BEST BEST & KRIEGER LLP
ERIC L. GARNER, Bar No. 130665
JEFFREY V. DUNN, Bar No. 131926
WENDY Y. WANG, Bar No. 228923
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612
TELEPHONE: (949) 263-2600
TELECOPIER: (949) 260-0972
Attorneys for LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40

OFFICE OF COUNTY COUNSEL
COUNTY OF LOS ANGELES
RICHARD D. WEISS, BAR NO. 89791
ACTING COUNTY COUNSEL
WARREN WELLEN, Bar No. 139152
PRINCIPAL DEPUTY COUNTY COUNSEL
500 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012
TELEPHONE: (213) 974-8407
TELECOPIER: (213) 687-7337

Attorneys for LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40

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BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:
Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Los Angeles, Case No. BC 325201;

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. v. City of Lancaster, Diamond Farming Co. v. City of Lancaster, Diamond Farming Co. v. Palmdale Water Dist., Superior Court of California, County of Riverside, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668

RICHARD WOOD, on behalf of himself and all other similarly situated v. A.V. Materials, Inc., et al., Superior Court of California, County of Los Angeles, Case No. BC509546

Judicial Council Coordination Proceeding No. 4408

CLASS ACTION

Santa Clara Case No. 1-05-CV-049053
Assigned to the Honorable Jack Komar

LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40'S OPPOSITION TO CHARLES TAPIA AND NELLIE TAPIA FAMILY TRUST'S MOTION TO SET ASIDE DEFAULT IN CROSS COMPLAINT, AND REQUEST FOR DEFAULT AGAINST CROSS-COMPLAINANT

Date: September 26, 2014
Time: 10:00 a.m.
Dept. 20

The Los Angeles County Waterworks District No. 40 ("District No. 40") hereby opposes Cross-Defendants Charles Tapia and the Nellie Tapia Family Trust's (the "Tapias") Motion to Set Aside Default in Cross-Complaint; Request for Sanctions against Cross-Complainant ("Motion") as follows:

I. INTRODUCTION

District No. 40 requests that the Court deny this Motion because the manner of service provided to Mr. Tapia was reasonably calculated to inform Mr. Tapia of the proceeding and it satisfies California law. Contrary to the contention of the moving parties, District No. 40 made multiple attempts to serve Mr. Tapia as an individual and as trustee of the Nellie Tapia Family Trust at Mr. Tapia's residence. Only when such attempts were unsuccessful did District No. 40 seek permission from this Court for service by publication. (Motion, Exs. A, B & C) Upon obtaining this Court's permission, District No. 40 published the summons in the Los Angeles Times, the Bakersfield Californian and the Antelope Valley Press, which are newspapers of general circulation within Los Angeles and Kern Counties. (Declaration of Jeffrey V. Dunn ("Dunn Decl."), Exs. C-E [Proofs of Publication], G [Entry for Default].) The default was entered years after service by publication, after District No. 40 demonstrated that multiple attempts had been made to notify Mr. Tapia of this action, and after service was properly made.

II. RELEVANT FACTUAL HISTORY

During the course of this coordinated proceeding, the Court ordered the Public Water Suppliers to individually name and serve their First Amended Cross-Complaints on certain cross-defendants. The Public Water Suppliers undertook a search to identify each landowner in the Antelope Valley Groundwater Adjudication Basin ("Basin"). In addition to the named parties identified in the Public Water Suppliers' First Amended Cross-Complaint, an initial search was conducted to identify: (1) landowners owning over 100 acres within the Basin; (2) landowners pumping more than 25 acre feet of groundwater per year; and (3) mutual water companies located within the Basin. As part of this search, Charles Tapia and the Nellie Tapia Family Trust were identified as joint owners of a 137.36-acre parcel located within the Basin. (Dunn Decl., ¶4, Ex. A; Motion at 3 & Ex. D.) Mr. Tapia is the trustee of the Nellie Tapia Family Trust. (Motion at 3

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& Ex. D.) The Tapia Property is located in Kern County, but Mr. Tapia resides at 21083 Placerita Canyon Road, Newhall, Los Angeles County, California ("Tapia Residence"). (Motion at 3 & Ex. D.)

Upon learning the identity of the Tapias, the Public Water Suppliers amended their First Amended Cross-Complaint and named the Tapias jointly as Roe 568 in July 2007. (Dunn Decl., ¶5, Ex. B.) Due to the sheer number of cross-defendants in this action, it is the practice of District No. 40's counsel to attempt mail service of the cross-defendants before attempting personal service. (Dunn Decl., ¶5.)

The Public Water Suppliers, through a service agent, made multiple attempts to serve the Tapias, including ***four attempts for personal service*** at the Tapia Residence in September 2008 at different hours of the day. (Dunn Decl., ¶6; Motion, Exs. A & B.) The service agent's Declaration of Non Service identify the dates and times of his attempts to personally serve the Tapias as follows:

- September 15, 2008 at 9:30 p.m.
- September 16, 2008 at 11:25 a.m.
- September 17, 2008 at 8:05 a.m.
- September 19, 2008 at 2:00 p.m. (Motion, Ex. B).

The Public Water Suppliers requested the Court's permission to serve the Tapias by publication only after prior service attempts had failed. (Dunn Decl., ¶6.) In and around April and May 2010, the Public Water Suppliers properly served the Tapias by posting the Summons on the First Amended Cross-Complaint and the Tapias' names on three newspapers of general circulation in Kern County and Los Angeles County. (Dunn Decl., ¶7, Exs. C-E.) Having not received a responsive pleading from the Tapias, District No. 40 moved in December 2010 to have default entered against the Tapias. (Dunn Decl., ¶8, Ex. F.) Default was eventually entered against the Tapias on March 23, 2012. (Dunn Decl., ¶9, Ex. G.)

Mr. Tapia admits that he became aware of this coordinated proceeding through

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discussions with other landowners during the same year that the default against him was entered.[1] (Declaration of Charles Tapia ("Tapia Decl."), ¶4; Motion at 5 ["Tapia, on behalf of himself and of the Trust, knew that there was some sort of litigation involving his Ranch's water rights."].) However, Mr. Tapia made no attempt to ascertain whether he had been named as a party, even though a search of his name on the Court's website would have identified the Tapias as parties to this action. (Dunn Decl., ¶8, Ex. F.)

In fact, Mr. Tapia waited two years before contacting District No. 40 in April 2014—when most of the active parties in this action were engaged in global settlement discussions. (Dunn Decl., ¶11.) On or about April 11, 2014, Jeffrey Dunn, counsel for District No. 40, received a phone call from the Tapias' then legal counsel, Mr. Thomas Ward, who requested that his clients be named as parties. (*Id.*) However, Mr. Ward did not provide the parcel and ownership information of his clients until April 16, 2014. (*Id.*) Upon receiving this vital information, District No. 40 realized that a default had already been entered against the Tapias, and promptly informed Mr. Ward of this discovery and provided the Entry of Default requested by Mr. Ward. (Declaration of Wendy Wang ("Wang Decl."), ¶¶3-5.)

Mr. Ward subsequently asked District No. 40 to voluntarily set aside the default. After careful consideration of the facts and circumstances concerning service and default of the Tapias, counsel for District No. 40 informed Mr. Ward on June 6, 2014 that District No. 40 would not stipulate to set aside the default. (Dunn Decl., ¶11; Wang Decl, ¶6) The Tapias then retained new counsel, who then repeatedly contacted District No. 40's counsel and threatened to seek sanctions unless District No. 40 agreed to set aside the default, even though the new counsel was aware of the prior communications that counsel for District No. 40 had with Mr. Ward regarding this issue. (Dunn Decl., ¶12, Ex. J.)

[1] Mr. Tapia's alleged lack of knowledge of this action until 2012 is doubtful. In or around 2007, Wildermuth Environmental, Inc. prepared a parcel analysis to identify potential members of the Willis Class and the Wood Class. The Tapias and the Tapia Residence were included in the lists used to serve notice of class action to potential members of both classes. Mr. Tapia would have received these notices in 2008 or 2009. (Dunn Decl., ¶5.)

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III. ARGUMENTS

A. The Entry of Default Is Valid Because District No. 40 Properly Served the Tapias

Contrary to the Tapias' contentions, neither the order for publication nor the entry of default is void. District No. 40 was reasonably diligence in attempting to serve the Tapias prior to seeking an order to allow service by publication. Judicial Council Comment to Section 415.50 of the Code of Civil Procedure, which governs service by publication, provides that "[a] number of honest attempts to learn defendant's whereabouts or his address[, including] . . . investigation of . . . the real and personal property index in the assessors' office, near the defendant's last known location, are generally sufficient." (*See also, Stern v. Judson* (1912) 163 Cal. 726, 727-28.) As discussed above, District No. 40 made diligent efforts to ascertain the service address of the cross-defendants by identifying the owner of the property, finding a valid address to personally serve the Tapias and making four attempts at different times of the day to personally serve the Tapias – twice in the a.m. and twice in the p.m. (Motion Exs. A & B.) District No. 40 resorted to service by publication only when those attempts failed. (Dunn Decl., ¶6.) Consequently, District No. 40 has shown reasonable diligence in serving the Tapias prior to publishing notice.

The California Supreme Court stated, in a case involving large number of defendants, that service by publication may be appropriate because the sheer number of defendants may make it impossible to serve them with "reasonable diligence" in any other manner. (*Monterey S. P. P'ship v. W. L. Bangham* (1989) 49 Cal. 3d 454, 461, fn. 4 ["Although personal service on each of 252 beneficiaries probably would be difficult, [plaintiff] might have pursued a number of potential alternatives, including . . . requesting permission from the trial court to serve a summons on the beneficiaries by publication"].) Here, District No. 40 had to serve thousands of defendants, made multiple attempts to serve the Tapias, and more than met the "reasonable diligence" standard set forth in *Monterey S. P. P'ship*.

Furthermore, service of process by publication is valid because District No. 40 published notice of this action in major publications covering the area wherein the Tapia Property lies and where Mr. Tapia resides. (Dunn Decl, ¶7; Exs. C-E.) The Los Angeles Times, the Bakersfield

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Californian, and the Antelope Valley Press are widely circulated newspapers within the Kern County, where the Tapia Property and Mr. Tapia's ranch are located—a fact that the Tapias do not deny. (*Id.*) Moreover, the Los Angeles Times is a widely circulated newspaper where Mr. Tapia lives. (*Id.*) Consequently, this Court should deny the Tapia's request to set aside the default and to void the order for publication.

B. The Tapias Failed to File Their Motion Within a Reasonable Time

Both statute and case law require that a motion seeking relief from default be brought within a reasonable time. (Code Civ. Proc. § 473, subd. (b) ["Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time . . . ."]; Code Civ. Proc. § 473.5, subd. (a) ["The notice of motion shall be served and filed within a reasonable time . . . ."]; *Barnett v. Reynolds* (1932) 124 Cal App 750, 751 ["Where, as here, the motion to set aside a default judgment is made upon grounds not specified in section 473 of the Code of Civil Procedure, but is one addressed to the general equity powers of the court, it must be made within a reasonable time."].)

A key determining factor in deciding whether or not the motion was filed within a reasonable time is whether the moving party was diligent in seeking relief. (*Elston v. City of Turlock* (1985) 38 Cal. 3d 227, 234 ["In order to qualify for relief under section 473, the moving party must act diligently in seeking relief."].) Unless satisfactory diligence is shown, courts generally deny relief if the moving party waited three months or more to move to set aside the default. (*Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 529 ["Defendant has not cited, nor has independent research disclosed, any case in which a court has set aside a default where, in making application therefor, there has been an unexplained delay of anything approaching three months after full knowledge of the entry of the default."]; *Stafford v. Mach* (1998) 64 Cal. App. 4th 1174, 1184 [finding no support to set aside default where there was a three month delay in filing papers and "little or no explanation"]; *Ludka v. Memory Magnetics International* (1972), 25 Cal. App. 3d 316, 321-22.)

Here, the moving parties waited more than four months after receiving notice to the

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default to file the Motion. On April 28, 2014, counsel for District No. 40 informed Mr. Ward (then counsel of the Tapias) that default had been entered in 2012. (Wang Decl., ¶ 4.) Per Mr. Ward's request, a copy of the entry of default was provided to him on May 1, 2014. (Wang Decl., ¶ 5, Ex. A.) Yet, the Tapias did not move to set aside the default until September 4, 2014 – more than four months after the moving parties were made aware of default and approximately three months after District No. 40 declined to set aside the default. (Wang Decl., ¶¶ 4-6.) The moving parties provided no explanation for their dilatory conduct in filing this Motion.

Also, glaringly absent from the Motion is any discussion of efforts made by Mr. Tapia to determine if he was named in the lawsuit "involving his Ranch's water rights." (Motion at 5.) As landowner of property within the Basin, Mr. Tapia would have received notices sent to potential members of the Willis Class and the Wood Class in 2008 or 2009 – three or four years before default was entered. (Dunn Decl., ¶5.) In fact, the Tapias and the Tapia Residence were included in the lists used to serve notice of the class actions. (*Id.*)

By Mr. Tapia's own admission, he became aware of this action "in 2012 through other landowners." (Tapia Decl., ¶4.) By that time, multiple filings concerning the Tapias had been posted by District No. 40 to the Court's website and Mr. Tapia could have ascertained from the website whether or not he was a party to this action. (Dunn Decl., ¶8, Ex. F.) Yet, the records show that Mr. Tapia made no attempt to actively engage in this lawsuit concerning his water rights until presumably a settlement was on the horizon. (Motion, Ex. F [Mr. Ward wrote to Mr. Tapia, "The law firm that named you as a Defendant and whom I have been dealing with will not agree to set aside the Default entered against you. Since it was done 2 years ago, I do not believe you can get it set aside ***so that you cannot be involved in the settlement***."] [emphasis added].)

C. <u>The Tapias Failed to Establish Its Lack of Actual Notice Was Not Caused By Their Neglect</u>

In their Motion and the accompanying declarations, the Tapias failed to present any factual evidence that their lack of actual notice was not the result of their inexcusable neglect. Section 473.5 of the Civil Code of Procedure provides:

> A notice of motion to set aside a default or default judgment and for

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> leave to defend the action shall . . . be accompanied by an affidavit showing under oath that the party's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect.

(Code Civ. Proc. § 473.5, subd. (b).) Noticeably missing from Mr. Tapia's declaration is any statement that the lack of actual notice was not the result of his neglect. Mr. Tapia claims that he has followed the same work and sleep schedule for an unspecified number of years regardless of season or harvest times, and that he does not answer the doorbell after he retires for the evening. (Tapia Decl., ¶¶ 11 & 12.) Such generic statements falls short of the required statement that Mr. Tapia's lack of actual notice was not the result of his neglect as required by Section 473.5 of the Code of Civil Procedure.

D. Equity Demands that this Court to Deny the Tapias' Request

As a final argument to set aside the default, the Tapias argue that the court should set aside the default for equitable purposes. Specifically, the Tapias claim that District No. 40 committed extrinsic fraud in declaring "that Tapia was unreachable." (Motion at 7.) There was nothing fraudulent about District No. 40's representation to the Court in its request for service by publication. Accompanying District No. 40's request for publication were its service agents' declarations of non-service, two of which are attached by the moving parties to the Motion. (Motion, Exs. A & B.) As discussed above, District No. 40 acted in good faith and was diligent in its attempt to serve the Tapias and requested to serve by publication only after prior attempts to serve have failed. Extrinsic fraud does not exist here.

Moreover, equity demands that this Court deny the Tapias' motion, which in essence is asking this court to ignore District No. 40's efforts to identify not just the Tapias, but all property owners in the Basin, multiple attempts to personally serve the Tapias and other Cross-Defendants, and service by publication in three major newspapers that are widely circulated in Kern and/or Los Angeles Counties. In considering the equities, this Court should weigh District No. 40's diligent efforts to serve the Tapias against Mr. Tapia's apparent disinterest in the lawsuit he knew would have a direct impact on his ranch's water rights.

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E. District No. 40's Refusal to Set Aside the Default Does Not Justify Sanctions

The Motion cites no statute or case law that supports issuance of sanctions. In fact, the Motion does not discuss or request sanctions be issued. Only the caption of the Motion and Ms. Ijames' emails threatening District No. 40 with sanctions unless the default is set aside indicate the Tapias' intent to request for sanctions. (Dunn Decl., Ex. J.)

Assuming, *arguendo*, that a request for sanctions has been made, there is no basis to grant such a request. As discussed above, District No. 40 and its counsel acted in good faith at all times regarding the service of summons and entry of default. Upon receiving the Tapias' request to set aside the default, District No. 40 evaluated the facts and circumstances concerning service of Mr. Tapia and the entry of default, and informed Mr. Ward (the Tapias' former counsel) that District No. 40 did not intend on setting aside a default that was properly entered by the clerk. (Dunn Decl., ¶11; Wang Decl., ¶6.) Mr. Ward subsequently informed his clients that the default, in his opinion, cannot be set aside. (Motion, Ex. F.) Rather than accepting District No. 40's position, Mr. Tapia retained new counsel, who then repeatedly harassed District No. 40's counsel and threatened to seek sanctions unless District No. 40 abide by Mr. Tapia's request, even though the new counsel was aware of the prior communications that counsel for District No. 40 had with Mr. Ward regarding this issue. (Dunn Decl., ¶12, Ex. J ["You had previously spoken with attorney Thomas Ward regarding a request to stipulate to set aside Mr. Tapia's default. Mr. Ward communicated to our client that you would not stipulate."].) Such behavior is expressly condemned by California Rules of Professional Conduction. (Cal. Rules of Prof'l Conduct, Rule 5-100, ["A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. . . . [T]he term 'administrative charges' means the filing or lodging of a complaint with a federal, state, or local governmental entity which . . . may impose or recommend the imposition of a fine, [or] pecuniary sanction, ..."].) Accordingly, the Court should deny the Tapias' request for sanctions, if such request has or will been made.

IV. CONCLUSION

For the reasons stated above, District No. 40 respectfully requests the Court deny the Motion to Set Aside Default in Cross-Complaint, and Request for Sanctions Against Cross-

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

Complainant.

Dated: September 15, 2014

BEST BEST & KRIEGER LLP

By _____
ERIC L. GARNER
JEFFREY V. DUNN
WENDY Y. WANG
Attorneys for
LOS ANGELES COUNTY
WATERWORKS DISTRICT NO. 40

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BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

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18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

PROOF OF SERVICE

I, Sandra K. Sandoval, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP,300 South Grand Avenue, 25th Floor, Los Angeles, CA 90071. On September 15, 2014, I served the within document(s):

LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40'S OPPOSITION TO CHARLES TAPIA AND NELLIE TAPIA FAMILY TRUST'S MOTION TO SET ASIDE DEFAULT IN CROSS COMPLAINT, AND REQUEST FOR DEFAULT AGAINST CROSS-COMPLAINANT

☒ by posting the document(s) listed above to the Santa Clara County 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 September 15, 2014, at Los Angeles, California.

Sandra K. Sandoval

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