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9 **SUPERIOR COURT OF CALIFORNIA**

10 **COUNTY OF LOS ANGELES - CENTRAL DISTRICT**

11  
12 Coordination Proceeding  
Special Title (Rule 1550(b))

13 **ANTELOPE VALLEY**  
14 **GROUNDWATER CASES**

15 Included Actions:

16 *Los Angeles County Waterworks District*  
*No. 40 v.*  
17 *Diamond Farming Co., et al.*  
Los Angeles County Superior Court, Case  
18 No. BC 325 201

19 *Los Angeles County Waterworks District*  
*No. 40 v.*  
20 *Diamond Farming Co., et al.*  
Kern County Superior Court, Case No.  
21 S-1500-CV-254-348

22  
23 *Wm. Bolthouse Farms, Inc. v. City of*  
*Lancaster*  
24 *Diamond Farming Co. v. City of Lancaster*  
*Diamond Farming Co. v. Palmdale Water*  
25 *Dist.*  
Riverside County Superior Court,  
26 Consolidated Action, Case Nos. RIC 353  
840, RIC 344 436, RIC 344 668

27 **AND RELATED CROSS-ACTIONS**  
28

) Judicial Council Coordination Proceeding  
) No. 4408

)  
) (For Filing Purposes Only: Santa Clara  
) County Case No.: 1-05-CV-049053)

)  
) Assigned for All Purposes To:  
) Judge: Hon. Jack Komar

)  
) (Filing Fees Exempt, Per Gov't Code § 6103)

) **SUR-REPLY OF PHELAN PIÑON**  
) **HILLS COMMUNITY SERVICES**  
) **DISTRICT IN OPPOSITION TO**  
) **BOLTHOUSE PROPERTIES, LLC'S**  
) **AND WM. BOLTHOUSE FARMS,**  
) **INC.'S MOTION IN LIMINE NO. 2**  
) **OBJECTING TO INTRODUCTION OF**  
) **EVIDENCE ON UNSUPPORTED**  
) **LEGAL THEORY**

) **Phase Five Trial:**

) Date: February 10, 2014

) Time: 9:00 a.m.

) Dept.: Room 222 (Old Dept. 1)

) (Phase Six Trial Date: August 4, 2014)

1 TO ALL PARTIES HEREIN AND TO THEIR ATTORNEY OF RECORD:

2 Phelan Piñon Hills Community Services District (“Phelan Piñon Hills”), hereby files this  
3 sur-reply because a portion of Defendants’ Bolthouse Properties, LLC and Wm. Bolthouse Farms,  
4 Inc.’s (collectively, “Bolthouse”) reply (“Reply”) to Phelan Piñon Hills’ opposition (“Opposition”)  
5 to Motion in Limine No. 2 Objecting to Introduction of Evidence on Unsupported Legal Theory  
6 (“Motion”) *raises new content that was not included within the Motion, namely new arguments*  
7 *relating to legal authorities cited in Phelan Piñon Hills’ Opposition, and, misstatements of*  
8 *Phelan Piñon Hills’ position.* For that reason, Phelan Piñon Hills offers this sur-reply to assist the  
9 Court and parties in addressing and resolving the Motion.

10 Fundamentally, Phelan Piñon Hills does not contend the return flow right it seeks is a  
11 “groundwater right” as Bolthouse continues to characterize the claim throughout its Motion and  
12 Reply.<sup>1</sup> Also, Bolthouse completely ignores the fact that it failed to comply with Los Angeles  
13 Superior Court Rule 3.57(b), which prohibits a motion *in limine* such as the immediate Motion  
14 given its effect, *if* granted, would adjudicate a cause of action (namely, Phelan Piñon Hills’ Sixth  
15 Cause of Action claiming the right to recapture native groundwater return flows).

16 As to the legal authorities, Bolthouse’s only criticism of Phelan Piñon Hills’ reliance on the  
17 United States Supreme Court case of *State of Montana v. State of Wyoming* (2011) 131 S.Ct. 1765  
18 (“*State of Montana*”) and *Department of Ecology v. U.S. Bureau of Reclamation* (1992) 118  
19 Wash. 2d 761 (“*Department of Ecology*”) is that the cases have “nothing to do with groundwater”<sup>2</sup>  
20 because surface water was at issue. Bolthouse’s distinctions are without significance. First, what  
21 is well-settled in California water law is that an “*overlying right is analogous to that of the riparian*  
22 *owner in a surface stream.*”<sup>3</sup>

23  
24 <sup>1</sup> Bolthouse’s contention that Phelan Piñon Hills does not have any appropriative rights because it  
25 “only began pumping recently” is an odd statement, contrary to well-settled law, but nonetheless  
seeming more appropriately within the scope of Phase 6 for water-rights determinations.

26 <sup>2</sup> Reply, p. 2:23.

27 <sup>3</sup> *City of Barstow, et al. v. Mojave Water Agency, et al.* (2000) 23 Cal.4th 1224 (“*Mojave*”), 1240.

1 Second, *City of San Fernando and City of Glendale* dealt primarily, if not exclusively, with  
2 surface water (the Los Angeles River and Upper Los Angeles River Area (“ULARA”)), yet those  
3 decisions from the California Supreme Court are applied to groundwater adjudication proceedings.<sup>4</sup>

4 Third, the “runoff and seepage water” at issue in *State of Montana*, and the subsequent *right*  
5 *of the appropriator to recapture such water*, is aligned with Phelan Piñon Hills’ return flow claim  
6 at issue in this case given the “seepage” or percolation of water from Phelan Piñon Hills’  
7 customers’ septic systems and losses from Phelan Piñon Hills’ sub-surface water-system (e.g.,  
8 pipes). Further demonstrating such is the fact *Mojave, supra at fn. 3*, involved an issue of  
9 “recirculating water” done by aquaculture operators which were overlies as well as a public water  
10 supplier, the Hesperia Water District.<sup>5</sup> There, the California Supreme Court held that the use of the  
11 water resulted in very little consumptive use, with approximately 50% able to return to the basin.<sup>6</sup>

12 Bolthouse also misstates the purpose for which Phelan Piñon Hills’ Opposition refers to  
13 *City of Glendale and City of San Fernando*<sup>7</sup>; Phelan Piñon Hills cited to those cases to demonstrate  
14 that this Court may do what the California Supreme Court did in both of those cases: Rely on out-  
15 of-state authorities.<sup>8</sup> And to be clear, *City of San Fernando* did not hold that a native return flow  
16 right does not exist; instead, in explaining the rationale for the imported return flow right, the  
17 Court, at page 261, rejected a party’s argument that a native return flow right then “obviously”  
18 exist because the imported return flow right exists.

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21 <sup>4</sup> *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68 (“*City of Glendale*”), 71-72; *City of*  
*Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199 (“*City of San Fernando*”), 207.

22 <sup>5</sup> *City of Barstow, supra*, 23 Cal.4th at 1255.

23 <sup>6</sup> *Id.* In this case, Phelan Piñon Hills would offer similar evidence, namely, that a return flow factor  
24 of 56% exists relating to its production, distribution, and customers’ use.

25 <sup>7</sup> Reply, p. 3:4-8.

26 <sup>8</sup> *City of Glendale* relied on State of Colorado and United States Supreme Court authorities at pages  
27 77 and 78, respectively. *City of San Fernando* relied on United State Supreme Court authority at  
28 page 230. **Also**, *Mojave, supra*, relied at pages 1245-1246 on the United States Supreme Court’s  
decision in *Nebraska v. Wyoming* (1945) 325 U.S. 589.

Moreover, California courts of appeal and the Supreme Court are often called upon to clarify or correct for what was said, or not said, in a prior case. For instance, in *City of Santa Maria, et al. v. Richard E. Adam, et al.* (2012) 211 Cal.App.4th 266 (“*City of Santa Maria*”), some landowner parties argued that return flow rights (*albeit*, imported return flows were at issue) exist only if pumping stations are downgradient from place of percolation, but the *City of Santa Maria* Court **clarified** *City of San Fernando* by stating the right to return flows does not attach to the “particular molecules of water...” and “the fact that spread water is commingled with other ground water is no obstacle to the right of recapture...”<sup>9</sup> Also, *Mojave, supra*, disapproved *San Fernando* to the extent *San Fernando* suggests in dictum that priority of rights may be disregarded.<sup>10</sup>

Here, Phelan Piñon Hills does not challenge that an importer should “bear the fruits of his endeavors” as the *San Fernando* court said, nor does Phelan Piñon Hills’ return flow right alter the importer’s right or the priority of that return flow right. Instead, Phelan Piñon Hills has and continues to contend that it has a return flow right resulting from use of native groundwater based upon the fact that its production is unaccounted for in this case; Phelan Piñon Hills is uniquely situated; and legal authorities do exist that support Phelan Piñon Hills’ claim. Nor does any California case hold that a native groundwater return flow right does not exist; in fact, *Mojave* suggests it does, but the issue was addressed simply through a stipulated judgment.

Ultimately, Phelan Piñon Hills has established a sufficient basis to proceed with its Sixth Cause of Action. And it seeks to do so with a legal basis and pursuant to well-established principles of California water law to utilize “...water resources of the State be put to beneficial use to the **fullest** extent possible of which they are capable...”<sup>11</sup> And, Phelan Piñon Hills respectfully requests this Court recognize a key principle spoken of by the *City of Santa Maria* Court:

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<sup>9</sup> *City of Santa Maria, supra*, 211 Cal.App.4th at 302.

<sup>10</sup> *Mojave, supra*, 23 Cal.4th at p. 1248: “To the extent footnote 61 in *City of San Fernando* could be understood to allow a court to completely disregard California landowners’ water priorities, we disapprove it.”

<sup>11</sup> *Ibid.* at p. 1235.

1 "Each case must turn of its own facts, & the power of the court extends to working out a  
2 fair and just solution."<sup>12</sup>

3  
4 Dated: February 7, 2014

ALESHIRE & WYNDER, LLP

5  
6 By: 

7 Wesley A. Miliband  
8 Attorneys for Cross-Defendant and  
9 Cross-Complainant,  
10 Phelan Piñon Hills Community  
11 Services District  
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27 <sup>12</sup> *City of Santa Maria, supra*, 211 Cal.App.4th at p. 288.  
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**PROOF OF SERVICE**

I, Marie W. Young,

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 18881 Von Karman Avenue, Suite 1700, Irvine, CA 92612.

On February 7, 2014, I served the within document(s) described as follows: **SUR-REPLY OF PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT IN OPPOSITION TO BOLTHOUSE PROPERTIES, LLC'S AND WM. BOLTHOUSE FARMS, INC.'S MOTION IN LIMINE NO. 2 OBJECTING TO INTRODUCTION OF EVIDENCE ON UNSUPPORTED LEGAL THEORY**

☒ (ELECTRONIC SERVICE) By posting the document(s) listed above to the Santa Clara County Superior Court website in regard to Antelope Valley Groundwater matter pursuant to the Court's Clarification Order. Electronic service and electronic posting completed through [www.scefiling.org](http://www.scefiling.org).

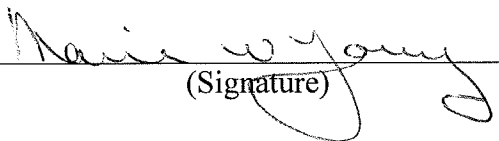
☐ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth above. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Irvine, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ (BY OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by Overnight Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in a sealed envelope or package designated by the express service carrier, addressed as set forth above, with fees for overnight delivery paid or provided for.

Executed on February 7, 2014, at Irvine, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Marie W. Young  
(Type or print name)

  
(Signature)