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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

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
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-254-348Wm. 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 No. RIC 353 840,
RIC 344 436, RIC 344 668

Judicial Council Coordination Proceeding
No. 4408

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

ANTELOPE VALLEY GROUNDWATER
AGREEMENT ASSOCIATION'S
OBJECTION TO PROPOSED ORDER
AMENDING AND MODIFYING COURT'S
CLASS CERTIFICATION ORDER DATED
SEPTEMBER 11, 2007

1 The Antelope Valley Groundwater Agreement Association ("AGWA") hereby objects to the
2 Proposed Order Amending and Modifying Court's Class Certification Order Dated September 11,
3 2007, filed on behalf of the Los Angeles County Waterworks District No. 40 and the Rosamond
4 Community Services District on March 11, 2008 ("Proposed Order"). The Proposed Order would
5 not amend and modify the Court's September 11, 2007 Order as requested by the Court at its March
6 3, 2008 hearing.

7 Additionally, the approval of any amendment or modification to the Court's September 11,
8 2007 Order without concurrently approving the requested proposed form of Notice of Class Action
9 is inappropriate, since it is through the notice that the conflict issues among the class members
10 within a general landowner class will be addressed. Only through the provision of the Notice of
11 Class Action to Basin landowners can the Class Counsel avoid a conflict requiring his
12 disqualification as Class Counsel.

13 I. **THE PROPOSED ORDER DOES NOT MODIFY THE CLASS AS REQUESTED BY**
14 **THE COURT**

15 The Proposed Order would not modify the Order Certifying Class in this action as requested
16 by the Court at the March 3, 2008 hearing in this matter. The Court requested that the proposed
17 order modifying the Class contain provisions as to the Class's inclusion of certain Basin landowners
18 located within the service territory of a public water purveyor:

19
20 Mr. Dunn: Your Honor, Maybe what we could offer is this. We
21 would exclude property owners within the two cities, Palmdale and
22 Lancaster. We would also exclude property owners within the public
23 water supplier service areas who own less than 25 acres. And we
24 would also exclude people having a water service agreement
application or arrangement with the County. There are various
arrangements that the County has in terms of providing these water
services, from will serve letters to –

25 The Court: Well, to the extent that they have actual service or applied,
26 it seems to me – because you may have somebody that is outside the
city limits –

27 Mr. Dunn: Yes

28 OBJECTION TO PROPOSED ORDER AMENDING AND MODIFYING CLASS CERTIFICATION ORDER

1 The Court: - who has connected up to the water system.

2 Mr. Dunn: Yes

3 The Court: So they should be excluded too.

4 Mr. Dunn: Yes, they should. They should.

5 (March 3, 2008 Hearing Transcript, 29:6-24.)

6 The Proposed Order contains no proposed amendment or modification consistent with the
7 Court's request. As AGWA counsel made clear at the March 3, 2008 hearing, AGWA members are
8 the only parties to this action presently spending their own money to defend their interests and are
9 eager to have the case at issue. Unfortunately, the public water purveyors appear content to continue
10 to waste the time and money of the other parties to this action by neglecting to follow the requests of
11 the Court.
12

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14 **II. WITHOUT THE SERVICE OF A PROPERLY CRAFTED NOTICE OF CLASS**
15 **ACTION, THE STRINGENT PER SE RULE OF DISQUALIFICATION WOULD**
16 **APPLY TO REQUIRE DISQUALIFICATION OF CLASS COUNSEL**

17 AGWA's prior briefing in this action has dealt extensively with the conflict that exists
18 between non-pumper and pumper members of a Class.¹ This conflict can only be avoided through
19 the crafting of a Class, and the service of a Notice of Class Action, that allows landowners relying on
20 their pumping history to opt out of that Class, which AGWA understood that the Court had required
21
22
23

24 ¹ See Antelope Valley Groundwater Agreement Association's Response to Plaintiff Willis' Partial
25 Objection to Public Water Suppliers' Motion to Amend Class Certification Order, filed February 20,
26 2008; Antelope Valley Groundwater Agreement Association's Response to Motions to Amend Class
27 Definition, filed February 15, 2008; Statement of Clarification; Statement of Support for Plaintiff
28 Willis' Withdrawal of Motion for Class Certification; Joinder in Objections by Diamond Farming
Company, filed August 15, 2007; Response to Public Water Suppliers' Proposals for Class
Definition and Method of Notice, filed April 6, 2007; Antelope Valley Groundwater Agreement
Association's Objection to Motions for Class Certification, filed February 27, 2007;.

1 the public water purveyors to submit in tandem with the Proposed Order.² Absent such a process,
2 the Class Counsel would face a conflict requiring his disqualification from representation of any of
3 the members of the Class.

4
5 **A. An Uncured Actual Conflict of Interest Exists Between the Class Members**

6 Rule of Professional Conduct rule 3-310(C) provides, in relevant part: "A member shall not,
7 without the informed written consent of each client: [¶] (1) Accept representation of more than one
8 client in a matter in which the interests of the clients potentially conflict; or [¶] (2) Accept or
9 continue representation of more than one client in a matter in which the interests of the clients
10 actually conflict...."³

11 As the California Supreme Court explained in *Flatt v. Superior Court* (1994) 9 Cal.4th 275
12 282, fn. 2, *quoting* Canon 6 of the ABA's 1908 Canons of Professional Ethics, "'a lawyer represents
13 conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to
14 another client requires him to oppose.'" "Conflicts of interest may arise in various factual settings.
15 Broadly, they embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client
16 are threatened by his responsibilities to another client or a third person or by his own interests."
17 (*People v. Dunkle* (2006) 36 Cal.4th 861, 914 (citations omitted).)

18 Dual representation of multiple clients always presents the risk of a conflict of interest and
19 requires informed written consent of this potential. (2 *Mallen & Smith, Legal Malpractice* (2008), 9
20 17:2, p. 881; Rule 3-310(C).) If the situation changes and an actual conflict arises among the
21 clients, the attorney must obtain new informed written consent before proceeding with the
22 representation. (Rule 3-310, Discussion ("if the potential adversity should become actual, the
23 member must obtain the further informed written consent of the clients pursuant to subparagraph

24 ²

25 The Court: We are going to have a form of notice by this Friday and
also a form of order for the certification this Friday.

26 (March 3, 2008 Hearing Transcript, 41:21-23; see also March 3, 2008 Minute Order ["Counsel
27 Jeffrey Dunn to prepare and submit Orders Re form of notice and certification issues on March 7,
2008."])

28 ³ All further references to the Rules refer to the California Rules of Professional Conduct.

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(C)(2)"). Implied consent is insufficient in such a situation. (Rule 3-310(C)(2); *Blecher Collins, P.C. v. Northwest Airlines, Inc.* (C.D. Cal. 1994) 858 F. Supp. 1442, 1455 (holding that California law does not allow a client to impliedly waive an actual conflict of interest).)

B. Regardless of Whether Informed Written Consent Is Obtained, an Attorney Cannot Concurrently Represent Clients with Actually Conflicting Interests at a Hearing or at Trial

Even if informed written consent is properly obtained from the clients with actually conflicting interests, counsel may not advocate opposite positions at a hearing or trial. (*Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 898.) The rationale behind this rule flows from the attorney's duty of loyalty:

As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.

(*Ibid.*)

Based upon the facts set forth in AGWA's prior briefing in this action, an actual conflict of interest exists between Class members relying on their pumping histories, on the one hand, and "non-pumper" Class members, on the other hand.

C. Representing Actually Conflicting Interests at Hearing or Trial would Mandate Disqualification

Automatic disqualification is the penalty for violating the conflict of interest rules. When an attorney represents more than one client in a matter in which their interests are directly adverse, the attorney's actual intention and motives are immaterial, and the rule of automatic disqualification applies. (*Fremont Indemnity Corp. v. Fremont General Corp.* (2006) 143 Cal.App.4th 50, 64.) In other words, "[a]n attorney who seeks to simultaneously represent clients with directly adverse interests in the same litigation will be automatically disqualified." (*City and County of San*

1 *Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846, *quoting Flatt*, 9 Cal.4th at 284 fn. 3.)
2 As well, "an attorney may not switch sides during pending litigation representing first one side and
3 then the other." (*City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 23.)

4 The authority of a trial court "to disqualify an attorney derives from the power inherent in
5 every court '[t]o control in furtherance of justice, the conduct of its ministerial officers.'" (*People ex*
6 *rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145
7 *quoting CCP 9 128(a)(5).*) "Ultimately, disqualification motions involve a conflict between the
8 clients' right to counsel of their choice and the need to maintain ethical standards of professional
9 responsibility." (*Ibid.*) "The paramount concern must be to preserve public trust in the scrupulous
10 administration of justice and integrity of the bar." (*Ibid.*) In this case, this tension does not exist
11 since none of the Class members except Ms. Willis herself will have actually "chosen" their counsel.

12 Any representation of landowners with conflicting interests would mandate disqualification –
13 it could not be cured by the later "firing" of any of those landowners. Counsel for the Class in this
14 matter "...may not avoid the automatic disqualification rule applicable to concurrent representation
15 of conflicting interests by unilaterally converting a present client into a former client." (*Pour Le*
16 *Bebe, Inc. v. Guess? Inc.* (2003) 112 Cal.App.4th 810, 823 *quoting American Airlines, Inc. v.*
17 *Sheppard, Mullin, Richter Hampton* (2002) 96 Cal.App.4th 1017, 1037. The "hot potato rule" stands
18 to bar an attorney from curing a dual representation conflict by dropping one of the conflicting
19 clients. (*Flatt*, 9 Cal.4th at 288.)

20 In this action, an actual conflict of interest would exist among the Class members if those
21 members claiming a water rights premised on a history of groundwater pumping are not allowed to
22 opt out of the Class. Counsel's continued representation of all Class members without obtaining
23 informed written consent would be prima facie improper under Rule 3-310.

24 **III. CONCLUSION**

25 Based on the above, AGWA submits that the Proposed Order cannot be adopted as currently
26 drafted, as it would not modify or amend the Class as requested by the Court. Additionally,
27 without concurrently approving the requested proposed form of Notice of Class Action, approval of
28

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1 the Proposed Order would be inappropriate, since it is through the Notice that the conflict issues
2 among the class members within a general landowner class are proposed to be avoided.

3
4
5 Dated: March 13, 2008

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

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9 By: 

MICHAEL T. FIFE
BRADLEY J. HERREMA
ATTORNEYS FOR AGWA

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PROOF OF SERVICE

**STATE OF CALIFORNIA,
COUNTY OF SANTA BARBARA**

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 E. Carrillo Street, Santa Barbara, California 93101.

On March 13, 2008, I served the foregoing document described as:

**ANTELOPE VALLEY GROUNDWATER AGREEMENT ASSOCIATION'S OBJECTION
TO PROPOSED ORDER AMENDING AND MODIFYING COURT'S CLASS
CERTIFICATION ORDER DATED SEPTEMBER 11, 2007**

on the interested parties in this action.

By posting it on the website at 9 p.m./a.m. on March 13, 2008. This posting was reported as complete and without error.

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

Executed in Santa Barbara, California, on March 13, 2008.

April Robitaille
TYPE OR PRINT NAME

April Robitaille
SIGNATURE

OBJECTION TO PROPOSED ORDER AMENDING AND MODIFYING CLASS CERTIFICATION ORDER