Bob H. Joyce, (SBN 84607)
David R. Lampe (SBN 77100)
Andrew Sheffield (SBN 220735)
LAW OFFICES OF
LEBEAU • THELEN, LLP
5001 East Commercenter Drive, Suite 300
Post Office Box 12092
Bakersfield, California 93389-2092
(661) 325-8962; Fax (661) 325-1127

Attorneys for DIAMOND FARMING COMPANY, a California corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| Coordination Proceeding Special Title (Rule 1550 (b))<br><br>ANTELOPE VALLEY GROUNDWATER CASES<br><br>Included actions:<br><br>Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company<br>Los Angeles Superior Court<br>Case No. BC 325201<br><br>Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company<br>Kern County Superior Court<br>Case No. S-1500-CV 254348 NFT<br><br>Diamond Farming Company vs. City of Lancaster<br>Riverside County Superior Court<br>Lead Case No. RIC 344436 [Consolidated w/Case Nos. 344668 & 353840] | Judicial Council Coordination No. 4408<br><br>Case No.: 1-05-CV-049053<br><br>**POINTS AND AUTHORITIES IN OPPOSITION TO PUBLIC WATER SUPPLIERS' MOTION FOR CLASS CERTIFICATION**<br><br>Hearing:<br><br>Date: March 12, 2007<br>Time: 1:30 p.m.<br>Dept.: 1 |

///

///

///

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES — Page No.

STATUTES

Diamond Farming Company presents the following points and authorities in opposition to the Public Water Suppliers' motion for a defendant class certification.

## I. INTRODUCTION

The Public Water Suppliers[1] have made a motion for class certification which completely ignores the predominant and threshold issue in this case– the adjudication of the Public Water Suppliers' alleged prescriptive right to take water, superior in right to all overlying landowners. The motion offers no evidence whatsoever that this key issue can be litigated on a class wide basis. In fact, the issue cannot be adjudicated against a class, unless the Public Water Suppliers admit to (or the court establishes) an evidentiary standard for notice of adversity and hostility (a vital element of the claim) that would apply uniformly to the entire class, such as proof of notice intended and reasonably calculated to provide actual notice to all affected landowners. If the Public Water Suppliers can make an offer of proof or other showing to that effect, then perhaps a defendant class can be appropriately certified. Any other standard would require an inquiry into the notice available to each separate individual landowner– a daunting task for such a vast number of class members.

The only evidence that the Public Water Suppliers have offered in support of the motion is that the proposed class is very large (estimated at 65,000 parcels). Size alone is no grounds for certification of a class, and, in fact, the size of the class works against certification on the issue of prescription, so long as the Public Water Suppliers insist that they may establish prescription merely upon evidence of overdraft and their pumping. Upon this evidence, the facts of notice will vary widely within the class, depending upon the location of individual parcels and the use by the owners of those parcels.

The Public Water Suppliers have intentionally and blithely ignored the core issue of prescription in their motion. It has been their consistent pattern throughout this litigation (which for Diamond has ensued since 1999) to use the weight of procedure to avoid being put to their proof on the question of the fact of and the quality of the notice required to support their claim of prescription. They can no

///

---

1 By the motion, the "Public Water Suppliers" are identified as California Water Service Company, City of Lancaster, City of Palmdale, Littlerock Creek Irrigation District, County of Los Angeles Waterworks District No. 40, Palmdale Water District, Rosamond Community Services District, Palm Ranch Irrigation District and Quartz Hill Water District.

longer ignore the issue. Class certification must be based upon substantial evidence, and the burden of proof lies with the moving party, the Public Water Suppliers.

Certification of a defendant class is at best premature because the Public Water Suppliers have not made any preliminary evidentiary showing of commonality within the proposed defendant class upon the facts of the required notice of their adverse and hostile claims. Unless the Public Water Suppliers establish superior prescriptive rights to groundwater, then all of the other elements of their case– declaration of priorities, appropriative rights, physical solution, and municipal priority– cannot be effectively adjudicated and determined. The Public Water Suppliers' claim of prescription must be adjudicated. As between private litigants, prescription requires, at a minimum, the type of notice that would put a reasonable owner to a duty of inquiry. Constitutionally sufficient notice required of the government, the Public Water Suppliers, is, under due process standards, notice intended and reasonably calculated to provide actual notice. If the Public Water Suppliers claim that there is notice based only upon "constructive" knowledge that their pumping was adverse or lowering groundwater levels, then there can be no class as defined, because there is no commonality. The Public Water Suppliers will be put to the test of proving such notice. Commonality and uniformity would require that they would have to prove the running of the same 5 year prescriptive period for every overlying owner affected. If the Public Water Suppliers admit (or the court declares) that the standard of notice required for the taking of private property for a public use is notice intended and reasonably calculated to provide actual notice to all affected landowners, and if the Public Water Suppliers can make an offer of proof or other evidentiary showing to that effect, then perhaps a defendant class could be appropriately certified. In short, the moving parties have fallen short of their burden of proof to demonstrate that a defendant class can be lawfully certified at this time and on the evidence offered.

There are other defects with respect to the motion's proposed class definition and class representative. The Public Water Suppliers propose a class that includes public entities against whom no prescriptive rights can obtain. Thus, the Public Water Suppliers do not have any cause of action against these defendants on the issue of prescription, which is fatal to the establishment of the defined defendant class. For the same reason, the Public Water Suppliers' proposal to certify the State as class representative is wrong, because the State has no meaningful interest in defending private landowners

against the Public Water Suppliers' takings claims under a theory of prescription, and the State has political burdens that make it a potentially ineffective class representative for private landowners.

This motion should be denied without prejudice to a future motion made upon proper evidence establishing the factual basis for notice of prescription uniformly applicable to the entire class.

## II. ARGUMENT

### A. *The Public Water Suppliers have failed to meet their burden of proof that their claim of prescriptive rights can be adjudicated against a defendant class, because they have not shown any common question of law or fact on the predominate issue of notice of adversity and hostility.*

#### 1. The proponent of class certification has the burden of proving that common questions of law and fact predominate.

Code of Civil Procedure section 382 authorizes the use of a class action "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1103-1104 (*Lockheed Martin*), citing *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913; *Sony Electronics, Inc. v. Superior Court*(2006) 145 Cal.App.4th 1086, 1093- 1094.)

This court must preliminarily consider evidence going to the issue of the Public Water Suppliers' claim of prescriptive rights in order to determine the propriety of class certification.

Whether certification of a class is appropriate is essentially a procedural question that usually does not depend on the legal or factual meritoriousness of the class claims. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440.) However, the trial court's determination of whether it should certify a class will often involve some inquiry, although perhaps a general one, into the factual and legal issues comprising the plaintiff's causes of action. When the merits of the claim are enmeshed with class action requirements, the trial court must consider evidence bearing on the factual elements necessary to determine whether to certify a class. The community of interest is established upon the merits, and the proponent of the class certification must establish by evidence the community as a matter of fact. (*Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 471-472; *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 656; *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113

Cal.App.4th 195, 222.) The court's determination to certify or not will involve an inquiry into "**. . . the factual and legal issues comprising the plaintiff's cause[s] of action.**" (*Caro, supra*, at p. 656.) The critical inquiry on a motion for class certification is whether "**the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.**" (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327; *Sony* at 1093- 1094.)

A trial court's decision on the question must be supported by substantial evidence generally and may not be based on improper criteria or erroneous legal assumptions. (*Washington Mutual*, *supra*, at p. 914; *Sony*, *supra*, at 1094.) Class certification must be such as to give res judicata effect to the ultimate judgment as to all class members. (*Sony*, supra, at 1094- 1095.)

Class certification cannot simply be based upon a speculative "**reasonable possibility**."(*City of San Jose* v. *Superior Court* (1974) 12 Cal.3d 447, 460; see also *Vasquez* v. *Superior Court* (1971) 4 Cal.3d 800, 820-821.) The burden requires that the plaintiff establish more than "**a reasonable possibility**" that class action treatment is appropriate. The "**reasonable possibility**" standard applies when the class action complaint is tested on demurrer (*Vasquez, supra*, at p. 813), but not when the court determines the issue of class propriety at hearing on a certification motion at which substantial evidence must be presented. (*Vasquez, supra*, at pp. 820-821; see also *Beckstead* v. *Superior Court* (1971) 21 Cal.App.3d 780, 783.) At that time the issue of community of interest is determined on the merits and the plaintiff must establish the community as a matter of fact.

Here, the Public Water Suppliers must establish the requisite commonality on the issue of notice to all landowners of their adverse and hostile claim by a preponderance of substantial evidence. In the *Hamwi* case (*supra*), lessees of space in an office building sought to bring a class action against the lessors and related defendants, on their own behalf and on behalf of all tenants past and present who leased or were leasing floor space from defendant in the building occupied by plaintiffs and other buildings owned and operated by defendants pursuant to a written lease. The trial court determined that a rent escalation clause at issue was ambiguous on its face, that the clause was not susceptible to a uniform interpretation, so that in order to determine its meaning a court would have to consider the circumstances surrounding the negotiations and execution of each individual lease. Therefore, unique questions of fact and law predominated over the common questions.

Requisite commonality cannot exist when there is the potential, and likelihood, that class members will have divergent interests on any of the questions presented. (*Horton v. Citizens Nat. Trust & Sav. Bank of Los Angeles* (1948) 86 Cal. App. 2d 680.) Query: Is there no divergent interest between landowners who have engaged in self-help and pumped groundwater, and those who have not and who have unexercised overlying rights?

Plaintiffs' burden on moving for class certification is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate*. (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913.) This means each member must not be required to individually litigate numerous and substantial factual or legal questions to determine his or her rights following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants. (*Id.* at pp. 913-914, quoting *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460.)

2. When one or more legal and factual issues predominates requiring individual adjudication, class certification is not proper.

In *Lockheed Martin Corp v. Superior Court* (2003) 29 Cal.4th 1096, individuals brought an action against multiple manufacturers alleging that defendants discharged dangerous chemicals that contaminated a city's drinking water and that a large portion of the city's residents used this contaminated water. Plaintiffs sought, on behalf of themselves and persons similarly situated punitive damages and defendants' funding of a court-supervised program for the medical monitoring of class members. The court held that class certification was an abuse of discretion. Viewed altogether, the individual questions that needed to be resolved in order to resolve plaintiffs' claims were staggering in both number and complexity. In Lockheed, the trial court would have to conduct tens of thousands of complex individualized trials over causation, damages and affirmative defenses. Invocation of the class action mechanism under these circumstances would not promote efficiency. Rather, it would deprive either the defendants or the members of the class– or both– of a fair trial. (*Lockheed* at 1116 [concurring opinion of J. Brown].) The court concluded that the trial court's predominance finding was not supported by the record. The questions respecting each individual class member's rights appear so numerous and

substantial as to render any efficiencies attainable through joint trial of common issues insufficient, as a matter of law, to make a class action certified on such a basis advantageous to the judicial process and the litigants. (*Lockheed* at 1111.)

In rem actions involving multiple parcels and title or damage claims are particularly problematic. In a purported class action against a municipal airport, plaintiffs sought recovery for diminution in the market value of their property allegedly caused by aircraft noise, vapor, dust, and vibration. The defendant moved for an order declaring the action inappropriate as a class action. The Supreme Court granted a writ of mandamus directing the vacation of the order certifying the action as a class suit. The court held that the trial court had abused its discretion in certifying the matter as appropriate for a class suit, in part because the action was based on facts peculiar to each prospective plaintiff (parcel) to such an extent that the requirement for a class action of a community of interest could not be met. The action for nuisance and inverse condemnation was predicated on facts peculiar to each prospective plaintiff. For example, an approaching or departing aircraft may or may not give rise to actionable nuisance or inverse condemnation depending on a myriad of individualized evidentiary factors. While landing or departure may be a fact common to all, liability could be established only after extensive examination of the circumstances surrounding each party. Development, use, topography, zoning, physical condition, and relative location were among the many important criteria to be considered. No one factor, not even noise level, would have been determinative as to all parcels. These separate unique factors weighed heavily in favor of requiring independent litigation of the liability to each parcel and its owner. Because liability was predicated on the impact of certain activities on a particular piece of land, the factors determinative of the close issue of liability were the specific characteristics of that parcel. The court held that the superficial adjudications which class treatment would entail could or would deprive members of the class of the constitutional mandates of due process. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 461- 462.)

In *Frieman v. San Rafael Rock Quarry, Inc.* (2004) 116 Cal.App.4th 29, 38, residents living near a quarry filed suit against the quarry, alleging nuisance and violations of California's unfair competition law. Whether each resident even heard or felt the impact of quarry's operations was subject to separate and differing matters of proof. Each resident would have been required to prove interference with the

comfortable enjoyment of life or property and that the interference was substantial and unreasonable. However, the plaintiffs produced no evidence that these issues did not vary significantly as to each individual in the defined area. Query: What evidence have the Public Water Suppliers offered that all class members were equally and uniformly affected by their pumping?

In *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 911, plaintiffs brought actions to quiet title to undivided mineral interests. The court upheld the denial of class certification because every member of the alleged class would have had to litigate numerous and substantial questions determining his individual rights, and the defendants would have undoubtedly raised the defense of abandonment of the mineral interests as to each alleged member of the class, which created a factual issue as to each individual owner's intent.

3. The Public Water Suppliers must demonstrate "notice of adversity and hostility" applicable to each member of the proposed class to establish their claim of prescription, and they have failed to do so.

In order to establish a prescriptive easement to the subsurface waters at issue in this case, the Public Water Suppliers must show that the easement was used for a period of five years, that the use was open, notorious, and clearly visible to each owner of a burdened estate, and that the use was hostile and adverse to the title of each owner, and that each owner knew or should have known of the hostile and adverse character of the use. Use alone is insufficient to establish a prescriptive right. Well over a hundred years ago, the California Supreme Court, in *Sullivan v. Zeiner* (1893) 98 Cal. 346, affirmed that notice of the adverse claim by the injured party is a cardinal fact that must exist, **". . . else all statutes of limitation and all rules of prescription or of presumption, of license or grant, would be but rules of spoliation or robbery."** (*Sullivan, supra*, at pp. 351-352.) The use must be sufficiently visible, open and notorious so that anyone in title to the proposed servient estate would discover the prescriptive use and adverse claim. The prescriptive user "must unfurl his flag on the land and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest." (*Wood v. Davidson* (1944) 62 Cal.App.2d 885, 890.)

For well over a century, the California Supreme Court has held that as between private citizens, prescription follows upon a presumption that the adversely affected landowner, with knowledge of the adverse claim, by acquiescence, impliedly granted an easement or license to the prescripting party.

> "Title by prescription is created in such cases only where the conduct of the party who submits to the use by another cannot be accounted for on any other hypotheses than that which raises the presumption of the grant of an easement. The conduct of the party claiming the benefit of the presumption must in all cases have been such in itself as to give the other party the right to complain." (*Lakeside Ditch Company* v. *Henry A. Crane, et al.* (1889) 80 Cal. 181; pp. 183-184.)

By definition, the use may not be obscure or clandestine. (*Connolly v. McDermott* (1984) 162 Cal.App.3d 973, 977; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 927; *Pleasant Valley Canal Co. v. Borrow* (1998) 61 Cal.App.4th 742.)

Unless the claimant can meet his ultimate burden of proof that the owner of the servient estate had actual or constructive knowledge, the claimant cannot establish a prescriptive right. (*Fogerty v. State of California* (1986) 187 Cal.App.3d 224, 238; *Lynch v. Glass* (1975) 44 Cal.App.3d 943, 950; *Kerr Land & Timber Co.v. Emerson* (1969) 268 Cal.App.2d 628, 634.)

When the use is insufficient to give notice to the owner that the use is contrary to the interest of the owner, or the owner does not have an apparent remedy to prevent the use, the user cannot acquire prescriptive rights. The owner must have some notice that unless some action is taken to prevent the use, it may ripen into a prescriptive easement. (*Clark v. Clark* (1901) 133 Cal. 667, 670-671; *Sullivan, supra,* at pp. 348- 350; *Lakeside Ditch Company* v. *Henry A. Crane, et al.* (1889) 80 Cal. 181, 183- 184; *Jones v. Tierney-Sinclair* (1945) 71 Cal.App.2d 366, 369; *Nelson v. Robinson* (1941) 47 Cal.App.2d 520; *Peck* v. *Howard* (1946) 73 Cal.App.2d 308, 325- 326.)

In *Peck* v. *Howard* (1946) 73 Cal.App.2d 308, at pages 325-326, the Second District Court of Appeals observed:

> "The law will not allow the property of one person to be taken by another, without any conveyance or consideration, upon slight presumptions or probabilities." (*Niles* v. *Los Angeles*, 125 Cal. 572, 576.) (*Peck, supra.*)

That court further held:

> "**That owners are not affected by acts which do not bring to them knowledge of the assertion of an adverse right**, and that the use by the adverse claimant was not hostile unless there was an actual clash with the rights of the actual owners, and that before a right by prescription is established the acts by which such establishment is sought must operate as an invasion of the rights of the parties against whom it is set up, was the holding in *Anaheim Water Co.* v. *Semi-Tropic Water Co.*, 64 Cal. 185, 192 [30 P. 623]; *City of San Diego* v. *Cuyamaca Water Co.*, 209 Cal. 105, 133 [287 P. 475]; *Churchill* v. *Louie*, 135 Cal. 608, 611 [67 P. 1052]; *Skelly* v. *Cowell*, 37 Cal.App. 215, 218 [173 P. 609]; *Faulkner* v. *Rondoni*, 104 Cal. 140, 147 [37 P. 883]; *Pabst* v. *Finmand*, 190 Cal. 124, 128, 129 [211 P. 11.]. To the same effect, was the holding in the well considered

case of *Jobling* v. *Tuttle*, 75 Kan. 351 [89 P. 699, 9 L.R.A.N.S. 960, 965, 966], and *Dondero* v. *O'Hara* [***39] , 3 Cal.App. 633 [86 P. 985]." [Emphasis added.]

The California Supreme Court in *City of Los Angeles* v. *City of San Fernando* (1975) 14 Cal.3d 199, 281- 283 makes clear " **. . . if the other party is not on notice that the overdraft exists, such adverse taking does not cause the commencement of the prescriptive period.**" That court continued:

> "The findings that the takings from the basin were open and notorious and were continuously asserted to be adverse does not establish that the owners were on notice of adversity in fact caused by the actual commencement of overdraft." [Emphasis added.] (*City of Los Angeles*, *supra*, at 282.)

In *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, at page 90, that court held that cooperation in or knowledge of a public entities taking of water for a public purpose did not equate with or constitute knowledge that individual overlying rights were in jeopardy. Thus, as stated, notice of adversity in fact must be established by evidence.

By definition then, the right of public entities, such as the Public Water Suppliers, to assert a taking by prescription, corresponds to the concomitant right of the owner to maintain an action in inverse condemnation, and that right cannot arise until the owner has notice of an apparent invasion of or interference with his enjoyment of his property sufficient to initiate an action in inverse condemnation.[2] In *Smart v. City of Los Angeles* (1980) 112 Cal.App.3d 232 (cited in Diamond's previous demurrer), the owner of a vacant parcel of land located near Los Angeles International Airport, brought an action for inverse condemnation based on a reduction in value of the property from jet overflights. In 1972, the plaintiff discovered his damages when a prospective buyer was refused financing because of the land's exposure to high levels of noise. (*Smart* at 234-235.) The City argued that the claim was time barred and that the airport noise would have been "sufficiently appreciable to a reasonable person" [constructive notice] by the year 1966. (*Smart* at p. 238.) The Court made clear that it is not a hypothetical interference that determines a taking, but rather a substantial interference with the property owner's actual use and

---

2 "Generally, the limitations period on such inverse condemnation claims [the same 5 years required for preservation] begins to run when the governmental entity takes possession of the property. (See *Ocean Shore R.R. Co. v. City of Santa Cruz* (1961) 198 Cal.App.2d at p. 272; see also *Williams v. Southern Pacific R.R. Co.* (1907) 150 Cal. 624, 627 [89 P. 599]; *Mosesian v. County of Fresno* (1972) 28 Cal.App.3d 493, 500-502 [104 Cal.Rptr. 655].) *Where, however, there is no direct physical invasion of the landowner's property and the fact of taking is not immediately apparent, the limitations period is tolled until 'the damage is sufficiently appreciable to a reasonable [person] ....'* (*Mehl v. People* ex rel. *Dept. Pub. Wks.* (1975) 13 Cal.3d 710, 717 [119 Cal.Rptr. 625, 532 P.2d 489].) *Otay Water District v. Beckwith* (1991) 1 Cal.App.4th 1041, 1048-1049 (Emphasis added and brackets added.)

enjoyment of the land. The court ruled that aircraft overflight noise did not cause a substantial interference with plaintiff's *actual* use and enjoyment of the land until he attempted to sell it, thus his cause of action did not accrue until his discovery of the "red-lining" in 1972.

Therefore, the legal analysis used to fix the date of accrual of a cause of action in inverse condemnation must be, at the very least, applied to fixing the date upon which any prescriptive period asserted by the government as against private property can commence.

> "In determining the related question as to when a cause of action for inverse condemnation accrues, a 'taking' occurs 'when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property." (*Smith* v. *County of Los Angeles* (1989) 214 Cal.App.3d 266, 291; *Smart* v. *City of Los Angeles* (1980) 112 Cal.App.3d 232, 235.)
>
> "It is by focusing on the impact of the governmental activity upon the property owners actual use that the courts have determined a date of 'taking' in inverse condemnation actions." (*Smart*, *supra*, at p. 238.)

The Court of Appeal then concluded "**we merely recognize that property owners may be damaged by a given governmental activity in different ways and at different times.**" This Court must recognize that all property owners within the proposed class likely obtained knowledge of each Public Water Suppliers adverse and hostile claim **". . . in different ways and different times."**

Here, the Public Water Suppliers have made no showing at all of how the issue of notice as a prerequisite to prescription may be adjudicated on a class wide basis. We and this Court are left to speculate. All that is known is what is stated in the Public Water Suppliers' pleadings to the effect that they "have pumped water from the Basin" "under a claim of right in an actual, open, notorious, exclusive, continuous, hostile and adverse manner" such that the defendant class of overlying landowners had "actual and/or constructive notice of these activities." (Proposed First Amended Cross-complaint, ¶ 42.) Where is the evidence? By what standard do the Public Water Suppliers propose that notice may be adjudicated uniformly against the defendant class?

Technical evidence suggesting overdraft, and evidence of pumping by the Public Water Suppliers alone is insufficient to adjudicate prescription against the proposed class. Diamond has submitted the declaration of its expert, Steven B. Bachman, Ph.D., to the effect that there are substantial areas of property within the adjudicated jurisdictional boundary that would have experienced rising water levels during the alleged prescriptive period and there are substantial areas where overlying landowners have

not pumped or used the subterranean waters which is their right. It is an extreme simplification to suggest that groundwater conditions, either currently or historically, manifest themselves uniformly to overlying landowners within the adjudicated jurisdictional boundary.

Unless the Public Water Suppliers make some showing that there is a uniform standard or uniform proof of notice to the defendant class which supports a uniform adjudication of their alleged prescriptive rights, the class cannot be certified.

4. The standard of notice of hostility which should apply in this case is one that satisfies due process, which then, theoretically (dependant upon proof) might support class adjudication and therefore certification.

Diamond has consistently advocated that the Public Water Suppliers must demonstrate constitutionally sufficient notice under standards of due process in order to succeed in their case for prescriptive rights superior to those of the overlying landowners (i.e., a taking of private property for a public use without compensation). The Public Water Suppliers have consistently opposed such a standard of notice. Now, however, the Public Water Suppliers move for class adjudication of their prescriptive right. What evidence of notice of adversity and hostility could the Public Water Suppliers offer that would have class wide and uniform application, if not constitutionally sufficient due process notice?

In order to litigate their prescriptive rights against a class, the Public Water Suppliers must each make a showing (to a class certification standard) that each separate landowner in the proposed class received constitutionally sufficient due process notice of each public entities adverse claim consistent with the standard established in *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306. The required notice must be intended and reasonably calculated, under all the circumstances, to apprise interested parties of the claim and to afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their own claim. The means employed must be such as one desirous of actually informing might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary

substitutes. (See *Mullan*e at 314- 315.) Unless the Public Water Suppliers can show that the affected landowners are "**not reasonably identifiable, constructive notice alone does not satisfy the mandate of Mullane**." (*Mennonite Board of Missions vs. Adams* (1983) 462 U.S. 791 at 798.)

In *Walker v. City of Hutchison* (1956) 352 U.S. 112, the court held that statutory constructive notice by publication failed to meet the requirements of due process. There a city exercised its power of eminent domain over a landowner's property and the Supreme Court held that such notice failed to meet the *Mullane* standard, and ordered that notice "reasonably intended to and calculated to inform" must be given to any landowner whose address is readily known from the public record.

In *Schroeder v. City of New York* (1962) 371 U.S. 208, the court applied the *Mullane* rule, holding that a riparian property owner was not given adequate due process notice of the City's eminent domain proceedings to divert upstream waters, when notice was attempted only by postings and publication. It was held that some good faith effort to give actual notice to property owners was required, if their names were reasonably ascertainable from public records. In both *Walker, supra*, and *Schroeder, supra*, the suits were filed after the statute of limitations had run but the absence of due process notice resulted in a reversal by the Supreme Court.[3] (See *Jones v. Flowers* (2006) 126 S. Ct. 1708; 164 L. Ed. 2d 415; 2006 U.S. LEXIS 3451.)

The Public Water Suppliers' mere allegation that all landowners had "actual and/or constructive notice of its "pumping" is not sufficient to carry the day for class certification of its "claim of right," "claim of hostility," or "claim of adversity," and certainly is not substantial evidence of "acts or declarations or both" which by their nature and essence constitutes constitutionally sufficient due process notice of its adverse claim to all members of the proposed class.

///

---

3 "The majority opinion in the New York Court of Appeals seems additionally to have drawn support from an assumption that the effect of the city's diversion of the river must have been apparent to the appellant before the expiration of the three-year period within which the statute required that her claim be filed. 10 N.Y. 2d, at 526-527, 180 N. E. 2d, at 569-570. There was no such allegation in the pleadings, upon which the case was decided by the Trial Court. But even putting this consideration aside, knowledge of a change in the appearance of the river [here, the gradual lowering of well water levels] is far short of notice that the city had diverted it and that the appellant had a right to be heard on a claim for compensation for damages resulting from the diversion. That was the information which the city was constitutionally obliged to make at least a good faith effort to give personally to the appellant – an obligation which the mailing of a single letter would have discharged. (*Schroeder, supra*, pp. 213-214. [Bracket inserted.])

Diamond continues to assert that the Public Water Suppliers must give evidence of constitutionally sufficient due process notice as an element of their claim of prescription. Certainly, the Public Water Suppliers must show some substantial evidence of notice uniformly applicable to all landowners to sustain their burden on the point to demonstrate that the issue of notice can be adjudicated against the class. Here, they have offered nothing. The motion must be denied until the Public Water Suppliers can make that evidentiary showing.

5. The authority cited by Public Water Suppliers does not support class certification.

The Public Water Suppliers' citation to *Sav-On Drug Stores, Inc.v. Superior Court* (2004) 34 Cal.4th 319 does not help their case for class certification. *Sav-on* confirms that the moving parties have the burden of establishing the basis for class certification based upon substantial evidence, which includes a showing (and finding) that common questions of law and fact predominate. (*Sav-on* at 326.) Sav-on also confirms that in determining whether there is substantial evidence to support certification, the court must consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. (*Sav-on* at 327.) In *Sav-on*, two managers who had been classified as exempt employees of a drugstore chain brought a class action against the drugstore chain alleging violation of the overtime statutes. The court affirmed the trial court's class certification, notwithstanding the fact that individual claimants might have particular damage issues, because the predominant issue was whether each class member worked for defendant during the relevant period in a position that was misclassified either deliberately (on a class basis) or circumstantially (again, as a consequence of defendant's class-wide policies and practices). (*Sav-on* at 332- 333.) The record contained substantial, if disputed, evidence that deliberate misclassification was defendant's policy and practice. The record also contained substantial evidence that, owing in part to operational standardization and perhaps contrary to what defendant expected, classification based on job descriptions alone resulted in widespread de facto misclassification. (*Sav-on* at 330.)

The Public Water Suppliers' turn the *Sav-on* decision on its head. Here, the predominate question is the moving parties' claims of prescription. Until those claims are adjudicated, no other issue can be effectively litigated (such as physical solution) because the threshold issue of priority cannot be

established. The only evidence of commonality that the movants have offered is a declaration of Mark Wildermuth, an engineer, who opines that the defendant class is very large (estimating 65,000 parcels). This "evidence" demonstrates nothing about common questions of law and fact. Actually, the size of the proposed defendant class is evidence that the adjudication of the case will remain impossibly unwieldy so long as the predominate issue is the Public Water Suppliers' prescription claim, and so long as that claim is dependent upon notice to individual landowners of the Public Water Suppliers' hostility, as opposed to notice which may apply commonly, such as notice which meets a due process standard. Looking solely to the cross-complaint by the Public Water Suppliers, the allegation is that there is "actual and/or constructive notice of these activities, either of which is sufficient to establish the Public Water Suppliers' prescriptive rights." (Proposed First Amended Cross-complaint, ¶¶ 38, 42, and 43.). What does this mean? Do the Public Water Suppliers have evidence suggesting that notice of hostility is established class-wide? Where is the evidence of that notice? When did it happen? Is the running of the prescriptive period universal across the class? The moving parties have not even made an offer of proof as to these issues, let alone submitted any such proof. Until this court establishes that there is a standard for class notice of hostility to support the Public Water Suppliers' prescription claims, which Diamond believes and advocates is a due process standard, and until the Public Water Suppliers' can demonstrate substantial evidence that they have met that standard, class certification is premature.

In *Sav-on*, the fundamental liability issue was amenable to class treatment. In the present case, the fundamental issue is not amenable to class treatment, unless there is common basis for the Public Water Suppliers to establish notice of hostility for their claim of prescription.

The Public Water Suppliers citation to *Orange County Water District v. City of Riverside* (1959) 173 Cal.App.2d 137 as a case authorizing the certification of a defendant class of overlying property owners, borders on the disingenuous. That case did not involve class certification. The court noted that the action joined no other party plaintiffs except for the Orange County Water District, and joined no other defendants than the four cities of Fullerton, Anaheim, Orange, Santa Ana and Huntington Beach. (See *Orange County* at 151.) The plaintiff was authorized to bring the case upon its corporate statutory authority and to assert its corporate right so long as those rights were without infringement upon the established rights of others. (*Orange County* at 172- 173.) The Public Water Suppliers turn the *Orange*

*County* case upside down, just as they did in citing *Sav-on*. The *Orange County* case did not involve a class, and in fact stated that the rights of non-party appropriators from whom the defendant cities acquired water could not be affected by the judgment (*Orange County* at 218- 219.)

The Public Water Suppliers also cite to *City of Chino v. Superior Court* (1967) 255 Cal.App.2d 747, which was simply extended litigation by the Orange County Water District arising following the *Orange County* case. Again, *City of Chino* made it clear that it was not a class action, and that the plaintiff's standing was based solely upon its corporate statutory authority. (*City of Chino* at 755- 756.) *City of Chino* certainly does not stand for the proposition that prescriptive rights may be asserted against a defendant class of overlying landowners, and each member of the class held to the res judicata effect of the decision without any trial of the issue of notice of hostility to each member of the class.

The Public Water Suppliers also cite to an unpublished Sacramento Superior Court order in the "Putah Creek Adjudication." Diamond and this Court have no ability to determine the applicability of the issues in that litigation. Mr. Dunn's Declaration and the attached order are objectionable and objected to, and must be stricken. Citation to this superior court order is improper and cannot be considered. (Cal. Rules of Court, rule 8.1115; See *Dunbar v. Albertson's, Inc.* (2006) 114 Cal.App.4th 1422.)

B. *The Public Water Suppliers have not demonstrated the requirement for a defendant class certification that they have an effective claim of prescription against every member of the class.*

A plaintiff cannot use the procedure of a class action to establish standing to sue a class or group of defendants unless the plaintiff has a cause of action against each member of the defendant class. Although a plaintiff may represent a group of individuals all of whom have causes of action similar to his own against the same defendant or defendants, he cannot represent a class having causes of action against other defendants as to whom the plaintiff himself has no cause of action. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834; *Phillips* v. *Crocker-Citizens Nat. Bank* (1974) 38 Cal.App.3d 901, 906-909; *Petherbridge* v. *Altadena Fed. Sav. & Loan Assn.* (1974) 37 Cal.App.3d 193, 195-201.) The Public Water Suppliers have not shown by any evidence that their claim of prescription applies to all members of the class. Also, the inclusion of the State of California and the United States in the proposed defendant class defeats the motion on its face, because there can be no prescription against these public entities. (Civ. Code, § 1007.) Thus, the Public Water Suppliers' claim of prescription against the proposed class

fails, because the Public Water Suppliers have no cause of action for prescription against these defendants.

In *Simons v. Horowitz* (1984) 151 Cal.App.3d 834, the court emphasized that the court must give careful scrutiny in certifying a defendant class, as opposed to a plaintiff class. In that case the trial court certified a class action for damages and an injunction against a defendant class of art dealers, museums and all other persons similarly situated, brought by two individuals claiming to be fine artists within the meaning of the act. The trial court entered judgment against the defendant class, ordering each defendant class member to account for and pay each member of the plaintiff class commissions due on sales of fine art in California occurring from a certain date to the date of the judgment. The Court of Appeal reversed and remanded with directions to enter judgment in favor of the class of defendants. The court noted that A defendant class should be certified and such an action tried only after the most careful scrutiny is given to preserving the safeguards of adequate representation, notice and standing, and that failure to insure any of these essentials requires reversal of a judgment against a defendant class.

In *Baltimore Football Club. Inc.* v. *Superior Court* (*Ramco, Inc.*) (1985) 171 Cal.App.3d 352 ("*Baltimore Football*"), the court considered the propriety of certifying a class action of National Football League ticket holders for claimed damages arising out of a players' strike. The underlying action sought damages based upon claims of unjust enrichment from the use of season ticket purchase money during a year in which games were cancelled due to the strike. The court concluded that the requisite community of interest was lacking as to the multiple defendants and for that reason reversed the lower court's certification order.

The community of interest requirement is difficult when there are multiple defendants. It has been noted that the "'[resolution] of the class action issue assumes an added dimension when multiple parties are named as defendants. This often occurs when several persons have engaged in parallel conduct that affects a class of persons in the same or a similar way. The question is whether a plaintiff who has been affected by the conduct of one of the defendants can name all those who engaged in the challenged conduct as defendants, though that plaintiff had no contact with some of them.'" (See *Baltimore Football* at 358- 359.) In the absence of a conspiracy between all of the defendants, California has adopted the rule that a class action may only be maintained against defendants as to whom the class representative has a

cause of action. Without such a personal cause of action, the prerequisite that the claims of the representative party be typical of the class cannot be met. If the plaintiff class representative only has a personal cause of action against one defendant and never had any claim of any kind against the remaining defendants, his claim is not typical of the class. This prerequisite is also absent when the class representative's cause of action, although similar to those of other members, is only against a defendant as to whom the other class members have no cause of action. The typicality requirement is thus not fulfilled merely because the plaintiffs allege that they suffered injuries similar to those of other parties at the hands of other defendants. (See *Baltimore Football* at 359.)

C. *The State of California is an inappropriate representative class defendant.*

The community of interest requirement for class certification embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1101.) The primary criterion for determining whether a class representative has adequately represented a class is whether the representative, through qualified counsel, will vigorously and tenaciously protect the interests of the class.

The Public Water Suppliers propose that the court certify the State of California as the class representative. The State of California is not a representative that can present an adequate defense to the Public Water Suppliers' claims of prescription, because the State cannot be prescripted against. A prescriptive right cannot be established against any federal, state, or local entity. (Civ. Code, § 1007.) Therefore, the State cannot be the class representative, because the State does not have the same interest in defending against the Public Water Suppliers' claims of prescription as does a private owner. Furthermore, the State is by definition a political entity that has competing political interests to concern itself with the rights of all its citizens, with all of the attendant political pressures that may cause the State to be less than vigorous in pursuing the defenses of the overlying property owners against the Public Water Suppliers' claims of prescriptive rights.

///

///

D. *The court must proceed with extreme caution in certifying a defendant class.*

There is a substantial difference between a plaintiffs' class suit and a lawsuit against a class of defendants. Defendants' class actions involve the serious danger of lack of due process. A defendant class should be certified and such an action tried only after the most careful scrutiny is given to preserving the safeguards of due process. Failure to insure the essentials of due process ultimately would require reversal of any judgment against a defendant class. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 844- 845; See also, *Pinnacle Holdings, Inc. v. Simon* (1995) 31 Cal.App.4th 1430, 1437.)

Here, the Public Water Suppliers threaten a serious constitutional due process problem with their motion. The Public Water Suppliers refuse to acknowledge that their claims of prescription, if affirmed by a judgment of this Court, will result in the taking of the private property rights of 65,000 plus citizens for a public use without just compensation or any compensation whatsoever and without due process notice in the first instance. They propose class certification to adjudicate away the rights of all overlying landowners with no evidentiary showing to this Court that the predominate common question of notice of adversity and hostility to support their prescriptive claims may be adjudicated uniformly against all landowners and thus the proposed class.

## III. CONCLUSION

The Public Water Suppliers have made no substantial evidentiary showing whatsoever to meet their burden that the predominate issue of prescription can be tried commonly against the proposed defendant class. The motion should be denied due to the lack of evidentiary support.

Dated: February 26, 2007

LeBEAU • THELEN, LLP

By: _____
BOB H. JOYCE
Attorneys for DIAMOND FARMING COMPANY, a California corporation