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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 1550 (b))

ANTELOPE VALLEY GROUNDWATER CASES

Included actions:

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

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

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

Judicial Council Coordination No. 4408

Case No.: 1-05-CV-049053

POINTS AND AUTHORITIES IN SUPPORT OF DIAMOND FARMING COMPANY'S 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

Hearing:

Date: May 21, 2007
Time: 9:00 a.m.
Dept.: 1

Diamond Farming Company ("Diamond") presents the following points and authorities in support of its motion to strike the class allegations of the First Cause of Action to the Public Water Suppliers' First Amended Cross-complaint, or, in the alternative, to deny certification of the class action as to the First Cause of Action of the Cross-complaint.

I. INTRODUCTION

On March 12, 2007, this court authorized the Public Water Suppliers to file a First Amended Cross-Complaint to include class defendant allegations. The pleading has now been filed and served. At the hearing on March 12, 2007, the court made it clear that it was not yet certifying a class, because the requirements for class certification– for instance, definition and representation– had not been determined. The court had not yet finalized any formal written order for class certification because it had not yet been submitted by counsel. The court stated that it was at that point only allowing the First Amended Cross-complaint to be filed, and that the parties should have the opportunity to oppose the pleading if they should choose. The court also expressed some doubt as to whether it could certify the First Cause of Action which deals with prescription, and that the court would await an appropriate opposition to the pleading in order to address that issue.

Diamond opposes class adjudication of the prescriptive rights which the Public Water Suppliers now allege in their First Cause of Action of the First Amended Cross-complaint. Unless the court independently establishes a standard of notice of adversity that would apply to all landowners within the class universally, the prescriptive claim cannot be maintained against a class, because the issue would then necessarily focus upon the state of mind of each individual overlying landowner.

For these reasons, Diamond moves the court for an order striking the incorporation of Paragraphs 13 and 14 of the First Amended Cross-complaint of the Public Water Suppliers in the First cause of Action, as incorporated by Paragraph 41 of the complaint.

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II. ARGUMENT

A. *The First Cause of Action for a declaration of prescriptive rights cannot be adjudicated against a class of defendants.*

The Public Water Suppliers have obtained leave of court to file their First Amended Cross-complaint, which now incorporates allegations of a defendant class, which are incorporated by reference into each of their causes of action.

The First Cause of Action of the Cross-complaint cannot be litigated against a class as a matter of law, so long as the question presented is the state of mind of the overlying landowners as to notice of the Public Water Suppliers' claims of a superior and hostile right to pump water from the groundwater basin. The focus of that inquiry is necessarily whether the underlying landowners had sufficient notice that the claim was hostile. Unless the court adopts a constitutionally sufficient standard of due process notice (which instead focuses upon the good faith effort to give actual notice by the Public Water Suppliers to a class), the motion to strike should be granted, or the class should not be certified as to the First Cause of Action.[1]

In order to establish a prescriptive easement to the subsurface waters at issue in this case, the Public Water Suppliers must allege 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. Over a hundred years ago, the California Supreme Court, in *Sullivan v. Zeiner* (1893) 98 Cal. 346, affirmed that notice of the adverse nature of the claim to 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

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1 Diamond has correspondingly filed a motion for the court to set such a standard as a condition of class certification as to the First Cause of Action

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.)

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 demonstrate 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.*)

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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 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

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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.)

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 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.)
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> "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.**"

For these reasons, the issue of notice as a prerequisite to prescription cannot be adjudicated against a class. The Public Water Suppliers' pleadings simply state 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." (First Amended Cross-complaint, ¶ 42.) By what standard can this notice be adjudicated uniformly against the defendant class?

Allegations of pumping by the Public Water Suppliers alone are insufficient to claim prescription against the proposed class. Unless the Public Water Suppliers can demonstrate 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 claim cannot be litigated against a class, and the class cannot be certified as to this cause of action.

B. *Unless the court establishes a uniform standard for the Public Water Suppliers to show notice of adversity applying across the proposed class, such as "due process" notice, the court cannot certify the class as to the First Cause of Action.*

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 notice of adversity and hostility 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 *Mullane* 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 does not demonstrate "acts or declarations or both" which constitute constitutionally sufficient due process notice of its adverse claim to all members of the proposed class.

Diamond continues to assert that the Public Water Suppliers must demonstrate constitutionally sufficient due process notice as an element of their claim of prescription. Certainly, the Public Water

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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.])

Suppliers must show some notice uniformly applicable to all landowners to adjudicate the issue against a class.

III. CONCLUSION

The court should strike the class allegations of the First Cause of Action of the First Amended Cross-complaint of the Public Water Suppliers, or deny certification of the class as to that cause of action (unless the court sets a standard for notice of hostility applicable uniformly to the class.

Dated: April 12, 2007

LeBEAU • THELEN, LLP

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

PROOF OF SERVICE

ANTELOPE VALLEY GROUNDWATER CASES
JUDICIAL COUNCIL PROCEEDING NO. 4408
CASE NO.: 1-05-CV-049053

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within action; my business address is: 5001 E. Commercenter Drive, Suite 300, Bakersfield, California 93309. On April 12, 2007, I served the within **POINTS AND AUTHORITIES IN SUPPORT OF DIAMOND FARMING COMPANY'S 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**

■ **(BY POSTING)** I am "readily familiar" with the Court's Clarification Order. Electronic service and electronic posting completed through www.scefiling.org ; All papers filed in Los Angeles County Superior Court and copy sent to trial judge and Chair of Judicial Council.

Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012
Attn: **Department 1**

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Appellate & Trial Court Judicial Services
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☐ **(BY MAIL)** 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 at Bakersfield, California, in the ordinary course of business.

☐ **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee(s). Executed on _____, 2007, at Bakersfield, California.

■ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct, and that the foregoing was executed on April 12, 2007, in Bakersfield, California.

Donna M. Luis

DONNA M. LUIS