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7 Inc.

8 SUPERIOR COURT OF CALIFORNIA

9 COUNTY OF SANTA CLARA

10 * * *

11 COORDINATION PROCEEDING) Judicial Council Coordination
12 SPECIAL TITLE (Rule 1550(b))) Proceeding No. 4408
13 ANTELOPE VALLEY GROUNDWATER)
14 CASES) CASE NO. 1-05-CV-049053
15 INCLUDED ACTIONS:)
16 LOS ANGELES COUNTY WATERWORKS) NOTICE OF MOTION AND MOTION TO
17 DISTRICT NO. 40 v. DIAMOND) QUASH TRIAL SUBPOENA OF N.
18 FARMING COMPANY, et al.,) THOMAS SHEAHAN [C.C.P.
19 Los Angeles Superior Court) \$1987.1]; MEMORANDUM POINTS AND
20 Case No. BC325201) AUTHORITIES; AND DECLARATIONS
21 OF N. THOMAS SHEAHAN AND
22 LOS ANGELES COUNTY WATERWORKS) RICHARD G. ZIMMER IN SUPPORT
23 DISTRICT NO. 40 v. DIAMOND) THEREOF
24 FARMING COMPANY, et al.,) DATE: OCTOBER 31, 2008
25 Kern County Superior Court) TIME: 9:00 A.M.
26 Case No. S-1500-CV-254348) DEPT: 17C
DIAMOND FARMING COMPANY, and)
W.M. BOLTHOUSE FARMS, INC., v.)
CITY OF LANCASTER, et al.,)
Riverside Superior Court)
Case No. RIC 344436 [c/w case no.)
RIC 344668 and 353840])
ROSAMOND COMMUNITY SERVICES)
DISTRICT,)
CROSS-COMPLAINANT,)

1 TO ANAVERDE, LLC AND TO THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on October 31, 2008, at 9:00 a.m.,
3 or as soon thereafter as the mater may be heard in Department 17C
4 of the Santa Clara County Superior Court, located at 191 North
5 First Street, San Jose, California 95113, Bolthouse Properties,
6 LLC and Wm. Bolthouse Farms, Inc. will, and hereby do, move the
7 Court for an order (1) quashing the service of the subpoena
8 issued by Anaverde, LLC, and/or modifying same as necessary in
9 the discretion of the Court; and (2) ordering reasonable
10 attorney's fees and expenses incurred in making this Motion.

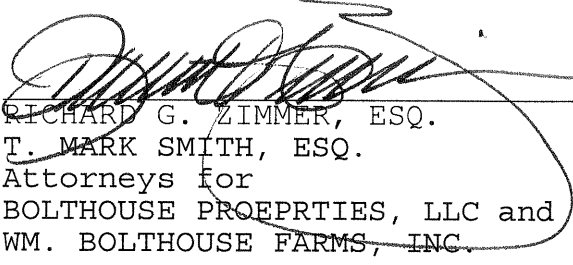
11 This Motion is made under *Code of Civil Procedure*, Sections
12 1987.1 and 1987.2 on the grounds that the subpoena is invalid and
13 defective in that the subpoena serves Thomas Sheahan as a
14 percipient witness only, that there is no good cause nor
15 materiality to his testimony as a percipient witness, that his
16 deposition is being taken as an expert for trial purposes
17 pursuant to *Code of Civil Procedure*, Section 2025.620(d) and
18 other applicable statutory and case law and pursuant to Court
19 approval, on the grounds that the subpoena was served by Anaverde
20 LLC knowing that expert, Thomas Sheahan, was not available on the
21 date subpoenaed, knowing that his testimony would be taken for
22 trial on October 27, 2008 and serving the subpoena
23 notwithstanding Anaverde LLC's knowledge that the witness would
24 be out of the continental United States and unavailable to
25 testify on the date of the subpoena in bad faith and/or without
26 substantial justification.

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This Motion is based upon this Notice, the pleadings, papers and records in this action, the included Memorandum of Points and Authorities and the Declarations of Thomas Sheahan and Richard G. Zimmer and upon such other and further evidence as may be presented at the hearing of this matter.

DATED: October 24, 2008

CLIFFORD & BROWN

By: 
RICHARD G. ZIMMER, ESQ.
T. MARK SMITH, ESQ.
Attorneys for
BOLTHOUSE PROEPRTIES, LLC and
WM. BOLTHOUSE FARMS, INC.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 THE COURT HAS THE POWER TO QUASH THE SUBPOENA AND TO AWARD
4 ATTORNEY'S FEES

5 *Code of Civil Procedure*, Section 1987.1 provides as follows:

6 "When a subpoena requires the attendance of a
7 witness or the production of books, documents
8 or other things before a court, or at the
9 trial of an issue therein, or at the taking
10 of a deposition, the court, upon motion
11 reasonably made by the party, the witness,
12 [1] any consumer described in Section 1985.3
13 or any employee described in Section 1985.6,
14 or upon the court's own motion after giving
15 counsel notice and an opportunity to be
16 heard, may make an order quashing the
17 subpoena entirely, modifying it, or directing
18 compliance with it upon such terms or
19 conditions as the court shall declare,
20 including protective orders. In addition,
21 the court may make any other order as may be
22 appropriate to protect the parties, the
23 witness, [2] the consumer, or the employee
24 from unreasonable or oppressive demands,
25 including unreasonable violations of [3] **the**
26 right of privacy of the witness, consumer, or
employee."

18 *Code of Civil Procedure*, Section 1987.2 provides as follows:

19 "In making an order pursuant to motion made
20 under subdivision (c) of Section 1987 or
21 under Section 1987.1, the court may in its
22 discretion award the amount of the reasonable
23 expenses incurred in making or opposing the
24 motion, including reasonable attorneys' fees,
25 if the court finds the motion was made or
26 opposed in bad faith or without substantial
justification or that one or more of the
requirements of the subpoena was oppressive."

Motions to quash a subpoena may be made on a variety of
grounds, including failure to show good cause, lack of

1 materiality and privilege. *In re Adams* (1980) 108 Cal.App.3d
2 685, 695; *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 342.
3 Motions to quash also can be granted on the grounds that the
4 testimony is inadmissible in that the witness cannot offer
5 relevant testimony (*People v. Rhone* (1968) 267 Cal.App.2d 652),
6 or on the grounds that the subpoena is too broad. (*Pelton*
7 *Motors, Inc. v. Superior Court* (1953) 120 Cal.App.2d 565.)

8 As discussed below, there is no good cause for the subpoena
9 to Thomas Sheahan. Mr. Sheahan will be deposed as an expert for
10 purposes of trial testimony on October 27, 2008. He was
11 subpoenaed as a lay witness. Given the fact that he will not be
12 called to offer lay percipient testimony, his testimony as a lay
13 witness is immaterial to the matters at issue. Further, to the
14 extent that he has been designated as a consultant for moving
15 parties herein, potential testimony could involve privileged
16 consulting matters. The Phase II Trial involves expert opinions
17 regarding hydrologic connection which is not the subject of lay
18 testimony, but rather, requires expert testimony. Accordingly,
19 such testimony is inadmissible.

20 II

21 **ANAVERDE, LLC SERVED THOMAS SHEAHAN WITH A SUBPOENA AS A LAY**
22 **WITNESS FOR WHICH THERE IS NO GOOD CAUSE NOR MATERIAL TESTIMONY**

23 Anaverde, LLC served Thomas Sheahan with a Civil Subpoena
24 pursuant to *Code of Civil Procedure*, Section 1985. Attached to
25 the Subpoena was a check in the amount of Seventy-Five Dollars
26 (\$75.00) for the witness fee and mileage. (See Exhibit "A"

1 attached to the Declaration of Richard G. Zimmer attached hereto
2 and herein incorporated by reference.) The witness fee was for a
3 lay witness since Mr. Sheahan's expert witness; pursuant to his
4 expert witness designation is Six Hundred Dollars (\$600.00) per
5 hour.

6 The issue in Phase II is whether there are areas within the
7 area of adjudication which are not hydraulically connected such
8 that they should be treated as sub-basins. The issue of
9 hydraulic connection is solely the subject of expert testimony.
10 Expert Thomas Sheahan will be providing testimony as an expert
11 witness. Additionally, as noted below, testimony of expert
12 witnesses at trial is governed by *Code of Civil Procedure*,
13 Sections 2034, et seq., not by *Code of Civil Procedure*, Section
14 1985. Accordingly, the subpoena should be quashed.

15 III

16 **THOMAS SHEAHAN HAS BEEN DESIGNATED AS AN EXPERT WITNESS PURSUANT**
17 **TO CODE OF CIVIL PROCEDURE, SECTIONS 2034, ET SEQ. AND WILL GIVE**
18 **TESTIMONY FOR USE AT TRIAL PURSUANT TO CODE OF CIVIL PROCEDURE,**
SECTION 2025.610 (d) AMONG OTHER STATUTORY AND CASE LAW AND AS
APPROVED BY THE COURT

19 Expert Thomas Sheahan has been designated by the moving
20 parties to testify as an expert pursuant to *Code of Civil*
21 *Procedure*, Sections 2034, et seq. These sections outline the
22 statutory procedure for designating expert witnesses and
23 depositions of expert witnesses. Thomas Sheahan was not
24 designated as a percipient witness. Accordingly, his testimony
25 is controlled by Sections 2034, et seq.

26 *Code of Civil Procedure*, Section 2025.620 provides as

1 follows:

2 "At the trial or any other hearing in the
3 action, any part or all of a deposition may
4 be used against any party who was present or
5 represented at the taking of the deposition,
6 or who had due notice of the deposition and
7 did not serve a valid objection under Section
8 2025.410, so far as admissible under the
9 rules of evidence applied as though the
10 deponent were then present and testifying as
11 a witness, in accordance with the following
12 provisions:

13 "... (d) Any party may use a video recording
14 of the deposition testimony of a treating or
15 consulting physician or of any expert witness
16 even though the deponent is available to
17 testify if the deposition notice under
18 Section 2025.220 reserved the right to use
19 the deposition at trial, and if that party
20 has complied with subdivision (m) of Section
21 2025.340." [Emphasis added.]

22 At the completion of the first installment of the Phase II
23 Trial which completed on October 10, 2008, the Court received
24 information from the various party attorneys regarding the
25 availability of expert witnesses to set a further trial date for
26 the completion of the Phase II Trial. The Court had limited
dates available for the trial and decided to set the matter for
November 3, 2008. Counsel for moving parties advised the Court
that their expert witness, Thomas Sheahan, had a pre-planned,
pre-paid 70th birthday vacation for him and his wife and his
eleven (11) grandchildren in Hawaii. Counsel for moving parties
offered to take Mr. Sheahan's testimony for purposes of trial by
videotape in order to accommodate the Court's calendar. The
Court advised this would be acceptable and counsel proceeded
accordingly. Mr. Sheahan's deposition is currently scheduled for

1 October 27, 2008.

2 All parties have been given notice pursuant to *Code of Civil*
3 *Procedure*, Section 2025.620 of Thomas Sheahan's deposition
4 scheduled for October 27, 2008, including the intention to use
5 the deposition at the continued trial of this matter commencing
6 on November 3, 2008. No party has objected to the deposition,
7 the Court has been apprised of and approved the use of the
8 deposition and the deposition will proceed on the 27th. All
9 parties have been provided with a report generally summarizing
10 the opinions Mr. Sheahan will give at the deposition and all
11 parties will have the opportunity to cross-examine Mr. Sheahan at
12 the deposition.

13 Given the fact that Mr. Sheahan's trial testimony will be
14 taken on October 27, 2008, and that Anaverde, LLC will have the
15 opportunity to cross-examine Mr. Sheahan at that time, there is
16 no good cause to require him to testify at the trial of this
17 matter. Further, given that Mr. Sheahan will be testifying as an
18 expert and cross-examined as such on October 27th for purposes of
19 trial, any further testimony at trial would be immaterial
20 inasmuch as such non-expert testimony would not be relevant to
21 the issue of hydraulic connection at issue in Phase II.

22 IV

23 **ANAVERDE, LLC'S OPPOSITION TO THIS MOTION IS NOT IN GOOD FAITH,**
24 **IS WITHOUT SUBSTANTIAL JUSTIFICATION AND IS OPPRESSIVE,**
25 **JUSTIFYING AN AWARD OF ATTORNEY'S FEES NECESSARY TO BRING THIS**
26 **MOTION**

As noted above, on the last day of the first installment of

1 the Phase II Trial, counsel for moving parties advised that Mr.
2 Sheahan had a pre-paid two week vacation with his wife and eleven
3 (11) grandchildren during the time the case was set for trial.
4 As an accommodation, counsel for moving parties advised that it
5 would notice Mr. Sheahan's deposition to be taken by videotape
6 for purposes of trial which the Court advised that it had
7 considered as well. Thereafter, counsel for moving parties set
8 the deposition by videotape, pursuant to *Code of Civil Procedure*,
9 Section 2025.620(d), advising that they would use this videotape
10 for purposes of trial. Notwithstanding the fact that Anaverde,
11 LLC was fully aware that this expert witness would be deposed for
12 trial on October 27th, and that he was not available for trial
13 beginning on November 3rd, Anaverde, LLC served a subpoena on
14 this witness. The expert witness was disclosed pursuant to *Code*
15 *of Civil Procedure*, Sections 2034, et seq., and the deposition
16 notice advised that his deposition was being taken for purposes
17 of trial.

18 In addition, he was served as a percipient witness,
19 tendering lay witness fees and mileage. Further, in discussions
20 with the Court and counsel regarding this issue, the Court
21 advised that it will accept Mr. Sheahan's expert testimony by
22 videotape, that other counsel will be given full opportunity to
23 cross-examine Mr. Sheahan at the time of his deposition, and that
24 third parties will have full opportunity to make objections at
25 the time of the deposition as they deem necessary.

26 Anaverde, LLC has nonetheless advised that it will not

1 withdraw the subpoena, forcing this motion to quash the subpoena.
2 Anaverde, LLC's actions are not in good faith, are without
3 substantial justification and are oppressive. Accordingly,
4 attorney's fees in the amount of \$1,237.50 (5.5 hours at
5 \$225.00/hour), plus costs in the amount of \$100.00 (\$40.00 filing
6 fee and \$60.00 fee for courtcall), for a total of \$1,337.50, were
7 necessitated as a result of having to make this Motion and to
8 attend the hearing on this Motion, should be granted to moving
9 parties herein.

10 V

11 CONCLUSION

12 Moving parties disclosed expert Thomas Sheahan as an expert
13 witness pursuant to *Code of Civil Procedure*, Sections 2034, et
14 seq. Pursuant to discussion with the Court and pursuant to *Code*
15 *of Civil Procedure*, Section 2025.620, Mr. Sheahan's deposition
16 has been set as an expert, for use as testimony at trial, on
17 October 27, 2008. Nevertheless, Anaverde, LLC served a subpoena
18 upon Mr. Sheahan as a lay witness, tendering lay witness fees.
19 Mr. Sheahan's testimony as a lay witness is irrelevant and
20 immaterial. Additionally, Mr. Sheahan has a pre-paid vacation
21 for himself, his wife and his grandchildren during the time set
22 for the continued Phase II Trial.

23 Notwithstanding that Mr. Sheahan's deposition/trial
24 testimony will be conducted with all parties having an
25 opportunity to conduct appropriate cross-examination and to make
26 appropriate objections, Anaverde, LLC has refused to withdraw the

1 subpoena. This Motion to Quash should not have been necessary.
2 The opposition to this Motion is not in good faith, is without
3 substantial justification and is oppressive, justifying an award
4 of attorney's fees and costs in the amount of \$1,337.50.

5 DATED: October 24, 2008


Respectfully submitted

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CLIFFORD & BROWN

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By: 
RICHARD G. ZIMMER, ESQ.
T. MARK SMITH, ESQ.
Attorneys for
BOLTHOUSE PROEPRTIES, LLC and
WM. BOLTHOUSE FARMS, INC.

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