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ANTELOPE VALLEY-EAST KERN WATER AGENCY

Exempt from filing fee

Gov't. Code Section 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

Coordination Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company, a corporation, Superior Court of California, County of Los Angeles, Case No. BC325201;

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company, a corporation., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. vs. City of Lancaster, Diamond Farming Company, a corporation, vs. City of Lancaster, Diamond Farming Company, a corporation vs. Palmdale Water District, Superior Court of California, County of Riverside, Case Nos.

Judicial Council Coordination Proceeding No. 4408

Santa Clara Case No. 1-05-CV-049053
The Honorable Jack Komar, Dept.17

ANTELOPE VALLEY-EAST KERN WATER AGENCY'S JOINDER TO AGWA'S OPPOSITION TO MOTION IN LIMINE NUMBER ONE BY LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40

Trial Date: February 10, 2014
Time: 9:00 a.m.
Room: 1 (Los Angeles Superior Court)

RIC 353840, RIC 344436, RIC 344668.

AVEK hereby joins in AGWA's Opposition to District #40's In Limine Motion. In doing so, AVEK also incorporates herein by this reference, as though fully set forth herein, AVEK's Opposition to District #40's Supplement Request for Judicial Notice (Exhibit A attached hereto), and particularly points II, III and IV contained therein.

Dated: January 31, 2014

BRUNICK, McELHANEY & KENNEDY

By: _____
WILLIAM J. BRUNICK
LELAND P. McELHANEY
Attorneys for Cross-Complainant,
ANTELOPE VALLEY-EAST KERN
WATER AGENCY

EXHIBIT A

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

Coordination Proceeding
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ANTELOPE VALLEY GROUNDWATER CASES

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Judicial Council Coordination Proceeding No. 4408

Santa Clara Case No. 1-05-CV-049053
The Honorable Jack Komar, Dept.17

ANTELOPE VALLEY-EAST KERN WATER AGENCY'S OPPOSITION TO DISTRICT NO. 40's SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE OF PHASE THREE TRIAL TESTIMONIES AND EXHIBITS

Trial Date: February 10, 2014
Time: 9:00 a.m.
Room: To be determined

Cross-Complainant, the Antelope Valley-East Kern Water Agency (AVEK), submits this Opposition to the Supplemental Request for Judicial Notice of Phase Three Trial Testimonies and Exhibits, filed by Los Angeles County Waterworks District No. 40 ("District No. 40).

I.

INTRODUCTION

Pursuant to the provisions of Evidence Code § 452, subdivision (d), District 40 requests that the Court take judicial notice of transcripts of the Phase 3 trial testimonies of Joseph Scalmanini and other witnesses, and related trial exhibits. Implicit therein, is District 40's request that judicial notice be taken *as to the truthfulness* or binding effect of such prior trial testimonies and trial exhibits. As demonstrated below, however, judicial notice cannot be taken of *the truthfulness* of such prior testimonies and exhibits.

Additionally, the Court's Orders preceding the Phase 3 trial did not inform the parties that return flow amounts or percentages would be determined in that trial phase. Consequently, the parties (including AVEK) who wish to litigate that issue during the Phase 5 trial, but who did not participate in the Phase 3 trial, were not provided with any *notice* that return flow percentages would be determined in that phase of the trial. For that reason, AVEK did not participate in the Phase 3 trial.

Due process requires that AVEK be given an opportunity in the Phase 5 trial to cross-examine any witness whose testimony is proffered for the purpose of establishing return flow percentages. For this additional reason, the Court should not take judicial notice of prior trial testimonies, and related exhibits -- unless the witnesses are produced at the Phase 5 trial and AVEK, and others, are given the opportunity to cross-examine those witnesses regarding their prior testimonies and exhibits prepared by them.

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II.

BECAUSE THEY ARE REASONABLY SUBJECT TO DISPUTE, THE TRUTHFULNESS OF FACTS ALLEGED IN PRIOR TESTIMONIES OR TRIAL EXHIBITS MAY NOT BE JUDICIALLY NOTICED

The author of 2 Jefferson's California Evidence Benchbook (4th ed.), §49.10, pp. 1147-1148) succinctly notes:

> There is a mistaken notion that taking judicial notice of court records under Evid C §452(d) . . . means taking judicial notice of the existence of facts asserted in every document of a court file, including pleadings and affidavits. The concept of judicial notice requires that the matter which is the proper subject of judicial notice be a fact that is not reasonably subject to dispute. Facts in the judicial record that are subject to dispute, such as allegations in affidavits, declarations, . . . are not the proper subjects of judicial notice even though they are in a court record.

By logical extension, this applies as well to trial testimonies and trial exhibits.

"[W]hen a court takes judicial notice of a document, 'the truthfulness and proper interpretation of the document are disputable.'" (Id., at p. 1147; *StorMedia Inc. v. Superior Court* (1999) 20 Cal. 4th 449, 457, fn 9; and *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1266 ["while we take judicial notice of the *existence* of the documents in court files, *we do not take judicial notice of the truth of the facts asserted in such documents*" [emphasis in original].)[1]

Therefore, the Court may "not take judicial notice of the truth of the facts asserted in such" prior testimonies and related exhibits. Accordingly, unless such witnesses are produced

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1 Even an appellate court opinion's recitation of facts should not be considered as true on any theory of judicial notice, because such is nothing more than the hearsay assertions of the justices who issued the opinion (2Jefferson, *supra*, §49.11, p.1148; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 887; *Plumley v. Mockett* (2008) 164 Cal.App.4th 2031, 1050 [judicial notice that judge made particular factual findings is far cry from judicial notice that facts found by judge must necessarily be true].)

for cross-examination during the Phase 5 trial, their prior testimonies and exhibits are of no value and are inadmissible.

III.

DUE PROCESS

The Court's relevant Orders preceding the Phase 3 trial did not indicate that a final determination would be made therein as to return flow amounts or percentages. The Court's orders titled, ORDER AFTER CASE MANAGEMENT CONFERENCE ON MARCH 22, 2010, and ORDER AFTER CASE MANAGEMENT CONFERENCE ON MAY 6, 2010, each state the following:

> In this third phase of trial, the Court will hear evidence to determine whether the basin, as previously defined by the Court in trial phases one and two, is in such overdraft and to determine whether there is a basis for the Court to exercise its equitable jurisdiction, including the implementation of a "physical solution," as prayed for by the public water provider parties. The public water providers have the burden of proof.
>
> The Court . . . expects to hear evidence concerning total pumping and total recharge from all sources, with a further breakdown showing the amount of imported water on an annual basis.

(Copies of both Orders are attached as Exhibits 1 and 2 hereto.)

The foregoing demonstrates that the Court intended that the Phase 3 trial would determine: (1) whether the basin was in overdraft and, if so, the basin's safe yield; and (2) whether the Court should exercise its equitable jurisdiction to implement a physical solution. There was no clear indication that the Court intended to make a final determination in the Phase 3 trial as to return flow amounts or percentages.

Accordingly, the parties were not given adequate notice that the Court intended to make a final determination in the Phase 3 trial as to return flow amounts or percentages. An elementary and fundamental requirement of due process in any proceeding that is to be accorded finality is notice appropriate to the nature of the case and reasonably calculated, under all the

circumstances, to apprise interested parties of the pendency of a matter to be determined. (*Malek v. Koshad* (2011) 200 Cal.App.4th 1540, 1547.)

In short, the parties (including AVEK) who did not participate in the Phase 3 trial, but who wish to litigate return flow amounts/ percentages in the Phase 5 trial, were not given adequate notice that such would be determined in the Phase 3 trial. Due process requires that they be given an opportunity to cross-examine any witness whose testimony is proffered in the Phase 5 trial as to return flow amounts or percentages. Otherwise, they would be denied due process.

IV.

THE PHASE 3 RULING REFERENCES "ESTIMATES" ONLY

The Court's Statement of Decision re Phase III Trial, repeatedly notes that the return flow percentages noted therein are imprecise "estimates" only (St. Dec., 6:26-28 ["The Court recognizes the imprecision of the various estimates and the fact that an estimate by definition is imprecise"]; and 8:4-5 ["the amount of hydro-conductivity between Basin areas was beyond the scope of the Phase III trial"].

Moreover, the data presented to the Court in 2011, may not be accurate with respect to the imported water return flow amounts or percentages which exist in 2014 (*inter alia*, because the amount of imported water varies from year to year). In this connection, Quartz Hill's prior motion *in limine* conceded that, "The return flows from importer water fluctuate every year, based upon the amount of water imported the prior year" (Quartz Hill Mot., 5:22-23), and "[T]he amount of imported water will fluctuate annually" (Id., 6:10).[2]

For this reason, the Court should rely upon data and analyses which are most current to the date final judgment is entered in this action, or at least as of the conclusion of the Phase V trial.

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2 As noted in *City of Santa Maria*, fn. 11, "Any portion of Return Flows that is not used in a given Year shall not be carried over into the following year."

V.

CONCLUSION

For all of the reasons set forth above, AVEK respectfully submits that the Court should deny District No. 40's supplemental request for judicial notice, and should not accept or admit into evidence *for the truth of the facts asserted therein* any prior testimonies or exhibits – unless adequate opportunity is given during the Phase 5 trial to cross-examine each witness regarding his prior testimony and the exhibits relating thereto.

Dated: January 30, 2013

BRUNICK, McELHANEY & KENNEDY

By: _____
WILLIAM J. BRUNICK
LELAND P. McELHANEY
Attorneys for Cross-Complainant,
ANTELOPE VALLEY-EAST KERN
WATER AGENCY

EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES

Included Consolidated Actions:

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.
Superior Court of California
County of Los Angeles, Case No. BC 325 201

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.
Superior Court of California, County of Kern,
Case No. S-1500-CV-254-348

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

Rebecca Lee Willis v. Los Angeles County Waterworks District No. 40
Superior Court of California, County of Los Angeles, Case No. BC 364 553

Richard A. Wood v. Los Angeles County Waterworks District No. 40
Superior Court of California, County of Los

Judicial Council Coordination Proceeding No. 4408

Lead Case No. BC 325 201

ORDER AFTER CASE MANAGEMENT CONFERENCE ON MARCH 22, 2010

Hearing Date(s): March 22, 2010
Time: 9:00 a.m.
Location: Department 1, LASC

Judge: Honorable Jack Komar

Angeles, Case No. BC 391 869

The matter came on as a regularly scheduled telephonic Case Management Conference on March 22, 2010 in Department One in the above entitled Court. All parties appeared by telephone. Those parties appearing are listed in the minutes of the Court prepared by the Clerk of Court.

The parties having briefed and argued the issues, good cause appearing, the Court makes the following Case Management order:

The Third Phase of Trial is scheduled for September 27, 2010 at 9:00 a.m. in Department One of this Court. The time of trial is estimated at 10 court days. The Court will be in session for trial Monday through Thursday of each week. If additional days of trial are required, the Court will schedule such after conferring with the parties.

The parties shall comply with the provisions of Code of Civil Procedure Section 2034.210 and engage in a simultaneous disclosure and exchange of expert information, including any reports prepared by such experts, on July 1, 2010. Any supplemental disclosures and exchange of information shall occur on July 15, 2010. Expert depositions shall be taken between July 15 and August 30, 2010.

On July 1, 2010, any party who intends to call non-expert witnesses to provide percipient testimony shall file a statement listing such witness, the subject matter of their testimony, and an estimate of the amount of time required for their testimony on direct.

All discovery shall be completed in compliance with the Code of Civil Procedure 30 days before trial and all motions shall be heard no later than 15 days before trial.

Trial briefs and motions in limine shall be filed no later than September 15, 2010 and any responses or opposition shall be filed no later than September 24, 2010.

The public water provider parties have essentially alleged that the basin is in overdraft, that extraction of water on an annual basis exceeds recharge, and that the basin will suffer serious degradation and damage unless the Court exercises its equitable jurisdiction. In this third phase of trial, the Court will hear evidence to determine whether the basin, as previously

defined by the Court in trial phases one and two, is in such overdraft and to determine whether there is a basis for the Court to exercise its equitable jurisdiction, including the implementation of a "physical solution," as prayed for by the public water provider parties. The public water providers have the burden of proof.

The Court will not hear any evidence concerning prescription claims nor does it expect to hear evidence of individual pumping of water by any party within the basin; rather, it expects to hear evidence concerning total pumping and total recharge from all sources, with a further breakdown showing the amount of imported water on an annual basis.

Any party requiring further clarification of the issues in this third phase of trial is invited to request such clarification and the Court will consider a further case management conference to provide such clarification unless it is a simple matter permitting the Court to issue a clarifying order.

Dated: March 22, 2010

/s/ Jack Komar
Honorable Jack Komar
Judge of the Superior Court

EXHIBIT 2

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES

Included Consolidated Actions:

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.
Superior Court of California
County of Los Angeles, Case No. BC 325 201

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.
Superior Court of California, County of Kern,
Case No. S-1500-CV-254-348

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

Rebecca Lee Willis v. Los Angeles County Waterworks District No. 40
Superior Court of California, County of Los Angeles, Case No. BC 364 553

Richard A. Wood v. Los Angeles County Waterworks District No. 40
Superior Court of California, County of Los

Judicial Council Coordination Proceeding No. 4408

Lead Case No. BC 325 201

ORDER AFTER CASE MANAGEMENT CONFERENCE ON MAY 6, 2010

Hearing Date(s): May 6, 2010
Time: 9:00 a.m.
Location: Department 1, LASC

Judge: Honorable Jack Komar

Angeles, Case No. BC 391 869

The matter came on as a regularly scheduled telephonic Case Management Conference on May 6, 2010 in Department One in the above entitled Court. All parties appeared by telephone. Those parties appearing are listed in the minutes of the Court prepared by the Clerk of Court.

The parties having briefed and argued the issues, good cause appearing, the Court makes the following Case Management order:

ORDERS AMENDING THE MARCH 22, 2010 ORDER AFTER CASE MANAGEMENT CONFERENCE

The Third Phase of Trial remains scheduled for September 27, 2010 at 9:00 a.m. in Department One of this Court. The time of trial remains estimated at 10 court days. The Court will be in session for trial Monday through Thursday of each week. If additional days of trial are required, the Court will schedule such after conferring with the parties.

The Request of Grimmway Enterprises, Inc., Lapis Land Company, LLC, Crystal Organics, LLC and Diamond Farming Company to Modify the March 22, 2010 Case Management Order, posted on April 30, 2010, is granted as follows: the time for parties to comply with the provisions of Code of Civil Procedure Section 2034.210 and engage in a simultaneous disclosure and exchange of expert information, including any reports prepared by such experts, is extended from July 1, 2010 to **July 15, 2010**. The time for any supplemental disclosures and exchange of information is extended from July 15, 2010 to **July 29, 2010**. The time for expert depositions to be conducted is amended to **between July 29, 2010 and September 13, 2010**.

On July 15, 2010, any party who intends to call non-expert witnesses to provide percipient testimony shall file a statement listing such witness, the subject matter of their testimony, and an estimate of the amount of time required for their testimony on direct.

All discovery shall be completed in compliance with the Code of Civil Procedure 30 days before trial and all motions shall be heard no later than 15 days before trial.

Trial briefs and motions in limine shall be filed no later than September 15, 2010 and any responses or opposition shall be filed no later than September 24, 2010.

The public water provider parties have essentially alleged that the basin is in overdraft, that extraction of water on an annual basis exceeds recharge, and that the basin will suffer serious degradation and damage unless the Court exercises its equitable jurisdiction. In this third phase of trial, the Court will hear evidence to determine whether the basin, as previously defined by the Court in trial phases one and two, is in such overdraft and to determine whether there is a basis for the Court to exercise its equitable jurisdiction, including the implementation of a "physical solution," as prayed for by the public water provider parties. The public water providers have the burden of proof.

The Court will not hear any evidence concerning prescription claims nor does it expect to hear evidence of individual pumping of water by any party within the basin; rather, it expects to hear evidence concerning total pumping and total recharge from all sources, with a further breakdown showing the amount of imported water on an annual basis.

WOOD PLAINTIFFS' MOTION TO DISQUALIFY

The Motion by the Wood Plaintiffs to Disqualify the Law Firm of Lemieux & O"Neill is denied based upon the information provided to the Court.

WOOD PLAINTIFFS' MOTION FOR ALLOCATION OF EXPERT WITNESS FEES

On March 25, 2010, the Wood Plaintiffs submitted a Proposed Order re Motion for Allocation of Expert Witness Fees, providing that the twelve named "Public Water Suppliers" equally share the costs of Entrix in the amount of $4,784.68. Objections thereto were filed by the Cities of Lancaster and Palmdale. After considering the pleadings filed by all parties, the Court finds the fees incurred to date by Entrix, in the amount of $4,784.68 are reasonable, but modifies the order to exclude the Cities of Lancaster and Palmdale from obligation as neither of those parties are making claims against the these landowners.

The Court hereby orders the following public water suppliers to pay this bill directly to Entrix within fourteen days (14) of this order. The following ten public water suppliers are

ordered to pay this bill, in equal shares: Rosamond Community Services District, Los Angeles County Waterworks District No. 40, Littlerock Creek Irrigation District, Palm Ranch Irrigation District, North Edwards Water District, Desert Lake Community Services District, California Water Service Company, Quartz Hill Water District, Palmdale Water District and Phelan Pinon Hills Community Services District.

Further, the request of Richard Wood to authorize the court-appointed expert to commence the work outlined in the proposal from Entrix, which was attached to the moving papers, is denied without prejudice based on the decision that no evidence of individual pumping will be heard at the Phase III trial, as set forth in the Court's March 22, 2010 Order.

TRANSFEREE/TRANSFEROR OBLIGATION

Regarding the Proposed Order submitted by Tejon Ranchcorp on January 4, 2008 re Jurisdiction over Transferees of Property, previously granted by the Court in open hearings, the Court hereby confirms that it will defer signing said Order until further briefing and hearing of the issues by the parties. The Court requests that the proponent of this transfer document file by May 24, 2010, a formal motion to modify it and apply it appropriately; briefing deadlines shall be per Code of Civil Procedure; the hearing date is set for **June 14, 2010 at 9:00 a.m. in Department 1, Los Angeles County Superior Court.**

SO ORDERED.

Dated: May 25, 2010

Honorable Jack Komar
Judge of the Superior Court

PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF SAN BERNARDINO }

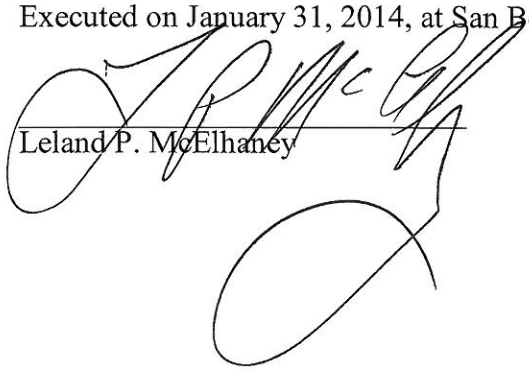
I am employed in the County of San Bernardino, State of California. I am over the age of 18 and not a party to the within action; my business address is 1839 Commercenter West, San Bernardino, California 92408-3303.

On December 23, 2013, I served the foregoing document described as: **ANTELOPE VALLEY-EAST KERN WATER AGENCY'S JOINDER TO AGWA'S OPPOSITION TO MOTION IN LIMINE NUMBER ONE BY LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40** on the interested parties in this action in the following manner:

■ **BY ELECTRONIC SERVICE AS FOLLOWS**: by posting the document listed above to the Santa Clara website in the action of the *Antelope Valley Groundwater Litigation,* Judicial Council Coordination Proceeding No. 4408, Santa Clara Case No. 1-05-CV-049053.

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

Executed on January 31, 2014, at San Bernardino, California.



Leland P. McElhaney