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8 SUPERIOR COURT OF CALIFORNIA

9 COUNTY OF SANTA CLARA

10 * * *

11 COORDINATION PROCEEDING) Judicial Council Coordination
SPECIAL TITLE (Rule 1550(b))) Proceeding No. 4408

12)
13 **ANTELOPE VALLEY GROUNDWATER**) CASE NO. 1-05-CV-049053
CASES)

14 INCLUDED ACTIONS:)

15 LOS ANGELES COUNTY WATERWORKS)
DISTRICT NO. 40 v. DIAMOND) **OPPOSITION TO DEMURRER OF**
16 FARMING COMPANY, et al.,) **SHELDON R. BLUM, TRUSTEE, TO**
Los Angeles Superior Court) **CROSS-COMPLAINT OF BOLTHOUSE**
17 Case No. BC325201) **PROPERTIES, LLC**

18 LOS ANGELES COUNTY WATERWORKS)
DISTRICT NO. 40 v. DIAMOND)
19 FARMING COMPANY, et al.,)
Kern County Superior Court)
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)
DISTRICT,)
25 CROSS-COMPLAINANT,)
26)

1 Cross-Defendant/Cross-Complainant, BOLTHOUSE PROPERTIES, LLC
2 (hereinafter "BOLTHOUSE PROPERTIES"), hereby submits its
3 Opposition to Demurrer of Cross-Defendant, Sheldon R. Blum
4 Trustee (hereinafter "BLUM"), to Cross Complaint of BOLTHOUSE
5 PROPERTIES, LLC.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I**

8 **SUMMARY OF ARGUMENT**

9 BLUM filed the instant Demurrer without standing to do so
10 and upon a patent misunderstanding of the procedural posture of,
11 and the substantive law applicable to, this coordinated action.
12 In sum, BLUM demurs to a pleading to which he is not an
13 interested party and founds the Demurer upon his belief that
14 BOLTHOUSE PROPERTIES is attempting to impair his rights.
15 BOLTHOUSE PROPERTIES' pleading does not contain any allegations
16 against BLUM, does not assert any rights adverse to BLUM and
17 therefore cannot be challenged on Demurrer by BLUM. BLUM'S angst
18 is misdirected, and should be aimed at the parties who seek to
19 impair his overlying landowner rights; the municipal purveyors.

20 **II**

21 **PROCEDURAL POSTURE ESTABLISHING THAT BLUM LACKS STANDING**

22 Plaintiff/Cross-Defendant/Cross-Complainant, WM. BOLTHOUSE
23 FARMS, INC. filed a quiet title action against *certain municipal*
24 *purveyors only* on January 25, 2001. On January 18, 2006, those
25 municipal purveyors filed a cross-complaint against anyone who
26 may claim a right to groundwater in the Antelope Valley,

1 ostensibly including BLUM. In response, BOLTHOUSE PROPERTIES
2 filed its Cross-Complaint, the pleading attacked herein by BLUM'S
3 Demurrer, against the *municipal purveyors* only. BOLTHOUSE
4 PROPERTIES' Cross-Complaint does not present any allegations
5 against BLUM. Accordingly, BLUM has no standing to attack the
6 sufficiency of BOLTHOUSE PROPERTIES' Cross-Complaint and the
7 totality of his arguments may, thus, be disregarded by the court.

8 **III**

9 **JUDICIAL NOTICE OF THE LEASE IS IMPROPER**

10 **[Demurrer § 1.]**

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

1 as should all references thereto in the Demurrer.

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

8 **IV**

9 **REAL PARTY IN INTEREST**

10 **[Demurrer § 6.A.(1)]**

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

21 **V**

22 **VERIFICATION OF FIRST CAUSE OF ACTION OF CROSS-COMPLAINT**

23 **[Demurrer § 6.B.]**

24 BLUM is the first party to assert that the First Cause of
25 Action of BOLTHOUSE PROPERTIES' Cross-Complaint requires
26 verification. First, title is not being quieted against BLUM, so

1 he has no standing to challenge the sufficiency of the cause of
2 action. Second, if the court requires verification, BOLTHOUSE
3 PROPERTIES can, and will, ameliorate the problem by verification
4 and/or amendment.

5 **VI**

6 **LESSOR VS. LESSEE RIGHTS**

7 **[Demurrer §§ 6.A.(2) & 7.]**

8 BLUM cites several authorities for the proposition that a
9 lessee cannot take from his lessor by adverse possession.
10 (Schwarzbaugh v. Sampson, (1936) 11 Cal.App.2d 451; Amalgamated
11 Transit Union, Local 1756, AFL-CIO v. Superior Court, (2007) 148
12 Cal.App.4th 39; Civil Code § 1006) BLUM further cites to
13 authority establishing that an overlying landowner has paramount
14 rights to subsurface water beneath his property. (City of Barstow
15 v. Mojave Water Agency, (2000) 23 Cal.4th 1224) While BOLTHOUSE
16 PROPERTIES acknowledges that the above authorities, and the
17 propositions asserted by them, are instructive law, they have no
18 bearing on the allegations of BOLTHOUSE PROPERTIES' Cross-
19 Complaint because BOLTHOUSE PROPERTIES asserts no claim of right
20 to water beneath BLUM'S property paramount or adverse to BLUM. A
21 lessee of BLUM'S parcels is free to assert rights to subsurface
22 waters to which his lease grants him use. Such a claim of right
23 asserted by a lessee is not paramount to his lessor, but rather,
24 is subservient and founded upon the rights conferred by the
25 lease.

26 ///

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.

VII

42 USCS 1983 CAUSE OF ACTION IS NOT AGAINST BLUM

[Demurrer § 8.]

BOLTHOUSE PROPERTIES acknowledges and agrees that its Third and Fourth Causes of Action, based on 42 USCS 1983, are not proper if alleged against a private citizen (absent concerted action allegations). As with the remainder of the allegations of the Cross-Complaint, however, the Third and Fourth Causes of Action are not leveled at BLUM, so this ground for demurrer is improper.

VIII

5TH THROUGH 10TH CAUSES OF ACTION ARE PROPERLY PLED

[Demurrer §§ 9. - 13.]

BLUM argues that the Fifth through Tenth Causes of Action of the Cross-Compliant fail to incorporate or set forth a sufficient factual or legal foundation. First, as stated above, none of the allegations of this pleading are leveled at, or applicable to, BLUM. Second, even if BLUM had standing to attack them, each of these causes of action is complete and procedurally sufficient.

A simple review of the Common Allegations, which are incorporated by reference into each cause of action, reveals that the issues to be decided or declared are fully and adequately set

forth in a manner which apprises the affected cross-defendants of the matter in dispute. Each such cause of action alleges rights to water underlying identified parcels, be it as an overlying owner, overlying lessee or as a return flow facilitator. The essence of BLUM'S attack on these causes of action lies in a lack of an understanding of the rights in dispute among the numerous parties and the limited sub-group thereof against whom the Cross-Complaint is actually directed. None of these causes of action adversely impacts whatever rights BLUM may have as an overlying landowner of an affected parcel.

IX

THERE IS NO DEFECT OR MISJOINDER OF PARTIES

[Demurrer § 14.]

BOLTHOUSE PROPERTIES' Cross-Complaint does not claim rights superior to BLUM. As set forth above, BOLTHOUSE PROPERTIES acknowledges that its rights to water as a lessee are subordinate and dependent upon the rights of the lessor. In this instance, BOLTHOUSE PROPERTIES is not a party to the LEASE. The Cross-Complaint responds to the municipal purveyors' Cross-Complaint and asserts rights adverse to the municipal purveyors, not overlying landowners. Accordingly, BLUM need not be added as a MOE cross-defendant by BOLTHOUSE PROPERTIES for he is not an interested or indispensable party to BOLTHOUSE PROPERTIES' Cross-Complaint. There is no defect or nonjoinder issue, so demurrer under *Code of Civil Procedure § 430.10(d)* is not properly asserted.

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1 X

2 THERE IS NOT ANOTHER ACTION PENDING

3 [Demurrer § 15.]

4 BOLTHOUSE PROPERTIES is befuddled by BLUM'S *Code of Civil*
5 *Procedure* § 430.10(c) argument that BOLTHOUSE PROPERTIES' Cross-
6 Complaint is barred because there is "another action pending"
7 based upon the pleadings filed by WM. BOLTHOUSE FARMS, INC.
8 First, BOLTHOUSE PROPERTIES, LLC and WM. BOLTHOUSE FARMS, INC.
9 are separate and distinct legal entities. Second, the filing of
10 a cross-complaint in response to a cross-complaint by yet another
11 party does not constitute "another pending action."

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; Childs v. Eltinge, (1973) 29 Cal.App.2d 843, 848) Such
16 is not the case in this coordinated action.

17 XI

18 THE CROSS-COMPLAINT IS NOT UNCERTAIN

19 [Demurrer § 16.]

20 Incorporating the above discussion, the Cross-Complaint is
21 not subject to attack by BLUM and does, nevertheless, set forth
22 sufficient allegations to constitute its causes of action. No
23 further comment is warranted.

24 ///

25 ////

26 ////

XII

ATTORNEY'S FEES ARE NOT APPROPRIATE

[*Demurrer* § 17.]

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. First, 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. Second, *Civil Code* § 1717 applies only to the parties to the contract, not a third party such as BOLTHOUSE PROPERTIES, LLC. (Sessions Payroll Management v. Noble Construction Co., (2000) 84 Cal. App. 4th 671) Third, 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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XIII

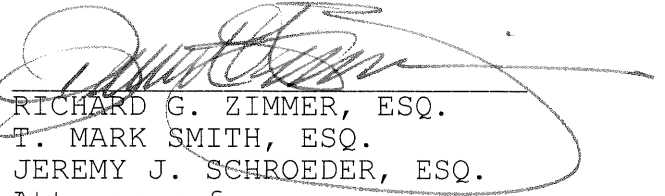
CONCLUSION AND REQUEST FOR RELIEF

BOLTHOUSE PROPERTIES, 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:


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*Antelope Valley Groundwater Cases
Judicial Counsel Coordination Proceeding No. 4408
Santa Clara County Superior Court Case No. 1-05-CV-049053*

On January 25, 2008, I served the foregoing document(s) entitled:

Nanette Maxey
NANETTE MAXEY
2450-37