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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SANTA CLARA**

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

13 Included Actions:

14 Los Angeles County Waterworks District No.
40 v. Diamond Farming Co.
Superior Court of California
15 County of Los Angeles, Case No. BC325201

16 Los Angeles County Waterworks District No.
40 v. Diamond Farming Co.
17 Superior Court of California
County of Kern, Case No. S-1500-CV-254-
18 348

19 Wm. Bolthouse Farms, Inc. v. City of
Lancaster
20 Diamond Farming Co. v. City of Lancaster
Diamond Farming Co. v. Palmdale Water Dist.
21 Superior Court of California
County of Riverside, consolidated actions
22 Case Nos. RIC 353840, RIC 344436,
RIC 344668

Judicial Council Coordination
Proceeding No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to the Honorable Jack Komar

CROSS-DEFENDANT ANAVERDE LLC's
EX PARTE MOTION TO CONTINUE
TRIAL DATE AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF

Date: October 23, 2008

Time: 8:15 a.m.

Dept.: 17C

Telephonic call-in number: (866) 844-4955

Passcode: 9554462#

Phase 2 Trial: November 3, 2008

Time: 9 a.m.

Location: LASC, Dept. 1

*[Filed concurrently herewith Declaration of
Joseph Salazar, Jr. in Support Thereof,
Declaration of Kimberly A. Huangfu in
Support Thereof, and [Proposed] Order]*

28

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that at 8:15 a.m. on October 23, 2008, an ex parte application by
3 Cross-defendant, Anaverde LLC (“Anaverde”), call-in number (866) 844-4955, passcode
4 9554462#, will be heard in Dept. 17C of the Santa Clara Superior Court. Anaverde will move the
5 Court for an order continuing the trial in this case from November 3, 2008 to November 17, 2008,
6 or for 14 days. The motion is made on the grounds that Anaverde’s lead trial counsel,
7 Mr. Joseph Salazar, Jr. previously had been ordered to appear on October 28, 2008, in *Shewbridge*
8 *v. El Dorado Irrigation District* before the Honorable Frank C. Damrell, Jr., United States District
9 Court, Eastern California of California, Case No. 2:05-CV-00740-FCD-EFB. This federal trial
10 previously has been rescheduled four times, and the Clerk of the Federal Court has confirmed that
11 it will not be continued again. (See Declaration of Joseph Salazar filed concurrently herein at pg.
12 2, ¶¶2-5, lln. 9-26 (“Salazar Decl.”).)

13 Mr. Salazar is the only attorney qualified to represent Anaverde at this juncture. He is the
14 sole trial lawyer involved in this case, and he has attended all key depositions and prepared all
15 witnesses. (Salazar Decl. at pg. 4, ¶¶19-20, lln. 9-13.) Previously, Mr. Salazar set aside the
16 weeks of October 6th, 14th and 21st to complete this case based upon prior statements by this Court
17 in earlier status conferences. On September 30, 2008, however, we learned that this Court would
18 not proceed the week of October 14th. In fact, the Court did not set the new date until October 9,
19 2008, at which point Mr. Salazar immediately informed this Court of his conflict. (*Id.* at pg. 5,
20 ¶25, lln. 1-4.)

21 This motion further is based upon the unavailability of Bolthouse Properties LLC’s
22 (“Bolthouse”) rebuttal witness, Mr. Sheahan, at trial. Mr. Scalmanini, expert witness for the PWS,
23 is also unavailable to offer deposition testimony to rebut proffered evidence due to his vacation
24 schedule. Supporting this motion are the declarations of Mr. Joseph Salazar and Ms. Kimberly
25 Huangfu, the Memorandum of Points and Authority served and filed herewith, on the records on
26 file herein, and on such oral and documentary evidence as may be presented at the hearing on the
27 motion.

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DATED: October 21, 2008

Respectfully submitted,

MALISSA HATHAWAY McKEITH
JOSEPH SALAZAR, JR.
JACQUELINE MITTELSTADT
KIMBERLY A. HUANGFU
LEWIS BRISBOIS BISGAARD & SMITH LLP

By: /s/ _____
KIMBERLY A. HUANGFU
Attorneys for ANAVERDE, LLC.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

3 Anaverde LLC (“Anaverde”) brings this motion for an order¹ continuing the
4 recommencement of the Phase 2 trial, currently scheduled for November 3, 2008, to November 17,
5 2008. Anaverde’s *lead* trial counsel is unavailable during the week of November 3, 2008, because
6 of a previously scheduled trial. (Salazar Decl. at pg. 3, ¶10, lln. 9-10.) Counsel for Anaverde did
7 explore the possibility that the previously scheduled trial be continued a fifth time; however, the
8 Clerk confirmed that it would go forward on October 28, 2008. (*Id.* at pg. 3, ¶10, lln. 10-12.)

9 Anaverde already has found itself at a distinct disadvantage in this case, and the
10 unavailability of its trial counsel would land a serious blow. Unlike many other parties before the
11 Court, Anaverde was not part of the Phase 1 trial. More recently, it had roughly four months to
12 prepare for this trial after the Court lifted the discovery stay in May 2008, and its Managing Agent
13 emerged from bankruptcy on June 19, 2008. Since then, Anaverde worked diligently over the
14 summer in generating physical evidence to support its claim that any hydraulic connection
15 between the Anaverde Creek Basin and the primary Antelope Valley Basin was negligible. It also
16 was forced on an accelerated basis to obtain and to absorb hundreds of thousands of pages of data
17 available to other parties for years.²

18 Despite these constraints, Anaverde has done nothing to delay the trial, and the evidence
19 presented thus far shows that it has a strong argument to support a separate basin. In contrast, the
20 PWS’ evidence is so weak that Anaverde submitted a Motion for Judgment at the close of its case,
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23 ¹ All parties were served and Anaverde has compiled with the notification requirements of
24 California *Rules of Court* 3.12036 and Complex Civil Guidelines, Part V.

25 ² Anaverde’s challenges in obtaining timely discovery responses are well documented in the
26 Declaration of Kimberly Huangfu in support of Anaverde’s Ex Parte Motion to: (1) Compel
27 Responses to Outstanding Discovery Requests Against Los Angeles County Waterworks District
28 No. 40, (2) Request Continuance of Deposition of John Lambie, and (3) Request Date Certain for
Anaverde Trial Briefing and Presentation, dated September 22, 2008.

1 which this Court deferred until after Anaverde’s expert and the PWS’ rebuttal witnesses are heard.
2 As such, the next several days of trial are key to Anaverde.

3 Refusing to allow a short continuance to accommodate Anaverde’s trial counsel given his
4 pre-existing conflicts, and the confusion over when this case, would resume would be grossly
5 unfair under the circumstances. On September 30, 2008, the Court informed counsel of its
6 unavailability during the week of October 13, 2008.³ (*Id.* at pg. 3, ¶11, lln. 14-16.) This was the
7 first notice Anaverde received that the case would not proceed from week-to-week. Subsequently,
8 during the first week of the Phase 2 trial, the Court offered three dates for recommencement of the
9 trial: October 20, October 27, and November 3, 2008. (*Id.* at pg. 4, ¶23, lln. 20-21.) Despite
10 objections by counsel for Anaverde, the Court adopted the November 3, 2008 date. (*Id.* at pg. 4,
11 ¶26, lln. 25-28.)

12 Anaverde also has learned just this week that the PWS’ experts are either not available for
13 deposition or are not available at trial. (*Id.* at pg. 3, ¶¶12-13, lln. 17-23.) The PWS and Bolthouse
14 have indicated that Mr. Scalmanini and Mr. Sheahan will testify as rebuttal witnesses. Mr.
15 Sheahan will be deposed on October 27, 2008; however, *he is unavailable at trial*. Mr. Sheahan’s
16 prior deposition was taken off calendar by Mr. Zimmer and Mr. Orr and, to date, he has produced
17 no documents concerning Anaverde. Therefore, this deposition will be our first and only
18 opportunity to learn his opinion and cross-examine him, if he is not available at trial.

19 Mr. Scalmanini similarly is unavailable for deposition. (*Id.* at pg. 3, ¶13, lln. 22-23.) To
20 date, he has provided only general testimony about Anaverde, and it is unclear whether he will be
21 offering any other opinion as a rebuttal witness. If so, Anaverde has the right to depose him. He
22 is out of the country until October 30, 2008.
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25 _____
26 ³ This was a surprise to Anaverde since the Court had not expressed scheduling conflicts during
27 the week of October 13, 2008 at the September 23, 2008 ex parte hearing. In fact, counsel for
28 Tejon and counsel for Anaverde discussed the order of their witnesses in light of Tejon’s
scheduling problems the week of October 6th.

1 With the current November 3, 2008 trial date, Anaverde would have less than three weeks
2 to have another attorney review and digest all of the information relevant to this complex
3 litigation. This is an impossible task to undertake. Anaverde is willing to present its case in Santa
4 Clara, if it is more convenient for this court; however, there is no reason to penalize Anaverde in
5 such a fashion, particularly given the good faith it has shown to move its case along.

6 **II. GOOD CAUSE EXISTS TO VACATE THE TRIAL DATE AND GRANT A**
7 **CONTINUANCE.**

8 This court is empowered, under California law, to proscribe a shorter notice period than
9 the generally required 21 days. (*Code of Civil Procedure*, §1005(b).) Further, *California Rules of*
10 *Court*, Rule 317 provides, as follows:

11 (b) [Order Shortening Time] The court, on its own motion, or on application
12 for an order shortening time supported by a declaration showing good
13 cause, may prescribe shorter times for the filing and service of papers in the
14 time specified in the Code of Civil Procedure Section 1005.

15 Here, good cause exists to shorten time and to immediately set for hearing on October 23,
16 2008, Anaverde's motion to continue the trial date to a date on or after November 17, 2008. The
17 fast-approaching current trial date of November 3, 2008, and unavailability of Anaverde's lead
18 trial counsel, necessitates a trial continuance. As late as October 15, 2008, counsel for Anaverde
19 requested confirmation from the federal court that the case would proceed. (Salazar Decl. at pg. 3,
20 ¶10, lln. 9-10.) It has been continued four times, and that court will not entertain another
21 continuance. (*Id.* at pg. 2, ¶4, lln. 15-21.)

22 California *Rules of Court*, Rule 3.1332 sets forth a non-exclusive list of factors to be
23 considered by the court in determining whether or not to grant a trial continuance. The court may
24 grant a continuance only on an affirmative showing of good cause requiring the
25 continuance. (Rule 3.1332, subd. (c) and (d).) Examples of good cause include, but are not
26 limited to: (1) the unavailability of a party or trial counsel because of death, illness or other
27 excusable circumstances, (2) a party's excused inability to obtain testimony, documents, or other
28 material evidence despite diligent efforts, and (3) a significant, unanticipated change in the status
of the case as a result of which the case is not ready for trial. (*Id.*)

1 Rule 3.1332(d) states, in part:

2 In ruling on a motion or application for continuance, the court must consider all the facts
3 and circumstances that are relevant to the determination. These may include the following factors:

- 4 a.) The proximity of the trial date;
- 5 b.) Whether there was any previous continuance, extension of time, or delay of trial due to
6 any party;
- 7 c.) The length of the continuance requested;
- 8 d.) The availability of alternative means to address the problem that gave rise to the motion
9 or application for a continuance;
- 10 e.) The prejudice that parties or witnesses will suffer as a result of the continuance;
- 11 f.) If the case is entitled to a preferential trial setting, the reasons for that status and
12 whether the need for a continuance outweighs the need to avoid delay;
- 13 g.) The court's calendar and the impact of granting a continuance on other pending trials;
- 14 h.) Whether trial counsel is engaged in another trial;
- 15 i.) Whether all parties have stipulated to a continuance;
- 16 j.) Whether the interests of justice are best served by a continuance, by the trial of the
17 matter or by imposing conditions on the continuance; and,
- 18 k.) Any other fact or circumstance relevant to the fair determination of the motion or
19 application.

20 (California *Rules of Court*, Rule 3.1332(d).)

21 These various factors are addressed, as follows:

- 22 a.) The current trial date is November 3, 2008 (Salazar Decl. at pg. 3, ¶14, lln. 24);
- 23 b.) There has been no previous trial continuance in this matter (for this phase) (*Id.* at pg. 3,
24 ¶15, lln. 25);
- 25 c.) The length of the continuance requested will allow Mr. Salazar to finish his other trial;
- 26 d.) There are no alternative means to address the above-stated issues. The other attorneys
27 who have assisted on this matter have no meaningful trial experience and no time
28

- 1 exists for other attorneys to learn a complicated water case and adequately protect
2 Anaverde's substantial interests (*Id.* at pg. 4, ¶16, lln. 1-3);
- 3 e.) The parties or witnesses will *not* suffer prejudice as a result of the continuance. To the
4 contrary, other parties will similarly benefit from this brief continuance. There are
5 several potential rebuttal witnesses, including Mr. Scalmanini, Ms. Oberdorfer, Mr.
6 Durbin, Mr. Utley, and Mr. Sheahan, all of who may be offered to provide rebuttal
7 testimony at trial. (*Id.* at pg. 4, ¶17, lln. 4-7.) Parties have not been able to depose Mr.
8 Scalmanini and Mr. Sheahan with regard to their opinions specific to Anaverde's
9 property;
- 10 f.) There is no basis for trial preference in this matter;
- 11 g.) In the interest of justice and equity, the Court should be able to grant a two-week
12 continuance in light of the long-reaching history of this case. Anaverde is willing to
13 accommodate the Court's schedule in any way possible, including proceeding in the
14 Santa Clara Superior Court. Anaverde's issue is quite narrow so that no prejudice
15 results to other parties if the case is not heard in Los Angeles. (*Id.* at pg. 4, ¶18, lln. 7.)
- 16 h.) Lead Trial Counsel for Anaverde, Joseph Salazar, has a federal trial commencing
17 October 28, 2008 (*Id.* at pg. 3, ¶10, lln. 9-10);
- 18 i.) Other counsel are available during the week of November 17th, 2008. Messrs. William
19 and Robert Kuhs are available to recommence trial on November 17, 2008. (See
20 Declaration of Kimberly A. Huangfu filed concurrently herein at pg. 3, ¶9, lln. 8-9
21 ("Huangfu Decl.")). Anaverde contacted Mr. Bunn, counsel for Palmdale Water
22 District, Ms. Goldsmith, counsel for the City of Los Angeles, Mr. Dubois, counsel for
23 the United States Department of Justice., and Mr. Bradley Weeks, counsel for Quartz
24 Hill Water District. Mr. Bunn, Mr. Dubois, and Mr. Weeks are available during the
25 entire week of November 17th, 2008. Ms. Goldsmith is available on November 17, 18,
26 20, and 21. (*Id.* at pg. 3, ¶11, lln. 16-23.) Counsel for Anaverde also attempted to
27 contact Mr. Dunn, counsel for the Los Angeles County Waterworks District No. 40 and
28 Rosamand Community Services District. (*Id.* at pg. 3, ¶8, lln. 5-7.)

1 j.) The interests of justice are best served by a continuance of this matter. In order for all
2 parties to have a full and fair trial, the attorney that is most familiar with the intricacies
3 of this highly technical and complicated case are crucial to ensuring a fair outcome;
4 and,

5 In *Taylor v. Bell* (1971) 21 Cal. App. 3d 1002, 1007, the court noted that trial judges have
6 a great deal of leeway in granting continuances. The court stated:

7 The factors which influence the granting or denying of a
8 continuance in any particular case are so varied that the trial judge
9 must necessarily exercise a broad discretion. On an appeal from a
10 judgment (the order itself being non-appealable) it is particularly
11 impossible to show reversible error in granting of a continuance.

12 (*See also, Hartford Accident & Indemnity Co. v. Gropman* (1984), 163 Cal. App. 3d Supp. 33, 41.)

13 On the other hand, courts must exercise discretion as to all interests involved in
14 determining whether to grant a continuance, as a refusal may have the practical effect of denying
15 the applicant a fair hearing. (*In re Marriage of Hoffmeister* (1984) 161 Cal. App. 3d 1163, 1169-
16 1171 (holding that the proximity in time between the submission of an amended financial
17 statement, submitted in an spousal support case, prevented appellant from adequately preparing for
18 the hearing; the appellate court reversed the trial court's refusal to grant a continuance of trial
19 concluding that it deprived appellant of a fair hearing).) A continuance should be granted if
20 failure to allow the continuance would probably or possibly prejudice the party seeking the
21 continuance by depriving that party of the opportunity to fully and fairly present his case. (*In re*
22 *Dolly A.* (1986) 177 Cal. App. 3d 195, 201 (emphasis added).)

23 **(a.) Unavailability of Trial Counsel Due to Another Scheduled Trial Constitutes**
24 **Good Cause.**

25 In the present case, good cause for the continuance exists based on a number of the factors
26 set forth in Rule 3.1332. This is the first trial continuance requested by Anaverde in this matter.
27 Given the unavailability of Anaverde's lead trial counsel, it will be impossible to coordinate and
28 complete the necessary trial preparation if another attorney has to assume trial responsibility mid-
case. Mr. Salazar has already taken the lead in preparing for the Phase 2 trial, was present during
the first week of the Phase 2 trial, and attended and took all of the depositions of expert witnesses

1 in Sacramento, California. (Salazar Decl. at pg. 4, ¶19, lln. 9-13.) As a result, on this basis alone,
2 good cause exists for a continuance.

3 Similarly, case law recognizes unavailability of trial counsel due to another scheduled trial
4 to constitute good cause. In *Oliveros v. County of Los Angeles* (2004) 120 Cal. App. 4th 1389
5 (“*Oliveros*”), the appellate court held that the trial court abused its discretion in denying a party's
6 motion for a three-week continuance due to a scheduling conflict where counsel advised the court
7 that he would be in trial, in another matter, on the same trial date. This case was complex and
8 involved 43 trial witnesses, including 18 designated experts. To prepare for trial, the parties had
9 to comb through thousands of pages of deposition testimony. The original attorney for the
10 defendant "devoted more than 250 hours to reviewing the voluminous medical records and
11 deposition transcripts, and to meeting with the . . . witnesses." (*Id.* at 1392.)

12 The trial was continued a few times due to scheduling conflicts. (*Id.*) The court was also
13 made aware of trial conflicts ". . . but stated that [the other case] had priority because it was filed
14 first." (*Id.*) Unfortunately, counsel was unable to get the other trial continued. (*Id.* at
15 1393.) Consequently, counsel requested a continuance in the *Oliveros* case and the judge "said
16 that he was not inclined to grant the continuance and suggested that another lawyer in Mr.
17 Peterson's office try *Oliveros*." (*Id.*) Counsel that requested the continuance, Mr. Peterson,
18 explained that "[[a]ll but one] of his firm's other senior trial attorneys were in trial; the remaining
19 attorney was on vacation in Europe. None of the firm's other lawyers had experience trying cases
20 of the complexity of *Oliveros*." More importantly, no one other than Mr. Peterson had prepared to
21 try the case. Therefore, Mr. Peterson suggested that it would be unfair to the client 'to ask [new
22 counsel] to suddenly step into a case cold." (*Id.* at 1393.)

23 Experience of counsel was a factor that influenced the Court of Appeal's decision to
24 reverse the trial court's refusal to grant a continuance. There, the court observed that defendant
25 chose Mr. Peterson "because of his exceptional skill as a trial lawyer . . . [and the client] invested
26 significant resources preparing to try the case and that it could not prepare any other attorney to try
27 the case on such short notice . . . 'It is a severe prejudice to us in the enormity of the damages that
28

1 can be assessed in this case to send us into court without the attorney that we put before this
2 court." (*Id.* at 1394.)

3 Importantly, the Court of Appeal noted that, though a "motion for continuance is addressed
4 to the sound discretion of the trial court . . . [t]he trial judge must exercise his discretion with due
5 regard to all interests involved, and the refusal of a continuance which has the practical effect of
6 denying the applicant a fair hearing is reversible error." (*Id.* at 1395 quoting *In re Marriage of*
7 *Hoffmeister* (1984) 161 Cal. App. 3d 1163, 1169; compare to *Agnew v. Parks* (1963) 219 Cal.
8 App. 2d 696 (court denied plaintiff's request for continuance when counsel failed to promptly
9 request continuance upon ascertaining the need for one due to scheduling conflicts); see also
10 *Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal. App. 3d 167,
11 172 (court denied oral motion because counsel failed to submit written declaration and requested
12 continuance was based "in part by the departure of one of the partners" which occurred four
13 months prior to request for continuance).)

14 More importantly, the court "must look beyond the limited facts which cause a litigant to
15 request a last-minute continuance and consider the degree of diligence in his or her efforts to bring
16 the case to trial, including participating in earlier court hearings, conducting discovery, and
17 preparing for trial." (*Id.* at 1396 citing *Link v. Cater* (1998) 60 Cal. App. 4th 1315 at 1324-
18 1325.) Essentially, the court should have conducted a balancing test to weigh the court's need to
19 move the case along and the prejudicial effect of continuing without the lead trial attorney who is
20 familiar with the case.

21 Similar to the cases referenced above, Anaverde has demonstrated good cause for a trial
22 continuance due to the unavailability of counsel. Since June of this year, Mr. Salazar has actively
23 engaged in preparing and trying the case as Anaverde's lead trial counsel. In addition to preparing
24 and drafting all substantive pleadings and discovery requests, Mr. Salazar worked solely with
25 Anaverde's expert witness to prepare for his deposition and trial testimony. Like *Oliveros*, no one
26 other than Mr. Salazar has prepared to try the case.

27 As set forth in the accompanying declaration, Mr. Salazar is lead trial counsel in the matter
28 of *Scott Shewbridge v. El Dorado Irrigation District, a municipal corporation, Ane Deister, David*

1 *Powell, Thomas Cumpston, George Wheeldon, George Osborne, individuals, and Does 1 through*
2 *50, inclusive (“Shewbridge”), United States Court for the Eastern District of California, Case No.*
3 *2:05-CV-00740FCD PAN. (Salazar Decl. at pg. 2, ¶2, lln. 9-13.)*

4 The *Shewbridge* case commenced on April 15, 2005. (*Id.* at pg. 2, ¶3, lln. 13.) To date, it
5 has been continued four times. It was originally scheduled to proceed on February 6, 2007. Since
6 September 2006, the case has been continued with the corresponding dates, as follows:

- 7 • Continued from February 6, 2007 to May 22, 2007 on September 12, 2006;
- 8 • May 22, 2007 trial date vacated on May 1, 2007;
- 9 • New trial date set for September 11, 2007 on May 24, 2007;
- 10 • September 11, 2007 trial date vacated on August 27, 2008 due to scheduling conflict;
- 11 • New trial date set for June 3, 2007 on September 11, 2007;
- 12 • June 3, 2007 trial date is vacated due to scheduling conflict and reset for October 21, 2008;
- 13 • Trial confirmed to begin on October 28, 2008.

14 (*Id.* at pg. 2, ¶4, lln. 15-21.)

15 After this Court’s decision to reconvene trial on November 3, 2008, Mr. Salazar
16 informally requested that his federal trial be continued to avoid scheduling conflicts. Mr. Salazar
17 received a response that the federal trial “is confirmed set to go on Tuesday, October 28, 2008”
18 from Ms. Kruger, the Dourtroom Deputy to the Honorable Frank C. Damrell, Jr. (*Id.* at pg. 2, ¶5,
19 lln. 23-26.) Due to the complex nature of the *Shewbridge* case, and the large number of parties
20 involved, Mr. Salazar is unable to delegate the role of lead trial attorney to another attorney in his
21 office. (*Id.* at pg. 2, ¶6, lln. 27-28.) Mr. Salazar brought the *Shewbridge* case with him when he
22 switched firms in June 2007. (*Id.* at pg. 3, ¶7, lln. 3.) This case has been ongoing since 2005 and
23 involves multiple parties with a total of 44 witnesses to be presented at trial. (*Id.* at pg. 2, ¶6, lln.
24 27-28.)

25 (1.) *Anaverde Must Complete its Direct Examination of Mr. Lambie Upon*
26 *Commencement of Part 2 of the Phase 2 Trial.*

27 Specifically, upon commencement of the Phase 2 trial, Anaverde will complete its direct
28 examination of its expert witness, Mr. Lambie; since Anaverde will be the primary party moving
forward upon commencement, it is crucial that Anaverde’s lead counsel be present to complete
direct and cross-examine any rebuttal witnesses.

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Moreover, in the instant case, vacating and continuing the current trial date to a date on or
after November 17, 2008, subject to the Court's calendar, will not prejudice any party. There are
approximately two expert witnesses remaining that will testify to the lack of hydrological
connectivity. Mr. Lambie must complete his direct and cross-examination and Mr. Rhone will
testify as well. The total number of rebuttal witnesses for the PWS, the City of Los Angeles, and
the United States remains unclear.

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**(b.) Other Rebuttal Expert Witnesses Are Either Unavailable to Testify at a November
3, 2008 Trial or Unavailable to Testify at Deposition Prior to that Date.**

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Other factors that courts have considered include the unavailability of witnesses to testify
at trial. (*Agnew v. Larson* (1961) 197 Cal. App. 2d 444, 450 (holding that the court has a wide
discretion in granting or denying continuances and such rule applies when the motion is made
because of the absence of a material witness).) Therefore, in addition to the aforementioned good
cause justifications, there are also global scheduling difficulties between all the parties in
completing these discovery matters by November 3, 2008. Bolthouse noticed the deposition of its
expert, Mr. Sheahan, for October 27, 2008 at 9 a.m., to offer testimony as a rebuttal witness.
(Salazar Decl. at pg. 3, ¶12, lln. 17-211.) Mr. Sheahan will be unavailable to offer live testimony
at trial because he will be out of the state on November 3, 2008. (*Id.*) As a result, Bolthouse
Properties intends to videotape Mr. Sheahan's deposition testimony to be offered (in lieu of his
live testimony) at trial. Pursuant to Civil Code of Procedure section 6025.620, Bolthouse
Properties is obligated to identify specific sections of the deposition to be offered at trial and other
parties are then afforded an opportunity to object. (*Id.*) Since Mr. Sheahan's deposition testimony
will take place merely four calendar days before the November 3, 2008 trial date, this affords little
to no time for counsel to effectively prepare for trial.

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Mr. Scalmanini, the expert for the Public Water Suppliers, is currently out of the country,
scheduled to return on October 30, 2008 – just three days before the November 3, 2008 Part 2 trial
date. (*Id.* at pg. 3, ¶13, lln. 22-23.) At the close of trial, counsel for the LACWW reserved the
right to call Mr. Scalmanini as a rebuttal witness to provide testimony specific to Anaverde's

1 property. His unavailability makes it virtually impossible to depose him or otherwise prepare for
2 his testimony before the November 3, 2008 trial date.

3 The Court previously indicated its desire to complete the Phase 2 trial before January 2009.
4 Even if the Court grants Anaverde's request for a brief continuance, this phase will be completed
5 by that time. For the aforementioned reasons, including scheduling conflicts of counsel and
6 material experts who may offer rebuttal testimony, Anaverde respectfully requests a two-week
7 trial continuance to November 17, 2008, as convenient to the Court's calendar and all counsel's
8 schedules. Therefore, as stated above, good cause exists to grant a continuance.

9 **III. ANAVERDE WAS UNINFORMED OF THE PHASE 2 TRIAL SCHEDULING AND**
10 **SOUGHT CONTINUANCE AT FIRST AVAILABLE OPPORTUNITY.**

11 Anaverde raised the above conflict with this Court as soon as it set the November 3, 2008
12 trial date. Moreover, it was not aware of the unavailability of Messrs. Sheahan and Scalmanini
13 until October 9, 2008. In ruling on a motion for continuance, the court should consider, among
14 other things, the diligence of counsel in bringing the emergency to the court's attention and to the
15 attention of opposing counsel at the first available opportunity. (Cal. Rules of Court 3.1332.)

16 As discussed during the September 23, 2008 ex parte application, it was Anaverde's
17 understanding that the Court would be starting the Phase 2 trial on October 6, 2008 and continue
18 into the week of October 13, 2008, if necessary. (Huangfu Decl. at pg. 2, ¶3, lln. 14-16.) During
19 this hearing, no mention of a one or two-week continuance – after completion of the first full week
20 starting October 6, 2008 – was raised. (*Id.* at pg. 2, ¶4, lln. 17-18.) Therefore, Anaverde was
21 under the impression that the Phase 2 trial would commence on October 6, 2008 and end on
22 October 17, 2008, if such extra time was necessary. (*Id.* at pg. 2, ¶5, lln. 19-20.)

23 On September 30, 2008, an email was sent to all counsel from the Court and provided, as
24 follows:

25 The Court has received many inquiries about the time estimate for the October 6, 2008
26 Trial. Please be advised that the Court expects to proceed with the trial, day to day from
27 Monday, October 6, 2008 through Friday, October 10, 2008. If the trial needs to proceed
28 beyond October 10, 2008, the Court will issue the return dates at that time. It is not likely
that the Court will hold session the following week, due to other obligations in Santa Clara
County.

1 (Huangfu Decl. at pg. 2-3, ¶6, lln. 22-27 and 1-2.)

2 On October 9, 2008, counsel was informed that the Court intends to proceed, after a three-
3 week recess, on November 3, 2008. (*Id.* at pg. 3, ¶7, lln. 3-4.) During informal discussions off-
4 record on October 9, 2008, Mr. Salazar informed the Court that he has another trial, in the United
5 States District Court, Eastern District of California in Sacramento, California, starting on October
6 28, 2008. This trial is expected to proceed for two weeks through November 11, 2008.
7 Consequently, Mr. Salazar requested, on the record, that this Phase 2 trial “resume . . . on
8 November 17th so that [he] could come back and finish.” (Salazar Decl. at pg. 5, ¶25, lln. 1-2.)
9 This Court provided that “[it] can’t do that.” (*Id.*)

10 Given the unexpected scheduling of this case, Anaverde respectfully requests that this
11 motion for continuance of trial date be granted. Given the potential hardships imposed on
12 Anaverde, if it is forced to proceed without its lead trial attorney, a two-week continuance is
13 reasonable and necessary to ensure fair resolution of this adjudication.

14 **IV. CONCLUSION.**

15 The factors enumerated above weigh in favor of granting the requested continuance of the
16 trial date pursuant to Rules 3.1332 and 3.1335. Therefore, good cause exists to grant the requested
17 continuance and schedule a trial of this matter to November 17, 2008.

19 DATED: October 21, 2008

Respectfully submitted,

20 MALISSA HATHAWAY McKEITH
21 JOSEPH SALAZAR, JR.
22 JACQUELINE MITTELSTADT
23 KIMBERLY A. HUANGFU
LEWIS BRISBOIS BISGAARD & SMITH LLP

24 By: /s/
25 KIMBERLY A. HUANGFU
26 Attorneys for ANAVERDE, LLC.
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PROOF OF SERVICE

I declare that:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 221 North Figueroa Street, Suite 1200, Los Angeles, California 90012.

On October 21, 2008, I served **CROSS-DEFENDANT ANAVERDE LLC's EX PARTE MOTION TO CONTINUE TRIAL DATE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by posting the document(s) to the Santa Clara Superior Court website in regard to the Antelope Valley Groundwater matter.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct, executed on October 21, 2008.

/s/ _____
Maritza Estrada