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EXEMPT FROM FILING FEES UNDER GOVERNMENT CODE SECTION 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:
Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Los Angeles, Case No. BC 325201;

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. v. City of Lancaster, Diamond Farming Co. v. City of Lancaster, Diamond Farming Co. v. Palmdale Water Dist., Superior Court of California, County of Riverside, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668

Judicial Council Coordination No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to The Honorable Jack Komar

PUBLIC WATER SUPPLIERS' OPPOSITION TO DIAMOND FARMINGS MOTION TO STRIKE CLASS ALLEGATIONS AS TO THE FIRST CAUSE OF ACTION AND MOTION IN LIMINE

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OPPOSITION

I. INTRODUCTION

There are at least four reasons why Diamond Farming's motions should be denied.[1] First, Diamond Farming's argument fails on a motion to strike because it does not accept as true the allegations of the cross-complaint. Second, notice is a factual issue that cannot be resolved on a motion to strike. Third, even if Diamond Farming's argument were appropriate on a motion to strike, it is wrong under California law. Finally, Diamond Farming continues to ignore California Class Action Law which provides flexibility and creativity for trial court management of class action issues.

Contrary to Diamond Farming's unsupported arguments, no law holds that a prescriptive right cannot be asserted against a class of property owners; and no law requires Public Water Suppliers to meet Diamond Farming's self-created evidentiary standard.

II. THE CROSS-COMPLAINT STATES A CAUSE OF ACTION FOR PRESCRIPTION.

1. Diamond Farming Does Not Accept As True The Allegations In The Cross Complaint

Diamond Farming concedes the cross complaint alleges a valid claim for prescriptive rights including the element of notice: "In order to establish a prescriptive easement to the

[1] This Opposition responds to both Diamond Farming Motions: (1) Motion To Strike The Class Allegations As To The First Cause of Action Of The First Amended Cross-Complaint Of the Public Water Suppliers, Or, In The Alternative, Motion Not To Certify Any Defendant Class As To The First Cause Of Action Of That Cross Complaint and (2) Motion In Limine For An Order Establishing the Evidentiary Standard For Notice Of Hostility Necessary For Proof Of Prescription By The Public Water Suppliers. Both motions depend on the same unsupported arguments and seek the same relief.

subsurface waters at issue in this case, the Public Water Suppliers must allege that the easement was for a period of five years, that the use was open, notorious, and clearly visible to each owner of the burdened estate, and the use was hostile and adverse to the title of each owner, that each owner knew or should have known of the hostile and adverse character of the use. . . . Unless the claimant can demonstrate that the owner of the servient estate had actual or constructive knowledge, the claimant cannot establish a prescriptive right." (Diamond Farming Opp., p. 3:14-15; and p. 4:12-13 [emphasis omitted.)

The Public Water Suppliers' cross-complaint alleges they have continuously and for more than five years pumped water from the Basin for reasonable and beneficial purposes and have done so "under a claim of right in an actual, open, notorious, exclusive, continuous, hostile and adverse manner" and that the defendant property owners "had actual and/or constructive notice of these activities either of which is sufficient to establish the Public Water Suppliers' prescriptive right." (First-Amended Cross-Complaint ¶ 42 [emphasis added].)

For purposes of ruling on a motion to strike, all facts pleaded in the cross-complaint are assumed to be true. (See, *e.g.*, *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.) On its motion to strike, Diamond Farming must accept as true the allegations that defendants had "actual and/or constructive notice" of the Public Water Suppliers' pumping and that they have continuously and for more than five years pumped water from the Basin for reasonable and beneficial purposes and have done so under a claim of right in an actual, open, notorious, exclusive, continuous, hostile and adverse manner. Accepting these allegations as true, the Public Water Suppliers state a valid notice claim for prescriptive rights against all property owner defendants (except those public entities that own property within the Adjudication Area).

Moreover, there are limited grounds upon which a party may move to strike, and the Diamond Farming motion is not based on any recognized ground. (See, Weil & Brown, *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2006) § 7:156 *et*

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seq.) Instead, Diamond Farming again attacks class certification, and Diamond Farming's motion to strike is not the proper motion for such an attack. As already shown in this case, there are well-recognized statutory requirements and deadlines applicable to Diamond Farming to oppose class certification.

2. Whether Any Party Had Actual or Constructive Notice Is A Factual Issue That Cannot Be Resolved On a Motion to Strike

"Notice is a question of fact." (*Lindsay v. King* (1956) 138 Cal.App.2d 333, 343 [involving water rights to a spring].) Numerous courts have held that "[t]he questions whether the use of an easement is adverse and under a claim of right, or permissive and with the owner's consent, and the question whether the nature of the use is sufficient to put the owner on notice, are all questions of fact." (*Gaut v. Farmer* (1963) 215 Cal. App. 2d 278, 283; *see also Guerra v. Packard* (1965) 236 Cal. App. 2d 272, 288 [same]; *Warsaw v. Chi. Metallic Ceilings* (1984) 35 Cal. 3d 564, 570 ["Whether the elements of prescription are established is a question of fact for the trial court."].)

The issue of whether Diamond Farming or other private property owners (including class members) had notice of adversity sufficient to establish prescriptive rights is a question of fact that cannot be resolved on a motion to strike. (*See, e.g., Clauson v. Superior Court*, 67 Cal.App.4th at p. 1255.) Diamond Farming concedes the cross-complaint alleges actual or constructive notice as to all private property owners, and the motion to strike should be denied.

3. Constructive Notice Is Sufficient To Establish Prescriptive Rights As To All Private Property Owners Whether In The Class Or Not

Even if Diamond Farming's class notice issue could be resolved on a motion to strike, Diamond Farming cites no authority to support its argument that there cannot be a class of private

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property owners subject to a prescriptive rights claim. As to any private property owner, prescriptive title vests automatically upon the completion of five years of adverse use, so long as the use was open and notorious, adverse and hostile, and continuous and uninterrupted, and for a reasonable and beneficial purpose. (Code Civ. Proc., § 318; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 930-33; *Saxon v. DuBois* (1962) 209 Cal.App.2d 713, 719.) Moreover, numerous courts have held that constructive notice of adverse use is sufficient to establish prescriptive rights. In *Bennet v. Lew* (1984) 151 Cal.App.3d 1177, 1184, the court held that "[t]he requisite elements for a prescriptive easement are designed to insure that the owner of the real property which is being encroached upon has actual or constructive notice of the adverse use." (Emphasis added.) In *Kerr Land & Timber Co. v. Emmerson* (1969) 268 Cal. App. 2d 628, 634 the court stated: "It is settled that to establish rights by adverse use the owner must be notified in some way that the use is hostile and adverse but actual notice is not indispensable. Either the owner must have actual knowledge or the use must be so open, visible and notorious as to constitute reasonable notice."

Similarly, in water cases, courts have held that constructive notice of an overdraft condition is sufficient to establish prescriptive rights. For example, in *City of Pasadena v. City of Alhambra* (1949) 33 Cal. 2d 908, 930, the California Supreme Court held that falling groundwater level conditions were sufficient to put all groundwater users on notice that overdraft had commenced and therefore, that adversity was present. Twenty-six years later, the Court in *City of Los Angeles v. City of San Fernando* (1975) 14 Cal. 3d 199, 282 cited approvingly to the language in *Pasadena* indicating that declining well levels are sufficient to place all parties on notice of adversity. In *Lindsay v. King* (1956) 138 Cal. App. 2d 333, 343, a case involving water rights to a spring, the court held that proof of facts that raise an individual's duty of inquiry is adequate to support a claim of prescription. (See also *Hudson v. Dailey* (1909) 156 Cal. 617, 630.) In *Jones v. Harmon* (1959) 175 Cal. App. 2d 869, 879, the court held that the requisite notice of adversity was present where "defendants had actual notice of facts and circumstances to put them on inquiry."

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There is no authority requiring public agencies acquiring prescriptive rights to water to satisfy Diamond Farming's fictional "actual notice." In the absence of legal authority to support Diamond Farming's arguments, it misinterprets *Walker v. City of Hutchinson* (1956) 352 U.S. 112, *Schroeder v. City of New York* (1962) 371 U.S. 208, and *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306 as they have nothing to do with prescriptive rights. *Walker* and *Schroeder* involve the sufficiency of a public agency's notice to interested parties of the agency's condemnation proceedings. *Mullane* concerns the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law. Moreover, even if these cases were on point - which they are not - they do not stand for the proposition that actual notice is required in order to meet due process standards. Rather, the standard in these cases is that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties" of the pendency of an action affecting an interested party's rights. (*Mullane, supra,* 339 U.S. at 314.)

Diamond Farming's use of *Wright v. Goleta* (1985) 174 Cal.App.3d 74, is misplaced because that case did not address a prescriptive rights notice standard, but rather whether the unexercised overlying rights of absent landowners could be subordinated in the context of a groundwater adjudication.

In sum, there is no law that requires a public water supplier to plead and prove that it has provided actual notice in acquiring prescriptive rights against class members. Under well-established California Water Law, the Public Water Suppliers state a valid cause of action as to all property owners, and Diamond Farming must accept the allegations in the cross-complaint as true for purposes of a motion to strike. Whether the facts and circumstances are such that the requisite notice existed amongst class members is a question of fact that cannot be resolved on a motion to strike.

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III. PRESCRIPTION IS APPROPRIATELY PLED AGAINST A CLASS OF DEFENDANTS BECAUSE PRESCRIPTION IS PROVEN ON A BASIN WIDE BASIS.

Diamond Farming erroneously claims that prescription cannot be asserted as a valid claim against a class because prescription should be proven on a parcel-by-parcel basis. Diamond Farming cites no relevant authority for this assertion, because none exists. To the contrary, relevant California Water Law holds that a finding of prescription operates against the Basin as a whole. (See generally *e.g.*, *City of Pasadena v. City of Alhambra* (1949) 33 Cal. 2d 908 and *City of Los Angeles v. City of San Fernando* (1975) 14 Cal. 3d 199.)

For prescription to occur there must be overdraft, and overdraft is not determined parcel by parcel but is based on basin conditions. "Safe yield" is defined as "the maximum quantity of water which can be withdrawn annually from a groundwater supply under a given set of conditions without causing an undesirable result." An "undesirable result" is the "gradual lowering of the ground water levels resulting eventually in depletion of the supply." (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal. 3d 199, 278.) A groundwater basin is in a state of surplus when the amount of water being extracted is less than the maximum that could be withdrawn without adverse effects on the basin's long term supply. (*City of Los Angeles v. City of San Fernando*, *supra*, at p. 277.) "Overdraft commences whenever extractions increase, or the withdrawable maximum decreases, or both, to the point where the surplus ends." (*City of Los Angeles v. City of San Fernando*, *supra*, at p. 278.)

All of these determinations - which have developed out of more than fifty years of California Supreme Court decisional law - are determined on basin-wide conditions and not on a parcel-by-parcel basis. The reason for this basin-wide determination is simple: The primary means by which the "notice of adversity" element is shown is through falling basin water levels or other indicia of overdraft. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal. 2d 908, 930.)

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By their nature, overdraft conditions typically occur in the basin as a whole, therefore providing actual or constructive notice to all basin landowners. Not one of the relevant California groundwater cases mandates a "parcel by parcel" showing of notice. Indeed, because prescriptive rights are typically established against all overlying landowners in a basin, a claim of prescriptive rights is well-suited to class action procedures. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) Thus, Diamond Farming's baseless assertions should not interfere with class certification.

In *Orange County Water District v. Riverside* (1959) 173 Cal.App.2d 137, the Court of Appeal held that the Orange County Water District could represent all overlying owners within its boundaries as a class. The court specifically contemplated that those rights could be reduced by prescription. (*Orange County Water District v. Riverside, supra*, at p. 162.) Indeed in that case prescriptive rights were directly at issue: "[T]hey are entitled at least to a definition of whatever prescriptive rights the users above them of waters tributary to their own basin may have, and to such declaratory relief as shall prevent the further extension of such upstream prescriptive rights to the detriment of their own future use of their own rights. (*Orange County Water District v. Riverside, supra*, at p.184.)

By common sense and logic, constructive notice is by definition different from actual notice to each property owner. As shown above, constructive notice includes Basin-wide conditions that are known or should be known by any property owner.

IV. THERE ARE NO HEIGHTENED NOTICE STANDARDS FOR PUBLIC AGENCIES PLEADING PRESCRIPTIVE RIGHTS.

Diamond Farming cites no authority for its claim that the Public Water Suppliers have a heightened notice standard. In the absence of case law supporting such a claim, Diamond Farming relies on a series of inapposite eminent domain cases. As demonstrated above, California Water Law allows for actual or constructive notice for prescriptive rights claims.

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V. CLASS ACTION MAINTENANCE AND MANAGEMENT

California Rules of Court, Rule 3.541 together with Rule 3.760 *et seq.*, give broad powers to this court to manage a class action in these coordinated proceedings. The court has the power to modify the class representation through party or issue severance, bifurcation, intervention by dissident class members, and the creation of sub-classes for particular issues. (See *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 479 [The California Supreme Court noted that differences between class members can be accommodated by intervention or subclassing].) Thus, the court can later amend or modify the class certification order as the court manages the class action.

Additionally, California public policy favoring class actions is reflected in numerous California Supreme Court decisions recognizing the court's broad powers to manage class actions to accommodate individual class member claims as well as differing positions amongst class members:

> "We long ago recognized 'that each class member might be required ultimately to justify an individual claim does not necessarily preclude maintenance of a class action.' Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.' Individual issues do not render class certification inappropriate so long as such issues may effectively be managed."
>
> . . .
>
> "It may be, of course, that the trial court will determine in subsequent proceedings that some of the matters bearing on the right to recovery require separate proof by each class member. If

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this should occur, the applicable rule . . . is that the maintenance of the suit as a class action is not precluded so long as the issues which may be jointly tried, when compared to those requiring separate adjudication, justify the maintenance of the suit as a class action.'"

. . .

"Courts seeking to preserve efficiency and other benefits of class actions routinely fashion methods to manage individual questions. *For decades 'this court has urged trial courts to be procedurally innovative in managing class actions, and 'the trial court has an obligation to consider the use of . . . innovative procedural tools proposed by a party to certify a manageable class."*

. . .

"If the factual underlying class members' claims differ, or if class members disagree as to the proper theory of liability, the trial judge, through use of techniques like sub-classing, or [other judicial] intervention, may incorporate the class differences into the litigative process, and give all class members their due in deciding what is the proper outcome of the litigation.'"

(*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334-340 [citations omitted and emphasis added].)

All members of the class have predominant common question of law and fact regardless of whether they have pumped water. Common questions include the determination of the safe yield, historical groundwater levels, historical pumping by appropriators – all of which impart actual and/or constrictive notice to all landowners including class members. To the extent there arises a need to make other determinations including individualized notice claims, the court can use subclassing, severance, and other case management techniques.

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VI. DIAMOND FARMING'S MOTION IN LIMINE IS PREMATURE

There is no trial date. Factual and legal issues are not yet finally determined for trial. The case does not yet have all parties making their appearances. Thus, Diamond Farming's motion in limine is premature.

VII. CONCLUSION

For the above reasons, the Public Water Suppliers respectfully request that the Diamond Farming motions be denied.

Dated: May 11, 2007

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PROOF OF SERVICE

I, Kerry V. Keefe, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 5 Park Plaza, Suite 1500, Irvine, California 92614. On May 11, 2007, I served the within document(s):

PUBLIC WATER SUPPLIERS' OPPOSITION TO DIAMOND FARMINGS MOTION TO STRIKE CLASS ALLEGATIONS AS TO THE FIRST CAUSE OF ACTION AND MOTION IN LIMINE

☒ by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.

☐ by causing personal delivery by ASAP Corporate Services of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery by Federal Express following the firm's ordinary business practices.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on May 11, 2007, at Irvine, California.

Kerry V. Keefe

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