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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Coordination Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER
CASES

RICHARD A. WOOD, an individual, on
behalf of himself and all others similarly
situated,

Plaintiff,

v.

LOS ANGELES COUNTY
WATERWORKS DISTRICT NO. 40; et al.

Defendants.

Judicial Council Coordination
Proceeding No. 4408

(Santa Clara Case No. 1-05-CV-049053,
Honorable Jack Komar)

Case No.: BC 391869

PLAINTIFF'S *EX PARTE*
APPLICATION FOR ORDER
STAYING CLASS NOTICE

[relying on previously filed
Declarations of Michael D. McLachlan
and Richard Wood]

Date: May 20, 2009
Time: 10:00 a.m.
Dept.: 17C (telephonic)

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Richard Wood requests that this Court issue an order staying notice to the
4 putative Small Pumper Class (the “Class”) pending resolution of serious defects in the list
5 of proposed class members that render class formation untenable, and adverse to the
6 interests of the Class. That notice is currently ordered to issue by May 25, 2009.

7 The problem facing the class is the fact that the class list – the ‘inside the water
8 service areas’ portion – contains thousands of parcels that are not small pumpers, e.g.
9 mutual water company shareholders and public water supplier customers. There is no
10 dispute on this.

11 To solve this problem, counsel for the class and lead counsel for the public water
12 suppliers, entered into a stipulation, filed on May 5, 2009, which made the parcels on the
13 ‘inside the water service areas’ list subject to an opt-in class notice. (Stipulation and
14 Order, ¶ 2.) The reasoning behind this was that counsel believe there are actually likely
15 to be only a few hundred actual class members inside the service areas, so the loss of
16 class members through the opt-in notice would be relatively small, particularly in light of
17 the more than 5,000 non-class members that would be eliminated.

18 The Court signed this order on May 6, 2009. Unfortunately, further legal research
19 indicates that California law no longer permits an opt-in class, even in unusual
20 circumstances such as those in this case. (*Hypertouch, Inc. v. Superior Court* (2005) 128
21 Cal.App.4th 1527, 1543-1550.)

22
23 Plaintiff requests that the May 25, 2009 class mailing date be suspended pending
24 further work to narrow the ‘inside the water service areas’ list to an appropriate level.
25 Class counsel proposes the following steps:

- 1 1. Shareholder lists be obtained from all of the mutual water companies that are
- 2 party to this proceeding, and those shareholders be eliminated from the Small
- 3 Pumper Class list;¹
- 4 2. The public water suppliers check the remaining ‘inside the service area’
- 5 parcels against their records to eliminate their customers;
- 6 3. If the first two steps are unable to remove the non-class parcels with a high
- 7 degree of reliability: (A) a letter will be sent to the remaining ‘inside the water
- 8 service areas’ parcels inquiring about their pumping; or (B) a door to door
- 9 survey will occur to eliminate erroneous parcels from the list.
- 10 4. After this process is completed, the Small Pumper class notice will issue to all
- 11 putative class members, on an opt-out basis only.

12 **II. THE PROBLEM**

13 **A. The Class Lists are Seriously Defective**

14 Last week, counsel for the class was informed by counsel for the public water
15 suppliers (specifically Los Angeles County Waterworks District 40 and Rosamond
16 Community Services District), that the number of proposed members of the Class has
17 jumped from 7,500 to approximately 15,000. (Declaration of Michael McLachlan, filed
18 May 4, 2009 (“McLachlan Decl.”) ¶ 9.) Plaintiff knows of no one who believes there is
19 anywhere near 15,000 small pumper wells in the area of adjudication, and such a number
20 is inconsistent with the analyses done by the various experts in the case. A cursory
21 review of the proposed class lists shows that there are substantial numbers of parcels that
22 do not belong in the Class. Counsel for the Class conducted an informed survey of some

23
24
25 ¹ Plaintiff will likely have most of the mutual water company shareholder lists by the time
26 of the hearing on this application (those represented by Covington & Crowe). Michael
27 Fife is apparently unable to supply the list of White Fence Farms No. 3, and counsel is
28 waiting to hear back from Lemieux & Lemieux on their shareholder list.

1 of the newly-added parcels, confirming the fact that the current lists are defective.
2 (McLachlan Decl. ¶¶ 11-13.)

3 Plaintiff believes there are likely at least 5,000 parcels on the current class lists
4 that fall outside the definition of the Class. Many of these properties appear to be
5 metered parcels connected solely to public water supplies, mutual water companies and
6 their shareholders, governmental agencies, large farmers, among others.² (McLachlan
7 Decl. ¶¶ 11-13.)

8 This is an “opt-out” class, meaning that anyone who does not respond to the class
9 notice is deemed to be a class member. The response rates in class actions are always
10 less than half, and often much lower as was the case with the Willis class, which had a
11 response rate of 25%. With regard to proposed Class noticees who do not pump
12 groundwater, we can expect a much lower response rate because they will read the notice
13 and discard it as erroneous, since they know they do not pump groundwater.
14 Consequently, if notices are sent out to thousands of parcels that do not pump, we will
15 end up with a Class filled with non-pumpers.

16 **B. Harm to the Class and Other Overlying Users**

17 The issuance of notice to this existing group of noticees would be prejudicial to
18 the Class, and/or the other overlying landowners. It is likely that any settlement or
19 judgment in this case would entail the allocation of some di minimis pumping exemption,
20 or free production allowance, to this group of largely single-family residential pumpers.
21 In this scenario, the case cannot be settled, or fairly adjudicated, using a fixed free-
22 pumping allowance without doing harm to the rights of either the small pumpers, or the
23 rights of the other overlying landowners. In other words, in a 15,000 member class that
24 consists of 7,500 actual small pumpers, and another 7,500 parcels that do not fit the class
25 definition, the allocation of water to those class members actually pumping must
26
27
28

1 necessarily be reduced, lest the share available to other overlying uses be unfairly and
2 unnecessarily reduced to compensate for the allocation of water to parcels without wells,
3 mutual water company shareholders, and parcels only receiving municipal water service.

4 Moreover, if the basin is indeed in overdraft, it is a waste of this resource to
5 allocate water to parcels that do not need it or are not entitled to it. While the law allows
6 for some tolerance in formation of a class – in this case likely a few hundred errant
7 members – it is not legally viable to form a class in which likely 30-50% of its members
8 do not meet the class definition.

9 Unfortunately, California law no longer permits an opt-in class, even apparently in
10 unusual circumstances such as those in this case. (*Hypertouch, Inc. v. Superior Court*
11 (2005) 128 Cal.App.4th 1527, 1543-1550.)
12

13 **III. A SOLUTION**

14 While it is speculation, the confirmed presence of several foreclosed properties on
15 the current list might suggest that the public water supplier lists used to locate potential
16 class members inside the service areas (*See generally* McLachlan Decl. ¶3), may not have
17 been lists of metered parcels but rather lists of active customers. If this is indeed correct,
18 properties that are solely on public water supply would have ended up on the list if they
19 were vacant and the water service was shut off. Given the number of foreclosures in the
20 Antelope Valley, this could account for thousands of properties. The first step would be
21 to eliminate these parcels by checking water supplier records for metered parcels.

22 Simultaneously, customer lists should be obtained from the mutual water
23 companies, and those names should be excluded, along with public agencies such as the
24 City of Los Angeles and AVEK.

25 Remaining parcels inside, and potentially some outside, the public water service
26

27 2 The Class definition excludes governmental entities, the defendants, and any person or entity
28 that is a shareholder in a mutual water company. (Order Certifying Small Pumpers Class Action,

1 areas may need to be physically surveyed to confirm their membership in the Class. This
2 can be done inexpensively with semi-skilled contract labor working in conjunction with
3 counsel for the water suppliers and the Class, and their experts. Counsel for the Class
4 will endeavor to meet and confer with counsel for the water suppliers and their
5 consultants in an effort to develop a mutually agreeable strategy. Alternatively, a mailing
6 may be used to expedite this process.

7 If such a strategy cannot be worked out, the Class should be decertified. The
8 interests of the small pumper are better served outside this adjudication or individually
9 represented, rather than inside a mal-formed class.

10
11 DATED: May 18, 2009

LAW OFFICES OF MICHAEL D. McLACHLAN
LAW OFFICE OF DANIEL M. O'LEARY

12
13
14 By: _____ //s//
15 Michael D. McLachlan
16 Attorneys for Plaintiff
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28 September 2, 2008).

1 **PROOF OF SERVICE**

2 I am employed in the County of Los Angeles, State of California. I am over the age of 18
3 and am not a party to the within action. My business address is 523 West Sixth Street, Suite 215,
4 Los Angeles, California 90014.

5 On May 18, 2009, I caused the foregoing document(s) described as **PLAINTIFF'S EX**
6 **PARTE APPLICATION FOR ORDER STAYING CLASS NOTICE**
7 to be served on the parties in this action, as follows:

- 8 (X) (BY ELECTRONIC SERVICE) by posting the document(s) listed above to the Santa
9 Clara County Superior Court website: www.scefiling.org regarding the Antelope Valley
10 Groundwater matter.
11 () (BY U.S. MAIL) I am readily familiar with the firm's practice of collection and
12 processing of documents for mailing. Under that practice, the above-referenced
13 document(s) were placed in sealed envelope(s) addressed to the parties as noted above,
14 with postage thereon fully prepaid and deposited such envelope(s) with the United States
15 Postal Service on the same date at Los Angeles, California, addressed to:
16 () (BY FEDERAL EXPRESS) I served a true and correct copy by Federal Express or other
17 overnight delivery service, for delivery on the next business day. Each copy was
18 enclosed in an envelope or package designed by the express service carrier; deposited in a
19 facility regularly maintained by the express service carrier or delivered to a courier or
20 driver authorized to receive documents on its behalf; with delivery fees paid or provided
21 for; addressed as shown on the accompanying service list.
22 () (BY FACSIMILE TRANSMISSION) I am readily familiar with the firm's practice of
23 facsimile transmission of documents. It is transmitted to the recipient on the same day in
24 the ordinary course of business.
25 (X) (STATE) I declare under penalty of perjury under the laws of the State of California that
26 the above is true and correct.
27 () (FEDERAL) I declare under penalty of perjury under the laws of the United States of
28 America that the foregoing is true and correct.

//s//
Michael McLachlan