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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE 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 325 201 Los Angeles County Waterworks District No. 40 v. Diamond Farming Co. Superior Court of California, County of Kern, Case No. S-1500-CV-254-348Wm. 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, consolidated actions, Case No. 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

**ANTELOPE VALLEY GROUNDWATER**  
**AGREEMENT ASSOCIATION'S EX**  
**PARTE APPLICATION FOR RELIEF**  
**FROM EXPERT DISCLOSURE**  
**DEADLINE; MEMORANDUM IN**  
**SUPPORT OF APPLICATION**

**Date: June 18, 2008**  
**Time: 8:15 a.m.**  
**Department: 17**

**EX PARTE APPLICATION**

**FOR RELIEF FROM EXPERT DISCLOSURE DEADLINE**

The Antelope Valley Groundwater Agreement Association ("AGWA") hereby moves this Court for relief from the deadline for disclosure of expert witness information, as provided in the Court's May 27, 2008 Amended Order after Case Management Conference.

Pursuant to the attached Memorandum in Support of Application for Relief from Disclosure Deadline, AGWA requests that the court allow AGWA a 60-day extension, until noon on August 26, 2008, to make its required expert disclosures.

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EX PARTE APPLICATION FOR RELIEF FROM DISCLOSURE DEADLINE; MEMORANDUM IN SUPPORT

**MEMORANDUM IN SUPPORT OF EX PARTE APPLICATION FOR RELIEF FROM  
EXPERT DISCLOSURE DEADLINE**

**I. INTRODUCTION**

Pursuant to the Court's direction at the May 22, 2008 case management conference hearing, its May 27, 2008 Amended Order after Case Management Conference, and subsequently at the June 11, 2008 ex parte hearing, the Antelope Valley Groundwater Agreement Association ("AGWA") hereby requests relief from the June 27, 2008 expert disclosure deadline. AGWA requests a 60-day extension of this deadline for itself, until August 26, 2008. This request is based on the practical impossibility of AGWA being able to know the content of its testimony when no meaningful discovery has yet occurred in the case, as well as the alignment between the members of AGWA and the proposed small pumper class, which is not scheduled for certification until August 11, 2008.

**II. COMPLIANCE WITH CALIFORNIA RULE OF COURT 3.1202(C)**

As described in more detail below, this ex parte request is based upon the impossibility of AGWA meeting the June 27, 2008 deadline. The Court has made it clear that the appropriate avenue through which to address an inability to meet the deadline is an ex parte request,<sup>1</sup> and, in fact, it is not possible to avoid missing this deadline without an ex parte request. (See May 27, 2008 Amended Order after Case Management Conference.) The inability to meet a deadline has been held sufficient to constitute immediate harm. (See *Black Historical Society v. City of San Diego* (2005) 134 Cal.App.4th 670, 676.)

**III. THE LACK OF DISCOVERY MAKES IT A PRACTICAL IMPOSSIBILITY FOR  
AGWA TO MEET THE JUNE 27, 2008 DEADLINE**

The Court has indicated that the Phase II trial, scheduled for October 6, 2008, will address basin characteristics, including subbasins, safe yield and overdraft. These issues are relevant because overdraft is a key element of the purveyors' claims of prescription, and subbasins and safe yield are component issues relevant to whether overdraft exists. Accordingly, the parties who have

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<sup>1</sup> On June 6, 2008, AGWA filed an Ex Parte Application for Relief from Expert Disclosure Deadline, requesting that the court vacate the October 6, 2008 Phase 2 trial date. This application was refused.

1 alleged prescription against the members of AGWA will bear the burden of proof at Phase 2 trial.

2 Since AGWA does not bear the burden of proof in this phase of the trial, it believes that any  
3 testimony it offers will be reactive to the testimony offered by the purveyors. That is, since the  
4 purveyors will be required to provide a full analysis of basin characteristics in order to meet their  
5 burden of proof, AGWA does not see the value to the Court in AGWA providing a duplicative  
6 analysis that will simply reiterate the many areas in which the two analyses would likely agree. (See  
7 Declaration of Michael T. Fife in Support of Ex Parte Application (hereafter "Fife Declaration"), ¶  
8 3.) Rather, it is more appropriate for AGWA to offer testimony concerning those areas of the  
9 purveyors' analysis with which it disagrees. However, AGWA cannot know what these areas of  
10 disagreement are until it knows something about the purveyors' intended testimony.

11 Like most modern professionals, hydrologists and hydrogeologists have areas of focus and  
12 specialization. For example, some have particular expertise in modeling, others in soil permeability,  
13 and others in bedrock infiltration. (Fife Declaration, ¶ 4.) AGWA will not know who it should  
14 retain in order to offer testimony until it knows what the purveyors claim and whether there are areas  
15 of disagreement. (Fife Declaration, ¶ 5.)

16 Until recently, the Court had imposed a stay on all discovery relating to any issues other than  
17 the certification of the proposed landowner classes. This stay was prompted in part by discovery  
18 propounded by Diamond Farming Company requesting basic information about the purveyors'  
19 prescriptive rights claims, such as the specific years in which they allege that overdraft has occurred.  
20 This information will be fundamental to the purveyors' case in chief in October. To date, the  
21 purveyors have refused to respond to this discovery. (Fife Declaration, ¶ 2.) Given that the  
22 purveyors have refused to respond to basic and unambiguous written discovery, it is reasonable for  
23 AGWA to conclude that meaningful information about their allegations would not be obtained until  
24 they had designated their experts for trial and those experts were deposed. In any event, it cannot be  
25 denied that they have not responded to even this basic level of discovery and the deadline to  
26 designate experts is now less than two weeks away.

27 It is thus a practical impossibility for AGWA to meet the June 27, 2008 expert disclosure

28 EX PARTE APPLICATION FOR RELIEF FROM DISCLOSURE DEADLINE; MEMORANDUM IN SUPPORT

1 deadline. The first meaningful information AGWA will obtain about the purveyors' claims will  
2 likely not be obtained until they post their expert disclosures on June 27. It is likely that AGWA will  
3 not know anything about these claims until the experts are subject to deposition and must explain the  
4 assumptions and reasoning on which they base their opinions. Until AGWA has been permitted at  
5 least some amount of meaningful discovery, it cannot know who to offer as an expert, what type of  
6 focus or specialization the expert should have, and what the content of that expert's testimony will  
7 be.<sup>2</sup>

8 **IV. AGWA'S ABILITY TO MEANINGFULLY PARTICIPATE IN THE PHASE 2 TRIAL**  
9 **IS TIED TO THE DISPOSITION OF THE SMALL PUMPER CLASS PROCESS**

10 AGWA's request for relief from the expert disclosure deadline is based on its inability to  
11 meet the June 27, 2008 deadline. However, this is not a situation where a party has ignored the  
12 proceedings and is now attempting to become active at the last minute; AGWA has been actively  
13 engaged in good faith in both the Court process and in the concurrent settlement process.

14 AGWA has engaged legal counsel to participate in the legal proceedings and settlement  
15 negotiations because there has been no other realistic way to participate in either of those processes.  
16 AGWA has not missed a single hearing or settlement meeting. AGWA has also participated on the  
17 technical committee through a member of the group named Eugene Nebeker. (See Declaration of  
18 Eugene B. Nebeker in Support of Ex Parte Application, ¶ 1.) Mr. Nebeker is a third generation  
19 alfalfa farmer in the Antelope Valley and has farmed at Nebeker Ranch for almost 50 years. (*Id.*, at  
20 ¶ 2.) Mr. Nebeker is conversant in water issues and was able to provide the committee with valuable  
21 information about local conditions and farming practices. (*Id.* at ¶ 3.) He served on the Lahontan  
22 Regional Water Quality Control Board for about 15 years and is a registered engineer in both  
23 chemical and agricultural engineering, but, contrary to the purveyors remarks in their June 10, 2008

24 <sup>2</sup> All of this is beside the point to the possibility that any overdraft that may currently be occurring is  
25 a recent phenomena that has only been occurring since the recent housing boom began and that the  
26 filing of the Diamond Farming Company and Bolthouse Farms quiet title actions prevented the  
27 pumping during this overdraft condition from ripening into a prescriptive right. That is, once the  
28 specific allegations of the purveyors are known, it may be possible to resolve the primary  
controversies about the technical information by legal argument alone and thus avoid the hiring of  
additional experts, which the landowners can barely afford as it is.

1 Objection, he is not a expert and has never “purported” to be an expert. (*Id.* at ¶¶ 4, 5.) He is a local  
2 water user who took the time to participate in the process (the only member of the technical  
3 committee who was not compensated for his participation) in an effort to promote settlement and to  
4 participate in good faith until other landowners came in to the case and more official participation  
5 through a hired expert was possible. (*Id.* at ¶¶ 6, 7.)

6 AGWA has expended significant resources in order to participate in the class certification  
7 process over the last year and a half because the issue of which landowners will be in the case and  
8 the manner in which they will be in the case is central to AGWA’s ability to participate. (Fife  
9 Declaration, ¶¶ 7, 8.)

10 As AGWA has stated many times before, the only way for landowners to be able to  
11 participate in litigation such as this – especially where the principal aggressor is Los Angeles County  
12 – is to band together and share the expense of the litigation. Only a small number of landowners  
13 have been brought in to the case so far.<sup>3</sup> AGWA will not know what its resources are, and it will not  
14 know what the resources of any aligned groups are, until the small pumper class has been created  
15 and the opt out period has expired. (Fife Declaration, ¶¶ 7, 8.)

16 **V. REQUESTED RELIEF**

17 Because of the lack of discovery to date, and because of AGWA’s alignment with the  
18 proposed small pumper class, AGWA requests a 60-day extension of the expert disclosure deadline  
19 until August 26, 2008.

20 AGWA does not actually believe that this amount of time is truly sufficient to resolve the  
21 issues described above. For example, if all goes well, the small pumper class will only have been  
22 certified two weeks earlier and it is unlikely that the class notice to either class will have yet been  
23 mailed. But AGWA recognizes that the purveyors must be given their own opportunity to conduct  
24 discovery regarding AGWA’s designated expert. If AGWA is permitted to designate its expert on

25  
26 <sup>3</sup> AGWA notes that while the purveyors were able to present a well researched and vigorously  
27 argued objection to AGWA’s June 6, 2008 filing, they did not even mention one of AGWA’s central  
28 points in that filing: that they simply refuse to tell the Court or any of the parties how many  
landowners have yet to be successful served.

1 August 26, 2008, then the purveyors will still have over a month to depose that expert before the  
2 commencement of trial on October 6, 2008. Thus, even though the 60-day extension to August 26,  
3 2008 does not provide complete relief, it seems to be a reasonable compromise date that affords  
4 AGWA some measure of relief and is still fair to the purveyors.

5  
6 Dated: June 16, 2008

BROWNSTEIN HYATT FARBER  
SCHRECK, LLP

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9 By: 

MICHAEL T. FIFE  
BRADLEY J. HERREMA  
ATTORNEYS FOR AGWA

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA,  
COUNTY OF SANTA BARBARA**

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 E. Carrillo Street, Santa Barbara, California 93101.

On June 16, 2008, I served the foregoing document described as:

**ANTELOPE VALLEY GROUNDWATER AGREEMENT ASSOCIATION'S EX PARTE  
APPLICATION FOR RELIEF FROM EXPERT DISCLOSURE DEADLINE;  
MEMORANDUM IN SUPPORT OF APPLICATION**

on the interested parties in this action.

By posting it on the website at 1:00 p.m./a.m. on June 16, 2008. This posting was reported as complete and without error.

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed in Santa Barbara, California, on June 16, 2008.

Rachel Roberto

TYPE OR PRINT NAME

Rachel Roberto

SIGNATURE

EX PARTE APPLICATION FOR RELIEF FROM DISCLOSURE DEADLINE; MEMORANDUM IN SUPPORT