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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

REPLY POINTS AND AUTHORITIES TO OPPOSITION OF PUBLIC WATER SUPPLIERS TO 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: 10:00 a.m.
Dept.: 1

Diamond Farming Company ("Diamond") presents the following points and authorities in reply to the opposition of the Public Water Suppliers to Diamond's motion to strike the class allegations of the First Cause of Action of the Public Water Suppliers' First Amended Cross-complaint, etc.

I. INTRODUCTION

The Public Water Suppliers have filed an opposition which completely ignores the substance of the motion. The opposition continues a pattern in this case. The Public Water Suppliers have been consistently dismissive of Diamond's "notice" arguments to the point of arrogance. The Public Water Suppliers must be made to understand that the field of "water law" does not preempt the common law as applied to prescription, and it certainly does not preempt the Constitution.

First, the Public Water Suppliers argue that Diamond's motion to strike does not accept as true the allegations of the complaint. This argument ignores that Diamond does not move to strike the allegations of the First Cause of Action for prescription, but moves to strike the class allegations as applied to that cause of action, because the notice element of prescription as advocated by the Public Water Suppliers cannot be adjudicated on a class wide basis as a matter of law .

Second, the Public Water Suppliers claim that notice is a factual issue that cannot be resolved upon a motion to strike. This ignores the other aspect of the motion which is to request that the court not certify the class as to the First Cause of Action of the Public Water Suppliers's cross-complaint. Certification of a class has not yet been ordered. The Public Water Suppliers have yet to present to the court many details of an order that would satisfy certification requirements. Certification is a fact based proceeding. The Public Water Suppliers have yet to show any evidence, or make any offer of proof, as to how they intend to litigate notice as an element of prescription on a class wide basis. The Public Water Suppliers need to make a satisfactory showing before the court can proceed to certify a class as to the First Cause of Action.

The Public Water Suppliers also argue that Diamond is simply wrong. They argue, as expected, that the notice issue of prescription may be adjudicated basin wide on the basis of falling water tables alone. It is the Public Water Suppliers who are wrong. Falling water levels or well levels alone can never prove prescription if "notice" for prescription purposes focuses on the actual or constructive

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knowledge of the overlying owner. As such, proof of notice is necessarily unique to each owner, not a class.

Finally, the Public Water Suppliers argue that Diamond is ignoring the law of class actions. It is the Public Water Suppliers who ignore the law by refusing to make any adequate record upon which this court may reasonably rely to certify a class action as to the First Cause of Action.

II. ARGUMENT

A. *Diamond moves to strike the class allegations of the First Cause of Action, not the Cause of Action itself, and, therefore, the motion to strike is a proper means.*

The Public Water Suppliers misconstrue the motion to strike. The motion is for an order striking the class allegations of the First Cause of Action of the First Amended Cross-complaint by striking the incorporation of Paragraphs 13 and 14, as incorporated by Paragraph 41. The motion concedes that the cause of action itself states a claim of prescription as a matter of pleading. However, as a matter of law, based upon the standard of notice for prescription advocated by the Public Water Suppliers, the class allegation cannot stand. The Public Water Suppliers are incorrect that Diamond's motion is not based upon any recognized ground. A motion to strike is proper for the court to strike "improper' matter not reached by demurrer. Since Diamond is not objecting to the whole of the First Cause of Action, but only to the class allegations, Diamond may not bring a demurrer. A demurrer does not lie to a part of a cause of action. However, a motion to strike is the appropriate vehicle to reach a substantive defect of less than an entire cause of action. (*PH II v. Superior Court* (1995) 33 Cal.App.4th 1680.)

B. *Diamond's alternative motion is to request denial of class certification of the First Cause of Action, which necessarily requires a "fact based"inquiry.*

The Public Water Suppliers complain that the elements of prescription are questions of fact, not reachable by motion to strike. The Public Water Suppliers ignore that Diamond's alternative motion is for the court not to order class certification as to the First Cause of Action.

The proponent must establish class certification by evidence 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 *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906; *Sony Electronics, Inc. v. Superior Court*(2006) 145 Cal.App.4th 1086, 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.)

For these reasons, Diamond has appropriately filed an alternative motion objecting to class certification of the First Cause of Action because of the impossibility of proving the element of prescription against a class. The Public Water Suppliers must offer evidence demonstrating the basis for class adjudication on the issue of notice. They have not done so. Therefore, there is no proper basis for the court to certify a class upon this issue.

C. *Even "constructive" notice for purposes of prescription cannot be adjudicated against a class.*

The Public Water Suppliers raise another "straw man" issue. The Public Water Suppliers claim that Diamond argues that "actual notice" is necessary for the prescriptive claim. Diamond has never made that assertion. Constructive notice is sufficient to support a prescriptive claim, but Diamond has consistently and correctly stated that even constructive notice requires that the use be open, notorious, and clearly visible to each owner of a burdened estate,that the use be hostile and adverse to the title of each owner, and that the evidence be that each owner knew or should have known of the hostile and adverse claim. Use alone is insufficient to establish a prescriptive right. (See Points and Authorities in Support of Diamond Farming Company's Motion to Strike, Etc., p. 3- 5, and authorities cited therein.)

The cases cited by the Public Water Suppliers are not to the contrary. These cases actually support Diamond's position.

In *Saxon v. DuBois* (1962)209 Cal.App.2d 713, the court found a prescriptive right in plaintiff to take water from a spring on defendant's land. Although the defendant denied actual knowledge at the time of purchase, plaintiff's water system was open and visible, with a surface pipe running 369 feet into the property of the defendant from plaintiff's land, and where 100 per cent of the spring water was taken

by plaintiff in dry months– conditions that had existed for 34 years. The court held that the pipe plainly led to the plaintiff's land. The court stated that use of a plainly visible easement across the land is sufficient to put an owner on such inquiry as would lead to actual knowledge of the rights of those apparently exercising the easement. (*Saxon* at 718- 719.) Thus, the *Saxon* case (cited by the Public Water Suppliers) exactly illustrates Diamond's point. The notice element of prescription may be proven by demonstrating facts showing open, visible, and notorious use under claim of right, but that issue depends upon the facts reasonably available to *each* owner. It is legally impossible for the Public Water Suppliers to show a collective state of mind at a point in time as to more than 65,000 owners.

The case of *Bennett v. Lew* (1984) 151 Cal.App.3d 1177, is to the same effect, and supports Diamond's argument. The Public Water Suppliers have misquoted the *Bennett* opinion at page 5, line 8, of their opposition, by putting a period where it does not belong. The true quote from the opinion is "[t]he requisite elements for a prescriptive easement are designed to insure that the owner of the real property which is being encroached upon has actual or constructive notice of the adverse use, *and to provide sufficient time to take necessary action to prevent that adverse use from ripening into a prescriptive easement.*" (Emphasis added.) As Diamond has argued, a key feature of the law of prescription is *inaction* by a landowner under circumstances which put the landowner on notice of an adverse claim. Again, it is virtually impossible to demonstrate such notice without an inquiry into the circumstances of each affected property.

The case of *Kerr Land & Timber Co. v. Emmerson* (1969) 268 Cal.App.2d 628, cited by the Public Water Suppliers, also supports Diamond's argument, which is why it is cited in Diamond's supporting points and authorities. In *Kerr*, the issue presented was whether an original permissive easement to transmit timber over a roadway easement by grant from a particular timber basin had ripened into a prescriptive easement to transmit lumber from outside the basin due to excessive use consisting of 25 trucks per day. The court held that constructive notice requires that the owner be notified that the use is hostile and adverse by open, notorious, and visible use. In *Kerr*, the number of trucks was not deemed sufficient notice that the original permissive user had ripened into a hostile use. The court noted that the plaintiffs' knowledge of the defendant's activities may well have put them on inquiry as to the source of the 25 or more trucks a day that went by with logs. However, "[d]espite this

knowledge there was evidence which could support the belief that the logs being transported came from within the Maple Creek Basin. This was a sizeable area. There were other permissive users of the roadway over the Barr Ranch. The record discloses the Salisburys, the Wiggins, the Russes and other neighbors used the easement without toll or objections. The use permitted to others had reciprocal benefits to respondent who, in turn, received the right to use rights-of-way belonging to these parties." The *Kerr* court further noted the burden is upon one claiming the acquisition of a right by prescription to prove it by the clearest and most satisfactory proof and to establish all of the elements essential to such title. (*Kerr* at 637.) *Kerr*, therefore, further illustrates why basin wide adjudication of notice is legally impossible in this case, upon the standard of notice advocated by the Public Water Suppliers.

Once again, the Public Water Suppliers cite another case that supports Diamond's position. In *Lindsay v. King* (1956) 138 Cal.App.2d 333, the question presented was whether a permissive user in water from a spring had ripened into a prescriptive easement to one-half the supply. The court cites with approval the proposition that possession alone is not sufficient to gain prescription, but that the record owner must either have actual knowledge of the claims, or the possession must be so open, visible and notorious that it will raise a presumption of notice of the adverse claim. It must be made clearly proven that the party claiming the easement has been in actual use of the easement, openly, continuously and notoriously, not clandestinely, and that it has been held hostile to the title of the owner. The *Lindsay* court repeats that the prescriptive claimant 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." (See *Lindsay* at 336.) In *Lindsay*, the court found that the prescriptive claimant, at least annually, made open entry on the landowner's property to repair, flush out, maintain and even replace the pipe from the spring, which was sufficient conduct to give actual notice to the landowner. Again, the focus was a set of facts to establish knowledge of the particular landowner. Here, there is no way to establish what each of over 65,000 overlying owners did know or could have known. Class adjudication simply cannot be done.

In *Jones v. Harmon* (1959) 175 Cal.App.2d 869, also cited by the Public Water Suppliers, the court noted that underground rights (in *Jones*, a pipeline) do not give rise to a prescriptive easement due to lack of notoriety, unless there are other facts sufficient to render the adverse use "plainly apparent."

D. *Relevant authority makes clear that prescriptive rights in an underground water basin cannot be proven against a class of overlying landowners in the basin as a whole.*

The plan by the Public Water Suppliers in this case is apparent. They plan to simply prove overdraft, and then ask this court to leap to the conclusion that overdraft by itself establishes a basin wide prescriptive right against all overlying private interests. They plan to persuade this court to certify a class on the issue, and then use the weight of that procedure to simply exhaust the private litigants into acquiescence. The Public Water Suppliers blithely and incorrectly state that relevant California water law holds that a finding of prescription "operates against the Basin as a whole," citing *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908 and *City of Los Angeles* v. *City of San Fernando* (1975) 14 Cal.3d 199. Not only do *City of Pasadena* and *City of Los Angeles* not stand for the proposition that the "notice" element of prescription can be adjudicated against a class, those two case show why such an adjudication is not possible where the focus of the notice issue is the available information to the holder of the overlying right.

The Public Water Suppliers state that the primary means by which "notice of adversity" is proven is through indicia of overdraft, such as by falling water basin water levels, and that this adjudication may therefore be made against a basin wide class of overlying rights, citing *City of Pasadena. City of Pasadena* holds no such thing. In *City of Pasadena*, the sole appellant was a public utility. All of the parties, including the appellant, had stipulated that "all of the water taken by each of the parties to this stipulation and agreement, at the time it was taken, was taken openly, notoriously and under a claim of right, which claim of right was continuously and uninterruptedly asserted by it to be and was adverse to any and all claims of each and all of the other parties joining herein." Appellant, however, was the only party not to stipulate to the ultimate judgment mutually limiting rights. The appellant contended that there was insufficient evidence of overdraft and that safe yield was greatly understated, which artificially restricted the use allocated to the Appellant. Thus, in *City of Pasadena*, the notice element of prescription was *stipulated*, and it was not at issue. The only two questions presented were the length of time of the stipulated adverse user, and the extent of the actual stipulated adverse user. (*City of Pasadena* at 928.) On this basis, the court noted that the Appellant's own wells demonstrated a 74 foot drop in 17 years, which was sufficient to prove the statute of limitations. (*City of Pasadena* at 928.)

This evidence was not used to prove the "notice" element, because that had been stipulated. The question of basin overdraft was relevant to the extent of mutual adverse user, not notice. *City of Pasadena* is not a class action case, it does not support class wide adjudication against overlying private owners, and it does not stand for the proposition that the "notice" element of prescription can be established by evidence of overdraft alone when there is no prescription.

In fact, the *City of Los Angeles* case affirmatively holds to a proposition that forestalls any such class wide adjudication. In *City of Los Angeles*, the court held that, while basin overdraft may be an element of proof of adversity, overdraft alone is insufficient to prove "notice." The court reversed a trial court finding to the contrary and remanded the case for trial on the issue of notice applied to private overlying landowners. (*City of Los Angeles* at 281- 283.) The court stated:

> "Thus in the present case the trial court erred in basing an award of prescriptive rights on the running of a prescriptive period whose commencement coincided with the commencement of overdraft without making any determination of the time at which the owners of the rights being lost by such prescription were first chargeable with notice of the overdraft. 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. Nor have the parties called to our attention any evidence in the record from which the trial court could have fixed any time at which the owners of Sylmar basin rights should reasonably be deemed to have received notice of the commencement of overdraft in the basin. Accordingly the parties should be permitted to introduce evidence on this issue on remand insofar as necessary to determine prescriptive claims in Sylmar basin consistently with this opinion." (*City of Los Angeles* at 283.)

City of Los Angeles is also not a class action case.

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 *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' assertion that fifty years of California Supreme Court decisional law support a basin wide adjudication against a class of private overlying rights is simply a sweeping misstatement of law. The decisions point to the contrary.

E. *Diamond does not argue for "actual notice," but does insist that the principles of due process apply.*

At page 6 of the Opposition, the Public Water Suppliers attempt to characterize Diamond's motion as one advocating "actual notice" as the standard for the Public Water Suppliers to prove the notice element of their claim of prescription. This follows a pattern in the Opposition of raising "straw man" arguments. Diamond has never made such an assertion. However, Diamond has insisted that public agencies such as the Public Water Suppliers must meet Constitutional due process standards of notice to perfect a prescriptive claim. The required notice must be intended and reasonably calculated, 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. (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306.) This is not a standard of actual notice. This is a standard which focuses not *post hoc* on the individual landowners, but *ex ante* on the conduct of the Public Water Suppliers. This standard is one which facilitates class adjudication. The Public Water Suppliers resist this principle, because they know that they ultimately cannot meet the test, and that their prescriptive claims fail for Constitutional reasons. Nevertheless, as a matter of law, this is the standard of notice the court must enforce.

The Public Water Suppliers complain that Diamond's citation to the authority of United States Supreme Court decisions are "misinterpretations" because those cases do not specifically deal with prescriptive rights. The Public Water Suppliers insist that as public agencies they may usurp the rights of private overlying landowners and take priority rights without following due process. Diamond has pointed out that the Constitution states otherwise. "'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U.S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether

to appear or default, acquiesce or contest." (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314.) "It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation. The right to a hearing is meaningless without notice. In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests." (*Walker v. City of Hutchison* (1956) 352 U.S. 112, 115.)

F. *Diamond does not ignore the law of class actions, but asks that it be followed.*

The Public Water Suppliers argue that Diamond ignores the public policies which favor class actions. On the contrary, Diamond simply asks that the law be appropriately and judiciously applied. The Public Water Suppliers state that class treatment will aid determination of safe yield, historical groundwater levels, and historic pumping by appropriators. All of this may be true with respect to the causes of action in the cross-complaint other than the First. However, the Public Water Suppliers then make the leap of judgment that these proofs "impart actual and/or constructive notice to landowners," which is a fundamental misstatement of the law. (See Opposition, p. 10, ll. 24- 26.)

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." (*Smart v. City of Los Angeles* (1980) 112 Cal.App.3d 232, 239.)

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. If a common law standard which focuses on the actual or constructive knowledge of the overlying landowners applies, then class adjudication is not possible.

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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: May 17, 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 May 17, 2007, I served the within

REPLY POINTS AND AUTHORITIES TO OPPOSITION OF PUBLIC WATER SUPPLIERS TO 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 (courtesy copy sent to Judge Komar).

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**Hon. Jack Komar
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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.

■ **(**OVERNIGHT/EXPRESS MAIL**) By enclosing a true copy thereof in a sealed envelope designated by United States Postal Service (Overnight Mail)/Federal Express/United Parcel Service ("UPS") addressed as shown on the above by placing said envelope(s) for ordinary business practices from Kern County. I am readily familiar with this business' practice of collecting and processing correspondence for overnight/express/UPS mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service/Federal Express/UPS in a sealed envelope with 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 authorized courier or driver authorized by United States Postal Service (Overnight Mail)/Federal Express/United Postal Service to receive documents].

■ (**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 May 17, 2007, in Bakersfield, California.

Donna M Luis

DONNA M. LUIS