

1 Bob H. Joyce, (SBN 84607)
2 Dave R. Lampe (SBN 77100)
3 Andrew Sheffield (SBN 220735)

LAW OFFICES OF

4 **LEBEAU • THELEN, LLP**
5 5001 East Commercenter Drive, Suite 300
6 Post Office Box 12092
7 Bakersfield, California 93389-2092
8 (661) 325-8962; Fax (661) 325-1127

9 Attorneys for DIAMOND FARMING COMPANY,
10 a California corporation

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **IN AND FOR THE COUNTY OF LOS ANGELES**

13 Coordination Proceeding

Judicial Council Coordination No. 4408

14 ANTELOPE VALLEY GROUNDWATER
15 CASES

Case No. 1-05-CV-049053

16 Included actions:

**REPLY TO OPPOSITION LOS
ANGELES WATER WORKS NO. 40 TO
MOTION TO STRIKE THE
COMPLAINTS IN ACTIONS S-1500-
CV254348 AND BC325201**

17 Los Angeles County Waterworks District No.
18 40 vs. Diamond Farming Company
19 Kern County Superior Court
20 Case No. S-1500-CV 254348 NFT

21 Los Angeles County Waterworks District No.
22 40 vs. Diamond Farming Company
23 Los Angeles Superior Court
24 Case No. BC 325201

Date: December 2, 2005
Time: 10:00 a.m.
Dept.: 1, Rm. 534

25 Diamond Farming Company vs. City of
26 Lancaster
27 Riverside County Superior Court
28 Lead Case No. RIC 344436 [Consolidated
w/Case Nos. 344668 & 353840]

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1 Defendant Diamond Farming, Inc., hereby submits the following Reply to Waterworks'
2 Opposition to Defendant's Motion to Strike the Complaints in Action Nos. S-1500-CV254348 and
3 BC325201.

4 I.

5 **INTRODUCTION**

6 Waterworks has opposed Diamond's Motion to Strike on three separate grounds:

- 7 1. "The Complaints seek an adjudication of all rights and interests to the Basin while
8 Diamond Farming's Action seeks only limited redress to its water rights, and thus the
9 two actions are different and not duplicative."
- 10 2. "The Motion to Strike is inconsistent with Diamond Farming's pleadings before the
11 Riverside County Court as to whether the County's claims are compulsory cross-claims;
12 and the doctrine of judicial estoppel requires denial of Diamond Farming's Motion."
- 13 3. "County Waterworks District No. 40 filed the complaint pursuant to an Order by the
14 Riverside County Superior Court, an action that Diamond itself requested before the
15 Riverside Court."

16 In Making these arguments, Waterworks is playing 'fast and loose' with the facts by claiming
17 that the actions are now "different and not duplicative" as to Diamond. Judicial estoppel prevents
18 Waterworks from making such an argument simply for the sake of defeating this motion.

19 Waterworks also accuses Diamond of taking a different position than that taken in prior
20 proceedings. Waterworks, however, is again playing 'fast and loose' with the facts in an effort to defeat
21 this motion. Waterworks has also attributed orders to the Riverside Court that were never made. As will
22 be shown below, many, if not all, of the verbiage quoted by Waterworks are parts of an entire dialogue,
23 which, when taken as a whole, do not support Waterworks' interpretation of the facts. Further, the
24 position alleged to have been taken by Diamond was never adopted by the court, a prerequisite to the
25 invocation of judicial estoppel.

26 Finally, Waterworks ignores Diamond's second argument concerning the impropriety of the form
27 of the Complaints. By ignoring this argument, Waterworks concedes the fact that this is not an original
28 action or a cross-complaint between Waterworks and Diamond. Waterworks also failed to provide any
authority contesting the impropriety of a declaratory relief action when the identical issues will be
determined in an already pending action.

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II.

LAW AND ARGUMENT

A. *The Court has Authority to Strike Each Cause of Action Contained in the Complaint and/or Strike each Complaint in Their Entirety.*

Waterworks has made the allegation that Diamond has failed to provide any legal authority empowering the court to strike the County's Complaints as "irrelevant," "redundant," or "duplicative." Waterworks ignores Diamond's citation to Code of Civil Procedure section 436., which specifically states "The court may, upon a motion made pursuant to Section 435, *or at any time in its discretion, and upon terms it deems proper*: [P] (a) Strike out any *irrelevant, false, or improper matter inserted* in any pleading. [P] (b) *Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.*" [Emphasis Added.] This statute has been broadly interpreted as "grant[ing] the trial court discretion to consider striking improper matter from pleadings 'at any time in its discretion.'" (*CPF Agency Corp. v. R&S Towing* (2005) 132 Cal. App. 4th 1014, 1021.) Items included in the pleading that are "irrelevant," "redundant," or "duplicative" are improper and not filed in conformity with the laws of this state. Therefore, Waterworks' claim that Diamond's Motion is without legal authority is unfounded and contrary to the evidence that is before this court.

B. *The Matters Being Asserted by Waterworks in Both Complaints are Irrelevant and Redundant as Against Diamond Farming.*

Waterworks' Complaints allege two periods of overdraft upon which it attempts to claim prescriptive rights to the groundwater in the Antelope Valley Basin. In opposing this motion. Waterworks ignores the distinction between the two time periods and the rights that accompany them. Waterworks simply opposes the motion on the unsupported claim that the two "new" actions are different and not duplicative. For the sake of clarity, these time periods are addressed separately below.

a) *Periods Alleged from November 1999 to the November 2004 and December 1999 to December 2004*

Diamond will concede that the allegations concerning these periods are different and not duplicative of the Riverside County action. However, the allegations concerning these periods of alleged overdraft are irrelevant as to Diamond because Diamond engaged in self-help and sought to confirm its priority by filing the Riverside County action in October 1999. This litigation effectively stopped the

1 accrual of the statutory period for prescription in October 1999 as to Diamond. Waterworks fails to
2 provide any legal authority contradicting this assertion or otherwise oppose the merits of this argument
3 in its Opposition. Therefore, inasmuch as both Complaints are relying on these five year periods,
4 Diamond is hereby requesting that both complaints be stricken in their entirety.

5 b) *The Unspecified Period Prior to the Filing of Diamond's Complaint*

6 Waterworks attempts to rely on the most recent five year period to claim that the "new"
7 complaints are different and not duplicative. In order for Waterworks to make this argument,
8 Waterworks ignores the fact that Diamond has filed, and Waterworks has answered, a pending action
9 that will address the rights of Waterworks and Diamond covering all time periods prior to October 1999.
10 Waterworks' new Complaints expressly acknowledge this lawsuit. Further, Waterworks has previously
11 conceded that the allegations contained in the "new" Complaints are identical, arise from the same facts,
12 encompass the same legal issues and parties. In Waterworks' Petition for Coordination (attached to
13 Waterworks' Request for Judicial Notice as Exhibit 5), Waterworks makes the following admissions:

14 "Accordingly, the District's Los Angeles County Action arises from the same facts and
15 implicates the same legal issues as the Riverside County Action." (Waterworks' Request
for Judicial Notice, Exhibit 5, p. 7, ll. 18-19.)

16 "The District names the same defendants and makes essentially the same allegations in
17 its Kern County Action as in the Los Angeles Action but includes parties who own
property in Kern County." (Waterworks' Request for Judicial Notice, Exhibit 5, p. 7,
18 ll. 24-27.)

19 "The District's Los Angeles And Kern County Actions Are Also "Complex" Because
20 They Involve The Same Legal Issues, Facts And Parties As The Riverside County
Action" (Waterworks' Request for Judicial Notice, Exhibit 5, p. 8, ll. 20-21.)

21 "First, the District's Los Angeles and Kern County actions implicate the same legal
22 issues, facts, and parties as the Riverside County Action." (Waterworks' Request for
Judicial Notice, Exhibit 5, p. 9, ll. 1-2.)

23 "The legal and factual issues determining the parties respective claims to this percolating
24 groundwater are essentially identical, because the three Actions pertain to the
adjudication of various parties' right to extract ground water from a common aquifer
25 located in Antelope Valley." (Waterworks' Request for Judicial Notice, Exhibit 5, p. 10,
ll. 13-16.)

26 Waterworks' attempt to now argue to this court that the actions are different and not duplicative
27 is mere gamesmanship employed for the sole purpose of avoiding this Motion to Strike. Waterworks
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1 should be judicially estopped¹ from now taking this contrary position. The court should accept
2 Waterworks' prior claims that the actions are identical, with the same parties, same issues and same law
3 and determine that, as to Diamond, the claims arising from the period of overdraft existing prior to the
4 filing of Diamond's original action are redundant, irrelevant and will be addressed within the subject
5 matter of the coordinated Riverside County action. Based on this determination, the Motion to Strike
6 must be granted.

7 C. *The Matters Waterworks Now Attempts to Plead by its New Complaints Were*
8 *Required to be Pled by Compulsory Cross-Complaint in the Riverside Court, and are*
9 *Barred When not Pled by Cross-Complaint.*

10 Waterworks has not Opposed this Motion on the basis that the claims now being asserted against
11 Diamond were not required to be pled by compulsory cross-complaint. In fact, Waterworks' counsel
12 has expressly admitted that the claims against Diamond were in fact compulsory and therefore subject
13 to the bar contained in Code of Civil Procedure section 426.30.

14 " . . . the need now arises to - - to file this compulsory cross-complaint and move this
15 basin wide adjudication forward." (Waterworks' Request for Judicial Notice Exhibit 2,
16 p. 25, ll. 16-18.)

17 "All right, There will be a basin adjudication, to answer the court's question. There's no
18 game of chicken here. That statement is now on the record.

19 The question is: Is it going to take place for the interest of justice and because it's
20 compulsory cross-complaint in this case or are we going to have to go through what I
21 have briefly described today, in more detail described in the motion and reply, a process
22 by which multiple actions will be filed in other counties, a request to the Judicial Counsel
23 to coordinate all of those cases." (Waterworks' Request for Judicial Notice Exhibit 2,
24 p. 15, ll. 27-28 and p. 16, ll. 1-9.)

25 Rather than challenge the compulsory nature of the claims as to Diamond, Waterworks claims
26 that Diamond is estopped from invoking the bar of Code of Civil Procedure section 426.30 because
27 Diamond argued that the County should file a separate action. To support its argument, Waterworks cites
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1 Judicial Estoppel is invoked to prevent "the intentional assertion of an inconsistent position that perverts the judicial machinery." *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 183.) It precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." [Citation.] The doctrine applies when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal. 4th 412, 422.)

1 portions of Diamond's Opposition to the Motion for Leave and the court transcript from the hearing on
2 the Motion for Leave to File a Cross-Complaint. Waterworks' citations are a deliberate attempt to
3 mislead this court as they contain only portions of the transcript that are taken out of context.

4 Waterworks makes the following assertion in opposition:

5 "In the Diamond Farming action, the County filed a Motion for Leave to File a Cross-
6 Complaint, but Diamond Farming opposed that motion and argued that the County
7 'Should file a separate action,' and that the proposed cross-complaint was 'unnecessary'
to litigate the issues between the parties in the Riverside Action." (Opposition p. 5,
ll. 20-23.)

8 The full quote from the Opposition referencing the filing of the Cross-Complaint is consistent
9 with the arguments that Diamond is making before this court, i.e., the second action as to Diamond is
10 unnecessary and improper and if litigation is needed to resolve Waterworks' claims as to other parties,
11 it should proceed by way of separate actions. The full quotation from Diamond's Opposition is as
12 follows:

13 "If [County] wishes to litigate its prescription claims against the "other farming
14 interests," "non-party persons and other entities" based upon events occurring in the last
15 five (5) years after Plaintiff filed its Complaint, they should file a separate
action." (Waterworks' Request for Judicial Notice, Exhibit 1, p. 9, ll. 24-27.)

16 Further, the entire three-page argument from which the "unnecessary" quote was taken is
17 identical to the arguments being advanced in this Motion to Strike - that the causes of action alleged in
18 these "new" complaints are redundant and irrelevant and therefore unnecessary. (See Waterworks'
19 Request for Judicial Notice Exhibit 1, pp. 13-15.)

20 Contrary to Waterworks' claims, the arguments being advanced today are consistent with the
21 position advanced by Diamond throughout the course of this litigation. At the hearing on Waterworks'
22 Motion for Leave to File a Cross-Complaint, Diamond's counsel again reiterated these points. The
23 relevant portion of the hearing transcript is contained in Waterworks' Request for Judicial Notice,
24 Exhibit 2, pp. 2-4:

25 "THE COURT: All right. Let's start the threshold question. No one needs my
26 permission to file a new and separate action asking for a basin
adjudication, do they?

27 MR. DUNN: May I be heard on that, your Honor?

28 THE COURT: Since you're the one who thinks you might be filing it, yeah.

1 MR. DUNN: Jeffrey Dunn on behalf of the moving party. The issue arises
2 whether there has to be a cross-complaint filed in this action. In
3 other words, is the cross-complaint compulsory or is it
4 permissive? And depending upon whether it's permissive or
5 compulsory, that would impact the ability of any of these
6 defendants to file a separate action for adjudication.

7 If it is a compulsory cross-complaint in this action, there could be
8 an argument in a separate action or actions that those actions are
9 improper or otherwise should not be brought, but instead should
10 have been brought as a compulsory cross-complaint in this action.

11 THE COURT: Aren't there a number of parties who are not parties in this action
12 that had the ability to seek a basin-wide adjudication?

13 MR. DUNN: No question that that is true. However, as to the parties who are
14 defendants in this action, and specifically my client, the
15 waterworks district, it is a party, it is a defendant, and it is faced
16 with the issue of filing a compulsory cross-complaint in this
17 action. So we are not in a position to ignore the compulsory
18 cross-complaint rule. And that's why the motion is brought.

19 THE COURT: Would I be safe to assume that the only persons that can make
20 such a complaint against you if you were to file a separate action
21 would be the two plaintiffs in this case?

22 MR. DUNN: Hard to say, your Honor. It is possible that parties—excuse me—
23 entities that are not parties to this case, but would be parties in a
24 separate action or separate actions, could still make the claim that
25 the basin adjudication claim, at least as it relates to these two
26 plaintiffs, should have been raised in this action today.

27 THE COURT: As it relates to these two plaintiffs?

28 MR. DUNN: Correct.

THE COURT: These two plaintiffs interested in raising such a procedural
objection to a separately filed basin adjudication claim?

MR. JOYCE: Well, your Honor, I - - I don't necessarily want to prejudice or
speculate as to what my legal position would or would not be
until I was confronted with that event.

I will advise the Court that I think, as we clearly point out in our
opposition papers, that first and foremost any claims that are now
desired to be advanced as against[sic] the quote-unquote Roe
cross-defendants, are not compulsory by clear definition are
permissive at best.

As against any defendant as against any other defendant, those
would be likewise permissive at best.

1 If and to the extent any claims could be characterized as,
2 quote-unquote, and I use that word advisedly, as compulsory, it
3 would be any - - it would have to be claims as between the party
4 and plaintiff and the defendant. And I think we made it fairly
5 clear in our opposition that in the characterization of this action
6 as it properly is as a straightforward quiet title action that the
7 cross-complaint is really an unnecessary procedural vehicle
8 inasmuch as all issues of contest as to the adversity of title are
9 raised by virtue of answer and the affirmative defenses pled
10 therein.

11 So I don't think it's a compulsory cross-complaint at all. I think
12 that's a bit of a red herring. I would advise the Court that I find
13 it a bit interesting that in the motion in the first instance, they
14 were relying upon subsection (c) of 426.50.

15 This concept of compulsory cross-complaint is something that
16 they allude to, but don't even affirmatively ascertain to be the
17 case in the reply memorandum. I don't know if it was - - if they
18 were holding it in abeyance or if this was just a new thought that
19 came to mind, but in any event this motion as originally brought
20 and brought pursuant to 426.50 subparagraph (c) therein, that is
21 the basis for the motion. And under that the only standard to be
22 applied is the interest of justice standard. And we've addressed
23 that in our opposition."

24 As with its recitation of Diamond's Opposition, Waterworks attempts to hang its hat on one
25 sentence plucked from an entire dialogue. As evidenced above, Diamond's counsel was arguing
26 consistent with Diamond's opposition papers, both of which illustrate the following points:

- 27 ● As to the Roe defendants, the Cross-Complaint was permissive and not compulsory;
- 28 ● Diamond's counsel did not, and would not, speculate on Diamond's future legal position
relative to the compulsory Cross-Complaint issue between the parties in that action; and
- That a Cross-Complaint and/or new Complaint was unnecessary to settle the issues
between the parties to Diamond's quiet title action.

When the Opposition and the hearing transcript are read together, they provide a consistent
pattern of argument made on Diamond's behalf. It is clear that Diamond has not argued both sides of
this issue when it argued that the additional action, whether by Cross-Complaint or new action, is
procedurally incorrect and unnecessary in light of the issues asserted in the Riverside action by way of
the Complaint and the Answers filed therein. These are the same arguments being asserted in this
Motion to Strike. Therefore, Waterworks' request for judicial estoppel fails to meet the required

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1 elements and the two “new” Complaints, as against Diamond, must be stricken as they were required
2 to be filed at the time Waterworks answered the Complaint in the Riverside County action.

3 Finally, Waterworks’ judicial estoppel argument fails because the court never adopted the
4 position that the proposed Cross-Complaint was compulsory. Despite making the inquiry, the court
5 never made any findings on this issue nor was it a part of his ruling denying the Motion for Leave to File
6 a Cross-Complaint. “If the earlier position was not adopted by the tribunal, there is no danger of
7 inconsistent results and thus no impairment of the judicial process.” (*Jackson, supra*, 60 Cal. App. 4th
8 at p. 183.)

9 D. *Waterworks was Never Ordered to File the “New” Complaints by the Riverside County*
10 *Superior Court*

11 Waterworks continues in its attempt to foil this motion through deceit and misrepresentation by
12 claiming that the Court in Riverside County “ordered,” “directed,” and “ruled that the county must file
13 separate adjudication actions.” In support of this assertion, Waterworks cites to the transcript from the
14 hearing on the Motion for Leave to File a Cross-Complaint. (Waterworks’ Request for Judicial Notice
15 Exhibit 2, p. 31, ll. 14-128; p. 32, ll. 1-11.) The relevant text of the citation is as follows:

16 “THE COURT: All right. The request to file the cross-complaint is denied on this basis: It
17 appears to the Court that the appropriate way to have a basin-wide adjudication
18 is to file a basin-wide adjudication in Los Angeles County and/or in Kern County.
19
20 The Court fully anticipates that should such action be filed, that an appropriate
21 coordination motion would be made. . . .
22
23 And I will state this though: I am not going to rush this case to trial if I am
24 convinced that the filing of the separate action and the seeking to coordinate the
25 actions is proceeding rapidly. I know coordination takes time. But if I become
26 convinced that someone is dragging their feet just getting this matter - - a
27 coordination decision made, then I’ll just set this for trial. I assume you can have
28 a trial within 90 days of me saying we’re going to have a trial.”

23 It is clear by reading the text cited by Waterworks that no such order was ever made. The court’s
24 ruling on this matter does not order, but rather anticipates, the filing of separate actions based on the
25 multiple statements by Waterworks’ counsel claiming that Waterworks would do so if the outcome on
26 the Motion to file the Cross-Complaint was denied. (See Waterworks’ Request for Judicial Notice
27 Exhibit 2, p. 15, ll. 27-28 and p. 16, ll. 1-2; p. 30, ll. 14-28 and p. 31, ll. 1-7.) Waterworks, whether by
28 design or defect, misinterprets the court’s statements concerning the new actions. The court simply

1 anticipated that Waterworks would follow through on its threat and promise to file a new action for basin
2 wide adjudication and seek coordination with the Riverside action. As evidenced by the above cited
3 transcript, it is clear that Waterworks was not ordered or directed to file a new action against Diamond.

4 E. *Both Complaints for Declaratory Relief are Improper as Against Diamond and not Filed*
5 *in Conformity With the Laws of this State*

6 In addition to the above stated grounds, Diamond moved to strike both Complaints on basis that
7 claims for declaratory relief in the two “new” actions is improper. The impropriety arises from the fact
8 that the actions filed by Waterworks are not original actions nor are they Cross-Complaints between
9 Waterworks and Diamond as required by Code of Civil Procedure section 1060. Waterworks has
10 chosen not to oppose this argument.

11 Diamond also argued and provided case authority for the proposition that an action for
12 declaratory relief is unavailable for the determination of issues involved in an already pending action.
13 Again, Waterworks chose not to oppose this argument. Having shown no exceptions which would allow
14 them to contravene the statutory language of Code of Civil Procedure section 1060, Waterworks’
15 Complaints must be stricken as they are not drawn or filed in conformity with the laws of this state.

16 Dated: November 23, 2005

Respectfully submitted,

17 LeBEAU • THELEN, LLP

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19 By: 

20 Bob H. Joyce
21 Attorneys for DIAMOND FARMING COMPANY,
22 a California corporation
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1 **PROOF OF SERVICE**

2 ANTELOPE VALLEY GROUNDWATER CASES
3 JUDICIAL COUNSEL PROCEEDING NO. 4408
4 CASE NO.: 1-05-CV-049053

5 I am a citizen of the United States and a resident of the county aforesaid; I am over the age
6 of eighteen years and not a party to the within action; my business address is: 5001 E. Commercenter
7 Drive, Suite 300, Bakersfield, California 93309. On November 23, 2005, I served the within
8 **REPLY TO OPPOSITION LOS ANGELES WATER WORKS NO. 40 TO MOTION TO**
9 **STRIKE THE COMPLAINTS IN ACTIONS S-1500-CV254348 AND BC325201**

10
11 ■ **(BY POSTING)** I am "readily familiar" with the Court's Clarification Order.
12 Electronic service and electronic posting completed through www.scefilings.org ; All papers filed
in Los Angeles County Superior Court.

13 □ **(OVERNIGHT/EXPRESS MAIL)** By enclosing a true copy thereof in a sealed
14 envelopedesignated by United States Postal Service (Overnight Mail)/Federal Express/United
15 Parcel Service ("UPS") addressed as shown on the above by placing said envelope(s) for ordinary
16 business practices from Kern County. I am readily familiar with this business' practice of
17 collecting and processing correspondence for overnight/express/UPS mailing. On the same day
18 that the correspondence is placed for collection and mailing, it is deposited in the ordinary course
19 of business with the United States Postal Service/Federal Express/UPS in a sealed envelope with
20 delivery fees paid/provided for at the facility regularly maintained by United States Postal Service
(Overnight Mail/Federal Express/United Postal Service [or by delivering the documents to an
21 authorized courier or driver authorized by United States Postal Service (Overnight Mail)/Federal
Express/United Postal Service to receive documents].

22 □ **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to
23 the offices of the addressee(s). Executed on _____, 2005, at Bakersfield, California.

24 ■ **(STATE)** I declare under penalty of perjury under the laws of the State of
25 California that the above is true and correct, and that the foregoing was executed on November
26 23, 2005, in Bakersfield, California.

27 
28 **DONNA M. LUIS**