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10 A. Godde, Lawrence A. Godde and Godde Trust, Kootenai Properties, Inc., Gailen Kyle, Gailen
11 Kyle as Trustee of the Kyle Trust, James W. Kyle, James W. Kyle as Trustee of the Kyle Family
12 Trust, Julia Kyle, Wanda E. Kyle, Eugene B. Nebeker, R and M Ranch, Inc., Edgar C. Ritter Paula
13 E. Ritter, Paula E. Ritter as Trustee of the Ritter Family Trust, Trust, Hines Family Trust , Malloy
14 Family Partners, Consolidated Rock Products, Calmat Land Company, Marygrace H. Santoro as
15 Trustee for the Marygrace H. Santoro Rev Trust, Marygrace H. Santoro, Helen Stathatos, Savas
16 Stathatos, Savas Stathatos as Trustee for the Stathatos Family Trust, Dennis L. & Marjorie E.
17 Groven Trust, Scott S. & Kay B. Harter, Habod Javadi, Eugene V., Beverly A., & Paul S. Kindig,
18 Paul S. & Sharon R. Kindig, Jose Maritorea Living Trust, Richard H. Miner, Jeffrey L. & Nancee J.
19 Siebert, Barry S. Munz, Terry A. Munz and Kathleen M. Munz, Beverly Tobias, Leo L. Simi, White
20 Fence Farms Mutual Water Co. No. 3., William R. Barnes & Eldora M. Barnes Family Trust of
21 1989, Healy Enterprises, Inc., John and Adrienne Reca, Sahara Nursery, Sal and Connie L. Cardile,
22 Gene T. Bahlman, **collectively known as the Antelope Valley Ground Water Agreement**
23 **Association ("AGWA")**

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **FOR THE COUNTY OF SANTA CLARA**

17 ANTELOPE VALLEY	)	Judicial Council Coordination Proceeding
18 GROUNDWATER CASES	)	No. 4408
19 Included Actions:	)	Santa Clara Case No. 1-05-CV-049053
20 Los Angeles County Waterworks District No.	)	Assigned to The Honorable Jack Komar
21 40 v. Diamond Farming Co. Superior Court of)	
22 California County of Los Angeles, Case No. BC	)	ANTELOPE VALLEY GROUNDWATER
23 325 201 Los Angeles County Waterworks	)	AGREEMENT ASSOCIATION'S EX
24 District No. 40 v. Diamond Farming Co.	)	PARTE APPLICATION FOR RELIEF
25 Superior Court of California, County of Kern,	)	FROM EXPERT DISCLOSURE
26 Case No. S-1500-CV-254-348Wm. Bolthouse	)	DEADLINE; MEMORANDUM IN
27 Farms, Inc. v. City of Lancaster Diamond	)	SUPPORT OF APPLICATION
28 Farming Co. v. City of Lancaster Diamond)	
29 Farming Co. v. Palmdale Water Dist. Superior	)	Date: June 11, 2008
30 Court of California, County of Riverside,	)	Time: 8:15 a.m.
31 consolidated actions, Case No. RIC 353 840,)	Department: 17
32 RIC 344 436, RIC 344 668)	

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EX PARTE APPLICATION
FOR RELIEF FROM EXPERT DISCLOSURE DEADLINE

The Antelope Valley Groundwater Agreement Association (“AGWA”) hereby moves this Court for relief from the deadline for disclosure of expert witness information, as provided in the Court’s May 27, 2008 Amended Order after Case Management Conference.

Pursuant to the attached Memorandum in Support of Application for Relief from Disclosure Deadline, AGWA requests that the court grant the relief requested by vacating the October 6, 2008 trial date.

1 On June 2, 2008, Richard A. Wood filed the Class Action Complaint for the Small Pumpers
2 Class. The class definition identifies the class as:

3 All private (i.e., non-governmental) persons and entities that own real
4 property within the Basin, as adjudicated, and that have been pumping
5 on their property within the five year period preceding the filing of this
6 action. The Class excludes the defendants herein, any person, firm,
7 trust, corporation, or other entity in which any defendant has a
8 controlling interest or which is related to or affiliated with any of the
9 defendants, and the representatives, heirs, affiliates, successors-in-
interest or assigns of any such excluded party. The Class also
excludes all person to the extent their properties are connected to a
municipal water system, public utility, or mutual water company form
which they receive water services, *as well as all persons who are
required by law to report their water usage to any government agency.*

10 (Richard A. Wood Class Action Complaint, ¶ 17, emphasis added.)

11 The exclusion of parties who are required by law to report their water usage to any
12 government agency presumably includes anyone who pumps more than 25 acre-feet per year and is
13 therefore required to report such pumping to the State Water Board pursuant to Water Code section
14 5001. AGWA believes this is an appropriate class definition that identifies an ascertainable class of
15 pumpers too numerous to be practically named and served individually and who share a community
16 of interest. AGWA believes this class as defined can be certified by the Court without the need for
17 an evidentiary hearing. However, based on the experience the parties have had with the certification
18 of the Non-Pumpers Class – more than a yearlong process – it is not unreasonable to think that the
19 Small Pumpers Class certification may not be completed on August 11, 2008.

20 Even assuming that a Small Pumpers Class can be certified as scheduled, the notice of class
21 action will not have been prepared and approved by that date. After it is approved, the notice will
22 still need to be sent out and the opportunity provided for prospective class members to opt out of the
23 class and participate individually in this matter. Should any parties decide to opt out of the class,
24 there will be a group of parties still needing to be served. It is not possible that all of this can be
25 accomplished by the October Phase 2 trial date.¹

26 ¹ AGWA believes that no one who is currently involved in this process can predict the consequences
27 that will follow when thousands of letters are sent to people who depend on their small wells for
28 their homes and businesses notifying them that their right to continue to use that water will be
determined in this case. It is prudent to assume some level of organization and process will
necessarily attend that event once it happens.

1 Finally, it is unclear whether even the parties who are supposed to be named and served have
2 been served yet. At the May 22, 2008 Case Management Conference, counsel for the purveyors was
3 circumspect as to the service of process. (See May 22, 2008 CMC Transcript, 64:18-65:6 (“... have
4 all had at least attempted personal service”) All that we know from this statement is that
5 service has been attempted; we have no indication for how many of these parties service has been
6 successful. For all the present parties know, only a small number of landowners have currently been
7 effectively served.

8 For all these reasons – that the notice to the Non-Pumpers Class has not yet gone out, that the
9 Small Pumpers Class has not yet been certified, and that there is some indeterminate number of
10 landowners who are not in either class who have not yet been served – it is not clear that service of
11 process can be accomplished by the date that has been set for trial. Even if service could be
12 completed on all these parties before trial, these parties must be given a reasonable opportunity to
13 prepare for this trial which will establish core issues in this case. AGWA submits that beginning the
14 Phase 2 trial in October of this year, while all of these issues remain to be resolved, will deprive a
15 large number of landowners of due process thereby causing injury to these parties. (Declaration of
16 Michael T. Fife, ¶ 6.)

17 **III. SERVICE ISSUES HAVE ALSO IMPACTED EXISTING LANDOWNER PARTIES**

18 AGWA raises issues concerning the rights of other local landowners because currently it is
19 the only landowner group that has the resources to actively participate in the case. However,
20 AGWA’s resources are limited. The other landowner parties – those who have not yet been
21 effectively served and those who will be in the Small Pumpers Class – are aligned with AGWA and
22 will help to defend the landowner side of the case by banding together and sharing costs. This is the
23 way in which landowners have defended themselves in every adjudication, and it is reasonable for
24 AGWA to have waited to expend its resources until the landowner parties were fully brought in to
25 this case.

26 The purveyors delayed service on landowners pending the outcome of the class certification
27 process (“... service stopped pending the class issue” (May 22, 2008 CMC Transcript, 64:25))
28 and it was similarly reasonable for AGWA to also delay its case preparation pending the outcome of
EX PARTE APPLICATION FOR RELIEF FROM DISCLOSURE DEADLINE; MEMORANDUM IN SUPPORT

1 these issues so that it could know who would be in the case and in what manner. The members of
2 AGWA have actively participated in settlement negotiations and the Court's proceedings related to
3 determining how a class structure will be used in the matter. It has been reasonable for AGWA to
4 wait to begin preparation for the next phase of the litigation until the process of bringing landowners
5 in to the case is complete.² This strategy has been reasonable because, among other reasons, it was
6 entirely possible that if a class could not be certified, the purveyors would have chosen another
7 avenue to manage the basin other than individually naming and serving tens of thousands of
8 landowners. That is, if class certification had not been possible, this case may have ended.

9 Similarly, there have been times over the past year when the landowner class was proposed
10 to include all landowners currently not in the case. If such a class had been certified, or if a class of
11 similar magnitude had been certified, it would have potentially represented the vast majority of
12 landowners and possibly pumping by the local landowners. It would have been reasonable for the
13 other landowners, such as AGWA, to look to that class to be the lead in the litigation, much as the
14 landowners in the Santa Maria Adjudication looked to the Santa Maria Valley Water Conservation

15 ² The necessity to conserve financial resources in this action is not unique to AGWA, but was also
16 expressed by attorneys other landowner parties during the May 22 Case Management Conference:

17 MR. BEZERRA: [t]hose of us who are in a position to have to try to
18 husband our resources in participation of a very protracted piece of
19 litigation are in an extremely disadvantaged place to prepare for an
20 October trial against parties that have conducted extensive – on
21 extensive work on the Basin and characteristics.

22 I mean, as your honor is aware, these groundwater litigations have
23 been going on for quite some time. And as private landowners, you
24 have to make choices about when to address certain issues and when to
25 spend money.

26 ***

27 It would seem to me that a few more months to prepare for such a trial
28 would be particularly useful, especially given that we are apparently
29 are going to be running concurrently class certification of proceedings
30 that are – will bring in additional parties in to this litigation whose
31 rights will need to be considered in relation to any sub-basin or safe
32 yield trial.

(May 22, 2008 CMC Transcript, 39:20 – 40:17.)

EX PARTE APPLICATION FOR RELIEF FROM DISCLOSURE DEADLINE; MEMORANDUM IN SUPPORT

1 District to lead their defense. Even now, with a more limited Small Pumpers Class proposed, the
2 representative of the Small Pumpers Class has requested that the Court appoint an expert to testify
3 for the class at trial. Since AGWA's interests and the interests of the Small Pumpers Class are
4 aligned, it is justifiable for AGWA to wait to see whether the Court grants this request before
5 expending its own limited resources on a duplicative expert.

6 AGWA has reasonably conducted itself with respect to the progress of this case to date.
7 Scheduling a Phase 2 trial in October, along with the attendant short schedule for designation of
8 expert witnesses, will cause harm to the members of AGWA. (Declaration of Michael T. Fife, ¶ 7.)

9 **IV. LANDOWNER PREPARATION FOR TRIAL HAS HERETOFORE BEEN**
10 **IMPRACTICAL DUE TO THE STAY ON DISCOVERY**

11 At its core, this case is about prescriptive rights allegations by the purveyors against the
12 landowners. The purveyors have the burden of proof on this issue and all of the elements of the
13 issue, including overdraft. It has been impractical for the landowners to prepare for trial due to the
14 Court's discovery stay, which has only recently been lifted. It is unreasonable to expect the limited
15 number of landowners who are currently in the case to expend their resources to conduct a full basin
16 analysis prior to any knowledge of what the purveyors will claim at trial. For example, overdraft of
17 the basin is only relevant as an element of the purveyor's claim of prescription during a particular
18 five year period – why should the landowners be expected to guess what prescriptive period will be
19 asserted by the purveyors? It is much more reasonable that the purveyors would tell the landowners
20 what facts they will allege to support their claims and then allow the landowners an opportunity to
21 decide whether and to what extent they need to hire consultants to rebut those claims.

22 The stay on discovery has heretofore made this impossible. The landowners know that
23 certain issues will be involved in the Phase 2 trial – such as safe yield and overdraft – but they have
24 no idea what positions with regard to these issues they are expected to rebut. Heretofore the only
25 way to prepare for the next phase of trial would have been to conduct a full basin analysis – it is
26 unreasonable to have expected the limited number of landowners currently in the case to conduct
27 such a costly endeavor when it is very possible that they will only object to discrete elements of the
28 analysis to be presented by the purveyors.

1 Again, AGWA has reasonably conducted itself with respect to the progress of this case to
2 date given the stay on discovery. Scheduling a Phase 2 trial in October, along with the attendant
3 short schedule for designation of expert witnesses, will cause harm to the members of AGWA.
4 (Declaration of Michael T. Fife, ¶ 8, 9.)

5 **V. THE OCTOBER PHASE 2 TRIAL DATE INHIBITS SETTLEMENT**
6 **NEGOTIATIONS**

7 In their May 1, 2008 Case Management Statement, the purveyors indicated that settlement
8 negotiations among the present parties are ongoing and that meetings with a settlement facilitator are
9 being held regularly. The purveyors' Case Management Statement gave no indication that there was
10 any stalemate or inhibition to settlement. In fact, AGWA believes that the settlement process has
11 been positive and productive, and it looks forward to continued participation in that process.

12 While the threat of a trial can help to motivate settlement, it can also have the opposite effect
13 when the settlement process was otherwise proceeding in a productive manner. The Court's setting
14 of an October date for the Phase 2 trial, and the schedule that it requires, is of such disadvantage to
15 landowners that it encourages the parties who are advantaged by that schedule to prefer trial to
16 settlement. In addition, because the time between now and trial is so short, even if the trial date were
17 to serve to motivate settlement it is not possible that a settlement could be constructed that could
18 avoid the trial, leaving the parties with no choice but to resign themselves to a trial they were hoping
19 to avoid through settlement. Thus, the schedule that has been established has the effect of
20 encouraging parties to prefer trial and itself precludes the possibility of a settlement.

21 For these reasons, AGWA believes that the settlement process is now at risk, and that the
22 scheduling of the Phase 2 trial in October has therefore caused harm to all parties in the case.
23 (Declaration of Michael T. Fife, ¶ 10, 11.)

24 **VI. RESOLUTION**

25 AGWA believes the following to be an appropriate resolution of the issues outlined above.

- 26
- 27 • The Court's October Phase 2 trial date should be vacated.
 - 28 • The Court's schedule for deadlines in anticipation of the Phase 2 trial should not begin until
class notice for both classes has gone out and the period to opt out of the class has expired
- EX PARTE APPLICATION FOR RELIEF FROM DISCLOSURE DEADLINE; MEMORANDUM IN SUPPORT

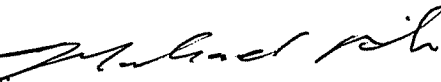
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and all (or reasonably all) parties who need to be individually served have been individually served.

- Prior to the August 11, 2008 hearing, the purveyors should be ordered to report to the Court in writing regarding how many parties have been *successfully* served and how this relates to the total number of parties who need to be individually named and served.
- The Court should establish a schedule by which personal service must be complete.
- The Court's lifting of the discovery stay should enable the existing parties to begin gathering information from the purveyors and will enable them to begin analyzing this information, and this should be allowed to continue. Based on the responses to the discovery, the landowner parties can determine whether they will hire experts and the scope of the testimony for which these experts will be needed.

Dated: June 6, 2008

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

By: 

MICHAEL T. FIFE
BRADLEY J. HERREMA
ATTORNEYS FOR AGWA

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PROOF OF SERVICE

**STATE OF CALIFORNIA,
COUNTY OF SANTA BARBARA**

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 E. Carrillo Street, Santa Barbara, California 93101.

On June 6, 2008, I served the foregoing document described as:

**ANTELOPE VALLEY GROUNDWATER AGREEMENT ASSOCIATION'S EX PARTE
APPLICATION FOR RELIEF FROM EXPERT DISCLOSURE DEADLINE;
MEMORANDUM IN SUPPORT OF APPLICATION**

on the interested parties in this action.

By posting it on the website at 3:00 p.m./a.m. on June 6, 2008. This posting was reported as complete and without error.

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed in Santa Barbara, California, on June 6, 2008.

Rachel Roberto

TYPE OR PRINT NAME

Rachel Roberto

SIGNATURE