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11 SUPERIOR COURT OF CALIFORNIA

12 COUNTY OF SANTA CLARA

13 \* \* \*

14 COORDINATION PROCEEDING	)	Judicial Council Coordination Proceeding No.
15 SPECIAL TITLE (Rule 1550(b))	)	4408
16 ANTELOPE VALLEY GROUNDWATER	)	CASE NO. 1-05-CV-049053
17 CASES	)	
18 INCLUDED ACTIONS:	)	<b>BOLTHOUSE PROPERTIES, LLC'S</b>
19 LOS ANGELES COUNTY	)	<b>AND WM. BOLTHOUSE FARMS, INC.'S</b>
20 WATERWORKS DISTRICT NO. 40 v.	)	<b>OBJECTION TO UNITED STATES'</b>
21 DIAMOND FARMING COMPANY, et al.,	)	<b>REQUEST FOR JUDICIAL NOTICE</b>
22 Los Angeles Superior Court Case No.	)	<b>AND JOINDER IN OBJECTION BY</b>
23 BC325201	)	<b>AGWA REGARDING SAME</b>
24 LOS ANGELES COUNTY	)	
25 WATERWORKS DISTRICT NO. 40 v.	)	<b>PHASE 3 TRIAL DATE:</b>
26 DIAMOND FARMING COMPANY, et al.,	)	<b>January 4, 2011</b>
27 Kern County Superior Court Case No. S-	)	<b>TIME: 9:00 A.M.</b>
28 1500-CV-254348	)	<b>DEPT: 1</b>
29 DIAMOND FARMING COMPANY, and	)	
30 W.M. BOLTHOUSE FARMS, INC., v.	)	
31 CITY OF LANCASTER, et al.,	)	
32 Riverside Superior Court	)	
33 Case No. RIC 344436 [c/w case no. RIC	)	
34 344668 and 353840]	)	
35 ROSAMOND COMMUNITY SERVICES	)	
36 DISTRICT,	)	
37 CROSS-COMPLAINANT,	)	

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1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that BOLTHOUSE PROPERTIES, LLC and WM.  
3 BOLTHOUSE FARMS, INC. (hereinafter “Bolthouse”) objects to the United States’ Request  
4 for Judicial Notice as follows, and for the reasons stated in the Objection of Antelope Valley  
5 Groundwater Agreement Association to United States’ Request for Judicial Notice,  
6 incorporated herein by reference.

7 **INTRODUCTION**

8 The California *Code of Civil Procedure* provides for discovery, including discovery and  
9 depositions of expert witnesses, in order to properly prepare for trial. The *Code* also requires  
10 expert witness declarations in order to select supplemental experts as necessary and to prepare  
11 for expert depositions and trial. The Purveyor party experts analyzed separate issues for the  
12 Phase 3 Trial. These opinions were contained in a document entitled Summary Expert Report.  
13 Purveyor expert declarations identified particular experts to testify to particular opinions  
14 relevant to the Phase 3 Trial. Depositions of Purveyor experts were noticed, along with  
15 requests for production to produce all writings relevant to their testimony. The depositions of  
16 the Purveyor experts were taken. These experts specifically identified their opinions for  
17 purposes of the Phase 3 Trial and gave testimony regarding these limited issues. June  
18 Oberdorfer, the expert for the United States, for the most part, simply agreed with opinions of  
19 the other Purveyor experts.

20 The Summary Expert Report contained no subsidence data after approximately 1992.  
21 In particular, the Summary Expert Report contained no extensometer data for any locations.  
22 Furthermore, no Purveyor expert testified to having reviewed any such data or to any opinions  
23 regarding such data. This data was not provided either in the Summary Expert Report, or at  
24 any of the depositions of any of the experts until approximately 4:00 p.m. on December 13,  
25 2010, at the last segment of the deposition of Joseph Scalmanini.

26 The extensometer data in question involves only one location and is of questionable  
27 relevance and persuasive value. Nevertheless, the entire focus of the Purveyor presentation  
28 seems in large part to have changed on the eve of trial. In particular, Mr. Scalmanini now seeks

1 to opine on issues of subsidence and with regard to this new subsidence data. He was not  
2 disclosed as an expert to testify on subsidence and testified at deposition that he did not do any  
3 subsidence analysis. The only subsidence analysis conducted by the Purveyor experts was  
4 performed by Peter Leffler. However, Peter Leffler did not produce this data at his deposition  
5 and did not give any opinions regarding this extensometer data at his deposition.

6 The United States, at the recent Case Management Conference, requested for the second  
7 time, an order expanding the potential testimony of its expert June Oberdorfer. As noted  
8 previously, Ms. Oberdorfer was not designated as an expert on subsidence and did not provide  
9 any of the data at issue at the time of her deposition. As discussed at length at the Case  
10 Management Conference, allowing the United States at the last minute to expand the opinions  
11 of Ms. Oberdorfer would be extremely prejudicial. Likewise, taking judicial notice of  
12 subsidence data on the eve of trial likewise would be extremely prejudicial.

13 Prejudice is compounded by the Purveyors' attempt to markedly change their strategy  
14 for the Phase 3 Trial, by now for the first time contending that subsidence data is available and  
15 that the groundwater basin is continuing to subside. This change in strategy and attempt to  
16 amend the expert designation is particularly prejudicial given that this request was made over  
17 the Christmas holiday when many of the attorneys, including myself, have not been in the  
18 office. In any event, Bolthouse requests the opinions of the Purveyor experts be limited by the  
19 scope of their expert declaration and depositions and that the new data be excluded. Bolthouse  
20 also makes the following observations:

21 **EXPERT TESTIMONY SHOULD BE LIMITED BASED UPON THE CODE OF CIVIL**  
22 **PROCEDURE, MAKING THE REQUEST FOR JUDICIAL NOTICE BOTH**  
23 **IMPROPER AND IRRELEVANT**

24 *Code of Civil Procedure*, Sections 2034.010, et seq., provide for simultaneous exchange  
25 of expert witness information and define the scope of potential expert witness testimony at trial.  
26 Briefly stated, the *Code of Civil Procedure* requires that parties identify expert witnesses which  
27 will be presented at trial including a "brief narrative statement of the general substance of the  
28 testimony that the expert is expected to give." Adverse parties are entitled to rely on the

1 designation of experts for purposes of determining whether to designate supplemental experts  
2 and for the purpose of determining whether to take depositions of these experts. The *Code of*  
3 *Civil Procedure* also provides for deposition of adverse experts and for production of records  
4 and data relied upon such experts to support their expert opinions. The parties designated  
5 experts and conducted depositions of the experts. Testimony by the experts should be limited  
6 by the scope of the expert witness declarations and limited to the opinions they gave at the time  
7 of their depositions.

8 As noted above, Peter Leffler was designated by the Purveyors to testify regarding  
9 subsidence. Attorneys designating Mr. Scalmanini and Ms. Oberdorfer did not provide expert  
10 declarations indicating that either would testify regarding subsidence. Ms. Oberdorfer did not  
11 testify at her deposition regarding any opinion of subsidence and in fact indicated she had no  
12 such opinion. Mr. Scalmanini admitted at his deposition that he and his office did not do work  
13 on subsidence. Nevertheless, on the last day of his testimony, on December 13, 2010, at  
14 approximately 4:00 p.m., Mr. Scalmanini for the first time provided new subsidence data, and  
15 testified to a subsidence opinion based upon this data. In summary, neither Mr. Scalmanini nor  
16 Ms. Oberdorfer should be allowed to testify regarding subsidence because they were not  
17 designated to testify regarding subsidence and because they did not have any subsidence data or  
18 had no subsidence opinions at all, or gave such an opinion too late to allow any meaningful  
19 response by the Landowners.

20 **THE EXTENSOMETER DATA IS INADMISSIBLE HEARSAY**

21 The United States has requested this Court take judicial notice of approximately nine  
22 hundred (900) pages of hearsay data provided on the eve of trial. The subsidence data which  
23 the Purveyors have requested the Court judicially notice is not the type of document which may  
24 properly be judicially noticed. Nevertheless, whether or not a document may properly be  
25 judicially noticed, inadmissible hearsay within such a document is not admissible. “[A] court  
26 cannot take judicial notice of *hearsay allegations* as being true,” just because the statements of  
27 fact are contained within records to which judicial notice is sought. *Sosinsky v. Grant* (1992) 6  
28 Cal.App.4<sup>th</sup> 1548, 1564 (emphasis in original); quoting, *2 Jefferson’s California Evidence*

1 *Bench Book* (2d Ed. 1982) Section 47.2, Page 1757. “Judicial notice substitutes for formal  
2 proof only because the matters judicially noticed are *not reasonably subject to dispute.*” *Id.*, 6  
3 Cal.App.4<sup>th</sup> at 1566. In this instance, the conclusions of the report and subsidence data is  
4 fraught with hearsay. There exist no facts within the reports to which this Court may take  
5 judicial notice under California *Evidence Code*, Section 452. Further, the data clearly requires  
6 expert testimony to understand and provide any evidentiary value to this data. It is clear the  
7 data was provided at the last minute, on the eve of trial. Finally, there has been no showing that  
8 the extensometers were maintained and calibrated and that they produced accurate data, which  
9 would require additional discovery and testimony. The Landowners have had no meaningful  
10 time to analyze this data, no time to retain experts to evaluate this data and no time to  
11 meaningfully address issues raised by this data in advance of the trial scheduled in less than one  
12 week. Accordingly, the request for judicial notice should be denied.

13 **CONCLUSION**

14 Bolthouse requests this Court require compliance with the *Code of Civil Procedure*.  
15 The Purveyor Parties have on the eve of trial apparently changed their trial strategy and now  
16 seek to have experts testify in areas for which they were not disclosed. Further, the area in  
17 which they seek to broaden their expert witness designations, already is covered by Peter  
18 Leffler, another expert witness disclosed by the Purveyors. Finally, the Request for Judicial  
19 Notice seeks to admit hearsay evidence disclosed at the last minute before trial. Although a  
20 document may otherwise be judicially noticed, judicial notice of the document does not make  
21 admissible hearsay evidence contained therein. Even if the data contained therein was  
22 admissible, expert testimony would be required to give meaning and evidentiary value to the  
23 data. The Purveyor Parties failed completely to give notice of an intent to show subsidence  
24 during the time frame reflected by the data, failed to properly designate experts on this issue  
25 and instead seek to expand on expert designations of other experts which at this late date will  
26 be severely prejudicial to the Landowner parties. The *Code of Civil Procedure* is designed to

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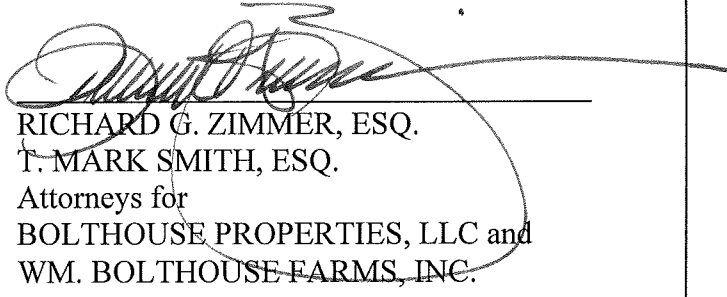
1 avoid the manifest prejudice presented by these Purveyor actions..

2  
3 DATED: December 29, 2010

Respectfully submitted.

4 CLIFFORD & BROWN

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6  
7 By:

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

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**PROOF OF SERVICE (C.C.P. §1013a, 2015.5)**

*Antelope Valley Groundwater Cases  
Judicial Counsel Coordination Proceeding No. 4408  
Santa Clara County Superior Court Case No. 1-05-CV-049053*

I am employed in the County of Kern, State of California. I am over the age of 18 and not a party to the within action; my business address is 1430 Truxtun Avenue, Bakersfield, CA 93301.

On December 29, 2010, I served the foregoing document(s) entitled:

**BOLTHOUSE PROPERTIES, LLC'S AND WM. BOLTHOUSE FARMS, INC.'S  
OBJECTION TO UNITED STATES' REQUEST FOR JUDICIAL NOTICE AND  
JOINDER IN OBJECTION BY AGWA REGARDING SAME**

— by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

— by placing \_ the original, \_ a true copy thereof, enclosed in a sealed enveloped addressed as follows:

X BY SANTA CLARA SUPERIOR COURT E-FILING IN COMPLEX LITIGATION PURSUANT TO CLARIFICATION ORDER DATED OCTOBER 27, 2005.

Executed on December 29, 2010, at Bakersfield, California.

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

— (Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

  
NANETTE MAXEY  
2455-2