Exhibit 1

IN THE

Court of Appeal of the State of California

IN AND FOR THE

Fifth Appellate District

Coordination Proceeding
Special Title (Rule 3.3550(c))
ANTELOPE VALLEY GROUNDWATER CASES*

RICHARD A. WOOD et al.,
Plaintiffs and Appellants,
v.
LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40,
Defendant and Appellant.

F083138

TO THE SUPERIOR COURT:

*** * * REMITTITUR * * ***

This remittitur is issued in the above entitled cause. Also enclosed is a file-stamped copy of the opinion/order.

Counsel for the Wood Class shall recover their costs on appeal.

Date: December 6, 2021

BRIAN COTTA, Clerk/Executive Officer

By: Melissa J Lopez
Deputy Clerk

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

Coordination Proceeding Special Title (Rule 3.3550(c)) ANTELOPE VALLEY GROUNDWATER CASES*	F083138
RICHARD A. WOOD et al., Plaintiffs and Appellants, v. LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40, Defendant and Appellant.	(JCCP No. 4408) **OPINION**

APPEALS from a judgment of the Superior Court of Los Angeles County. Jack Komar, Judge.†

McLachlan Law, Michael McLachlan; Law Office of Daniel M. O'Leary, and Daniel M. O'Leary; for Plaintiffs and Appellants.

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*_Los Angeles County Waterworks District No. 40 v. Diamond Farming Co._ (Super. Ct. Los Angeles County, No. BC325201); _Los Angeles County Waterworks District No. 40 v. Diamond Farming Co._ (Super. Ct. Kern County, No. S-1500-CV254348); _Wm. Bolthouse Farms, Inc. v. City of Lancaster_ (Super. Ct. Riverside County, No. RIC353840); _Diamond Farming Co. v. City of Lancaster_ (Super. Ct. Riverside County, No. RIC344436); _Diamond Farming Co. v. Palmdale Water Dist._ (Super. Ct. Riverside County, No. RIC344668); _Willis v. Los Angeles County Waterworks District No. 40_ (Super. Ct. Los Angeles County, No. BC364553); _Wood v. Los Angeles County Waterworks District No. 40_ (Super. Ct. Los Angeles County, No. BC391869).

†Retired Judge of the Santa Clara Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Mary Wickham, County Counsel, Warren R. Wellen, Deputy County Counsel; Best Best & Krieger, Eric L. Garner, Jeffrey V. Dunn, and Wendy Y. Wang for Defendant and Appellant.

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In this appeal, two parties challenge a series of postjudgment orders in the coordination proceeding known as the Antelope Valley Groundwater Cases (AVGC). Counsel for Richard A. Wood, an individual, on behalf of himself and all others similarly situated (Wood or the Wood Class), were awarded over $2.5 million in attorney fees, paralegal fees, and litigation costs. Liability for most of the award was allocated to Los Angeles County Waterworks District No. 40 (District 40).

The award was significantly lower than the amount requested. The Wood Class sought compensation for approximately 4,800 hours of attorney time at a rate of $720 per hour, and they requested an enhancement multiplier of 2.5. The trial court approved the time spent, but at an hourly rate of $500 and no enhancement. It also taxed over $24,000 in costs.

Wood claims the trial court erred by taxing costs and awarding inadequate fees. District 40 argues Wood was not entitled to *any* fees or costs. The parties also dispute conflicting rulings regarding District 40's claimed right under the Government Code to satisfy the award in partial payments over a 10-year period.

We conclude the Wood Class was entitled to recover fees and costs. However, Wood has demonstrated errors in the trial court's fee analysis. The trial court relied on inapplicable criteria, and it is unclear how the hourly rate was determined. Therefore, the matter will be remanded for further consideration of the amount of attorney fees to be awarded.

Wood's arguments regarding the taxing of costs are unpersuasive, but the ruling is contradictory in terms of the amounts taxed and awarded. Those discrepancies may be addressed on remand. Lastly, the record shows District 40 did not establish a statutory

right to pay the award in annual installments. We affirm in part, reverse in part, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Overview

The AVGC concern the existence and priority of water rights in the Antelope Valley Groundwater Basin (the basin or aquifer). The basin spans more than 1,000 square miles across arid regions of southeastern Kern County and northeastern Los Angeles County. A large portion of the overlying land is owned by the federal government, but there are thousands of citizens and entities who also own real property in the area.

District 40 is a public agency governed by the Los Angeles County Board of Supervisors. It operates and maintains a public waterworks system, supplying water to over 200,000 people through approximately 56,500 metered connections. District 40 obtains the water it supplies by pumping it from the aquifer and purchasing imported State Water Project water.

The Wood Class comprises over 4,000 landowners who obtain groundwater directly from the aquifer. Historically, the class members' individualized pumping did not exceed 25 acre-feet per year (afy). Due to the relatively small amounts of production, this group is also known as the "Small Pumper Class."

Early Litigation (1999–2006)

The earliest lawsuits concerning rights to the subject groundwater were filed in 1999 and 2000. In late 2002, a trial commenced to determine the jurisdictional boundaries of the area involved in the litigation. Those proceedings were ultimately abandoned, and the parties attempted mediation. The mediator concluded it was necessary to determine the groundwater rights of all interested parties, including parties not yet involved in the lawsuits.

In 2004, District 40 filed an action seeking (1) a comprehensive determination of the rights of thousands of individuals, companies, public water suppliers, and public agencies to extract water from the basin and (2) a physical solution[1] to alleviate alleged overdraft conditions and protect the basin's groundwater supply. District 40 alleged it possessed appropriative and prescriptively acquired groundwater rights superior to those of other water suppliers and landowners in the region.

In 2005, the Judicial Council coordinated the various actions, which collectively became known as the AVGC. The Los Angeles Superior Court was chosen as the venue. However, the matter was assigned to a judge from the Santa Clara Superior Court.

In 2006, District 40 and eight other water suppliers (collectively, the Public Water Suppliers or PWS) filed a cross-complaint for declaratory and injunctive relief.[2] Later that year, the trial court issued an order declaring the jurisdictional boundaries of the aquifer, i.e., the Antelope Valley Adjudication Area (AVAA). This completed the first of six phases of trial proceedings (Phases 1–6) and made it possible to determine the necessary parties for a comprehensive adjudication.

Class Action Proceedings (2007-2008)

The PWS's cross-complaint alleged the United States was an essential party to the action. To obtain jurisdiction over the United States, it was necessary to litigate "the

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[1]"The phrase 'physical solution' is used in water rights cases to describe an agreed-upon or judicially imposed resolution of conflicting claims in a manner that advances the constitutional rule of reasonable and beneficial use of the state's water supply." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287.) In cases like this one, the term means "'an equitable remedy designed to alleviate overdrafts and the consequential depletion of water resources in a particular area, consistent with the constitutional mandate to prevent waste and unreasonable water use and to maximize the beneficial use of this state's limited resource.'" (*Id.* at p. 288, quoting *California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 480.)

[2]In addition to District 40, the self-described Public Water Suppliers consisted of California Water Service Company, City of Lancaster, City of Palmdale, Littlerock Creek Irrigation District, Palm Ranch Irrigation District, Palmdale Water District, Quartz Hill Water District, and Rosamond Community Services District.

undetermined claims of all parties with an interest in the relevant water source." (*U.S. v. State of Or.* (9th Cir. 1994) 44 F.3d 758, 769; see generally *id.* at pp. 763-770 [discussing the "McCarran Amendment," i.e., 43 U.S.C. § 666].) To achieve this result, the trial court proposed the use of class action procedures.

In early 2007, Rebecca Lee Willis filed a putative class action complaint on behalf of herself and other private landowners in the AVAA (Willis or the Willis Class). The action was filed against the Public Water Suppliers and other defendants. Shortly thereafter, the PWS amended their cross-complaint to plead class action claims against all "owners of, and/or … beneficial interest holders in real property within the [AVAA]."

Disagreements arose over whether the private landowners identified in the Willis complaint could be represented as a single class. There were concerns about conflicts of interest between landowners who had never extracted groundwater from the basin (the so-called "dormant" or "nonpumping landowners") and those who operated "groundwater wells on relatively small-sized properties." The PWS tried unsuccessfully to find individuals willing to serve as class representative or legal counsel for the "small pumper group."

In mid-2007, Willis's complaint was amended. The proposed class was redefined as "private landowners in the Antelope Valley who are not presently pumping water on their properties." In September 2007, the trial court certified the Willis Class based on a further modified definition: "All private [owners of land in the AVAA] that are not presently pumping water on their property and did not do so at any time during the five years preceding January 18, 2006."

Meanwhile, the search continued for representation of the small pumper group. A sole practitioner from Los Angeles, Michael McLachlan, was approached about taking on the case and declined. McLachlan later assisted the Willis attorneys in their effort to find class counsel for the small pumper group, but to no avail.

In 2008, at the continued urging of people involved in the AVGC (primarily David Zlotnick, then cocounsel for Willis), McLachlan agreed to represent the group eventually certified as the Wood Class. McLachlan recruited another sole practitioner, Daniel O'Leary, to serve as cocounsel. The Wood Class filed a class action complaint against the PWS, two other entities that were apparently later dismissed, and numerous Doe defendants. Three of the fictitiously named parties were later identified as Desert Lake Community Services District, North Edwards Water District, and Phelan Piñon Hills Community Services District.

Phase 2 and Consolidation (2008-2010)

In late 2008, Phase 2 commenced to establish the hydrologic nature of the aquifer within the boundaries of the AVAA. The issue was whether there were any distinct groundwater subbasins that did not have hydrologic connection to other parts of the aquifer. The trial court found all areas of the AVAA were sufficiently hydrologically connected to constitute a single aquifer for purposes of the coordinated proceedings.

In 2009, the PWS moved to transfer and consolidate all pending AVGC actions and cross actions. The motion was granted in early 2010. The consolidation order authorized the parties to settle "any or all claims between or among them[selves] as long as any such settlement expressly provide[d] for the Court to retain jurisdiction over the settling parties for purposes of entering a judgment resolving all claims to the rights to withdraw groundwater from the [basin] as well as the creation of a physical solution if [necessary]."

Subsequent Phases and Proceedings (2011-2015)

Phases 3 & 4

In 2011, Phase 3 was conducted to determine the condition of the aquifer and its safe yield.[3] The trial court found the basin was in a state of overdraft due to decades of unregulated pumping. The total safe yield was determined to be 110,000 afy.

Phase 4, conducted in 2013, focused on the levels of groundwater production during 2011 and 2012. The trial court found the collective pumping by dozens of parties had exceeded 120,000 afy in both years of the sample period, and those figures did not include pumping by the Wood Class. In short, ongoing production was exceeding the total safe yield.

First Wood Class Settlement (the "2013 Settlement")

In late 2013, the Wood Class reached a settlement with the City of Lancaster, Palmdale Water District, Phelan Piñon Hills Community Services District, and Rosamond Community Services District. Three of the settling parties agreed to pay a portion of the Wood Class's fees and costs. The payment included $701,965 in attorney fees at a stipulated hourly rate of $550, which translated to 1,276.3 hours of attorney time—roughly one-third of the total hours McLachlan and O'Leary had spent on the case through the end of 2013. The trial court approved the settlement in January 2014.

Phase 5

Phase 5 began in February 2014. This phase concerned "the issues of federal reserved water rights and claimed rights to return flows from imported water." After a few days of evidence presentation, the trial court granted a stay of the proceedings to facilitate large-scale settlement negotiations.

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[3]The term "safe yield" generally refers to the amount of water that can be extracted annually without risking permanent depletion of the supply. (*Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74, 81, fn. 2.) When average annual withdrawals or diversions of the groundwater supply exceed the safe yield, the resulting condition is known as "overdraft." (*Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1272.)

The "Global Settlement"

By April 2014, most AVGC litigants had tentatively agreed to the terms of a physical solution. During the remainder of the year, those parties worked on drafting and editing an agreement entitled "Stipulation for Entry of Judgment and Physical Solution" (some capitalization omitted). Despite opposition by multiple parties (e.g., the Willis Class), the trial court and others referred to this agreement as the "Global Settlement."

Finalization of the Global Settlement was delayed by several months because of a dispute over provisions concerning the Wood Class's fees and costs. The issue was eventually resolved, and parties began signing the agreement in December 2014. Representatives for District 40 and the Wood Class signed in February 2015. The Global Settlement was amended in March and July 2015, but those slight changes are not relevant to this appeal.

Second Wood Class Settlement (the "2015 Settlement")

On or about February 26, 2015, a written agreement entitled "Small Pumper Class Stipulation of Settlement" (some capitalization omitted) was entered into by and between the Wood Class and California Water Service Company, City of Palmdale, Desert Lake Community Services District, District 40, Littlerock Creek Irrigation District, Palm Ranch Irrigation District, and Quartz Hill Water District. The Global Settlement was attached and expressly integrated into the agreement. The parties agreed, inter alia, to dismiss their respective claims against one another, including the water suppliers' claims of prescriptively acquired water rights superior to those of the Wood Class. The Wood Class was to be allocated up to 3 afy of groundwater per existing household, which was more than double the median production per household during the sample period of 2011–2012. Aggregate pumping for the entire class was not to exceed 3,806.4 afy.

Phase 6 and Final Judgment

Phase 6 was essentially a "prove up" of the Global Settlement combined with challenges to the same by nonstipulating parties. The final trial proceedings began in late

September 2015 and concluded approximately five weeks later. On December 28, 2015, the trial court entered a final judgment, which approved the Global Settlement and adopted the parties' proposed Judgment and Physical Solution. A separate judgment on the Wood Class's 2013 Settlement and 2015 Settlement was incorporated into the final judgment.

Postjudgment Proceedings (2016)

First Motion for Fees and Costs

In January 2016, counsel for the Wood Class filed a motion for attorney fees, costs, and an incentive award for the class representative. The requested fees totaled $3,348,160 based on 4,538.8 hours collectively worked by McLachlan and O'Leary at a proposed hourly rate of $720, and 679.5 paralegal hours at rates of $110 and $125 per hour.

Counsel additionally requested a positive multiplier of 2.5. The proposed incentive award for Richard Wood was the right to pump 5 afy from the aquifer, i.e., 2 afy above the limit applicable to other class members. The amount of claimed costs was $76,639.48.

The motion was made pursuant to Code of Civil Procedure section 1021.5 (section 1021.5), which is "a codification of the 'private attorney general' attorney fee doctrine." (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933.) However, in a supporting declaration, McLachlan alleged District 40 and other water suppliers had already "agreed to bear the attorneys' fees and costs for the Small Pumper Class" under the terms of the Global Settlement. This contention was repeated in the reply brief.

District 40 and the City of Palmdale filed a joint opposition. City of Palmdale did so out of an abundance of caution despite Wood's acknowledgement that the 2015 Settlement shielded the City of Palmdale from liability for fees or costs. District 40

argued the Wood Class was not entitled to any fees or costs. In the alternative, District 40 claimed the amount requested was unreasonable.

A separate opposition was filed by five water suppliers who labeled themselves the "Small Districts": Desert Lake Community Services District, Littlerock Creek Irrigation District, North Edwards Water District, Palm Ranch Irrigation District, and Quartz Hill Water District. Besides summarily joining in District 40's arguments, they claimed financial hardship and argued "the court should use its equitable discretion to deny the fees motion against the Small Districts" or otherwise apply a negative multiplier to the lodestar.

A group of AVGC litigants calling themselves the "Overliers" (primarily consisting of landowners who were not members of the Willis or Wood classes) filed a brief in response to District 40's opposition. The Wood Class had not sought fees or costs from the Overliers. Nevertheless, the Overliers took issue with an argument made by District 40 which they interpreted as suggesting liability for Wood's fees should be apportioned among other parties to whom pumping rights were allocated under the Physical Solution. Citing provisions of the Global Settlement, the Overliers argued District 40 and other water suppliers had "contractually agreed and covenanted" to pay all reasonable fees and costs of the Wood Class.

On April 1, 2016, the motion was heard and argued. On April 25, 2016, a written decision was issued. The trial court ruled Wood was entitled to fees and costs on two independent grounds. First, District 40 and other water suppliers were found to have agreed to pay such fees and costs under the terms of the Global Settlement. Second, as to fees, the Wood Class was found to have satisfied the requirements of section 1021.5.[4]

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[4]"Section 1021.5 authorizes an award of fees when (1) the action 'has resulted in the enforcement of an important right affecting the public interest,' (2) 'a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons …,' and (3) 'the necessity and financial burden of private enforcement … are such as to make the award appropriate ….'" (*Serrano v. Stefan Merli Plastering Co., Inc.* (2011) 52

Relevant to costs, the Wood Class was declared a prevailing party (see Code Civ. Proc., § 1032, subd. (b) ["a prevailing party is entitled as a matter of right to recover costs in any action or proceeding"]).

The trial court awarded $2,269,400 in attorney fees and $80,224 in paralegal fees. The attorney fees were calculated by multiplying the claimed hours by an hourly rate of $500. The paralegal fees matched the hours and rates requested in the motion.

The costs ruling was limited to the issue of entitlement. Counsel for Wood was "directed to file a Memorandum of Costs under the provisions of the Code of Civil [P]rocedure." In further statements made under the heading of "COSTS," the trial court wrote:

> "The allocation of fees between the public water producers should be apportioned according to percentages of water received as a result of the global settlement and the judgment. The fee and cost award shall be several against all public water producers save the parties who have previously settled and paid fees and costs. Moreover, any pub[l]ic water producer may opt to pay such fees or costs over a ten year period in accord with the law."

Motion for Clarification

On May 2, 2016, the Wood Class filed a motion for "an amendment or further order clarifying the identity of the [p]arties subject to the award of fees and costs, as well as clarifications that the costs awarded will be allocated in the same fashion as the attorneys' fees." The motion was heard on May 25, 2016. On June 28, 2016, the trial court issued an order assigning responsibility for the fees and costs as follows:

District 40:	74.76%
Littlerock Creek Irrigation District:	8.77%
Quartz Hill Water District:	6.21%
Palm Ranch Irrigation District:	5.13%
California Water Service Company:	3.78%

Cal.4th 1018, 1026.) In such actions, fees may be awarded "to a successful party against one or more opposing parties." (§ 1021.5.)

Desert Lake Community Services District:	0.81%
North Edwards Water District:	0.54%

The order further decreed that District 40 and the Small Districts "shall be entitled to pay this judgment in 10 equal payments over a period of 10 years."

Cost Bill and Additional Motions

On May 11, 2016, counsel for Wood filed a memorandum of costs. Three weeks later, District 40 and the Small Districts filed a motion to strike the memorandum of costs as untimely. In the alternative, the parties moved to tax "at least $16,119.35 in prohibited costs."

On June 27, 2016, the Wood Class filed a motion for a supplemental award of fees and costs incurred since January 27, 2016. This motion and the motion to strike/tax costs were both heard on July 28, 2016. On or about August 15, 2016, the trial court issued a written decision.

The motion to strike the memorandum of costs was denied. The motion to tax costs was partially granted, as was the motion for additional postjudgment fees and costs. Further details are provided, *post*.

Orders re: Periodic Payments

On August 12, 2016, District 40 filed a notice and request for hearing as required by rule 3.1804 of the California Rules of Court regarding its intention to satisfy the fee award in annual installments pursuant to Government Code section 984. (All subsequent rule references are to the California Rules of Court.) The Wood Class filed an opposition, arguing the statute was not applicable. The matter was heard on September 8, 2016. The trial court ruled against District 40, but it continued the hearing based on indications District 40 and/or the Small Districts might produce evidence of eligibility to make periodic payments under Government Code section 970.6.

On September 20, 2016, District 40 filed a second notice of election regarding Government Code section 984. At the continued hearing, held October 18, 2016, the trial

court again ruled the statute was not applicable. District 40 did not proffer any evidence relevant to Government Code section 970.6.

Appellate Proceedings (2016–2021)

With the exception of the rulings in September and October 2016, the Wood Class, District 40, and the Small Districts all filed timely notices of appeal in connection with the postjudgment orders discussed above. District 40 filed additional notices of appeal as to the orders regarding periodic payments under Government Code section 984.

On September 2, 2016, this court received notice of a settlement of all claims between the Wood Class and California Water Service Company. (See rule 8.244(a)(1).) A notice of abandonment of those claims was subsequently filed with the trial court. (Rule 8.244(a)(3), (b)(1).)

For various reasons, the appellate briefing was not completed until October 2020. On February 5, 2021, the Wood Class and the Small Districts filed a stipulation to dismiss their respective claims against one another. (Rule 8.244(c).) The remaining claims on appeal are those by and between the Wood Class and District 40.

DISCUSSION

I. Attorney Fees

A. Entitlement to Fees

"The issue of a party's entitlement to attorney's fees is a legal issue which we review de novo." (*Garcia v. Santana* (2009) 174 Cal.App.4th 464, 468; accord, *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751 ["'a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo'"].)

District 40 claims the entitlement ruling was erroneous on both alternative grounds, i.e., the contractual obligation finding and under section 1021.5. Apart from disputing the trial court's interpretation of the settlement agreements, District 40 alleges

the "contractual argument" was untimely and should not have been considered. We conclude the trial court (1) had discretion to consider the applicability of the settlement agreements and (2) correctly interpreted those agreements. Therefore, it is unnecessary to determine whether attorney fees were independently recoverable under section 1021.5.

B. Additional Background

The Global Settlement contained the following provisions, which the parties refer to as paragraphs 11 and 12:

> "11. The Public Water Suppliers and no other Parties to this Stipulation shall pay all reasonable Small Pumper Class attorneys' fees and costs through the date of the final Judgment in the Action, in an amount either pursuant to an agreement reached between the Public Water Suppliers and the Small Pumper Class or as determined by the Court. The Public Water Suppliers reserve the right to seek contribution for reasonable Small Pumper Class attorneys' fees and costs through the date of the final Judgment in the Action from each other and Non-Stipulating Parties. Any motion or petition to the Court by the Small Pumper Class for the payment of attorneys' fees in the Action shall be asserted by the Small Pumper Class solely as against the Public Water Suppliers (excluding Palmdale Water District, Rosamond Community Services District, City of Lancaster, Phelan Piñon Hills Community Services District, Boron Community Services District, and West Valley County Water District) and not against any other Party.
>
> "12. In consideration for the agreement to pay Small Pumper Class attorneys' fees and costs as provided in Paragraph 11 above, the other Stipulating Parties agree that during the Rampdown established in the [Physical Solution], a drought water management program ('Drought Program') shall be implemented as provided in Paragraphs 8.3, 8.4, 9.2 and 9.3 of the [Physical Solution]."

As discussed above, the Wood Class entered into a separate agreement, the 2015 Settlement, with District 40 and six other water suppliers. The 2015 Settlement refers to the entire group as the "Settling Parties." The Wood Class is individually referred to as the Small Pumper Class.

The 2015 Settlement states, in relevant part: "This Agreement and the exhibits hereto, including the Stipulation for Entry of Judgment and Physical Solution ([i.e., the Global Settlement]) attached hereto as Exhibit A set forth the terms of the settlement by and between the Settling Parties …." Incorporation of the Global Settlement is repeated in an integration clause, which says the 2015 Settlement, "including its exhibits, constitute the entire, complete and integrated agreement among the Settling Parties, and supersede all prior or contemporaneous undertakings of the Settling Parties in connection herewith."

The 2015 Settlement also contains the following provision, which District 40 relies upon in this appeal:

"Fees And Costs of Settling Plaintiff's Counsel.

> "1. The Settling Parties understand that Small Pumper Class counsel intend to seek an award of their fees and costs from the Court at the time set for the Final Approval Hearing. Any such awards will be determined by the Court unless agreed to by the Settling Parties. Settling Defendants will likely oppose the motion for attorneys' fees and costs. Notwithstanding any other provisions in this Agreement, the Settling Parties agree this Agreement does not restrict, compromise or otherwise prohibit Settling Defendants' rights to seek contribution for Small Pumper Class counsel's fees and costs, if such fees and costs are awarded to Class Counsel. The Settling Defendants hereby expressly reserve their rights to seek contribution for such fees and costs."

The trial court, in its ruling dated April 25, 2016, analyzed and interpreted paragraphs 11 and 12:

> "The 'global' stipulation for settlement provides that 'the PWS and no other parties … shall pay all reasonable Small Pumper Class attorneys' fees and costs … through the date of the final judgment in an amount agreed to by the PWS and the Small Pumper Class, or as determined by the court.' PWS reserved the right to seek contribution for reasonable class fees and costs from each other and from non-stipulating parties. See Paragraph 11 and 12 of the [Global Settlement].

"The scope and meaning of the fee provision in the so-called global settlement is disputed. The Wood Class contends that it means that the PWS is bound to pay the fees and costs of Wood Class counsel, either by agreement ***as to amount***, or if there is no agreement as to amount, then the amount shall be determined by the court. The PWS, on the other hand, assert that if the parties cannot agree, then the entire question of whether PWS should pay any fees and costs is to be determined by the court based on the law applied to the facts in the case.

"In examining the language in paragraphs 11 and 12 of the [Global Settlement], no other evidence of intent being offered by either partry, , [*sic*] it would appear that the PWS agreed to pay such fees and costs as the court decided was reasonable if the parties could not agree as to the 'amount.' In the absence of extrinsic evidence of the discussions and negotiations of the parties related to this issue, the court is limited to the contract language alone. The court examines the entire contract under the provisons [*sic*] of the Civil code, and in particular Section 1641.

"Paragraph 12 specifically provides, 'that in consideration for the agreement to pay Small Pumper Class attorneys' fees and costs as provided in paragraph 11 above, the other Stipulating Parties agree that during the Rampdown established in the Judgment, a drought water management program ('Drought Program') shall be implemented as provided in Paragraphs 8.3, 8.4, 9.2 and 9.3 of the Judgment.'

"While perhaps Paragraph 11 is ambiguous on the question, Paragraph 112 [*sic*] weighs in favor of the interpretation of the Wood Class. [¶] ... [¶] [T]he court concludes that the PWS are obligated for reasonable fees and costs based upon the language in the [Global Settlement]."

C. Waiver/Forfeiture

We must first determine whether the trial court erred by considering the Global Settlement as a basis for awarding fees. District 40 alleges the Wood Class "raised the contractual argument for the first time in its reply brief ([record citations]), and only after other landowner parties submitted a 'response brief' that made the contractual argument to ensure that the Public Water Suppliers [were] not claiming that those other landowners should pay for Wood Class attorney's fees." Based on those contentions, District 40 claims the trial court "should have disregarded the Wood Class' argument made for the first time on reply."

District 40 relies on cases holding that new issues raised in a reply brief on appeal are considered forfeited. (E.g., *Hudson v. Superior Court* (2017) 7 Cal.App.5th 999, 1016 [""""points raised for the first time in a reply brief will not be considered unless good reason is shown for failure to present them earlier""""].) Similar principles apply to motions in the trial court, but trial courts generally have discretion to consider untimely arguments. (See *Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1009 ["a court has discretion to accept arguments or evidence made for the first time in reply"]; *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 241 [same]; *California Retail Portfolio Fund GMBH & Co. KG v. Hopkins Real Estate Group* (2011) 193 Cal.App.4th 849, 861 [concluding trial court did not abuse its discretion by considering reply evidence].) Furthermore, District 40's factual assertion is technically incorrect. Counsel for Wood did raise the issue, albeit cursorily, in the initial moving papers.

"A notice of motion must state in writing the 'grounds upon which it will be made.' [Citations.] Generally, the trial court may only consider those grounds specified in the notice." (*366-386 Geary St., L.P. v. Superior Court* (1990) 219 Cal.App.3d 1186, 1199.) However, "failure to expressly state a ground for recovery does not in every case preclude recovery on the omitted ground." (*Id.* at p. 1200.) Our district elaborated on this rule in *Carrasco v. Craft* (1985) 164 Cal.App.3d 796: "Even though the notice of motion fails to state a particular ground for the motion, where the notice states, as here, that the motion is being made upon the notice of motion and accompanying papers and the record, and these papers and the record support that particular ground, the matter is properly before the court and the defect in the notice of motion should be disregarded." (*Id.* at p. 808.)

Wood's notice of motion, filed January 27, 2016, reads: "Plaintiff brings this motion pursuant to … section 1021.5. [¶] The Motion is based on this Notice, the Memorandum of Points and Authorities, the Declaration of Michael D. McLachlan, …

the records and file herein, and on such evidence as may be presented at the hearing of the Motion." In McLachlan's contemporaneously filed declaration, he asserted:

> "I will also note that pursuant to the Stipulation for Entry of Judgment and Physical Solution, [i.e., the Global Settlement,] these settling defendants have agreed to bear the attorneys' fees and costs for the Small Pumper Class (and have expressly excluded from such liability, Defendants Palmdale Water District, Rosamond Community Services District, and Phelan Pinon Hills Community Services District). ([Global Settlement], ¶ 11.) These non-settling defendants [*sic*] have received consideration for this in the form of specific provisions in the Judgment and Physical Solution. ([Global Settlement], ¶ 12.)"

The initial moving papers focused on the amount of fees requested. The supporting memorandum was 15 pages long, but counsel's discussion of section 1021.5 was limited to approximately three paragraphs. Two of those paragraphs summarized the law.

District 40's opposition devoted approximately 16 pages to arguing Wood was not entitled to fees and could not meet the requirements of section 1021.5. Wood's reply brief attempted to refute those arguments, and counsel repeatedly noted the Public Water Suppliers had agreed to pay Wood's reasonable fees and costs under the terms of the Global Settlement. District 40 insinuates the "contractual argument" was made only because the Overliers had raised the issue in their separate response to its opposition. However, the Overliers' brief and Wood's reply brief were both filed on the afternoon of Friday, March 25, 2016—one week prior to the motion hearing.

In the Overliers' brief, approximately 20 parties to the Global Settlement argued the "Public Water Suppliers contractually agreed and covenanted that they 'shall pay all reasonable Small Pumper Class attorneys' fees and costs through the date of the final Judgment ....'" The Overliers directed the trial court's attention to paragraphs 11 and 12, quoting those provisions and attaching copies of the Global Settlement to both the six-page brief and a supporting attorney declaration.

The record on appeal does not show District 40 made any attempt to respond to the Overliers' brief. The lack of response is noteworthy considering the history of disputes and negotiations over the very provisions in question. As discussed, finalization of the Global Settlement was delayed by months because multiple parties disagreed over terms regarding payment of the Wood Class's fees and costs. For example, in a case management statement filed in August 2014, the PWS reported that "the Wood Class attorney fee claim against the Public Water Suppliers is unresolved and is the only remaining settlement obstacle."

District 40 did not request a continuance or otherwise attempt to respond to the arguments regarding paragraphs 11 and 12. On the day before the motion hearing, it filed objections to evidence submitted by Wood in support of the reply brief. Presented in table format, there were 33 enumerated objections. A boilerplate recital of law was repeated throughout the document in a separate column with only slight variations for certain objections, e.g., "Untimely and improper new evidence submitted with reply. New evidence may not accompany a reply except in the most 'exceptional case.' (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 …."

Only two of District 40's objections were relevant to the Global Settlement argument. The first objection was to a statement in McLachlan's supplemental declaration identifying an attached exhibit as a true and correct copy of the Global Settlement. The other objection was to the document itself. However, District 40 did not object to the Overliers' attachment of the Global Settlement to their brief and supporting declaration. The trial court summarily sustained District 40's objections, but with the disclaimer that documents already contained in the court record (e.g., the Global Settlement) "are proper subjects for consideration by the court in its own consideration of the issues …, whether or not cited by the parties."

Counsel for Wood relied on the Global Settlement provisions during the motion hearing. His argument included these statements:

> "And the punch line here really is this stipulation that they entered into in paragraph 11 .... And really—what's really important it says they shall pay, right there in black and white, all reasonable attorneys' fees. This stipulation kills almost all of their arguments. I mean they can argue about market rate and certainly the multiplier. But all the rest, in terms of [section] 1021.5, if they weren't already dead, this kills it. And this is a bargain[ed] for stipulation. They received consideration. Your Honor knows what that consideration is. It's a contract. They're stuck with it. They all signed it. And it got approved by the Court."

When counsel for District 40 argued the opposition, his response to the Global Settlement argument was brief and conclusory: "Let me point out very quickly I find it stunning that class counsel would try to convert his [section] 1021.5 motion and now sort of a contract claim or a settlement claim. No such motion is before this Court. His interpretation of what that settlement agreement provides is not at issue and it's wrong."

To summarize, the Overliers' brief independently put District 40 on notice, one week prior to the motion hearing, of a potentially dispositive argument regarding Wood's entitlement to fees. The same argument had been made in Wood's initial moving papers and was repeated three different places in Wood's reply brief. The reply brief was filed on the same day as the Overliers' brief. District 40 did not object to the Overliers' brief and made no attempt to refute Wood's or the Overliers' arguments regarding paragraphs 11 and 12 of the Global Settlement. Wood reasserted the argument at the motion hearing, and District 40 virtually ignored it. Under these circumstances, we conclude it was within the trial court's discretion to consider the "contractual argument" on the merits. (Cf. *California Retail Portfolio Fund GMBH & Co. KG v. Hopkins Real Estate Group*, *supra*, 193 Cal.App.4th at p. 861 [complaining party "did not ask for a continuance to rebut the evidence" presented in reply]; *Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308 [trial court did not abuse discretion to consider new evidence in preliminary injunction reply papers when defendant had opportunity to testify at hearing]; *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, fn. 8 [consideration of new

material in summary judgment reply not an abuse of discretion if opposing party has notice and an opportunity to respond].)

D. Contractual Interpretation

"Generally, the interpretation of a settlement agreement is governed by the same rules that apply to other contracts. [Citation.] 'When no extrinsic evidence is introduced, or when the competent extrinsic evidence is not in conflict, the appellate court independently construes the contract.' [Citations.] When the competent extrinsic evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld if it is supported by substantial evidence.'" (*Coral Farms, L.P. v. Mahony* (2021) 63 Cal.App.5th 719, 726; accord, *Karpinsky v. Smitty's Bar, Inc.* (2016) 246 Cal.App.4th 456, 461.) The trial court did not rely on extrinsic evidence, so the standard of review is de novo.

Contractual interpretation must "give effect to the mutual intention of the parties as it existed at the time of contracting." (Civ. Code, § 1636.) If the agreement is in writing, "the intention of the parties is to be ascertained from the writing alone, if possible" (*id.*, § 1639), which can be accomplished if the language therein "is clear and explicit, and does not involve an absurdity" (*id.*, § 1638). Put differently, "California recognizes the objective theory of contracts [citation], under which '[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation' [citation]. The parties' undisclosed intent or understanding is irrelevant to contract interpretation." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 956; accord, *Iqbal v. Ziadeh* (2017) 10 Cal.App.5th 1, 8.)

Paragraph 11 of the Global Settlement opens with this sentence: "The Public Water Suppliers and no other Parties to this Stipulation shall pay all reasonable Small Pumper Class attorneys' fees and costs through the date of the final Judgment in the

Action, in an amount either pursuant to an agreement reached between the Public Water Suppliers and the Small Pumper Class or as determined by the Court."

The quoted language is unambiguous and can only be interpreted as a commitment to pay the fees and costs of the Wood Class. Placement of the comma before the words "in an amount" makes clear the only issue left for future determination was how much money would be paid. Thus, "The Public Water Suppliers … shall pay all reasonable Small Pumper Class attorneys' fees and costs …, in an amount *either* pursuant to an agreement reached between the Public Water Suppliers and the Small Pumper Class *or* as determined by the Court." (Italics added.)

The plain meaning of the quoted language is confirmed by paragraph 12: "In consideration for *the agreement to pay Small Pumper Class attorneys' fees and costs as provided in Paragraph 11 above*, the other Stipulating Parties agree that during the Rampdown established in the [Physical Solution], a drought water management program ('Drought Program') shall be implemented as provided in Paragraphs 8.3, 8.4, 9.2 and 9.3 of the [Physical Solution]." (Italics added.) The cited provisions of the Physical Solution benefit the Public Water Suppliers in various ways during the seven-year "Rampdown" period. That is why Wood's counsel called paragraph 11 a "bargain[ed] for stipulation" and why the Overliers said "the Public Water Suppliers received separate and additional consideration for that undertaking."

District 40 does not deny there was a bargained-for exchange, but it argues paragraphs 11 and 12 merely "place a limitation on the Wood Class when choosing the parties from which to seek its attorney fees." However, that aspect of the agreement is encapsulated in the third sentence of paragraph 11: "Any motion or petition to the Court by the Small Pumper Class for the payment of attorneys' fees in the Action shall be asserted by the Small Pumper Class solely as against the Public Water Suppliers (excluding [certain entities]), and not against any other Party."

If the sole purpose and intention of the clause was, as District 40 alleges, to "eliminat[e] the possibility that the Wood Class could claim fees against [parties other than the PWS]," then why does the first sentence of paragraph 11 state the PWS "shall pay" Wood's reasonable fees and costs, and why does paragraph 12 reference "the agreement to pay" such fees and costs? "An interpretation that leaves part of a contract as surplusage is to be avoided." (*Rice v. Downs* (2016) 248 Cal.App.4th 175, 186; see Civ. Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"]; see generally *id.*, § 1644 ["The words of a contract are to be understood in their ordinary and popular sense"].)

District 40 next contends the issue is governed by the "more specific" 2015 Settlement. In making this argument, District 40 implies the trial court erred by "us[ing] another agreement to find an attorney fees payment obligation"—the other agreement being the Global Settlement. However, the Global Settlement is expressly incorporated into the 2015 Settlement. Therefore, the terms of the 2015 Settlement include paragraphs 11 and 12 of the Global Settlement.

District 40 relies on this language in the 2015 Settlement:

> "The Settling Parties understand that Small Pumper Class counsel intend to seek an award of their fees and costs from the Court at the time set for the Final Approval Hearing. Any such awards will be determined by the Court unless agreed to by the Settling Parties. Settling Defendants will likely oppose the motion for attorneys' fees and costs."

"Readers must assume legal authors mean to draft texts that cohere. To assume otherwise departs from common sense and makes mischief. So we read documents to effectuate and harmonize all contract provisions." (*Bravo v. RADC Enterprises, Inc.* (2019) 33 Cal.App.5th 920, 923; accord, *Retsloff v. Smith* (1926) 79 Cal.App. 443, 452 ["It is fundamental in the interpretation of contracts that the various terms will be harmonized if possible"].) The provisions in question are easily reconciled. The

statement, "Any such awards will be determined by the Court unless agreed to by the Settling Parties" is consistent with paragraph 11, i.e., "The [PWS] … shall pay all reasonable Small Pumper Class attorneys' fees and costs …, in an amount either pursuant to an agreement reached between the [PWS] and the Small Pumper Class or as determined by the Court." The phrase "[a]ny such awards" logically refers to the amount of the fees and costs.

District 40 places emphasis on the words, "Settling Defendants will likely oppose the motion for attorneys' fees and costs." This language is also consistent with paragraph 11. The statement means the Public Water Suppliers did not expect to agree to the amount of fees and/or costs sought by Wood's counsel and anticipated challenging those figures as unreasonable, which is exactly what happened. This interpretation is supported by the surrounding circumstances. (See Civ. Code, § 1647 ["A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates"].)[5]

Approximately 14 months prior to the 2015 Settlement, the Wood Class entered into the 2013 Settlement with four other water suppliers. The 2013 Settlement included a stipulation for payment of Wood's attorney fees at the rate of $550 per hour. Wood's counsel maintained the rate was under market value for their services but a necessary compromise to achieve the resolution. In conjunction with a motion for court approval of the 2013 Settlement, which District 40 opposed, Wood filed a separate motion for

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[5]Civil Code section 1647 "is applicable only where the language used in the contract is doubtful, uncertain or ambiguous, and then only when the doubt appears on the face of the contract and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said." (*Pope v. Allen* (1964) 225 Cal.App.2d 358, 364–365; accord, *United Iron Wks. v. Outer H. etc. Co.* (1914) 168 Cal. 81, 84.) We discuss the circumstances leading up to the Global Settlement and 2015 Settlement only to demonstrate the shortcomings of District 40's argument, not because we view the language in question as uncertain. Our conclusion is the provisions at issue are clear and unambiguous.

approval of the attorney fees and costs. District 40 also opposed the fees motion, arguing the hours claimed and the stipulated hourly rate were excessive and unreasonable.

In light of District 40's opposition to Wood's claimed hours and negotiated rate in the 2013 Settlement, the language in the 2015 Settlement ("Settling Defendants will likely oppose the motion for attorneys' fees and costs") does not cast doubt upon the plain meaning of paragraph 11. It simply indicates the Public Water Suppliers anticipated a disagreement with Wood's counsel over what constituted a "reasonable" amount of fees and costs. The likelihood of a such a dispute was apparent from the parties' inability to reach an agreement on the issue in 2014 during efforts to finalize the Global Settlement.

Lastly, District 40 alleges certain statements by attorney McLachlan support its position regarding the mutual intent behind the fees and costs provisions. The propriety of these arguments is questionable since they require consideration of evidence beyond the unambiguous language of the contract. (See Civ. Code, §§ 1638, 1639.) The arguments are also unpersuasive.

District 40 quotes a statement by McLachlan in a declaration supporting a motion for preliminary approval of the 2015 Settlement. McLachlan wrote, "No attorneys' fees or costs were agreed upon and those issues had no bearing whatsoever on the relief for the Class." District 40 characterizes this statement as a binding admission that the PWS never agreed to pay Wood's fees or costs.

"The admission of fact in a pleading is a 'judicial admission.'" (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271.) However, "[a]n unclear or equivocal statement does not create a binding judicial admission." (*Stroud v. Tunzi* (2008) 160 Cal.App.4th 377, 385.) If the statement is "ambiguous in any way," it is not a binding admission. (*National Union Fire Ins. Co. v. Miller* (1987) 192 Cal.App.3d 866, 869; accord, *Irwin v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 709, 714.)

District 40 omits the context in which McLachlan's statement was made. As explained above, it had opposed the 2013 Settlement between Wood and certain water suppliers. The 2013 Settlement included a stipulation regarding the amount of fees and costs to be paid by the settling defendants. District 40 argued "the stipulated attorneys' fees here should be subject to heightened scrutiny because there is increased potential for conflicts between the class and their counsel when attorneys' fees provisions are set forth in a class action settlement agreement, such as they are here." District 40 repeated this argument throughout the 2013 Settlement approval proceedings. Accordingly, when McLachlan moved for preliminary approval of the 2015 Settlement with District 40 and others, he declared, "No attorneys' fees or costs were agreed upon and those issues had no bearing whatsoever on the relief for the Class."

The statement itself provides little support for District 40's position. To reiterate, paragraph 11 of the Global Settlement says the PWS "shall pay all reasonable Small Pumper Class attorneys' fees and costs …, in an amount *either* pursuant to an agreement reached between the [PWS] and the Small Pumper Class *or* as determined by the Court." (Italics added.) The Global Settlement was finalized prior to the 2015 Settlement and incorporated into the latter agreement. Thus, McLachlan's representation that "[n]o attorneys' fees or costs were agreed upon" in connection with the 2015 Settlement is reasonably understood as referring to the *amount* of fees and costs to be awarded. Insofar as it is susceptible of a different interpretation, the statement is ambiguous and does not qualify as a binding admission.[6] (*Stroud v. Tunzi*, *supra*, 160 Cal.App.4th at p. 385; *National Union Fire Ins. Co. v. Miller*, *supra*, 192 Cal.App.3d at p. 869.)

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[6]We further note Wood's earlier fees and costs motion concerning the 2013 Settlement was also made pursuant to section 1021.5. Even though the settling defendants had stipulated to Wood's recovery of fees *and* the amount of those fees, Wood's notice of motion identified section 1021.5 as the basis for recovery and did not reference the contractual obligation. In light of how Wood's counsel approached both the 2013 and 2016 fee motions, we are not persuaded by District 40's related argument that Wood's failure to discuss the Global Settlement in the

The other purported "admission" by McLachlan is a statement made during a court hearing on July 28, 2016, several months *after* the subject motion ruling. The issue being argued was the timeliness of Wood's memorandum of costs, and there was a brief discussion about paragraph 11. McLachlan said, "It's really sort of noticed language where they [the PWS] say, listen, we know you're going to file a motion for fees and costs. We are going to contest it."

According to District 40, the fact Wood's counsel expected the PWS to oppose the fees motion proves paragraph 11 was not intended as an agreement by the PWS to pay Wood's reasonable fees and costs. McLachlan's quoted statement admits no such thing. Like written submissions, "an oral statement by counsel in the same action is a binding judicial admission if the statement was an unambiguous concession of a matter then at issue and was not made improvidently or unguardedly." (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752.) McLachlan's words are easily interpreted to mean he anticipated a dispute over the *amount* of fees and costs. He was arguing a different issue during the July 2016 court appearance, and the remark did not concede the position District 40 has asserted on appeal.

Based on the foregoing analysis, we agree with the trial court's interpretation of the contractual language. District 40 has not demonstrated cause for reversal of the entitlement ruling. The ruling will therefore be affirmed.

II. Apportionment Claim

District 40 also seeks reversal "for the additional and independent reason that the fees awarded should have been reduced so that the Public Water Suppliers pay only those fees that are attributable to them, and not to Phelan and other landowner parties,

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2016 notice of motion and supporting memorandum was an implied admission that paragraph 11 does not mean what it says.

including the Willis Class and the Tapia parties." This claim was originally made by District 40 and the Small Districts in their jointly filed opening brief, and the argument focused on the Small Districts' "meager" financial resources. The Small Districts have now settled with the Wood Class and their claims have been dismissed, so those contentions are moot.

"Once a trial court determines entitlement to an award of attorney fees, apportionment of that award rests within the court's sound discretion." (*Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 505.) "The court abuses its discretion whenever it exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish that discretion was clearly abused and a miscarriage of justice resulted." (*Ibid.*)

District 40 argues the apportionment of responsibility for Wood's fees should not have been limited to the PWS since numerous other parties "played a role in generating [those] fees." The trial court disagreed, reasoning Wood's litigation efforts vis-à-vis the non-PWS parties contributed to the ultimate resolution, i.e., the Global Settlement and final judgment, which it described as "a very excellent result for everybody involved."

Furthermore, the PWS contractually agreed to pay Wood's reasonable fees and costs. As set forth in paragraph 12, the PWS did so in exchange for certain favorable provisions of the Physical Solution. As such, the trial court's exercise of discretion does not appear arbitrary or outside the bounds of reason.

III. Amount of Fees Awarded

Wood's counsel, Michael McLachlan and Daniel O'Leary, claimed to have worked over 5,800 hours on the AVGC between August 2007 and January 2016. The aggregate figure included 1,276.3 hours for which they had already received payment following the 2013 Settlement. Accounting for the earlier recovery, McLachlan and O'Leary jointly requested compensation for 4,538.8 hours of attorney time at a rate of

$720 per hour. This proposed calculation of the lodestar totaled $3,267,936. They argued for an enhancement multiplier of 2.5, which would have resulted in an award of nearly $8.2 million in attorney fees alone.

The trial court found "that the hours claimed were reasonably spent on the case." However, the award was limited to $500 per hour. In a subsequent ruling, the trial court approved an additional 260.6 hours of postjudgment attorney time at the same rate. Pursuant to both rulings, McLachlan and O'Leary were awarded $2,399,700 in attorney fees. They were also awarded $84,586.50 in paralegal fees incurred through June 2016. (See *Roe v. Halbig* (2018) 29 Cal.App.5th 286, 312 ["paralegal fees may be awarded as attorney fees if the trial court deems it appropriate"].) Therefore, excluding the 2013 Settlement, the total fee award was $2,484,286.50.

Our analysis will focus on the hourly rate of $500. As we will explain, it is unclear whether the trial court followed the conventional lodestar method before considering the question of a multiplier. Despite some inconsistent language, it seems the trial court agreed $720 was within the prevailing market rates for purposes of determining the lodestar. It then essentially applied a negative multiplier of just under 0.70, i.e., a downward adjustment of roughly 30 percent.

Whatever the method used to arrive at the final amount, Wood's counsel have shown the trial court relied on factually erroneous and legally erroneous criteria. (See further discussion, *post*.) "When the record is unclear whether the trial court's award of attorney fees is consistent with the applicable legal principles, we may reverse the award and remand the case to the trial court for further consideration and amplification of its reasoning." (*In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1052; see *Roe v. Halbig*, *supra*, 29 Cal.App.5th at p. 312 ["Because we cannot determine how the trial court arrived at the attorney fees it awarded, we cannot assess whether the trial court properly exercised its discretion"].) For guidance on remand, we address both the inapplicable criteria and the parties' arguments concerning other relevant factors.

A. Additional Background

According to their sworn declarations, McLachlan and O'Leary are plaintiffs' lawyers who specialize in complex civil cases. The "vast majority" of McLachlan's practice is devoted to class action litigation. In 2016, when the first postjudgment fees motion was filed, both men had been practicing law for over 20 years.

McLachlan and O'Leary are sole practitioners, but they shared an office suite during most of the relevant time period. Despite their joint representation of the Wood Class, it was McLachlan who served as lead counsel. His predominant role is reflected in this breakdown of hours worked by year through January 2016:

	Year	Hours	Year	Hours
Daniel O'Leary	2008	94.4	2013	27.8
	2009	72.3	2014	20.4
	2010	102.3	2015	66.6
	2011	103.8	2016	9.7
	2012	13.8	**TOTAL**	**511.1**

	Year	Hours	Year	Hours
Michael McLachlan	2007	16.9	2013	948
	2008	383.9	2014	608.7
	2009	650.2	2015	967.2
	2010	793.6	2016	90.6
	2011	529.7	**TOTAL**	**5,232** (See fn. 7, *ante*.)
	2012[7]	243.2		

To support the requested hourly rate of $720 and a positive multiplier of 2.5, Wood's counsel submitted a 39-page expert declaration by Richard M. Pearl. Pearl is a California attorney and author of multiple published works on the subject of attorney

[7]The record on appeal is missing McLachlan's billing record for April 2012. This may explain a 42-hour discrepancy in the hours claimed in the moving papers and the hours supported by the record. McLachlan claimed a total of 5,304 hours through January 27, 2016, which included a 30-hour estimate for future work on the motion (i.e., reply brief and oral argument).

fees, including the treatise, California Attorney Fee Awards (Cont.Ed.Bar). According to his declaration, various editions of the treatise have been "cited by the California appellate courts on more than 35 occasions." (E.g., *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 576, 584; *Hardie v. Nationstar Mortgage LLC* (2019) 32 Cal.App.5th 714, 720.)

Pearl cited fee awards in eight cases allegedly representative of "the range of non-contingent market rates charged for reasonably similar services by Los Angeles Area attorneys of reasonably similar qualifications and experience," including a case in which McLachlan had recovered fees at $690 per hour. Pearl also provided a range of "standard hourly non-contingent rates for comparable civil litigation" charged by 36 law firms "that have offices in or regularly practice in the Los Angeles area." He further relied on survey data collected and published by the National Law Journal.

Pearl opined $720 per hour was "slightly *below* what could be requested in the current market rates," but still "entirely reasonable." (Italics added.) He further opined, based on an analysis set forth in the declaration, that the requested multiplier of 2.5 was "particularly appropriate here" and "entirely justified." The trial court's rejection of the proposed hourly rate and multiplier is explained in these excerpts from its order dated April 25, 2016:

> "HOURLY RATE FOR COUNSEL AND PARALEGAL
>
> > "The court is familiar with the compensation rates of counsel practicing in California, and in particular, in urban areas. While the opposition to the claim suggests that the court should evaluate the fee rates by looking to rural areas and lawyers' fees in the rural Antelope Valley, the court is satisfied that the venue of the action is the proper locale to evaluate attorney's fees.
> >
> > "While the rates requested are not far out of line with current large firm attorney fee rates for experienced lawyers in the Los Angeles area, it is not disputed that neither counsel had much experience with ground water litigation and that the rates requested should be reduced to reflect that fact. The counsel did have expertise in class action law and practice but not

water law and have had to consult with other lawyers having that expertise as well as conduct legal research. Counsel became involved in the case in middle 2008, and while they seek a high level of fees for the entire 8 years, the court concludes that rates fell in 2008 and gradually rose from that reduced level over the period of the last eight years.

"In 2008, as the entire country entered into what has been called 'the Great Recession,' law firms were dissolving, some were declaring bankruptcy, lawyers were being laid off or fired, salaries reduced, clients were looking for firms offering lower fees, and many lawyers were leaving the profession. Based on the observations of the court, averaging the hourly rate acknowledging these factors, along with rising fees more recently, the court will approve a fee rate for each counsel of $500.00 hourly. When counsel volunteer for cases such as this there also must be an element of *pro bono publico* involved, especially when the obligor who will pay the fees is a public entity supported by tax dollars. As officers of the court, lawyers are not (or should not be) mere mercenaries. [¶] ... [¶]

"TOTAL FEES

"The court declines to apply a multiplier to the fee award and finds that fees should be based upon a rate of $500.00 hourly."

B. Standard of Review

We review the amount of fee awards for abuse of discretion. (*Dzwonkowski v. Spinella* (2011) 200 Cal.App.4th 930, 934.) "The '"experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong."'" (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.) "Unless an appellant demonstrates otherwise, we assume the trial court followed the law and acted within its discretion." (*Sonoma Land Trust v. Thompson* (2021) 63 Cal.App.5th 978, 984.)

Although the standard of review is "highly deferential," the trial court's exercise of discretion "'must be based on a proper utilization of the lodestar adjustment method, both to determine the lodestar figure and to analyze the factors that might justify application of a multiplier.'" (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233,

1239–1240.) "A trial court abuses its discretion when it relies on improper criteria. [Citations.] A trial court also abuses its discretion if it relies on a fact wholly unsupported by the evidence." (*Waterwood Enterprises, LLC v. City of Long Beach* (2020) 58 Cal.App.5th 955, 966.)

Errors warrant reversal if the record indicates "that a different result would have been probable if such error … had not occurred or existed." (Code Civ. Proc., § 475.) "[A] 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) Again, if the record "is unclear whether the trial court's award of attorney fees is consistent with the applicable legal principles, we may reverse the award and remand the case to the trial court for further consideration and amplification of its reasoning." (*In re Vitamin Cases*, *supra*, 110 Cal.App.4th at p. 1052.)

C. Law and Analysis

"[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) "The reasonable hourly rate is that prevailing in the community for similar work." (*Ibid.*) The rate component has also been described as the "'"hourly amount to which attorneys of like skill in the area would typically be entitled"'" and "the hourly prevailing rate for private attorneys in the community conducting *noncontingent* litigation of the same type." (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1133.) The resulting figure, i.e., the lodestar, "may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided." (*PLCM Group, Inc. v. Drexler*, *supra*, at p. 1095.)

A trial court adjusts the lodestar by applying a "multiplier." Practitioners tend to use this term as synonymous with a positive multiplier. However, any downward

adjustment of the lodestar is, in essence, the application of a negative multiplier. (See *Laffitte v. Robert Half Internat., Inc.* (2016) 1 Cal.5th 480, 489 ["'Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative "multiplier" to take into account a variety of other factors'"].)

"Use of a multiplier can affect the final award considerably: it can double or treble the beginning figure, or more, and can reduce it drastically too. No established criteria calibrate the precise size and direction of the multiplier, thus implying considerable deference to trial court decisionmaking about attorney fee awards." (*Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal.App.5th 734, 745.) The most commonly cited factors are those listed in *Serrano v. Priest* (1977) 20 Cal.3d 25 (*Serrano*):

> "(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall upon the taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purpose of bringing law suits of the character here involved; (6) the fact that the monies awarded would inure not to the individual benefit of the attorneys involved but the organizations by which they are employed; and (7) the fact that in the court's view the two law firms involved had approximately an equal share in the success of the litigation." (*Id.* at p. 49, fn. omitted.)

"This set of factors is illustrative only and does not constitute an exhaustive list of all relevant considerations that may justify an exercise of judicial discretion to increase or decrease the lodestar amount." (*In re Lugo* (2008) 164 Cal.App.4th 1522, 1545.)

1. Lodestar Calculation

It is unclear what rate the trial court used to determine the lodestar because the lodestar was never stated. A necessary component of the lodestar is the prevailing rate in the community for similar work. (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1095.) The trial court said "the rates requested are not far out of line with current large

firm attorney fee rates for experienced lawyers in the Los Angeles area," but it concluded "the rates requested should be reduced" for reasons unrelated to any market data. Did the trial court find the prevailing market rate was $500 per hour? Or did it calculate the lodestar using the rate of $720 per hour and then adjust the lodestar downward based on various factors?

The parties seem equally uncertain on this point. Wood's briefing alleges "the trial court abused its discretion in setting the lodestar at $500 per hour," but elsewhere the trial court is said to have reduced the lodestar. District 40's briefing argues $500 per hour generally "reflects applicable market rates for comparable work within the community at the time," but District 40 also claims the trial court acted "within its discretion … in adjusting the lodestar." To the extent District 40 contends the prevailing market rate in 2016 was $500 per hour, the evidence upon which it relies is unsupportive.

District 40 and the Small Districts argued for the lodestar to be calculated using "the prevailing rates in the Antelope Valley community" instead of the Los Angeles metropolitan area. The trial court properly rejected the argument. (See *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 71 ["The relevant 'community' is that where the court is located"].) District 40 now concedes this issue, but it continues to rely on evidence of rates paid by the Small Districts. Those rates were as high as $400 per hour but reportedly averaged out to just under $300 per hour over time. However, the same evidence indicates the Small Districts are located in rural areas outside of the relevant market and paid negotiated discounted rates based on their limited financial means.

District 40 further relies on a remark made by its counsel during the motion hearing: "I charge $295 an hour. That started back in 1999. It continued in [*sic*] for well over ten years and changed about maybe 18 months ago [i.e., circa October 2014] and it went up to $350 an hour." As Wood correctly argues, unsworn statements by counsel are

not evidence. (Evid. Code, § 140; *People v. Kiney* (2007) 151 Cal.App.4th 807, 815; *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 843.)

Furthermore, District 40's counsel did not say whether $350 per hour was a discounted rate specific to District 40 or his standard rate for comparable work in the Los Angeles area for any given client. "[B]ecause government and insurance defense counsel generally charge lower rates than plaintiffs' attorneys for complex litigation, such attorneys' rates reflect a different market and, therefore, may not be probative." (2 Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 3d ed. March 2021 update) § 9.121, p. 9–119.) "'The reasonable market value of the attorney's services is the measure of a reasonable hourly rate[,]'" and this standard applies regardless of whether lawyers in the case are charging their clients "'below-market or discounted rates.'" (*Chacon v. Litke* (2010) 181 Cal.App.4th 1234, 1260, quoting Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 2d ed. Sept. 2008 update) § 12.26, pp. 358–359.)

Next, District 40 points to the hourly rate of $550 used in the 2013 Settlement between Wood and other water suppliers. It quotes McLachlan out of context by arguing he told the trial court, "I don't think [$]550 at that time was unreasonable." The uncontroverted evidence is McLachlan and O'Leary believed $550 per hour was below the market rate but felt compelled to stipulate to it in order to achieve the settlement. In a subsequent ruling, the trial court noted the rate used in the 2013 Settlement was "negotiated by the parties themselves and did not represent the court's judgment as to what fees should have been awarded."

What McLachlan actually said during the 2016 motion hearing was, "I don't think 550 at that time was unreasonable. It was low. But it wasn't [$200] or $300 dollars low. It was maybe 75 or $100 low." In other words, McLachlan claimed the prevailing market rate in 2013 was approximately $625–$650 per hour.

Although McLachlan's unsworn statement at the motion hearing was not evidence, it was consistent with a declaration he had filed in connection with the 2013

Settlement. Evidence submitted with the earlier declaration indicated the market rate in 2013 for attorneys with 11 to 19 years of experience was $640 per hour. McLachlan's estimate of 2013 market rates was also consistent with his sworn declaration supporting the 2016 motion, wherein he claimed a federal court had approved his fees at $690 per hour for work performed in a class action during 2013 and 2014.

Finally, District 40 relies on the Willis Class's recovery of attorney fees in 2011 at hourly rates of $400 and $450. There are obvious flaws in this argument. Willis was represented by a law firm in San Diego; they requested and received an award based upon "the hourly rates the firm charges their hourly-rate clients." There is no evidence the market rates in San Diego as of early 2011 are indicative of the prevailing market rate in Los Angeles in early 2016.

Incidentally, the Willis Class also filed a postjudgment fees motion that was pending at the same time as Wood's postjudgment fees motion. To be clear, both the Wood Class and the Willis Class made separate motions that were heard on April 1, 2016, and ruled upon in an order dated April 25, 2016. Willis's counsel requested attorney fees calculated at the "prevailing market rates in Los Angeles" (and alternatively argued for no less than their "historical" hourly rates). Willis claimed, and produced evidence to show, the "prevailing market rate in Los Angeles [was] over $700 per hour for attorneys with over 20 years of experience."

Given the weight of evidence supporting Wood's position regarding the prevailing market rate, the trial court's general acceptance of the evidence ("the rates requested are not far out of line with current large firm attorney fee rates for experienced lawyers in the Los Angeles area"), and its discussion of the rate being "reduced" due to case-specific factors, it appears the prevailing market rate was determined to be upwards of $700 per hour. Conversely, since $500 per hour was said to represent the "averaging" of rates over an eight-year period, the trial court evidently did not find $500 per hour to be the prevailing market rate for Los Angeles in 2016. Although the trial court "decline[d] to

apply a multiplier to the fee award," it is most likely the term "multiplier" was intended to mean a positive multiplier. In practical effect, the trial court applied a negative multiplier to the unspecified lodestar.

The lodestar calculation "anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1095.) Failure to specify the lodestar is not error per se, but it does hinder appellate review of the award. (See *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1249–1250.) On remand, it would be best to have clear findings as to the lodestar and the market rate upon which it is based.

2. Multiplier Factors

a. Counsel's Experience (Error #1)

The trial court's ruling states: "While the rates requested are not far out of line with current large firm attorney fee rates for experienced lawyers in the Los Angeles area, it is not disputed that neither counsel had much experience with ground water litigation and that the rates requested should be reduced to reflect that fact. The counsel did have expertise in class action law and practice but not water law and have had to consult with other lawyers having that expertise as well as conduct legal research."

McLachlan and O'Leary argue there is no evidence of them consulting with other lawyers having expertise in "water law." We agree. Moreover, in a declaration filed by McLachlan to support the second postjudgment fees motion, he attested no such consulting ever occurred.

It was counsel for the *Willis* Class who hired a lawyer named Gregory L. James on a consultancy basis. Attorney James submitted a declaration in support of Willis's postjudgment fees motion, stating he had "served as consulting attorney … on water law and other issues involved in this litigation, to Krause, Kalfayan, Benink & Slavens LLP,"

i.e., Willis's counsel, from April 2008 through December 2015. James spent hundreds of hours on the case, which may explain why the consultation was viewed as a relevant factor. Regardless of why it was deemed probative, reliance "on a fact wholly unsupported by the evidence" exceeds the limits of a trial court's discretion. (*Waterwood Enterprises, LLC v. City of Long Beach*, *supra*, 58 Cal.App.5th at p. 966; accord, *Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 531 [factual findings upon which discretionary rulings are based must be supported by substantial evidence].)

The trial court was also incorrect in stating, "[I]t is not disputed that neither counsel had much experience with ground water litigation and that the rates requested should be reduced to reflect that fact." The issue *was* disputed, and McLachlan insisted he had relevant experience justifying a rate *higher* than $720 per hour. In his supporting declaration, McLachlan wrote:

> "I also have extensive experience litigating complex cases involving groundwater, having worked on all but one Superfund case filed in Los Angeles County over the past twenty years .... While I do not have a degree in hydrogeology, I have substantial experience in the field over many years of time working with hydrogeologists and hydrologists in a variety of contexts. I have taught a 'groundwater for lawyers' class on several occasions, and have published papers on matters impacting groundwater."

In the supporting memoranda, McLachlan described his years of working on "Superfund"[8] cases as "extensive groundwater litigation experience." He further claimed, "This extensive experience in groundwater litigation has been directly relevant

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[8]"'Superfund' refers to the trust fund created by CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 et seq.], but also is used to refer to the law generally." (*Otay Land Co., LLC v. U.E. Limited, L.P.* (2017) 15 Cal.App.5th 806, 822, fn. 7.) California's Superfund statute (Health & Saf. Code, § 25300 et seq.), which is "a counterpart to the federal Superfund statute, ... sets forth a comprehensive regulatory scheme and authorizes the Department [of Toxic Substances Control], among other things, to investigate, remove and/or remediate hazardous substances at contaminated sites." (*Van Horn v. Department of Toxic Substances Control* (2014) 231 Cal.App.4th 1287, 1290.)

and indeed has been essential to litigating this matter over a nearly five year period in which Class Counsel was deprived of a groundwater expert to consult with on technical hydrologic issues." The latter point was emphasized elsewhere in his declaration: "On a particle [*sic*] day-to-day level, not having access to [a hydrogeology] expert for over seven years on a case of this technical nature, made it extremely challenging to litigate. If I did not have more than 20 years' experience working with hydrologists, hydrogeologists, and engineers, as well as my own science background, it would have been impossible to adequately represent the Class."

None of McLachlan's above-described experience was acknowledged or addressed in the motion ruling. In light of the erroneous statement regarding consultation with water law attorneys, the mischaracterization of the issue as undisputed suggests the trial court further conflated the experience of Wood's counsel and Willis's counsel. The fact separate fee motions by Willis and Wood were under simultaneous consideration adds to the likelihood such a mix-up occurred.

District 40 argues McLachlan admitted his lack of experience during the April 2016 motion hearing, which is an overstatement. The trial court asked McLachlan why he took the case in 2008 after having declined to get involved the previous year. In a lengthy response, McLachlan referred to the year 2007 and said, "at that time, you know, I knew a little bit about water rights, but not that much."

The quoted statement partially supports the trial court's rationale in terms of the lack of expertise in water law. However, the trial court considered the "expertise" factor in relation to counsel's alleged need to consult with water law specialists—which never happened—and the conducting of "legal research." No examples of such research were provided.

McLachlan's billing records show he spent 1.5 hours researching "several issues in water law" in August 2007. In May and June 2008, he spent a combined 8.9 hours reviewing "Hutchins book on CA water law." In January 2009, he spent 0.5 hours

performing "research on correlative rights." An additional 6.1 hours of research related to water law was performed between 2011 and 2014. The total amount of "water law" research appears to be approximately 17 hours.

District 40 argues McLachlan also "billed 21.9 hours researching rural residential use of water" in 2011, but it unsuccessfully made the same argument in 2013 when opposing the fee award for the 2013 Settlement. In a sworn declaration, McLachlan explained it was not "legal research" but "technical research on numerous water use issues impacting the Class …."[9] Either way, 38.8 hours of research (21.9 +17.0) is a fraction of one percent of the 5,815 total hours (rounded) worked during the eight-year period ending in January 2016 and would not reasonably justify a 30 percent reduction of the lodestar.

b. The "Great Recession"

The trial court's second reason for reducing the award was as follows:

> "Counsel became involved in the case in middle 2008, and while they seek a high level of fees for the entire 8 years, the court concludes that rates fell in 2008 and gradually rose from that reduced level over the period of the last eight years. [¶] In 2008, as the entire country entered into what has been called 'the Great Recession,' law firms were dissolving, some were declaring bankruptcy, lawyers were being laid off or fired, salaries reduced, clients were looking for firms offering lower fees, and many lawyers were leaving the profession. Based on the observations of the court, averaging the hourly rate acknowledging these factors, along with rising fees more recently, the court will approve a fee rate for each counsel of $500.00 hourly."

Wood complains the trial court "created this factual record out of whole cloth based on the trial court's personal perspective and memory." The argument is misguided insofar as it suggests trial judges cannot rely on anecdotal evidence of their own personal

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[9]In Wood's reply brief on appeal, McLachlan reiterates "that the work performed was on scientific research and data relating to the issue of how rural residential water use has been calculated, as well as the actual analysis of data gathered in this case."

knowledge. (See *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1009 ["The court may rely on its own knowledge and familiarity with the legal market in setting a reasonable hourly rate"].) However, Wood makes a valid point in noting the trial judge was on special assignment from Santa Clara County. The record indicates the trial judge retired in late 2009 but continued to preside over the AVGC through the postjudgment proceedings of 2016.

The "Great Recession" is generally considered to have lasted from December 2007 through June 2009.[10] (Rich, *The Great Recession*, Federal Reserve History (Nov. 22, 2013) <www.federalreservehistory.org/essays/great-recession-of-200709> [as of Aug. 24, 2021].) Considering (1) the trial judge was from a different part of the state and (2) the AVGC was presumably the only matter over which he presided from 2010 onward, it is difficult to reasonably infer the trial court's knowledge of the market rates in Los Angeles.[11] In any event, the record does not substantiate the notion that $500 per hour represents the literal "averaging" of the prevailing market rates from 2008 to 2016.

District 40 argues the hourly rate of $500 is supported by *Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852 (*Redondo*). The *Redondo* opinion affirmed a fee award made in a Los Angeles Superior Court case. (*Id.* at p. 855.) The award was for work performed in 2010. (*Id.* at pp. 860, 871.)

Counsel for the *Redondo* plaintiff "provided the court with declarations describing their professional backgrounds that included special expertise in the areas of environmental, land use and administrative law." (*Redondo*, *supra*, 203 Cal.App.4th at p. 871.) "Attached as exhibits to lead counsel's declaration were billing surveys conducted

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[10]Based on this time frame, McLachlan and O'Leary collectively worked 894 hours (rounded) during the Great Recession. That is approximately 15.4 percent of the 5,815 total hours (rounded) worked through January 2016.

[11]Wood's expert, Richard M. Pearl, stated in his declaration, "[T]he fact is that hourly rates charged in the Los Angeles area are generally higher than Northern California rates."

by a national law journal reflecting that for law firms in Los Angeles handling environmental and land use cases, hourly partner rates ranged from $475 to $850 and hourly associate rates from $275 to $505." (*Ibid.*) The superior court calculated the lodestar using partner rates of $500–$550 per hour, stating the rates were "at the 'high end' of the scale" but justified because, among other reasons, "lead counsel was a leading expert" in his field. (*Id.* at pp. 871, 872.)

At best, *Redondo* shows $500 per hour was in the range of prevailing market rates for Los Angeles in 2010, i.e., one year into the market's recovery from the Great Recession. Wood's evidence showed market rates were significantly higher in the following years. It is thus unclear how the trial court arrived at the hourly rate of $500 for all work performed through 2016, and we would again encourage greater clarity on remand. (See *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 101 ["A trial court's award of attorney fees must be able to be rationalized to be affirmed on appeal"].)

c. The "*Pro Bono Publico*" Standard (Error #2)

The trial court's last reason for reducing the award was because "[w]hen counsel volunteer for cases such as this there also must be an element of *pro bono publico* involved, especially when the obligor who will pay the fees is a public entity supported by tax dollars. As officers of the court, lawyers are not (or should not be) mere mercenaries."

The trial court's rationale implies that lawyers who take on public interest litigation on a contingency basis should expect to be underpaid. This conflicts with settled legal principles. "California law requires that attorneys' fee awards be 'fully compensatory.'" (*Roth v. Plikaytis* (2017) 15 Cal.App.5th 283, 290.) The requirement has been emphasized in the context of public interest litigation. (See, e.g., *Ketchum v. Moses*, *supra*, 24 Cal.4th at pp. 1133–1134; *Redondo*, *supra*, 203 Cal.App.4th at p. 873

["An award of attorney fees under fee-shifting statutes is computed based on the reasonable market value of services *even if* the attorney has performed services pro bono" (italics added)].) Simply stated, "public interest litigation '"should not have to rely on the charity of counsel ...." [Citation.]' [Citation.] The controlling factor, again, is the fair market value of the legal work which was performed." (*Rogel v. Lynwood Redevelopment Agency* (2011) 194 Cal.App.4th 1319, 1332 (*Rogel*); accord, *Redondo*, *supra*, at p. 873.)

The trial court's reliance on a "*pro bono publico*" standard may explain why it awarded fees at a rate "averag[ed]" over an eight-year period instead of the prevailing market rate. Wood's expert, Richard M. Pearl, declared: "In my experience, fee awards are almost always determined based on current rates, *i.e.*, the attorney's rate at the time a motion for fees is made, rather than the historical rate at the time the work was performed. This is a common and accepted practice to compensate attorneys for the delay in being paid."

This district addressed the factors of contingent risk and delay in *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359 (*Horsford*). There, a trial court had opined the standard for awarding "reasonable attorneys' fees" does "not necessarily [require] adequate compensation." (*Id.* at p. 395.) The appellate panel explained: "It has long been recognized ... that the contingent and deferred nature of the fee award in a civil rights or other case with statutory attorney fees requires that the fee be adjusted in some manner to reflect the fact that the fair market value of legal services provided on that basis is *greater* than the equivalent noncontingent hourly rate." (*Id.* at pp. 394–395, italics added.)

The contingent risk factor "is '[o]ne of the most common fee enhancers' and an important consideration in the multiplier analysis." (*Cates v. Chiang* (2013) 213 Cal.App.4th 791, 823; quoting *Graham v. DaimlerChrysler Corp*, *supra*, 34 Cal.4th at p. 579.) """A lawyer who both bears the risk of not being paid and provides legal services

is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases."'" (*Horsford*, *supra*, 132 Cal.App.4th at p. 395, quoting *Ketchum v. Moses*, *supra*, 24 Cal.4th at pp. 1132–1133.)

The *Horsford* opinion further states: "[T]he market value of the services provided by plaintiffs' counsel in a case of this magnitude must take into consideration that any compensation has been deferred for [multiple] years from the time an hourly fee attorney would begin collecting fees from his or her client [and] that the demands of the present case substantially precluded other work during that extended period, which makes the ultimate risk of not obtaining fees all the greater (since the attorneys must use savings or incur debt to keep their offices afloat and their families fed during the years-long litigation) …." (*Horsford*, *supra*, 132 Cal.App.4th at pp. 399–400.)

In McLachlan's declaration, he claimed to have suffered "profound" financial and emotional hardship due to the factors of contingent risk and delay. He discussed being unable to take on other work (he "had to turn down" at least 10 cases), borrowing "sums in excess of six-figures" to cover litigation costs (for which he "incurred nearly $30,000 in interest"), and not receiving any compensation in the AVGC until nearly six years into his representation of the Wood Class. McLachlan declared those circumstances led "directly to [him] losing [his] long-time home in 2012," i.e., prior to securing a partial recovery of fees and costs in the 2013 Settlement.

At the motion hearing, the trial court noted "there was a considerable sacrifice in undertaking the adjudication." In remarks directed toward District 40's attorney, the trial court said, "I think even you[, counsel,] have to be appreciative of the sacrifice that a lawyer undertakes when he takes a case in a public nature that will not assure the lawyer that he will ever be paid or be reimbursed for costs that come out of the lawyer's pocket. That's a sacrifice." The judge's recognition of the contingent risk, combined with other factors supporting a positive multiplier or at least compensation at prevailing market

rates, indicate there is a reasonable chance the pro bono publico error affected the motion ruling. (See *Serrano*, *supra*, 20 Cal.3d at p. 49 [relevant factors include "the novelty and difficulty of the questions involved" and "the extent to which the nature of the litigation precluded other employment by the attorneys"].)

Finally, we note the pro bono publico standard was cited in connection with the award being paid by "public entit[ies] supported by tax dollars." District 40 argues the trial court properly considered its status as a public entity. It is not uncommon for judges to factor the impact on taxpayers into a decision to deny a request for a positive multiplier or to limit such an enhancement to a modest percentage. However, applying a *negative* multiplier for that reason, i.e., reducing the lodestar because the payor is a government entity, is a far more controversial proposition.

In *Serrano*, a trial court had enhanced a fee award by a positive multiplier of approximately 1.4 after considering several competing factors; "some militated in favor of augmentation and some in favor of diminution." (*Serrano*, *supra*, 20 Cal.3d at p. 49.) The California Supreme Court listed seven of those factors, which were approvingly described as "relevant." (*Ibid.*) The fourth factor was "the fact that an award against the state would ultimately fall upon the taxpayers." (*Ibid.*)

In *Horsford*, our district concluded "the trial court's reliance on the public-entity status of the defendant to completely deny an enhancement multiplier … was an abuse of discretion." (*Horsford*, *supra*, 132 Cal.App.4th at p. 400.) The opinion distinguishes *Serrano*, noting "the *Serrano* court did not say and has not said that a public entity should not fully compensate plaintiffs' attorneys when litigation has been necessary to remedy intentional race discrimination by the public entity." (*Ibid.*) The *Horsford* case is distinguishable because here there was no racial discrimination or similarly egregious behavior. However, in *Rogel*, *supra*, 194 Cal.App.4th 1319, Division Eight of the Second Appellate District reached the same conclusion as *Horsford* pursuant to a more comprehensive analysis.

The *Rogel* court agreed with *Horsford* and further relied on *Schmid v. Lovette* (1984) 154 Cal.App.3d 466 as standing for the principle "that it [is] an abuse of discretion to rely on the public entity status of the defendant to deny a positive multiplier." (*Rogel*, *supra*, 194 Cal.App.4th at p. 1331.) It also interpreted the high court's *Serrano* decision as "preclud[ing] a rule which awards less than the fair market value of attorneys' fees merely because the case was filed against a government agency." (*Rogel*, at p. 1332.) The opinion thus holds "a trial court is not permitted to use a public entity's status to negate a lodestar that would otherwise be appropriate." (*Id.* at p. 1331.)

We need not determine the extent to which a party's government entity status may be considered in the multiplier analysis. However, this district's precedent and other appellate decisions indicate the financial impact of an award on such parties and their constituents cannot be the sole or primary reason for reducing the lodestar or declining to apply a positive multiplier.[12]

D. Remand is Necessary

In summary, Wood has demonstrated error in the form of reliance on inapplicable criteria and facts unsupported by the record. For the reasons discussed, it is reasonably probable the errors affected the ruling. Accordingly, and because additional circumstances make it "unclear whether the trial court's award of attorney fees is consistent with the applicable legal principles," the matter will be remanded for "further

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[12]See *Rogel*, *supra*, 194 Cal.App.4th at pages 1331–1332 (holding "the fact that the fee award must be paid from the limited budget of a public entity 'does not constitute a special circumstance rendering [a lodestar] fee unjust'"); *Horsford*, *supra*, 132 Cal.App.4th at page 401 (holding trial courts cannot use "the 'public entity' factor to wholly negate the enhancement of a lodestar that otherwise would be appropriate after consideration of the contingency and delay factors"); cf. *Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1242–1243 (no abuse of discretion where taxpayer impact was among several factors considered in denial of request for a positive multiplier); *San Diego Police Officers Assn. v. San Diego Police Department* (1999) 76 Cal.App.4th 19, 24 (affirming a negative multiplier where prevailing party "had achieved very limited success" on a matter that "did not involve complex issues of law"; did not preclude counsel from working on other cases; "did not involve a contingency fee; and the award of fees would ultimately be borne by the taxpayers").

consideration [of the amount to be awarded] and amplification of its reasoning." (*In re Vitamin Cases*, *supra*, 110 Cal.App.4th at p. 1052; accord, *Roe v. Halbig*, *supra*, 29 Cal.App.5th at p. 312; *Nichols v. City of Taft*, *supra*, 155 Cal.App.4th at p. 1242.)

IV. Costs

A. Entitlement to Costs

District 40 argues Wood was not a prevailing party for purposes of Code of Civil Procedure section 1032 and, therefore, was not entitled to recover costs. However, as with the attorney fees, the trial court ruled Wood was entitled to costs on two independent grounds, i.e., "based upon the language in the [Global Settlement] … and the prevailing party doctrine." We have affirmed the trial court's ruling based on the Global Settlement. Therefore, the claim fails.

B. Denial of Motion to Strike the Memorandum of Costs

District 40 also seeks reversal of the costs award on procedural grounds, claiming the trial court erred by denying its motion to strike Wood's memorandum of costs. We are not persuaded.

1. Additional Background[13]

On December 28, 2015, District 40 served a notice of entry of judgment. On January 8, 2016, the trial court held an unreported telephonic conference "to discuss Wood Class attorney's fees and incentive awards to the class representative and any other issues outstanding." The quoted language is taken from a minute order issued the same day. The minute order set a schedule for "fee motions related to the Willis Class Settlement [and] the Wood Class/Small Pumper Settlement," stating, "[M]oving papers to be filed by January 22, 2016."

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[13]The factual and procedural background on the motion to strike is complicated, especially with regard to a counterargument by Wood alleging defects in the notice of entry of judgment. In the interest of judicial economy, since we agree with Wood's main position, we do not address the other contentions.

On January 22, 2016, the Wood Class and District 40 filed a stipulation "to move the filing date for the Motion for Attorneys' Fees and Award of Incentive Payment from January 22, 2016 to January 27, 2016." The stipulation was signed by counsel for both parties. On January 27, 2016, Wood filed the previously discussed "Motion for Award of Attorney Fees, Costs and Incentive Award." (Boldface and some capitalization omitted.)

The moving papers clearly indicated Wood's counsel were seeking both fees and costs. Costs were mentioned several times and discussed under a separate heading. The amount claimed was $75,242.06. In McLachlan's supporting declaration, he identified and attached a 13-page itemized statement of all costs incurred by his office in the AVGC from May 5, 2008, through January 27, 2016. In O'Leary's supporting declaration, he identified and attached a one-page itemized statement of all costs incurred by his office in the AVGC from October 7, 2008, through December 23, 2015.

In District 40's opposition, it challenged Wood's entitlement to costs but did not argue the request for costs was untimely. On April 25, 2016, the trial court ruled in Wood's favor. The order states, in pertinent part, "Counsel for the Wood Class is directed to file a Memorandum of Costs under the provisions of the Code of Civil procedure." The judge later explained this language was intended as a directive to use the approved Judicial Council forms because counsel's declarations and attached documents "were not clear to the court." McLachlan claimed to have interpreted the statement the same way. Accordingly, on May 11, 2016, McLachlan filed Wood's memorandum of costs and a related worksheet using Judicial Council forms MC–010 and MC–011.

On May 31, 2016, District 40 filed a motion to strike the memorandum of costs as untimely. Relying on rule 3.1700(a)(1), it argued Wood's cost memorandum was due 15 days after service of the notice of entry of judgment, i.e., January 12, 2016. Although the trial court had set January 22, 2016, as the deadline for Wood's "fee motion[]," and the

parties had stipulated to extending the deadline by five days, District 40's motion implied those dates did not pertain to any requests for costs.

When the motion to strike was heard, the trial court stated its recollection and understanding of the prior events: "It seems to me that what was agreed to here was for the court to hear the motion concerning fees and costs in the manner in which it was filed. The court then became dissatisfied with the manner in which the costs—partly in response to objections by District 40—in the form in which the cost request was made and asked for it in a different form. [¶] [T]o claim now that it was untimely because it was late really belies … what the parties understood at the time that this occurred."

In its order denying the motion to strike, the trial court found the parties had "implicitly agreed that Wood Class counsel could file its motion for fees and costs on January 2[2], 2016," and later stipulated to extending the deadline by several days. The trial court noted Wood's motion included "declaration[s] setting forth costs expended to that date with attachments." The order further states, "The parties agreed when filings were to occur and no timeliness objections were made. The court deems such later objections to have been waived …." Accordingly, the motion to strike was denied.

2. Law and Analysis

"A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of service of the notice of entry of judgment …." (Rule 3.1700(a)(1).) The deadline is not jurisdictional. (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 880; *Sanabria v. Embrey* (2001) 92 Cal.App.4th 422, 426.) Therefore, extensions of time are permitted. (Rule 3.1700(b)(3).) Stipulated extensions "must be confirmed in writing, specify the extended date for service, and be filed with the clerk. In the absence of an agreement, the court may extend the times for serving and filing the cost memorandum … for a period not to exceed 30 days." (*Ibid.*)

Preliminarily, it is questionable whether the deadlines of rule 3.1700 applied given the parties' contractual agreement for fees and costs to be awarded in amounts determined by the trial court. In *Gorman v. Tassajara Development Corp.*, *supra*, 178 Cal.App.4th 44, the litigants reached a "global settlement" under which it was agreed the plaintiffs were "entitled to recover costs as authorized by law as if they were prevailing parties in the Action." (*Id.* at pp. 52–53.) The plaintiffs then filed a "'Motion for Attorneys' Fees and Costs.'" (*Id.* at p. 56.) The motion was opposed, but the plaintiffs argued the defendant forfeited any objections to their claimed costs by not filing a motion to tax costs. (*Id.* at p. 68.) A motion to tax costs is governed by rule 3.1700 and must be filed "15 days after service of the cost memorandum." (*Id.*, subd. (b)(1).) However, the appellate court held, "The wording of the settlement agreement and the subsequent conduct of the parties provided substantial evidence for the trial court to conclude that the parties had stipulated to an alternative procedure for awarding costs, dispensing with the usual formalities of a complete cost memo and a motion to tax costs." (*Gorman*, *supra*, at p. 70.)

Assuming the applicability of rule 3.1700, District 40's claim involves two issues. The first is what constitutes a "memorandum of costs" for purposes of rule 3.1700(a)(1). As aptly framed by Wood, the question is whether a party claiming costs is required to use certain Judicial Council forms. If the documents filed with Wood's motion on January 27, 2016, qualified as a memorandum of costs, the second issue is whether the filing was timely.

The difference between mandatory and optional forms is explained in *In re Marriage of Sharples* (2014) 223 Cal.App.4th 160 at page 166:

> "Rules 1.30, 1.31, and 1.35 distinguish 'mandatory forms' from 'optional forms.' Mandatory judicial forms '*must* be used by all parties'; optional forms '*may* be used by parties.' (Rules 1.31(a), 1.35(a), italics added.) Mandatory forms are required to include the words, '"Form Adopted for Mandatory Use," "Mandatory Form," or "Form Adopted for Alternative

Mandatory Use"' (rule 1.31(c)); optional forms must bear the words, '"Form Approved for Optional Use" or "Optional Form"' (rule 1.35(c))."

The Judicial Council has approved a form entitled "Memorandum of Costs (Summary)" (MC-010) and a corresponding worksheet (MC-011). Both say, "Form Approved for Optional Use," i.e., they are not mandatory. (Rule 1.35(a), (c); see *Kaufman v. Diskeeper Corp*, (2014) 229 Cal.App.4th 1, 9 [referring to MC-010 and MC-011 as "optional forms"].) Therefore, the timeliness of Wood's cost memorandum was not dependent upon the use of these forms.

Rule 3.1700(a)(1) states, "The memorandum of costs must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred in the case." On January 27, 2016, McLachlan and O'Leary filed and served sworn declarations identifying and attaching itemized statements of their costs incurred in the AVGC. The trial court's ruling necessarily implies a finding that counsel's declarations and attachments satisfied the requirements of rule 3.1700. District 40 fails to demonstrate error in this regard. (See *Pacific Southwest Airlines v. Dowty-Rotol, Ltd.* (1983) 144 Cal.App.3d 491, 495 [affirming denial of motion to strike based on plaintiff's substantial compliance with requirements for cost memorandum]; cf. *California Recreation Industries v. Kierstead* (1988) 199 Cal.App.3d 203, 209 [no prejudicial error where plaintiffs requested attorney fees in memorandum of costs instead filing a noticed motion].)

The next question is whether Wood's cost bill needed to be filed on or before January 12, 2016, i.e., within 15 days of the notice of entry of judgment. District 40 notes it did not stipulate to the extension for Wood's fees motion until January 22, 2016, implying the cost memorandum was already late. District 40 further contends the stipulation did not apply to requests for costs. However, the trial court had already extended the filing deadline beyond the 15-day window in its order dated January 8,

2016. The trial court also found the parties understood the extension was for a motion regarding fees *and* costs.

The trial court's findings appear partially based on its knowledge of what occurred during the unreported conference on January 8, 2016. They are also impliedly based on credibility determinations, which are not subject to appellate review. (See *Nissan Motor Acceptance Cases* (2021) 63 Cal.App.5th 793, 812 ["we may not second-guess the trial court's credibility determinations"], 820 ["we must defer to the trial court's credibility findings"].) Supporting the trial court's findings are the fact the 2015 Settlement contemplated a forthcoming "*motion* for attorneys' fees and costs" (italics added), and District 40's failure to dispute the timeliness of the initial request for costs. "When, as here, 'the evidence gives rise to conflicting reasonable inferences, one of which supports the findings of the trial court, the trial court's finding is conclusive on appeal.'" (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 623.)

Furthermore, regardless of the original intention behind the scheduling order of January 8, 2016, the trial court had authority to extend the deadline for Wood's cost memorandum by up to 30 days. (Rule 3.1700(b)(3).) Such extensions may be granted after the initial 15-day deadline has expired. (Cf. *Robinson v. U-Haul Co. of California* (2016) 4 Cal.App.5th 304, 326 [trial court may grant extension of rule 3.1702 deadline for fees motions after the deadline has passed]; *Lewow v. Surfside III Condominium Owners Assn., Inc.* (2012) 203 Cal.App.4th 128, 135 [same].) Wood's counsel filed declarations with attached costs summaries within 30 days of service of the notice of entry of judgment. By ruling on the merits of Wood's claim of entitlement to costs, the trial court effectively extended the cost memorandum deadline within the limits permitted by rule 3.1700(b)(3). (See *Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011, 1016, fn. 2 [implied extension of rule 3.1700 deadline under similar circumstances].)

Wood's memorandum of costs and worksheet, filed on May 11, 2016, are reasonably construed as court-ordered supplements to the original costs memoranda

timely filed on January 27, 2016. In any event, District 40 did not file its motion to strike until May 31, 2016. The memorandum of costs was electronically filed and served 20 days earlier. Pursuant to rule 3.1700(b)(1), "Any notice of motion to strike or to tax costs must be served and filed 15 days after service of the cost memorandum. ... If the cost memorandum was served electronically, the period is extended as provided in Code of Civil Procedure section 1010.6(a)(4)." The latter provision allows for only two extra court days. (Code Civ. Proc., § 1010.6, subd. (a)(4)(B).) These facts independently support the trial court's finding of waiver/forfeiture. For all the above reasons, the motion to strike was properly denied.

C. Amount of Costs Awarded

Wood alleges the trial court erred by taxing specific costs. We disagree with those arguments. However, there are discrepancies and computational errors in Wood's own costs requests and in the trial court's award. The trial court's ruling is internally contradictory to a degree warranting remand for further consideration and clarification. Except as specified in this discussion, remand proceedings on the issue of costs shall be limited to reconciling the arithmetical inconsistencies.

1. Discrepancies and Computational Errors

In the initial fees and costs motion, Wood's counsel claimed to have incurred $92,280.14 in total costs from May 5, 2008, through January 27, 2016. This figure did not account for the 2013 Settlement. However, McLachlan declared he and O'Leary had already recovered $17,038.08 in costs from the 2013 Settlement and were thus seeking adjusted costs of $75,242.06.

According to other court documents, the costs recovered in the 2013 Settlement totaled $17,037.71, not $17,038.08. We surmise McLachlan was rounding up and mistakenly typed ".08" instead of ".00." The difference of $0.37 is de minimis, but it is noted for the sake of completeness.

McLachlan later filed a supplemental declaration claiming his office had incurred additional costs of $1,397.42 through March 25, 2016, thus bringing the total adjusted costs up to $76,639.48.

On May 11, 2016, Wood's counsel filed their memorandum of costs and worksheet (the "cost bill") using Judicial Council forms. The total amount of *nonadjusted* costs claimed on the form was $90,226.86. The next day, McLachlan filed a brief to explain certain aspects of the cost bill. The brief reads, in relevant part:

> "The cost bill filed on May 11, 2016 totals $90,226.86 and, as noted above, includes costs for both Class Counsel. That sum is larger than [the amount requested]. In 2013, Class Counsel were paid a portion of their costs pursuant to that prior settlement. The balance of costs being sought … is $76,639.48."

McLachlan's brief cited to his March 2016 declaration as evidence of the adjusted total of $76,639.48. However, when the costs recovered in the 2013 Settlement (using McLachlan's figure of $17,038.08) are added to that adjusted total, the sum is $93,677.56. To reiterate, the amount of nonadjusted costs identified on the cost bill was $90,226.86, which is what the trial court used to calculate the award (see below). In the appellate briefing, Wood's counsel maintain the total adjusted costs claimed through May 2016 was $76,639.48, not realizing the trial court understood the amount to be only $73,188.86 based on their cost bill and the rounded sum of costs recovered in the 2013 Settlement ($90,226.86 – $17,038.00 = $73,188.86).

On May 31, 2016, District 40 moved to tax "at least $16,119.35 in prohibited costs." On June 27, 2016, Wood's attorneys moved for a supplemental award of fees and costs. They requested additional costs of $1,838.37 above the amount claimed in the cost bill. The trial court ruled on both motions in an order dated August 15, 2016.

As explained, the trial court adopted the numbers provided in the cost bill and rounded the 2013 Settlement recovery to $17,038. It thus assumed the adjusted costs through May 2016 were $73,188.86. In one part of the order, the trial court said it was

taxing costs in the amount of "$24,031.84," resulting in an award of "$49,157.02" for costs incurred through May 2016. The motion for additional costs of $1,838.37 was granted. Although not expressly stated in the order, those figures indicate a total award of $50,995.39.

The problem is that elsewhere in the ruling, the trial court's breakdown of taxed items far exceeds the referenced sum of $24,031.84. As detailed in the written order, costs were taxed as follows:

Expert witness fees not ordered by court:	$1,625.00
Copy costs other than exhibits:	$4,667.64
Postage and mailing:	$1,717.98
Transcripts not ordered by the court:	$2,073.33
Parking:	$2,011.31
Air Fare:	$5,579.97
Westlaw/Lexis:	$9,532.15
"Attorney Service":	$1,518.81
Taxis:	$609.65
Hotel:	$623.56
Rental Car:	$144.80
Federal Express:	$2,112.37
"Consultant Fees re: Class List":	$1,335.00
Mileage:	$472.42
"Veritext Call":	$90.00
Total	**$34,113.99**

As an added wrinkle, the amount listed for Federal Express charges was clearly a typographical error. Federal Express costs were claimed in the amount of $212.37, not $2,112.37. Even accounting for this $1,900 discrepancy, the costs taxed on a category-by-category basis total $32,213.99, not $24,031.84. Therefore, under the trial court's assumption of Wood's claimed adjusted costs being $75,027.23 ($73,188.86 + $1,838.37), the total award would be $42,813.24 ($75,027.23 – $32,213.99).

An appellate court may correct clerical errors on its own motion to reflect the true facts. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Here there are discrepancies we

cannot explain. Therefore, remand is appropriate to allow the trial court to recalculate and clarify the amount of costs taxed and awarded.

2. Wood's Claims re: Taxing of Costs

Wood's counsel argue the trial court erred by taxing costs in the categories of (1) expert witness fees not ordered by the court; (2) copy costs other than trial exhibits; (3) postage and mailing expenses; and (4) trial transcripts not ordered by the court. They argue the trial court should have exercised discretion to allow the costs pursuant to Code of Civil Procedure section 1033.5, subdivision (c)(4). However, recovery of those categories of items is expressly disallowed by subdivision (b) of the same statute. A trial court does not have discretion under subdivision (c)(4) of Code of Civil Procedure section 1033.5 to allow costs prohibited under subdivision (b). (See *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1148 ["subdivision (c)(4) describes items that 'may be allowed or denied in the court's discretion' if not enumerated in subdivisions (a) and (b)"].) Therefore, the argument fails.

Counsel further contend the trial court should have discretionarily allowed various costs not expressly prohibited by statute. The trial court declined to do so because the cost bill provided "no explanation that would justify inclusion as allowable costs for the specified items." The challenge to this ruling is insufficiently developed and rejected for that reason (see *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["An appellate court is not required to examine undeveloped claims"]), except for one category substantively discussed in the opening brief: travel expenses Wood alleges were "directly incurred at the request of the trial court."

"Where costs are not expressly allowed by the statute, the burden is on the party claiming the costs to show that the charges were reasonable and necessary." (*Foothill-De Anza Community College Dist. v. Emerich* (2007) 158 Cal.App.4th 11, 29.) The issue "'presents a question of fact for the trial court and its decision is reviewed for abuse of

discretion.'" (*Id.* at pp. 29–30.) Wood argues the trial court should have awarded costs for things like travel to Sacramento for settlement conferences, but the dates and amounts of those costs are not specified in the appellate briefing. The cost bill was even more generalized, e.g., claiming $5,579.77 for "Airfare."

In order to determine which expenses in the cost bill pertained to court-mandated proceedings in Northern California, the trial court would have needed to cross-reference documents counsel had filed several months earlier and puzzle out how discrete line items related to, and added up to match, the lump sums claimed on the Judicial Council form. The endeavor might have revealed certain travel was unavoidable, but the reasonableness of a given expenditure would not necessarily have been apparent. Just as an appellate court is not required to "scour the record unguided" (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287), a trial court need not perform such detective work—especially where, as here, the record is truly massive. Wood fails to show the trial court abused its discretion by requiring greater specificity than was provided.

Finally, counsel argues the disallowed costs should have been "allocated" to the 2013 Settlement to avoid conferring a "windfall" to District 40. This argument was touched upon at the motion hearing, with McLachlan asking the trial court to assume statutorily disallowed costs had already been paid by the parties who settled in 2013. The court responded, "Well, I think that in terms of the earlier payment [of] costs, that does not validate, necessarily, any [unrecoverable] costs."

The allowance of costs to which parties are not entitled as a matter of right, and any apportionment of the same, are discretionary decisions. (See *El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc.* (2007) 150 Cal.App.4th 612, 617.) The trial court's ruling "should not be disturbed on appeal unless it is '"'clearly wrong.'"'" (*Ibid.*) Wood's argument does not meet this standard.

V. Orders re: Periodic Payments

The trial court made conflicting rulings as to the Public Water Suppliers' ability to satisfy the fees and costs award in annual installments. The Wood Class and District 40 respectively appeal the orders made in the opposing party's favor. Wood's positions are correct.

A. Government Code Section 970.6

"The Government Code establishes the general procedures for the payment of claims for money or damages against local public entities. (Gov. Code, §§ 970–971.2.) Specifically, Government Code section 970.6 provides for spreading payments over a 10-year period." (*Community Redevelopment Agency v. Force Electronics* (1997) 55 Cal.App.4th 622, 628, fn. omitted.) The relevant language is as follows:

> "(a) The court which enters the judgment shall order that the governing body pay the judgment, with interest thereon, in not exceeding 10 equal annual installments if both of the following conditions are satisfied:
>
> "(1) The governing body of the local public entity has adopted an ordinance or resolution finding that an unreasonable hardship will result unless the judgment is paid in installments.
>
> "(2) The court, after hearing, has found that payment of the judgment in installments as ordered by the court is necessary to avoid an unreasonable hardship." (Gov. Code, § 970.6, subd. (a).)

Wood's counsel alluded to Government Code section 970.6 (section 970.6) during the attorney fees hearing on April 1, 2016, in relation to what McLachlan called the Small Districts' "poverty argument." He argued their alleged budgetary constraints did not justify a reduction of the fee award since "they have a government code election. … They can spread this out over ten years." Subsequently, in the order dated April 25,

2016, the trial court said all Public Water Suppliers "may opt to pay such fees or costs over a ten year period in accord with the law."[14]

On June 28, 2016, the trial court issued its order clarifying the allocation of liability for Wood's fees and costs. Over Wood's objection, the order included language stating District 40 and the Small Districts "shall be entitled to pay this judgment in 10 equal payments over a period of 10 years." When the issue came up again at a subsequent hearing, the trial court said, "I think, frankly, what I was thinking at the time was that they would have to do whatever is required by the code in order to take advantage of that."

In the order dated August 15, 2016, the trial court made an apparent effort to clarify its prior rulings: "The court has previously determined that the fee and cost award is several and not joint. The percentage of each obligation is as previously ordered. The court has also provided that the public entity parties against whom fee and costs are awarded may opt in accordance with the law to make payments over a ten year period with interest in accordance with the law. See Government Code Section §970.6."

District 40 makes a perfunctory argument for the earlier orders to be affirmed, claiming the trial court declared its "right to make periodic payments." But clearly the statutory requirements were not satisfied. There is no evidence the governing body of District 40, i.e., the Los Angeles County Board of Supervisors, "adopted an ordinance or resolution finding that an unreasonable hardship will result unless the judgment is paid in installments." (Gov. Code, § 970.6, subd. (a)(1).) The trial court did not hold a section

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[14]In the appellate briefing, filed before the Small Districts reached a settlement with Wood, it is argued McLachlan's statement was a binding admission of the Public Water Suppliers' entitlement to relief under section 970.6. We reject this argument because the statement did not unequivocally concede entitlement to relief as opposed to the ability to seek such relief. (See *Stroud v. Tunzi*, *supra*, 160 Cal.App.4th at p. 385 ["An unclear or equivocal statement does not create a binding judicial admission"].) Moreover, the comment exclusively pertained to the Small Districts and was intended to rebut their so-called "poverty argument." McLachlan even noted, "District 40 does not make this poverty argument."

970.6 hearing, and it made no findings of unreasonable hardship. (See *id.*, subd. (a)(2).) Any such implied findings are devoid of evidentiary support. Therefore, the rulings must be reversed.

B. Government Code Section 984

When it became evident the trial court would require proof of eligibility under section 970.6, District 40 claimed it was entitled to make periodic payments under a different statute, Government Code section 984 (section 984). The statute provides, in relevant part: "If, after making any deductions pursuant to Section 985 of the Government Code, the judgment on a tort claims action against a public entity that is not insured is greater than five hundred thousand dollars ($500,000), the public entity may elect to pay the judgment in periodic payments as provided in this subdivision." (§ 984, subd. (d).) The provision goes on to explain that despite the preceding language, the threshold is no longer $500,000. The amount changed in 1990 and perpetually increases according to a specified formula.[15]

The parties dispute how the minimum threshold is calculated and whether District 40's financial obligation, i.e., 74.76 percent of the sum awarded to Wood's counsel, is above or below the threshold. The trial court did not reach this issue. Instead, it agreed with Wood's argument that District 40's obligation to pay attorney fees does not constitute a "judgment on a tort claims action against a public entity." (§ 984, subd. (d).)

Wood relied on *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139 (*Lozada*), arguing that attorney fees are legally defined as costs, not

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[15] "Effective January 1, 1990, the five hundred thousand dollar ($500,000) threshold amount shall be five hundred fifty thousand dollars ($550,000). Effective January 1, 1992, that amount shall be six hundred thousand dollars ($600,000). Effective January 1, 1994, that amount shall be six hundred fifty thousand dollars ($650,000). Effective January 1, 1996, that amount shall be seven hundred twenty–five thousand dollars ($725,000), and thereafter, the seven hundred twenty–five thousand dollar ($725,000) amount shall be increased 5 percent on January 1 of each year." (Gov. Code, § 984, subd. (d).)

damages, and such an award does not constitute a judgment on a tort claim. During the second hearing on this issue, the trial court said, "It appears to me that *Lozada* does apply." In its minute orders, District 40's attempt to invoke section 984 was summarily denied.

Section 984 is not discussed in *Lozada*. The opinion focuses on Government Code section 905, which establishes a prelitigation claim procedure applicable to "all claims for money or damages against local public entities" except as otherwise specified therein. The issue in *Lozada* was whether "a public safety officer, when seeking actual damages and civil penalties in addition to declaratory and injunctive relief for alleged violations of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq. (POBRA)) [is] required to present a claim to the public entity employer pursuant to the 'Government Claims Act' (Gov. Code, § 900 et seq.)[.]" (*Lozada*, *supra*, 145 Cal.App.4th at pp. 1146–1147, fn. omitted.)

Wood relies on an excerpt from *Lozada* explaining that mere inclusion of an attorney fees request in the pleadings is not determinative of whether the claim presentation statutes apply. (*Lozada*, *supra*, 145 Cal.App.4th at p. 1160.) In other words, "the claim for attorney fees cuts neither for nor against application of the claim filing requirement as to the action as a whole." (*Ibid.*) Within this discussion, the appellate court noted "the recovery of attorney fees such as those sought here are not a separate item of monetary relief or damages to which the Government Claims Act applies. When authorized by statute, awards of attorney fees are defined as costs, not damages." (*Ibid.*)

Although *Lozada* is not controlling, other authorities support the crux of Wood's argument. Fee awards "'are properly made to plaintiffs' attorneys rather than to plaintiffs themselves.'" (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 582.) Counsel made this point below, and their focus on attorney fees being classified as costs is relevant. "Indeed, the Supreme Court has explained that cost awards 'are, in fact, separate and complete judgments in themselves.' (*Stockton Theatres, Inc. v. Palermo* (1961) 55

Cal.2d 439, 443.) So when the court must still determine *if* one side should pay certain expenses of their opponent, there is no money judgment as to those expenses unless and until the court decides they are recoverable." (*Felczer v. Apple Inc.* (2021) 63 Cal.App.5th 406, 415.) As such, the award to Wood's counsel does not seem to be a "judgment on a tort claims action against a public entity," which is the phrase used in section 984 but not defined therein or elsewhere.

District 40 argues "section 984 applies because the Wood Class' complaint falls within the scope of the Government Tort Claims Act." However, a line of authority holds that "[i]n determining whether the Claims Act applies, the critical question is whether the recovery of money or damages was the primary purpose of [p]laintiffs' claims." (*Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1493.) District 40 cites one such case, *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744. The opinion explains "the proposition that where a claimant seeks both damages and nonmonetary relief from a public entity in the same action, the applicability of the claim filing requirement turns on whether the damages sought are ancillary to the equitable relief also sought, in which case the claim filing requirement is inapplicable, or the reverse is true, in which case the filing requirement applies." (*Id.* at p. 761.) The *Lozada* opinion, issued by the same district and division that published *Gatto*, also discusses these principles. (*Lozada*, *supra*, 145 Cal.App.4th at pp. 1166–1169.)

If the test is whether the primary purpose of Wood's lawsuit was to obtain equitable relief or damages, District 40's argument fails. The Wood Class did plead causes of action for damages in addition to seeking declaratory and injunctive relief. However, as argued by McLachlan below and acknowledged by the trial court in other postjudgment proceedings, the Wood Class's lawsuit was essentially defensive to the Public Water Suppliers' claims of superior prescriptive groundwater rights. The goal of

the class was to preserve the right to use the wells on their properties to pump water from the basin.

Perhaps most tellingly, the claim presentation requirements of Government Code section 905 et seq. were apparently disregarded and not enforced, which would not happen in an ordinary tort action for money and/or damages. (See generally *California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, 1591–1592 [discussing claim presentation requirement in a class action context].) "Timely claim presentation is not merely a procedural requirement, but is a condition precedent to the claimant's ability to maintain an action against the public entity.... [¶] The failure to timely present a claim to the public entity bars the claimant from filing a lawsuit against that public entity." (*Id.* at p. 1591.)

Given the unique nature and circumstances of this case, the award of fees and costs to Wood's counsel is not accurately described as a judgment on a tort claims action against a public entity. The ruling on the inapplicability of section 984 will therefore be affirmed. Having concluded the statute does not apply, we do not reach the question of how the threshold amount described therein is calculated.

VI. Attorney Fees on Appeal

In their briefing, Wood's counsel request an award of attorney fees on appeal. District 40 does not respond. Rule 3.1702(c) provides that a party claiming attorney fees on appeal must file a motion for fees within the time required for serving and filing a memorandum of costs under rule 8.278(c)(1). Under rule 8.278(c)(1), a party claiming an award of costs must file a memorandum of costs within 40 days of the issuance of the remittitur. Since the matter is being remanded for further proceedings, we defer to the trial court to rule on issues of fees on appeal.

DISPOSITION

The orders from which the parties' appeals are taken are affirmed in part and reversed in part. The rulings determining issues of entitlement to attorney fees, paralegal fees, and costs, and whether and/or how such fees and/or costs should be apportioned, are affirmed. The rulings as to the amount of fees and costs awarded are reversed. All rulings expressly or impliedly finding Los Angeles County Waterworks District No. 40 satisfied the conditions of Government Code section 970.6, subdivision (a), are reversed. The rulings made with regard to Government Code section 984 are affirmed. The matter is remanded for further proceedings consistent with this opinion.

Counsel for the Wood Class shall recover their costs on appeal.

Peña

PEÑA, Acting P.J.

WE CONCUR:

Smith

SMITH, J.

Snauffer

SNAUFFER, J.