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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

COORDINATION PROCEEDING, SPECIAL TITLE (Rule 1550 (b)), **ANTELOPE VALLEY GROUNDWATER CASES ,** INCLUDED ACTIONS: LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40 v. DIAMOND FARMING COMPANY, et al.,, Los Angeles Superior Court Case No. BC325201, LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40 v. DIAMOND FARMING COMPANY, et al. , Kern County Superior Court Case No. S-1500-CV-254348, 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] ,	Judicial Council Coordination Proceeding No. 4408 CASE NO.: 1-05-CV-049053 **BOLTHOUSE PROPERTIES LLC'S AND WM. BOLTHOUSE FARMS, INC.'S OBJECTION TO MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT FILED BY RICHARD WOOD AND LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40** **DATE:** MAY 24, 2011 **TIME:** 0:00 a.m. **DEPT:** 316 **JUDGE:** Hon. J. Komar

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1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that Bolthouse Properties, LLC and Wm. Bolthouse Farms, 3 Inc. (hereinafter "Bolthouse") hereby object to the Motion for Preliminary Approval of Class 4 Settlement filed by Richard Wood and Los Angeles County Waterworks District No. 40 on the 5 grounds that the Wood Class Stipulation of Settlement (hereinafter "Settlement") which is 6 requested to be approved, is contrary to law, against public policy and unjust. The Settlement 7 creates rights inconsistent with California law, conveys legal rights which the Settling Parties 8 have no legal right to convey, confirms legal rights which are prejudicial to the Non-Settling 9 Parties and creates a conflict of interest for the Court, which in order to preserve the Stipulation, 10 will put pressure on the Court to make subsequent rulings consistent with the Stipulation. 11 Additionally, the Stipulation of Settlement requires prejudgment on the part of the Court, 12 without evidence, and includes contingencies which may render the judgment void, thereby 13 making any judgment non-final. Finally, the Settlement will inhibit a comprehensive 14 settlement.

15 **INCORPORATION OF BOLTHOUSE OBJECTIONS TO WILLIS CLASS**
16 **SETTLEMENT**

17 Bolthouse herein incorporates by reference Bolthouse Properties, LLC's and Wm. 18 Bolthouse Farms, Inc.'s Supplemental Objection to Motion for Order Granting Preliminary 19 Approval of Class Action Settlement and Approving Notice to the Class, filed in response to the 20 Willis Class settlement, as if set forth at length herein..

21 **THE COURT MAY NOT ENTER THE STIPULATION OF SETTLEMENT AS A**
22 **JUDGMENT**

23 The Court may not enter a settlement agreement as a Judgment which is contrary to law, 24 against public policy or unjust. (*Timney v. Lin* (2003) 106 Cal.App.4th 1121.) The proposed 25 Settlement incorporates definitions which are inconsistent with California law, conveys water 26 rights without legal authority to do so and creates rights without evidentiary hearing and proof 27 of such rights. The Settlement divests the Court of jurisdiction over critical issues and creates a 28 conflict of interest for the Court by requesting the Court prejudge issues in order to avoid

nullifying the Settlement later. Approving the Settlement makes it likely the Court will favor the Settlement terms over the rights of non settling parties in order to avoid nullification of the Settlement.

FEDERAL RESERVE RIGHT

Whether a Federal Reserve right exists, the nature and extent of such a right and whether a Federal Reserve right can be proved in this case, has not yet been litigated. The Settling Parties cannot by contract create a Federal Reserve right. Likewise, the Settling Parties cannot by contract convey, or receive as a part of the consideration for their agreement, that which they do not have a legal right to convey or receive as a matter of law. Specifically, these Settling Parties have no legal authority to convey or divide up the correlative Overlying Landowner safe yield.

As noted previously, whether a Federal Reserve right exists, the nature and extent of such a right, and whether such a right can be proved, has not been litigated. On Page 9, Line 16 through 18, the Settling Parties purport to "**agree that the Settling Defendants and the Wood Class Members each have rights to produce groundwater from the Basin's Federally Adjusted Native Safe Yield**." There is no recognized legal right to the so called Basin's Federally Adjusted Native Safe Yield. Even if there were such a legal right, this right has not been litigated. Finally, the Settling Parties have no right by contract or otherwise to convey or divide up any purported Federally Adjusted Native Safe Yield, nor to determine that such rights are a part of the Overlying Landowner safe yield.

PRESCRIPTIVE RIGHTS

The Settling Purveyors may agree, as consideration for their agreement, that they will not assert prescriptive rights against the Class. However, these parties cannot legally stipulate that this agreement will not "**limit the Settling Defendants' prescriptive claims *vis a vis* the basin or any Non-Settling Parties**." This issue also will need to be litigated between the Non-Settling Parties. Also, the Settling Parties cannot legally agree that "**Defendants collectively have the right to produce up to 15% of the Basin's Federally Adjusted Native Safe Yield free of any Replacement Assessment**," as set forth in Lines 24 through 26 on Page 9. If the so

called Federally Adjusted Native Safe Yield includes the correlative overlying supply, these parties clearly have no right to convey away 15% of this correlative right. In the same way that the agreement cannot affect the overlying rights of the City of Palmdale and Lancaster, as set forth on Lines 3 through 5 at Page 10, this Settlement Stipulation cannot allocate, affect, convey or award the correlative rights of any other landowner.

WOOD CLASS MEMBERS' PUMPING RIGHTS

Allocation of 3 Acre Feet Per Year

The Settlement Stipulation provides, at Page 10, lines 18 through 19, that "**each Wood Class Member is entitled to the reasonable and beneficial use of up to 3 acre-feet per year on their overlying land.**" The Settling Parties cannot create such a right. Further, the Settling Parties cannot "**agree that the Wood Class Members have an Overlying Right to a correlative share of 85% of the Federally Adjusted Native Safe Yield for reasonable and beneficial uses on the overlying land.**" Whether a "Federally Adjusted Native Safe Yield" exists, whether this includes the Overlying Landowner correlative safe yield and whether the Wood Class Members have any rights to any portion of the safe yield has not been litigated. The parties cannot create such rights by agreement.

Likewise, the provision on Page 11, Lines 7 through 9 that "**To the extent that pumping by all overlying pumpers exceeds 85% of the Federally Adjusted Native Safe Yield, any Assessment shall be borne by the Overlying Owners (subject to the Wood Class Members' 3 acre-feet exemption).**" is legally unsound and cannot be agreed to by these parties. Additionally, the statement on Page 11, Lines 9 through 12 that "**If the Court does not approve this provision as part of this Agreement or at a future date, the physical solution provisions in Section V.B., as well as any related Watermaster provisions of this Agreement, shall not be applicable to the Wood Class Members.**" deprives the court of jurisdiction, exempts the settling parties from a physical solution and will prevent a combined judgment. Finally, the statement on Page 11, lines 26 through 27 that "**The Wood Class Members' pumping in excess of 3 acre-feet per year shall not be singled out by the**

Watermaster for a reduction of pumping or Assessment." cannot be agreed to by contract and improperly restricts the jurisdiction of the Court and a potential Watermaster.

The Settling Parties cannot lawfully determine that the Settling Landowners have a water right or that the water right is equal to 3 acre-feet per year. This issue has not bee litigated. Further, 3 acre-feet per year does not bear any reasonable relationship to the one acre foot which is often discussed as the amount a typical household will use in any given year. Regardless of the amount, whether the Settling Defendants have any overlying right and the nature and extent of this right, must be litigated and determined by the Court, not agreed to in a Settlement Agreement between parties that have no right to make this determination.

Water Code section 106

The Settling Parties improperly attempt by contract to create a priority overlying right based upon *Water Code* Section 106. (See Page 12, Lines 6 through 16.) Overlying rights are correlative. No priority exists for one overlying user over another. Whether or not *Water Code* Section 106 applies, the meaning of *Water Code* Section 106, the affect of *Water Code* Section 106 on a correlative groundwater right and whether any of the Settling Parties have such a right, have not been litigated. The Settling Parties cannot avoid litigation of this issue by simply adding the supposed priority in a Settlement Agreement. On Page 12, Lines 23 through 27, the parties improperly attempt by the Stipulation to bind the Court to the statement that "**However, by approving this Agreement, the Court expressly recognizes that the 3 acre-foot per year Assessment-exempt pumping right, set forth in IV.D.2, above, is domestic use pursuant to California Water Code section 106.**" Not only has the applicability and affect of *Water Code* Section 106 not been litigated, there has been no determination that even if the section did apply, that it exempts any of the Settling Parties from jurisdiction of the Court or that it increases or decreases or exempts their water rights from the Court's jurisdiction.

The Settling Parties have no right to require or predetermine that "**Exemption of the Wood Class by the Court from pumping reductions shall not impact the Settling Defendants' water rights or Assessments in any way**" or that "**Any pumping reductions needed because of the Wood Class exemption would be made solely by Overlying Owners**

from their 85% share of the Federally Adjusted Native Safe Yield" as set forth on page 12, lines 12-16. The Stipulating Parties cannot by stipulation exempt their pumping from any pumping reductions the Court may order, nor agree that any reductions necessary because of the exemption will be made solely by other Overlying Owners. This would improperly give the Wood Class members a priority overlying right, divest the Court of jurisdiction over this issue, prevent a combined judgment and be contrary to law and public policy.

DI MINIMUS ARGUMENT

The moving parties assert that they may pump 3 acre feet per year as a "**di minimus exemption**" as discussed on page 5 of the Motion, lines 16-19 and in footnote 2 on the same page. The Settling Parties may not contract nor agree that the Class Landowners' rights and/or water use is "di minimus" and therefore immune from litigation and/or determination of their rights by the Court. The Declaration of Eric Garner is hearsay, improper opinion and an attempt to avoid litigation of issues and to deprive the Court of jurisdiction over the Settling Parties. Further, there does not appear to be any legal authority supporting the proposition that a so called di minimus status somehow creates an overlying water right superior to that of other overlying landowners.

Nevertheless, providing a 3 afy priority to small pumpers is by no means di minimus. In the NOTICE OF MOTION AND MOTION TO FOR CLASS CERTIFICATION, page 7, lines 18-21. Class Counsel makes the representation:

> The Class here is comprised of a large number of property owners believed to total approximately 7,500.

Subsequent comments have suggested the class may consist of 10,000 landowners. **No proof has been made as to the legal basis for the alleged priority. Also, no proof has been made as to the number of class members. Finally, no proof has been made of the nature and extent of class member groundwater use, whether such use consists of household, domestic, irigation, farming, industrial or otherwise.** However, if the Class consists of as many as 10,000 property owners, pumping by the class could hardly be described di minimus, comprising roughly 30,000 afy of the safe yield. If there are 7,500 members, the priority right

would, under the Settlement, apply to 22,500 afy. Once again, such use clearly is not di minimus. This alleged priority would reduce what as a matter of law should be a correlative right held by all landowners. The Settlement cannot create this right and the right cannot simply be assumed without adjudication, both factually and legally.

RETURN FLOWS

Whether return flows exist, the amount of return flows, water rights related to return flows and associated issues, have not been litigated by this Court. Accordingly, the Settling Parties may not create such rights by Agreement as set forth on Page 13, Lines 2 through 6 of the Stipulation. Whether such rights exist must be litigated and decided by the Court. The Court cannot be deprived of jurisdiction over such alleged rights and the Settling Parties may not by Agreement determine that the "**Settling Parties will not be subject to any Replacement Assessment for their production of an amount equal to the Return Flows from Imported Water that they put to reasonable and beneficial use in the Basin.**" Likewise, they cannot determine by Agreement the amount of such return flows.

WATER STORAGE RIGHTS

Water storage rights have not been litigated. Whether storage rights exist, the nature and extent of storage rights, storage capacity and associated issues, have not been litigated. Likewise, priority rights to basin storage and geographic issues related to use of stored water have not been litigated and cannot properly be determined by the Settling Parties.

RECYCLED WATER RIGHTS

Finally, recycled water rights, if any, have not been litigated. The definition of recycled water has not been determined and cannot be determined by the Settling Parties.

CONCLUSION

The Settlement seeks to create and/or convey that which the Settling Parties have no right to create and/or convey. The Settlement clearly is much broader than the matters at issue between the Class and the Purveyors and seeks to avoid litigation of matters and rights which must be litigated. The Parties have no right to create a priority overlying landowner right for the Class without litigation of such a right. The Settlement Stipulation likewise cannot divest

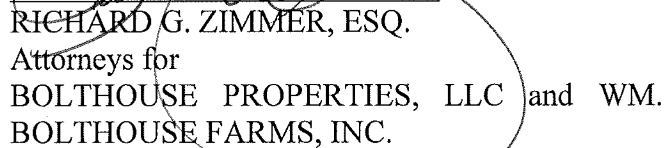
the Court of jurisdiction. The Settlement Stipulation should not be entered as a judgment if it is contrary to law, against public policy and/or unjust, as is the Settlement in question. Finally, entering the Settlement as a judgment will make it difficult or impossible to properly combine it with the remaining litigation in such a way as to reach a comprehensive adjudication of issues.

Based upon the foregoing, Bolthouse respectfully requests the Court deny the request for preliminary approval of the Settlement.

DATED: May 11, 2011

Respectfully submitted,

CLIFFORD & BROWN

By: 

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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 May 11, 2011, I served the foregoing document(s) entitled:

BOLTHOUSE PROPERTIES LLC'S AND WM. BOLTHOUSE FARMS, INC.'S OBJECTION TO MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT FILED BY RICHARD WOOD AND LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40

__ 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 May 11, 2011, 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