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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES – CENTRAL DISTRICT

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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]

AND RELATED ACTIONS.

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JUDICIAL COUNCIL COORDINATION
PROCEEDING No. 4408

CASE NO. 1-05-CV-049053
Action Filed: October 26, 2005

**BOLTHOUSE PROPERTIES, LLC and
Wm. BOLTHOUSE FARMS, INC.'S
OPPOSITION TO:**

- 1. Motion in Limine No. One by Los Angeles County Waterworks District No. 40;**
- 2. Los Angeles County Waterworks District 40's Request for Judicial Notice of Trial Testimonies, Exhibits, and Decision in Phase Three Re Return Flows;**
- 3. Los Angeles County Waterworks District 40's Supplemental Request for Judicial Notice of Phase Three Trial Testimonies and Exhibits**

**Trial Date: February 10, 2014
Time: 9:00 a.m.
Dept: Old Dept. One**

1 COME NOW BOLTHOUSE PROPERTIES, LLC and WM. BOLTHOUSE FARMS,
2 INC. (hereinafter "Bolthouse") in opposition to:

- 3 1. Motion in Limine No. One by Los Angeles County Waterworks District No. 40;
- 4 2. Los Angeles County Waterworks District 40's Request for Judicial Notice of
5 Trial Testimonies, Exhibits, and Decision in Phase Three Re Return Flows filed
6 March 29, 2013; and
- 7 3. Los Angeles County Waterworks District 40's Supplemental Request for Judicial
8 Notice of Phase Three Trial Testimonies and Exhibits.

9 The Motion in Limine, Request for Judicial Notice and Exhibit List seek to eliminate
10 presentation of evidence and litigation of the purveyor claimed rights to return flows. As
11 discussed below, the motion, Request for Judicial Notice and Supplemental Request for
12 Judicial Notice improperly suggest that return flow rights were litigated in Phase 3, would
13 result in a finding of return flow rights based upon hearsay without proper foundation, would
14 deprive the parties of their due process right to litigate return flow claims and would not be in
15 the interest of justice because it would deprive parties of their opportunity to litigate the return
16 flow issues and would force parties to appeal to obtain a trial on return flows.

17 **I. THE MOTION IN LIMINE AND THE REQUEST FOR JUDICIAL NOTICE**
18 **IMPROPERLY SUGGEST THAT RETURN FLOW RIGHTS WERE LITIGATED**
IN PHASE 3

19 **A. Return Flow Rights Were Not Litigated in Phase 3.**

20 Numerous parties over a significant period of time voiced concerns about proceeding to
21 the Phase 3 Trial in the absence of clearly defined trial issues. The Court also was concerned
22 about the issues which would be tried. Given the fact that the Court did not intend to try
23 distinct causes of action, and given the extremely complicated and factually intensive nature of
24 a groundwater rights adjudication, it was essential to determine exactly what was being tried
25 and to limit presentation of evidence to the issues being tried and to limit the findings to the
26 Phase 3 issues tried. As early as March 8, 2010, counsel and this Court considered what issues
27 would be tried in Phase 3. The following comments were made at the March 8th hearing:

28 ////

1 THE COURT:

2 "And I would like to talk about the issues to be
3 adjudicated in that next phase of the trial. It seems to me that it
4 has got to evolve around the question of overdraft. Certainly if
5 the current conditions - - because if we are talking about issues
6 related to the management of the aquifer, we need to determine
7 what its present conditions are.

8 If there is no overdraft - - and that is possible and I don't
9 know what the evidence is in this case - - that is going to end that
10 inquiry.

11 Then it's going to be up to the individual disputants
12 among themselves to determine whether or not they have any
13 claims that they wish to pursue against each other. (page 2)

14 ... Well, my interest right now is determining whether or
15 not the Court is going to have to be involved in the management
16 of this basin, totally apart from what the rights inter se may be
17 between the various complainants against each other in terms of
18 prescriptive rights or appropriated rights and the like. (page 5)

19 **... And then that is totally apart from any individual claims**
20 **that parties may have vis-à-vis each other whether it be**
21 **public water providers or landowners or whoever it might**
22 **be. All right. (page 6) (Emphasis added.)**

23 MR. ZIMMER:

24 ... And I think it is important that everybody understands what is
25 being tried and what evidence we are going to be admitting for
26 what purposes rather than have a bunch of evidence come in and
27 not knowing whether it is going to be used in this phase or the
28 next phase or whatever. (page 9 and 10)

...I guess what I might suggest that we shake some of that out
earlier rather than before we get to the expert deposition phase. I
know in the last trial we ended up in a big flurry at the end. And
everybody had a different idea what we were trying, and I would
like to see, I guess, is some kind of pretrial order that issues
fairly early on with some comment by all counsel as to what we
think we are trying, and then we could come up with a pretrial
order as to what we - - an accounting by all as to what we will be
trying. (page 11 and 12)

... To the extent that the Court finds that there is an overdraft
here and the dealing with the management of the basin, that is
going to take place separately from the claims vis-à-vis each
other as to whether or not there is a claim ..." (page 13)

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1 See Exhibit "A" to the Declaration of Richard G. Zimmer (Reporter's
2 Transcript of Proceedings dated Monday, March 8, 2010 at pp. 2, 5, 6, 9, 10, 11, 12.

3 Thereafter, the Court issued an Order After Case Management Conference On
4 March 22, 2010, including the following language:

5 "... In this third phase of trial, the Court will hear evidence to
6 determine **whether the basin**, as previously defined by the Court
7 in trial phases one and two, **is in such overdraft** and to
8 determine whether there is a basis for the Court to exercise its
9 equitable jurisdiction, including the implementation of a
"physical solution," as prayed for the by the public water
provider parties. The public water providers have the burden of
proof." (Emphasis added.)

10 See Exhibit "B" to the Declaration of Richard G. Zimmer filed herewith. (Order After
11 Case Management Conference On March 22, 2010 at p. 2, 3.)

12 **B. The Discovery, Witnesses and Focus of Phase 3 Would Have Been Different
if Return Flows Were At Issue for the Phase 3 Trial.**

13 Discovery and depositions focused on the safe yield of the groundwater basin and
14 whether the groundwater basin was in overdraft such that the Court should exercise equitable
15 jurisdiction. Peter Leffler was identified as an expert witness for Phase 3. Joseph Scalmanini
16 also was designated as an expert by the purveyors for Phase 3. As the Court knows, these
17 experts participated on behalf of the purveyors in preparing what has been described as the
18 Summary Expert Report (SER), identified but not admitted into evidence at trial as Exhibit 101.
19 Mr. Leffler conducted the analysis to prepare section 3.6.5 "Fractured Bedrock" and IV Water
20 Resources Analyses, section 4.6 "Recycled Water" of the SER. The recycled water section
21 deals with return flows. The expert designations for these witnesses for Phase 3 designated
22 them as experts as follows:

23 Peter Leffler "12. Mr. Leffler will offer testimony regarding
24 characteristics of bedrock surrounding the Antelope Valley and
25 potential flows of groundwater through those materials into the
26 Basin. Mr. Leffler will also offer rebuttal testimony regarding
other experts' analyses regarding characteristics of bedrock
surrounding the Antelope Valley and potential flows of
groundwater through those materials into the Basin."

27 See Exhibit "C" to Declaration of Richard G. Zimmer filed herewith (Public Water
28 Suppliers' Expert Designation For Phase III Trial And Expert Declaration (page 7); See also

1 Exhibit "D" to Declaration of Richard G. Zimmer. (Reporter's Transcript of Proceedings dated
2 February 14, 2011, p. 88).

3
4 Joseph Scalmanini: "Mr. Scalmanini will testify as to
5 characteristics and hydrologic conditions of the groundwater in
6 the Antelope Valley Groundwater Adjudication Area ("Basin").
7 Mr. Scalmanini will testify concerning the Basin's sustainable
8 yield and geology and the occurrence of groundwater in the
9 Basin. Mr. Scalmanini's testimony will include historic
10 groundwater conditions, effects of groundwater development and
11 the current status and past changes in groundwater conditions.
12 Mr. Scalmanini will also be prepared to offer rebuttal testimony
13 concerning the groundwater conditions analyses prepared by
14 other experts."

15 See Exhibit "C" Public Water Suppliers' Expert Designation For Phase III Trial And
16 Expert Declaration (page 6).

17 After the deposition of Mr. Leffler was noticed, the Sanitation District attorney, Chris
18 Sanders, objected to the deposition of Mr. Leffler on the issue of recycled return flow water and
19 the analysis he did of recycled return flow water in the Summary Expert Report. Mr. Sanders
20 objected on the grounds that this analysis was beyond the expert designation for the Phase 3
21 Trial which included discussion of section 3.6.5 "Fractured Bedrock" of the SER but did not
22 include section IV Water Resources Analyses, section 4.6 "Recycled Water" of the SER. See
23 Exhibit "G" to the Declaration of Richard G. Zimmer filed herewith. (Trial Exhibit C4; See
24 also Exhibit "D" Reporter's Transcript of Proceedings dated February 14, 2011, p. 88.

25 Mr. Leffler's deposition was set a second time. This was met with another objection by
26 Mr. Sanders entitled "Objections to Bolthouse Notice of Deposition of Expert Peter Leffler"
27 attached as Exhibit "E" to the Declaration of Richard G. Zimmer filed herewith. (Also see
28 Exhibit "D" attached to the Declaration of Richard G. Zimmer (Reporter's Transcript of
Proceedings dated February 14, 2011, p. 90). The objection stated "Mr. Leffler has been
designated by the Public Water Suppliers for a limited purpose of providing expert testimony
and rebuttal testimony regarding characteristics of bedrock surrounding the Antelope Valley
and potential flows of groundwater through those materials into the basin." (*Id.* at p. 91.) The

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1 purveyor attorneys for Los Angeles County also objected in a document entitled "Objections"
2 attached as Exhibit "F" to the Declaration of Richard G. Zimmer filed herewith.

3 Given the fact that the purveyor parties had taken the position that the Phase 3 Trial
4 would not include testimony on return flows by the expert that did this analysis, and their
5 specific objection that Mr. Leffler would not be permitted to testify regarding recycled return
6 flow water, and because the trial was solely to evaluate safe yield and overdraft on a gross
7 basis, we argued:

8 Counsel pointed out to this Court the following:

9 "MR. ZIMMER: For example, Mr. Leffler provided all the recycled
10 water analysis. It is recycled water analysis that they are now attempting
11 to use through Mr. Scalmanini. So this is the foundation for that
12 objection." (See Exhibit "D" page 89)

13 "MR. ZIMMER: Our position regarding Mr. Leffler is that Mr. Scalmanini is
14 attempting to get into evidence information on recycled water in a very broad context,
15 many different issues, and attempting to get that before the Court when we were denied
16 the ability to depose Mr. Leffler on that issue and I will get to the deposition here I've
17 got attached on Exhibit C3 as well."

18 See Exhibit "D" to Declaration of Richard G. Zimmer filed herewith (Reporter's
19 Transcript of Proceedings dated February 14, 2011 at p. 92.)

20 We confirmed for the Court at that time, that the following stipulation was confirmed
21 by email:

22 "MR. ZIMMER: We by stipulation did not take his deposition on
23 recycled water because of the objection and because of the
24 stipulation of counsel that there would be no testimony about
25 recycled water." (page 93)

26 See Exhibit "D" to Declaration of Richard G. Zimmer filed herewith (Reporters
27 Transcript of Proceedings dated February 14, 2011 at p. 93.)

28 **C. The Presentation of Evidence Would Have Been Different if Return Flows
Was at Issue In the Phase 3 Trial.**

The Phase 3 Trial consisted of numerous experts being called on the issue of the safe
yield and whether current extractions were in excess of the safe yield, thereby resulting in
overdraft. Peter Leffler, who conducted the recycled water return flow analysis for the
purveyors, was not called as a witness by the purveyors, nor was any other witness called to

1 testify regarding the details of how the return flow analysis was done and therefore he was not
2 cross examined by the parties regarding the return flow numbers. The numbers were simply
3 accepted by Joseph Scalmanini, as discussed below, for the purpose of his expert opinion of
4 safe yield and overdraft.

5 Litigation of the return flow claims would have involved significant investigation,
6 discovery and expert analysis along with extensive presentation of evidence and expert
7 testimony at trial regarding the right to return flows, the amounts of return flows, transmission
8 losses, quality issues, and numerous other issues. This did not occur in the present case since
9 the scope of the Phase 3 trial was the overall safe yield and whether the basin was currently in
10 overdraft.

11 **D. If Return Flows Was Litigated in Phase 3, The Statement of Decision Would**
12 **Have Been Different.**

13 The Court requested proposed statements of decision following the Phase 3 Trial.
14 Consistent with the pre-trial conferences, pre-trial order and discovery and trial presentation,
15 Bolthouse submitted a proposed statement of decision including the following language:

16 “That the Statement of Decision be limited to ‘the safe yield of
17 the Antelope Valley Aquifer’ and ‘whether the Aquifer is in a
18 state of overdraft such that the Court should exercise equitable
19 powers to protect the Aquifer from detriment caused by any such
overdraft’ as set forth in the Order After Hearing Held on
November 18, 2010 setting forth the scope of the Phase 3 Trial.”

20 See Bolthouse Properties, LLC’s and Wm. Bolthouse Farms, Inc.’s Proposal Re Content
21 of Statement of Decision filed May 24, 2011 at p. 2 attached as Exhibit “H” to the Declaration
22 of Richard G. Zimmer filed herewith.

23 On June 6, 2011, Best, Best and Krieger, counsel for Los Angeles County Water
24 District 40 served a proposed Statement of Decision Re Phase III Trial submitted by Los
25 Angeles County and other water purveyors. The proposed Statement of Decision, attached to
26 the Declaration of Richard G. Zimmer as Exhibit “I” filed herewith, improperly attempted to
27 include issues in the Statement of Decision which were not litigated, including among other
28 issues, a detailed determination of return flow amounts and percentages.

1 Bolthouse filed an "Objection to Statement of Decision Re Phase 3 Trial Submitted By
2 Los Angeles County and Other Water Purveyors". Numerous objections were filed by other
3 parties as well. The Bolthouse objection included on page 3, a citation to this Court's "Order
4 After Hearings Held on November 18, 2010, setting forth the scope of the Phase 3 Trial as
5 follows:

6 "The trial will commence on January 4, 2011 at 9:00 a.m. in
7 department 1 of the Los Angeles County Superior Court to hear
8 evidence of the **safe yield** of the Antelope Valley aquifer and to
9 further hear evidence as to **whether the aquifer is in a state of
overdraft** such that the court should exercise equitable powers to
protect the aquifer from detriment caused by any such overdraft."
(Emphasis added.)

10 The Bolthouse objection also pointed out on page 5 that "The so called native safe
11 yield, supplemental safe yield and return flows were not litigated and have been improperly
12 added by Los Angeles County and the purveyors to the statement of decision."

13 A lengthy hearing regarding the scope of the Phase III Trial and the Statement of
14 Decision was held on July 11, 2011. At this hearing, Bolthouse and other parties argued that
15 the County and other purveyors were adding new issues to the case which were not tried and
16 which were not clearly defined before the trial started. (page 8) Bolthouse further argued:

17 "... these other issues that are being raised and - - or were raised
18 in terms of return flows and what others may argue in terms of
19 native recharge, the legal right to return flows, the amount of
20 return flows, if there's a legal right to it, those are all things that I
think we can properly tackle in a rights phase of the trial when
particular parties are claiming rights, for example, imported
water or to other aspects of the safe yield.

21 The bottom line is we tried safe yield for purposes of
22 overdraft, and that was it. And the Court made a decision on
that." (page 9)

23 Counsel also pointed out that:

24 "During the trial we objected on hearsay grounds to a lot of the
25 information that was being employed by the experts for precisely
26 this reason. And the Court, I believe, on several occasions said
27 that the - - all this information and data was being offered not for
the truth of the matter asserted, but for simply as a basis for an
expert's opinion as to safe yield or overdraft.

28 THE COURT: All right." (page 10)

1 All parties argued the issues extensively and vociferously. Following these arguments
2 the Court made the following comments:

3 “ ... THE COURT: All right. Thank you.

4 Let me make an observation. I’m going to give you a
5 written statement of decision that will encompass my final
6 rulings on these objections. But I think that is[sic] it is important
7 to note that the Phase III Trial - - the purpose was to determine
8 whether or not there was a status of overdraft within the basin
9 and the adjudication area such that it was necessary for the Court
10 to seek a physical solution to that problem.

11 So the principal issue was overdraft.” (page 12)
12 “... I did not make and could not make individual
13 determinations as to pumping in various areas, total sources of
14 water that went into various portions of the aquifer, the amount
15 of subsidence in variance areas or lack thereof.

16 None of those things were adjudicated. It was
17 adjudicated on a very general basis with the intent of determining
18 whether or not there was a sufficient overdraft problem in the
19 adjudication area such that the court would be in the position of
20 making determinations concerning physical solutions and how
21 that might be brought about.

22 So that when - - when you are asking for a lot of detailed
23 findings, I don’t think you are entitled to them. And I don’t
24 think you are entitled to findings - - and **I wouldn’t be**
25 **comfortable making findings as to what for example public**
26 **water - - California water project water is generated and**
27 **produced into the aquifer. I can’t make that determination.”**
28 (page 13, 14)

“**So I’m not inclined to do that.** And I think that there
is a possibility for a great deal of argument and discussion
concerning water that is introduced into the valley from other
areas as well as with the return flows might be for agricultural
and for municipal and industrial, for salvaged water for any
number of other sources of water or whatever they may be.

So, essentially, what I’m saying is **I’m going to sustain**
the objection. And what I’m ultimately going to do here with
regard to each one of these issues is deal with it in terms of the
Statement of Decision, and I’ll draft it myself. All right.” (page
14) (Emphasis added.)

See Reporter’s Transcript on Hearing dated July 11, 2011 at pp. 8, 9, 12, 13, 14.

The Court’s final Statement of Decision Phase Three Trial attached as Exhibit “L” to
the Declaration of Richard G. Zimmer filed herewith, confirmed:

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1 “The **only issues** at this phase of the trial were simply to
2 determine whether the adjudication area aquifer is in a current
3 state of **overdraft** and as part of the adjudication to determine
4 the **safe yield**. This Statement of Decision focuses solely on
5 those issues.” (page 2) (Emphasis added.)

6 The final Statement of Decision authored by this Court, is broken down into sub-parts
7 which include “overdraft,” page 5 and “safe yield,” page 7. Accordingly, there is no question
8 that the issues in the Phase III Trial were limited to safe yield and overdraft as a basis for
9 determining whether the Court has equitable jurisdiction.

10 **E. The Phase 5 Issues Would Be Different If Return Flows Were Litigated in**
11 **Phase 3.**

12 The issues in Phase 5 would be different if return flows were litigated in Phase 3. The
13 Court specifically articulated the Phase 5 issues in its Case Management Order for Phase 5
14 Trial filed on October 25, 2013, as follows:

15 The Phase 5 Trial is limited to the issues of federal reserved
16 water rights and claimed rights to return flows from imported
17 water. **As to return flows from imported water, the trial will
18 determine who has the right to recapture and use return
19 flows** that result from water imported into the Antelope Valley
20 Area of Adjudication, **as well as the amount of percentage of
21 return flows that augment the groundwater basin due to the
22 imported water.** The Phase 5 Trial will commence with the
23 federal reserved water rights issues followed immediately by
24 evidence related to such return flow issues. (Emphasis added.)

25 Case Management Order for Phase 5 and 6 Trials dated October
26 22, 2013, Page 2.

27 **II. ANY RETURN FLOW INFORMATION IN PHASE 3 WAS HEARSAY WITHOUT**
28 **FOUNDATION ADMITTED FOR THE LIMITED PURPOSE OF SHOWING THE**
BASIS FOR PURVEYOR EXPERT SCALMANINI'S CONCLUSION OF SAFE
YIELD AND OVERDRAFT

A. Procedural history:

As discussed above, the Phase 3 trial was limited to safe yield and overdraft. Purveyor expert Peter Leffler conducted the recycled water return flow analysis for the purveyors which is contained in the Summary Expert Report. Recycled water is a critical component of claimed return flows. Joseph Scalmanini testified at trial on behalf of the purveyors on the purveyor claim to the amount of the safe yield in order to support the purveyor claim of current

1 overdraft. The Court allowed Mr. Scalmanini to consider the analysis and findings of other
2 experts, including Mr. Leffler, in order to opine on the safe yield and whether the basin is
3 currently in overdraft. However, as discussed below, the Court properly ruled on numerous
4 occasions that the hearsay testimony, opinions of experts and other hearsay data, was being
5 admitted solely for the purpose of evaluating Mr. Scalmanini's opinion of safe yield and
6 overdraft and not for the truth of the matters contained in the hearsay.

7 **B. The Law.**

8 **Hearsay:**

9 While an expert may base his opinion on inadmissible hearsay evidence which is the
10 type of evidence an expert normally relies on, "when [an expert] opinion is based in part on
11 inadmissible hearsay statements, it is improper for the proponent of the testimony to solicit
12 evidence of the substance of the statements on direct examination." (*Korsak v. Atlas Hotels,*
13 *Inc.* (1992) 2 Cal.App.4th 1516, 1525-1527.)

14 The law also is clear that analysis and opinion of non-testifying experts is hearsay,
15 although it may be relied upon as a basis for the opinion of a testifying expert. *See, Continental*
16 *Airlines, Inv. v. McDonnell Douglas Corp.* (date) 216 Cal.App.3d 388. The *Continental* case
17 involved one expert who based his opinion on the analysis of two other experts who were not
18 present at trial. The court found that the analysis by the two absent experts was hearsay and
19 that the testifying expert could not properly testify to the hearsay in the reports of the non-
20 testifying experts. (*Id.* At 414).

21 "While an expert may state on direct examination the matters on
22 which he relied in forming his opinion, he may not testify as to
23 the details of such matters if they are otherwise inadmissible.
24 [citations]. The rule rests on the rationale that **while an expert**
25 **may give reasons on direct examination for his opinions,**
26 **including the matters he considered in forming them, he may**
27 **not under the guise of reasons bring before the jury**
28 **incompetent hearsay evidence.** [citation]." (*People v. Coleman*
(1985) 38 Cal.3d 69, 92) (Emphasis added.)

"In other words . . . **while an expert may rely on inadmissible**
hearsay in forming his or her opinion [citation], 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

1 **matters if they are otherwise inadmissible.”** (*Id.*) (Emphasis
2 added.)

3 The court in *Continental* affirmed the trial court’s decision to preclude one expert from
4 testifying as to the contents of the reports by other experts, upon which the testifying expert
5 relied. This case was discussed at length with this court in the trial proceedings on February
6 14, 2011 starting at page 95 of the Reporter’s Transcript. Likewise, as the court noted in
7 *People v. Campos*:

8 “An expert witness may not, on direct examination, reveal the
9 content of reports prepared or opinions expressed by
10 nontestifying experts. The reason for this is obvious. The
11 opportunity of cross-examining the other doctors as to the basis
12 for their opinion, etc., is denied the party as to whom the
13 testimony is adverse. [citation] . . . Here, the reports of the
14 nontestifying experts were hearsay. Doctor Mertz was properly
15 allowed to testify that she relied upon the reports in forming her
16 own opinions. The trial court erred, however, when it allowed
17 her to reveal their content on direct examination by testifying
18 that each prior medical evaluation agreed with her own opinion.
19 Doctors can testify as to the basis for their opinion [citation], but
20 this is not intended to be a channel by which testifying doctors
21 can place the opinion of innumerable out-of-court doctors before
22 the jury. [citations].” (*People v. Campos* (1995) 32 Cal.App.4th
23 304, 308.)

24 During this discussion on February 14, 2011, attorney Bob Joyce aptly described the
25 hearsay as “inadmissible hearsay on top of hearsay,” page 111 of the Reporter’s Transcript
26 attached as Ex “D” to the Declaration of Richard G. Zimmer filed herewith, also known as
27 multiple hearsay. Following the lengthy argument, the Court ultimately stated:

28 **“...What I’m doing in this phase will be safe yield, overdraft,
 whether the Court needs to exercise equitable jurisdiction.
 Those are the findings that we are making, and everything
 else will be simply hearsay that the expert relied upon to
 form his opinion if it is properly used in that manner.”** (page
 123) (Emphasis added.)

29 **Judicial Notice:**

30 The purveyors also improperly request that the Court take Judicial Notice of Phase 3
31 testimony to prove return flows even though the Phase 3 Trial was not intended to litigate
32 return flows and even though judicial notice would be improper.

33 “A court may take judicial notice of the *existence of each*
34 *document in a court file, but **can only take judicial notice of the***
35 12

1 *truth of facts asserted in documents such as orders, findings of*
2 *fact and conclusions of law and judgments.” (Garcia v. Sterling*
3 *(date) 176 Cal.App.3d 17, 22 [quoting Day v. Sharp (1975) 50*
4 *Cal.App.3d 904, 914]) (Emphasis added.)*

5 As such, a witnesses’ prior testimony is not accepted as true merely because judicial
6 notice may be taken of its existence. It is well established that:

7 “a court cannot take judicial notice of hearsay allegations as
8 being true, just because they are part of a court record or file . . .
9 .” (Day v. Sharp (1975) 50 Cal.App.3d 904, 914)(Emphasis
10 added.)

11 C. Requesting Judicial Notice of the Testimony of Joseph Scalmanini On Safe
12 Yield and Overdraft Which to a Limited Extent Was Based Upon Hearsay
13 Analysis and Conclusions of Peter Leffler Regarding Recycled Water Return
14 Flows, and Without Foundation by Mr. Scalmanini Since He Did Not Do This
15 Analysis, Is Clearly Improper.

16 As noted above, purveyor expert Peter Leffler conducted the analysis of recycled water
17 return flows for the purposes of the Summary Expert Report. Joseph Scalmanini relied on
18 recycled water return flow numbers based upon analysis done by Mr. Leffler, not by Mr.
19 Scalmanini. At trial on February 14, 2011, counsel objected to admitting such recycled water
20 return flow numbers for the truth of the numbers. See, Exhibit “D” to Declaration of Richard
21 G. Zimmer (Reporter’s Transcript dated February 14, 2011 at page 123). Counsel further
22 pointed out that numerous exhibits contained numbers that were not verified by Mr. Scalmanini
23 and that admitting such exhibits would suggest that this was actual data “as opposed to
24 something the expert merely relied upon.” page 124. Following the Court’s comments, counsel
25 further stated:

26 “So it is my understanding as to any of these exhibits
27 whether the Court introduces them or not to the extent they have
28 any pumping data on them, it’s not offered for the truth of the
matter, but merely as some indication of what the expert was
relying on.

THE COURT: To show the basis of the expert’s estimate
of pumping and recharge.

MR. ZIMMER: On a gross basis?

THE COURT: YES.” (pages 124-125)

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13

1 The Court correctly recognized that the only matters at issue in the Phase 3 Trial were
2 safe yield and overdraft and allowed Mr. Scalmanini to rely on the recycled water return flow
3 estimates by Mr. Leffler and other non-testifying experts as a basis for Mr. Scalmanini's
4 opinion as to safe yield and overdraft. The details relied upon are clearly hearsay within the
5 meaning of the *Continental* case and based upon the Court's ruling. Mr. Scalmanini lacked
6 foundation to testify to return flows because he did not do the analysis. To the contrary, the
7 return flow amounts were based upon the opinions of other non-testifying experts. Even if this
8 Court were to take judicial notice of the opinion of expert Scalmanini the Court could not
9 properly take judicial notice of the opinions and conclusions of other non-testifying experts
10 which may be contained in the materials relied upon by Mr. Scalmanini.

11 Additionally, the Sanitation District and Los Angeles County Water District 40,
12 objected to taking expert Leffler's deposition on the issue of recycled water return flows and
13 did not call him as an expert witness to properly introduce his opinions and conclusions into
14 evidence. Allowing this hearsay to be used by the purveyor parties in a different phase of trial
15 to prove different issues would be improper and would deny the landowner parties due process
16 of law and the ability to confront and examine all witnesses being relied upon by the purveyors
17 to prove their return flow claims.

18 **III. GRANTING THE MOTION IN LIMINE AND REQUESTS FOR JUDICIAL**
19 **NOTICE WOULD DEPRIVE PARTIES OF THE DUE PROCESS RIGHT TO**
LITIGATE RETURN FLOWS

20 As noted above, the Court properly defined the scope of the Phase 3 Trial as a
21 determination of safe yield and overdraft. The Court also properly ruled that the testimony of
22 the expert witnesses was limited to safe yield and overdraft and that all of the hearsay upon
23 which they relied for purposes of forming their opinions, was not being accepted for the truth
24 of the matters thereof. The Court made this ruling in trial on many occasions, such as during
25 the testimony of Mr. Wildermuth when the following clarification was requested:

26 "MR. ZIMMER: I would join as well, as well. Just for
27 clarification, your honor, it is my understanding that to the extent
28 that there is hearsay in any of these exhibits that these exhibits
are not being accepted for the truth of the matter, but merely as
the basis for the expert opinion.

1 THE COURT: Everyone[sic] of them. (page 140)

2 See Exhibit "O" to the Declaration of Richard G. Zimmer filed herewith.

3 As the Court responded in a further discussion regarding hearsay being relied upon by Mr.
4 Scalmanini:

5 "MR. ROBERT KUHS: ...Under the Continental case, I think it
6 is clear that the details don't come in; but if they are coming in, I
7 would like the court to make it clear that they are coming in not
8 for the truth of the matter asserted.

9 "THE COURT: They are so far coming in as the basis for Mr.
10 Scalmanini's opinion."

11 See Exhibit "D" to Declaration of Richard G. Zimmer filed
12 herewith at page 127.

13 Likewise, concerning the testimony of federal expert June Oberdorfer, the Court stated:

14 "MR. LEININGER: Your Honor, at this time, I would move for
15 entries of exhibits marked I-1 through 18 and I-20 of her
16 testimony.

17 THE COURT: Now I understand that there are objections to the
18 Court accepting the information for the truth of the matters. That
19 objection has been sustained. I'll permit them to come in
20 exemplifying her testimony with the understanding that hearsay
21 is hearsay."

22 See Exhibit "O" to Declaration of Richard G. Zimmer filed herewith.

23 (Reporter's Transcript dated February 17, 2011 at p. 85).

24 Granting the motion in limine and requests for judicial notice would deprive parties of
25 the due process right to litigate return flows for the following reasons:

- 26 1. Doing so would improperly allow the purveyor parties to rely on hearsay opinions and
27 conclusions of Peter Leffler, who conducted the recycled water return flow analysis,
28 presented by expert Scalmanini at a prior trial of different issues;
2. Doing so would allow the purveyor parties to rely for Phase 5 upon the opinions and
conclusions of non-testifying experts;
3. Doing so would allow the purveyor parties in Phase 5 to rely upon hearsay opinions and
conclusions of other experts, contained in materials relied upon by Mr. Scalmanini and
the improper suggestion that Mr. Scalmanini did the analysis of return flows, without

1 calling Mr. Scalmanini as an expert witness in the Phase 5 return flow trial (When the
2 Phase 3 Statement of Decision was filed indicating that return flows were not tried in
3 Phase 3, the purveyors could have preserved Mr. Scalmanini's testimony regarding
4 return flows, if any, for use at a later phase of trial by simply taking his deposition. At
5 that time he was clearly able medically to provide a deposition since his deposition was
6 taken on other issues);

7 4. Doing so would allow the purveyors to avoid direct examination of Mr. Leffler or some
8 other expert to provide appropriate foundation and basis for the recycled water return
9 flow numbers.

10 5. Doing so would deprive parties of the right to cross-examine Mr. Leffler, the individual
11 who did the recycled water return flow analysis.

12 6. Doing so would deny the parties the right to present rebuttal evidence based upon direct
13 and/or cross-examination testimony of the expert who did the recycled water return
14 flow analysis.

15 7. Doing so would allow proof of return flows based upon hearsay without foundation.

16 8. Doing so would allow proof of return flows without the proper foundation of the
17 process and procedure used to determine return flow numbers.

18 9. Doing so would require the court to make return flow findings without trial and without
19 providing the parties the opportunity to present their evidence on return flow issues.

20 **IV. GRANTING THE MOTION IN LIMINE AND THE REQUESTS FOR JUDICIAL**
21 **NOTICE IS NOT IN THE INTEREST OF JUSTICE BECAUSE IT WOULD BE**
22 **COUNTERPRODUCTIVE TO SETTLEMENT NEGOTIATIONS BY FORCING**
PARTIES TO SEEK APPELLATE RELIEF TO OBTAIN A TRIAL ON RETURN
FLows

23 It is clear that the Phase 3 Trial did not litigate return flow and recycled water issues. It
24 is also clear that due process requires that the parties be provided the opportunity to fairly
25 litigate return flow issues. Denying this right to trial on these important issues would be
26 counterproductive to settlement negotiations. It would force parties to seek appellate relief to
27 obtain a trial on these issues and would prevent them from considering such claims for
28 settlement purposes following the opportunity to investigate and dispute the claims. As such,

1 granting the motions in limine and request for judicial notice would not be in the interest of
2 justice.

3 **V. CONCLUSION**

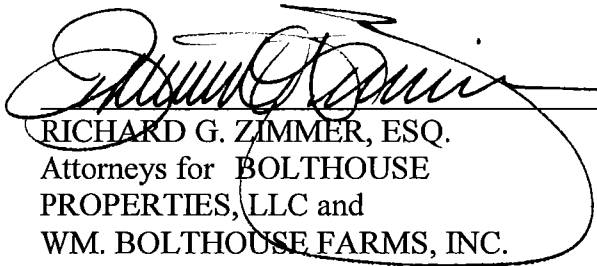
4 The motion in limine and requests for judicial notice improperly suggest that return
5 flow issues were litigated and decided in Phase 3. The record clearly demonstrates that this is
6 not correct. Further, the motion in limine and requests for judicial notice request findings on
7 return flows which were not litigated and which are based upon hearsay without proper
8 foundation. As such, the motion in limine and requests for judicial notice deprive parties of
9 their due process right to contest and litigate these issues. Accordingly, Bolthouse requests that
10 the motion in limine and requests for judicial notice be denied.

11 DATED: January 29, 2014

Respectfully submitted.

12 CLIFFORD & BROWN

13
14
15 By:


16 RICHARD G. ZIMMER, ESQ.
17 Attorneys for BOLTHOUSE
18 PROPERTIES, LLC and
19 WM. BOLTHOUSE FARMS, INC.
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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. I-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, Suite 900, Bakersfield, CA 93301.

On January 30, 2014, I served the foregoing document(s) entitled:

**BOLTHOUSE PROPERTIES, LLC AND WM. BOLTHOUSE FARMS, INC.'S
OPPOSITION TO (1) MOTION IN LIMINE NO. ONE BY LOS ANGELES
WATERWORKS DISTRICT NO. 40; (2) LOS ANGELES COUNTY
WATERWORKS DISTRICT 40 REQUEST FOR JUDICIAL NOTICE OF TRIAL
TESTIMONIES, EXHIBITS, AND DECISION IN PHASE THREE RE RETURN
FLOWS; (3) LOS ANGELES COUNTY WATERWORKS DISTRICT 40'S
SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE OF PHASE THREE TRIAL
TESTIMONIES AND EXHIBITS**

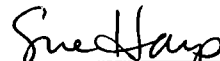
by placing the document listed above to the Santa Clara Superior Court website in regard to the Antelope Valley Groundwater Matter. All parties listed on the Santa Clara Superior Court in regard to the Antelope Valley Groundwater Matter are hereby incorporated within by this reference.

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

Executed on January 30, 2014, 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.



SUE HAYB
{2455-2}