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JAMES J. BANKS (SBN 119525)
W. DAVID CORRICK (SBN 171827)
BANKS & WATSON
901 F Street, Suite 200
Sacramento, California 95814
Phone: (916) 325-1000
Fax: (916) 325-1004
Email: jbanks@bw-firm.com

WILLIAM J. BRUNICK (SBN 46289)
LELAND P. MCELHANEY (SBN 39257)
BRUNICK, MCELHANEY & KENNEDY
1839 Commercenter West
San Bernardino, CA 92408
Phone: 909) 889-8301
Fax: (909) 388-1889
Email: lmcelhaney@bmklawplc.com

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

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER CASES

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

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

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

AND RELATED ACTIONS.

Judicial Council Coordination Proceeding No. 4408

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

AVEK'S REPLY IN SUPPORT OF ITS MOTION TO DISQUALIFY BEST BEST & KRIEGER AS LEGAL COUNSEL IN ANTELOPE VALLEY GROUNDWATER CASES

DATE: December 7, 2016
TIME: 9:00 a.m.
DEPT: Room 222
Stanley Mosk Courthouse
Los Angeles, California

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

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I. INTRODUCTION

In determining whether an attorney's conflict of interest requires disqualification, "[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal. 4th 1135, 1145 ("*SpeeDee*").) Inarguably, the attorney's duty of undivided loyalty to a client lies at the very heart of the "scrupulous administration of justice" and the "fundamental principles of our judicial process." (*Ibid.*) This duty of undivided loyalty to the client is so vigorous 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.].)

The memorandum in opposition ("Oppo." or "Opposition") to the present motion by Antelope Valley East - Kern Water Agency ("AVEK"), seeking an order from this court to disqualify Best Best & Krieger ("BB&K") from representing the Los Angeles County Waterworks District No. 40 ("District 40") or any other party in the Antelope Valley Groundwater ("AVG") litigation, is limited to two primary arguments: (1) AVEK waited too long to seek BB&K's disqualification and (2) District 40 will be severely prejudiced if BB&K is disqualified from the AVG litigation. Both arguments completely miss the point and demonstrate a fundamental misunderstanding of the difference between *successive* representation conflict cases and *concurrent* representation cases. The defenses advanced by the Opposition would only be potentially applicable if this was a case of a *successive* representation conflict. As this is a case of *concurrent* conflicting representation,[1] those defenses are not properly considered, and this motion should be granted.

In evaluating conflict claims in instances of concurrent representation, the primary value to be considered is the attorney's duty of loyalty, and the client's legitimate expectation that the attorney will not violate the duty of loyalty. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284.) In concurrent representation cases alleged client "delay" in asserting a conflict of interest is no defense to an attorney's breach of the duty of undivided loyalty to the client. (See *Blue Water Sunset, LLC v. Markowitz* (2011)

[1] The fact that this case deals with concurrent representation is fully developed in the moving papers. The Opposition makes no effort to dispute this fact.

192 Cal.App.4th 477, 486-87 [instructing that any exception to disqualification based on delay may only potentially apply in cases of successive representation, and not concurrent representation.].) Further, in cases of concurrent representation, the onus is on counsel to obtain the required conflict waivers. (See *State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422, 1435 [stating that the burden to obtain consent before engaging in the concurrent representation of adverse parties falls squarely and entirely on the attorney.].)

The Opposition's defense based on alleged "prejudice" is equally ineffectual because preserving the public trust in the integrity of the judicial process supersedes an individual's "'counsel of choice' rights. . ." (*SpeeDee, supra,* 20 Cal. 4th at 1145.) "The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." (*Ibid.*) The two arguments District 40 sets forth in its Oppositions have no applicability here. AVEK's recusal motion should be granted.

II. ARGUMENT

A. The Essential Operative Facts Are Not in Dispute.

The underlying facts in support of this motion are well-detailed in AVEK's moving papers, and District 40 does not dispute the essential facts. The Opposition papers merely cite to some purported "material facts" that AVEK allegedly "ignored" in its moving papers. However, as will be demonstrated, *infra*, the additional facts advanced by District 40 are neither material nor relevant to the instant motion and were rightly excluded from the moving papers.

Specifically, as primarily reflected in the declaration of BB&K attorney Jeffrey V. Dunn, the Opposition papers outline the progression of the AVG litigation through its various phases and submit that AVEK never asked BB&K to stop representing District 40 secondary to a conflict of interest at any point prior to BB&K receiving a letter dated January 27, 2016 from counsel specially retained by AVEK. (Declaration of Jeffrey V. Dunn ("Dunn Decl.") filed in support of District 40's Opposition at 11:22-12:3.) The Opposition papers also reference a contract dated July 17, 1970 between AVEK and District 40's alleged "predecessors in interest," which states AVEK would "assist" the predecessors in interest in retaining their rights in the groundwater supply in the event of "an adjudication of the basin," if the predecessors in interest "so desire." (Dunn Decl., at 4:10-17 and Exhibit A; Declaration of Adam

Ariki ("Ariki Decl.") filed in support of District 40's Opposition at 3:9-16 and Exhibit A.) In an effort to demonstrate that the conflict between AVEK and District 40 relative to the AVG litigation has been resolved, the moving papers cite to excerpts from an amended stipulation for entry of judgment and physical solution,[2] as well as excerpts from the Court's judgment and physical solution.[3] Finally, as a further sign of alleged solidarity of interests between AVEK and District 40, the Opposition papers cite to a December 7, 2004 memorandum of understanding between AVEK and District 40[4] and a 2015 leasing agreement between AVEK and District 40 pertaining to overlying production water rights.[5]

Notwithstanding the factual allegations asserted in the Opposition papers, the facts supporting this motion are without dispute. In brief summary: (1) BB&K attorney Michael T. Riddell ("Riddell") served as general counsel to AVEK almost continuously from 1987-2016;[6] (2) during Riddell's tenure as general counsel he was privy to the most intimate details of AVEK's operations and procedures; (3) the interested parties in the AVG litigation include an eight-member group of entities collectively known as the Public Water Suppliers ("PWS");[7] (4) BB&K attorneys Jeffrey V. Dunn ("Dunn") and Eric L. Garner ("Garner") undertook representation of District 40 in the AVG litigation in 2004; (5) when Dunn and Garner took District 40 on as a client in the AVG litigation, BB&K attorneys were aware of a potential conflict between District 40 and AVEK, but did not obtain a conflict waiver from either AVEK or District 40;[8] (6) the potential conflict between AVEK and District 40 became an actual conflict in 2006 when BB&K attorneys filed a cross-complaint on behalf of the PWS parties claiming *sole and exclusive* rights to recapture all return flows[9] attributable to imported State Water Project ("SWP") water, which was a position completely inimical to AVEK's interests; (7) BB&K never even attempted

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[2] Dunn Decl., 10:7-18 and Exhibit D; Ariki Decl., 3:23-4:2 and Exhibit C.

[3] Dunn Decl., 10:19-28 and Exhibit E.

[4] Ariki Decl., 3:17-22 and Exhibit B.

[5] Ariki Decl., 4:3-7 and Exhibit D.

[6] There was an approximate one-year interruption of Mr. Riddell's service as general counsel to AVEK from 2006-2007.

[7] District 40 and Rosamond Community Services District ("RCSD") are included within the PWS collective.

[8] In October 2004, Riddell notified the AVEK board that a potential conflict of interest between AVEK and District 40, but did not request a waiver from the board.

[9] After water is put to use, a portion of it percolates into the ground and eventually reaches and augments the Basin's groundwater supply. That portion of the water is referred to as "return flows."

to construct an ethical wall between Riddell and the BB&K attorneys representing District 40;[10] (8) due to the cross-complaint filed by the BB&K attorneys on behalf of the PWS, AVEK was forced to enter the AVG litigation by filing its own cross-complaint in order to protect its interests in the SWP return flows; (9) in September 2008, Riddell sought a conflict waiver from the AVEK board as to BB&K's simultaneous representation of RCSD in the AVG litigation which the board declined to extend; (10) at some point BB&K attorneys stopped representing RCSD in the AVG litigation, but have continued to represent District 40; (11) from 2006-2016, BB&K attorneys engaged in the concurrent representation of two clients with conflicting interests in the AVG litigation – AVEK and District 40; (12) in January 2016, AVEK's board voted to dismiss Riddell and BB&K as its general counsel; (13) in a letter dated January 27, 2016, specially retained counsel for AVEK's counsel demanded that BB&K recuse itself from the AVG litigation; and (14) in a letter dated February 15, 2016, counsel for BB&K communicated its refusal to withdraw from the AVG litigation.

B. California Law Does Not Consider Delay in Cases of Concurrent Representation.

It is undisputed that beginning in 2006 and continuing until 2016, BB&K attorneys represented District 40 in the AVG litigation while another BB&K attorney served as general counsel to AVEK. Absent an express written conflict waiver by *both* parties after full disclosure, such *concurrent representation* is prohibited by California Rules of Professional Conduct, rule 3-310(C)(3). The Opposition papers do not dispute this basic tenet of professional responsibility, but rather contend that AVEK waited too long to assert the conflict and seek BB&K's disqualification from the AVG litigation.

However, a client's alleged delay in seeking attorney disqualification does not serve as a defense in a case involving concurrent representation. In *Blue Water Sunset, LLC v. Markowitz* (2011), supra, 192 Cal.App.4th 477, the court very explicitly stated that any exception to disqualification based on delay could only potentially apply in cases of successive representation, not concurrent representation.

[10] The failure to make any effort to screen Dunn and Garner from AVEK's confidential information has real world consequences. For example, in his Opposition declaration, Dunn states that AVEK "interviewed six law firms for potential representation on AVEK's Urban Water Management Plan..." (Dunn Decl., 4:27-28.) Dunn would have no way of knowing how many law firms AVEK interviewed unless Riddell conveyed that information to him. Clearly then, BB&K is utilizing confidential information, acquired by a BB&K attorney in his capacity as AVEK's general counsel, to oppose AVEK's motion to disqualify BB&K. This illustrates plainly another reason this motion should be granted.

(*Id.* at 486-487; accord *State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.*, *supra*, 72 Cal.App.4th at 1433-1434.)

District 40 places primary reliance on the California Supreme Court's analysis and holding in the *SpeeDee* case for its assertion that even in cases of concurrent representation, a court should "balance the equities" when considering a motion for disqualification of counsel, including whether the moving party has "unreasonably delayed" bringing the disqualification motion. District 40 misreads the *SpeeDee* decision.

The *SpeeDee* case involved a dispute between SpeeDee Oil Change Systems, Inc. ("SpeeDee Oil") and Mobil Oil Corporation ("Mobil"). Attorneys for Mobil consulted with attorney Eliot Disner ("Disner") who was "of counsel" to Shapiro, Rosenfeld & Close (the "Shapiro firm"). While the Mobil attorneys were consulting with Disner, SpeeDee Oil retained the Shapiro firm as counsel of record. (*SpeeDee*, *supra*, 20 Cal. 4th at 1139.) Upon learning of Disner's association with the Shapiro firm, Mobil moved to disqualify the firm arguing that Disner had a conflict of interest requiring the firm's vicarious disqualification. (*Ibid.*) The trial court denied the motion and the appellate court affirmed, finding that Disner's relationship with the Shapiro firm was not "close, personal, continuous, and regular," and that Disner did not actually convey confidential information to the firm. (*Ibid.*) The Supreme Court addressed two questions (1) whether Disner's contacts and discussions with the Mobil attorneys were such that he "represented" Mobil for purposes of a conflict of interest analysis and (2) if so, whether Disner's conflict of interest in his capacity as "of counsel" should be imputed to the Shapiro firm so as to require its disqualification. (*Id.* at 1143.)

In analyzing the first question, the court cited the rule that an attorney represents a client for purposes of a conflict of interest analysis as soon as the attorney "knowingly obtains material confidential information from the client and renders legal advice or services as a result." (*SpeeDee*, *supra*, 20 Cal. 4th at 1148.) Applying the rule to the undisputed facts, the court found that Disner had, in fact, represented Mobil in the litigation. (*Id.* at 1152.) Finding that Disner and the Shapiro firm had represented adverse parties in the same litigation, the *SpeeDee* court cited the rule articulated in *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283, that when a conflict of interest requires an attorney's disqualification from a matter the disqualification extends vicariously to the entire law firm. The court

then analyzed whether the same rule should apply "when a party unknowingly consults an attorney 'of counsel' to the law firm representing the party's adversary in the subject of the consultation." (*SpeeDee, supra,* 20 Cal. 4th at 1139.) In answering the question in the affirmative, the court concluded that conflicting representations that would disqualify an entire law firm "are not more acceptable when an attorney of counsel to the firm creates the conflict." (*Id.* at 1139.)

In its analysis, the *SpeeDee* Court discussed general principles of attorney disqualification in both the successive and concurrent representation contexts. As to concurrent representation, the court noted that "a more stringent" rule of automatic disqualification applies. (*SpeeDee, supra,* 20 Cal. 4th at 1147.) Further relying on *Flatt*, the court stated that "[w]ith few exceptions, disqualification follows automatically, regardless of whether the simultaneous representations have anything in common or present any risk that confidences obtained in one matter would be used in the other." (*Ibid.*) As explained in Flatt, the "rare" exceptions to automatic disqualification may only be properly effectuated through *full disclosure* and a *written agreement* by *both* parties to waive the conflict. (*Flatt v. Superior Court*, *supra*, 9 Cal.4th at 285, fn. 4, emphasis added.) These facts are not present here.

District 40's contention that *SpeeDee* stands for the proposition that even in cases of concurrent representation, a court must balance the equities at issue is misleading. Since District 40 is arguing unreasonable delay, the statement promotes the notion that delay is one of the equitable issues that must be considered. However, the court clearly stated that since alleged delay was not an issue in the *SpeeDee* case, the court would not comment on the relative weight an argument of delay "might deserve in deciding a disqualification motion based on a conflict of interest." (*SpeeDee, supra,* 20 Cal. 4th at 1145, fn. 2.) To the extent that the majority's dicta may have "suggested" that factors including how promptly Mobil moved for disqualification should be considered in cases of concurrent representation, Justice Mosk's concurring opinion clarified that disqualification in concurrent representation cases is automatic and delay carries *no weight*, as "disqualification in these circumstances" represents a "breach of the twin duties of loyalty and confidentiality owed by an attorney to his client." (*Id.* at 1157.) Even though Disner's representation of Mobil had been brief, Justice Mosk observed that automatic disqualification in cases of concurrent representation is a "bright line" rule. (*Id.* at 1156.)

The Opposition papers attempt to discredit the instruction provided by the *Flatt* court because it involved a malpractice case and not a disqualification motion. (Oppo. at 4:5-7.) This argument is without merit as the same principles are implicated. Indeed, the *SpeeDee* court cited to and relied heavily upon the *Flatt* court decision in its analysis.

District 40 contends that the plain holding in *Blue Water* prohibiting consideration of alleged delay as a factor in ruling on a motion to disqualify in cases involving concurrent representation is defective because it "ignores" the California Supreme Court's "clear statement" in *SpeeDee*. However, as explained, *supra*, the majority opinion in the *SpeeDee* court did not consider what weight, if any, to give to delay in a concurrent representation case, and in the concurring opinion, Justice Mosk very explicitly comments that in such cases any alleged delay should carry no weight.

District 40 also seeks to discredit the rule cited in *State Farm Mutual Auto Ins. v. Federated Insurance Co.* (1999) 72 Cal.App.4th 1422 that delay as a "narrow exception" to the rules requiring disqualification only applies in successive representation cases on the grounds that since the court found no delay, the statement was "mere dicta." (*State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.*, *supra*, 72 Cal.App.4th at 433 [observing that in successive representation cases, delay provides a "narrow exception" to the rules requiring disqualification.].) District 40 again misreads and misinterprets the case law.

In *State Farm*, the court found that an attorney had simultaneously represented clients with adverse interests. (*State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.*, *supra*, 72 Cal.App.4th at 1431.) Because the case that created the conflict settled before the disqualification motion was heard, the lower court had improperly considered the case as one of successive representation. (*Id.* at 1432.) The appellate court found that the "fortuitous settlement" which acted to sever the attorney's relationship from the former client "did not remove the taint of a three-month concurrent representation." (*Id.* at 1432-1433.) Consequently, the *State Farm* court applied the automatic disqualification rule as set forth in *Flatt* and further stated that in such a context, it was inappropriate to consider the substantial relationship test or to engage in the "balancing of competing interests." (*Id.* at 1433.) In considering whether conduct *other than delay* could result in an implied waiver in cases of successive representation, the appellate court did note that delay was not a factor in the case under consideration. (*Id.* at 1434.)

However, the *State Farm* court was quick to point out that the case cited in support of an implied delay was inapposite because it involved a case of successive relationship and did not "hold or suggest that current clients can impliedly consent to conflicted representation." (*Ibid.*)

District 40 cites to *River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297 as an example of a case where the court found an implied waiver of an attorney's conflict of interest based upon delay in bringing a motion to disqualify. The *River West* case involved successive, not concurrent, representation, where 27-30 years earlier one of the plaintiffs' attorneys represented an individual who was named as a defendant in a new action. (*Id.* at 1299.) The court narrowly phrased its inquiry as, "[O]nce grounds exist for disqualification due to the *successive* representation of clients with adverse interests, is the appearance of impropriety a substantial enough concern to overcome . . . questions of *unreasonable delay* and prejudice?" (*Id.* 1300-1301, emphasis added.) As the *River West* case involved a successive representation case, its analysis and ruling is not applicable to this motion.

Liberty National Enterprises, L.P. v. Chicago Title Ins. Co. (2011) 194 Cal.App.4th 839, is another *successive* representation case upon which District 40 relies. District 40 contends that disqualification of counsel secondary to a conflict of interest may be waived if the Court finds a motion to disqualify was not brought in a timely manner. (*Id.* at 845 [noting that in California the delay must be extreme or unreasonable before it operates as a waiver.].) *Liberty National* involved an action that was filed in 2002. Plaintiff's counsel had represented defendant "from time to time" prior to 1995. (*Id.* at 842.) After the first phase of a three-phase trial concluded in favor of the plaintiff, defendant changed counsel and the new attorney moved to disqualify plaintiff's counsel on the grounds that he was privy to defendant's confidential information and because he was a witness in the case. (*Ibid.*) In affirming the lower court's decision to deny the motion to disqualify, the *Liberty National* court considered a number of factors, including delay in bringing the motion. Under the totality of the circumstances, the appellate court found the lower had not abused its discretion in finding the defendant's delay in bringing the motion to have been unreasonable. (*Id.* at 848.) However, like *River West*, the *Liberty National* analysis is inapposite because it involved successive representation where many years had lapsed between the former representation and the current litigation.

District 40 cites to *Koloff v. Metropolitan Life Ins. Co.* (E.D. Cal. June 10, 2014, Civ. A. No. 1:13-CV-02060-JLT) 2014 U.S. Dist. LEXIS 80322 an unpublished federal district court decision as "persuasive" authority that an unreasonable delay in bringing a motion to disqualify an attorney for a conflict of interest may be deemed a waiver of that right. However, this case likewise involved successive as opposed to concurrent representation. In supporting its finding that a conflict of interest waiver may be "implied" by delay in bringing a disqualification motion, the *Koloff* court relied upon *Trust Corp. of Montana v. Piper Aircraft Corp.* (9th Cir. 1983) 701 F.2d 85, which also involved a successive representation scenario. (*Koloff v. Metropolitan Life Ins. Co, supra,* U.S. Dist. LEXIS at *10.)

District 40 concedes that AVEK's moving papers cite "some authority for the proposition that disqualification of counsel cannot be waived" regardless of timing. (Oppo., 6:21-22.) In an effort to undermine those authorities, District 40 cites to *Liberty National*, *River West* and *Koloff*, which have all been shown to involve successive and not concurrent representation – they are immaterial to this analysis.

The state of the law with respect to concurrent representation was clearly stated by the *Flatt* court: "[I]n all but a few instances, the rule of disqualification in simultaneous representation cases is a *per se* or 'automatic' one." (*Flatt v. Superior Court*, *supra*, 9 Cal.4th at 284.) The "few instances" where concurrent representation may be permitted is in the "rare" circumstance where after *full disclosure* all conflicted parties execute a *written agreement* to waive the conflict. (*Flatt v. Superior Court*, *supra*, 9 Cal.4th at 285, fn. 4.) Rather than offering any modification of the *Flatt* decision, the *SpeeDee* court reinforced the rule of automatic disqualification in concurrent representation cases, and the concurring opinion confirmed explicitly that delay is not an appropriate factor to consider. (*SpeeDee, supra,* 20 Cal.4th at 1156-1157.)

C. The Integrity of the Judicial System Supersedes Prejudice to an Individual Party.

District 40 argues that this Court should weigh the prejudice it will cause District 40 to retain new counsel in the AVG litigation as a second equitable consideration. Without any factual basis to support his claim, District 40 supervisor Adam Ariki estimates it would cost District 40 "at least $2

million" to retain another law firm. (Ariki Decl., 2:14-16.[11])[12] However, like its equitable counterpart "delay," it is improper to consider prejudice to a party faced with having to retain new counsel when an attorney is disqualified on the basis of concurrent representation.

District 40 cites *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17. In that case, an attorney worked for a law firm that represented plaintiffs in a lawsuit against the City of Santa Barbara and actually worked on the case herself. (*City of Santa Barbara*, *supra*, 22 Cal.App.4th at 21.) While the litigation was still pending the attorney accepted a job at the city attorney's office and plaintiffs sought to have the entire office vicariously disqualified from the case. (*Id.* at 21-22.) The trial court ruled that the ethical wall the city attorney erected was insufficient to overcome the vicarious disqualification rule and granted the motion. (*Ibid.*) On appeal, the appellate court noted that no California court had considered vicarious attorney disqualification in the context of an entire city attorney's office and proceeded to address the matter on a de novo basis. (*Id.* at 22.) In performing its analysis, the appellate court noted that if the question involved a private law firm, the attorney's disqualification would clearly extend to the entire firm. (*Id.* at 24.) However, as a threshold matter, the appellate court determined that the city attorney's office was not a "law firm" within the meaning of the vicarious disqualification rule. (*Id.* at 20.) The court went on to find that the plaintiffs' interests were sufficiently protected by the screening measures established by the city attorney's office in conjunction with the observation that the attorney's violation of client confidences "would be a recipe for financial and professional suicide." (*Id.* at 27.) Conversely, this case involves private law firms and under the *City of Santa Barbara* analysis, the entire BB&K law firm is vicariously disqualified from further client representation in the AVG litigation.

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[11] The Ariki declaration does not contain a jurat, is not sworn, and should be disregarded. (Code Civ. Proc. § 2015.5; *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601 [excluding declaration from evidence for failure to fully comply with Code of Civil Procedure § 2015.5].)

[12] The premise of the Ariki declaration is incorrect. There should be no costs at all to District 40 if BB&K is recused. In that eventuality, District 40 would have the right to require BB&K to disgorge some or all of the attorneys' fees that District 40 paid it during the period it had a conflict. (*Jeffry v. Pounds* (1977) 67 Cal.App.3d 69; *Clark v. Millsap* (1926) 197 Cal. 765, 785 [stating that acts of impropriety inconsistent with the character of the profession, and incompatible with the faithful discharge of professional duties will prevent the attorney from recovering for services rendered.]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 618 [noting that "it is settled in California that an attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility."].)

District 40 attempts to distinguish *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050 on its facts. In *Truck Ins. Exchange* a law firm accepted representation of one insurance company client ("Truck") in an action against an existing insurance company client ("FFIC") even though the existing client objected to concurrent representation. (*Id.* at 1053-1054.) The law firm then withdrew its representation of FFIC. FFIC sought the law firm's disqualification of its representation of Truck on the grounds of concurrent representation maintaining that the firm had breached its duty of loyalty to FFIC and that the rule of automatic disqualification applied. (*Id.* at 1054.) The law firm argued that since it had withdrawn its representation, FFIC was a *former* client and that the substantial relationship test should apply. (*Ibid.*) The *Truck* court dismissed the law firm's argument holding that a law firm that knowingly undertakes adverse concurrent representation may not avoid disqualification by withdrawing from representation of the less favored client. (*Id.* at 1057.) District 40 argues that since BB&K did not withdraw from representing AVEK, but rather AVEK dismissed Riddell and BB&K as its general counsel, the rule prohibiting conversion of a current client into a former client as enunciated in *Truck* is inapplicable. District 40's argument is untenable and is abrogated by *SpeeDee* in which the *client* ended the attorney-client relationship.

The *Truck* case clearly sets forth the distinction between the interests sought to be protected in cases of successive representation as opposed to cases involving concurrent representation. In successive representation conflicts, the primary interest to be protected is the client's expectation that the former attorney will guard the client's confidences and secrets.[13] (*Truck Ins. Exchange v. Fireman's Fund Ins. Co., supra,* 6 Cal.App.4th at 1056-1057.) However, in concurrent representation conflicts, the interest at stake is the attorney's duty of undivided loyalty and commitment to the client. (*Ibid.*) That interest extends beyond any individual client to include the "public confidence in the legal profession and the judicial process." (*Id.* at 1057.)

Consequently, District 40 completely misses the point when it argues that AVEK has demonstrated a disregard for its confidential information by attaching certain emails to its moving papers that "could be construed as confidential information." This is a case of concurrent

[13] 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.)

representation, which implicates BB&K's duty of absolute and undivided loyalty to AVEK, which further implicates the public trust in the integrity of the judicial system.

Finally, District 40's argument that *Flatt* does not address the issue of waiver is apropos of nothing. District 40 contends that since *Flatt* did not involve a disqualification motion, the absence of a waiver discussion "is not surprising." Given the fact that District 40 relies so heavily on the *SpeeDee* decision in its Opposition and that the *SpeeDee* court relied so heavily on *Flatt*, District 40's argument is nonsensical and contradictory. Further, the *Flatt* court determined that had the attorney provided advice to the prospective client that was inimical to the interests of an existing client, such advice would have constituted a violation of the attorney's duty of undivided loyalty to an existing client. (*Flatt v. Superior Court*, *supra*, 9 Cal.4th at 290.) In other words, the attorney would have been guilty of concurrent representation of clients with adverse interests. Under such a circumstance, disqualification is automatic, and waiver is not a defense.

The only "evidence" of prejudice offered in the Opposition is the unsworn declaration of Adam Ariki,[14] which this Court should disregard. Even if considered by the Court, the declaration does not provide any evidence of prejudice; it merely offers unsupported and improper opinion testimony and speculation. (Ariki Decl., 2:10-28, 3:2-4, 3:23-25.) More importantly, "prejudice" is an equitable consideration that may only be contemplated in cases of successive as opposed to concurrent representation. As the *SpeeDee* court observed, "The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar." (*SpeeDee, supra,* 20 Cal. 4th at 1145.) The rights of the individual to retain an attorney are secondary to the ethical considerations that affect the public trust in the integrity of the judicial process. (*Ibid.*)

D. District 40's "Prophylaxis" Argument is Immaterial and Erroneous.

District 40 argues that disqualification is "warranted only where it will have a prophylactic effect on the litigation." This argument, derived from *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, represents another example of a misinterpretation and non-contextual reading of the case law. In *Gregori*, the issue was whether an attorney could be disqualified from a case for engaging in a social

[14] See footnote 11, *supra.*

relationship with a secretary from an opposing law firm. (*Id.* at 295.) The court conceded that there was no rule of professional conduct or statute that explicitly prohibited the attorney's conduct, and that the nature of the case was sui generis. (*Id.* at 301-302.) In fact, the court specifically stated that the attorney's conduct did not implicate the proscription against representing clients with conflicting interests. (*Id.* at 299, fn. 3.) In short, the Opposition does not set forth any authority for the proposition that "prophylactic effect" in concurrent representation cases is properly considered because no such authority exists.

Nonetheless, the suggestion that the conflicts between AVEK and District 40 relative to the AVG litigation have all been resolved and that there will be no future conflicts is patently false. During the last several months, District 40 and AVEK have taken diametrically opposed positions as to whether District 40 and the other PWS members should be allowed to vote for the election of landowner representatives to the Watermaster Board. (Supplemental Declaration of Leland P. McElhaney ("Supp. McElhaney Decl."), 3:5-10, filed herewith.) Indeed, on December 7, 2016, BB&K will argue in one hearing that the motion to disqualify should be denied partly because the adversity between AVEK and District 40 has ended, and in another hearing, BB&K will take a position on behalf of District 40 which is in direct conflict to AVEK's position, thus demonstrating that the conflicts between the parties continue. (Supp. McElhaney Decl., 3:11-19.)

E. The Undisputed Facts of this Case Require BB&K's Automatic Disqualification.

At its essence, this is a simple case. In 2004 BB&K accepted representation of District 40 in the AVG litigation even though it was fully aware of a potential conflict of interest with AVEK. Prior to accepting representation of District 40, it was incumbent upon BB&K to obtain the informed written consent of both AVEK and District 40.[15] BB&K clearly understood the existence of the potential conflict as demonstrated by Riddell's October 4, 2004, memorandum to the AVEK board in which he advised them of the possibility of being brought into the AVG litigation. (Declaration of Frank S. Donato filed in support of AVEK's moving brief ("Donato Decl.") at Ex. C.)

[15] California Rule of Professional Conduct, rule 3-310(C)(1) prohibits an attorney from *accepting* representation of a client where a conflict with an existing client *potentially* exists absent the express written informed consent of each client.

Despite this awareness, BB&K consciously decided to move forward with the representation of District 40 without fulfilling its ethical obligations. When the potential conflict of interest between AVEK and District 40 evolved into an actual conflict in 2006, BB&K was again under an ethical obligation to obtain written consent from AVEK and District 40 in order to continue representing District 40.[16] Two years later, in 2008, Riddell again sought a waiver from the AVEK board, but only as to the concurrent representation of RCSD. (Donato Decl., Ex. D.) Inexplicably, the requested waiver did not extend to BB&K's concurrent representation of District 40. (*Ibid.*) Regardless, the AVEK board declined to execute a written waiver for concurrent representation. In January of 2016, the AVEK board voted to excuse Riddell and BB&K as its general counsel. (*Id.* at 3:21-22.) Later that month AVEK's specially retained counsel demanded BB&K's withdrawal from the AVG litigation because of its concurrent representation of District 40. (Declaration of James J. Banks filed in support of AVEK's moving brief ("Banks Decl.") at 1:7-8.) Counsel for BB&K refused to withdraw, which precipitated this motion. (*Id.* at 1:9-11.)

There is no dispute that BB&K engaged in concurrent representation of clients with adverse interests in the AVG litigation. It is of no moment that BB&K attorneys never represented AVEK in the AVG litigation. Clearly, Riddell would have been disqualified from representing both AVEK and District 40 in the AVG litigation. Since BB&K is a private law firm, Riddell's disqualification extends to the entire firm. (*City of Santa Barbara v. Superior Court, supra,* 122 Cal.App.4th at 24.) Further, as this is a case of concurrent representation, the controlling authorities provide that the rule of per se automatic disqualification applies. There is no test to be performed, no competing interests to weigh, and no equitable concerns to consider. As Justice Mosk elegantly stated in his concurring opinion in the *SpeeDee* case, automatic disqualification in cases of concurrent representation is a "bright-line rule." (*SpeeDee*, *supra*, 20 Cal.4th at 1156.)

This situation is solely a creation of BB&K's failure to adhere to its ethical obligations and its dual duties of client confidentiality and undivided client loyalty. As one court put it, when an attorney engages in conflicting representation, the attorney "in effect gives a wild card to each of the clients. At

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[16] California Rule of Professional Conduct, rule 3-310(C)(2) prohibits an attorney from *continuing* representation of a client where a conflict with an existing client *actually* exists absent the express written informed consent of each client.

any time thereafter…any of the clients can play the card and require withdrawal of the attorney (and the attorney's law firm) entirely from the case." (*In re Jaeger* (Bankr. C.D. Cal. 1997) 213 B.R. 578, 586.)[17] Thus, when BB&K made the business decision to accept representation of District 40 in the AVG litigation without first obtaining the required waivers, BB&K assumed the risk that the firm could be disqualified by either client at any point in the litigation.

III. CONCLUSION

For the reasons set forth herein and as further delineated in the moving papers, AVEK respectfully requests the Court to grant the instant motion to disqualify BB&K from representing District 40 or any other party in the AVG litigation.

Respectfully submitted,

DATED: November 30, 2016

BANKS & WATSON

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

[17] Federal courts apply state law in determining matters of disqualification. (*Reading Int'l., Inc. v. Malulani Grp., Ltd.* (9th Cir. 2015) 814 F.3d 1046, 1049.)

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

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

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

On November 30, 2016, I served the within copy of:

AVEK'S REPLY IN SUPPORT OF ITS MOTION TO DISQUALIFY BEST & KRIEGER AS LEGAL COUNSEL IN ANTELOPE VALLEY GROUNDWATER CASES

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

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 30, 2016, at Sacramento, California.

_____
Janna Yoshida