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Class Counsel for the Willis Class

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' NOTICE OF MOTION
AND MOTION IN LIMINE NO. 1
RE: EXCLUSION OF EXPERT REPORT
OF TIM THOMPSON**

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

1 TO THE COURT AND ALL INTERESTED PARTIES:

2 PLEASE TAKE NOTICE that on August 3, 2015, at 10:00 a.m., in Room 222 of the Los
3 Angeles Superior Court (or such other department that the Court shall designate), located at 111
4 North Hill Street, Los Angeles, California, a hearing will be held on Willis Class' Motion in Limine
5 Number One for an order excluding Court-appointed Expert Report of Tim Thompson.

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7 The Motion is based on this Notice, the attached Memorandum of Points and Authorities,
8 the attached Exhibit A, and such other and further evidence as the Court adduces at the hearing.

9 **MOTION IN LIMINE NO. 1**

10 The Willis Class moves this Court for an Order in limine excluding the Court-appointed
11 Expert Report of Tim Thompson. The Expert Report is fundamentally flawed and unreliable
12 because Wood Class Counsel improperly participated in the actual conduct of the survey upon
13 which Mr. Thompson based his conclusions. The case law and learned treatises are clear that
14 attorneys **cannot** participate in the conduct of surveys relied on by independent experts because
15 any results obtained will be biased and rendered unreliable. Further, the Thompson Expert Report
16 should be excluded on the grounds that the data generated by the survey regarding class water usage
17 are not reliable due to selection bias and due to improper statistical analyses.

18
19 **STATEMENT OF FACTS**

20 Wood Class Counsel posted Mr. Tim Thompson's Expert Report ("Thompson Report") to
21 the Court website on July 9, 2015 (Doc. #10116). Willis Class Counsel previously had served a
22 Notice of Deposition of Mr. Thompson scheduling his deposition for July 7, 2015. For the
23 convenience of the witness and counsel, Mr. Thompson's deposition was Re-Noticed for July 27,
24 2015, and did in fact take place on July 27, 2015.

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26 During his deposition, Mr. Thompson testified that Wood Class Counsel (specifically, Mr.
27 McLachlan) sent the mailings to Wood Class Members requesting their participation in a survey
28

1 regarding their water usage and that Mr. Thompson never saw the content of the mailings.¹
2 Thompson Depo. at 13:7-15 & 86:12-16 (attached as Exhibit A). When Willis Class Counsel
3 requested copies of the mailings that were sent to potential survey participants, Mr. McLachlan
4 asserted the attorney-client privilege and refused to produce copies of those mailings. Id. at 23:23–
5 24:8. Later in the deposition, Mr. McLachlan started to describe the alleged content of those
6 mailings, but did not agree to waive his earlier assertion of the attorney-client privilege as to Willis
7 Class Counsel’s request for an actual copy of the mailings sent to potential survey participants. Id.
8 at 87:18–21. Mr. Thompson further testified that Mr. McLachlan spoke to Wood Class Members
9 who had agreed to participate in the survey regarding the nature of the litigation proceedings. Id.
10 at 85:9–86:3. Mr. Thompson was not present during these discussions with survey participants,
11 was not informed by Mr. McLachlan regarding the substance of those discussions, and was not
12 provided with a script, if any, that was used by Mr. McLachlan during those discussions. Id. at
13 86:4-11. Mr. Thompson also testified that Mr. McLachlan received all data from the Participating
14 Class Members (PCMs) and then passed the data along to him. Id. at 13:7-12. Mr. Thompson then
15 conducted the follow-up interviews with the survey participants and analyzed the data for his Expert
16 Report. Id. at 13:12-14:9.

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18
19 Mr. Thompson is a Certified Hydrologist. Mr. Thompson is not a statistician or an expert
20 in conducting surveys.
21

22 ARGUMENT

23 California Evidence Code Section 801 provides in relevant part:
24

25 ¹ According to the Thompson Report, four rounds of mailings went out to potential survey participants in the
26 Wood Class. See Thompson Report at p. 2. Four hundred (400) mailings were sent out in Round 1, three hundred
27 (300) in Round 2, and two hundred (200) in Round 3 for a total of nine hundred (900) mailings in the first 3 rounds.
28 Id. Mr. Thompson did not know how many Participating Class Members (PCMs) were obtained in the first 3 rounds.
Thompson depo. at 22:9-23 & 25:12-27:21. However, Mr. Thompson was aware that too few had responded in the
first 3 rounds and that a fourth round was required to ultimately obtain the 86 PCMs. Id. at 30: 21-25. 217 mailings
were sent out in Round 4. The recipients of the mailings in Round 4 had previously sent in responses to a mailing sent
out by Wood Class Counsel in 2009. See Thompson Report at p. 2.

1 If a witness is testifying as an expert, his testimony in the form of an opinion is
2 limited to such an opinion as is: . . . (b) Based on matter (including his special
3 knowledge, skill, experience, training, and education) perceived by or
4 personally known to the witness or made known to him at or before the hearing,
5 whether or not admissible, ***that is of a type that reasonably may be relied upon***
6 ***by an expert in forming an opinion upon the subject to which his testimony***
7 ***relates***, unless an expert is precluded by law from using such matter as a basis
8 for his opinion. (Emphasis supplied).

9 California Evidence Code Section 803 provides:

10 The court may, and upon objection shall, exclude testimony in the form of an
11 opinion that is ***based*** in whole or ***in significant part on matter that is not a***
12 ***proper basis for such an opinion***. In such case, the witness may, if there
13 remains a proper basis for his opinion, then state his opinion after excluding
14 from consideration the matter determined to be improper. (Emphasis supplied).

15 The Central District of California's decision in *Gibson* provides a useful summary of generally
16 accepted principles for surveys:

17 In *Pittsburgh Press*, the Third Circuit set forth the following standards for
18 assessing whether a survey of individuals had been conducted in accordance
19 with generally accepted principles: A proper universe must be examined and a
20 ***representative*** sample must be chosen; the persons conducting the survey must
21 be experts; the data must be properly gathered and accurately reported. It is
22 essential that the sample design, the questionnaires and the manner of
23 interviewing meet the standards of objective surveying and statistical techniques.
24 ***Just as important, the survey must be conducted independently of the attorneys***
25 ***involved in the litigation***. *Pittsburgh Press*, 579 F.2d [751,] 758; accord
26 *Lutheran Mut. Life Ins. Co. v. United States*, 816 F.2d 376, 378 (8th Cir.1987).

27 *Gibson v. Cnty. of Riverside*, 181 F.Supp.2d 1057, 1067-68 (C.D. Cal. 2002) (emphasis
28 supplied.)

Again relying on the Third Circuit's decision in *Pittsburgh Press*, the *Gibson* court went on to
describe the rationale for excluding an expert report that has been rendered unreliable by the
attorney's participation in conducting the survey:

The *Pittsburgh Press* court found that the cover letter which informed the
recipients of the questionnaires of the questionnaire's purpose irrevocably
undermined the reliability of the survey's results: ***The respondents, who were***
all Club members and thus interested in the litigation, were told the precise
nature of the litigation and the purpose of the survey. They consequently knew

1 which responses would be helpful to the [Plaintiff Club], and conversely, which
2 would be harmful. *Moreover, it was possible that a recipient of the*
3 *questionnaire would fail to respond because he knew an honest response*
4 *would be harmful to the Club's position. Thus the respondents might have*
5 *contained a higher percentage of those who could answer in a way helpful to*
6 *the Club.*

7 It therefore appears that [Plaintiff Club's] survey suffers from a severe dearth of
8 circumstantial guarantees of trustworthiness.... The respondents were all
9 interested in [Plaintiff Club] prevailing in the lawsuit. Yet they were expressly
10 advised about the nature of the litigation and the survey, as well as which
11 answers would benefit the Club. [*Id.* at 759.]

12 Because of these deficiencies, the Third Circuit held that it was beyond the district
13 court's discretion to consider the survey and that the district court thus erred in
14 considering it as admissible evidence. *See id.* at 759–60.

15 *Gibson v. Cnty. of Riverside*, 181 F. Supp. 2d 1057, 1068-69 (C.D. Cal. 2002)(emphasis supplied).

16 A renowned and well-respected treatise author as well as The Federal Judicial Center's 2011
17 Reference Manual on Scientific Evidence agree that attorneys should have no part in carrying out
18 surveys:

19 The only relevant limitation is that the attorneys do not *conduct* the survey. Once
20 the relevant universe and relevant questions are defined between the attorneys
21 and the survey director, *the attorneys should then step aside and allow the expert*
22 *survey director to carry out independently the survey in accordance with*
23 *accepted survey methodology.*

24 The Federal Judicial Center's 2011 Reference Manual on Scientific Evidence
25 agrees with this treatise that attorney participation in survey design is needed but
26 attorneys should not participate in the actual conduct of the survey:

27 A better interpretation is that the attorney should have no part in carrying out the
28 survey. However, some attorney involvement in the survey design is necessary to
ensure that relevant questions are directed to a relevant population *[T]he*
interviews themselves are not directly visible and any potential bias is
minimized by having interviewers and respondents blind to the purpose and
sponsorship of the survey and by excluding attorneys from any part in
conducting interviews and tabulating results. Reference Manual on Scientific
Evidence, 374 (Federal Judicial Center 3rd ed. 2011).

6 McCarthy on Trademarks and Unfair Competition § 32:166 (4th ed.) (emphasis supplied).

Appellate courts and learned treatises admonish trial courts not to admit expert opinions
that are based on surveys in which attorneys were directly involved in the conduct of the survey.
In this case, it is undisputed that an attorney (Mr. McLachlan) directly participated in the conduct

1 of the survey of Wood Class Members regarding the amount and purpose of their groundwater
2 pumping. Even worse, the participating attorney (Mr. McLachlan) refused to turn over the content
3 of what the survey recipients were shown in written form, i.e., the survey mailings, and did not
4 reveal the content of verbal discussions with the survey participants with respect to the “nature of
5 the litigation” to either the expert witness (Mr. Thompson) or opposing counsel. Survey recipients
6 were likely to know or to be alerted to the fact that reporting high amounts of groundwater pumping
7 could be harmful to their case because of allegations of waste or unreasonable and nonbeneficial
8 uses or possible requirements for metering to monitor their future groundwater pumping.

10 Willis Class Counsel is not aware of **any reported cases** in which survey results and
11 communications with survey participants were withheld based on the assertion of attorney-client
12 privilege. The practical result of the assertion of attorney-client privilege is that the expert witness,
13 opposing counsel, and this Court do not know the content of the survey mailings nor the content of
14 the discussions with survey participants regarding the litigation and purpose of the survey. Previous
15 courts at least were able to analyze the content of the communications between the attorney and the
16 survey participants to determine the level of bias. Either way, surveys conducted by attorneys are
17 **not** “*of a type that reasonably may be relied upon by an expert in forming an opinion upon the*
18 *subject to which his testimony relates*” under Evidence Code Section 801 and, therefore, the
19 Thompson Report should be excluded by this Court pursuant to Evidence Code Section 803.

22 As Mr. Thompson recognized, there are many reasons why survey recipients may or may
23 not want to voluntarily participate in a survey about their groundwater pumping, including their
24 reasons related to their understanding of the case that they learned through the attorney. Thompson
25 depo. at 91:6-92:2. In survey sampling, the bias that results from an unrepresentative sample is
26 called **selection bias**. Some common examples of selection bias are described below.

- 1 ▪ **Undercoverage.** Undercoverage occurs when some members of the population
2 inadequately represented in the sample. A classic example of undercoverage is the *Literary*
3 *Digest* voter survey, which predicted that Alfred Landon would beat Franklin Roosevelt in
4 the 1936 presidential election. The survey sample suffered from undercoverage of low-
5 income voters, who tended to be Democrats. Undercoverage is often a problem with
6 convenience samples.
- 7 ▪ **Voluntary response bias.** Voluntary response bias occurs when sample members are self-
8 selected volunteers, as in voluntary samples. An example would be call-in radio shows that
9 solicit audience participation in surveys on controversial topics (abortion, affirmative
10 action, gun control, etc.). The resulting sample tends to overrepresent individuals who have
11 strong opinions.
- 12 ▪ **Nonresponse bias.** Sometimes, individuals chosen for the sample are unwilling or unable
13 to participate in the survey. This can be a big problem with mail surveys, where the
14 response rate can be very low.

15 Because Mr. Thompson is not a survey expert, he does not have the expertise to account for these
16 various types of selection biases resulting from the scant number of survey participants (86 out of
17 3400). Therefore, the results he obtained from the survey data collected by Mr. McLachlan and his
18 follow-up interviews are not reliable because he could not quantify and account for the various
19 forms of selection biases in those data.

20 Likewise, because Mr. Thompson is not a statistician, he lacks the expertise to reliably
21 extrapolate the widely-divergent, non-Bell curve data from the 86 survey results to the 3400-
22 Member Wood Class. Therefore, the conclusions he reaches regarding groundwater usage by the

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1 entire Wood Class are not reliable under Evidence Code Section 801 and, therefore, should be
2 excluded under Evidence Code Section 803.

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4 Dated: July 31, 2015

Respectfully submitted,

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6 KRAUSE, KALFAYAN, BENINK &
SLAVENS, LLP

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9 _____
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