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

Attorneys for DIAMOND FARMING COMPANY, a California corporation, and CRYSTAL ORGANIC FARMS, a limited liability company

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 1550 (b))

ANTELOPE VALLEY GROUNDWATER CASES

Included actions:

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

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

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.

Judicial Council Coordination No. 4408
Santa Clara Case No. 1-05-CV-049053
Assigned to The Honorable Jack Komar

Case No.: 1-05-CV-049053

POINTS AND AUTHORITIES IN OPPOSITION TO PUBLIC WATER SUPPLIERS' MOTION TO AMEND OR MODIFY SEPTEMBER 11, 2007 ORDER CERTIFYING PLAINTIFF CLASS

Hearing:

Date: March 3, 2008
Time: 10:00 a.m.
Dept.: 1

Farms renew their argument that the Public Water Suppliers must establish the requisite commonality on the issue of notice to all landowners of their adverse and hostile claim of prescription by a preponderance of substantial evidence. Requisite commonality **cannot** exist when there is the potential, and likelihood, that class members will have divergent interests on any of the questions presented. (*Horton v. Citizens Nat. Trust & Sav. Bank of Los Angeles* (1948) 86 Cal. App. 2d 680.) There is clearly divergent interests between overlying landowners who have engaged in self-help and pumped groundwater and those who have not and who have unexercised overlying rights. Should this Court grant the Public Water Suppliers' motion, it will be creating a class that has – at the very least – a *potential* conflict of interest that is extremely likely to ripen into an *actual* conflict of interest at some later stage of this litigation.

The burden on moving for class certification is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate*. (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913.) This means each member must not be required to individually litigate numerous and substantial factual or legal questions to determine his or her rights following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants. (*Id.* at pp. 913-914, quoting *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460.).

If the plaintiff class is expanded to include all landowners in the Antelope Valley Basin regardless of their pumping status, common issues between pumpers and non-pumpers **cannot** be rationally found to predominate. For example, individual questions as to each members' usage of self help, knowledge of the adverse claims advanced by the Public Water Suppliers, and the effect to which each individual landowner has been affected by the pumping that allegedly gives rise to the prescriptive right claimed by the Public Water Suppliers cannot realistically be characterized as being common issues that predominate among class members.

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The case of *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447 is particularly instructive. In a purported class action against a municipal airport, plaintiffs sought recovery for diminution in the market value of their property allegedly caused by aircraft noise, vapor, dust, and vibration. The defendant moved for an order declaring the action inappropriate as a class action. The Supreme Court granted a writ of mandamus directing the vacation of the order certifying the action as a class suit. The court held that the trial court had abused its discretion in certifying the matter as appropriate for a class suit, in part because the action was based on facts peculiar to each prospective plaintiff (parcel) to such an extent that the requirement for a class action of a community of interest could not be met. The action for nuisance and inverse condemnation was predicated on facts peculiar to each prospective plaintiff. For example, an approaching or departing aircraft may or may not give rise to actionable nuisance or inverse condemnation depending on a myriad of individualized evidentiary factors. While landing or departure may be a fact common to all, liability could be established only after extensive examination of the circumstances surrounding each party. Development, use, topography, zoning, physical condition, and relative location were among the many important criteria to be considered. No one factor, not even noise level, would have been determinative as to all parcels. These separate unique factors weighed heavily in favor of requiring independent litigation of the liability to each parcel and its owner. Because liability was predicated on the impact of certain activities on a particular piece of land, the factors determinative of the close issue of liability were the specific characteristics of that parcel. The court held that the superficial adjudications which class treatment would entail could or would deprive members of the class of the constitutional mandates of due process. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 461- 462.)

When the alleged prescriptive use is insufficient to give notice to the owner that the use is contrary to the interest of the owner, or the owner does not have an apparent remedy to prevent the use, the user cannot acquire prescriptive rights. The owner must have some notice that unless some action is taken to prevent the use, it may ripen into a prescriptive easement. (*Clark v. Clark* (1901) 133 Cal. 667, 670-671; *Sullivan, supra,* at pp. 348- 350; *Lakeside Ditch Company* v. *Henry A. Crane, et al.* (1889) 80 Cal. 181, 183- 184; *Jones v. Tierney-Sinclair* (1945) 71 Cal.App.2d 366, 369; *Nelson v.*

Robinson (1941) 47 Cal.App.2d 520; *Peck* v. *Howard* (1946) 73 Cal.App.2d 308, 325- 326.) Should the Public Water Suppliers' motion be granted, the class would be forced to attempt to litigate this specific notice issue on a class-wide basis. The Public Water Suppliers could attempt to prove notice on a constructive basis against those overlying landowners who have exercised their overlying groundwater pumping rights (a point that Diamond Farming Company and Crystal Organic Farms do not concede). However, as previously stated on May 17, 2007 in Diamond Farming Company and Crystal Organic Farms' reply to the Public Water Suppliers' Opposition to Motion in Limine, supported by the USGS Water-Resources Investigations Report 98-4022, and in the Declaration of Dr. Steven Bachman, attached to Diamond Farming's Opposition to Public Water Suppliers' Motion to Certify a Defendant Class, such an argument could not be uniformly applied to the landowner members of the class who had not exercised their overlying groundwater pumping rights as they could not be held to the same constructive notice standards. The California Supreme Court in *City of Los Angeles* v. *City of San Fernando* (1975) 14 Cal.3d 199, 281- 283 makes clear " . . . if the other party is not on notice that the overdraft exists, such adverse taking does not cause the commencement of the prescriptive period." Non-pumping overlying landowners, unlike those landowners who have exercised their overlying groundwater rights, by definition cannot be on notice that any potential overdraft exists.

One of the main cases relied upon by the Public Water Suppliers in their motion is *Sav-On Drug Stores, Inc.v. Superior Court* (2004) 34 Cal.4th 319. That case confirms that the moving parties have the burden of establishing the basis for class certification based upon **substantial evidence**, which includes a **showing** (and **finding**) that common questions of law and fact predominate. (*Sav-on* at 326.) The Public Water Suppliers have failed to offer to this Court substantial evidence that common questions of law and fact would predominate should their motion be granted. The main fact that the Public Water Suppliers point to in support of their motion is that each class member owns land within the Basin and therefore all are interested in the determination of the safe yield of the Basin. Were this the only issue being litigated, then perhaps the Public Water Suppliers' position would have merit. Instead, the Public Water Suppliers desire to litigate the issue of prescription which, aside from the fact each amended class

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member would own land within the Basin, has no shared predominate questions of fact or law either between the pumping and non-pumping members or even within those two groups.

> "The adverse use must be such as to raise a presumption of a grant of an easement as the only hypothesis on which to account for the other party's failure to complain thereof. [Citation]. In the absence of any facts showing an actual knowledge by plaintiffs of the adverse nature of defendants' claim or of any facts sufficient to create a presumption of a knowledge of that claim, it cannot be said that a failure of plaintiffs to assert their rights by bringing an action against the defendants was such a submission as could be accounted for only on the hypothesis of a grant." (*Pabst v. Finmand* (1922) 190 Cal. 124, 129-130)

Ultimately, evidence of actual knowledge of the adverse claim of prescription asserted by each purveyor or evidence of facts sufficient to create a presumption of knowledge must be shown on an individual parcel-by-parcel, landowner-by-landowner basis. The motion by the Public Water Suppliers presupposes that each separate landowner knew or should have knew that each separate purveyor claimed a right to pump Basin groundwater adverse to each landowner's overlying right to pump regardless of whether that right was exercised or unexercised. The Public Water Suppliers cannot prove such actual or presumptive knowledge on the proposed class-wide basis, and that fact illustrates the impossibility of litigating the issue of prescription on a class-wide basis.

III. GRANTING THE PUBLIC WATER SUPPLIERS' MOTION WOULD PLACE PLAINTIFF CLASS COUNSEL IN PRIMA FACIE VIOLATION OF CALIFORNIA RULE OF PROFESSIONAL CONDUCT 3-310

"The duty of loyalty an attorney owes to a client is the principle underlying the rule that the attorney cannot undertake a representation that is directly adverse to an existing client [Citations]... [W]here an attorney's potentially conflicting representations are simultaneous... the primary value at stake... is the attorney's duty – and the client's legitimate expectation – of loyalty." (*Brooklyn Navy Yard Cogeneration Partners v. Superior Court* (1997) 60 Cal App 4th 248, 255).

Granting the Public Water Suppliers' motion would place plaintiff class counsel in a precarious position: counsel would be forced into a position to represent a class with members whose interests are directly adverse to one another. Counsel would be required to make an untenable choice --

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either withdraw from representation of the amended plaintiff class or attempt to gain informed written consent from each class member. California Rule of Professional Conduct 3-310(c) states:

> "(c) A member shall not, without the informed written consent of each client:
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict"

No party can, in good faith, advocate before the Court that there is not at the least a *potential* conflict between class members should the Public Water Suppliers' motion be granted. As stated above, even a potential conflict requires that class counsel gain informed written consent from each client member. This task is as monumentally difficult for class counsel to do as it would be for the Public Water Suppliers to prove actual notice of their prescriptive claims to all class members.

The Public Water Suppliers' cite to *Wershba v. Apple Computers, Inc* (2001) 91 Cal.App.4th 224 in support of their argument that no irreconcilable conflict would exist to prevent certifying the modified class. In that case, the Court of Appeal holds that "only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Id.* at p. 238 [incorrectly quoted by Public Water Suppliers in their Motion to Modify Order Certifying Plaintiff Class, p. 6, ln. 14-15]. Granting the Public Water Suppliers' motion would create a conflict that goes to the very subject matter of the litigation – who has what rights with regard to the usage of the water in the Antelope Valley Basin.

Unexercised rights want to preserve their legally defined overlying correlative right as against those landowners who have pumped groundwater and preserved their overlying correlative right under self-help. Those who have exercised self-help advance that any claims of prescription can only be asserted against those landowners who have not exercised their right to self-help, and if any rights to pump Basin groundwater should be extinguished, they must come from that set of landowners. Both sets of landowners have to respond to claims of prescription by the Public Water Suppliers. Defenses are available to those with exercised rights (self-help) that are unavailable to those who have not exercised their overlying groundwater pumping rights. A class counsel who represented both those who have exercised their rights and those who have not would be forced into acting in violation of California Rule

of Professional Conduct 3-310. For example, class counsel would have no motivation to assert the self-help defense to answer the claims of prescription on behalf of the overlying land owners who have exercised their overlying groundwater pumping rights – because doing so would place class counsel in a position where they would be arguing against the interests of the class representative Ms. Willis and those fellow overlying land owners who have not exercised their overlying groundwater pumping rights, as any assertion of self-help would ultimately reduce the amount of groundwater available for non-exercising class members should they choose to exercise their right in the future.

The case of *J. P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal. App. 4th 195 is instructive. In that case, the party moving for class certification was a large-scale copper purchaser who alleged that the defendants manipulated the price of copper on the London Metals Exchange and the American copper futures exchange. *Id.* at 201. Defendant J.P. Morgan opposed class certification, arguing that there were inherent and unavoidable conflicts among the proposed class members due to the complex nature of the copper marketing business in which various participants acted at various times as buyers and sellers. *Id.* at 206. The trial court disagreed with J.P. Morgan and granted plaintiff's motion for class certification under California Code of Civil Procedure § 382. *Id.* at 206. Upon review, the Court of Appeal found that the trial court abused its discretion in disregarding evidence of a conflict of interest among the proposed class members that went to the very subject matter of the litigation. *Id.* at 215. The court stated:

> "Thus, the difficulty here is in proving not only that there was a conspiracy to create the alleged price inflation, but also that it had maximum impact at the moment when the proposed class members' actionable purchases were made. This was a complicated and multilevel business structure in which the proposed class members were operating, in both buyer and seller capacities, and over a long period of time. Although the trial court found such challenges should go to the weight of the evidence, and need not be resolved at the stage of a motion to certify the class, we think this analysis is incomplete, because the wide-ranging evidence presented of the nature of this industry made it impossible to overlook the potential conflicts between class members, even at the preliminary class certification stage. The factual showing made here in opposition to the motion undermines any finding that the necessary community of interest is present, for both liability and damages purposes." (*Id.* at 214).

Another case on point is *In re Beer Distrib. Antitrust Litig.* (N.D.Cal. 1998) 188 F.R.D. 549. In that case, a group of small brewers moved for class certification under Federal Rule of Civil Procedure

23. *Id.* at 551. The brewers alleged that Anheuser-Busch participated in anti-competitive conduct and an antitrust conspiracy with its distributors when the company amended its distribution agreements to require distributors to use their "primary efforts" to move Anheuser-Busch products rather than their "best efforts" to do so. *Ibid.* Anheuser-Busch contended that intra-class conflict should preclude certification as the plaintiffs and the proposed class members vigorously compete with one another for distribution of their beer products. *Id.* at 554. The District Court ultimately agreed, noting that distributors "cannot service every brand of beer. Competition for the distribution services of beer distributors results in a conflict that goes to the merits of this litigation." *Ibid.* The Court further denied class certification by noting that individual questions "overwhelmingly" predominate any common questions of law or fact. *Id.* at 555.

In this case, there is only a finite set of water resources that can be safely taken from the Antelope Valley Basin in order to prevent an overdraft situation from presenting itself. The Public Water Suppliers, the individually represented overlying landowners who have exercised their overlying groundwater pumping rights, the unrepresented overlying landowners who have done so, and the represented class landowners who have not exercised their overlying groundwater pumping rights are all fighting for a slice of the same pie. There are conflicts between each of the above-identified groups. Attempting to place two of them into the same class, as the Public Water Suppliers intend to do with their motion, would automatically put class counsel in a situation where he would be violating California Rule of Professional Conduct 3-310.

IV. WITHOUT ADEQUATE PRE-CERTIFICATION DISCOVERY, DIAMOND FARMING COMPANY AND CRYSTAL ORGANIC FARMS CANNOT ASSESS THE VIABILITY OF CLASS CERTIFICATION. ANY RULING ON CLASS CERTIFICATION MUST BE POSTPONED TO ALLOW THE INTERESTED PARTIES TO CONDUCT DISCOVERY

As was made clear by the Appellate Court in *Louis E. Carabini, et al. vs. The Superior Court of Orange County* (1994) 26 Cal.App.4th 239, discovery directed at Class Certification is both appropriate and permitted in order to ensure a fair hearing.

> "Appellate courts have recognized the importance of such orders by creating an exception to the rule denying appellate review. 'Whether the order is directly appealable or we treat this as a petition for writ of mandate, the issue of the class certification order is and should be before us.' (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 871, fn. 9

> [196 Cal.Rptr. 69]; see also 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 85, p. 106.) Due process requires an order with such significant impact on the viability of a case not be made without a full opportunity to brief the issues and present evidence. This is true whether the issue is presented in a motion or by way of an order to show case issued by the court. In addition, each party should have an opportunity to conduct discovery on class action issues before its documents in support of or in opposition to the motion must be filed." *Carabini, supra*, pp. 243-244.

Diamond Farming Company served discovery directed at the issues raised by the Public Water Suppliers disguised motion after the Suppliers' own motion for class certification was made. Each Public Water Supplier has objected to, and refused to answer, these discovery requests. Diamond Farming Company then filed a motion to compel discovery responses, which was denied without prejudice by this Court and a stay was placed on all further discovery proceedings.

Diamond Farming Company renews and Crystal Organic Farms asserts objections to the class certification process in the absence of the ability to conduct pre-certification discovery. While the Public Water Suppliers allege that the proposed amended class would meet all the requirements for class certification, parties to this litigation cannot ascertain the truth of those allegations in the absence of pre-certification discovery. If the discovery stay is lifted, the responses would allow the court and the parties to have a well defined hearing that is supported by hard evidence that will allow the court to hold a meaningful hearing on the issue of whether the Public Water Suppliers can prosecute a claim of prescription against a class.

Diamond Farming Company and Crystal Organic Farms request that this Court lift the stay on discovery proceedings and continue the scheduled hearing on the proposed amended class certification until after pre-certification discovery can be completed.

V. CONCLUSION

The Public Water Suppliers' Motion to Amend or Modify September 11, 2007 Order Certifying Plaintiff Class should be denied. Litigating the issue of prescription through the class process is untenable and granting the motion would further exacerbate the problems inherent in the process. Importantly, if the motion is granted, it places class counsel in a position where he is forced to "serve two masters" with diametrically opposed interests, thereby violating California Rule of Professional

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Conduct 3-310. The unavailability of pre-certification discovery serves as further justification for denial of the amended class or the continuance of the class certification hearing until such discovery can be completed.

Dated: February 15, 2008

LeBEAU • THELEN, LLP

By: _____ for
BOB H. JOYCE, Attorneys for
DIAMOND FARMING COMPANY, California corporation, and CRYSTAL ORGANIC FARMS, a limited liability company

PROOF OF SERVICE

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

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within action; my business address is: 5001 E. Commercenter Drive, Suite 300, Bakersfield, California 93309. On February 15, 2008, I served the within POINTS AND AUTHORITIES IN OPPOSITION TO PUBLIC WATER SUPPLIERS' MOTION TO AMEND OR MODIFY SEPTEMBER 11, 2007 ORDER CERTIFYING PLAINTIFF CLASS

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

Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012
Attn: **Department 1**
(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

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

■ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct, and that the foregoing was executed on February 15, 2008, in Bakersfield, California.

Donna M. Luis

DONNA M. LUIS