

1 **LEWIS BRISBOIS BISGAARD & SMITH LLP**  
MALISSA HATHAWAY McKEITH, SB# 112917

2 E-Mail: [mckeith@lbbslaw.com](mailto:mckeith@lbbslaw.com)

3 JOSEPH SALAZAR, JR. SB# 169551

E-Mail : [salazar@lbbslaw.com](mailto:salazar@lbbslaw.com)

4 JACQUELINE MITTELSTADT, SB#172188

E-Mail: [mittelstadt@lbbslaw.com](mailto:mittelstadt@lbbslaw.com)

5 KIMBERLY A. HUANGFU, SB# 252241

E-mail: [huangfu@lbbslaw.com](mailto:huangfu@lbbslaw.com)

6 221 North Figueroa Street, Suite 1200

Los Angeles, California 90012

7 Telephone: 213.250.1800

Facsimile: 213.250.7900

8 Attorneys for ANAVERDE LLC

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

16 Los Angeles County Waterworks District No.  
17 40 v. Diamond Farming Co.  
Superior Court of California  
18 County of Kern, Case No. S-1500-CV-254-  
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 MOTION TO LIMIT THE SCOPE  
OF REBUTTAL TESTIMONY AND TO  
EXCLUDE THE TESTIMONY OF  
BOLTHOUSE PROPERTIES' EXPERT,  
MR. THOMAS SHEAHAN**

Phase 2 Trial: November 3, 2008  
Location: LASC, Dept. 1  
Time: 9:00 a.m.

1 Cross-defendant Anaverde LLC (“Anaverde”) moves this Court for an order limiting the  
2 scope of rebuttal testimony and excluding the testimony of Bolthouse Properties, LLC and Wm.  
3 Bolthouse Farms, Inc.’s (hereinafter collectively referred to as “Bolthouse”) expert, Mr. Thomas  
4 Sheahan.

5 Code of Civil Procedure section 2034, *et. seq.*, sets forth an orderly procedure for the  
6 introduction of rebuttal testimony. Here, Bolthouse and the Public Water Supply (“PWS”)  
7 agencies had the burden of establishing that sufficient hydraulic connectivity exists between the  
8 Anaverde Creek Basin and the Antelope Valley Adjudication Basin. Anaverde’s defense that the  
9 basin beneath its property is separate for adjudication purposes has been clearly before this Court  
10 since at least June 2008<sup>1</sup>. Nevertheless, absolutely no direct evidence was offered to support  
11 Bolthouse or PWS’ position during their case-in-chief. In his deposition, Mr. Sheahan (expert for  
12 Bolthouse) acknowledged that Mr. Zimmer provided him with no information concerning  
13 Anaverde until September 30, 2008, after Mr. Lambie’s report was presented.

14 Rather than to meet its burden in its case-in-chief, Bolthouse is improperly attempting  
15 prove up its case through rebuttal.<sup>2</sup> In so doing, its rebuttal expert is not countering the factual  
16 foundation for Mr. Lambie’s opinion (as is required by the Code), but he is offering entirely new  
17 “opinion” outside the scope of Lambie’s testimony and unsupported by any foundational evidence.

18 ///

19 \_\_\_\_\_  
20 <sup>1</sup> Anaverde LLC’s Case Management Statement, Aug. 6, 2008 at pg. 2:12-16 and  
21 pg. 3:1-2.

22 <sup>2</sup> Mr. Sheahan’s new testimony, and accompanying documents, should have been  
23 introduced during the first week of trial when the single basin proponents were putting on their  
24 case-in-chief. This Court already has received a motion, along with declarations, outlining how  
25 Mr. Sheahan produced some thousands of pages of documents, in three boxes, and a lengthy 77-  
26 page “expert” report on the eve of Mr. Zimmer’s purported “direct testimony” of Sheahan on  
27 rebuttal. The introduction of this testimony is untimely; the “rebuttal testimony” exceeds the  
28 scope of Mr. Lambie’s direct testimony, and his “Anaverde Creek Groundwater Basin Hydrologic  
Review” prepared in conjunction with this Phase 2 trial, and must be excluded. Anaverde  
therefore requests that this improper testimony be stricken, and it renews its request that this Court  
grant its Motion for Judgment filed on October 9, 2008.

1       **I. SCOPE OF REBUTTAL TESTIMONY IS LIMITED TO OPINIONS SET**  
2       **FORTH BY ANAVERDE'S EXPERT.**

3       Rebuttal evidence is evidence raised *in response* to a party's case in chief. (*Edgar v.*  
4       *Workmen's Compensation Appeals Bd.* (1966) 246 Cal. App. 2d 660.) Therefore, the rebuttal  
5       testimony must be addressed in opposition to evidence produced by the opposite party – not to the  
6       pleadings and *not to new opinions that should have been presented during the plaintiffs' case-in-*  
7       *chief.* Generally, parties may only offer evidence rebutting the other side's evidence, unless the  
8       court, for good cause, permits the parties to offer more direct evidence on their original cases.  
9       (Cal. Code of Civil Procedure §§ 607(6), 631.7.)

10       Because rebuttal testimony constitutes a reply to matters first brought out during  
11       defendant's case, a party has no right to withhold testimony that should have been offered in the  
12       case in chief merely for the purpose of offering it more dramatically in rebuttal. (*Ca. Wine Assn v*  
13       *Comm. Union Fire* (1910) 159 C 49; see also *Lipman v Ashburn* (1951) 106 Cal. App. 2d 616 at  
14       620 [holding in an action involving injuries for vehicular collision; evidence that the truck did not  
15       stop before entering the intersection is an essential part of the case in chief, and plaintiff does not  
16       have a right to withhold his testimony for the purpose of offering it in rebuttal].)

17       The purpose of the Code of Civil Procedure section 2034, *et seq.*, regarding expert witness  
18       disclosure, is to permit parties to adequately prepare to defend the opposing expert opinions that  
19       will be offered at trial. (*Jones v. Moore* (2000) 80 Cal. App. 557, 565.) In *Jones*, a legal  
20       malpractice case, plaintiff submitted an expert declaration that stated that its expert would testify  
21       as to the standard of care of attorneys practicing in the field of family law. (*Id.*) The expert  
22       subsequently gave his deposition and stated that he provided all opinions on which he intended to  
23       testify at trial at the deposition. At trial, the expert went well beyond the opinions offered at his  
24       deposition. The appellate court held that the trial court erred by allowing the expert to testify  
25       regarding opinions that were not disclosed at his deposition. According to the Court, when an  
26       expert deponent testifies as to specific opinions and affirmatively states those are the only  
27       expert deponent testifies as to specific opinions and affirmatively states those are the only  
28       expert deponent testifies as to specific opinions and affirmatively states those are the only

1 opinions he or she intend to offer at trial, it is unfair and prejudicial to permit the expert to offer  
2 additional opinions at trial. (*Id.*)

3           Though the *Jones* case involves expert testimony that exceeded the scope of the expert's  
4 deposition testimony, the principles of fairness and notice set forth by that court are applicable to  
5 Anaverde. The Anaverde situation, however, is far more problematic. First, Bolthouse and the  
6 other parties presented no evidence in their case-in-chief, even though Bolthouse had the  
7 opportunity to depose Mr. Lambie on September 30, 2008. Bolthouse now seeks to establish its  
8 prima facie case through "bootstrapping" new opinions onto Mr. Lambie's evidence and  
9 testimony. This is substantively not permitted by the California Evidence Code and is even more  
10 egregious here given the gamesmanship employed by Bolthouse in preventing a timely  
11 examination of Mr. Sheahan.<sup>3</sup> A cursory review of Mr. Sheahan's "direct" testimony reveals that  
12 he does not present new facts attacking the evidentiary foundation of Mr. Lambie's opinions (as  
13 required by the Evidence Code) but, instead, offers new "opinion" lacking any foundation.  
14

15  
16           Mr. Lambie's testimony that the Anaverde Creek Basin is separate from Antelope Valley  
17 is based upon: (a) his evaluation of rainfall and recharge versus consumptive use; (b) field  
18 evidence regarding a bounding effect along the San Andreas Earthquake Fault; (c) the geology of  
19 the aquifer material in the Anaverde Creek Basin and the Antelope Valley Basin; (d) the head  
20 differential between water levels north and south of the San Andreas Fault; (e) evapotranspiration  
21 by verdant area and consumptive use by vegetation; and, (i) the difference in water geochemistry.  
22

23  
24           <sup>3</sup> In this instance, Anaverde was not even afforded an opportunity to depose Mr. Sheahan until  
25 October 29, 2008 – merely 7 days before the recommencement of the Phase 2 trial. In addition to  
26 the time constraints created by Bolthouse's decision to take Mr. Sheahan's original deposition,  
27 scheduled for October 1, 2008, off-calendar, Anaverde was only afforded the opportunity to  
28 depose Mr. Sheahan after counsel for Bolthouse insisted on conducting his "direct". Due to the  
unavailability for Mr. Sheahan to testify at trial, this "direct" examination was conducted prior to  
Anaverde's deposition and severely hindered Anaverde's ability to properly cross-examine or  
prepare its cross-examination for trial.

1 (See “Anaverde Creek Groundwater Basin Hydrologic Review, John M. Lambie, Sept. 28, 2008 at  
2 pgs. 3-4, 6, and 12.)

3 On October 24, 2008, Bolthouse posted a letter to the Court website, along with a copy Mr.  
4 Sheahan’s report, entitled “Summary of Opinions Regarding Delineation of Sub-basins Antelope  
5 Valley Adjudication Area, Antelope Valley, California.” This report is dated October 22, 2008,  
6 however, it incorporates and largely relies upon Attachment No. 1, entitled “Mountain-Front  
7 Recharge Runoff and Bedrock Infiltration in the Antelope Valley, California”, dated March 9,  
8 2008. Allegedly, this report was prepared and submitted to the Antelope Valley Groundwater  
9 Adjudication Technical Committee for incorporation into the 2008 Problem Statement Report.<sup>4</sup>  
10

11 Notably, Mr. Sheahan admits that his opinions and conclusions regarding Anaverde are not  
12 based on facts and data specific to the Anaverde site and that his disagreement with Mr. Lambie’s  
13 conclusion are not based upon facts, but rather the interpretation of those facts (to the extent he  
14 understands the premise of Mr. Lambie’s conclusions) to formulas he separately developed for the  
15 larger Antelope Valley Watershed. Indeed, not only did Mr. Sheahan present no specific facts  
16 about Anaverde, he actually had no factual basis for his March 2008 analysis. Given the lack of  
17 foundation, his opinion regarding recharge would have been without merit if he had been offered  
18 on direct. Worse yet, as rebuttal testimony, it is far outside the scope of direct and, *as discussed*  
19 *below*, has no foundation.  
20  
21

22 Mr. Sheahan’s last minute report and his deposition testimony also reveal no facts to rebut  
23 Mr. Lambie’s conclusion regarding the bounding conditions of the fault; the metamorphosed  
24

25 <sup>4</sup> Whether this March 2008 report was incorporated into the Technical Committee’s  
26 Problem Statement Report is not of concern here. Anaverde takes issue, however, with the fact  
27 that this report was prepared in March 2008, and yet was not provided to Anaverde and other  
28 parties until October 24, 2008, after Bolthouse and other single basin proponents had already  
concluded their case-in-chief.

1 quartz monzonite barrier; the difference in head; or the difference in water geochemistry. Instead,  
2 Mr. Sheahan "disagrees" based upon his professional judgment. Mr. Sheahan acknowledges that  
3 physical work might have been done in the field to substantiate his opinion, one way or the other,  
4 but he acknowledges undertaking none of that work.<sup>5</sup>

5  
6 **II. THE PROFFERED "REBUTTAL TESTIMONY" LACKS FOUNDATION AND**  
7 **IS NOT BASED ON FACTS SPECIFIC TO ANAVERDE**

8 In addition to the scope of rebuttal testimony and the limits set forth above, new opinions  
9 and arguments that lack any foundational basis should also be excluded. Pursuant to California  
10 Evidence Code section 801, subsection (b), when expert opinion is not based on matters perceived  
11 by or personally known to the witness, but depends on information furnished by others, the  
12 opinion will be of little value unless the source is reliable. As set forth in section 801, the

13  
14 <sup>5</sup> Excerpt from Sheahan Deposition Transcript, Oct. 28, 2003 at pgs. 459:8-15, 460:20-25,  
15 462:9-25, 463:1-2, and 463:14-18:

16 Q (McKeith): If we wanted to conduct field work that would substantiate what kinds of impacts  
17 existed between pumping in the Anaverde Creek Watershed and the area north of the fault . . . to  
18 determine if, in fact, there is a hydraulic connection, if I had hired you to do that work, is there any  
19 work you would have done other than the methodology that you have employed in the March  
20 2008 report? . . .

21 A (Sheahan): But there are some things that occur to me that I would be able to do that would  
22 allow me to provide some hard field data that would help to determine one way or the other  
23 whether or not that hydrogeologic connection occurred . . .

24 --to demonstrate that. So I would select that alluvial channel, if you will. I would do test  
25 drilling to further define its geometry so that I would have a better understanding of the cross-  
26 sectional area and the materials in that. I would install piezometers in the general alignment of the  
27 alluvial channel up to and, if possible, just beyond where that challenge discharges from the  
28 watershed of the Anaverde Creek Watershed.

And I would monitor water levels in those piezometers to define the surface, if you will, of the  
water table so that I could characterize the gradient in terms of the magnitude of the hydraulic  
gradient and the direction of the hydraulic gradient. I would also take samples of the material for  
additional testing, to further define hydraulic characteristics such as hydraulic conductivity of  
those materials to support assessment of hydraulic connectivity that I had done with previous data.

. . .  
I would also then attempt to pump – I would consult a well and pump the alluvial aquifer some  
distance up gradient from where it leaves the site to see if that pumping would change the gradient  
between the pumping well and where it discharges from the site.

(See Exhibit A.)

1 information must be “of a type that reasonably may be relied upon” by the expert in forming an  
2 opinion on the subject.” (*Id.*)

3 Furthermore, the case law clearly provides that an expert’s ultimate conclusion is not  
4 acceptable if it is based on improper or unwarranted matters. (*In re Marriage of Micalizio* (1988)  
5 199 Cal. App. 3d 662, 673.) Therefore, inadmissible hearsay is a basis upon which an expert  
6 cannot base his or her opinion. If an expert relies on inadmissible hearsay, all or portions of the  
7 opinion may be stricken. On the other hand, an expert may rely on the reports by other experts (as  
8 opposed to opinions of other experts) that are based on their personal observations, tests, or  
9 examinations. (*Christianson v. Hollings* (1941) 44 Cal App 2d 332, 347.) Since Mr. Sheahan did  
10 not seek to review Mr. Lambie’s file, made available on September 30, 2008 at Mr. Lambie’s  
11 deposition, Mr. Sheahan’s opinions are not grounded in personal knowledge and he has no basis  
12 for his opinions. During his deposition, Mr. Sheahan acknowledged that Mr. Zimmer did not  
13 provide him with this information, even though Mr. Lambie’s deposition was taken over one  
14 month ago.<sup>6</sup>

15 In *Kelley v. Trunk* (1998) 66 Cal. App. 4th 519, 524, the court determined that granting a  
16 motion for summary judgment, based on defendant’s expert witness declaration, was not proper:  
17 “The required foundational showing that the opinion rest on matters of a type experts reasonably  
18 rely on is not made where, as here, the expert does not disclose what he relied on in forming his  
19 opinion.” (*Id.* (emphasis added).)

20 Similarly, Mr. Sheahan was not able to articulate the basis upon which he formed his  
21 opinions. Mr. Sheahan admits his opinions and conclusions, regarding Anaverde, are not based on  
22 facts and data specific to the Anaverde site. Mr. Sheahan has never been to the Anaverde Ranch  
23

24 <sup>6</sup>Excerpt from Sheahan Deposition Transcript, Oct. 29, 2003 at pg. 815:25 and pg. 816:1-15:  
25 Q (McKeith): Mr. Sheahan, were you provided with a copy of the files that were produced and  
copied in Mr. Lambie’s deposition?

26 A (Sheahan): No.

Q (McKeith): So your attorney did not provide you with that?

27 A (Sheahan): No.

(See Exhibit B.)  
28

1 site. (Sheahan Deposition Transcript, Oct. 29, 2003 at pg. 705:9-20.)<sup>7</sup> He has not reviewed Mr.  
2 Lambie's files, produced in accordance with the deposition notice on September 30, 2008, or any  
3 data collected specific to the Anaverde site. (See footnote 6, *infra.*) And, Mr. Sheahan has no  
4 evidence regarding the bounding or fault barriers surrounding Anaverde's property. Therefore, his  
5 opinions are mere speculations, at best, and lack personal knowledge and research. Mr. Sheahan  
6 purports to use research from his March 2008 report, however, he has not reviewed Mr. Lambie's  
7 file, research, and data and/or therefore cannot possibly merge his independent research with the  
8 facts unique to Anaverde's property.

9 As a result, Mr. Sheahan has not sufficiently relied up on the evidence and data available to  
10 him and simply chose to formulate his own opinions, based on information that is not specific to  
11 Anaverde. His use of improper assumptions and assessments, supposedly based on Mr. Lambie's  
12 research, without actually reviewing Mr. Lambie's file, demonstrates a lack of proper basis for Mr.  
13 Sheahan's October 22, 2008 report and any opinion testimony offered thereafter.

14 ///

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 \_\_\_\_\_  
22 <sup>7</sup> Excerpt from Sheahan Deposition Transcript, Oct. 29, 2003 at pg. 705:9-20:  
23 Q (McKeith): Have you undertaken any tests to determine if there's a subterranean channel on the  
24 Anaverde Creek watershed?

25 A (Sheahan): What did you mean by "tests"?

26 Q (McKeith): Have you undertaken any -- have you undertaken any physical tests in the field to  
27 determine whether or not there's a subterranean stream? . . .

28 Q (McKeith): Yes or no. Have you done any physical work?

A (Sheahan): No. You've asked me many times before and I've told you I've not  
been on the property.  
(See Exhibit B.)



1           **III. CONCLUSION.**

2           For the reasons set forth above, Anaverde respectfully requests that the Court issue an  
3 order precluding Bolthouse's expert, Mr. Sheahan, from offering opinions on issues beyond  
4 Mr. Lambie's testimony.

5  
6  
7 DATED: November 3, 2008

Respectfully submitted,

8 MALISSA HATHAWAY McKEITH  
9 JOSEPH SALAZAR, JR.  
10 JACQUELINE MITTELSTADT  
11 KIMBERLY A. HUANGFU  
12 LEWIS BRISBOIS BISGAARD & SMITH LLP

13 By:   
14 KIMBERLY A. HUANGFU  
15 Attorneys for ANAVERDE, LLC.  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**LEWIS BRISBOIS BISGAARD & SMITH LLP**  
221 NORTH FIGUEROA STREET, SUITE 1200  
LOS ANGELES, CALIFORNIA 90012  
TELEPHONE 213.250.1800

**LEWIS BRISBOIS BISGAARD & SMITH LLP**  
221 NORTH FIGUEROA STREET, SUITE 1200  
LOS ANGELES, CALIFORNIA 90012  
TELEPHONE 213.250.1800

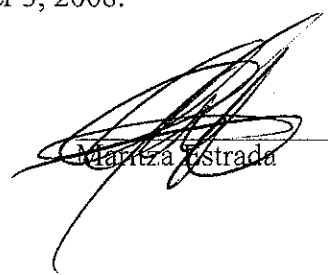
**PROOF OF SERVICE**

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 November 3, 2008, I served **CROSS-DEFENDANT ANAVERDE LLC'S MOTION TO LIMIT THE SCOPE OF REBUTTAL TESTIMONY AND TO EXCLUDE THE TESTIMONY OF BOLTHOUSE PROPERTIES' EXPERT, MR. THOMAS SHEAHAN** 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 November 3, 2008.

  
\_\_\_\_\_  
Maritza Estrada

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