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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))

) Judicial Council Coordination Proceeding No.  
) 4408

ANTELOPE VALLEY GROUNDWATER  
CASES

) CASE NO. 1-05-CV-049053

INCLUDED ACTIONS:

LOS ANGELES COUNTY  
WATERWORKS DISTRICT NO. 40 v.  
DIAMOND FARMING COMPANY, et al.,  
Los Angeles Superior Court Case No.  
BC325201

) **BOLTHOUSE PROPERTIES, LLC'S**  
) **AND WM. BOLTHOUSE FARMS, INC.'S**  
) **REPLY TO PUBLIC WATER**  
) **SUPPLIERS' RESPONSE TO**  
) **OBJECTIONS RE SCALMANINI**  
) **TESTIMONY**

LOS ANGELES COUNTY  
WATERWORKS DISTRICT NO. 40 v.  
DIAMOND FARMING COMPANY, et al.,  
Kern County Superior Court Case No. S-  
1500-CV-254348

) Phase 3 Trial Date:  
) January 4, 2011

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]

ROSAMOND COMMUNITY SERVICES  
DISTRICT,  
CROSS-COMPLAINANT,

Bolthouse Properties, LLC and Wm. Bolthouse Farms, Inc. (hereinafter "Bolthouse"),  
respond to Public Water Suppliers' Response to Objection Re Scalmanini Testimony in the

1 order of the arguments raised by the Public Water Suppliers and specifically without waiving  
2 objections previously made at trial of this matter and in the deposition of Mr. Scalmanini.

3 A. **MR. SCALMANINI'S EXPERT DESIGNATION DID NOT DISCLOSE HIM TO**  
4 **TESTIFY REGARDING EXTENSOMETER DATA**

5 Mr. Scalmanini's expert designation was premised upon the opinions contained in the  
6 "expert witness report" attached hereto as Exhibit "1" to the expert witness designation. (Public  
7 Water Suppliers' Expert Designation For Phase III Trial And Expert Declaration, page 3 line  
8 10 and Exhibit 1) The Summary Expert Report was attached to the expert designation as  
9 Exhibit 1. The landowners were justified in relying upon the representation as to the scope of  
10 Appropriator expert testimony, including that of Mr. Scalmanini, as set forth in the Summary  
11 Expert Report attached as Exhibit 1, in order to decide whether to designate any supplemental  
12 experts and as to the opinions Mr. Scalmanini would be called to give at the time of trial. The  
13 Summary Expert Report clearly provides as follows:

14 "Post-1992 subsidence data for the Antelope Valley is lacking.  
15 The water derived from compaction from 1993 to 2005 was  
16 estimated based upon the annual subsidence rate in 1992.  
17 **Estimates of the water derived from compaction from 2006  
through 2009 were not made due to lack of publicly available  
data.** The following steps were executed to calculate the value of  
subsidence (i.e., water derived from the compaction of aquitards):

18 The volume of water derived from compaction between 1951 and  
19 2005 is approximately 400,000 acre-feet. Figure E2-17 shows  
20 the cumulative volume of water derived from subsidence and  
21 **clearly shows that the majority of the subsidence occurred  
between 1957 and 1981."** (Summary Expert Report, Appendix  
E, Page 11, Section 2.6.3.)

22 Late in the afternoon on the last day of Appropriator expert witness depositions, on the  
23 last day of Mr. Scalmanini's deposition, only three weeks before trial and following completion  
24 of cross examination by the landowner attorneys, Appropriator attorneys began questioning Mr.  
25 Scalmanini regarding new data and a new opinion not contained in the Summary Expert  
26 Report. The new data was the extensometer data from one remote location in the Antelope  
27 Valley Groundwater Basin. The Summary Expert Report indicated that this data did not exist.  
28 Based upon this new data, Mr. Scalmanini opined that subsidence was continuing.

1 The Appropriators properly point out that unfair surprise or prejudice will limit an  
2 expert's ability to testify beyond written reports. (See discussion of *Easterby v. Clark* (2009)  
3 171 Cal. App. 4<sup>th</sup> 772, 775 on page 6, lines 4-6 of their Response.) The opinions expressed by  
4 Mr. Scalmanini at trial should be limited to the opinions and data contained in the Summary  
5 Expert Report. Allowing Mr. Scalmanini to testify to new opinions and data at trial is  
6 prejudicial to the landowners since they did not designate supplemental experts on the issue of  
7 the extensometer data or opinions related thereto, which were not identified as expert opinions  
8 which would be provided at trial by Appropriator experts.

9 The testimony regarding the extensometer data also should be excluded on the grounds  
10 of *Evidence Code* Section 352 since the probative value of this testimony is clearly far  
11 outweighed by the prejudicial affect of allowing introduction of this data and testimony. The  
12 data from one remote location in the basin shows only what was occurring at that particular  
13 location without significant evidentiary value in terms of what was occurring in the basin at  
14 large. Allowing expert opinions based upon this new data at the eleventh hour before trial,  
15 after all experts including those of the Landowner Parties, had been deposed, was very  
16 prejudicial. Any potential relevance this data and opinion is outweighed by the prejudicial  
17 affect on the landowners because of the surprise and inability to properly and fully address this  
18 information.

19 Additionally, simply because an expert includes a reference in his or her bibliography,  
20 does not make the contents of those bibliographic references admissible. Likewise, simply  
21 including a reference in a bibliography does not mean that an expert, simply because of  
22 referring to the reference in the bibliography, is permitted to testify to additional opinions not  
23 designated as opinions he or she would give at trial.

24 **B. EVIDENCE OF RECYCLED WATER SHOULD BE EXCLUDED.**

25 The critical course of events to be considered on this issue are as follows:

- 26 "1. Purveyor Expert Peter Leffler, conducted the expert  
27 analysis of recycled water and the amount thereof on  
28 behalf of the Appropriators.

2. Both Los Angeles County Sanitation and Los Angeles County Waterworks objected to deposition of Mr. Leffler related in any way to recycled water, and demanded that his deposition testimony be limited to the narrow issue of fractured bedrock as indicated in his expert witness designation.
3. E-mails clarified that Mr. Leffer would be allowed to testify only regarding fractured bedrock but not as to recycled water.
4. At the deposition of Mr. Leffler, representations were made by Appropriator attorneys, that the deposition of Mr. Leffler would be limited to fractured bedrock and that there would be no opinions given regarding recycled water or the amounts thereof.
5. The Landowner attorneys accepted this representation and deposed Mr. Leffler only regarding fractured bedrock and not on the issue of recycled water or the amount thereof.

As this Court is aware, the right to recycled water must be proved. Likewise the amount of return flow must be proved. For example, in the Santa Maria case over which this Court presided, the same attorneys involved in this case, offered purported proof of the amount of return flows claimed and the scientific and expert basis supporting the claim for recycled water and the amounts thereof. This type of proof was not introduced in this case.

The Appropriators assert that Mr. Scalmanini may testify to recycled water expert opinions. This is not only inaccurate, but would be patently unfair. First, Mr. Scalmanini did not do the expert recycled water analysis. This analysis was done by Mr. Leffler. Accordingly, Mr. Scalmanini has no expert basis to give testimony regarding recycled water, the right to this water, or the amount thereof. Further, the express representation of agreement by the Appropriator attorneys that they would not be giving recycled water expert opinions, certainly entitled the Landowner attorneys to rely on this representation.

The argument that Mr. Scalmanini should nevertheless be able to testify to Mr. Leffler's expert opinions regarding recycled water, and the amount thereof, improperly allows one expert to simply repeat the expert opinions of another expert and amounts to nothing more than a deceptive attempt by the Appropriators to prevent the Landowners from deposing the expert who did the recycled water expert analysis. It would be improper for the Court to allow this to

1 occur. The documents setting forth the objections by Los Angeles County and Los Angeles  
2 County Sanitation along with the e-mails and agreement at deposition accordingly, already  
3 were marked as an exhibit with the Court.

4 C. **THE COURT DID NOT PROHIBIT MR. SCALMANINI FROM TAKING INTO**  
5 **ACCOUNT INDIVIDUAL PUMPING AS A BASIS FOR HIS OPINION OF**  
6 **OVERDRAFT AND SAFE YIELD. HOWEVER, THE COURT DID ADVISE**  
**COUNSEL PRE-TRIAL THAT INDIVIDUAL PUMPING WOULD NOT BE**  
**INTRODUCED AS EVIDENCE OF WHAT PUMPING ACTUALLY WAS.**

7 Mr. Scalmanini certainly can testify about the pumping data that he evaluated and relied  
8 upon to form his opinions of sustainable yield and overdraft. However, that does not make the  
9 data he relied upon admissible as evidence of what actual pumping was collectively, or  
10 individually. The data itself is hearsay and inadmissible. *Continental Airlines v McDonnell*  
11 *Douglas* (1989) 216 Cal. App. 3d 388, 414-415.

12 D. **AN EXPERT MAY RELY ON HEARSAY AS A BASIS FOR AN EXPERT'S**  
13 **OPINION. HOWEVER, THE HEARSAY ITSELF IS NOT ADMISSIBLE.**

14 To the extent that hearsay is of the "type that may reasonably be relied upon by an  
15 expert in forming an opinion upon the subject to which his testimony relates...", an expert may  
16 rely upon such hearsay as a basis for an expert opinion. *Id.* at p. 414. However, the hearsay  
17 data itself is not admissible. As the Court in *Continental* explained:

18 "While an expert may state on direct examination the matters  
19 on which he relied in forming his opinion, he may not testify  
20 as to the details of such matters if they are otherwise  
21 inadmissible. [Citations.] The rule rests on the rationale that  
22 while an expert may give reasons on direct examination for his  
23 opinions, including the matters he considered in forming them, he  
24 may not under the guise of reasons bring before the jury  
25 incompetent hearsay evidence.

26 "In other words, as relevant here, while an expert may rely on  
27 inadmissible hearsay in forming his or her opinion (see  
28 *People v. Coleman, supra*) and may state on direct examination  
the matters on which he or she relied, the expert may not testify  
as to the details of those matters if they are otherwise  
inadmissible."

(emphasis added)

1 The distinction asserted by the Appropriators that inadmissible hearsay is only  
2 admissible when the case is tried to a jury, is simply without merit. Inadmissible hearsay is  
3 inadmissible whether or not a jury is present. A limiting instruction simply assures that when a  
4 jury hears a statement which would otherwise be hearsay, that the jury is instructed that such  
5 hearsay is not being admitted for the truth of the matter asserted therein. Clearly a limiting  
6 instruction is not necessary for the Court. However, the hearsay is still inadmissible.

7 In a court trial such as this, the problem with admitting hearsay, is most likely to occur  
8 on appeal. Unless the record is extremely clear regarding what evidence is being admitted for  
9 the truth of the matter and what evidence is not, confusion can result. The Court has, I believe,  
10 indicated that all of the data and reports relied upon by Mr. Scalmanini, are in fact hearsay, and  
11 only admitted as the basis for his expert opinion, and not for the truth of the matter asserted  
12 therein. Another way to handle the same circumstances is to simply identify all documents  
13 offered as the basis for the expert witnesses' opinion and to have them simply identified, not  
14 admitted as evidence. Nevertheless, assuming the record is clear, which hopefully it is, that  
15 none of the data, documents or other information relied upon by the experts is admitted for the  
16 truth of the matter, but solely as a basis for the expert's opinion, perhaps this is enough.

17 **E. EVIDENCE CODE, SECTION 356 DOES NOT PERMIT USE OF EXPERT**  
18 **OPINION REPORTS, SUCH AS USGS REPORTS.**

19 *Evidence Code*, Section 356 does allow introduction of other parts of a writing when  
20 that writing is "given in evidence" in order to make the part of the writing admitted into  
21 evidence understood. However, this section does not provide for admission of inadmissible  
22 hearsay, nor does it allow for admission into evidence of expert reports simply when an expert  
23 is questioned about a report upon which the expert relied, since the expert report and the part of  
24 the report which relates to impeachment, are not admissible and are only offered for  
25 impeachment.

26 As discussed before the Court, Mr. Scalmanini, for example, offered one graph from a  
27 report showing extensometer data. He was effectively impeached by the fact that he had not  
28 read the rest of the report, as a basis for showing that he may have improperly relied upon the

1 report without reading the whole thing. He admitted during cross-examination that he was not  
2 aware of, or did not recall, the language cited to him from the report and admitted during re-  
3 direct that he had not read other portions of the reports.

4 The cross-examination does not make the hearsay, which Mr. Scalmanini could either  
5 not recall or did not read, admissible. It simply impeaches his reliance on the underlying data  
6 showing that he did not fully read and/or remember the report. This type of impeachment does  
7 not provide a basis for the Appropriators to enlarge the scope of direct examination. Likewise  
8 this impeachment does not provide a basis for the Appropriators to simply read lengthy sections  
9 of any of these reports into the record as evidence or otherwise, since Mr. Scalmanini admitted  
10 he either did not read or did not remember any other portions of the report.

11 Additionally, the Appropriators intentionally ran out the clock of available time so that  
12 the Landowner Parties would have no time to effectively cross-examine Mr. Scalmanini  
13 regarding the new sections from USGS or other reports. This action prevented cross-  
14 examination and severely prejudice the Landowner Parties by denying them the ability to cross-  
15 examine Mr. Scalmanini on these new sections and by preventing them from offering further  
16 sections as necessary. Impeachment was proper to show that Mr. Scalmanini either did not  
17 read or could not remember the reports upon which he relied. This impeachment does not  
18 provide the basis to enlarge the scope of direct exam, or to allow improper hearsay, which the  
19 expert did not even read or remember, to be read into the record.

20 The Appropriator reliance on *Evidence Code* Section 1280 is misplaced and  
21 inappropriate. Contrary to the assertion of the Purveyors, *Evidence Code* Section 1280 does  
22 not make USGS and other governmental expert reports admissible as an official records  
23 exception to the hearsay rule. *Evidence Code* Section 1280 provides as follows:

24 “Evidence of a writing made as a record of an **act, condition, or**  
25 **event** is not made inadmissible by the hearsay rule when offered  
26 in any civil or criminal proceeding **to prove the act, condition,**  
27 **or event** if all of the following applies:

28 (a) The writing was made by and within the scope of duty of  
a public employee.

1 (b) The writing was made at or near the time of the act,  
2 condition, or event.

3 (c) The sources of information and method and time of  
4 preparation were such as to indicate its trustworthiness.”

5 (emphasis added)

6 USGS, or any other governmental reports containing expert opinion are not an “act,  
7 condition, or event” as contemplated by *Evidence Code*, Section 1280. What is contemplated  
8 by Section 1280 is the recordation of an “act, condition, or event”, which recordation is made  
9 “at or near the time of the act, condition, or event.” Further, “the sources of information and  
10 method and time of preparation were such as to indicate its trustworthiness.” Section 1280 is  
11 directed to ministerial acts by public employees within the scope of their duty as a public  
12 employee made at or near the time of the act, condition, or event. It has nothing to do with  
13 expert opinions by government or any other experts and is simply allowed as an exception to  
14 the hearsay rule, without cross-examination of the party recording the act condition or event,  
15 because of the general trustworthiness of an existence of an act condition or event recorded as a  
16 business record. Allowing introduction of expert opinion under the guise of an act, condition,  
17 or event, would totally deprive parties of the ability to cross-examine the expert regarding the  
18 basis of the opinion, its applicability to a particular fact situation and the evidentiary weight to  
19 be given to the opinion, in the particular case in question. Accordingly, Section 1280 does not  
20 make these reports admissible.

## 21 **F. CONCLUSION**

22 Testimony and evidence regarding extensometer data should be excluded since this  
23 information and testimony was not timely presented nor timely disclosed. This late disclosure  
24 resulted in unfair surprise and prejudice to the landowners. In addition, this evidence should be  
25 excluded since any marginal relevance of data from this one remote site in the basin is clearly  
26 outweighed by the prejudicial affect on the landowners of being unable to properly and fully  
27 address the new data and opinions.

28 The only expert who analyzed and provided an expert opinion on recycled water, was  
expert Peter Leffler. LA County Waterworks and LA County Sanitation objected to Mr.



1 Leffler's deposition on the issue of recycled water and indicated that his testimony would be  
2 limited to the narrow scope of his expert designation limited to the issue of fractured bedrock.  
3 They confirmed their objection in e-mails and confirmed at the beginning of Mr. Leffler's  
4 deposition that they would not use his recycled water expert opinion. Mr. Scalmanini did not  
5 conduct any expert analysis of recycled water or the amount thereof. Allowing Mr. Scalmanini  
6 to testify regarding Mr. Leffler's expert opinion would improperly allow Mr. Scalmanini to  
7 testify to the expert opinion of another expert. Further, allowing Mr. Scalmanini to testify to  
8 Mr. Leffler's expert opinion would improperly subvert the agreement by the Purveyors that this  
9 expert opinion regarding recycled water would not be used.

10 The record should be made clear, that any evidence of pumping, in general, or  
11 specifically, was offered and/or admitted solely for the purpose of showing the basis for an  
12 expert opinion and not for the truth of the matter asserted therein. The record should likewise  
13 be clear that any other data or information relied upon by any expert, identified or admitted,  
14 was identified and/or admitted solely for the purpose of showing the basis for the opinion of  
15 said expert, and not for the truth of the matter asserted therein.

16 *Evidence Code* Section 356 does not allow the introduction of inadmissible hearsay to  
17 rebut impeachment of a witness' memory and/or whether a witness fully read a particular  
18 report. Finally, *Evidence Code*, Section 1280 does not make admissible USGS or other  
19 government expert reports.

20  
21 DATED: March 11, 2011

Respectfully submitted.

22 CLIFFORD & BROWN

23  
24  
25 By: 

RICHARD G. ZIMMER, ESQ.

T. MARK SMITH, ESQ.

Attorneys for

BOLTHOUSE PROPERTIES, LLC and

WM. BOLTHOUSE FARMS, INC.

**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 March 11, 2011, I served the foregoing document(s) entitled:

**BOLTHOUSE PROPERTIES, LLC'S AND WM. BOLTHOUSE FARMS, INC.'S REPLY  
TO PUBLIC WATER SUPPLIERS' RESPONSE TO OBJECTIONS RE SCALMANINI  
TESTIMONY**

— 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-FILEING IN COMPLEX  
LITIGATION PURSUANT TO CLARIFICATION ORDER DATED OCTOBER  
27, 2005.**

Executed on March 11, 2011, 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.

  
NANETTE MAXEY

2455-2