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Cross-Defendant and Cross-Complainant

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

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

Judicial Council Coordination Proceeding No. 4408

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

WHITE FENCE FARMS MUTUAL WATER CO. INC.'S OPPOSITION TO MOTIONS FOR CLASS CERTIFICATION

Date: March 12, 2007
Time: 9:00 a.m.
Dept.: 1

Cross-Defendants and Cross-Complainant White Fence Farms Mutual Water Co. Inc. submits its Memorandum of Points and Authorities in opposition to Motions for Class Certification.

Dated: 2/27/07

COVINGTON & CROWE, LLP

ROBERT E. DOUGHERTY
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Attorneys for White Fence Farms Mutual Water Co. Inc., Cross-Defendant/ Cross-Complainant

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Purveyors, now known as the "Public Water Suppliers" have requested this court to certify a class of property owners within the adjudication area of the Antelope Valley Groundwater Basin, to be designated as defendants in this action. The proposed class has been defined as owners of property located within the adjudication area of the Antelope Valley Groundwater Basin who do not receive water from a public entity, public utility, or mutual water company. As established by the Court, the adjudication boundaries encompass an area of approximately 1,000 square miles and include more than 65,000 parcels of property. The adjudication area encompasses at least seven (7) separate groundwater sub-basins. Although many parcels are less than 10 acres and are believed to individually pump a relatively small amount of groundwater, if any at all, all of the undeveloped parcels retain at least dormant rights. This litigation involves appropriative and prescriptive rights as well as overlying rights. Complaints and cross-complaints have been filed. The parties currently involved in this lawsuit are seeking a determination of their rights as between themselves as well as against those opposing them. The parties sought to be joined will also have the opportunity to seek the same determination.

II.

THE PROPOSED CLASS DOES NOT MEET THE CALIFORNIA CLASS CERTIFICATION REQUIREMENTS

Under California law, two basic requirements must exist to sustain a class action. "The first is existence of an ascertainable class, and the second is a well-defined community of interest in the questions of law and fact involved." *Vasquez v. Superior Court (Karp)* (1971) 2Cal.3d, 800. The proper legal criterion for deciding whether to certify a class is that the moving party must establish by a preponderance of the evidence that the class action proceeding is superior to alternate means for a fair and efficient

adjudication of the litigation. *Sav-On Drugs v. Superior Court (Rocher)* (2004) 34 Cal.4th 319, 332.

"An ascertainable class must be established prior to certification of any class action." *Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 845. Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying the class members. *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263,1271. In the instant action, the purveyors have defined the class as owners of property located within the adjudication area of the Antelope Valley Groundwater Basin who do not receive water from a public entity, public utility, or mutual water company. The class comprises more than 65,000 parcels of property. Although the class members can be identified through public land records, the ease of identification may be illusory. Because not all mutual water companies have yet been made parties to this litigation, at this stage of the case the shareholders of the non-joined mutual companies could be erroneously included in the class. Until all the mutual water companies are joined in the litigation, and their shareholders identified, certification of a landowner class is premature.

The "community of interest" requirement embodies three separate factors: (1) predominant common questions of law or fact; (2) class representatives whose claims or defenses are typical of the class, and (3) class representatives who can adequately represent the class. *Richmond v. Dart Industries, Inc.* (1981) 29Cal.3d 462, 470. The parties objecting to certification of this class do not believe predominant questions of law or fact exist among those for whom the purveyors are seeking to certify as a class, and additionally, the State of California's claims or defenses are not typical of the class. There is no doubt the State of California has the resources to adequately represent the class, however questions arise in defendant class actions if the representative of the class will fully and fairly represent the interests of the defendant class when the representative and the remainder of the class may be operating at crossed purposes.

"There is a substantial difference between a plaintiffs' class action lawsuit and a

lawsuit against a class of defendants. Defendants' class actions involve the serious danger of fraudulent or calculated selection of defendants who might not fully and fairly represent the interests of the class." *Simons v. Horowitz*, *supra* at 844. "[I]t is the responsibility of the class representative to protect the interests of all class members" (*ibid.*) "A defendant class should be certified and such an action tried only after the most careful scrutiny is given to preserving the safeguards of adequate representation, notice, and standing. Failure to insure any one of these essentials would require reversal of a judgment against a defendant class." *Simons v. Horowitz*, *supra* at 845. The court, before approving a defendant class, must be aware of potential conflicts of interest or collusion between plaintiffs and defendant class representative(s) which would prejudice the representation of the class as a whole.

In the instant litigation the purveyors have nominated the State of California to be the class representative. It is believed the State of California is one of the largest land owners in the Antelope Valley. At first glance there appears to be a conflict of interest between a large land owner and a large number of small landowners when issues such as overlying water rights, prescriptive water rights, and appropriative water rights, with the large land owner forgoing the rights of the smaller owners if forced to make a choice. The State of California can acquire prescriptive water rights from overlying private landowners, but cannot be prescripted against. Conversely, private overlying landowners can lose overlying rights by prescription, but cannot acquire prescriptive rights against the State of California. Accordingly, the State's claims and defenses are not representative of the proposed class, because the State's rights and powers are different than those of the members of the proposed class.

Due to the potential of conflict of interest, the nomination of the State of California to be the defendant class representative seems to be calculated to provide the proposed class with representation which, although undoubtedly capable, may ultimately be operating at crossed purposes with the proposed class, creating a conflict of interest. "The representative party must be interested enough to be a forceful advocate and his

chosen attorney must be qualified, experienced and generally able to conduct the litigation, and the representative party must have interests which are compatible with and not antagonistic to those whom he would represent." *Richmond v. Dart Industries, Inc.*, *supra* at 472, quoting *Shulman v. Ritzenberg* (1969) 47 F.R.D. 202, 207. The difference in rights and powers between the State and other overlying land owners creates a potential conflict of interest. Due to this potential conflict of interest, the State of California should not be approved as the class representative and the Court should deny certification of the class. To do otherwise could result in a reversal of any judgment entered in this litigation.

At the present time, given the configuration of the parties, it seems premature to attempt to create a defendant class. All potential parties should be joined in the litigation before establishing a landowner class. Again, all the mutual water companies have not been joined. It is possible their shareholders would comprise a large percentage of those included in the purveyors' estimate. It would seem the best course of action at this time would be to wait until all parties are joined, then make a determination whether a class or classes should be formed.

III.

THIS LITIGATION CONCERNS DECLARATORY AND INJUNCTIVE RELIEF UNDER FRCP RULE 23(b)(2). DEFENDANT CLASSES ARE NOT CERTIFIABLE UNDER THAT RULE.

This litigation deals with declaratory relief enumerating the parties' duties and rights concerning their claims to water in the basin. If a physical solution is imposed, that solution will likely consist of both injunctive and declaratory. Money damages are not requested. One of the purveyors' authorities is entitled "Certification of Defendant Classes under Rules 23(b)(2)" 84 Colum. L.Rev. 1371 (1984). FRCP Rule 23(b)(2) states that an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate

final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

This case does not appear to be one in which "questions of law and fact common to the members of the class predominate over any questions affecting only individual members" FRCP Rule 23(b)(3). Therefore, the class should not be certified under rule 23(b)(3). In this action, not all plaintiffs are similarly situated and not all defendants are similarly situated. Issues such as overlying water rights, prescriptive water rights, and appropriative water rights do not apply equally to all members of the putative class. As an example, issues exist as to assertion of dormant overlying rights and presently exercised overlying rights. They are antagonistic to one another, destroying the commonality of the questions of law and fact to the class, and causing the broad classification of all owners of property located within the adjudication area of the Antelope Valley Groundwater Basin who do not receive water from a public entity, public utility, or mutual water company to be amalgamated into one class would not be appropriate. The class should not be certified under Rule 23(b)(3).

In *Henson v. East Lincoln Township* (1987) 814 F.2d 410, the Seventh Circuit Court of Appeals ruled that defendant classes are not certifiable under FRCP Rule 23(b)(2). In upholding the District Court's refusal to certify a defendant class in that action the Court stated, "[T]he language of (b)(2) is against [the plaintiff]. Always it is the alleged wrongdoer, the defendant-never the plaintiff (except perhaps in the reverse declaratory suit)-who will have "acted or refused to act on grounds generally applicable to the class." Also, "The drafting history is also against [the plaintiff]. The Advisory Committee's Notes make no reference to defendant class actions in connection with (b)(2). They describe the (b)(2) class action as an action by a plaintiff class against a defendant who has done something injurious to the class as a whole." *Henson v. East Lincoln Township*, *supra* at 414. "The petitioners argue that defendant class actions lie outside the purview of [Rule 23(b)(2)]. In general, we agree" *Tilley v. TJX Companies, Inc.* (2003) 345 F.3d 34, 39.

No California court has addressed whether defendant classes can be certified when brought for declaratory and injunctive relief under FRCP Rule 23(b)(2), nor has the United States Supreme Court. All Federal Circuit Courts in which the issue of certification of a defendant class under that rule have been argued, the Circuit Courts have invariably found that defendant class actions lie outside the purview of Rule 23(b)(2). "In the absence of California law to the contrary, we look to the federal rule for guidance . . ." *Simons v. Horowitz*, *supra* at 841. Federal case law indicates that federal courts would not certify a defendant class under that rule. This court should not either.

IV.

SERIOUS DUE PROCESS ISSUES ARISE IN DEFENDANT CLASS ACTIONS

" [A] defendant class differs in vital respects from a plaintiff class, and the very notion of a defendant class raises immediate due process concerns. When one is an unnamed member of a plaintiff class one generally stands to gain from the litigation. The most one can lose . . . is the right to later bring the same cause of action. However, when one is an unnamed member of a defendant class, one may be required to pay a judgment without having had the opportunity to personally defend the suit." *Marchinski v. Oliver Tyrone Corporation* (1979) 81 F.R.D. 487, 489. "Notice to each class member guarantees no absent defendant will be held liable for a money judgment without knowing of the pendency of the proceedings." *In re the Gap Stores Securities Litigation* (1978) 79 F.R.D. 283, 292. FRCP Rule 23(c)(2) provides that the court may direct appropriate notice to classes established under Rule 23(b)(1) or (2), and mandates notice to all class members, including individual notice to all members who can be identified through reasonable effort for classes established under Rule 23(b)(3). Here although the unnamed members would not be required to pay a money judgment, they face the possibility of having their water rights severely curtailed.

In light of the above, it seems clear that effective notice must be provided as a prerequisite to binding the absent members of the class. Regardless of the statutory basis for formation of the class, each individual intended to be included in the class must

receive individual notice in order to provide the absentees with a full and meaningful opportunity to intervene to protect their rights or to opt out. " . . . individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather an unambiguous requirement of Rule 23." *Eisen v. Carlisle and Jacquelin, et al.* (1974) 417 U.S. 156, 176. In *Eisen* the United States Supreme Court ordered individual notice mailed to each class member of a class of 2,250,000. Notifying some 65,000 potential class members in this matter by first class mail is not unreasonable.

It could also be argued that since the putative class must be notified by mail, perhaps the best solution would be to join each potential class member in the action, sending copies of the summons and complaints to each along with a Notice and Acknowledgment of Receipt, giving each the opportunity to answer or default. If that were done, each individual would have the opportunity to control his or her own fate.

V.

CONCLUSION

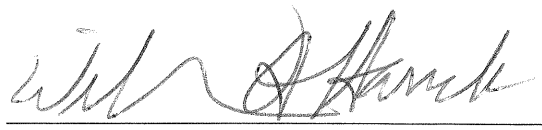
This opposing party predicts that the Court will ultimately find that groundwater in the adjudication area does not occur in a "soup bowl" of homogenous strata where hydrological and physical conditions are uniform throughout. Depending upon its location in the Antelope Valley, the groundwater available to any given parcel will vary significantly in many ways. Parcels in close proximity to a large municipal well field may have experienced declining well levels to the extent, and for a sufficient period of time, that prescription can be shown to have curtailed their overlying water rights. Other parcels, also in close proximity to that large municipal well field, may be isolated therefrom by faults, impervious strata, or other conditions which have kept them from suffering declining water levels. Still other parcels may be located up gradient from that same well field and thus can never be adversely affected by pumping from that well field.

In short, the unique nature of a parcel of real property is not confined to its surface location. Accordingly, it may be that a groundwater basin adjudication can never

proceed as a class action. Therefore, for the reasons cited above, this opposing party respectfully requests the Court to deny the relief requested by the Purveyors.

Dated: 2/27/07

COVINGTON & CROWE, LLP



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