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18  
19 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
20 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

21 ANTELOPE VALLEY GROUNDWATER  
22 CASES

23 Included Actions:  
24 Los Angeles County Waterworks District No.  
40 v. Diamond Farming Co., Superior Court of  
25 California, County of Los Angeles, Case No.  
BC 325201;

26 Los Angeles County Waterworks District No.  
27 40 v. Diamond Farming Co., Superior Court of  
California, County of Kern, Case No. S-1500-  
28 CV-254-348;

Wm. Bolthouse Farms, Inc. v. City of

**EXEMPT FROM FILING FEES  
UNDER GOVERNMENT CODE  
SECTION 6103**

Judicial Council Coordination Proceeding  
No. 4408

CLASS ACTION

Santa Clara Case No. 1-05-CV-049053  
Assigned to the Honorable Jack Komar

**OPPOSITION TO ANTELOPE  
VALLEY EAST – KERN WATER  
AGENCY’S MOTION TO  
DISQUALIFY BEST BEST &  
KRIEGER AS LEGAL COUNSEL IN  
ANTELOPE VALLEY  
GROUNDWATER CASES**

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

Rebecca Lee Willis v. Los Angeles County  
Waterworks District No. 40, et al., Superior  
Court of California, County of Los Angeles,  
Case No. BC364533

Richard Wood v. Los Angeles County  
Waterworks District No. 40, et al., Superior  
Court of California, County of Los Angeles,  
Case No. BC391869

Date: December 7, 2016  
Time: 10:00 a.m.  
Dept.: Room 222

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**TABLE OF CONTENTS**

	<b>Page</b>
FACTUAL SUMMARY	1
A.    AVEK Has Intolerably Delayed Bringing This Motion.	1
B.    District No. 40 Would Be Extremely Prejudiced By Disqualification.	2
LEGAL ARGUMENT	3
THE MOTION MUST BE DENIED BECAUSE IT WOULD BE MANIFESTLY INEQUITABLE TO DISQUALIFY BB&K AT THIS LATE DATE.	3
A.    The Court’s Authority To Disqualify Counsel Is Inherently Equitable.	3
B.    Equitable Considerations Compel The Conclusion That Disqualification Would Be Unnecessary And Unfair.	5
1.    AVEK has improperly delayed seeking disqualification and manifestly consented to BB&K’s long-standing representation of District No. 40.	5
2.    District No. 40 would be severely prejudiced.	7
3.    There is no prophylactic interest served in disqualifying BB&K.	8
CONCLUSION	9

**TABLE OF AUTHORTIES**

**Page(s)**

**Federal Cases**

1  
2  
3  
4 *Blecher & Collins, P.C. v. Northwest Airlines* 4  
(C.D. CA 1994) 858 F.Supp. 1442  
5 *Trust Corp. of Montana v. Piper Aircraft Corp.* 8  
(9th Cir. 1983) 701 F.2d 85  
6

**State Cases**

7  
8 *Blue Water Sunset, LLC v. Markowitz* 4  
(2011) 192 Cal.App.4th 477  
9 *City of Santa Barbara v. Superior Court* 7  
(2004) 122 Cal.App.4th 17  
10  
11 *Continental Ins. Co. v. Superior Court* 3  
(1995) 32 Cal.App.4th 94  
12 *Flatt v. Superior Court* 4, 8  
(1994) 9 Cal.4th 275  
13  
14 *Gregori v. Bank of America* 3  
(1989) 207 Cal.App.3d 291  
15 *Hetos Investments, Ltd. v. Kurtin* 3  
(2003) 110 Cal.App.4th 36  
16  
17 *In re Farm Raised Salmon Cases* 5  
(2008) 42 Cal.4th 1077  
18 *In re Marriage of Zimmerman* 6  
(1993) 16 Cal.App.4th 556  
19  
20 *Koloff v. Metropolitan Life Ins. Co* 5, 6  
(E.D. Cal. June 10, 2014, No. 1:13-CV-02060-LJO) 2014 WL 2590209  
21 *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* 5  
(2010) 183 Cal.App.4th 238  
22  
23 *Liberty National Enterprises L.P. v. Chicago Title Ins. Co.* 5, 6  
(2011) 194 Cal.App.4th 839  
24 *Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.,* 1  
Superior Court of California, County of Kern, Case No. S-1500-CV-254-348  
25  
26 *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* 3-5, 7  
(1999) 20 Cal.4th 1135  
27 *River West, Inc. v. Nickel* 5, 6  
(1987) 188 Cal.App.3d 1297  
28

1	<i>Sharp v. Next Entertainment, Inc.</i> (2008) 163 Cal.App.4th 410	9
2	<i>State Farm Mutual Auto Ins. Co. v. Federal Insurance Co.</i> (1999) 72 Cal.App.4th 1422	4
3		
4	<i>Truck Ins. Exchange v. Fireman's Fund Ins. Co.</i> (1992) 6 Cal.App.4th 1050	7

**State Statutes**

7	California Rules of Court Rule 8.1115	5
8		
9	Code of Civil Procedure Section 187	3

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1 **OPPOSITION TO MOTION TO DISQUALIFY COUNSEL**

2 AVEK’s motion to disqualify Best Best & Krieger LLP (“BB&K”) from continuing to  
3 represent District No. 40 in this seventeen-year-long litigation should be denied because it comes  
4 far too late and would result in an intolerable injustice.

5 **FACTUAL SUMMARY**

6 AVEK chooses to point out only a few facts to support its motion. It ignores other  
7 material facts that require that its motion be denied.

8 **A. AVEK Has Intolerably Delayed Bringing This Motion.**

9 As explained in detail in the accompanying declarations of BB&K attorney Jeffrey Dunn  
10 and District No. 40 representative Adam Ariki, and as the Court knows from its first-hand  
11 experience with this case, BB&K has never represented AVEK in this litigation. Furthermore,  
12 BB&K has never been privy to any of AVEK’s confidential information about this lawsuit and  
13 does not now represent AVEK in any matter. Rather, AVEK has been represented solely by  
14 Brunick, McElhaney & Kennedy ever since AVEK was first drawn into the litigation in 2006.  
15 (Dunn Decl., ¶¶ 21, 53.)

16 Long before this litigation began, AVEK and District No. 40 agreed in writing that if ever  
17 there were litigation over groundwater rights, AVEK would assist District No. 40 in retaining its  
18 rights to the groundwater supply. (Dunn Decl., ¶ 16.) Once the litigation began, AVEK initially  
19 announced its neutrality on the major issues. (Dunn Decl., ¶ 26.) Only later did a third party  
20 bring AVEK into the litigation. Eventually, AVEK and District No. 40 settled the litigation  
21 without a peep from AVEK that it was dealing with disqualified counsel. Now, with appeals  
22 pending, AVEK suddenly perceives a conflict of interest?

23 Where was AVEK all this time? Throughout the litigation, through six phases of trial,  
24 AVEK and the Brunick firm sometimes standing side by side with District No. 40 and BB&K in  
25 defending their mutual interests. AVEK and the Brunick firm never objected that BB&K had a  
26 disqualifying conflict of interest even though AVEK and its separate counsel were obviously  
27 aware that BB&K was representing District No. 40. To the contrary, AVEK and the Brunick firm  
28 relied on BB&K, with its exceptional expertise in this very specialized area of the law, to carry

1 the laboring oar in important aspects of this long and complex litigation, all to AVEK's benefit.  
2 (Ariki Decl., ¶ 5.) Even after filing this motion, AVEK continued to rely on and joined in a filing  
3 by BB&K on behalf of District No. 40. (Dunn Decl., ¶ 52.)

4 Moreover, AVEK is seemingly attempting to cut off its nose to spite its face. It would, in  
5 fact, be very much in AVEK's best interests to have BB&K—which has been successfully  
6 litigating the case for thirteen years and has significant knowledge of the legal and factual issues  
7 of this case—to continue to defend the judgment and the agreements between District No. 40 and  
8 AVEK. (Ariki Decl., ¶ 15.)

9 **B. District No. 40 Would Be Extremely Prejudiced By Disqualification.**

10 For the past thirteen years, BB&K has represented District No. 40 in mediation,  
11 settlement, six phases of trial, countless motions, and now the appeals of the final judgment in the  
12 Adjudication. District No. 40 has invested significant time and resources in BB&K. Specifically,  
13 District No. 40 has collectively spent thousands of hours working closely with BB&K attorneys  
14 and educating them as to: (a) District No. 40's operations, various water-related agreements, and  
15 water rights; and (b) historical, current, and potential future use of water in Antelope Valley  
16 region, uses of water by other parties, and highly technical aspects of the geology, hydrology and  
17 sophisticated computer modeling of the Antelope Valley Groundwater Basin. Consultants  
18 retained by BB&K and whose professional services costs and expenses were paid for by District  
19 No. 40, have also spent hundreds of hours working with Jeffrey Dunn, Eric Garner, Wendy Wang  
20 and former BB&K attorney Stefanie Morris on complex technical issues concerning the Basin's  
21 present and long overdraft conditions. Knowledge gained by BB&K is not only necessary for the  
22 litigation, but is also important in management of the Basin and in addressing future legal issues.  
23 (Ariki Decl., ¶ 5.)

24 BB&K knows the law and the lawsuit. If it were even possible, it would be extremely  
25 costly and cause considerable delay for all concerned for a new law firm to come in cold to the  
26 case and attempt to learn it all over again. To properly prepare for the appeal and to continue to  
27 represent District No. 40 in ongoing matters, new counsel would minimally have to review most  
28 of the written products that BB&K prepared in this matter as well as thousands of filings,

1 discovery responses, orders, and deposition, hearing and trial transcripts. Moreover, District  
2 No. 40 would have to spend significant time educating its new counsel on matters that BB&K  
3 learned over the past seventeen years, including the operations of, and water use by, District No.  
4 40 and other parties. (Ariki Decl., ¶ 7.)

## 5 LEGAL ARGUMENT

### 6 THE MOTION MUST BE DENIED BECAUSE IT WOULD BE MANIFESTLY 7 INEQUITABLE TO DISQUALIFY BB&K AT THIS LATE DATE.

#### 8 A. The Court's Authority To Disqualify Counsel Is Inherently Equitable.

9 Contrary to AVEK's assumption, this Court's authority to disqualify counsel rests not in  
10 the State Bar rules but rather in the Court's inherent authority to control the conduct of litigation.  
11 (Code Civ. Proc., § 187; *Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 111,  
12 n. 5. ["the 'business' of the court is to dispose of 'litigation' and not to oversee the ethics of those  
13 that practice before it unless the behavior 'taints' the trial"] [quoting *Monsanto Co. v. Aetna Cas.  
14 & Sur. Co.* (Del. 1990) 593 A2d. 1013, 1029.]

15 The Court's authority under section 187 is *equitable*, and balancing the equities is  
16 therefore an inherent part of any disqualification decision. Accordingly, a finding that counsel  
17 has violated an ethical rule is not dispositive of whether disqualification is the equitable thing to  
18 do. (*Hetos Investments, Ltd. v. Kurtin* (2003) 110 Cal.App.4th 36, 46-47; *Gregori v. Bank of  
19 America* (1989) 207 Cal.App.3d 291, 303 ("*Gregori*").) Rather, "[d]epending on the  
20 circumstances, a disqualification motion may involve such considerations as a client's right to  
21 chosen counsel, an attorney's interest in representing a client, the financial burden on a client to  
22 replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification  
23 motion." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20  
24 Cal.4th 1135, 1144-1145 ("*SpeeDee*").) "Since the purpose of a disqualification order must be  
25 prophylactic, not punitive, the significant question is whether there exists a genuine likelihood  
26 that the status or misconduct of the attorney in question will affect the outcome of the  
27 proceedings before the court. (*Gregori, supra*, 207 Cal.App.3d at pp. 308-309.)



1 AVEK tries to sidestep the need to address these equitable considerations by arguing a  
2 rule of automatic, per se disqualification in the context of this case. Yet, our Supreme Court has  
3 never held that a substantial delay in bringing a motion for disqualification or a client's long-  
4 standing knowledge of, and consent to, purported adverse representation are irrelevant to the issue  
5 of disqualification. While AVEK cites *Flatt v. Superior Court* (1994) 9 Cal.4th 275 as support  
6 for its automatic disqualification rule, *Flatt* did not involve a disqualification motion—it was a  
7 malpractice case. The same is true of *Blecher & Collins, P.C. v. Northwest Airlines* (C.D. CA  
8 1994) 858 F.Supp 1442.

9 In *State Farm Mutual Auto Ins. Co. v. Federal Insurance Co.* (1999) 72 Cal.App.4th  
10 1422, the court observed that there had been no delay in bringing the disqualification motion.  
11 (*Id.* at p. 1434.) Hence the court's statement that delay is not a consideration in a disqualification  
12 motion based upon concurrent representation is mere dicta, and unsupported dicta at that, as it  
13 relies entirely on *Blecher & Collins, supra*, which, as noted, is a federal district court decision  
14 that does not even involve a disqualification motion. (*Id.* at pp. 1434-1435.) *Blue Water Sunset,*  
15 *LLC v. Markowitz* (2011) 192 Cal.App.4th 477, 486-487 in turn relies on both *Flatt, supra* and  
16 *State Farm, supra*, in espousing a rule of automatic disqualification in the concurrent  
17 representation context, while ignoring the Supreme Court's clear statement in *SpeeDee, supra*,  
18 that even in cases concerning alleged concurrent representation, a court must always balance the  
19 equitable issues in determining whether disqualification is warranted. (*Id., SpeeDee, supra*, 20  
20 Cal.4th at pp. 1144-1145.) In *SpeeDee*, the court found disqualification appropriate based upon  
21 concurrent representation and presumed access to confidential information by an attorney who  
22 was "of counsel" to a firm, only after a searching inquiry into the circumstances of the  
23 representation and the context in which the motion for disqualification was brought. In fact,  
24 Justice Mosk filed an opinion concurring only in the result, and not the reasoning of the court's  
25 opinion, precisely because the majority rejected the very sort of per se rule of disqualification that  
26 AVEK urges here. (*Id.* at p. 1157 ["The majority suggest, in my view incorrectly, that it matters  
27 how long the conflict herein lasted, how promptly Mobil sought to disqualify Disner, and whether  
28 attorneys from the Shapiro firm actually had access to Mobil's confidences."].)

1 AVEK's position cannot be reconciled with the Supreme Court's decision in *SpeeDee*. As  
2 we discuss, the equities in this case overwhelming balance against disqualification of BB&K.

3 **B. Equitable Considerations Compel The Conclusion That Disqualification**  
4 **Would Be Unnecessary And Unfair.**

5 **1. AVEK has improperly delayed seeking disqualification and manifestly**  
6 **consented to BB&K's long-standing representation of District No. 40.**

7 One important equitable consideration is whether the moving party has unreasonably  
8 delayed bringing the disqualification motion, coupled with prejudice to the party who would lose  
9 its chosen attorney. In *River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, disqualification of  
10 plaintiffs' counsel was reversed on appeal. The defendant had waited 47 months after filing an  
11 answer to move for disqualification. (*Ibid.*) During that time, plaintiffs' counsel expended a  
12 great amount of resources in the case. (*Ibid.*) The delay in moving to disqualify was so  
13 unreasonable and the resulting prejudice so great that it justified a conclusion that the defendant  
14 impliedly waived the right to disqualify the plaintiffs' attorney. (*Id.* at p. 1313.)

15 In *Liberty National Enterprises L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th  
16 839, the court affirmed the trial court's order denying a motion to disqualify counsel, noting that  
17 the moving party had no explanation for waiting two years before bringing the motion, and even  
18 then only bringing it after the litigation proceeded to a point where the court had rendered a  
19 tentative decision. (*Id.* at pp. 845-847.)

20 Similarly, in *Koloff v. Metropolitan Life Ins. Co.* (E.D. Cal. June 10, 2014, No. 1:13-CV-  
21 02060-LJO) 2014 WL 2590209 ("*Koloff*"), the district court denied a motion to disqualify  
22 counsel, noting that the moving party had delayed at least four months, and possibly as long as  
23 three years before moving to disqualify opposing counsel, and that the opposing party would  
24 sustain substantial prejudice in having to obtain new counsel. (*Id.* at \*2, \*4.)<sup>1/</sup>

25  
26 \_\_\_\_\_  
27 <sup>1/</sup> Unpublished federal district court decisions may properly be cited as persuasive,  
28 although not binding, authority. (Cal. Rules of Court, rule 8.1115; *In re Farm Raised Salmon  
Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18; see *Landmark Screens, LLC v. Morgan, Lewis &  
Bockius, LLP* (2010) 183 Cal.App.4th 238, 251.)

1 In the present case, the delay was even more unreasonable and the prejudice even more  
2 profound. AVEK, all while represented by the Brunick firm and presumably aware of the alleged  
3 conflict, waited *ten years* to move for disqualification. During that time, BB&K attorney Michael  
4 Riddell, who was not involved in the litigation, notified AVEK that there could be a conflict and  
5 sought a written waiver, to which AVEK voiced no objection and continued to employ Mr.  
6 Riddell for other matters and even re-employed him when it was dissatisfied with representation  
7 on other matters by the Brunick firm. (AVEK motion, Exh. "E" to Frank S. Donato declaration in  
8 support of AVEK motion, Riddell email to AVEK General Manager Flore dated September 24,  
9 2015.) And, without explanation, AVEK even delayed several months after termination of Mr.  
10 Riddell's representation before filing this motion. All those years, BB&K expended a huge  
11 amount of resources in litigating this complex group of cases, gathered a storehouse of  
12 information, and exercised its considerable expertise in an esoteric area of the law, often to the  
13 benefit of AVEK. Other litigants have relied on BB&K's expertise to take the lead in protecting  
14 their mutual interests. For new counsel to start over at this late date in the proceedings would be  
15 an extremely costly undertaking for District No. 40, and many other parties, and would almost  
16 certainly cause major delays in moving the cases forward. (See *In re Marriage of Zimmerman*  
17 (1993) 16 Cal.App.4th 556, 565 ["To deprive respondent of the counsel of his choice at this late  
18 stage in the proceedings, where no unfair disadvantage to appellant is indicated, would, we  
19 believe, cause undue hardship to respondent without serving the purpose of the disqualification  
20 remedy"].)

21 As noted, AVEK cites some authority for the proposition that disqualification of counsel  
22 cannot be waived even when the motion is brought after an extremely long passage of time.  
23 However, "the majority view appears to be that attorney disqualification can be impliedly waived  
24 by failing to bring the motion in a timely manner." (*Liberty National Enterprises, L.P. v.*  
25 *Chicago Title Ins. Co., supra*, 194 Cal.App.4th at pp. 844-845.) "Under California law, if a  
26 former client 'inexcusably postpone[s] objections,' the court may find delay 'forecloses the  
27 former client's claim of conflict.' [Citation.] When the present client 'offers prima facie evidence  
28 of an unreasonable delay by the former client in making the motion and resulting prejudice to the

1 current client,’ ‘[t]he burden shifts back to the party seeking disqualification to justify the delay.’”  
2 (*Koloff, supra*, 2014 WL 2590209, at \*4, quoting *River West, Inc. v. Nickel, supra*, 188  
3 Cal.App.3d at 1309.) Here, AVEK has offered zero explanation for its decade-long delay in  
4 bringing this motion.

5 **2. District No. 40 would be severely prejudiced.**

6 A second equitable consideration is the fact that disqualification motions are “especially  
7 prone to tactical abuse because disqualification imposes heavy burdens on both the clients and  
8 courts: clients are deprived of their chosen counsel, litigation costs inevitably increase and delays  
9 inevitably occur.” (*City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 23.)  
10 “Consequently, judges must examine these motions ‘carefully to ensure that literalism does not  
11 deny the parties substantial justice.’” (*SpeeDee, supra*, 20 Cal.4th at p. 1144.) AVEK is carrying  
12 literalism to the extreme. It sat by for ten years without questioning BB&K’s participation in the  
13 litigation. AVEK has always had its own counsel. Even before AVEK finally terminated BB&K,  
14 Mr. Riddell declined to participate in this litigation in any way. AVEK offers no evidence that  
15 BB&K had actual knowledge of any of AVEK’s litigation strategy or confidential  
16 communications with the Brunick firm. Indeed, AVEK does not seem to care about its  
17 confidential communications, because it attaches to its motion a series of emails that could be  
18 construed as confidential communications. There is, therefore, no genuine likelihood that at this  
19 very late date the status or alleged misconduct of BB&K will affect the outcome of the  
20 proceedings.

21 AVEK’s reliance on the “hot potato” rule is misplaced. The seminal hot potato case,  
22 *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, held that counsel  
23 cannot cure a dual representation conflict by dropping its relationship with one client in favor  
24 another client. (*Id.* at p. 1060.) That’s not this case. BB&K did not drop AVEK in favor of  
25 another client. When AVEK apparently saw a tactical reason to do so, it dropped its long-time  
26 counsel, Mr. Riddell. AVEK had the advantage of BB&K’s participation in this case on behalf of  
27 other parties for years, and continued to do so even after it terminated its relationship with Mr.  
28 Riddell. (Dunn Decl., ¶ 52.) It was only after terminating BB&K from all representation that

1 AVEK brought its disqualification motion. Again, “[i]t is well settled that a former client who is  
2 entitled to object to an attorney representing an opposing party on the ground of conflict of  
3 interest but who knowingly refrains from asserting it promptly is deemed to have waived that  
4 right.” (*Trust Corp. of Montana v. Piper Aircraft Corp.* (9th Cir. 1983) 701 F.2d 85, 87.)

5 As noted, *Flatt v. Superior Court*, *supra*, 9 Cal.4th 275, cited numerous times by AVEK,  
6 does not address the waiver issue at all, which is not surprising as it does not involve a  
7 disqualification motion. But *Flatt* does emphasize that a major consideration in a disqualification  
8 setting is the potential that a client might discover from a source other than the attorney that the  
9 client is being sued by the same attorney. (*Id.* at p. 290.) Again, that is not this case. AVEK has  
10 always had other counsel in this litigation, always knew that BB&K represented other parties in  
11 these proceedings, and, if there was ever any doubt as to its knowledge, was informed by Mr.  
12 Riddell in 2008 and asked for written consent, after which AVEK consented by its conduct.  
13 (AVEK motion, Exh. “C,” memorandum dated October 4, 2004 by Mike Riddell to the AVEK  
14 General Manager and Board of Directors.)

15 **3. There is no prophylactic interest served in disqualifying BB&K.**

16 As noted, disqualification is warranted only where it will have a prophylactic effect on the  
17 litigation. AVEK does not come close to making out any case for barring BB&K from further  
18 participation in this action. It does not suggest what, if any, confidential information BB&K  
19 might have obtained, and as noted in the declaration of Jeffrey Dunn, the evidence is to the  
20 contrary—Mr. Riddell and District No. 40’s lawyers did not share confidential information  
21 concerning the case. (Dunn Decl., ¶ 53.) Indeed, AVEK cannot even establish that District  
22 No. 40 and AVEK will have any ongoing dispute in this litigation, and in fact their interests are  
23 aligned as to remaining claims.

24 Nor is there any generalized public interest served in disqualifying BB&K in the context  
25 of this case. This is not a case where there was an inadvertent, belated discovery of a potential  
26 conflict of interest by a client who promptly brought its concerns regarding alleged loyalty (or  
27 lack thereof) of its counsel to the attention of the court through a motion for disqualification. To  
28 the contrary, AVEK was well aware of the alleged conflict for over a decade, reaped the benefits

1 of BB&K's representation of District No. 40, only to seek disqualification as a tactical matter  
2 years after any client with legitimate concerns would have acted to safeguard its interests with  
3 respect to its relationship with its attorneys. Moreover, AVEK is not an unsophisticated client,  
4 but an entity with long-standing litigation experience, represented by independent counsel in this  
5 litigation for the past 10 years. If anything does violence to the public interest, it would be to  
6 allow AVEK to profit from its own calculated, gross delay and exploitation of BB&K's  
7 representation of District No. 40, and to inflict the substantial cost of retaining new counsel on  
8 District No. 40 and the public, at the 11th hour.

9 **CONCLUSION**

10 Motions to disqualify counsel are prone to abuse and must be carefully scrutinized to  
11 avoid injustice. (*Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4th 410, 434.) AVEK  
12 has proffered no good reason why, at this very late date, BB&K should be disqualified from this  
13 case. To the contrary, it would inequitable to do so.

14 AVEK's motion should be denied.

15 Respectfully submitted,

16 Dated: November 22, 2016

BEST BEST & KRIEGER LLP

17  
18  
19 By 

ERIC L. GARNER  
JEFFREY V. DUNN  
WENDY Y. WANG

Attorneys for  
LOS ANGELES COUNTY  
WATERWORKS DISTRICT NO. 40

**PROOF OF SERVICE**

I, Kerry V. Keefe, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 18101 Von Karman Avenue, Suite 1000, Irvine, California, 92612. On November 22, 2016, I served the within document(s):

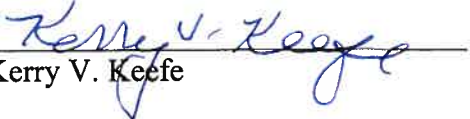
**OPPOSITION TO ANTELOPE VALLEY EAST – KERN WATER AGENCY’S  
MOTION TO DISQUALIFY BEST BEST & KRIEGER AS LEGAL COUNSEL IN  
ANTELOPE VALLEY GROUNDWATER CASES**

- by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.
- by causing personal delivery by ASAP Corporate Services of the document(s) listed above to the person(s) at the address(es) set forth below.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery by Federal Express following the firm’s ordinary business practices.

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 in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on November 22, 2016, at Irvine, California.

  
Kerry V. Keefe