

1 Ralph B. Kalfayan, SBN133464
David B. Zlotnick, SBN 195607
2 KRAUSE, KALFAYAN, BENINK
& SLAVENS LLP
3 625 Broadway, Suite 635
San Diego, CA 92101
4 Tel: (619) 232-0331
Fax: (619) 232-4019

5 Attorneys for Plaintiff and the Class
6
7
8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF LOS ANGELES**

11 **ANTELOPE VALLEY**
12 **GROUNDWATER CASES**

) JUDICIAL COUNCIL COORDINATION
) PROCEEDING NO. 4408
)

13 This Pleading Relates to Included Action:
14 REBECCA LEE WILLIS, on behalf of
15 herself and all others similarly situated,

) CASE NO. BC 364553
)

16 Plaintiff,

) **PLAINTIFF'S REPLY MEMORANDUM**
) **IN SUPPORT OF APPLICATION FOR**
) **ATTORNEYS' FEES IN RESPONSE TO**
) **THE OPPOSITION FILED BY LOS**
) **ANGELES COUNTY WATERWORKS**
) **DISTRICT NUMBER 40**

17 vs.

18 LOS ANGELES COUNTY WATERWORKS
19 DISTRICT NO. 40; CITY OF LANCASTER;
CITY OF LOS ANGELES; CITY OF
20 PALMDALE; PALMDALE WATER
DISTRICT; LITTLEROCK CREEK
IRRIGATION DISTRICT; PALM RANCH
21 IRRIGATION DISTRICT; QUARTZ HILL
WATER DISTRICT; ANTELOPE VALLEY
22 WATER CO.; ROSAMOND COMMUNITY
SERVICE DISTRICT; MOJAVE PUBLIC
23 UTILITY DISTRICT; and DOES 1 through
1,000;

) Date: March 22, 2011
) Time: 9:00 a.m.
) Dept: 15 (CCW)
) Judge: Hon. Jack Komar
Coordination Trial Judge

24 Defendants.
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES.....ii

I. INTRODUCTION.....1

II. BACKGROUND.....1

III. ARGUMENT.....2

 1. Block billing is commonly used and is not unreasonable.....3

 2. The research performed was reasonable and not extensive.....4

 3. The work was divided appropriately.....6

 4. Mr. Zlotnick’s time was not duplicative.....7

 5. Substantial work was performed between June 26 and August 11, 2008...8

 6. The work on the summary judgment motion was reasonable.....8

 7. Appearance at phase 2 depositions and trial was necessary.....8

 8. Discovery and document review was necessary.....9

 9. Travel time incurred is compensable.....9

 A. Class Counsel’s Billing Rates Are Reasonable as Demonstrated By the Evidence They Have Submitted and Defendants Have Offered No Proof to the Contrary.....10

 i. Plaintiff’s billing rates are reasonable as defined by law and are in accordance with prevailing rates in the community.....10

 ii. Greg James’ request rate is reasonable.....11

 iii. Plaintiff’s work on this matter precluded Counsel from working on other cases.....12

 B. Plaintiff’s Costs should Be Granted because they were Reasonably Necessary...14

TABLE OF AUTHORITIES

CASES

Bowman v. City of Berkeley
(2005) 131 Cal.App.4th 173.....3

Center for Biological Diversity v. County of San Bernadino
(2010) 115 Cal.Rptr.3d 762.....11, 12

Children’s Hosp. & Med. Ctr. v. Bonta
(2002) 97 Cal.App.4th 740.....10

Democratic Party of Washington v. Reed
(2004) 388 F.3d 1281.....9

Fair Housing of Marin v. Combs
(2002)(9th Cir 2002) 285 F3d 899.....4

Graham v. DaimlerChrysler Corp.
(2004) 34 Cal.4th 553.....10

Hensley v. Eckerhart
(1983) 461 US 424.....3

Ketchum v. Moses
(2001)24 Cal.4th 1122.....2, 3, 13

Ladas v. California State Auto. Assn.
(1993) 19 Cal.App.4th 761.....14

MBNA America Bank, N.A. v. Gorman
(2006) 54 Cal.Rptr.3d 724.....10

Meister v. Regents of University of California
(1998) 67 Cal.App.4th 437.....2, 3

Mejia v. City of Los Angeles
(2007) 156 Cal.App.4th 151.....12

Moreno v. City of Sacramento
(2008)(9th Cir. 2008) 534 F3d 1106.....7

Nightingale v. Hyndai Motor Am
(1994) 31 Cal.4th 99.....4

Page v. Something Weird Video
(1996)(C.D.Cal.1996) 960 F.Supp. 1438.....14

1		
2	<i>Peak-Las Positas Partners v. Bollag</i>	
	(2009) 172 Cal.4th 101.....	2
3	<i>PLCM Group, Inc. v. Drexler</i>	
4	(2000) 22 Cal.4th 1084.....	2
5	<i>San Bernardino Valley Audubon Soc., Inc. v. San Bernardino County</i>	
6	(1984) 202 Cal.Rptr. 423.....	11
7	<i>Thayer v. Wells Fargo Bank</i>	
	(2001) 92 Cal.4th 819.....	8
8	<i>U.S. v. City & County of San Francisco</i>	
9	(1990)(ND Cal 1990) 748 F Supp 1416.....	10
10	<i>United Steelworkers v. Retirement Income Plan</i>	
	(2008)(9 th Cir 2008) 512 F.3d 555.....	4

11 **STAUTES**

12		
13	ABA Model Code Prof. Responsibility	
	DR 2-106(B)(8).....	13
14	ABA Model Rules Prof. Conduct	
15	Rule 1.5(a)(8).....	13
16	California Code of Civil Procedure	
	§ 1021.5.....	1
17	§ 1033.5.....	14
18	§ 1033.5(c)(4).....	14
19	Rules Prof. Conduct	
	Rule 4-200(B)(9).....	13

20 **MISCELLANEOUS**

21		
22	Leubsdorf, <i>The Contingency Factor in Attorney Fee Awards</i>	
	(1981) 90 Yale L.J. 473, 480.....	13
23	Posner, <i>Economic Analysis of Law</i>	
24	(4 th ed. 1992) pp. 534, 567.....	13

25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

I. INTRODUCTION

Rebecca Lee Willis (“Plaintiff” or “Willis”) and the Willis class respectfully submit this reply memorandum in support of their application for an award of attorney’s fees and in response to the opposition submitted by Los Angeles County Waterworks District Number 40 (“LACWW”). Class counsel have litigated this case for over four (4) years without compensation, incurred over \$85,000 in costs, and settled on terms favorable to the members of the Willis class. For their effort as the prevailing party, class counsel petitioned the court for an award of fees under CCP section 1021.5. The Public Water Suppliers (“PWS”) opposed.

There can be no question that Willis class is a prevailing party. The PWS initiated this litigation against all landowners in the Antelope Valley and claimed superior rights to groundwater by prescription. They sought almost one third of the native yield by prescription. See Kalfayan declaration¶2. Willis compromised the claim and has agreed not to contest the PWS’ right to pump up to 15% of the native safe yield. In defending this case, class counsel incurred a combined lodestar of \$2.3 million, consisting of 5,985 hours at a blended rate of \$384. The hours and rate are reasonable. The PWS were asked to submit their total hours and rates. They refused. If their lodestar was lower, they certainly would have had every incentive to share it with the court. Lawyers will not easily take on public interest cases if they are not fairly compensated. This case is a classic example where class counsel’s fees should be compensated.

II. BACKGROUND

22 This case was particularly challenging given the number of parties involved, the novel
23 and complex issues it raised, and the strong and uncompromising opposition from the PWS.
24 These points should not be lightly dismissed. Class counsel separately dealt with seven (7)
25 different law firms who represented ten (10) different PWS. These law firms were well funded
26 and had the benefit of coordinating their effort against the Willis class. Not only was the Willis
27

1 class adverse to these governmental entities but other landowners further complicated the work
2 of class counsel. As District 40 correctly points out in its brief regarding equitable
3 apportionment, “considerable time has been spent by all attorneys in this action, **including class**
4 **counsel**, responding to delay tactics and maneuvers undertaken by the landowner pumpers,
5 including appeals and redundant objections and motions.”

6
7 The PWS were tenacious in their prosecution of this case. While the court is well aware
8 of the many motions that were filed, opposed, and argued, there was substantial work that was
9 not directly before the court which merits attention. Class counsel led the landowner group in
10 propounding uniform discovery, meeting and conferring with each PWS, then summarizing the
11 results of the work in order to move to compel. Class counsel also collected documents from all
12 the PWS, coordinated a document protocol, summarized the production, and organized the
13 documents in a usable database. LACWW’s production alone yielded over 23 boxes of
14 documents. The PWS cannot litigate tenaciously and then be heard to complain about the time
15 necessarily spent by class counsel in response. See *Peak-Las Positas Partners v Bollag* (2009)
16 172 CA4th 101, 114.

17 18 **III. ARGUMENT**

19 In determining the amount of reasonable attorney fees to award her, the court begins by
20 calculating the “lodestar” amount. *Ketchum v. Moses*, 24 Cal.4th 1122, 1131; *Meister v. Regents*
21 *of University of California* (1998) 67 Cal.App.4th 437, 448-449 (*Meister*). The “lodestar” is “the
22 number of hours reasonably expended multiplied by the reasonable hourly rate.” *PLCM Group,*
23 *Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095. To determine the reasonable hourly rate, the court
24 looks to the “hourly rate prevailing in the community for similar work.” (*Ibid.*) Using the
25 lodestar as the basis for the attorney fee award “anchors the trial court's analysis to an objective
26 determination of the value of an attorney's services, ensuring that the amount awarded is not
27

1 arbitrary.” (*Ibid.*) The California Supreme Court has further instructed that attorney fee awards
2 “should be fully compensatory.” (*Ketchum*, at 1133) Thus, in the absence of “circumstances
3 rendering an award unjust, an attorney fee award should ordinarily include compensation for *all*
4 of the hours *reasonably spent*, including those relating solely to the fee.” (*Ibid.*)

5 “California courts have long held that trial courts have broad discretion in determining
6 the amount of a reasonable attorney's fee award. This determination is necessarily ad hoc and
7 must be resolved on the particular circumstances of each case.” *Meister*, *supra*, at p. 452. In
8 exercising its discretion, “the trial court is to assess the litigation realistically and determine from
9 a practical perspective whether the statutory criteria have been met.” *Bowman v. City of*
10 *Berkeley*, (2005) 131 Cal.App.4th 173, 177.

11
12 **1. Block billing is commonly used and is not unreasonable**

13 Defendant LACWW complains that class counsel’s use of “block billing” is disfavored
14 and may lead to an unreasonable increase of time billed. The Supreme Court noted however in
15 *Hensley v. Eckerhart* (1983) 461 US 424, that counsel need not account for the exact services
16 performed for every minute claimed. “Plaintiff’s counsel...is not required to record in great
17 detail how each minute of his time was expended.” *Id.* at 437 n12. Here, class counsel’s
18 itemized bills were contemporaneously recorded on the date the tasks were performed. While
19 not every task performed is reflected in the itemized bills, the level of detail that is provided in
20 the itemized bills is sufficient to confirm the reasonableness of the lodestar. The court is well
21 aware of the work performed by class counsel including responding to demurrers, class
22 certification issues, communications with class members, and preliminary and final approval
23 motions.
24

25 The California courts do not require detailed time records, and trial courts have discretion
26 to award fees based on declarations of counsel describing the work they have done and the
27

1 court's own view of the number of hours reasonably spent. Itemized bills are not necessary.
2 Courts recognize that block billing is not automatically suspect or grounds for a fee reduction.
3 *See, e.g., United Steelworkers v Retirement Income Plan* (9th Cir 2008) 512 F.3d 555, 565
4 (rejecting defendant's arguments that fees should have been reduced due to insufficient
5 description and block billing. Attorneys are not "required to record in great detail how each
6 minute of their time was expended.) *Nightingale v Hyundai Motor Am.* (1994) 31 CA4th 99
7 (block billing acceptable when the court can determine that hours claimed were reasonable for
8 tasks performed).
9

10 **2. The research performed was reasonable and not excessive.**

11 Defendant challenges the time spent by Messrs. Watson, Oudom, Gibson, Kalfayan in
12 researching issues related to prescription, groundwater law and inverse condemnation. The work
13 performed by these attorneys was reasonable. The associates were tasked with separate projects
14 to specifically address different arguments raised by the PWS. Their work did not overlap and
15 were directly responsive to issues raised by the defendant PWS. *See, e.g., Fair Housing of Marin*
16 *v Combs* (9th Circuit 2002) 285 F3d 899, 908, (affirming finding that counsel's hours were
17 justified by the quality of the papers and the detailed and fact specific work that was required to
18 prepare them)
19

20 For example, the work performed by Mr. Watson, as described on page 17 of plaintiff's
21 exhibit 3, related to Cal Water's position on demurrer that Willis could not claim an inverse
22 condemnation theory against it as they were not a governmental entity. Willis was required to
23 research and address those arguments unique only to Cal Water. Mr. Watson performed that
24 work exclusively, albeit under the supervision of Mr. Kalfayan. Similarly, the work performed
25 by Mr. Oudom in early 2007 was necessary and not duplicative as it related to cases where
26 percription claims were based on constructive or inquiry notice, a key issue in this case. The
27

1 work performed by Mr. Gibson in early 2007 related to inverse condemnation and a study of
2 other California basin adjudications.

3 Defendant also challenges Mr. Kalfayan's time incurred in 2008. A review of the
4 itemized bills however reveals that this work was not duplicative of the associates' time. His
5 work related to the preparation of the second amended complaint, motion to amend, an update
6 and review of cases researched in 2007, reviewing Mr. Garner's and Mr. Slater's books on CA
7 Water Law, reviewing pleadings, and preparation for hearings. All this work was separate and
8 apart from the research performed by the associates.
9

10 It is noteworthy that Class counsel entered this matter several years after this complex
11 litigation had commenced. Following their entry into the case, in order to best protect the
12 interests of the Class, counsel had to expend considerable time "to quickly get up to speed." For
13 instance, counsel were confronted with legal questions over whether the landowners comprising
14 the class could lose their water rights by prescription or subordination because as non-pumping
15 property owners, they lacked a key "self help" defense to the prescription claims. Moreover,
16 there were issues over whether the public water suppliers would be liable in inverse
17 condemnation for compensation if they were successful in asserting their claims of prescriptive
18 rights. Further, there were questions as to whether the Class members' groundwater rights could
19 be extinguished as part of a physical solution. With regard to the question of notice to the Class
20 members of overdraft in the basin (and for other critical reasons), Class counsel had to conduct
21 discovery to learn how much groundwater had been and was being pumped and when it was
22 pumped. In addition to addressing these legal issues, ongoing settlement negotiations and
23 mediation required Class counsel to become familiar with the bewildering array of issues of the
24 overall litigation so that they could meaningfully assess the merits of potential settlements to the
25 Class. In short, the complexities of this matter demanded substantial efforts.
26
27

1 Defendant cites many entries in support of the argument that more work should have
2 been delegated by Mr. Kalfayan. Those entries however do not support their proposition. For
3 example, on July 11, 2008, work was done related to preparation of discovery directed to all
4 PWS, preparation for hearing on CMC, and statute of limitations research. On July 14, 2008,
5 work was done related to the review of discovery received from the parties. These tasks should
6 not have been performed by associates or paralegals. When appropriate, associates and
7 paralegals did perform tasks such as reviewing documents, handling document protocols,
8 organizing documents in database, and screening hundreds of calls from class member
9

10 **4. Mr. Zlotnick's time was not duplicative**

11 Mr. Zlotnick has many years of experience in handling complex litigation. His work was
12 productive, economical and not duplicative. Some of his work included drafting briefs, the class
13 certification motion, class notice, preliminary approvals, and responding to communications
14 from class members. Messrs. Zlotnick and Kalfayan were careful not to duplicate work.
15 Generally, only one lawyer appeared at hearings unless numerous or complex matters were at
16 issues. In such instances, the second lawyer was never a mere observer. His presence was
17 necessary to aid co-counsel in arguing against an opposition that included several lawyers from
18 the PWS, or aiding counsel in finding citations to the record, or in responding to questions
19 related to class issues after the hearing. If the PWS consider this work duplicative, it was
20 necessary duplication. See *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1111-
21 1112 (“the number of hours to be compensated is calculated by considering whether, in light of
22 the circumstances, the time could reasonably have been billed to a private client... By and large,
23 the court should defer to the winning lawyer’s professional judgment as to how much time he
24 was required to spend on the case; **after all, he won, and might not have, had he been more of**
25 **a slacker.**”) (emphasis added).
26
27

1 should not be compensated as it did not provide any benefit to the class. Class counsel's
2 attendance at these depositions and trial was necessary and important. The work allowed Mr.
3 Kalfayan to examine some of the critical technical issues in the case, which counsel legitimately
4 believed he would need to understand prior to the phase 3 trial. In addition, attendance was
5 important because if the court determined that the Antelope Valley contained more than one
6 basin, the class case would have been impacted. (See also *Democratic Party of Washington v*
7 *Reed*, 388 F.3d 1281, "...a lawyer who has worked on the case and will be working on it
8 subsequently may need to observe argument to judge how to proceed later.")
9

10 **8. Discovery and document review was necessary**

11 Over the years Willis class counsel submitted several proposals to the PWS for the
12 settlement of the case. Each proposal was met with either rejection or silence. In discovery, class
13 counsel sought all the documents in support of the claim of prescription. Again, the PWS
14 delayed or objected. Class counsel was forced to review boxes of documents because the PWS
15 refused to answer interrogatories or direct class counsel to the appropriate information. Without
16 pursuing the discovery or conducting its due diligence under the settlement, class counsel would
17 have violated its fiduciary duties to the class.
18

19 **9. Travel time incurred is compensable**

20 Class counsel reside in San Diego and the case is venued in Los Angeles. It is unfortunate
21 that a significant amount of travel time was incurred by class counsel in defending this case.
22 But, as the court will recall, the parties searched for local counsel but were unsuccessful. It was
23 difficult to find lawyers willing to litigate a complex groundwater adjudication, against large and
24 well funded public entities, over a period that could well take well over 10 years. This case
25 required more than a water lawyer as it also involved complex class action issues. Reasonable
26 travel time by the attorneys during the course of the litigation is compensable at full rates, if that
27

1 is the practice in the community. *See, e.g. U.S. v City & County of San Francisco* (ND Cal 1990)
2 748 F Supp 1416.

3
4 **A. Class Counsel’s Billing Rates Are Reasonable as Demonstrated By the Evidence**
5 **They Have Submitted and Defendants Have Offered No Proof to the Contrary.**

6 Class counsel’s rates are reasonable. They are in accord with prevailing rates in the
7 community for complex litigation, track Best Best and Krieger’s rates, and are below national
8 rates as defined by the Laffey Matrix. See Kalfayan Declaration. In addition, Defendants have
9 provided no evidence to support a reduction in Plaintiff’s reasonable and legitimate billing rates.

10 Plaintiffs generally do not contest that courts must “evaluate the reasonable hourly rate
11 for each attorney and other billing professional[s] nor that a reasonable rate should be determined
12 by “looking at the reasonable market value of the services rendered” and “whether the requested
13 rate is within the range of reasonable rates charged by comparable attorneys performing
14 comparable work.” Dkt. 4326 citing *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553,
15 579; and *Children’s Hosp. & Med. Ctr. v. Bonta* (2002) 97 Cal.App.4th 740, 783. Plaintiff’s rate
16 is reasonable when evaluated under these criteria.

17 **i. Plaintiff’s Billing Rates are Reasonable as defined by law and are in**
18 **accordance with prevailing rates in the community.**

19 Reasonable market rates of attorney’s services are based on prevailing rates in the
20 community where the services are rendered. *MBNA America Bank, N.A. v. Gorman* (2006) 54
21 Cal.Rptr.3d 724. Here, Plaintiff’s rate tracks neatly with prevailing rates in the community. The
22 National Law Journal’s (“NLJ”) survey of billing rates of the largest U.S. law firms provides the
23 high and low rates for partners and associates as each firm reports their own rates. As a result, it
24 is known that Best Best and Krieger’s partners bill a maximum rate of \$550 per hour to a
25 minimum rate of \$310 per hour in the relevant geographic community. In addition, the Laffey
26 Matrix which provides hourly rates for attorneys of varying experience levels and is prepared by
27 the Civil Division for the United States Attorney’s Office for the District of Columbia has

1 established the current hourly rate for attorneys practicing over 20 years at \$709 per hour.
2 Plaintiff's rate of \$400 and \$450 per hour fall squarely between Best Best and Krieger's rates
3 and well below rates determined under the Laffey Matrix.

4 Defendant's argument that Plaintiffs' counsel are inexperienced in water litigation misses
5 the mark and is an improper attempt to divert attention from Plaintiff's successful ability to
6 navigate this complex class action litigation, a field in which Counsel is greatly experienced, and
7 successfully preserve the rights of the Class. Attorney Jeffrey Dunn's own biography on his firm
8 website describes this case as "the largest groundwater rights adjudication in California." Such
9 complex litigation certainly necessitates the expertise of Plaintiff's counsel's experience in
10 litigating complex class action cases.

11 Plaintiff's counsel bore the risk of not being paid and provided legal services. Counsel
12 zealously represented their clients against competent counsel and ultimately preserved their
13 client's rights. While any particular motion or issue, from any case, can be evaluated in
14 retrospect, it would be improper to use the clarity of perfect hindsight to reduce fees from the
15 totality of competent and reasonable representation that collectively resulted in Plaintiff's
16 success. Stated differently, but for Plaintiff's counsel's representation, Plaintiff's rights would
17 have gone unprotected. In light of these prevailing rates in the community and the benefit
18 Plaintiffs conferred on their client – preservation of their water rights –the billing rates are
19 reasonable and the motion should be granted.

20
21 **ii. Greg James' Request Rate is Reasonable.**

22 The reasonable market value of an attorney's services is not necessarily measured
23 by his billing rate, but rather by the reasonable market value of the attorney's services. *Center*
24 *for Biological Diversity v. County of San Bernardino* (2010) 115 Cal.Rptr.3d 762; see also *San*
25 *Bernardino Valley Audubon Soc., Inc., v. San Bernardino County* (1984) 202 Cal.Rptr. 423
26 Finally, courts have found that contracts which capped hourly rates do not necessarily rebut
27 evidence on home market rates and standing alone do not justify a reduction in rates when setting

1 a lodestar amount. *Center for Biological Diversity*, supra.

2 Mr. James' requested fee rate is reasonable because of the reasonable market value of
3 attorney's services in this jurisdiction. Furthermore, even if his usual hourly rate is lower in other
4 cases, undercharging elsewhere does not require him to undercharge in the present case. Most
5 notably, while Mr. James' **non**-contingent hourly fees have ranged from \$150 per hour to \$225
6 per hour, Mr. James has been awarded an hourly rate of \$435 against a government entity as
7 recently as 2008 in a contingent fee case seeking award of fees under CCCP section 1021.5. *See*,
8 Supplemental Declaration of Gregory L. James, at paras. 12 & 13. Finally, even if Best Best
9 and Krieger have contracted with Public Water Suppliers for reduced billing rates, their usual
10 billing rate indicates that Mr. James' billing rate conforms to the prevailing market rate in the
11 community. Mr. James' request for an hourly rate of \$400 is well below his previously awarded
12 rate of \$435 and falls within Best Best and Krieger's rates. *Id.* For these reasons, Mr. James'
13 request is reasonable.

14
15 **iii. Plaintiff's Work on This Matter Precluded Counsel from Working on other cases.**

16 Fees granted under the private attorney general theory are intended to ensure that
17 those who have acted to protect public interests will not be forced to shoulder the cost of
18 litigation. *Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 161. In addition, "after
19 making the lodestar calculation, the court may augment" fees based on "the extent to which the
20 case precluded the attorneys from accepting other work." *Center for Biological Diversity*, supra,
21 at 616. Here, Plaintiff's counsel ensured that the Willis' Class—comprised of thousands of
22 individuals—had their property rights protected. The efforts required by this case, including the
23 travel time involved, made counsel unable to accept other work. Defendants argue that Plaintiff
24 should have found more proximately located counsel. But Plaintiff's counsel was not located
25 many hours away or even out of state. If followed, Defendant's argument would force Plaintiffs
26 to seek the least expensive counsel when seeking representation. Such a requirement would
27 clearly be inequitable and have a chilling effect on the desire of competent counsel to

1 represent any client not located in their absolute closest proximity. For the above reasons,
2 Plaintiffs respectfully submit that counsel's fees are reasonable and fall within the prevailing
3 market rate of the community.

4 The Court should enhance the lodestar for the reasons that the Supreme court
5 articulate in *Ketchum, supra*:

6 "...the lodestar is the basic fee for comparable legal services in the community; it
7 may be adjusted by the court based on factors including, as relevant herein, (1) the
8 novelty and difficulty of the questions involved, (2) the skill displayed in presenting
9 them, (3) the extent to which the nature of the litigation precluded other employment by
10 the attorneys, (4) the contingent nature of the fee award. The purpose of such adjustment
11 is to fix a fee at the fair market value for the particular action. In effect, the court
12 determines, retrospectively, whether the litigation involved a contingent risk or required
13 extraordinary legal skill justifying augmentation of the unadorned lodestar in order to
14 approximate the fair market rate for such services. The " 'experienced trial judge is the
15 best judge of the value of professional services rendered in his court, and while his
16 judgment is of course subject to review, it will not be disturbed unless the appellate court
17 is convinced that it is clearly wrong.' " (*Ibid.*)

18 "A contingent fee must be higher than a fee for the same legal services paid as
19 they are performed. The contingent fee compensates the lawyer not only for the legal
20 services he renders but for the loan of those services. The implicit interest rate on such a
21 loan is higher because the risk of default (the loss of the case, which cancels the debt of
22 the client to the lawyer) is much higher than that of conventional loans." (Posner,
23 *Economic Analysis of Law* (4th ed. 1992) pp. 534, 567.) "A lawyer who both bears the
24 risk of not being paid and provides legal services is not receiving the fair market value of
25 his work if he is paid only for the second of these functions. If he is paid no more,
26 competent counsel will be reluctant to accept fee award cases." (Leubsdorf, *The*
27 *Contingency Factor in Attorney Fee Awards* (1981) 90 Yale L.J. 473, 480; see also Rules
28 Prof. Conduct, rule 4-200(B)(9) [recognizing the contingent nature of attorney
representation as an appropriate component in considering whether a fee is reasonable];
ABA Model Code Prof. Responsibility, DR 2-106(B)(8) [same]; ABA Model Rules Prof.
Conduct, rule 1.5(a)(8). (*Ibid*)

Here several reasons favor a fee enhancement. First, the contingent nature of the case
cannot be disputed. Second, this case involved novel and complex issues. Third, class counsel
was precluded from engaging in other work as testified by Mr. Kalfayan in his declaration.
Fourth, class counsel will be required to continue to monitor future events in this case as they
unfold. Fifth, class counsel have suffered delay in payment for years and may have to endure
further delays in payment of their fees. For all these reasons, including those outlined in the

1 accompanying reply briefs, the court should enhance class counsel's fee award.

2 **B. Plaintiff's Costs should Be Granted because they were Reasonably Necessary**

3 Recovery of any cost not detailed in California Civil Code § 1033.5 may be allowed at
4 the Court's discretion. *Page v. Something Weird Video*, (C.D.Cal. 1996) 960 F.Supp. 1438, 1447
5 citing C.C.P. § 1033.5. California Code 1033.5 specifically enumerates costs that are allowable
6 and costs that are not allowable; other costs do not fall under its statutory scheme and are at the
7 discretion of the trial court. C.C.P. 1033.5(c)(4). Courts have held that local travel costs such as
8 "parking fees, cab fares and "mileage/parking" fees for attorneys" are not recoverable. *Ladas v.*
9 *California State Auto. Assn.*, (1993) 19 Cal.App.4th 761, 776. However, where travel expenses
10 were incurred and were reasonably necessary to conduct litigation, costs are recoverable. *Page*,
11 *supra*. In *Page*, the court reimbursed air travel required for the New York attorney to attend two
12 hearings in California and granted reimbursement of such costs but stopped short of reimbursing
13 for the difference in price for a first class ticket. *Id.*

14 Plaintiffs request for travel costs do not fall under any statutorily prohibited section of
15 1033.5. Thus the court has discretion to grant those costs. Plaintiff's counsel was required to
16 attend hearings, trials, and other meetings relating to discovery in furtherance of the case and in
17 order to zealously advocate for and succeed in protecting the Class' rights. Thus, counsel's costs
18 were reasonably necessary to the conduct of the litigation rather than merely convenient or
19 beneficial. Similarly, Rebecca Willis was integral part of this case and deserves a modest
20 incentive award. For these reasons, Plaintiff's Counsel's motion for costs should be granted.

21 Dated: March 15, 2011

KRAUSE KALFAYAN BENINK
& SLAVENS LLP

22
23
24 /s/Ralph B. Kalfayan
Ralph B. Kalfayan, Esq.
David B. Zlotnick, Esq.
Attorneys for Plaintiff and the Class
25
26
27