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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

**MEMORANDUM 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

Judge: Hon. Jack Komar
Complaint Filed: 9/22/2005
Trial Date:

AND RELATED ACTIONS.

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1 **I. INTRODUCTION**

2 All clients have a right to expect undivided loyalty from their counsel. Those who hold fiduciary
3 duties “[are] held to something stricter than the morals of the marketplace. Not honesty alone, but the
4 punctilio of an honor the most sensitive, is then the standard of behavior” (*Meinhard v. Salmon*
5 (N.Y. 1928) 249 N.Y. 458, 464.) Unfortunately, in this matter, Best Best & Krieger (“BB&K”) has for
6 years maintained litigation positions on behalf of one of its clients that are absolutely antagonistic to
7 those of the Antelope Valley East - Kern Water Agency (“AVEK”), another of its clients. AVEK seeks
8 an order from this court disqualifying BB&K from representing the Los Angeles County Waterworks
9 District No. 40 (“District 40”), or any other party, in this litigation.¹

10 BB&K served as general counsel to AVEK beginning in 1987 and continuing, almost
11 uninterrupted, until January of 2016. BB&K attorneys had open access to all aspects of AVEK’s
12 business and operations. In 2004, BB&K undertook representation of District 40² in this large, highly
13 complex multi-party consolidated legal proceeding which has come to be known as the Antelope Valley
14 Groundwater (“AVG”) cases. As soon as BB&K assumed District 40’s representation, a conflict
15 between AVEK and District 40 arose. Although the conflict was initially only a potential conflict,
16 within a relatively short period of time the potential conflict developed into an actual conflict with
17 District 40 taking positions in the litigation antagonistic and adversarial to AVEK’s interests.

18 BB&K never obtained the informed written consent of AVEK (or ostensibly District 40), which
19 would enable the firm to represent District 40 in the AVG cases. BB&K should be precluded from
20 representing any party to this litigation, including but not limited to District 40.

21 **II. STATEMENT OF FACTS**

22 AVEK is a state water contractor that imports water from Northern California into the Antelope
23 Valley Groundwater Basin (“the Basin”). AVEK was formed by a special act of the California
24 Legislature in 1959. Concerned citizens of the Antelope Valley sponsored the enabling legislation due
25

26 ¹ Each court in this state is vested with the inherent power “[t]o control in furtherance of justice, the conduct of its ministerial
27 officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining
thereto.” (Code Civ. Proc. § 128(a)(5).)

28 ² BB&K also undertook the representation of Rosamond Community Services District (“RCSD”) at that time. Although
BB&K no longer represents RCSD, there are issues around that representation which are delineated, *infra*.

1 to concerns over the lowering water table secondary to excessive groundwater pumping. Construction
2 of the State Water Project ("SWP") and routing of the East Branch of the California Aqueduct along the
3 southern rim of the Antelope Valley created an opportunity for the Antelope Valley region to obtain an
4 imported water supply, which would obviate the need for excessive pumping. (See Declaration of Frank
5 S. Donato ("Donato Decl.") 2:9-12; filed herewith.)

6 BB&K, with a history spanning more than a century, has eight offices in California and one
7 office in Washington, D.C. BB&K is one of the largest law firms in California employing upwards of
8 200 attorneys.

9 In 1962, AVEK entered into a water supply contract with the State of California to import
10 specified amounts of SWP water. In 1972, the East Branch of the California Aqueduct became
11 operational. AVEK supplies water primarily on a wholesale basis to retail water purveyors who then
12 deliver the water to their customers. District 40 is one such retailer. (Donato Decl., 2:13-17.)

13 The bulk of the SWP water AVEK imports to the Basin is treated and distributed to its customers
14 through the Domestic-Agricultural Water Network ("DAWN") project facilities. Most of the water is
15 eventually used for agricultural, commercial, and municipal purposes. AVEK's role is vital to the
16 region because the Basin has been in a state of water overdraft since at least the 1940s. (Donato Decl.,
17 2:20-21.)

18 **A. As AVEK's General Counsel for Almost Twenty Years, BB&K had Detailed**
19 **Knowledge of AVEK's Confidential and Proprietary Information.**

20 On or about December 24, 1986, attorney Michael T. Riddell ("Riddell"), then a partner at
21 BB&K, submitted a proposal to AVEK for purposes of renewing the firm's association with AVEK as
22 its general counsel. (Donato Decl., Ex. A.) In January of 1987, the AVEK board voted to engage
23 BB&K as its general counsel. In a letter to the AVEK board dated March 17, 1987, Riddell confirmed
24 BB&K's retention as general counsel to AVEK. (Donato Decl., Ex. B.)

25 Over the years, Riddell and other BB&K attorneys have provided AVEK with the typical array
26 of general counsel services, including employment matters. Riddell attended AVEK board meetings.
27 He was privy to the most intimate details of AVEK's operations and procedures. With the exception of
28 an approximate one-year period from 2006-07, Riddell served continuously as AVEK's general counsel

1 until January of 2016. (Donato Decl., 3:1-5.) The circumstances surrounding Riddell's departure as
2 general counsel are discussed, *infra*.

3 **B. BB&K Chose to Represent District 40 in the Antelope Valley Groundwater**
4 **Litigation.**

5 At its most basic level, the AVG litigation sought to assign, clarify, and oversee certain water
6 disputes within the Basin. The interested parties include landowners, special districts, mutual water
7 companies, the federal government, and an eight-member group of entities collectively known as the
8 "Public Water Suppliers" ("PWS"). District 40 and Rosamond Community Services District ("RCSD")
9 are included within the PWS collective.³ BB&K attorneys were involved in representing parties in the
10 AVG litigation from its inception. Specifically, two BB&K partners, Jeffrey V. Dunn ("Dunn") and
11 Eric L. Garner ("Garner") undertook representation of District 40 and RCSD. Throughout their
12 representation, Riddell continued to serve as AVEK's general counsel.

13 **C. BB&K Knowingly Undertook Representation of Potentially Adverse Parties in the**
14 **AVG Litigation Without Obtaining AVEK's Informed Written Consent.**

15 In a memorandum dated October 4, 2004, Riddell advised the AVEK board of imminent
16 litigation to be undertaken by the Los Angeles County Waterworks Districts ("Districts") to seek a
17 judicial determination of groundwater rights in the Antelope Valley. Riddell stated his understanding at
18 the time to be that the Districts did not intend to name AVEK as a defendant in the litigation. He noted
19 the possibility of AVEK being named as a cross-defendant, however, and further stated that if AVEK
20 were to be so named, "[W]e would need to request a *conflict waiver* from the AVEK Board in order to
21 appear on AVEK's behalf since we also serve as either *general counsel or special counsel to a couple of*
22 *other parties* that will be involved in the litigation." (Donato Decl., Ex. C; emphasis added.)

23 Clearly then, when BB&K decided to represent District 40 and RCSD, the firm was well aware
24 of its new clients' potential conflict of interest with AVEK. In a September 4, 2015 email from Riddell
25 to former AVEK general manager Dan Flory, Riddell acknowledged that around the time the AVG
26 litigation was initiated, Garner approached him and asked if he thought taking on District 40 and RCSD

27
28 ³ The other members of the PWS are: Palmdale Water District, City of Palmdale, City of Lancaster, Quartz Hill Water District, Little Rock Creek Irrigation District, and California Water Service Company.

1 as clients would create a conflict with AVEK. Riddell responded by saying, he “didn’t think so, because
2 AVEK had made it very clear that [it] wanted to stay as far away from groundwater issues as
3 possible...” Riddell added, “Maybe I should have foreseen that AVEK’s position on that issue might
4 change...” (Donato Decl., Ex. E.)

5 In sum, BB&K attorneys recognized the issue of a potential conflict between their clients at the
6 inception of the AVG litigation. By 2006, the potential conflict between AVEK and District 40/RCSD
7 became an actual conflict. Throughout, BB&K utterly failed to obtain AVEK’s informed written
8 consent. Prior to and after AVEK entered the AVG litigation, Riddell advised the board that there was
9 no real conflict of interest with his representation of as general counsel to AVEK even though BB&K
10 attorneys were representing potential and actual adverse parties in the AVG litigation. (Donato Decl.,
11 3:9-12.)

12 **D. AVEK was Forced to Enter the Antelope Valley Groundwater Litigation in a**
13 **Posture Conflicting with that of District 40.**

14 On January 18, 2006, the BB&K litigation team filed a cross-complaint for declaratory and
15 injunctive relief and the adjudication of water rights on behalf of the PWS, including District 40 and
16 RCSD. (Declaration of Leland P. McElhaney (“McElhaney Decl.”) Ex. A filed herewith.) Paragraph 26
17 of the pleading states “certain Public Water Suppliers” purchase imported State Water Project (SWP)
18 water from AVEK, and without the PWS, the imported water would not reach the Basin. In their sixth
19 cause of action, the PWS parties claimed *sole and exclusive* rights to recapture all return flows⁴
20 attributable to imported SWP water.⁵ This claim is and was contrary to AVEK’s interests and position.
21 (McElhaney Decl., 1:16-21.)

22 Although AVEK was not actually named as a party in the January 18, 2006 cross-complaint, the
23 cross-complaint sought to advance water right claims on behalf of the PWS inimical to AVEK’s
24 interests. As a result, AVEK was forced to retain outside counsel and appear in the AVG litigation.
25 (McElhaney Decl., 1:7-10.) Consequently, on August 30, 2006, AVEK filed its own cross-complaint for

26 ⁴ After water is put to use, a portion of it percolates into the ground and eventually reaches and augments the Basin’s
27 groundwater supply. That portion of the water is referred to as “return flows.”

28 ⁵ Of course, the PWS position ignores the fact that if AVEK did not import the water in the first instance, there would be no
water for the PWS parties to sell.

1 declaratory and injunctive relief against a host of cross-defendants, including District 40, RCSD, and the
2 other PWS members. (McElhaney Decl., Ex. B.) In its fourth cause of action, AVEK asserted its claim
3 that as the importer of supplemental SWP water, AVEK had the *sole and exclusive* rights to recapture all
4 return flows resulting from use of that imported SWP water.

5 **E. BB&K Sought a Conflict Waiver as to RCSD Only.**

6 Any possible doubt as to the existence of an actual conflict of interest with respect to BB&K's
7 simultaneous representation of AVEK, District 40, and RCSD ceased to exist once AVEK filed its
8 cross-complaint in the AVG litigation. Yet, BB&K still took no steps to address the issue for two more
9 years.

10 Finally, in a letter dated September 15, 2008, Riddell sought to obtain AVEK's informed written
11 consent to a conflict wholly of its own making, but only as to BB&K's representation of RCSD.
12 (Donato Decl., Ex. D.) In the letter Riddell wrote "[T]here may be a conflict in our representation of
13 both AVEK and RCSD with respect to environmental review and other related issues between AVEK
14 and RCSD." Riddell set forth the full text of Rule 3-310(C) of the California Rules of Professional
15 Conduct pertaining to representing clients with actual and potential conflicts of interest.⁶ Riddell's letter
16 sought AVEK's permission to continue representing RCSD on a number of matters which posed direct
17 conflicts of interest with AVEK, including the AVG litigation.

18 Riddell's letter made no mention of the inherent conflict in BB&K's simultaneous representation
19 of AVEK and District 40. AVEK did not give its informed written consent as to the issues Riddell did
20 raise, at least not as to the AVG litigation. BB&K eventually gave up its representation of RCSD in the
21 AVG litigation. However, BB&K continued to represent District 40 and, on behalf of District 40,
22 BB&K attorneys advanced positions in diametric opposition to AVEK's goals and interests.

23
24
25
26 ⁶ CRPC, Rule 3-310(C) reads: A member shall not, without the informed written consent of each client: (1) Accept
27 representation of more than one client in a matter in which the interests of the clients potentially conflict; or, (2) Accept or
28 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.

1 **F. There are Direct and Concurrent Conflicts Between BB&K's Clients AVEK and**
2 **District 40.**

3 The AVG litigation raised two contentious and actual conflicts between AVEK and District 40.
4 One conflict, as noted *supra*, pertained to the right to recapture return flows resulting from use of the
5 SWP water AVEK imported into the Basin. Another involved allocation of attorneys' fees.

6 **1. District 40 has Conflicted with AVEK on the Issue of Recapture of Return**
7 **Flow Rights.**

8 On November 11, 2013, AVEK filed a motion for summary adjudication of all causes of action
9 relating to ownership of return flows. (McElhaney Decl., Ex. C.) AVEK asserted that as a matter of
10 well-settled law, an importer of "foreign water" maintains *all* rights to recapture and use return flows.
11 AVEK set forth a number of factors to support its position that it is entitled to recapture all return flows
12 of the water it imports, including its manifested intent to recapture the flows, and the fact that it has not
13 transferred its recapture rights to any other person or entity. In its moving papers, AVEK also pointed
14 out that its customers, including District 40, have only paid a portion of the total cost of the imported
15 water from which they derive benefit, and that allowing them to usurp AVEK's return flow rights would
16 be contrary to established law holding the purpose behind assigning return flow rights to the water
17 importer is to "credit the importer with the fruits of his expenditures and endeavors in bringing into the
18 basin water that would not otherwise be there." (*Los Angeles v. San Fernando* (1975) 14 Cal.3d 199,
19 261.)

20 On or about December 27, 2013, the BB&K litigation team on behalf of District 40 and the other
21 PWS litigants filed an opposition to AVEK's motion for summary adjudication. (McElhaney Decl., Ex.
22 D.) BB&K asserted, inter alia, that AVEK is a "wholesaler," and no court has ever recognized a
23 wholesaler's rights to the return flows of its retail customers. The opposition set forth a litany of other
24 allegations in support of denying the motion, including the contentions that: (1) AVEK's water rights
25 only entitle it to deliver water, not to recapture return flows; (2) the motion was procedurally defective
26 on numerous grounds; (3) the motion lacked legal authority for AVEK's return flow claims; and (4) the
27 PWS parties hold return flow rights under existing law. AVEK's motion for summary adjudication
28 ultimately was denied. (McElhaney Decl., 2:1-8.)

1 2. **AVEK was Forced to Defend District 40's Improper Claim for Attorneys'**
2 **Fees.**

3 A party to the AVG litigation is known collectively as the "Willis Class." Certain water
4 pumping rights were at issue in the Willis Class claims. AVEK was not involved in that aspect of the
5 litigation. After the court approved a settlement on behalf of the Willis Class, its attorneys filed a
6 motion to recover attorneys' fees pursuant to Code of Civil Procedure section 1021.5 against the PWS
7 litigants. (McElhaney Decl., 2:9-13.) On March 9, 2011, the BB&K litigation team filed a brief
8 opposing any award of attorneys' fees to the Willis Class. In the alternative, BB&K attorneys requested
9 that the court apportion fees among other AVG litigation parties, including parties such as AVEK who
10 were not parties in the Willis Class pumping claims. (McElhaney Decl., 2:14-18 and Ex. E).

11 Because of the position taken by District 40 in its opposition to the Willis Class request for
12 attorneys' fees, which was adverse to AVEK's interests, AVEK was required to incur additional
13 attorneys' fees in the preparation and filing of a brief opposing District 40's request to apportion
14 attorneys' fees among non-parties to the Willis Class litigation, and in participating in the hearing on the
15 attorney fee motion. (McElhaney Decl., 2:19-23 and Ex. F.) This Court eventually declined District
16 40's invitation to distribute liability for attorneys' fees to non-class action participants, noting that: (1)
17 assessing attorneys' fees against such parties would exceed the scope of the requested relief; and (2) in
18 its consolidation order, the court had already established that "[c]osts and fees could only be assessed for
19 or against parties who were involved in particular actions." (McElhaney Decl., 2:24-3:2 and Ex. G.)

20 **G. AVEK and District 40 have a Continuing Conflict Regarding Rights to Return**
21 **Flows.**

22 Due to the complex nature of the AVG litigation, it was segmented into phases. Prior to the
23 commencement of trial in Phase VI of the proceedings, a large number of the remaining parties,
24 including AVEK and District 40, stipulated to a proposed agreement called the Proposed Judgment and
25 Physical Solution ("PJPS"). (McElhaney Decl., 3:3-6.) In the PJPS, AVEK agreed to relinquish some
26 of its return flow rights, but retain return flow rights with respect to SWP water it sells to non-stipulating
27 parties. (McElhaney Decl., 3:7-8.) However, AVEK never abandoned its legal position that, as a matter
28 of law, it is entitled to recapture the return flows resulting from all water it imports into the Basin.

(McElhaney Decl., 3:9-10.) That position is firmly set forth in AVEK's Phase VI trial brief, which was filed on or about September 22, 2015. (McElhaney Decl., 3:10-11 and Ex. H.) Ultimately, however, the brief urged this Court to approve the PJPS, even though AVEK would thereby relinquish certain return flow rights because the PJPS would "benefit the Basin and, over time, succeed in bringing the Basin into balance..." (McElhaney Decl., 3:12-14 and Ex. H at 9:18-19.)

On or about September 22, 2015, however, the BB&K litigation team also filed a Phase VI trial brief on behalf of District 40 and the other PWS parties. (McElhaney Decl., 3:15-16 and Ex. I.) Like AVEK's counsel, the PWS attorneys urged the court to approve the PJPS. (McElhaney Decl., 3:16-17.) However, in their trial brief, the PWS attorneys again took positions antagonistic and hostile toward AVEK and its interests. Specifically, the PWS brief states that the PWS and other persons who use the SWP water AVEK imports have the right to recapture return flows and the PWS reserve the right to further brief additional grounds for their claims to recapture the return flows. (McElhaney Decl., 3:18-21 and Exhibit I at 8:7-9:14). On or about September 24, 2015, AVEK's trial counsel sent an email to the BB&K litigation team in which he objected to the PWS trial brief because it undermined a material term of the PJPS pertaining to return flow rights and invited the Court to eliminate a material term of the PJPS. (McElhaney Decl., 3:22-25 and Ex. J.) Counsel for PWS responded by dismissively stating that their brief "accurately describes the law" and "is consistent with Judge Komar's written opinion." (McElhaney Decl., 3:25-26.)

On or about December 23, 2015, the court issued a statement of decision in which it approved the PJPS. (McElhaney Decl., 4:1-3 and Ex. K.) With respect to return flows, the statement of decision states that the court found the right to return flows from SWP water as set forth in paragraph 5.2 and Exhibit 8 of the PPS to be properly allocated. (Ex. K at 24:10-12.)

H. AVEK and District 40 Will Continue to have Conflicts in the Antelope Valley Groundwater Litigation.

Not all parties stipulated to the PJPS. For example the Willis Class challenged certain aspects of the PJPS and argued that it should not to be bound thereby. (McElhaney Decl., 4:7-8.) Overruling these challenges, the Court indicated that, in its judgment, "to protect the Basin it is necessary that all parties

participate and be bound by the groundwater management provisions of the Physical Solution.” (McElhaney Decl., Ex K at 21:19-21.)

Non-stipulating parties have filed appeals from the resulting Judgment and Physical Solution (“the Judgment”). The right to return flows may again be put in issue during the appeals. (McElhaney Decl., 4:11-12.) Indeed, the Willis Class has now adopted the PWS competing position regarding entitlement to return flows. (McElhaney Decl., 4:12-14.) Further, the Judgment empowers the Water Master to reallocate return flow rights in the future. Given District 40’s continuing contention that AVEK is not entitled to recapture the return flows resulting from the SWP water it imports into the Basin, future conflict between AVEK and District 40 is likely, if not inevitable. (McElhaney Decl., 4:15-18.)

I. Due to the Conflict, AVEK was Forced to Dismiss BB&K as its General Counsel.

In January of 2016, the AVEK board voted to dismiss BB&K as its general counsel. (Donato Decl., 3:21-22.) However, the dismissal does not negate the conflict of interest at issue in this matter and does not free BB&K to represent District 40, or any other party, in the AVG litigation.⁷ An attorney’s duty of client loyalty is so fundamental that it continues even after active representation of the client has ended. (See, e.g., *Truck Ins. Exchange v. Fireman’s Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1059 [finding that a law firm may not cure a conflict of interest as between two clients by simply withdrawing representation from one of them].) On January 27, 2016, AVEK’s counsel demanded that BB&K recuse itself. (Declaration of James J. Banks (“Banks Decl.”) at 1:7-8.) On February 15, 2016, BB&K, through counsel, communicated its refusal to do so. (Banks Decl., at 1:9-11.)

III. ARGUMENT

California law prohibits attorneys from engaging in any conduct that would violate the lawyer’s duty of undivided loyalty and commitment to a client.⁸ That duty includes refraining from relationships and associations that would undermine a client’s legitimate expectation of undivided loyalty from the attorney. (See *Santa Clara County Counsel Attys Ass’n. v. Woodside* (1994) 7 Cal.4th 525, 548

⁷ From 2006, when AVEK was forced into the AVG litigation, through 2015, AVEK paid BB&K over \$1.1 million in attorneys’ fees. (Donato Decl., 4:1-2.)

⁸ California Business and Professions Code section 6068(e)(1) provides that it is the duty of an attorney to “maintain inviolate the *confidence*, and at every peril to himself or herself, to preserve the *secrets* of his or her client.” (Emphasis added.)

[instructing that attorneys are precluded from assuming any relationship that would prevent the attorney from being wholly devoted to a client's interests].)

To further that duty, California Rules of Professional Conduct, Rule 3-310 enumerates specific prohibitions against attorneys representing clients with adverse interests. Pursuant to Rule 3-310(C)(1)-(3), attorneys may not: (1) *accept* representation of more than one client in a matter in which the interests of the clients *potentially* conflict; (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. (Emphasis added.)

Under certain strict parameters and circumstances, these prohibited practices may be waived. But, for a waiver to be effective, it must be accomplished pursuant to the informed written consent of each involved client. (Rule Prof. Conduct, Rule 3-310(C).)

It is difficult to imagine anything more detrimental to a client's sense of "undivided loyalty" than his or her attorney undertaking representation of another client potentially possessed of adverse interests, and then continuing in that representation when the potential conflict becomes actual. Yet, that is precisely what the BB&K attorneys have done in this case. BB&K never obtained the informed written consent from AVEK pursuant to the dictates of Rule 3-310(C). Consequently, under the circumstances of this case, BB&K's disqualification from the AVG litigation is absolutely mandatory pursuant to California law.

A. Concurrent Representation of Clients with Adverse Interests is Prohibited.

1. Concurrent Representation by BB&K of Two Clients in the Same Litigation is Prohibited.

Without question, representing parties with adverse interests in the *same* litigation is so clearly untoward and indefensible that it requires little comment. As well-stated by the California Supreme Court in *Flatt v. Superior Court* (1994) 9 Cal.4th 275, "So patently improper is the spectacle of this sort of conflict that George Sharswood, a justice of the Supreme Court of Pennsylvania and a 19th century writer on legal ethics, wrote in 1854 that it, 'ought...to be passed over in silence in a code of professional ethics.'" (*Flatt v. Superior Court, supra*, 9 Cal.4th at 284, fn. 3.)

1 **a. It is Prohibited in Cases like this One of Potential Conflict.**

2 Before BB&K undertook to represent District 40 and RCSD in the AVG litigation, the BB&K
3 attorneys knew there was a very real possibility, if not a likelihood, that a conflict of interest would arise
4 between the potential new clients and AVEK, their long-term client. Consequently, BB&K was under
5 an ethical duty at that point to obtain the informed written consent from AVEK, District 40, and RCSD
6 before agreeing to the representation. Yet, the firm made a specific, conscious, and intentional decision
7 to go ahead with the representation of the new clients without obtaining the appropriate waivers from all
8 the affected parties.

9 **b. It is Prohibited in Cases like this One of Actual Conflict.**

10 By 2006, it was an indisputable fact that AVEK, District 40, and RCSD were in *direct actual*
11 conflict with respect to issues pertaining to the AVG litigation. By that time, the seeds of conflict that
12 were planted when BB&K agreed to represent District 40 and RCSD in the AVG litigation had
13 blossomed into undeniable competing interests between the parties.

14 Hence, it is an incontrovertible reality that BB&K was then under an ethical obligation to seek
15 the informed written consent from the involved parties to waive the conflict no later than sometime in
16 2006, when the actual conflicts became clearly evident. Had the firm been unsuccessful in that regard,
17 BB&K would have been under a duty to withdraw from representing both District 40 and RCSD. As
18 noted, *supra*, in 2008, BB&K apparently made an unsuccessful attempt to obtain informed written
19 consent from AVEK to concurrently represent RCSD in the AVG litigation. However, BB&K never
20 even requested a written conflicts waiver from AVEK regarding BB&K's manifestly adverse concurrent
21 representation of District 40.

22 As of 2006, and continuing for a number of years thereafter, Riddell continued as AVEK's
23 general counsel while his partners *continued* to represent parties in the AVG litigation in complete
24 opposition to AVEK's interests. It is of no moment that Riddell was serving solely as general counsel to
25 AVEK and did not himself represent AVEK in the AVG litigation. The attorneys representing District
26 40 and RCSD were from the same firm.

27 Under the imputed knowledge theory "knowledge by any member of a law firm is knowledge by
28 all of the attorneys in the firm, partners as well as associates." (*Chadwick v Superior Court* (1980) 106

Cal.App.3d 108, 116; see also, *Rosenfeld Construction Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 573 [stating “[i]t has long been recognized that knowledge obtained by one member of a firm of lawyers is imputed to all the other members.”].) ABA Model rule 1.10(a) states: “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 . . .”

In other words, the fact that Dunn and Garner were representing District 40 and RCSD was no different than had Riddell himself been representing those entities. Even if some allowance could be made for BB&K’s failure to obtain informed written consent from all involved parties when the conflict of interest was merely potential, once the *potential* conflict became an *actual* one, BB&K attorneys absolutely were obligated to either obtain the requisite waivers or withdraw from representing any party in the AVG litigation.

2. Automatic Disqualification Should Follow from BB&K’s Concurrent Representation of Two Clients in Unrelated Matters.

Even if Riddell’s representation of AVEK as its general counsel and the representation of the other BB&K attorneys of District 40 and RCSD could be somehow separated, once AVEK was brought into the case, at best this became a situation involving *concurrent representation* of adversaries in *unrelated* matters. An attorney representing clients with adverse interests in *wholly unrelated* matters requires a little more legal analysis. The *Flatt* Court provided excellent guidance on this issue.

In *Flatt*, an attorney met with a potential client who was seeking to bring a legal malpractice claim against his former attorney. Shortly after meeting with the potential client, the attorney learned that her firm represented the other attorney’s office in an unrelated matter. She then promptly sent a letter to the prospective client advising him that she could not represent him because of this conflict of interest. The potential client later filed a claim against the attorney and her firm, alleging a breach of a duty to advise him as to the statute of limitations. In finding in favor of the attorney and against the prospective client, the Court focused upon an attorney’s duty of client *loyalty*.⁹

⁹ The Court stated, “We conclude that the requirement of undivided loyalty to the first client negates any duty on the part of the attorney to inform the second client of the statute of limitations applicable to the proposed lawsuit...” (*Flatt v. Superior Court, supra*, 9 Cal.4th at 278-279.)

1 The *Flatt* Court explained that in evaluating conflict claims in instances of simultaneous or dual
2 representation, the primary value to be considered is the attorney's duty of loyalty, and the client's
3 legitimate expectation that the attorney will not violate the duty of loyalty.¹⁰ Indeed, the *Flatt* Court
4 instructed that this duty of undivided client loyalty has led "courts and ethical codes alike" to prohibit
5 simultaneous representation of adversaries *even when the substance of the conflict is unrelated* to the
6 respective representation. (*Flatt v. Superior Court, supra*, 9 Cal.4th at 285.)

7 As noted in *Flatt*, the reason for the automatic disqualification rule is self-evident. A client who
8 learns that his or her attorney has taken up the representation of a litigation adversary, even in a wholly
9 unrelated matter, "cannot long be expected to sustain the level of confidence and trust in counsel that is
10 one of the foundations of the professional relationship." (*Flatt v. Superior Court, supra*, 9 Cal.4th at
11 285.) The *Flatt* Court concluded, "[I]n all but a few instances, the rule of disqualification in
12 simultaneous representation cases is a per se 'automatic' one." (*Id.* at 284.)

13 Recognizing that the principle of undivided loyalty is for the client's benefit, the *Flatt* Court did
14 allow that in certain "rare" circumstances, an attorney *may* be able to engage in concurrent
15 representation of clients with adverse interests. However, such representation in this "rare"
16 circumstance may only be properly effectuated through *full disclosure* and a *written agreement* by *both*
17 parties to waive the conflict. (*Flatt v. Superior Court, supra*, 9 Cal.4th at 285, fn. 4.) It is incumbent
18 upon attorneys to avoid even the inadvertent appearance of impropriety.

19 Without question, BB&K undertook and continued to represent adverse clients in the same
20 matter. Since that is a prohibited practice absent obtaining the fully informed written consent of all the
21 involved parties, and since it is beyond dispute that BB&K did not obtain signed written consent from
22 all (and perhaps from any) of their dually represented clients, BB&K must be disqualified from further
23 representing any party in the AVG litigation.

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28 ¹⁰ "No one can serve two masters. Either you will hate the one and love the other, or you will be devoted to the one and
despise the other." (Matthew 6:24.)

1 3. **California Law Does Not Recognize Implied Consent in Cases of Concurrent**
2 **Adverse Representation.**

3 The court should disregard any potential claim by BB&K that AVEK somehow provided
4 “implied” consent to BB&K’s adverse dual representation in the AVG litigation. In *State Farm Mut.*
5 *Auto. Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422, the court rejected an implied consent
6 argument in a concurrent representation case stating that the burden to obtain consent before engaging in
7 the concurrent representation of adverse parties falls squarely and entirely on the attorney. (*Id.* at 1435.)

8 When discussing the “rare” circumstances under which an attorney or a law firm may be
9 permitted to represent adversarial clients in unrelated litigation, the *Flatt* Court pointed only to obtaining
10 written waivers based on fully informed consent. There was no allowance for anything remotely
11 resembling an “implied” consent exception. (*Flatt v. Superior Court, supra*, 9 Cal.4th at 285, fn. 4; see
12 also, *Blecher & Collins, P.C. v. Northwest Airlines, Inc.* (C.D. Cal. 1994) 858 F.Supp. 1442, 1455, fn.
13 14 [stating that “[b]y not allowing implied waivers of a conflict between co-parties, the law places all of
14 the burden of disclosure and consent on the attorney, where it belongs.”]; Flamm, Lawyer
15 Disqualification: Disqualification of Attorneys and Law Firms (2014) p. 409 [noting that California
16 courts in particular have declined to recognize “implied” consent in concurrent representation cases].)

17 4. **California Law Does not Consider Delay in Cases of Concurrent**
18 **Representation.**

19 It is the attorney’s duty, not the client’s, to identify and rectify conflict of interest issues. Just as
20 implied consent is not an exception to disqualification in cases of concurrent representation, so also the
21 client’s delay in seeking disqualification does not serve as a defense either. In *Blue Water Sunset, LLC*
22 *v. Markowitz* (2011) 192 Cal.App.4th 477, the court very explicitly stated that any exception to
23 disqualification based on delay could only potentially apply in cases of successive representation, and
24 not concurrent representation. (*Id.* at 486-487; accord *State Farm Mut. Auto. Ins. Co. v. Federal Ins.*
25 *Co., supra*, 72 Cal.App.4th 1433-1434.) As will be explained more fully, *infra*, even in cases of
26 successive representation “delay” presents a very narrow exception to attorney disqualification.

1 5. Dismissal of BB&K as General Counsel Does Not Create a Successive
2 Representation Scenario.

3 An attorney may not convert a case of concurrent representation into a case of successive
4 representation by simply dismissing an existing client. (See *American Airlines, Inc. v. Sheppard,*
5 *Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1037 [explaining that a lawyer may not avoid
6 the automatic disqualification rule applicable to concurrent representation “by unilaterally converting a
7 present client into a former client.”].) At the same time, an attorney may not claim successive
8 representation where the attorney’s ethical violation of the duty of loyalty causes the client to dismiss
9 the attorney. (See, e.g., *In re Cal. Cannery & Growers* (Bankr. N.D. Cal. 1987) 74 B.R. 336, 344
10 [providing that termination of representation must be disregarded if the client discharges the attorney
11 because of an alleged breach of loyalty because “[t]o hold otherwise would permit the attorney to
12 accomplish indirectly what he or she may not do directly.”].)

13 **IV. CONCLUSION**

14 For the reasons set forth herein, and as further delineated in the supporting declarations and
15 evidence filed and served contemporaneously herewith, AVEK respectfully requests the Court to grant
16 the instant motion to disqualify BB&K from representing District 40 or any other party in the above-
17 captioned litigation, and to require that BB&K disgorge all attorneys’ fees it received during its
18 concurrent representation of adverse parties in the AVG adjudication.

19 Respectfully submitted,

20 DATED: August 17, 2016

BANKS & WATSON

21
22 By: _____

JAMES J. BANKS
Attorneys for ANTELOPE VALLEY EAST –
KERN WATER AGENCY

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.

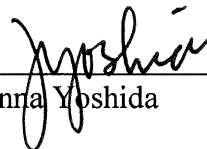
12 On August 17, 2016, I served the within copy of:

13 **MEMORANDUM IN SUPPORT OF MOTION TO DISQUALIFY BEST BEST & KRIEGER AS**
14 **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