of 3 AFY. Even under the SPPS, those members must pay for the water, yet there is no mechanism for them to reasonably meter and report. They get a free pass and a license to take water. This is neither fair nor reasonable for the Basin overall and for Nonpumper Wood Class Members and Willis Class Members, in particular.

Dated: July 21, 2015

Respectfully submitted,

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