BEST BEST & KRIEGER LLP
ERIC L. GARNER, Bar No. 130665
JEFFREY V. DUNN, Bar No. 131926
WENDY Y. WANG, Bar No. 228923
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612
TELEPHONE: (949) 263-2600
TELECOPIER: (949) 260-0972
Attorneys for LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40

OFFICE OF COUNTY COUNSEL
COUNTY OF LOS ANGELES
JOHN F. KRATTLI, Bar No. 82149
COUNTY COUNSEL
WARREN WELLEN, Bar No. 139152
PRINCIPAL DEPUTY COUNTY COUNSEL
500 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012
TELEPHONE: (213) 974-8407
TELECOPIER: (213) 687-7337
Attorneys for LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40

[See Next Page For Additional Counsel]

EXEMPT FROM FILING FEES UNDER GOVERNMENT CODE SECTION 6103

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

ANTELOPE VALLEY GROUNDWATER CASES Included Actions: Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Los Angeles, Case No. BC 325201; 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, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668 RICHARD WOOD, on behalf of himself and all other similarly situated v. A.V. Materials, Inc., et al., Superior Court of California, County of Los Angeles, Case No. BC509546	Judicial Council Coordination Proceeding No. 4408 CLASS ACTION Santa Clara Case No. 1-05-CV-049053 Assigned to the Honorable Jack Komar PUBLIC WATER SUPPLIERS' PHASE 5 TRIAL BRIEF Trial Date: February 10, 2014 (Phase 5)

RICHARDS WATSON & GERSHON
James L. Markman, Bar No. 43536
Steven Orr, Bar No. 136615
355 S. Grand Avenue, 40th Floor
Los Angeles, CA 90071-3101
(213) 626-8484; (213) 626-0078 fax
Attorneys for City of Palmdale

MURPHY & EVERTZ LLP
Douglas J. Evertz, Bar No. 123066
650 Town Center Drive, Suite 550
Costa Mesa, CA 92626
(714) 277-1700; (714) 277-1777 fax
Attorneys for City of Lancaster and Rosamond
Community Services District

LEMIEUX & O'NEILL
Wayne Lemieux, Bar No. 43501
4165 E. Thousand Oaks Blvd., Ste. 350
Westlake Village, CA 91362
(805) 495-4770; (805) 495-2787 fax
Attorneys for Littlerock Creek Irrigation District,
Palm Ranch Irrigation District, Desert Lake Community Services District, North Edwards Water District, Llano Del Rio Water Company, Llano Mutual Water Company, and Big Rock Mutual Water Company

LAGERLOF SENECAL GOSNEY & KRUSE
Thomas Bunn III, Bar No. 89502
301 North Lake Avenue, 10th Floor
Pasadena, CA 91101-4108
(626) 793-9400; (626) 793-5900 fax
Attorneys for Palmdale Water District

CHARLTON WEEKS LLP
Bradley T. Weeks, Bar No. 173745
1007 West Avenue M-14, Suite A
Palmdale, CA 93551
(661) 265-0969; (661) 265-1650 fax
Attorneys for Quartz Hill Water District

CALIFORNIA WATER SERVICE COMPANY
John Tootle, Bar No. 181822
2632 West 237th Street
Torrance, CA 90505
(310) 257-1488; (310) 325-4605-fax

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

TABLE OF CONTENTS

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Los Angeles County Waterworks District No. 40 ("District No. 40"), Palmdale Water District, City of Palmdale, City of Lancaster, Rosamond Community Services District, Littlerock Creek Irrigation District, Palm Ranch Irrigation District, Desert Lake Community Services District, North Edwards Water District, Llano Del Rio Water Company, Llano Mutual Water Company, Big Rock Mutual Water Company, Quartz Hill Water District, and California Water Service Company (collectively, "Public Water Suppliers") respectfully submit the following Phase 5 trial brief.

I. INTRODUCTION

This Court found that the Antelope Valley Groundwater Adjudication Area ("Basin") was and has been in an overdraft condition. During this longstanding overdraft condition, the Public Water Suppliers have purchased imported and used State Water Project ("SWP") water since the early 1970's. They have used the SWP water to meet the public's needs for water. Hundreds of thousands of homeowners and business depend upon the Public Water Suppliers ability to provide water.

The Phase 5 trial is to determine the right to the return flows and their cumulative percentage augmentation of the Basin's groundwater. There is no reasonable dispute that the return flows exist because the Public Water Suppliers and some private entities purchase SWP water. Absent those Public Water Suppliers and other AVEK customer purchases, no SWP water recharges the Basin. As the Court stated in its recent decision denying AVEK's motion for summary adjudication, the return flows:

> ***result from use of imported water; not just from importation***. On the undisputed evidence before the court, AVEK has failed to establish that, as a State Water Project ("SWP") contractor with a contractual entitlement to receive and deliver SWP water to public water suppliers and private property owners, it is an appropriator or importer of SWP water such that it may retain a prior right to recapture return flows from the water delivered to and used by others. AVEK has thus failed to establish it is entitled to summary adjudication of its return flow claim as a matter of law. The entirety of case law supports that proposition that water users who have imported the water into the basin and who have augmented the water in the acquifer through use are entitled rights to the amount of water augmenting the acquifer. If on the trial of this matter AVEK can establish some quantity of water augments the acquifer because of its use, beyond what it may sell to other water producers/providers, it may establish such rights.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

(See Order After Hearing on January 27, 2014: Motion by Cross-Complainant AVEK for Summary Judgment/ Summary Adjudication ("Order re AVEK's MSA"), at p. 4 [emphasis added].)

The Public Water Supplier customers depend upon the Public Water Suppliers to use the SWP water and Basin groundwater where the return flows are stored. In Phase 5, Public Water Suppliers will present evidence that they purchase SWP water pursuant to written contracts with AVEK. AVEK, on its part, is a wholesaler. The contracts convey the SWP water to Public Water Suppliers without any reservation of an interest in the SWP water on the part of AVEK.

AVEK has no groundwater right to SWP water return flows. The California Department of Water Resources ("DWR") diverts the SWP water in northern California. As one of many SWP contractor wholesalers, AVEK has a contract with DWR for AVEK to deliver SWP water who, in turn, sells it to all but two of the Public Water Suppliers and other private entities.[1]

In the Phase 5 trial, the Public Water Suppliers will present government records including invoices and other internal records showing the amount of their SWP water purchases. The Phase 3 trial testimony and exhibits establish that a certain amount of the imported SWP water augments the Basin's groundwater supply. As part of the Basin's safe yield, the return flow amounts were included in the safe yield determination in the Court's Phase 3 Statement of Decision.

As the importers and users of SWP water in the Basin, the Public Water Suppliers have the rights to SWP return flows. The Public Water Suppliers will also present expert witness testimony during Phase 5 that confirms Phase 3 trial expert witness Joseph Scalmanini's opinion regarding return flows, and demonstrate the cumulative return flow percentage for municipal and industrial uses to be 39.1 percent.

II. RETURN FLOWS BELONG TO THE IMPORTER AND USER OF THE IMPORTED WATER

An entity that uses imported water has the right to recapture and use the return flows from

[1] Two of the Public Water Suppliers, Palmdale Water District and Littlerock Creek Irrigation District, are State Water Contractors and receive imported water directly from the State Water Project. As such, Section III of this trial brief does not apply to them.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

that water. (*City of Santa Maria v. Adam* ("*Santa Maria*") (2012) 211 Cal.App.4th 266, 301 ["one who brings water into a watershed may retain a prior right to it even after it is used."] [citing *City of Los Angeles v. City of Glendale* ("*Glendale*") (1943) 23 Cal.2d 68, 77]; Wat. Code § 7075 ["Water which has been appropriated may be turned into the channel of another stream, mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another shall not be diminished."].)

As the California Supreme Court stated in *City of Los Angeles v. City of San Fernando* ("*San Fernando*") (1975), 14 Cal.3d 199, 261, "[t]he purpose of giving the right to recapture returns from delivered imported water priority over overlying rights and rights based on appropriations of the native ground supply is to credit the importer with the fruits of his expenditures and endeavors in bringing into the basin water that would not otherwise be there." Therefore, water users who have augmented the water supply in a basin through the use of imported water are entitled to the amount of water augmenting the aquifer. This right is not affected by the storage capacity of the aquifer. (See generally, *Glendale*¸*supra*, 23 Cal. 2d 68; *San Fernando*, *supra*, 14 Cal. 3d 199; *Santa Maria*, *supra*, 211 Cal. App. 4th 266.) As established in the Phase 3 trial, return flows augmented the Basin's groundwater supply and increased the Basin's safe yield.

To the extent groundwater storage space is any longer relevant to the parties' return flow claims, this issue was addressed by Public Water Suppliers' expert Mark Wildermuth in the Phase 3 trial. Consistent with the public reports by the United States Geological Survey ("USGS"), Mr. Wildermuth testified there has been a significant decline in groundwater storage in the Basin. (See Exhibit 1 [Trial Testimony of Mr. Wildermuth on January 4, 2011] at 156:19-23 ["Over the period of time 1951 to 2009, it shows a cumulative change of storage in a minus 5,184,000-acre fee."]; Exhibit 2 [Wildermuth Trial Exhibit 54].) The Basin, therefore, has at least 5 million acre-feet of available storage capacity.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

III. AVEK SELL SWP WATER TO THE PUBLIC WATER SUPPLIERS[2] WITHOUT RESERVATION OF RETURN FLOWS

A. AVEK Retains No Interest In SWP Water Purchased By the Public Water Suppliers

AVEK admits it exists "for the purpose of providing water received from the State Water Project ('SWP') as a supplemental source of water to retail water purveyors and other water interests within AVEK's Jurisdictional Boundaries ***on a wholesale basis***." (Exhibit 3 [Appendix B, Resolution R-11-09 to AVEK's 2010 UMWP] [emphasis added].) Consistent with its wholesaler status, AVEK has a contract with the DWR for AVEK to take and deliver SWP water to its customers, including District No. 40, City of Palmdale, City of Lancaster, Rosamond Community Services District, Palm Ranch Irrigation District, Desert Lake Community Services District, North Edwards Water District, Llano Del Rio Water Company, Llano Mutual Water Company, Big Rock Mutual Water Company, Quartz Hill Water District, and California Water Service Company.

Prior to their purchase of the SWP water from AVEK, Public Water Suppliers entered into written water service agreements with AVEK (collectively, "Water Service Agreements"), which are substantially the same. (Exhibits 3 [AVEK's Resolution R-11-09] ["'substantial uniformity' in those contracts is 'desirable' and that AVEK will 'attempt to maintain such uniformity' between such contracts."] & 4 at Article 19 [Los Angeles County Waterworks District No. 40's Water Service Agreement ("District 40's Water Service Agreement")].) The Water Service Agreements provide:

> [T]he Consumer desires to contract with [AVEK] for a water supply to be ***for the use and benefit of the Consumer***, and for which Consumer will make payment to [AVEK] upon the terms and conditions hereinafter set forth

(Exhibit 4 at p. 2 [emphasis added].) The Water Service Agreements do not mention any use of the SWP water by AVEK.

Article 4 of the Water Service Agreements provides: "Because it may be necessary that

[2] Since Palmdale Water District and Littlerock Creek Irrigation District are State Water Contractors and receive imported water directly from DWR, Section III of this trial brief does not apply to them.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

consumer maintain and operate his own wells to provide for his own system peak demands and as an emergency reserve water supply, it is advisable that consumer retain and protect his rights to groundwater." (Exhibit 4 [District 40's Water Service Agreement].) The Water Service Agreements do not mention return flows, nor do they mention any use of SWP water by AVEK or reserve AVEK's interest in SWP water sold to the Public Water Suppliers. (*Id*.)

By law, AVEK's failure to reserve any interests in the water sold under the Water Service Agreements means that AVEK transferred all its rights and interests in the SWP water to the Public Water Suppliers that purchased the water. (*See* Civ. Code §§ 1105 ["A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended."] & 1084 ["The transfer of a thing transfers also all its incidents, unless expressly excepted"]; *Long Beach v. Marshall* (1938) 11 Cal.2d 609, 613-14 [a transfer of real property is presumed to be a grant of fee simple title]; *American Enterprise, Inc. v. Van Winkle* (1952) 39 Cal. 2d 210, 220 ["In the absence of some exception, limitation or reservation, a grant deed is presumed to convey the grantor's entire interest."].) The right to receive water is a form of real property. (*Stanislaus Water Company v. Bachman* (1908) 152 Cal. 716, 726-727; ["The right in water which has been diverted into ditches or other artificial conduits, for the purpose of conducting to land for irrigation, has been uniformly classed as real property in this state"]; *Fullerton v. State Water Resources Control Board* (1979) 90 Cal. App. 3d 590, 598 ["an appropriative water right is a real property interest incidental and appurtenant to land"].)

B. AVEK's Water Service Agreements Provide That AVEK's Customers Retain Groundwater Rights, Such as Return Flows

The Water Service Agreements' silence on return flows is important because the contracts address groundwater rights:

> Because it may be necessary that consumer maintain and operate his own wells to provide for his own system peak demands and as an emergency reserve water supply, ***it is advisable that consumer retain and protect his rights to groundwater***.
>
> ***In the event there is an adjudication of the groundwater basin*** or any of its sub-units***, the Agency will assist the Consumers***, if the latter so desire, ***in retaining their rights in the groundwater supply***.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

(Exhibit 4 at Article 3A [District 40's Water Service Agreement] [emphasis added].)

The Water Service Agreements' reference to the Public Water Suppliers' groundwater rights and the lack of any mention of AVEK's use of groundwater leaves no doubt that AVEK has no return flow rights. AVEK sold SWP water to the Public Water Suppliers, who have a complete and undivided interest in the SWP water they purchased from AVEK including the return flows that recharge the Basin.

C. The Indemnity Provision of AVEK's Water Service Agreements Demonstrates that the Public Water Suppliers Have Return Flow Rights

Article 11 of the Water Service Agreements provide that once AVEK delivers the SWP water to the Public Water Suppliers, AVEK shall not be liable "for the control, carriage, handling, ***use***, disposal, distribution or changes occurring in the quality of such water supplied to the Consumer or for claim of damages of any nature . . . ; and the Consumer shall indemnify and hold harmless [AVEK] . . . from any such damages or claims of damages . . . ." (Exhibit 4 [emphasis added].)

This indemnity provision is consistent with the plain language of the Water Service Agreements. When AVEK delivers SWP water to Public Water Suppliers, AVEK transfers whatever interest AVEK has to SWP water to the Public Water Suppliers. AVEK's belated claim to the Public Water Suppliers' return flows leads to the nonsensical conclusion that the Public Water Suppliers are indemnifying AVEK for AVEK's nonuse of return flows. (*See Harris v. Klure* (1962) 205 Cal. App. 2d 574, 577-78 ["In construing a contract the court should strive to ascertain its object as reflected in the provisions thereof; should be guided by the intention of the parties as disclosed by those provisions; should adopt that construction which will make the contract reasonable, fair and just; . . . should avoid an interpretation which will make the contract unusual, extraordinary, harsh, unjust or inequitable, or which would result in an absurdity; should reject language which is wholly inconsistent with its object; should consider the contract as a whole, using each clause thereof as a help to interpret the others; should give effect to every part thereof if reasonably practicable and, if this is impossible, to favor an interpretation which gives effect to the main apparent purpose of the contract."] [citations and quotation marks omitted].)

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

IV. AVEK HAS NO REASONABLE AND BENEFICIAL USE FOR RETURN FLOWS

The California Supreme Court in *San Fernando, supra*, held that an importer "should be allocated the ground water ***it requires for reasonable beneficial use*** from the part of the supply shown to constitute return flow attributable to [the importer's] delivered imports." (14 Cal. 3d at p. 294 [emphasis added].) AVEK does not have a reasonable and beneficial use for the return flows. AVEK admits that it has never claimed return flows from SWP water as a potential source of water because AVEK "intends to maintain nearly all return flows in the groundwater to help replenish the Basin." (Exhibit 5 at 4:1-10 [AVEK's Response to District No. 40's Request for Admission].) Stated simply, AVEK has no "use" for the return flows..

Leaving groundwater water in a basin is not a reasonable and beneficial use. An entity acquires water rights only when it takes and uses the water.[3] Using water requires the entity to exercise physical control over the water. (*Fullerton, supra*, 90 Cal. App. 3d at p. 598.) "[T]he present constitutional provision consists of a broad policy declaration that the waters of the state should be placed to beneficial use in reasonable and nonwasteful ways. . . . To constitute an appropriation, three elements must coexist, '*the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use*'." (*Id.* at pp. 597-98 [citation omitted] [emphasis added].)

In *Fullerton, supra*, the State Water Resources Control Board ("SWRCB") rejected California Department of Fish and Game's application for an "in-stream" appropriation of water to provide minimum flow guarantees to protect the state's fish resources. While the *Fullerton* court recognized the value of protecting fish for food and recreational purposes, it held that the California Constitution requires all uses of water be reasonable and beneficial and that leaving the water in-stream "ignores the express language of the constitutional provision." (*Id.* at p. 597.) The Court of Appeal held that the Fish and Game Department, notwithstanding its broad mandate to protect fish, lacked the "minimal actual physical use" necessary to claim an appropriative water right. (*Id.* at p. 593.)

[3] Storing water in the Basin for future use could be a reasonable and beneficial use, but that is not what AVEK intends to do.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

Similarly, for AVEK to even claim a right to the return flows, AVEK would need to demonstrate that it had used or was going to use the return flows and that its use was reasonable and beneficial. (*See* Cal. Const, Art. X § 2.) As indicated by the Court at the January 27, 2014 hearing on AVEK's motion for summary adjudication, the party who imports ***and*** uses water is entitled to the return flow right. AVEK has not and cannot provide such evidence at trial as it has already admitted that it has no use for the return flows and intends to leave them in the Basin. The Public Water Suppliers will produce evidence, including correspondence and reports drafted by AVEK demonstrating that AVEK, at least until very recently, does not have the capacity to pump groundwater and does not have the intent to pump return flows.

V. THE PUBLIC WATER SUPPLIERS PUMP GROUNDWATER FROM THE BASIN

In *San Fernando* a critical element of the Court's holding was that Los Angeles had been pumping water from the Basin: "From the beginning of plaintiff's delivery of imported water to users in the San Fernando basin up to the present time, a return flow from such deliveries has augmented the basin's ground supply. From an even earlier time up to the present, plaintiff [Los Angeles] has relied and regularly drawn upon that same basin supply for its municipal water distribution system and has claimed the native waters of the basin . . . ." (14 Cal. 3d at 259.) The *San Fernando* court held that this history of pumping, coupled with the allegation of intent to recapture return flows in the complaint, was a sufficient manifestation of the intent to recapture return flows. (*Id*. at 259-60.)

As this Court noted, the right to return flows is separate and apart from a party's right to native water. (See Order re AVEK's MSA, at p. 3.) This is consistent with the Supreme Court's holding in *San Fernando*. (See *San Fernando*, 14 Cal. 3d at 254, 261 [there is no return flow right for native water] & 262 [Los Angeles's right to native water from its pueblo right was unaffected by its right to imported water return flows].)

Here, the Public Water Suppliers have demonstrated their intent to pump and use the return flows they imported. The Public Water Suppliers, like the City of Los Angeles in *San Fernando*, have been pumping from the Basin for many years and claim a right to the native

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

waters of the Basin. AVEK has not historically pumped groundwater or claimed a right to the Basin's native water.

In Phase 5, the Public Water Suppliers will present government records including invoices, statements from AVEK, and spreadsheets demonstrating the amount of SWP water they purchased from AVEK. The Public Water Suppliers will also present notices of groundwater extraction and diversion and spreadsheets showing their pumping of groundwater.

Government records are admissible under California Evidence Code Section 1280 to prove the occurrence or existence of an act, condition or event recorded in the record, provided that the writing "was made by and within the scope of duty of a public employee" and "was made at or near the time of the act, condition, or event." (*Jazayeri v. Mao* (2009) 174 Cal. App. 4th 301, 308 ["official records exception to the hearsay rule is beyond dispute."].) Moreover, these records were prepared in the "regular course of business" and also fall under the business record exception to the hearsay rule. (Cal. Evid. § 1271.)

The Public Water Suppliers will also present expert testimony, some of which were previously presented in Phase 3 trial, that SWP water it imported has recharged and continues to recharge the Basin. Pursuant to the Court's request at the January 27, 2014 hearing, the Public Water Suppliers will have copies of the relevant Phase 3 expert testimony available in court on the first day of trial.

VI. THE PUBLIC WATER SUPPLIERS ARE THE IMPORTERS AND USERS OF SWP WATER

A. AVEK Delivers the SWP Water to the Basin Only Because of Purchases by the Public Water Suppliers

As the wholesaler of SWP water, AVEK does not import SWP water to the Antelope Valley, except for small amounts for banking, unless and until the Public Water Suppliers purchase such water. In fact, even during years when its full contractual amount of 141,400 acre feet are available for delivery, AVEK has never received more than 90,000 acre-feet of SWP water from DWR in any given year.[4]

[4] 90,000 acre-feet is approximately 64 percent of AVEK's 141,400 acre-feet allotment of SWP water.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

The Public Water Suppliers will present letters from AVEK stating that: (1) AVEK must pay fixed costs to DWR regardless whether it receives any SWP water; (2) AVEK has historically required monetary deposits from its customers, before it will order SWP water from DWR; and (3) the Public Water Suppliers pay for the cost of SWP water as well as AVEK's infrastructure expenses. Furthermore, DWR bulletins show that AVEK routinely fails to order as much SWP water as it is entitled.

B. Case Law Supports the Public Water Suppliers' Right To Recapture and Use the SWP Water Return Flows

In *San Fernando, supra*, the California Supreme Court established that—with respect to water that the SWP contractor sells and delivers to a local water district, which the local district then delivers to the ultimate user—the local water district has the right to the return flows. The *San Fernando* decision was recently cited by the Court of Appeal in *City of Santa Maria v. Adam* (2012) 211 Cal. App. 4th 266, 301-303, which held that retail purchasers of SWP water are entitled to return flows attributed to their respective water purchases. Stated simply, retail purchasers like the Public Water Suppliers here, are the "importers" and users of SWP water.

1. The *San Fernando* Decision

In *San Fernando, supra*, the cities of Los Angeles, Glendale and Burbank (respectively, "Los Angeles," "Glendale" and "Burbank") respectively, claimed the right to the return flows of various waters that were imported into the Upper Los Angeles River Area ("ULARA"), which includes most of the San Fernando Valley. (14 Cal. 3d at pp. 208-209.) The imported waters fell into three categories: (1) the waters of the Owens River and Mono Lake Basin that Los Angeles diverted and transported through its own aqueduct to its facilities in the ULARA; (2) the waters of the Colorado River that Los Angeles purchased from the Metropolitan Water District of Southern California ("MWD"), which MWD delivered to the ULARA for Los Angeles' use; and (3) the waters of the Colorado River that Glendale and Burbank purchased from MWD, and that MWD delivered to the ULARA for Glendale's and Burbank's uses. (*Id.* at pp. 208-210, 255-

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

256.)[5]

The California Supreme Court held that Los Angeles had the right to the return flows of water that it imported from the Owens River and Mono Lake Basin through its own aqueduct to the ULARA, and that Glendale and Burbank did not have the right to these return flows. (*Id*. at 256-260.) The court stated that it had earlier decided this issue in *Los Angeles v. Glendale* ("*Glendale*") (1943) 23 Cal.2d 68, and that Los Angeles had the right to the return flows for the same reason that it was held to have the right in *Glendale*. (*Id.*)[6]

Second, the Supreme Court held that all three cities—Los Angeles, Glendale and Burbank—had the right to return flows of Colorado River water that they had purchased from MWD, and that MWD had delivered to them. (*Id*. at pp. 260-261.) Thus, Los Angeles had the right to return flows of Colorado River water that it purchased from MWD, and Glendale and Burbank had the right to return flows of Colorado River water that they purchased from MWD:

> Defendants Glendale and Burbank ***each delivers imported MWD water to users within its territory*** in the San Fernando basin and each has been extracting ground water in the same territory before and after the importation. Accordingly, ***each has rights to recapture water attributable to the return flow from such deliveries*** for the same reason that plaintiff [Los Angeles] has this right. These multiple rights necessitate the apportionment of the ground water derived from return flow into the amounts attributable to the important deliveries of each defendant and plaintiff.

(*Id*. at pp. 260-261 [emphasis added].)

The California Supreme Court's decision in *San Fernando, supra*, is determinative here. The court held that "each [city] delivers imported MWD water to users within its territory," and "each has rights to recapture water attributable to the return flow from such deliveries" of MWD-

[5] In addition, of the water that Los Angeles transported from the Owens River and Mono Lake Basin through its aqueduct, Los Angeles spread "relatively small quantities" of this water into the groundwater basin, in order to recharge the basin and "recapture the water thus stored." (*San Fernando*, 14 Cal.3d at 256, & n. 48, 262-263.)

[6] The court held that its earlier adjudication of Glendale's and Burbank's claims to the return flows in *Los Angeles v. Glendale* (1943) 23 Cal.2d 68, did not bar Glendale's and Burbank's claims in the instant case—because the earlier decision considered only return flows from agricultural, or "irrigation," use by "farmers," and the instant case involved return flows from non-agricultural uses—but that the same principles that apply in cases involving non-agricultural uses also apply in cases involving agricultural uses. (*San Fernando*, 14 Cal.3d at pp. 213, 258-259.)

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

imported water. (*Id.*) The court thus held that where MWD, which imports Colorado River water through its own aqueduct, sells and delivers the water to the three cities, which then provide the water to their customers for ultimate use, the return flows of the MWD-imported water belong to the three cities.

In the instant case, AVEK stands in the same place as MWD and the Public Water Suppliers stand in the places of the three cities. Like MWD, AVEK sells and delivers imported SWP water to the Public Water Suppliers, which then provide the water to their customers for ultimate use. Because the California Supreme Court held that the three cities have the right to the return flows of MWD-imported water in *San Fernando*, the Public Water Suppliers have the right to the return flows of SWP water here.

2. The *City of Santa Maria* Decision

The recent appellate court decision in *City of Santa Maria, supra,* 211 Cal.App.4th 266, 301-302, cites *Glendale* and *San Fernando* in upholding the right of the City of Santa Maria to return flows. In that case the City was in the same position as the Public Water Suppliers here and there was no consideration that the return flow right should go to the Department of Water Resources or Central Coast Water Authority (who was the State Water Contractor like AVEK is here). Stated simply, retail purchasers like the Public Water Suppliers here, are the "importers" and users of SWP water.

Like Central Coast Water Authority, the SWP wholesaler in *Santa Maria*, AVEK is a SWP wholesaler that delivers SWP water only when a retail water purchaser requests and pays for the SWP water. In fact, AVEK would only schedule water deliveries from DWR for the quantity of water on which the Public Water Suppliers have advanced monetary deposits. It is only because of the purchase by the retail water purchasers, like the Public Water Suppliers here, and the City of Santa Maria in *Santa Maria, supra*, that SWP water is actually imported. If purchasers, like the Public Water Suppliers do not buy and import the SWP water into the Antelope Valley Basin, AVEK does not purchase the SWP water and the SWP water would not reach the Basin.

Santa Maria, supra, held the return flow right "means that one who brings water into a

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

watershed may retain a prior right to it even after it is used." (*Glendale, supra*, 23 Cal.2d at pp. 76–77.) The practical reason for the rule is that the importer should be credited with the "fruits … of his endeavors in bringing into the basin water that would not otherwise be there." (*Santa Maria*, 211 Cal.App.4th at p. 301.)

Here, it is the Public Water Suppliers who pay for the water. Without the Public Water Suppliers' payments, the SWP water would not otherwise be there in the Basin. Consequently, the Public Water Suppliers should be credited with the benefits of their endeavors. The actual water importers and users here, as in *Santa Maria, supra*, are the Public Water Suppliers and other SWP purchasers because without their purchases, the SWP water they buy would not be imported into the Basin.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

VII. THE RETURN FLOW PERCENTAGE FOR MUNICIPAL AND INDUSTRIAL USES WAS LITIGATED IN THE PHASE 3 AND SHOULD NOT BE RE-LITIGATED IN PHASE 5

A. Safe Yield Encompasses the Return Flow Amount

The Court's Phase 3 Statement of Decision states: "The only issues in this phase of trial were simply to determine whether the adjudication area aquifer is in a current state of overdraft and as part of that adjudication determine safe yield." (Statement of Decision for Phase 3 ["Statement of Decision"] at p. 2.) The amount of safe yield was determined only after the Court ascertained the average amount of recharge from all sources, including return flows. (Statement of Decision at pp. 3-4 & 7.)

In *Los Angeles, supra*, the California Supreme Court stated:

> Basically, **safe yield was deemed equivalent to an adjusted figure for net ground water recharge, consisting of (A) recharge from** (1) native precipitation and associated runoff, **(2) return flow from delivered imported water**, and (3) return flow from delivered ground water less (B) losses incurred through natural ground water depletions consisting of (1) subsurface outflow, (2) excessive evaporative losses in high ground water areas and through vegetation along streams, (3) ground water infiltration into sewers, and (4) rising water outflow, or water emerging from the ground and flowing past Gauging Station No. F57 down the river channel to the sea.

(14 Cal. 3d at 278-79 [emphasis added].) More recently, in *Santa Maria, supra*, the court reiterated the principle that safe yield "is generally calculated as the net of inflows less subsurface

and surface outflows." (211 Cal.App.4th at 279 citing *Los Angeles, supra,* at pp. 278-79.)

In the finding here that the Basin's safe yield is 110,000 acre-feet per year ("afy"), the Court considered evidence on return flows. (Statement of Decision at p. 4.) The safe yield of 110,000 afy was the safe yield number presented by the Public Water Suppliers' primary witness in Phase 3 – Joseph Scalmanini – and it included Mr. Scalmanini's return flow amounts and percentages. No other evidence was presented that would have allowed the Court to make a safe yield determination of 110,000 afy.

Specifically, Mr. Scalmanini testified:

> [I]t would be my opinion or my conclusion that **the native or natural yield of the groundwater basin is about 82,000** or -- you know, we used, you know, a third digit, the 82,300 acre feet per year, meaning that's the yield that derives from waters that are local to the Valley itself.
>
> As I think most know, that the **Antelope Valley has made use of supplemental waters primarily from the state water project since the 1970s, and the importation and use of that supplemental water contributes in an indirect fashion additional recharge to the basin which augments the yield of the basin.**
>
> And I'm sure we'll get into it in more detail later, depending on what time period you analyze as representative cultural conditions, that that **use of supplemental water contributes something on the order of 25,000 to 28,000 acre feet per year of additional yield.**
>
> **So that in total the native yield plus a supplemental yield would add up to the better part of 110,000 acre feet per year**.

(Supplemental Request for Judicial Notice, posted on the Court's website on January 24, 2014 ("Supplemental RJN"), Ex. II, at 30:8-31:4 [emphasis added].) Mr. Scalmanini subsequently elaborated further on the basis of his opinion. (Request for Judicial Notice posted to the Court's website on March 29, 2013 ("RJN"), Ex. Q, at 500:7-514:4; Supplemental RJN, Ex. KK, at 514:5-516:5.) Significantly, Mr. Scalmanini testified that 28.1 percent of water delivered for municipal and industrial purposes percolates into the groundwater basin and approximately 27,500 acre-feet of the safe yield was attributable to return flows from imported water. (RJN, Ex. QQ, at 509:17-512:9; Supplemental RJN, Ex. KK, at 515:20-24.) As the return flows recharge the Basin, any reduction in the amount of return flows from imported water will necessarily decrease the Court's safe yield determination.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

B. Return Flow Percentage and Amount As to Individual Parcels Are Irrelevant

In Phase 3 the Court determined the safe yield of the Basin, which includes return flows. Some parties suggested that the return flow percentage and/or amount as to each individual parcel of land may be different. However, any such difference is irrelevant because the Basin-wide return flow amount has already been established by the Court.

None of the Public Water Suppliers claim that the return flow percentage from the SWP water it imports and uses is different than that of another Public Water Supplier. Furthermore, a finding that one Public Water Supplier's return flow amount is different would necessarily change other Public Water Suppliers' return flows because the total amount must necessarily remain the same. Because there is no dispute between the Public Water Suppliers as to individual return flow amounts this Court should not determine return flows on an individual parcel basis.

C. The Cumulative Return Flow Percentage for Municipal and Industrial Uses

As demonstrated by Mr. Scalmanini in Phase 3, 28.1 percent of water delivered for municipal and industrial purposes percolates into the groundwater basin. (RJN, Ex. QQ, at 509:17-512:9.) This means that out of every 100 acre-feet of SWP water imported and used by the Public Water Suppliers, 28.1 acre-feet of the water will enter the groundwater basin and can be pumped and re-used by the Public Water Suppliers. When that 28.1 acre-feet of imported water is re-used, 28.1 percentage of that water will then percolate into the groundwater again. This process repeats over and over, until the amount of water returning to the Basin becomes *de minimis.* In other words, supplemental water imported by the Public Water Suppliers augments the groundwater supply more than once and has a cumulative effect on the Basin. If there has to be a second determination of the return flow component of the Basin's safe yield, the Public Water Suppliers' expert witness will testify that the cumulative impact of importing 100 acre-feet of SWP water is to increase the overall groundwater supply of the Basin by 39.1 acre-feet.

D. Expert Witness Testimony

To the extent necessary, the Public Water Suppliers will present testimony from Phase 3 showing how Mr. Scalmanini calculated the safe yield and the quantity of return flows contributing to the safe yield. Furthermore, Dr. Dennis Williams, who is a certified groundwater

hydrologist and an expert in groundwater modeling, will testify as to the amount of return flows resulting from imported water, cumulative return flow percentage for municipal and industrial uses, and the characteristics, structure, hydrologic conditions of the groundwater underlying the Basin. Dr. Williams' resume is attached as Exhibit 6. Mr. Robert Beeby, who is one of the leading experts on California groundwater basins and participated in the Technical Committee, will testify as to return flow issues. Dr. Beeby's resume is attached as Exhibit 7.

VIII. CONCLUSION

The Public Water Suppliers are entitled to return flows from the SWP water they purchase and use for the following reasons:

- AVEK transfers all of its interests in SWP water to Public Water Suppliers and other purchasers.
- AVEK has no reasonable and beneficial use of the return flows.
- AVEK has not demonstrated an intent to use return flows, whereas the Public Water Suppliers, including District No. 40, have been pumping groundwater from the Basin as long as there have been SWP deliveries to the Basin.
- The SWP water that recharges the Basin was ordered by AVEK's customers for their use. AVEK would not have delivered the SWP water to the Basin "but for" the Public Water Suppliers' purchases.

Specifically, the Public Water Suppliers are entitled to cumulative return flows from water they import and use. The cumulative return flow percentage for municipal and industrial uses is 39.1 percent of all purchased SWP water purchased and used by the Public Water Suppliers.

Dated: January 31, 2014

BEST BEST & KRIEGER LLP

By _____
ERIC L. GARNER
JEFFREY V. DUNN
WENDY Y. WANG
Attorneys for Cross-Complainant
LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40

26345.00000\8547821.7

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

PROOF OF SERVICE

I, Sandra K. Sandoval, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP,300 South Grand Avenue, 25th Floor, Los Angeles, CA 90071. On January 31, 2014, I served the within document(s):

PUBLIC WATER SUPPLIERS' JOINT TRIAL BRIEF

☒ by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.

☐ by causing personal delivery by ASAP Corporate Services of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 31, 2014, at Los Angeles, California.

Sandra K. Sandoval