

1 Bob H. Joyce, (SBN 84607)
2 Andrew Sheffield (SBN 220735)
3 LAW OFFICES OF
4 LEBEAU • THELEN, LLP
5 5001 East Commercenter Drive, Suite 300
6 Post Office Box 12092
7 Bakersfield, California 93389-2092
8 (661) 325-8962; Fax (661) 325-1127

9 Attorneys for DIAMOND FARMING COMPANY,
10 a California corporation

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13
14 IN AND FOR THE COUNTY OF LOS ANGELES

15 Coordination Proceeding Special Title
16 (Rule 1550 (b))

Judicial Council Coordination No. 4408

17 ANTELOPE VALLEY GROUNDWATER
18 CASES

Case No.: 1-05-CV-049053

19 Included actions:

**DIAMOND FARMING'S OBJECTION
TO PLAINTIFF REBECCA LEE
WILLIS' PROPOSED ORDER
GOVERNING CLASS NOTICE**

20 Los Angeles County Waterworks District No.
21 40 vs. Diamond Farming Company
22 Los Angeles Superior Court
23 Case No. BC 325201

Hearing Date: October 16, 2007
Time: 9:00 a.m.
Dept: 1

24 Los Angeles County Waterworks District No.
25 40 vs. Diamond Farming Company
26 Kern County Superior Court
27 Case No. S-1500-CV 254348 NFT

28 Diamond Farming Company vs. City of
Lancaster
Riverside County Superior Court
Lead Case No. RIC 344436 [Consolidated
w/Case Nos. 344668 & 353840]

AND RELATED CROSS-ACTIONS.

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1 I.

2 **INTRODUCTION**

3 On September 25, 2007, plaintiff Rebecca Lee Willis submitted to the Court a Proposed Order
4 Governing Class Notice. Included in this Proposed Order was a Proposed Notice of Pendency of Class
5 Action (the "Notice") and a statement that such notice satisfies the requirements of Code of Civil
6 Procedure § 382 and due process. As the Notice currently exists, it neither satisfies the requirements of
7 Rule of Court 3.766(d) nor due process.

8 II.

9 **ARGUMENT**

10 The format and the content of a Class Notice are to be regulated by the trial court. *Gainey v.*
11 *Occidental Land Research* (1986) 186 Cal.App.3d 1051, 1057-1058, 231 Cal.Rptr. 239; *Frazier v. City*
12 *of Richmond* (1986) 184 Cal.App.3d 1491, 1499-1503, 228 Cal.Rptr. 376. One of the purposes of the
13 court's supervisory role is to assure that the Notice be "neutral and objective in tone, neither promoting
14 nor discouraging the assertion of claims." *Gainey v. Occidental, supra*, 1057-1058.

15 In support of plaintiff Willis' Motion, she cites to Code of Civil Procedure section 382 and
16 generalized notions of satisfying due process elements. As discussed below, the Proposed Notice does
17 not satisfy the requirements of due process and is neither accurate nor "neutral and objective in tone."

18 **A. Rule of Court 3.766(d)**

19 Under Rule of Court 3.766(d), the content of a Class Notice is subject to court approval.
20 Assuming that the prospective class members are to be given the right to request exclusion from the
21 class, the content of the Notice to prospective class members must contain "[a] brief explanation of the
22 case, including the basic contentions or denials of the parties." Rule of Court 3.766(d)(1). It logically
23 follows that the "brief explanation of the case" must also be accurate and not misleading. The basic
24 contentions or denials of all parties involved must be represented in the Proposed Notice.

25 Paragraph 6 of the Proposed Notice under the heading of "WHAT IS THE CASE ABOUT?"
26 violates CRC Rule 3.766(d)(1). There are four problem areas within this paragraph.

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1 First, is the usage of the phrase “[this] case concerns the parties’ rights to pump and use
2 groundwater.” This is a misleading and inaccurate phrase. The case is about the underlying property
3 right to pump and use the groundwater, a right based upon ownership and title to the land and
4 appurtenant to that title (See *City of Barstow v. Mojave Water Agency, et al.* (2000) 23 Cal.4th 1224,
5 p. 1240), and not merely the exercise of that right. The Public Water Suppliers are asserting a
6 prescriptive right to the groundwater in this case. This prescriptive right, if proven, transforms and
7 impairs title to the real property. This is a subtle distinction but an important one. A layperson may read
8 this Notice, as proposed, and not know that it is their legal rights, including title to their property, that
9 may be effected by the outcome of this litigation based on the Proposed Notice.

10 The second statement that is inaccurate and misleading is “Plaintiff Willis contends that she and
11 other landowners have a priority to pump and use the groundwater greater than the right of the Municipal
12 Water Suppliers.” This statement is erroneous because it presupposes an existing property right to the
13 use and ownership of the groundwater rights by defendant Public Water Suppliers. The statement, if not
14 changed, may lead proposed class members to believe that the litigation is about adjusting the priority
15 of the right to pump and use groundwater. A layperson could mistakenly believe that both plaintiff Willis
16 and defendant Public Water Suppliers have now, and will continue to have, two recognized rights to the
17 use of groundwater, and omits to inform that the outcome could divest them of all rights to use
18 groundwater, now or in the future. This statement should be reformed because the defendant Public
19 Water Suppliers can if they prove the prescriptive claims, divest and impair title to the real property
20 owned by each class member. The second statement in paragraph 6 omits that possible outcome and is
21 thereby misleading.

22 Finally, there is a problem with the statement of “The Water Suppliers contend that they have
23 rights to use that water which may impact the rights of the overlying landowners who are in the Class.”
24 This sentence is a gross understatement. Assuming that defendant Water Suppliers are able to win on
25 the merits of the case, there is no doubt that the rights of the overlying landowners “will” be impacted.
26 The use of the conditional term “may” implies that there is a potential that even if the defendants’ rights
27 are found to be valid, then the rights of the overlying landowners, may, nonetheless, not be impacted.
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1 This statement would instill a false sense of security in proposed class members, as they could be
2 erroneously led to believe that even if they receive an adverse judgment, there is a possibility their rights
3 would remain intact. A use of a more absolute term such as “will” as opposed to “may” would more
4 accurately reflect the realities of this litigation.

5 **B. Due Process Concerns and Fiduciary Duties**

6 Article I, Section 16 of the California Constitution states that “trial by jury is an inviolate right
7 and shall be secured to all.” A class action is a representative action in which the class representatives
8 assume a fiduciary responsibility to prosecute the action on behalf of the absent parties. *Southern*
9 *California Edison Co. v. Superior Court* (1972) 7 Cal.3d 832, 839-840, 103 Cal. Rptr. 709, 500 P.2d
10 621. When a plaintiff sues on behalf of a class, that person “assumes a fiduciary obligation to the
11 members of the class, surrendering any right to compromise the group action in return for an individual
12 gain.” *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 871, 97 Cal.Rptr.849, 489 P.2d
13 1113.

14 Further, the question of the existence of a prescriptive easement is a claim that invokes the right
15 to a trial by jury. The Courts of Appeal have held that a cause of action to establish a right to a disputed
16 easement is an action at law as to which the right to a jury trial existed in 1850 and continues to exist
17 today. *Arciero Ranches v. Meza* (Cal. Ct. App. 1993) 17 Cal.App.4th 114, 125, 21 Cal. Rptr. 2d 127;
18 *Frahm v. Briggs* (Cal. Ct. App. 1970) 12 Cal.App.3d 441, 445, 90 Cal. Rptr. 725. Therefore, in an
19 action to establish a prescriptive easement there is a constitutional right to a jury trial. *Arciero*
20 *Ranches v. Meza* (Cal. Ct. App. 1993), *supra*, 17 Cal.App.4th at 124-125, 21 Cal. Rptr. 2d 127; *Frahm*
21 *v. Briggs* (Cal. Ct. App. 1970), *supra*, 12 Cal.App.3d at 445-446, 90 Cal. Rptr. 725.

22 As the class representative in this case, plaintiff Willis has a fiduciary obligation to proposed
23 class members to inform them of their constitutional right to a trial by jury. Nowhere in the Proposed
24 Notice is this right mentioned. By failing to mention the right to a trial by jury, the Propose Notice is
25 fatally deficient in that it fails to apprise proposed class members of a key piece of information that could
26 effect whether or not a layperson receiving this Notice would decide to remain in the class or decide to

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1 opt out. Due process can only be satisfied if the proposed class members are aware of their right to a jury
2 trial and knowingly accept class membership.

3 Further, at no point in the Notice does plaintiff Willis mention that she possesses the power to
4 waive this constitutional right to a jury trial on behalf of the entire class. After class certification and
5 notice, the class representative is the party “responsible for trying the case, appearing in court, and
6 working with class counsel on behalf of absent members. The structure of the class action does not allow
7 absent class members to become active parties.” *Earley v. Superior Court* (Cal. Ct. App. 2000) 79
8 Cal.App.4th 1420, 1434, 95 Cal. Rptr. 2d 57. The class members are bound by the decisions made by
9 the class representative, and a judgment (favorable or not) will bind all members who do not request
10 exclusion from the prospective class. Rule of Court 3.766(d)(4). There is no direct case law on point
11 as to whether or not a class representative can waive the constitutional right to a trial by jury, but
12 presumably if the class representative maintains control over the direction and strategic choices in the
13 litigation then it would logically follow that such a power may be invested in the class representative as
14 well. Without information regarding their constitutional right to a trial by jury in the Proposed Notice,
15 proposed class members could find themselves in a situation where a class representative could waive
16 that constitutional right to a trial by jury without their knowledge of the right’s existence in the first
17 place.

18 If a layperson were to know that a class representative may have the power to waive a
19 constitutionally guaranteed right, and that such a waiver could have adverse consequences to one’s rights
20 in the underlying litigation, the proposed class member would be better equipped to make an accurate
21 and informed assessment and decision as to whether or not remaining in the proposed class would be
22 wise. An inclusion in the Proposed Notice informing prospective class members of the constitutional
23 right to a jury trial and a statement noting that this right might be waived by the class representative is
24 necessary for the fiduciary duties of plaintiff Willis to be satisfied and for the proposed class members’
25 due process rights to be satisfied.

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III.

CONCLUSION

For the foregoing reasons, plaintiff Willis' Proposed Notice must be amended.

Dated: October 9, 2007

LeBEAU • THELEN, LLP

By: 
BOB H. JOYCE
Attorneys for DIAMOND FARMING COMPANY,
a California corporation

PROOF OF SERVICE

1 ANTELOPE VALLEY GROUNDWATER CASES
2 JUDICIAL COUNCIL PROCEEDING NO. 4408
3 CASE NO.: 1-05-CV-049053

4 I am a citizen of the United States and a resident of the county aforesaid; I am over the age
5 of eighteen years and not a party to the within action; my business address is: 5001 E.
6 Commercenter Drive, Suite 300, Bakersfield, California 93309. On October 9, 2007, I served the
7 within **DIAMOND FARMING'S OBJECTION TO PLAINTIFF REBECCA LEE WILLIS'**
8 **PROPOSED ORDER GOVERNING CLASS NOTICE**

9 **(BY POSTING)** I am "readily familiar" with the Court's Clarification Order.
10 Electronic service and electronic posting completed through www.scefiling.org ; All papers filed
11 in Los Angeles County Superior Court and copy sent to trial judge and Chair of Judicial Council.

12 Los Angeles County Superior Court
13 111 North Hill Street
14 Los Angeles, CA 90012
15 Attn: **Department 1**
16 (213) 893-1014

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Appellate & Trial Court Judicial Services
(Civil Case Coordinator)
Carlotta Tillman
455 Golden Gate Avenue
San Francisco, CA 94102-3688
Fax (415) 865-4315

17 **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and
18 processing correspondence for mailing. Under that practice it would be deposited with the U.S.
19 Postal Service on that same day with postage thereon fully prepaid at Bakersfield, California, in
20 the ordinary course of business.

21 **(STATE)** I declare under penalty of perjury under the laws of the State of
22 California that the above is true and correct, and that the foregoing was executed on October 9,
23 2007, in Bakersfield, California.

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25 _____
26 **DONNA M. LUIS**

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