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to Gov't. Code § 6103

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Attorneys for Cross-Defendant/Cross-Complainants,
ANTELOPE VALLEY EAST – KERN WATER AGENCY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding
Special Title (Rule 1550(b))

Judicial Council Coordination Proceeding No. 4408

**ANTELOPE VALLEY
GROUNDWATER CASES**

Santa Clara Case No. 1-05-CV-049053
Assigned to the Honorable Jack Komar
Department 17C

Including **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

**DECLARATION OF JAMES J. BANKS IN
SUPPORT OF MOTION TO DISQUALIFY
BEST BEST & KRIEGER AS LEGAL
COUNSEL IN ANTELOPE VALLEY
GROUNDWATER CASES**

**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

**DATE: October 18, 2016
TIME: 10:00 a.m.
DEPT: Room 200
Stanley Mosk Courthouse
Los Angeles, California**

**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

Complaint Filed: 9/22/2005
Trial Date:

AND RELATED ACTIONS.

1 I, JAMES J. BANKS, declare:

2 1. I am an attorney at law licensed by the State of California and admitted to practice before
3 this Court. I am a member of Banks & Watson and counsel of record for Antelope Valley East - Kern
4 Water Agency ("AVEK") in this action. The statements of fact made in this declaration are made of my
5 own personal knowledge. If called upon and sworn as a witness in this proceeding, I could and would
6 competently testify to the matters set forth herein.

7 2. Attached hereto as Exhibit A is a true copy of my January 27, 2016 letter to Best Best &
8 Kreiger ("BB&K") demanding that BB&K voluntarily recuse itself from the above-captioned litigation.

9 3. Attached hereto as Exhibit B is a true copy of a letter dated February 15, 2016, from
10 counsel for BB&K advising me that BB&K would not voluntarily recuse itself from this litigation, thus,
11 necessitating the instant motion.

12 4. I am informed and believe that Mr. David Corrick of our firm coordinated the hearing
13 date for this motion with Ms. Wendy Chang, counsel to Best Best & Kreiger. A true copy of the email
14 exchange is hereto attached as Exhibit C.

15 I declare under the penalty of perjury under the laws of the State of California that the foregoing
16 is true and correct. Executed this 17th day of August, 2016, at Sacramento, California.

17
18 
19 JAMES J. BANKS

EXHIBIT A

BANKS & WATSON
ATTORNEYS

901 F STREET, SUITE 200 • SACRAMENTO, CALIFORNIA 95814-0733
TELEPHONE 916 325.1000 • FAX 916 325.1004
WWW.BANKSFIRM.COM

January 27, 2016

JAMES J. BANKS

VIA ELECTRONIC & FIRST CLASS MAIL

Mr. Michael T. Riddell
(Michael.Riddell@bbklaw.com)
Best Best & Krieger
3390 University Avenue
Riverside, CA 92501

Re: Antelope Valley East - Kern Water Agency

Dear Mr. Riddell:

We write on behalf of Antelope Valley East – Kern Water Agency (“AVEK”) to inform you and Best Best & Krieger (“BB&K”) that BB&K’s concurrent representation of: (1) AVEK as AVEK’s general counsel for many years; and (2) the Los Angeles County Water Works District No. 40 (“District 40”) in the coordinated proceeding entitled *Antelope Valley Groundwater Cases*, Santa Clara Superior Court Case No. 1-05-CV-049053 (“Action”), constitutes clear breaches of your duties of loyalty and of confidentiality to AVEK. Because BB&K’s dual representation of AVEK and District 40 constituted a direct and simultaneous conflict of interest, BB&K should immediately recuse itself from its representation of District 40 in the Action. BB&K undertook this conflicting representation without obtaining the informed written consent of AVEK as required by the Rules of Professional Conduct and applicable law. For the reasons set forth *infra*, and pursuant to the Rules of Professional Conduct and other applicable law, AVEK insists that BB&K withdraw as counsel to District No. 40 in the Action.

As part of its representation of District 40, BB&K argued various positions directly contrary to AVEK’s interests, both as to AVEK’s interests as a party to the Action and to AVEK’s interests as a client with an ongoing, long-term attorney-client relationship with BB&K. By choosing to represent District 40 in the Action, BB&K violated its duty of loyalty to AVEK.

As one instance where BB&K has advocated for its client District 40 in a manner adverse to its client AVEK’s interests, AVEK and District 40 have made exclusive claims to ownership of “return flows” resulting from state water project (“SWP”) water that AVEK imports into the Antelope Valley groundwater basin. These arguments regarding

the “return flows” issue demonstrate a direct, concurrent conflict between the interests of AVEK and those of District 40:

- In the Sixth Cause of Action of its cross-complaint filed in the Action, dated January 18, 2006, District 40, as represented by BB&K, asserted that it and other similarly situated customers of AVEK had the exclusive right to use the return flows from the SWP water that AVEK sells and delivers to them, to the exclusion of AVEK. (See Cross-Complaint of Municipal Purveyors for Declaratory Relief and Adjudication of Water Rights dated, January 18, 2006, at ¶¶ 26, 69 and 71.)
- In its 2006 cross-complaint in the Action, AVEK asserted that AVEK alone is entitled to recapture and use the return flows resulting from the SWP water it imports into the area of adjudication and then sells to its customers. (See Cross-Complaint of AVEK for Declaratory Relief, dated August 30, 2006, at ¶¶ 35-40.) This basic dispute between AVEK and District 40 as to return flows has been extant in the Action since at least 2006.
- In both 2013 and 2015, the numerous parties to the Action litigated AVEK’s claim that it was entitled to the exclusive right to use the pertinent return flows. One party contesting AVEK’s claims was District 40, represented by BB&K. BB&K opposed AVEK’s Motion for Summary Adjudication principally arguing that AVEK does not have groundwater rights in the basin or the right to return flows. (See Opposition to AVEK’s Motion for Summary Adjudication, dated December 27, 2013, at 6:25-8:3.)
- AVEK made the same argument in its trial brief filed in September 2015, prefatory to the Phase Six trial in the captioned litigation. District 40 filed its own trial brief in which it made arguments contrary to AVEK’s position regarding its entitlement to return flows. (See Public Water Suppliers’ Phase Six Trial Briefs, dated September 22, 2015, 3:4-8:6.)
- Some of the many parties to the Action entered into a compromise and proposed stipulated judgment which allocates return flow rights among all of the parties, including AVEK and District 40. Certain non-stipulating parties may appeal that judgment. There likely will be further proceedings to effectuate the settlement.

BB&K’s representation of two distinct parties who both sought the same “return flows” rights to the same water constitutes an actual, simultaneous conflict of interest. As the parties currently face continued litigation and likely appeals in the Action, these conflicts will continue in the future. Because BB&K has concurrently represented District 40 and advocated against its concurrent client AVEK’s interests, BB&K has breached its

duty of loyalty to AVEK. It is subject to mandatory disqualification. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284-286.)

A second point of direct conflict between AVEK and District 40 in the Action – while both were concurrently represented by BB&K – involved an effort by BB&K and District 40 to shift its liability for any attorneys’ fees award imposed against District 40 (and other similarly situated parties) to other parties to the Action against whom the attorneys’ fees sanction was not sought, including AVEK. In response to this argument by BB&K and District 40, AVEK was required to file an opposition to BB&K’s motion for equitable apportionment:

- In its Brief for Equitable Apportionment of Willis Class Fee Award dated March 3, 2011, BB&K (on behalf of District 40) argued that any attorneys’ fees award imposed against District 40 should be redistributed to other parties, including AVEK: “the Court should apportion fees to each party [which would include AVEK] that pumps from the Antelope Valley Groundwater Basin (“Basin”) based on a pro rata share of their pumping.” (Los Angeles County Waterworks District No. 40’s Brief Re Equitable Apportionment of Willis Class Fee Award, dated March 9, 2011, at 1:7-9.)
- AVEK, in its opposition to this attempt by BB&K and District 40 to force AVEK to pay some part of an attorneys’ fees award imposed against District 40, objected that “based upon Waterworks 40’s request, AVEK will be exposed to thousands of dollars in attorney’s fees based on its current pumping.” (Antelope Valley-East Kern Water Agency’s Opposition to Los Angeles County Waterworks District No. 40’s Brief Re Equitable Apportionment of Willis Class Fee Award, dated March 18, 2011, at 3:1-2) In direct opposition to District 40’s position, AVEK argued that “the Court should deny Waterworks 40’s request as to AVEK’s requirement to pay any portion of the *Willis Class* attorney fees.” (*Id.* at 3:19-20.)
- In its Order on this attorneys’ fees award issue, the Court awarded \$1,839,494 in attorneys’ fees to the Willis Class and against District 40 and other similarly situated public water purveyors. (Order After Hearing on Motion by Plaintiff Rebecca Lee Willis and the Class for Attorneys’ Fees, Reimbursement of Expenses and Class Representative Incentive Award, dated May 4, 2011, at 11:21-12:2.) The Court denied BB&K and District 40’s equitable apportionment motion, stating that imposing such a sanction against parties other than those named by the Willis Class (including AVEK) “would be going beyond the scope of the requested relief.” (*Id.* at 9: 16-17.)

Again, with respect to this separate issue regarding potential redistribution of an attorneys' fees award, BB&K has asserted positions on behalf of its client District 40 that directly conflict with the interests of its concurrent client, AVEK. As both of these examples demonstrate, by representing District 40 in the Action while it represented AVEK as general counsel, BB&K had taken on the simultaneous representation of two parties who have a direct, active and indisputable conflict of interest.¹

As a result of such misconduct, BB&K is in breach of its obligations under Rules of Professional Conduct, rule 3-310(C). This rule provides:

- (C) A member shall not, without the informed written consent of each client:
 - (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
 - (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
 - (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

See also ABA Model Rule 1.7 (“(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client . . .”).

BB&K's simultaneous representation of AVEK and District 40 represents a clear violation of rule 3-310(C) and applicable California law: despite the prohibition against representing two clients with direct conflicts of interest, BB&K has undertaken to represent AVEK as its general counsel and at the same time represent District 40 as its litigation counsel in the Action, an entity whose interests in the Action run clearly and concurrently adverse to AVEK. (*See rule 3-310(C)*; see also *Mindscape, Inc. v. Media Depot, Inc.* (ND CA 1997) 973 F.Supp. 1130, 1132 [ordering disqualification of attorney who simultaneously represented clients with adverse interests].) In fact, BB&K's concurrent

¹ Your September 5, 2015 email to Mr. Flory underscores the inadequacy of BB&K's response to a problem wholly of its own making. You argue AVEK purportedly created its own conflict because it allegedly reversed its position regarding the return rights issue. It was BB&K's obligation to seek AVEK's informed, written consent under Rules of Professional Conduct, rule 3-310(C) because that representation at a minimum presented at least a potential conflict at the time BB&K elected to commence its representation of District 40. BB&K admittedly did not do so. BB&K cannot foist its failure to comply with rule 3-310 on AVEK.

representation of AVEK and District 40 constitutes the “paradigmatic instance of such prohibited dual representation—one roundly condemned by courts and commentators alike—[. . .] where the attorney represents clients whose interests are *directly* adverse in the same litigation.” (*Flatt v. Superior Court*, *supra*, 9 Cal.4th at 284 n.3 (original emphasis).) BB&K’s joint representation of two clients with actively conflicting and mutually exclusive interests in the same matter constitutes a violation of BB&K’s duty of absolute loyalty to AVEK, as well as of its concomitant duty to preserve AVEK’s secrets. (*Id.* at 284-286; *M’Guinness v. Johnson* (2015) 243 Cal.App.4th. 602, 613-615 [discussing the duties of loyalty and confidentiality]; *Truck Ins. Exchange v. Fireman’s Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1056-1057 [stating that “if this duty of undivided loyalty is violated, public confidence in the legal profession and the judicial process is undermined.” (omitting quotations)]).)

Moreover, because BB&K did not obtain AVEK’s informed written consent, or refer AVEK to independent counsel to evaluate whether AVEK should consent to BB&K’s representation of District 40, it is subject to per se or automatic disqualification. (*Flatt v. Superior Court*, *supra*, 9 Cal.4th at 284 [“in all but a few instances, the rule of disqualification in simultaneous representation cases is a *per se* or ‘automatic’ one.”]; *M’Guinness v. Johnson*, *supra*, 243 Cal.App.4th. at 614 [“This per se rule is appropriate” in instances of concurrent representation”].) Since BB&K’s simultaneous representation falls squarely within the circumstances that trigger the rule of per se disqualification, no remedy short of its voluntary withdrawal or involuntary disqualification is sufficient to protect AVEK’s interests. (*Flatt v. Superior Court*, *supra*, 9 Cal.4th at 284 [discussing the per se rule]; *Concat LP v. Unilever, PLC* (ND CA 2004) 350 F.Supp.2d 796, 822 [“Although an ethical wall may, in certain limited circumstances, prevent a breach of confidentiality, it cannot, in the absence of an informed waiver, cure a law firm’s breach of its duty of loyalty to its client.”].) All attorneys at BB&K should withdraw from any further representation of District 40 in the Action. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 847-848 [normally an attorney’s conflict is imputed to the entire law firm as a whole]; see also ABA Model Rule 1.10(a) [“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so.”]; see also Rest.3d Law Governing Lawyers, § 123 - Imputation of Conflict of Interest to Affiliated Lawyer.)

Finally, although some parties to this Action have stipulated to settlement of certain claims, that settlement does not resolve the problem of BB&K’s simultaneous representation, nor does it mitigate the application of the mandatory disqualification rule. (*State Farm Mutual Auto Insurance Co. v. Federal Insurance Co.* (1999) 72 Cal.App.4th 1422, 1432-1433 [“although this fortuitous settlement acted to sever [counsel’s] relationship with its preexisting client, it did not remove the taint of a three-month concurrent representation.”] There also remains the possibility of appeal of various issues raised to date, including the right to return flows from imported SWP water. Consequently,

Mr. Michael T. Riddell
January 27, 2016
Page 6

the mandatory disqualification rule applies.) For all of these reasons, BB&K should withdraw from the Action immediately.

We would request that you respond to this letter in writing by no later than February 14, 2016, confirming that BB&K will withdraw as counsel for District 40 in the Action by no later than February 21, 2016. If BB&K chooses not to comply with this request, AVEK reserves its right to seek any and all legal remedies for BB&K's breach of its ethical and legal obligations toward AVEK, including without limitation, filing a motion to disqualify BB&K from representing any party in the Action.

Mr. Riddell, your anticipated courtesy and cooperation are appreciated.

Very truly yours,



JAMES J. BANKS

JJB:jdy

cc: (via electronic mail only)
Mr. Leland P. McElhaney

EXHIBIT B

HINSHAW

& CULBERTSON LLP

Wendy Wen Yun Chang
310-909-8006
wchang@hinshawlaw.com

ATTORNEYS AT LAW

11601 Wilshire Boulevard
Suite 800
Los Angeles, CA 90025-1744

(310) 909-8000
(310) 909-8001 (fax)
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February 15, 2016

VIA EMAIL AND US MAIL

James J. Banks, Esq.
BANKS & WATSON
901 F. Street Suite 200
Sacramento, CA 95814-0733

**Re: Antelope Valley Groundwater Cases, Santa Clara Superior
Court Case Number 1-05-CV-049053**

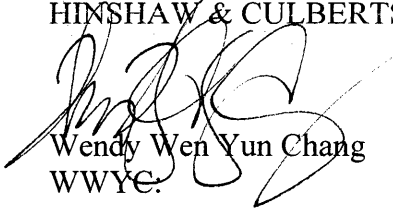
Dear Mr. Banks,

This office represents Best Best & Krieger LLP ("BBK") in relation to the issues raised in your letter dated January 27, 2016. We have carefully considered the issues raised in the January 27, 2016 letter. BBK respectfully declines to withdraw from the representation of Los Angeles County Water Works District No. 40 ["District 40"] in the coordinated proceeding entitled *Antelope Valley Groundwater Cases*, Santa Clara Superior Court Case Number 1-05-CV-049053 ["Action."] At all times, AVEK has been represented by Attorney Bill Brunick in the Action, and that representation has existed unabated from AVEK's first appearance in the Action in summer, 2006 to the present day.

Please direct all further communications to me regarding this matter.

Sincerely,

HINSHAW & CULBERTSON LLP



Wendy Wen Yun Chang
WWYC:

EXHIBIT C

David Corrick

From: David Corrick
Sent: Monday, August 01, 2016 8:43 AM
To: 'wchang@hinshawlaw.com'
Cc: Esther E. Poma; James J. Banks; Janna Yoshida
Subject: RE: AVEK motion

Great. We will go ahead and schedule. Thanks Wendy.

From: wchang@hinshawlaw.com [mailto:wchang@hinshawlaw.com]
Sent: Friday, July 29, 2016 4:42 PM
To: David Corrick
Cc: Esther E. Poma; James J. Banks; Janna Yoshida
Subject: RE: AVEK motion

Thanks for following up.

I think that's ok.

Thanks.

Best
Wendy

Wendy Wen Yun Chang
Partner
Hinshaw & Culbertson LLP
11601 Wilshire Blvd., Suite 800, Los Angeles, CA 90025
Tel: 310-909-8000 | Fax: 310-909-8001
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Certified Specialist in Legal Malpractice Law by the California State Bar's Board of Legal Specialization
twitter: @wendychang888

HINSHAW

& C U L B E R T S O N L L P

Building on the Barger Tradition

From: David Corrick <dcorrick@bw-firm.com>
To: "wchang@hinshawlaw.com" <wchang@hinshawlaw.com>,
Cc: "Esther E. Poma" <epoma@bw-firm.com>, "James J. Banks" <jbanks@bw-firm.com>, Janna Yoshida <jyoshida@bw-firm.com>
Date: 07/29/2016 04:32 PM
Subject: RE: AVEK motion

Hey there Wendy. Any word? We really need to go ahead and get this thing set. DC

From: wchang@hinshawlaw.com [mailto:wchang@hinshawlaw.com]

Sent: Wednesday, July 27, 2016 4:28 PM
To: David Corrick
Cc: Esther E. Poma; James J. Banks; Janna Yoshida
Subject: Re: AVEK motion

Thanks David. Let me check with folks on my side.

Wendy Wen Yun Chang
Partner
Hinshaw & Culbertson LLP
11601 Wilshire Blvd., Suite 800, Los Angeles, CA 90025
Tel: 310-909-8000 | Fax: 310-909-8001
E-mail: wchang@hinshawlaw.com
Certified Specialist in Legal Malpractice Law by the California State Bar's Board of Legal Specialization
twitter: @wendychang888

HINSHAW

& C U L B E R T S O N L L P

Building on the Barger Tradition

From: David Corrick <dcorrick@bw-firm.com>
To: "wchang@hinshawlaw.com" <wchang@hinshawlaw.com>,
Cc: "James J. Banks" <jbanks@bw-firm.com>, "Esther E. Poma" <epoma@bw-firm.com>, Janna Yoshida <jyoshida@bw-firm.com>
Date: 07/27/2016 04:27 PM
Subject: AVEK motion

Hi Wendy:

We just learned that the only date the court has availability in October is the 18th. Please let us know if you object to that date. Otherwise, we will go ahead and schedule. Thanks. DC

W. DAVID CORRICK
Associate Attorney
BANKS & WATSON
901 F Street, Suite 200
Sacramento, California 95814-2403
(916) 325-1000
(916) 325-1004 (facsimile)
<http://www.bw-firm.com>

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1 **BANKS & WATSON**
2 **CASE NAME: ANTELOPE VALLEY GROUNDWATER CASES**
3 **COURT: Santa Clara County Superior Court**
4 **CASE NO: CGC-13-533134 (JCCP No. 4408)**

5 **PROOF OF SERVICE**

6 STATE OF CALIFORNIA)
7) ss.
8 COUNTY OF SACRAMENTO)

9 At the time of service, I was over 18 years of age and not a party to this action. My business
10 address is 901 F Street, Suite 200, Sacramento, California 95814. My electronic address is jyoshida@bw-
11 firm.com.

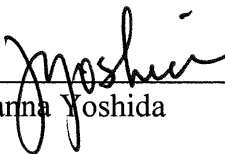
12 On August 17, 2016, I served the within copy of:

13 **DECLARATION OF JAMES J. BANKS IN SUPPORT OF MOTION TO DISQUALIFY BEST**
14 **BEST & KRIEGER AS LEGAL COUNSEL IN ANTELOPE VALLEY GROUNDWATER CASES**

15 on the interested parties in this action served in the following manner:

16 (✓) **BY ELECTRONIC FILING** – I caused the document(s) listed above to be transmitted *via*
17 Odyssey File & Serve to all parties appearing on the electronic services list for the Antelope
18 Valley Groundwater matter; proof of electronic filing through Odyssey File & Serve is then
19 printed and maintained in our office. Electronic service is complete at the time of transmission.

20 I declare under penalty of perjury under the laws of the State of California that the foregoing is
21 true and correct. Executed on August 17, 2016, at Sacramento, California.

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Janna Yoshida