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12 Trust

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

15 **ANTELOPE VALLEY**
16 **GROUNDWATER CASES**

17 Included Actions:

18 Los Angeles County Waterworks District
19 No. 40 v. Diamond Farming Co., Superior
20 Court of California, County of Los
21 Angeles, Case No. BC 325201

22 Los Angeles County Waterworks District
23 No. 40 v. Diamond Farming Co., Superior
24 Court of California, County of Kern, Case
25 No. S-1500-CV-254348

26 Wm. Bolthouse Farms, Inc. v. City of
27 Lancaster, Diamond Farming Co. v. City of
28 Lancaster, Diamond Farming Co. v.
Palmdale Water District, Superior Court of
California, County of Riverside, Case Nos.
RIC 353 840, RIC 344 436, RIC 344 668

Judicial Council Coordination No. 4408

CLASS ACTION

Santa Clara Case No. 1-05-CV-049053

**REPLY TO OPPOSITION – CHARLES
TAPIA AND THE TAPIA FAMILY
TRUST’S MOTION TO SET ASIDE
DEFAULT**

Date: September 26, 2014

Time: 10:00 a.m.

Place: 191 No. First St., Dept. 20
San Jose, CA 95113

REPLY

COMES NOW Cross-Defendants CHARLES TAPIA (“Mr. Tapia”) and the TAPIA
FAMILY TRUST (collectively referred to with Mr. Tapia as “Cross Defendants”) and hereby
submit their reply to Los Angeles County Waterworks District No. 40’s (“Cross Complainant”)
Opposition to Cross Defendants, Motion to Set Aside Defaults

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1 **A. A REASONABLE ATTEMPT TO SERVE CROSS DEFENDANTS WOULD**
2 **HAVE INCLUDED AN ATTEMPT AT THE PROPERTY ADDRESS**
3 **AFFECTED BY THIS LITIGATION.**

4 The Opposition starts by admitting that counsel for Cross Complainant knew Mr. Tapia's
5 farm address. (Opposition, Page 1, Lines 26-27.) The question then remains, why did Cross
6 Complainant not attempt service at the very property they have identified for years? Instead, the
7 only attempts were four times between the two Cross Defendants at issue, on four workdays in
8 September.

9 Understandably, service on the multitude of Roes in the Cross Complaint is a daunting
10 task, but a task counsel *willingly* undertook when they agreed to represent Cross Complainant. To
11 now say it was too hard to make *one* more attempt at a property address already identified by
12 Cross Complainant's counsel is unreasonable.

13 The Opposition relies on case law that suggests counsel for Cross Complainant reasonably
14 relied on publication because of the large number of cross defendants involved. (Opposition, Page
15 4, Lines 17 through 25, *citing, Monterey S.P. P'ship v. W.L. Bangham* (1989) 49 Cal.3d 454.) The
16 *Monterey* case said, however, that publication *may* be appropriate, (*Id.* at 461), not that it was the
17 default position before attorneys make service attempts at a place of employment, or attempts at a
18 residence after work hours or before retirement hours for the evening.

19 When it comes to the question of reasonableness of Cross Complainant's efforts in this
20 case, logic should be employed. Best, Best, & Krieger (Cross Complainant's counsel) is not an
21 unsophisticated law firm; they know what diligent search attempts would entail in any one of
22 their other cases: a place of employment and/or service attempts after work hours, and at a
23 reasonable time.

24 Here, however, counsel for Cross-Complainant tried only four times: three in the middle
25 of the day when Mr. Tapia was working at his farm, and once late at night when Mr. Tapia had
26 retired for the evening. Further, they never attempted service at the farm (employment) address. If
27 they had, years ago during the service attempts, the process server would have certainly found
28 Mr. Tapia working away. The month of attempted service, September, is Mr. Tapia's busiest
29 month of the year, and he is picking pumpkins for the upcoming Halloween and Thanksgiving

1 seasons.

2 Reasonableness should be gauged on the level of extra effort it would have taken the
3 process server to actually accomplish service. Based on the Mr. Tapia's Declaration, it appears it
4 would have taken nothing more than one extra trip, to an address counsel for Cross Complainant
5 already had, to serve Mr. Tapia and give him actual notice of the litigation. In this manner,
6 reasonableness dictates that counsel for Cross Complainant simply should have slowed down and
7 not taken the path of least resistance with publication.

8 **B. CROSS-DEFENDANTS DID NOT WAIT AN UNREASONABLE TIME TO**
9 **BRING THIS MOTION.**

10 The Opposition argues that because Mr. Tapia's former counsel requested information
11 about Cross-Defendant's involvement in this litigation in early April, but then did not file this
12 Motion until September 4th, it was Cross Defendants who unreasonably delayed.

13 This is a disingenuous argument because, by Cross Complainant's own Declarations
14 attached to their Opposition, they prove that the majority of the delay—between early April and
15 early September—was borne from their counsel's own office, as follows:

- 16 • April 11, 2014, counsel for Cross Complainants receives a phone call from Mr.
17 Tapia's former counsel and delegates the response to an associate, Ms. Wang.
18 (Declaration of Jeffrey V. Dunn, ¶¶ 10, 11.)
- 19 • In Ms. Wang's Declaration, she declares that she did not provide a response about
20 setting aside the default until June 6, 2014, some *two months* after Mr. Tapia's former
21 counsel made contact. (Declaration of Wendy Y. Wang, ¶ 6.)
- 22 • The underlying Motion only attached Mr. Tapia's former counsel's letter to Mr. Tapia
23 (Exhibit F) to show *when* Mr. Tapia received actual notice that Cross Complainant
24 would not set aside the default, namely, June 30, 2014, twenty-four days after Mr.
25 Dunn's office finally got back to Mr. Tapia's former counsel.
- 26 • About a month went by wherein Mr. Tapia searched for new counsel to address the
27 default, as Mr. Tapia did not feel his former council would adequately be able to do
28 so.

- The Declaration of Heather Ijames, attached to the underlying Motion, states that Mr. Tapia retained new counsel on August 8, 2014. (Declaration of Heather Ijames, ¶ 2.)
- The Declaration of Heather Ijames further states that contact with Mr. Dunn's office began on August 14th, with no response for the next three weeks. (Declaration of Heather Ijames ¶¶ 4 – 7.)

Therefore, out of the five months that elapsed from the first contact with Mr. Dunn's office through the when the Motion was filed, Mr. Dunn's office was personally responsible for nearly three months of delay. Mr. Tapia's former counsel took about three weeks to communicate Cross Complainant's stance on not wanting to set aside the default, and Mr. Tapia took one month to retain new counsel. New counsel thereafter took two weeks to research and draft the issues for the Motion.

If anyone has shown a pattern of delay, it is Cross Complainant's counsel. Once the amount of delay caused by Cross Complainant's counsel is backed out, Cross Defendants did bring their Motion in a reasonable amount of time from learning about their defaults. Even without backing out Cross-Complainants' counsel's delay, Cross Defendants brought their motion within six months of learning of their defaults, pursuant to CCP §473.5.

C. CROSS-DEFENDANTS' DECLARATION SPECIFICALLY STATES THAT TAPIA DID NOT RECEIVE ACTUAL NOTICE, AND FURTHER SPECIFICALLY STATES THAT HE WAS NOT AVOIDING SERVICE.

The Opposition accurately states the requirements of CCP§ 473.5, but then inaccurately states the contents of the Motion. Charles Tapia's Declaration attached to the Motion states in Paragraphs 8 and 9 that Cross Defendants did not receive actual notice of the publication or service of process. Then, in Paragraph 15, Mr. Tapia declares that he has never tried to avoid service of process. (Declaration of Charles Tapia ¶¶ 8,9 and 15.)

As is quoted in the Opposition, CCP§ 473.5 states in pertinent part that a motion to set aside default "be accompanied by an affidavit showing under oath that the party's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect." [Emphasis added.]

1 The last prong is “or,” not “and.” Mr. Tapia declared, under oath, that he did not avoid
2 service. That satisfies the latter prong. Further, in declaring that he did not receive actual notice,
3 the first prong of CCP§ 473.5 is also satisfied.

4 **D. EQUITY DEMANDS THAT MATTERS BE HEARD ON THEIR MERITS,**
5 **NOT THAT CROSS-COMPLAINANT GETS THE EASIEST TURN AT**
6 **LITIGATING A COMPLEX CASE.**

7 In arguing a matter of balancing the equities, the Opposition brazenly argues, and more or
8 less demands, that since they are responsible for litigating a large case, no one else’s interests
9 matters more than their own. In essence, they get a pass from the requirements of the Code of
10 Civil Procedure because their load is already too burdensome for this case. Yet, it was Cross-
11 Complainant who initiated this Cross-Complaint, seeking adversely to affect Mr. Tapia’s water
12 rights. As the Court is aware, the burden of prosecuting any case rests on plaintiffs/cross-
13 complainants.

14 Further, the Court should consider the equities of what is at stake here between setting
15 aside the default and not setting aside the default. Setting aside the default puts one more person
16 in the mix of resolving a case that will inevitably come to an end. There might be a small bump to
17 get Mr. Tapia’s interest streamlined alongside everyone else’s, but that is a minor thing
18 considering the gravity of consequences that will occur if Mr. Tapia’s interests are not
19 represented in any future settlement and/or resolution.

20 Mr. Tapia runs, and has run, his family farm for decades. Primarily, he sells pumpkins. He
21 has one large yield a year, and it is in the fall. By already calculating what Mr. Tapia’s new costs
22 would be for his water if his interests are not incorporated into the litigation, Mr. Tapia’s costs
23 will exceed his yield and he will be run out of business, the family farm lost forever.

24 This would be a most unequitable result, all because counsel for Cross Complainant did
25 not send out one last service instruction to attempt at Mr. Tapia’s farm.

26 **E. THE MOTION DOES NOT REQUEST SANCTIONS, NOR ARE**
27 **SANCTIONS BEING REQUESTED.**

28 The reference to a sanctions request was a typographical error in the Motion’s heading.
That is why the mention of sanctions does not appear anywhere else in the Motion. Further,

1 despite Cross-Complainant's misstatement to the contrary, the e-mail attached as Exhibit J to the
2 Opposition was not made as a "threat" to council. It appears that the Opposition cherry-picked
3 phrases from this e-mail to paint as dark a picture as it could, when in reality the e-mail reads as
4 intended, a notice that sanctions might be requested based on the sheer failure of opposing
5 counsel to reply to any effort proffered in contacting him.

6 The sanctions requests was thereafter dropped from the motion (except for the typo in the
7 heading), based on the possibility that Mr. Dunn's failure to respond was one of a benign nature.
8 However, the Opposition proves that Mr. Dunn's failure to respond was much more intentional
9 than assumed¹, and continues to demonstrate that Cross Complainant's counsel does not want to
10 be bothered with the smaller factions of this litigation. Irrespective of this behavior, Cross
11 Defendants are still not requesting sanctions. They simply want their chance to participate in the
12 litigation.

13 C. CONCLUSION

14 The balancing of the equities and traditional notions of reasonableness as they relate to
15 process of service beckon this court to set aside Cross-Defendants' defaults.

16 Dated: September 19, 2014

BRUMFIELD & HAGAN, LLP
A Limited Liability Partnership

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19 By: 

Robert H. Brumfield, III
Attorneys for Charles Tapia and the Nellie
Tapia Family Trust

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26 ¹ The Opposition seems to purport the argument that simply because someone from Best, Best & Krieger had
27 communicated a "no" to Mr. Tapia's former counsel, that they did not have to bother with a response to Mr. Tapia's
28 current counsel's office. Since it was Mr. Tapia's current counsel who would be filing the motion and would have to
include their own declarations regarding attempts to contact defaulting counsel's office as a meet and confer *prior* to
the filing of a motion, attempts to ask the same question were necessary as a matter of civil procedure requirements
and still should have been given a response.

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REPLY TO OPPOSITION – CHARLES TAPIA AND THE TAPIA FAMILY TRUST’S MOTION TO SET ASIDE DEFAULT

Jeffrey V. Dunn, Esq.
Best Best & Krieger, LLP
18101 Von Karman Ave., Ste. 1000
Irvine, CA 92612

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.


Olga Lampkin