RICHARD G. ZIMMER, ESQ., State Bar No. 107263
T. MARK SMITH, ESQ., State Bar No. 162370
CLIFFORD & BROWN
A Professional Corporation
Attorneys at Law
1430 Truxtun Avenue, Suite 900
Bakersfield, CA 93301-5230
(661) 322-6023
(661) 322-3508 - Fax

Attorneys for Bolthouse Properties, LLC and Wm. Bolthouse Farms, Inc.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

COORDINATION PROCEEDING, SPECIAL TITLE (Rule 1550 (b)), **ANTELOPE VALLEY GROUNDWATER CASES ,** INCLUDED ACTIONS: LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40 v. DIAMOND FARMING COMPANY, et al.,, Los Angeles Superior Court Case No. BC325201, LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40 v. DIAMOND FARMING COMPANY, et al. , Kern County Superior Court Case No. S-1500-CV-254348, DIAMOND FARMING COMPANY, and W.M. BOLTHOUSE FARMS, INC., v. CITY OF LANCASTER, et al., Riverside Superior Court Case No. RIC 344436 [c/w case no. RIC 344668 and 353840] ,	Judicial Council Coordination Proceeding No. 4408 CASE NO.: 1-05-CV-049053 **BOLTHOUSE PROPERTIES LLC AND WM. BOLTHOUSE FARMS, INC. SUPPLEMENTAL OBJECTION TO MOTION FOR ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVING NOTICE TO THE CLASS** **DATE**: October 7, 2010 **TIME**: 9:00 a.m. **DEPT**: 1 **JUDGE**: Hon. J. Komar

The Bolthouse entities file this Supplemental Objection To The Willis Class Motion For Order Granting Preliminary Approval of Class Action Settlement and Approving Notice to the Class after further consideration and review of the terms and provisions of the proposed settlement for the following reasons:

The Judgment Cannot Be Final

Bolthouse joins in and incorporates the arguments made by Diamond Farming correctly pointing out that the proposed judgment cannot be final.

The Proposed Willis Class Settlement Purports To Settle Much Broader Issues Than The Complaint Asserts

As noted in the filing by AGWA, the Willis class Complaint consisted of causes of action to defeat the prescription claims and requesting compensation in the event groundwater rights are awarded to the purveyor parties. The class attorneys for the Willis Class strongly asserted in the past that their operative Complaints were limited to defeating prescription claims by the purveyor entities. In response to motions to dismiss based upon failure to join indispensable parties, the class attorneys continuingly maintained that the correlative rights of class members vis-à-vis other overlying landowners, were not at issue. Nevertheless, the scope of the proposed settlement purports to settle correlative rights of the Willis Class.

If The Proposed Settlement Includes Correlative Rights, An Indispensible Parties Issue Still Exists

The class Complaint sought a determination of prescriptive rights, not a determination of the pumping rights of the class members and other landowners. Although the Complaint filed by the Purveyors named all parties, including Doe Defendants, as Defendants to the basin wide adjudication of all groundwater rights of all parties, individual class members were not served. Nevertheless, such individual landowners, whether a member of the classes or not, still are parties named in the case. If the individual class members are not parties to the continuing action, the Court will lack indispensible parties to determine correlative rights.

///

///

In A Basin Wide Adjudication, A Party Must Appear And Be Present To Prove Their Correlative Rights

An overlying landowner must be present to prove correlative overlying rights and /or defend such overlying rights against prescription. For example, such a party potentially would need to prove self-help as a defense to a claim of prescription. In the case of a dormant party, such dormant party would be required to prove title to property and the right to a correlative groundwater right in the absence of pumping. Apparently, none of the settling class landowners would be present to make this proof.

The Court Must Avoid Any Conflict Of Interest

The trial court may not represent the interests of landowners or any other party, whether or not they appear at any subsequent phase of trial. Further, the Court may not place itself in a conflict by attempting to protect the rights of parties who are not present or who do not participate at subsequent phases of trial.

Class Counsel Either Needs To Settle The Narrow Claims They Asserted, Or Participate In Further Phases Of Trial To Properly Represent The Interest Of Class Members With Regard To Other Aspects Of Their Groundwater Rights.

Class counsel may not over-broadly settle a case on behalf of class members in the absence of proper representation and expert analysis. The class members have only pleaded relief from prescription claims. Class counsel requested a court appointed expert to determine safe yield, which has a critical bearing on the extent and measure of correlative rights. The Court denied this request. The class attorneys appear to have retained no expert to determine safe yield or to evaluate any other hydrogeological issue necessary to properly evaluate and settle the interests of class members, if any, to the correlative supply. Accordingly, to the extent the settlement purports to give away or determine class rights beyond that which the class actions pleaded, would not be in the interest of the class members and would be contrary to the interests of non-settling parties.

///

///

A Settlement Agreement May Not Be Reduced To Judgment If It Is Against Public Policy, Contrary To Law Or Unfair

The proposed settlement stipulation contains definitions which are contrary to the common law including definitions of "Correlative Rights" (fails to reference right to the native yield), so called "Federally Adjusted Native Safe Yield" (no such right), "Imported Water" (should be water which originates "outside the water shed", not "outside the basin" and fails to reflect requirements discussed in *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68 (Glendale) and *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199) (San Fernando), "Native Safe Yield" ("long term depletion of Basin groundwater storage" is not the correct definition set forth in San Fernando), "Overlying Rights" (incorporates incorrect Native Safe Yield definition), "Physical Solution" (definition inconsistent with case law), "Recycled Water" (vague definition without legal support; nature of the right undecided in the courts), "Return Flows" (fails to reflect Glendale and San Fernando requirements) and "Total Safe Yield" (again relies on "long term depletion" language not definition set forth in San Fernando). As such, the stipulation should not be approved or entered as a judgment. Entering this settlement as a Judgment or combining this settlement judgment with a subsequent settlement or judgment applicable to the remaining parties, will result in inconsistent judgments, will be unclear, contrary to law, against public policy and unjust. (*Timney v. Lin* (2003) 106 Cal.App.4th 1121)

THE TRANSITION PERIOD OF SEVEN YEARS HAS NO BASIS IN LAW OR FACT

A physical solution has not been litigated. Whether a transition period is needed, and the length thereof, must be litigated. This issue was not pleaded as between the settling parties. Approving a transition period now, as fair and reasonable, would improperly suggest that somehow the court has approved and/or adjudicated whether a physical solution is appropriate and whether a transition period and the length thereof, are appropriate.

///

///

///

THE SETTLEMENT AGREEMENT PURPORTS TO CREATE A FEDERAL RESERVE RIGHT WHICH CANNOT BE CREATED BY SETTLING PARTIES.

Whether or not a federal reserve right exists requires both legal and factual analysis. Neither of the class plaintiffs nor the class defendants can create or agree to such a right.

The Class Plaintiffs Cannot As A Matter Of Law Create Or Convey A RIGHT TO THE CLASS DEFENDANTS FOR FIFTEEN PERCENT OF THE SAFE YIELD

In the proposed settlement, the class plaintiffs purport to convey fifteen percent of the correlative safe yield to the settling Defendants. The correlative right to the safe yield is indivisible and shared equally by overlying landowners. The class plaintiffs have no right to convey any part of the safe yield to the settling defendants.

THE CLASS DEFENDANTS HAVE NO BASIS TO CONVEY PUMPING RIGHTS TO THE CLASS PLAINTIFFS

The settlement agreement purports to give eighty-five percent of the "federally adjusted native safe yield" to the class plaintiffs. The settling defendants, purveyor parties, have no rights to the correlative safe yield and accordingly cannot as a matter of law convey such rights to the class plaintiffs, nor lawfully agree that the class plaintiffs hold some portion of such rights. Further, the class plaintiffs did not plead any request for any of the safe yield, correlative or otherwise.

THE CLASS PLAINTIFFS AND SETTLING DEFENDANTS CAN AGREE TO SETTLE THE PRESCRIPTION CLAIM

The class plaintiffs and the settling defendants can settle the prescription claims alleged by the class defendants. However, consideration for this agreement cannot include that which the class plaintiffs do not have the legal right to convey, cannot include and/or affect in any way the rights of other parties to litigation and cannot be reduced to judgment in such a way that is against public policy, contrary to law or unjust. To the extent that the settlement, or the framework therefore, is intended to be imposed on the non-settling parties, as a physical solution or otherwise, such provisions have not been litigated and are inconsistent with law and public policy and should not be reduced to judgment.

THE CLASS PLAINTIFFS AND SETTLING DEFENDANTS CANNOT CREATE IMPORTED WATER RIGHTS BY AGREEMENT

Whether the settling defendants have return flow rights from imported water requires detailed and complex legal and factual analysis consistent with Glendale and San Fernando. Imported water rights were not a part of the Cross-Complaint and the class plaintiffs and settling defendants cannot legally or factually create these rights by agreement. The settlement stipulation creates and defines these rights in a manner that is inconsistent with law, against public policy and unfair to other priorities to the extent this settlement agreement may be made a portion of an overall judgment of the court after trial or subsequent settlement by any parties. Likewise, the figures and approach to determine percentages of return flow for agricultural and municipal purposes, and/or return flows from municipal and industrial use etc. which the class attorneys are agreeing to give up have not been litigated. Given the fact that no expert apparently has been engaged by the classes to evaluate these issues, clearly it is not in the best interest of the class members to agree or suggest they agree with these numbers.

WATER STORAGE IS NOT AT ISSUE IN THE CLASS COMPLAINT AND INVOLVES MULTIPLE ISSUES

Water storage is not at issue in the Class Complaint. Water storage issues are numerous and cannot be created by the class plaintiffs or settling defendants by agreement.

RECYCLED WATER RIGHTS ALSO WERE NOT AT ISSUE IN THE CLASS COMPLAINT AND CANNOT BE CREATED BY THE CLASS PLAINTIFFS OR THE CLASS DEFENDANTS

Whether or not a return flow right derives from recycled water has yet to be litigated. In Additionally, the nature of the right, if any, to groundwater which results from treating waste water has not been decided. Complicated factual and legal analysis is necessary to prove such a right. Giving away this right on behalf of the class members clearly will reduce the amount of groundwater available to class members now and in the future. Given the fact that it appears neither class retained the services of an expert hydrologist to evaluate this issue, clearly this is not in the best interest of the class. The class plaintiffs and settling defendants cannot create this right by agreement.

THE FEES AND COSTS SECTION SUGGESTS FUTURE CLAIMS AGAINST THE CLASSES, IN WHICH CASE THE CLASSES WILL BE UNREPRESENTED

Under the Fees and Costs Section, on page 17, line 11-13, the agreement provides that the Willis Class may obtain attorneys fees "to defend against any new or additional claims or causes of action asserted by settling defendants against the Willis Class in pleadings or motions filed in the Consolidated Actions." It is clear based on this statement that the settlement agreement cannot be final and cannot be recorded as a final judgment.

THE STIPULATION PROBABLY CANNOT BE REDUCED TO JUDGMENT BEFORE THE JANUARY TRIAL

On page 18 of the proposed settlement, the settlement provides that the stipulation will be effective only after a determination is made regarding approval of the stipulation including all material parts thereof, including the time for any appeals. This probably will delay determination of a final judgment until after the Phase 3 trial. If the settlement is not affirmed in its entirety, the parties to the proposed settlement have a right to rescind the agreement in which case the Phase 3 trial would need to be repeated with involvement by the class members.

IT IS NOT IN THE BEST INTEREST OF THE CLASS TO HAVE ITS ATTORNEYS WITHDRAW FROM CLASS REPRESENTATION BEFORE SAFE YIELD AND OVERLYING CORRELATIVE RIGHTS ARE CONFIRMED BY THE COURT

After the classes were formed, the Court deferred the taking claims to some later phase of trial. Effectively, this removed any incentive by way of potential financial compensation, to the class attorneys. In the absence of a way to be paid by contingent fee or otherwise, the class attorneys were unwilling to engage experts to evaluate safe yield and to evaluate numerous other issues to fully protect the members of the classes. With no way to recover their fees, they were forced into settlement with the class defendants. It cannot be in the best interest of the class members or their attorneys not to engage experts to maximize and protect their rights to the safe yield of the basin.

If the settlement is limited to a determination of whether a prescriptive rights exist, as the class attorneys articulated on numerous occasions, that claim potentially can be settled

properly by the class attorneys without the necessary evaluation of safe yield and numerous other hydrogeologic and legal issues necessary to protect the class member broader groundwater rights. If so, the settlement agreement should be narrowly tailored to what was pleaded by the class.

CLASS MEMBERS WERE NOT GIVEN NOTICE THAT THEIR RIGHTS, IN THE BROAD WAY THAT THEY ARE ADDRESSED IN THE PROPOSED SETTLEMENT AGREEMENT, WERE BEING ADJUDICATED

The class complaints sought a determination of prescriptive rights only, as the class attorneys have on numerous occasions advised the Court. They were never given notice that their rights in the much broader context addressed by the proposed settlement, would be adjudicated. Accordingly, proper class notice of the issues to be settled was not provided.

THE PROPOSED SETTLEMENT ON PAGE 15, LINES 4-5, "COMBINES WILLIS CLASS MEMBERS AND ONLY WITH RESPECT TO THOSE PROPERTIES WITHIN THE BASIN ON WHICH THEY HAVE NOT PUMPED WATER"

It is not clear whether these Willis class members who may have properties upon which they do pump, are included in the Wood class.

THE MATTERS PURPORTEDLY SETTLED ARE NOT CONSISTENT WITH THE RELEASE AND DISMISSALS

The matters purportedly settled in the proposed settlement agreement are extremely broad, as noted above, including prescriptive rights, correlative rights, imported water rights, recycled water rights, storage rights, etc. By contrast, the settling defendants only release the settling plaintiffs from the matters arising from or relating in any way to the matters at issue in the Willis action ("Released Claims", page 15 of the proposed Settlement, and lines 13-14) Once again, this is an indication that the settling parties are attempting to settle that which they have no right to settle and that which is far beyond the matters pleaded in the class action complaints.

Finally, this is one more indication that the class members are indispensible parties to the underlying action and procedurally cannot settle out separately without an indispensible

party problem.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the proposed settlement should not be entered as a Judgment.

DATED: September 30, 2010

Respectfully submitted,

CLIFFORD & BROWN

By: _____
RICHARD G. ZIMMER, ESQ.
T. MARK SMITH, ESQ.
Attorneys for plaintiff/defendant,
BOLTHOUSE PROPERTIES, LLC

PROOF OF SERVICE (C.C.P. §1013a, 2015.5)

Antelope Valley Groundwater Cases

Judicial Counsel Coordination Proceeding No. 4408

Santa Clara County Superior Court Case No. 1-05-CV-049053

I am employed in the County of Kern, State of California. I am over the age of 18 and not a party to the within action; my business address is 1430 Truxtun Avenue, Bakersfield, CA 93301.

On September 30, 2010, I served the foregoing document(s) entitled:

BOLTHOUSE PROPERTIES, LLC AND WM. BOLTHOUSE FARMS, INC. SUPPLEMENTAL OBJECTION TO MOTION FOR ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVING NOTICE TO THE CLASS

__ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

__ by placing _ the original, _ a true copy thereof, enclosed in a sealed enveloped addressed as follows:

X **BY SANTA CLARA SUPERIOR COURT E-FILING IN COMPLEX LITIGATION PURSUANT TO CLARIFICATION ORDER DATED OCTOBER 27, 2005.**

Executed on September 30, 2010, at Bakersfield, California.

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

_ (Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Rose Mary Myers

ROSEMARY MYERS
2455-2