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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

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| 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>**OBJECTION TO THE PUBLIC WATER SUPPLIERS' STATEMENT OF SUPPORT FOR A MODIFIED CLASS AS PROPOSED BY REBECCA LEE WILLIS AND RENEWAL OF OBJECTION TO CLASS CERTIFICATION HEARING UNTIL AFTER DISCOVERY RESPONSES HAVE BEEN PROVIDED BY THE PUBLIC WATER SUPPLIERS**<br><br>Date: August 20, 2007<br>Time: 9:00 a.m.<br>Dept: 1 |

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## I. INTRODUCTION

On May 21, 2007, this court reserved the hearing date August 20, 2007 for all motions pertaining to class certification. The court also ordered that the briefing schedule follow the rules set forth in the Code of Civil Procedure. The only party to file a motion for class certification was the proposed plaintiff class representative Rebecca Lee Willis who timely filed her motion for class certification on July 23, 2007. Numerous other parties, including Diamond Farming Co., timely filed their documents opposing and supporting the motion within the time frame specified by the Code of Civil Procedure.

The only parties who were unable to comply with the court's order and the Code of Civil Procedure were the Public Water Suppliers. The Public Water Suppliers ignored the court's order and disregarded the time parameters contained in the Code of Civil Procedure to file what is essentially a disguised motion, or at best a mislabeled Opposition. This untimely filing was not done by accident. The filing came only after the Public Water Suppliers had made an agreement to have their previously filed answers stand as answers to the Plaintiff's class action complaint, after all other parties had responded to the plaintiff's motion, and at such a time that a meaningful response to the Public Water Suppliers' disguised motion could not be submitted.

The titling of the document as "support" for the class certification is designed to obfuscate the untimeliness and purpose of what is actually a motion seeking a court order that materially alters the plaintiff class definitions of both the plaintiffs and the municipal water system. The purpose behind obfuscation is to allow the public water suppliers to achieve through the back door what they could not achieve through the front - the certification of a defendant class of overlying land owners on their claim of prescription.

Should the court grant certification of any plaintiff class, the Public Water Suppliers (who have alleged prescription as an affirmative defense in their Answers) will simply cross-complain thereby creating a class of defendants without subjecting themselves to the burden of certifying that class, proving their claims or subjecting themselves to the opposing party's pre-certification discovery.

During the March 12, 2007 Case Management Hearing the court recognized the inherent problem with certifying a defendant class as to the Public Water Suppliers' claims of prescription. Since that hearing circumstances between the parties have not changed except that the Public Water Suppliers have now claimed prescription as an affirmative defense to plaintiff's claims by way of answer to the First Amended Complaint. The act of creating a defendant class has been strenuously objected to by Diamond Farming who has continuously had its attempts to conduct discovery obstructed and ignored. The objection to this class certification hearing is hereby renewed by way of this filing and, coupled with the new arguments contained herein, warrant the denial of the motion to certify the plaintiff class at this time. In the alternative, should the court consider the certification of a plaintiff class, the court must continue the hearing in this matter and set a briefing schedule that contemplates all pending discovery be answered prior to the filing deadline of any Opposition, any other option will deprive Diamond Farming, and all others opposed to the certification of a defendant class of a fair evidentiary hearing and thus their due process rights.

## II. ARGUMENT

### A. The Public Water Supplier's Disguised Motion Fails to Comply with this Court's Order issued on May 21, 2007, the Rules of Court and the Code of Civil Procedure

A motion is defined in Code of Civil Procedure section 1003. That section states: "Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion." (*Reifler v. Superior Court* (1974) 39 Cal. App. 3d 479, 483.) The Public Water Suppliers' filing seeks a court order certifying a plaintiff class wholly different that the class proposed by the plaintiff herself. Therefore, regardless of its title, the filing is a motion seeking class certification that must comply with the rules and requirements of such a motion.

#### 1) The Filing Failed to Comply with the Court's Order

This court established the hearing date for motions pertaining to class certification on August 20, 2007. Pursuant to inquiry by counsel for Diamond Farming, the court ordered that all filings comply with the time restrictions set forth in the Code of Civil Procedure. The court's order, coupled with the

Code of Civil Procedure, required all motions to be filed no later than July 27, 2007. The Public Water Supplier's filing was improperly posted on August 9, 2007 and therefore must not be considered by this court.

If the court does not accept that the Public Water Suppliers' filing is a disguised motion, then at best it can be considered an Opposition to the class certification proposed by the plaintiff.[1] Pursuant to this Court's order and the Code of Civil Procedure, all Oppositions were due to be filed 9 court days prior to the hearing date, or August 7, 2007. (Code of Civil Procedure § 1005(b).) The Public Water Suppliers' filing was posted on August 9, 2007. This exceeded the time for filing an Opposition. Therefore, the untimely filing of the document renders the opposition defective, deprives other interested parties from presenting a meaningful reply and it must not be considered by this court.

**2) The Filing Failed to Comply with the Rules of Court**

An application for an order from the court is "law and motion" as defined in the Rules of Court. (Rule 3.1103.) All motions filed must consist of the notice of hearing, the motion and the memorandum in support of the motion. (Rules 3.1112.) The Public Water Suppliers have filed a motion seeking a court order without a notice of hearing and motion as required by Rule 3.1112. This renders the filing defective.

The Rule of Court 3.764 specifically governs filings pertaining to motions to certify, amend or modify a class certification. Section (b) of the rule requires service of a notice of motion for class modification. This Section also requires that such a motion be filed 28 days before the court hearing. Should the filing be deemed and opposition than it had to be filed 14 days before the hearing date. The Public Water Suppliers' motion for class modification completely ignores this rule and must therefore be disregarded.

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1 Although the title attempts to mislead the court by using the word support, the filing actually undermines the Motion by Rebecca Lee Willis by attempting to expand the class definition beyond the parameters of the motion so that the new proposed class definitions are unsupported by the evidence submitted by Ms. Willis in support of her motion.

**3) The Filing Failed to Comply with the Code of Civil Procedure**

a. Code of Civil Procedure Section 1005

The filing fails to comply with Code of Civil Procedure section 1005 which requires that all notices of motion, motions and moving papers must be filed and served at least 16 court days before the scheduled hearing to effect proper notice. The Public Water Suppliers failed to give proper notice when they served and filed their documents with only 7 court days notice before the hearing. In addition to being untimely, the Public Water Suppliers failed to include a notice of motion or motion with their filing. (Code of Civil Procedure § 1005(a).) This belated and incomplete filing is not in compliance with the Code of Civil Procedure and provides sufficient grounds to set aside any order issued on the motion. (*Armstead v. Jackson* (1929) 100 Cal. App. 725, 729.). Therefore the filing must not be considered by this court in making any determination on class certification.

b. Code of Civil Procedure Section 1010

Code of Civil Procedure section 1010 provides as follows:

> "Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based. If any such paper has not previously been served upon the party to be notified and was not filed by him, a copy of such paper must accompany the notice."

The public water purveyors have failed to provide a written notice with their disguised motion. This failure to serve notice is in violation of Section 1010. The failure to provide proper, timely notice has prevented Diamond Farming from being able to properly respond to the motion and provide proper evidence through enforcement of its discovery rights. Therefore, the Public Water Suppliers' motion to modify the class must not be considered as to do so would be a violation of Diamond Farming's, and others similarly situated, due process rights.

**B. Diamond Farming Renews its Objections to Class Certification**

**1) Any Ruling on Class Certification Must be Postponed to Allow the Interested Parties to Conduct Discovery**

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As was made clear by the Appellate Court in *Louis E. Carabini, et al. vs. The Superior Court of Orange County* (1994) 26 Cal.App.4th 239, discovery directed at Class Certification is both appropriate and permitted in order to ensure a fair hearing.

> "Appellate courts have recognized the importance of such orders by creating an exception to the rule denying appellate review. 'Whether the order is directly appealable or we treat this as a petition for writ of mandate, the issue of the class certification order is and should be before us.' (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 871, fn. 9 [196 Cal.Rptr. 69]; see also 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 85, p. 106.) Due process requires an order with such significant impact on the viability of a case not be made without a full opportunity to brief the issues and present evidence. This is true whether the issue is presented in a motion or by way of an order to show case issued by the court. In addition, each party should have an opportunity to conduct discovery on class action issues before its documents in support of or in opposition to the motion must be filed." *Carabini, supra*, pp. 243-244.

Diamond Farming served discovery directed at the issues raised by the Public Water Suppliers disguised motion after the Suppliers' own motion for class certification was made. Each Public Water Supplier has objected to, and refused to answer, these discovery requests. The responses will allow the court and the parties to have a well defined hearing that is supported by hard evidence that will allow the court to hold a meaningful hearing on the issue of whether the Public Water Suppliers can prosecute a claim of prescription against a class.

**2) The Public Water Suppliers Continue To Ignore the Requirements for Certification**

Through their disguised motion, the Public Water Purveyors attempt to circumvent the problems encountered when they attempted to certify a defendant class by seeking the court's authority to modify the proposed plaintiff class into the exact class sought in their previous motion. The first step towards circumventing the class certification procedures was done when the Public Water Suppliers entered into the Stipulation to have their Answer filed to each cross-complaint in this matter deemed answers to the plaintiff's First Amended Complaint. Each Answer filed by each Public Water Supplier

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raised the affirmative defense of prescription. This Stipulation alone raises the same issues that were before the court during the motion to certify a defendant class wherein the court stated:

> "One of the concerns that I have with the proposed cross-complaint that I authorized to be filed is that it seems to me very clear that the court can certify a class as to the Third, Fourth, Fifth and Sixth and Eighth causes of action. I'm not so sure about the first and second which deal with prescription. It seems to me that that might create more of a problem." (*Hearing Transcript* Dated March 12, 2007, Page 41,lines 17-22.)

Nothing presented in the motion to certify filed by plaintiff or the motion to modify the proposed classes addresses or eliminates this issue. Nothing that has occurred in the case has changed the problem recognized by the court that is created by the Public Water Suppliers' attempts to litigate threshold issue of prescription on a class wide basis or to resolve the issues as framed by Diamond Farming's objections to the Public Water Suppliers' previous motion for class certification.[2]

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 moving party 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

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2 Diamond Farming has been raising these issues through various court filings and pleadings and would request that this court review its own files in this matter for further elaboration and corroboration of Diamond Farmings' arguments. Specifically, Diamond Farming requests that this court review the following: Diamond Famrings' Case Management Conference Statement filed on January7, 2006; Diamond Farming's Points and Authorities in Opposition to the Public Water Suppliers' Motion for Class Certification filed on February 26, 2007; Diamond Farming's Motion in Limine filed on April 12, 2007; Diamond Farming's Motion to Strike filed on April 12, 2007; The Public Water Suppliers' Motion for Class Certification filed on January 10, 2007; The Stipulation Regarding Answer to First Amended Class Action Complaint filed August 6, 2007; Answer of City of Palmdale filed March 9, 2007; Answer of Antelope Valley Water Co. Filed February 22, 2007; Answer of Littlerock Creek irrigation District filed February 1, 2007; Answer of Palm Ranch Irrigation District filed on February 1, 2007; Answer of Rosamond Community Services District filed February 16, 2007 and February 1, 2007; Answer of Los Angeles Waterworks District No. 40 filed February 16, 2007 and February 1, 2007; and the Answer of the City of Lancaster filed February 21, 2007.

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.

The same problems encountered in certifying a defendant class exist with the ay certification of a plaintiff class because, should the proposed plaintiff class be certified, the court will essentially be certifying a defendant class. The recently circulated Stipulation signed by the Public Water Suppliers asserts the affirmative defense of prescription. It is not without merit to assume that the Public Water Suppliers will then file another cross-complaint against any plaintiff class thereby creating a defendant class without any evidentiary basis for the creation of such a class.

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. 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.

As the court has already recognized, in rem actions involving multiple parcels and title or damage claims are problematic. This problem has been recognized by numerous cases that have addressed class certification of classes on factual scenarios similar to the present matter.

In *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, plaintiffs sought recovery for diminution in the market value of their property allegedly caused by aircraft noise, vapor, dust, and vibration through a purported class action against a municipal airport. The class was certified over defendant's objection. 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 of land) 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 (parcel). 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 individual 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.

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.

The key component running through these cases is that where the defendants and plaintiffs will be required to litigate individual issues then typicality and commonality cannot exist and the class must not be certified.

**3) The Public Water Suppliers' claim of "notice of adversity and hostility" must be litigated as to each member of the proposed class in order for them to establish their claim of prescription**

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

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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.[3]

In *Smart v. City of Los Angeles* (1980) 112 Cal.App.3d 232, 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 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 each parcel of 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.)

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3 "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.)

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 proposed class certification ignores the reality of the individual and in rem nature of the prescription claim. As pointed out in Diamond's previous Opposition to the certification of a defendant class, 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. All that is known on the threshold issue of prescription is what is stated in the Public Water Suppliers' pleadings which does not provide sufficient evidence to support the proposed class certification.

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

**4) The court must proceed with extreme caution in certifying a plaintiff class that will ultimately result in the certifying of 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 proposed class certification, coupled with the Public Water Suppliers stipulated answers, seeks to avoid addressing the constitutional due process problem that was an obstacle to the original motion to certify a defendant class. 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. Through procedural maneuvering, the Public Water Suppliers are attempting to use 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

Due to the recognized problem of certifying a class to adjudicate the claims of prescription, the court must continue the hearing on this matter and order that any party interested in the class certification issue may conduct discovery; that the Public Water Suppliers be ordered to provide responses to the discovery propounded by Diamond Farming and that the hearing date is moved to a date that allows for the completion of all discovery related to the issue of class certification. Otherwise, the motion for class certification should be denied due to the lack of evidentiary support.

Dated: August 14, 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 August 14, 2007, I served the within **OBJECTION TO THE PUBLIC WATER SUPPLIERS' STATEMENT OF SUPPORT FOR A MODIFIED CLASS AS PROPOSED BY REBECCA LEE WILLIS AND RENEWAL OF OBJECTION TO CLASS CERTIFICATION HEARING UNTIL AFTER DISCOVERY RESPONSES HAVE BEEN PROVIDED BY THE PUBLIC WATER SUPPLIERS**

■ **(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
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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.

■ **(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 August 14, 2007, in Bakersfield, California.

Donna M. Luis

**DONNA M. LUIS**