1   2   3   4   5   6	RICHARD G. ZIMMER - SBN 107263 T. MARK SMITH - SBN 162370 JEREMY J. SCHROEDER - SBN 223118 CLIFFORD & BROWN A Professional Corporation Attorneys at Law Bank of America Building 1430 Truxtun Avenue, Suite 900 Bakersfield, CA 93301-5230 (661) 322-6023 (tel) (661) 322-3508 (fax)				
7	Attorneys for WM. BOLTHOUSE FARMS, INC.				
8	SUPERIOR COURT OF CALIFORNIA				
9	COUNTY OF SANTA CLARA				
10	* * *				
11	COORDINATION PROCEEDING SPECIAL TITLE (Rule 1550(b))	Judicial Council Coordination			
12	ANTELOPE VALLEY GROUNDWATER	CASE NO. 1-05-CV-049053			
13	CASES	)			
14	INCLUDED ACTIONS:				
15	LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40 v. DIAMOND	OPPOSITION TO DEMURRER OF			
16	FARMING COMPANY, et al., Los Angeles Superior Court	SHELDON R. BLUM, TRUSTEE, TO			
17	Case No. BC325201	WM. BOLTHOUSE FARMS, INC.			
18	LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40 v. DIAMOND FARMING COMPANY, et al., Kern County Superior Court				
19		· )			
20	Case No. S-1500-CV-254348				
21	DIAMOND FARMING COMPANY, and W.M. BOLTHOUSE FARMS, INC., v.				
22	CITY OF LANCASTER, et al., Riverside Superior Court	) )			
23	Case No. RIC 344436 [c/w case no. RIC 344668 and 353840]	) )			
24	ROSAMOND COMMUNITY SERVICES				
25	DISTRICT, CROSS-COMPLAINANT,				
26		)			

Plaintiff/Cross-Defendant, WM. BOLTHOUSE FARMS, INC. (hereinafter "BOLTHOUSE FARMS"), hereby submits its Opposition to Demurrer of Sheldon R. Blum Trustee (hereinafter "BLUM"), to the Second Amended Complaint of WM. BOLTHOUSE FARMS, INC.

## MEMORANDUM OF POINTS AND AUTHORITIES

#### BLUM IS NOT A DEFENDANT TO THE SECOND AMENDED COMPLAINT

BLUM filed the instant Demurrer without standing to do so and upon a patent misunderstanding of the thrust and target of the pleading attacked. The Second Amended Complaint (hereinafter the "SAC"), like its predecessors, sought to quiet title to BLOTHOUSE FARMS' interests, both leasehold and fee, to certain identified parcels against certain municipal purveyors only. The SAC asserts no rights adverse to BLUM as an overlying landowner, so he is not a defendant and cannot, therefore, attack the SAC by demurrer. On this simple ground alone, BLUM'S Demurrer, in its entirety, should be overruled. BLUM'S angst is misdirected, and should be aimed at the parties who seek to impair his overlying landowner rights, the municipal purveyors by way of their Cross-Complaint against anyone claiming water rights in the Antelope Valley.

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# JUDICIAL NOTICE OF THE LEASE IS IMPROPER

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### [Demurrer § 1.]

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Despite BLUM'S claim that the lease between Sheldon Blum (as an individual) and WM. BOLTHOUSE FARMS, INC. dated August 2, 2001 (hereinafter the "Lease") is "of such common knowledge within the territorial jurisdiction of this Court that it cannot be the subject of dispute[,]" judicial notice cannot be taken of the document. As appropriately cited by BLUM, Code of Civil Procedure § 430.30 provides that a demurrer is appropriate only upon that which appears on its face, or upon that which the court is required to or may take judicial. (Code Civ. Proc. § 430.30(a)(b)) "If there is any doubt whatever either as to the fact itself or as to its being a matter of common knowledge, evidence should be required." (Barreiro v. State Bar, (1970) 2 Cal.3d 912, 925) How a lease agreement between private parties is "of such common knowledge" to this Court is not stated by BLUM, for it cannot be so stated with any degree of good faith. The Lease should be disregarded, as should all references thereto in the Demurrer.

BLUM'S request for judicial notice is also procedurally defective in that it is not made in a separate document as required by *Rule of Court 3.1306(c)*. Additionally, Sheldon R. Blum's attached Declaration is improper material outside the "four corners" of the pleading, and should likewise be disregarded on demurrer. (*Code Civ. Proc. § 430.30(a)(b)*)

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#### REAL PARTY IN INTEREST

III

### [Demurrer § 5.A.]

BLUM clearly fails to recognize that WM. BOLTHOUSE FARMS, INC. and BOLTHOUSE PROPERTIES, LLC are separate entities with independent rights at-issue in the coordinated action. the allegations presented by WM. BOLTHOUSE FARMS, INC. in its Amended Complaint and those alleged Second in BOLTHOUSE PROPERTIES, LLC'S Cross-Complaint conflict is of no consequence because the entities clearly cannot hold equal rights. Accordingly, the commonality of the entities respective allegations, or their counsel, is not a sufficient ground for demurrer pursuant to Code of Civil Procedure § 430.10.

IV

#### LESSOR VS. LESSEE RIGHTS

#### [Demurrer § 5.B.-D.]

BLUM cites several authorities for the proposition that a lessee cannot take from his lessor by adverse possession. (Schwarzbaugh v. Sampson, (1936) 11 Cal.App.2d 451; Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court, (2007) 148 Cal.App.4<sup>th</sup> 39; Civil Code § 1006) BLUM further cites to authority establishing that an overlying landowner has paramount rights to subsurface water beneath his property. (City of Barstow v. Mojave Water Agency, (2000) 23 Cal.4<sup>th</sup> 1224) While BOLTHOUSE FARMS acknowledges that the above authorities, and the propositions asserted by them, are instructive law, they have no

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bearing on the allegations of the SAC because BOLTHOUSE ARMS asserts no claim of right to water beneath BLUM'S property paramount or adverse to BLUM.

A lessee of BLUM'S parcels is free to assert rights to subsurface waters to which his lease grants him use. Such a claim of right asserted by a lessee is not paramount to his lessor, but rather, is subservient and founded upon the rights conferred by the lease. Accordingly, the SAC need not assert allegations specific to BLUM to establish its quiet title claim against the municipal purveyors. Additionally, the ultimate determination of rights to waters underlying parcels identified by both WM. BOLTHOUSE FARMS, INC. and BOLTHOUSE PROPERTIES, LLC will be in conformity with the authority cited by BLUM and not adverse to his rights as an overlying landowner.

V

# THERE IS NO DEFECT OR MISJOINDER OF PARTIES

[Demurrer § 6.]

The SAC does not claim rights superior to BLUM. As set forth above, BOLTHOUSE FARMS acknowledges that its rights to water as a lessee are subordinate and dependent upon the rights of the lessor. The SAC asserts rights adverse to the municipal purveyors, not overlying landowners. Accordingly, BLUM need not be added as a DOE defendant by BOLTHOUSE FARMS for he is not an interested or indispensable party to the SAC. There is no defect or nonjoinder issue, so demurrer under Code of Civil Procedure \$\Section 430.10(d)\$ is not properly asserted.

1	VI	
2	THERE IS NOT ANOTHER ACTION PENDING	
3	[Demurrer § 7.]	
4	BOLTHOUSE FARMS is befuddled by BLUM'S <i>Code of Civil</i>	
5	Procedure $\$$ 430.10(c) argument that the SAC is barred because	
6	there is "another action pending" based upon the pleadings later	
7	filed by BOLTHOUSE PROPERTIES, LLC. First, WM. BOLTHOUSE FARMS,	
8	INC. and BOLTHOUSE PROPERTIES, LLC are separate and distinct	
9	legal entities. Second, how the filing of a cross-complaint	
10	after the filing of the SAC constitutes "another pending action"	
11	is wholly confusing.	
12	Demurrers on this ground are disfavored unless the parties in	
13	both actions stand in the same relative positions and the actions	
14	are substantially the same. (Lord v. Garland, (1946) 27 Cal.2d	
15	840, 848; <u>Childs v. Eltinge</u> , (1973) 29 Cal.App.2d 843, 848) Such	
16	is not the case in this coordinated action.	
17	VII	
18	THE CROSS-COMPLAINT IS NOT UNCERTAIN	
19	[Demurrer § 8.]	
20	Incorporating the above discussion, the Cross-Complaint is	
21	not subject to attack by BLUM and does, nevertheless, set forth	

sufficient allegations to constitute its causes of action against

the municipal purveyors. No further comment is warranted. 23

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#### VIII

#### ATTORNEY'S FEES ARE NOT APPROPRIATE

### [Demurrer § 9.]

BLUM'S request for judicial notice of the Lease is ineffective as set forth above, so the court need not reach the issue of attorney's fees thereunder. Even if the court could take judicial notice of the Lease, the Civil Code § 1717 argument asserted by plaintiff is absurd. Under Civil Code § 1717(a) contractual attorney's fees are recoverable only upon the enforcement of the contract, which is not the case here on Demurrer. Pursuant to Civil Code § 1717(b) BLUM must be successful on his Demurrer, then file a motion with the court seeking a determination of who the prevailing party on the contract is and fixing reasonable fees under the contract. BLUM'S request should be summarily denied.

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IX CONCLUSION AND REQUEST FOR RELIEF WM. BOLTHOUSE FARMS, LLC. respectfully requests that BLUM'S request for judicial notice be denied, that the materials attached to the Demurrer be disregarded and that each ground for demurrer set forth therein be overruled. DATED: January 25, 2008 CLIFFORD & BROWN By: RICHARD G. ZIMMER, T. MARK SMITH, ESQ. JEREMY J, SCHROEDER, ESQ. Attorneys for BOLTHOUSE FARMS, INC. 

1 2 3	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			
4		I am employed in the County of Kern, State of California. I am over the age of 18 and not a		
5	party to the within action; my business address is 1430 Truxtun Avenue, Bakersfield, CA 93301.			
6		On January 2	5, 2008, I served the foregoing document(s) entitled:	
7	OPPOSITION TO DEMURRER OF SHELDON R. BLUM, TRUSTEE, TO SECOND AMENDED COMPLAINT OF WM. BOLTHOUSE FARMS, INC.			
8 9	XX		he true copies thereof enclosed in sealed envelopes stated on the attached mailing list.	
10			the original, _ a true copy thereof, enclosed in a sealed	
11	enveloped addressed as follows:		diessed as follows.	
12	X BY SANTA CLARA SUPERIOR COURT E-FILING IN COMPLEX LITIGATION PURSUANT TO CLARIFICATION ORDER DATED OCTOBER			
13		27, 2005.		
14		Executed on .	January 25, 2008, at Bakersfield, California.	
15 16	<u>X</u>	(State) I decl	are under penalty of perjury under the laws of the State of California that the above is true and correct.	
17		(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.	
18			w) .	
19			Marette Maxey	
20			NANETTE MAXEY $\int$	
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