ROBERT E. DOUGHERTY [SBN: 41317]
WILLIAM A. HAUCK [SBN: 202669]
Covington & Crowe, LLP
1131 West Sixth Street, Suite 300
Ontario, California 91762
(909) 983-9393; Fax (909) 391-6762

Attorneys for Defendant/Cross-Complainant
White Fence Farms Mutual Water Co. Inc.

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

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 RESPONSE TO PUBLIC WATER SUPPLIERS' PROPOSALS FOR CLASS DEFINITIONS AND METHOD OF NOTICE

Date: **April 16, 2007**
Time: **9:00 a.m.**
Dept.: **1**

[DECLARATION OF ROBERT E. DOUGHERTY FILED CONCURRENTLY HEREWITH]

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Defendant/Cross-Complainant White Fence Farms Mutual Water Co. Inc. submits its Memorandum of Points and Authorities in response to Proposals for Class Definitions and Method of Notice.

Dated: April 5, 2007

COVINGTON & CROWE, LLP

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

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Based on the Court's instructions at the case management conference held March 12, 2007, the Public Water Suppliers have submitted proposals for definitions of classes of property owners within the adjudication area of the Antelope Valley Groundwater Basin. It was not mentioned in the proposals whether the defined classes were to be designated as defendants or plaintiffs in this action.

One general class of landowners has been proposed, divided into two subclasses: Subclass A, which can generally be described as a group of "dormant" landowners, and Subclass B, which can generally be described as a group of landowners with operational groundwater wells. Exclusions for public entities and parties who have been or will be named and served in these coordinated groundwater adjudication proceedings were included. Proposed subclass rules indicate that all class members will be able to opt out of the class in order to have separate representation. No member will be able to opt out of the litigation unless it: (1) connects to a public water supplier's system; and/or (2) disclaims its right to pump groundwater from the land parcel. Any member of Subclass A that later operates a groundwater well will automatically become a member of Subclass B with the right to opt out of the class in order to have separate representation. Notice is proposed to be by "publication in local and regional newspapers".

White Fence Farms Mutual Water Co. Inc. still contends this is the type of litigation that does not lend itself to class action treatment due to the individuality of each landowner's claims and defenses, and the fact that class actions are not permissible in litigation requesting declaratory and injunctive relief under Federal Rules of Civil Procedure, Rule 23(b)(2). Also, no adequate class representative is currently in the lawsuit. If the Court elects to conduct this litigation as a class action, proper notice and adequate representation are required. Notice by publication is not permissible. Each

individual landowner must be identified and provided notice by first class mail to be rendered appropriate due process.

II.

IF IT IS DETERMINED THIS IS THE TYPE OF LITIGATION WHICH WILL LEND ITSELF TO CLASS ACTION, INDIVIDUAL NOTICE BY FIRST CLASS MAIL TO ALL IDENTIFIABLE CLASS MEMBERS IS REQUIRED

Federal Rules of Civil Procedure, Rule 23(c)(2) provides for 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). The Public Water Suppliers have now suggested that notice be provided by publication in the Antelope Valley newspapers and the Los Angeles Times. That is not adequate. Each individual class member must be notified by first class mail in order to satisfy the due process requirements enumerated in *Eisen v. Carlisle and Jacquelin, et al.* (1974) 417 U.S. 156.

"In the absence of California law to the contrary, we look to the federal rule for guidance . . ." *Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 841. In the instant matter, the federal rule is clear; readily identifiable class members must be notified by first class mail. The Public Water Suppliers have, in their Motion for Class Certification, indicated that another court in this state required notice to class members by first class mail in water rights litigation. This Court should establish the same requirement.

Regardless of the statutory basis for formation of the class, each putative member of the class must receive individual notice in order to be provided with a full and meaningful opportunity to intervene to protect his or her rights or to opt out. "[I]ndividual 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, supra,* at 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.

Although not all California cases have followed the notice requirements of *Eisen*, those California cases in which notice by publication was required were mostly consumer class actions, brought under Code of Civil Procedure section 1781, in which the damages for each individual class member rarely exceeded $5.00. (*Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853; *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960; and *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 179). That is not the case in this litigation.

Here, the unnamed members face the possibility of having their water rights severely curtailed, or losing them entirely. Those are significant property rights which should be defended. In order for each member of the class to properly protect those rights, or at least have knowledge of the right to protect those rights, the minimum notice which should be given is individual notice by first class mail. This is especially the case when those individual's addresses can be easily ascertained through the local County Assessor's offices.

The United States Supreme Court noted in *Eisen*:

> "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed." *Eisen, supra*, at 175.

The chance of actual notice is further reduced when, as proposed here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to the landowner's attention.

In order to demonstrate whether notice by publication would be effective, Defendant selected a one-square mile sample in the Antelope Valley, bounded by 110th Street West to 120th Street West on the east and west and West Avenue H and West Avenue I on the north and south. The Los Angeles County Assessor's office information set forth eighty-three (83) separate parcels located within the one-square mile area and provided the mailing addresses of the property owners. (See Declaration of Robert E.

Dougherty "RED", ¶3; Exh. A.) Only five owners, or 6%, live in the Antelope Valley. Another 22 owners, or 26%, live in Los Angeles County. There are 24 owners, 29%, who live in California counties other than Los Angeles. The largest group of owners, which number 30, or 36%, live outside the State of California. In two instances, the property owners live outside this country. (See Declaration of RED, ¶4; Exh. A.) In other words, a published notice in a local Antelope Valley newspaper, or even the Los Angeles Times newspaper, would probably exclude notice to 68% of these property owners. (See Declaration of RED, ¶5; Exh. A.) Most property owners, ***whose mailing addresses are readily available***, would likely never receive notice of this litigation through notice by publication.

Earlier, the Public Water Suppliers provided a blueprint for class notification in their original Motion for Class Certification. First, "the class is ascertainable because class members can be identified through public land records" (Public Water Suppliers' brief, Pages 10-11) Second, as stated on Page 3, Item 9 of the Order in the *Solano Irrigation District* litigation, attached to the Declaration of Jeffrey Dunn, "The notice will be delivered via first class mail to each class member." The need for individual notification of the existence of a lawsuit severely affecting property rights was recognized in that case, and should be required in this case.

If it is claimed that individual notice would be prohibitively expensive, "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." *Eisen, supra* at 176. It may be feasible to contact the County Assessor's office and make arrangements to send out a mailing with the property tax bills for all properties in the area. Although some landowners who will not be parties to the litigation will probably receive notice of the proceeding if notice is mailed by the assessor, it is better to notify too many, than too few.

". . . [T]he United States Supreme Court is the ultimate authority in deciding what type of notice would preclude a class member from relitigating issues decided in the class

action." *Cartt v. Superior Court (Standard Oil)* (1975) 50 Cal.App.3d 960, 969. The United States Supreme Court mandated personal notice by first class mail in *Eisen*, which was not a consumer class action suit. This court should mandate the same.

III.

NONE OF THE NAMED PARTIES APPEAR TO BE ADEQUATE CLASS REPRESENTATIVES FOR THE PROPOSED SUB-CLASSES

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) 2 Cal.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.

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) 29 Cal.3d 462, 470. At the current time, there appears to be no named defendant who has claims or defenses typical of the proposed class or subclasses.

"There is a substantial difference between a plaintiffs' class action lawsuit and a lawsuit against a class of defendants." *Simons*, *supra* at 844. "[I]t is the responsibility of the class representative to protect the interests of all class members." *Simons*, *supra* at 844. "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*, *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.

"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. At the present time, given the configuration of the parties, it seems premature to attempt to create a defendant class, as no named party has interests compatible with the smaller landowners.

It is also questionable whether putative plaintiff class representative Willis has the requisite "community of interest" with the other small landowners in the Valley to be an adequate plaintiff class representative. In the pleadings of that putative class, it has been stated that the entire Antelope Valley Groundwater Basin is in a state of overdraft. If the Willis group is designated as a plaintiff class representative, the entire class will be bound by the pleadings indicating overdraft, when it is possible that not every parcel in the Valley is currently overlying, or has ever overlain, an overdrafted basin or sub-basin.

Indeed, many members of the putative class may contend that any overdraft does not impact their properties and that no other parties have obtained prescriptive water rights against them. For that reason, the Willis plaintiffs would not be an adequate plaintiff class representative, and they also could not be a defendant class representative based on the current state of the pleadings.

IV.

CONCLUSION

Therefore, for the reasons cited above, White Fence Farms Mutual Water Co. Inc. contends this litigation is not the type which lends itself to handling as a class action. Indeed, it may be that a groundwater basin adjudication can never proceed as a class

action. If, however, the Court believes the matter should proceed as a class action, it is hoped the Court will exercise due caution in the appointment of a class representative and, in order to protect the due process rights of class members not present, require notice to each class member by first class mail.

Dated: April 5, 2007

COVINGTON & CROWE, LLP

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

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

I am employed in the County of San Bernardino, State of California. I am over the age of 18 and not a party to the within action; my business address is Covington & Crowe, LLP, 1131 West Sixth Street, Suite 300, Ontario, California 91762.

On **April 5, 2007**, I served the foregoing document described as **WHITE FENCE FARMS MUTUAL WATER CO. INC.'S RESPONSE TO PUBLIC WATER SUPPLIERS' PROPOSALS FOR CLASS DEFINITIONS AND METHOD OF NOTICE** on the interested parties in this action:

☒ by posting the document listed above to the Santa Clara County Superior Court website under the Antelope Valley Groundwater matter.

☐ by placing ☐ the original ☐ a true copy thereof enclosed in a sealed envelope addressed as follows:

☐ **BY MAIL**

☐ * I deposited such envelope in the mail at Ontario, California. The envelope was mailed with postage thereon fully prepaid.

☒ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Ontario, 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 PERSONAL SERVICE** I delivered such envelope by hand to the offices of the addressee.

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

Executed on **April 5, 2007**, at Ontario, California.

Carol Sanchez

CAROL SANCHEZ

COVINGTON & CROWE
ATTORNEYS AT LAW
1131 WEST SIXTH STREET,
Suite 300
ONTARIO, CA 91762