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 WATER WORKS DISTRICT NO. 40

*[See Next Page for Additional Counsel]*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

**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. BC325201;

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, consolidated actions; 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

**MEMORANDUM OF POINTS AND  
 AUTHORITIES OF PUBLIC WATER  
 SUPPLIERS IN OPPOSITION TO  
 ANAVERDE LLC'S MOTION *IN LIMINE*  
 NO. 1 TO EXCLUDE ALL  
 PROSPECTIVE WITNESSES FROM  
 THE COURTROOM DURING  
 TESTIMONY**

**DATE:** October 6, 2008  
**TIME:** 9:00 a.m.  
**DEPT:** 1

Trial Date: October 6, 2008

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION.**

The issue presented in the Phase 2 trial is whether a party can establish that areas within the court-determined Adjudication Area are so hydrologically isolated from the remainder of the Adjudication Area that they must be treated as separate groundwater basins and adjudicated separately. This is an expert driven issue where the parties will rely heavily, if not exclusively, on the advice and testimony of their experts.

Motion *in Limine* No. 1, filed by cross-defendant Anaverde LLC (“Anaverde”), is a tactical ploy intended to deprive Cross-Complainants Los Angeles County Water Works District No. 40, Rosamond Community Services District, City of Lancaster, City of Palmdale, Palmdale Water District, Quartz Hill Water District, California Water Service Company, and Littlerock Creek Irrigation District, *et al.*, (collectively referred to herein as “Public Water Suppliers”) and others access to advice from their designated-experts while other witnesses are testifying. The Motion seeks to “exclude any prospective witness who is not under examination and who is not a party to the action from the courtroom.” (Motion, at 3:14-15.) Anaverde (i) only recently made its position known in this case on the issue of subbasins, (ii) provided an expert report after business hours the evening before the deposition of Anaverde’s expert, making it impossible to review the report prior to the deposition, and (iii) identified a multitude of trial exhibits. Anaverde’s motion smacks of procedural gamesmanship, as Anaverde has delayed providing its evidence/discovery to the parties, and now attempts to preclude the parties’ experts from hearing, reviewing and rebutting that evidence at trial. The Motion should be denied for the following reasons:

**1. Anaverde offers no support for its request to exclude all non-testifying witnesses from the courtroom.** While the Court has discretion under Evidence Code section 777 to determine whether witnesses should be excluded from the courtroom, the policy underlying that section is not advanced here. Anaverde has made no showing that there is a specific risk of any witness tailoring factual testimony based on a preceding witness-examination. Furthermore, there is little, if any, reason for sequestering a witness who is to testify in an expert capacity only, and not to the facts of the case. (*See People v. Maxey* (1972) 28 Cal.App.3d 190, 198-199.)

2. Even assuming an exclusionary order is warranted as to percipient witnesses, there is no justification to exclude expert witnesses. Expert witnesses who may be asked to comment on, or base an opinion on, testimony given by other witnesses are properly excepted from exclusionary orders. (*See People v. Maxey, supra*, 28 Cal.App.3d at p. 198-190.) In the Phase 2 trial, the experts' presence will be beneficial for the trier of fact because the experts will be more likely to base their expert-opinions on a more accurate understanding of the issues as the expert testimony evolves during trial.

3. The complexity of the issues in the Phase 2 trial render "on the spot" expert advice essential to the presentation of the Public Water Suppliers' case. The technical nature of the core issues of the Phase 2 trial renders "on the spot" expert advice essential to the presentation of the Public Water Suppliers' case and the free flow of expert testimony to be presented to the court. As such, there is good cause for the presence -- in the courtroom -- of Public Water Suppliers' experts throughout the trial.

## II. THE COURT SHOULD DENY ANAVERDE'S CARTE BLANCHE REQUEST TO EXCLUDE ALL PROSPECTIVE WITNESSES FROM THE COURTROOM DURING TESTIMONY.

### A. Other Than Vague Assertions Of Inequity And Prejudice, Anaverde's Motion Offers No Justification To Exclude All Non-Party Witnesses from the Courtroom During Testimony.

Sequestering witnesses from a courtroom is not a matter of right. (*See Great Lakes Airlines, Inc. v. Smith* (1961) 193 Cal.App.2d 338, 345.) Rather, the trial court has discretion under Evidence Code section 777 to determine whether witnesses should be excluded from the courtroom to prevent tailored testimony. (*Ibid.*) As a practical matter, the policy underlying this rule is generally limited to "percipient" witnesses testifying to factual issues. (*See People v. Maxey, supra*, 28 Cal.App.3d at p. 198-199.)

The policy underlying Evidence Code section 777 would not be advanced by Anaverde's request. Other than a vague assertion of prejudice, Anaverde has not provided any reason for excluding prospective witnesses from the courtroom. The motion makes no reference to any specific

witness who may present a threat of tailoring his or her own factual testimony based on the testimony of preceding witness-examinations. Similarly, the motion fails to mention specific issues, areas of inquiry, or particular witnesses that may be “unfairly educated” prior to their own examination.

Furthermore, the motion draws no distinction between “percipient” as opposed to “expert” witnesses. Reviewing courts “have recognized the difference between percipient witnesses who testify to observed facts in the case, and expert witnesses who express their opinion on the basis of hypothetical facts, personal knowledge not in controversy, or testimony they hear in court.” (*People v. Valdez* (1986) 177 Cal.App.3d. 680, 688 citing *People v. Maxey*, 28 Cal.App.3d at p. 198-199.) There is little, if any, reason for sequestering a witness who is to testify in an expert capacity only, and not to the facts of the case. (*See People v. Maxey*, 28 Cal.App.3d at p. 198-190.)

In short, there is no justification to for Anaverde’s *carte blanche* request for an order excluding from the courtroom all non-party witnesses who are not under examination.

**III. IN THE EVENT THE COURT IS INCLINED TO GRANT ANAVERDE’S REQUEST, EXPERT WITNESSES SHOULD BE EXCEPTED FROM ANY EXCLUSIONARY ORDER.**

**A. Expert Witnesses Are Routinely Excepted From Exclusionary Orders.**

Trial courts also have discretion to except particular witnesses from an exclusionary order. (*See People v. Garner* (1961) 57 Cal.2d 135, 154-155.) Expert witnesses who may be asked to comment on, or base an opinion on, testimony given by other witnesses are properly excepted from exclusionary orders. (*See People v. Maxey, supra*, 28 Cal.App.3d at p.198-190 [the court observed that it was highly desirable that opposing experts heard one another’s testimony because “both experts were merely testifying to their medical opinions.”]) A leading treatise on civil trials and evidence in California states:

[m]ost judges are more flexible and permit experts to be present during part or all of the trial upon a proper showing of necessity (e.g., a showing that the attorney needs the expert’s assistance to understand the significance of opposing expert’s testimony and to prepare adequate cross-examination.

(Wegner, Fairbanks, Epstein, and Chernow, *Civil Trials and Evidence*, (The Rutter Group 2007), § 4:446); *see People v. Valdez*, 177 Cal.App.3d. at p. 688 [excepting experts from a order to exclude is appropriate upon a showing of good cause for the expert's presence during witness testimony].)

**B. The Complexity of The Issues in the Phase 2 Trial Render "On The Spot" Expert Advice Essential to the Presentation of the Public Water Suppliers' Case.**

The technical nature of the issues of the Phase 2 trial renders the advice of experts, on the spot, essential to the presentation of the Public Water Suppliers' case. As such, there is good cause for the presence of the Public Water Suppliers' experts -- in the courtroom -- throughout the trial. The core issue for the Phase 2 trial -- as it related to Anaverde -- is whether Anaverde can establish that areas within the court-determined Adjudication Area are so hydrologically isolated from the remainder of the Adjudication Area that they must be treated as separate groundwater basins and adjudicated separately. Whether the property owned by Anaverde or others meets the technical criteria for a separate groundwater basin requires a technical geologic and hydrologic inquiry. The inquiry will involve, among other issues, (i) the nature of the geologic formations; (ii) aquifer materials; (iii) the effects of geologic features on the occurrence and movement of groundwater; and (iv) the effects of geologic features on the physical effects of groundwater extraction.

The foregoing issues are of sufficient complexity to require immediate expert advice to understand the nuances of opposing experts' testimony and adequately prepare for cross-examination of those experts. Accordingly, good cause supports the presence of the Public Water Suppliers' designated experts throughout the trial. Furthermore, the experts' presence will be beneficial for the Court, as the trier of fact, because there will be an increased likelihood that the experts will base their opinions on a more accurate understanding of the issues as they evolve during trial.

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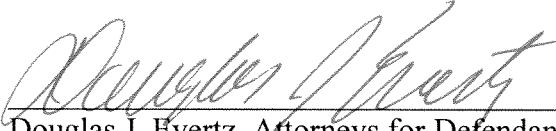
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IV. CONCLUSION.

For all of the foregoing reasons and authorities, the Public Water Suppliers respectfully request that Anaverde's Motion *in Limine* No. 1 be denied. In the alternative, the Public Water Suppliers request any exclusionary order be narrowly tailored to only exclude percipient witnesses.

DATED: October 2, 2008

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

By:   
 Douglas J. Evertz, Attorneys for Defendant/  
 Cross-Complainant and Cross-Defendant  
 CITY OF LANCASTER

**PROOF OF SERVICE**

**ANTELOPE VALLEY GROUNDWATER CASES**

Judicial Council Coordination, Proceeding No. 4408

Santa Clara Case No. 1-05-CV 049053

Assigned to the Honorable Jack Komar

Los Angeles County Superior Court, Central, Dept. 1

I am a resident of the State of California, over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is 2050 Main Street, Suite 600, Irvine, California 92614. On October 2, 2008, I served the within document(s):

**MEMORANDUM OF POINTS AND AUTHORITIES OF PUBLIC WATER SUPPLIERS  
IN OPPOSITION TO ANAVERDE LLC'S MOTION *IN LIMINE* NO. 1 TO EXCLUDE  
ALL PROSPECTIVE WITNESSES FROM THE COURTROOM DURING TESTIMONY**

☒ by posting the document(s) listed above to the website <http://www.scefiling.org>, a dedicated link to the Antelope Valley Groundwater Cases; Santa Clara Case No. 1-05-CV 049053, Assigned to the Honorable Jack Komar, said document(s) is electronically served/distributed therewith.

☐ By transmitting via e-mail the document(s) listed above to the e-mail address(es) and/or fax number(s) set forth below on this date.

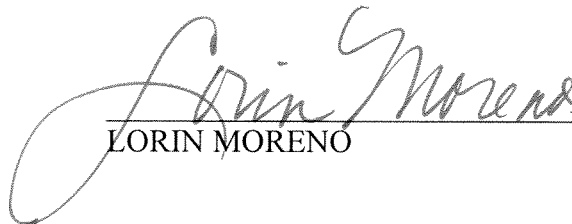
☐ by placing the document(s) listed above in a sealed Overnight Express envelope/package for overnight delivery at Irvine, California addressed as set forth below.

☐ by causing personal delivery by Nationwide Legal of the document(s) listed above, to the person(s) at the address(es) set forth below.

I am readily familiar with Luce, Forward, Hamilton & Scripps LLP's practice for collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on October 2, 2008, at Irvine, California.

  
LORIN MORENO