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9 ANTELOPE VALLEY-EAST KERN WATER AGENCY

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

12
13 Coordination Proceeding
14 Special Title (Rule 1550(b))

Judicial Council Coordination Proceeding
No. 4408

15 **ANTELOPE VALLEY**
16 **GROUNDWATER CASES**

Santa Clara Case No.
1-05-CV-049053
The Honorable Jack Komar, Dept.17

17 **Included Actions:**

18 Los Angeles County Waterworks District
19 No. 40 vs. Diamond Farming Company, a
20 corporation, Superior Court of California,
County of Los Angeles, Case No.
BC325201;

21 Los Angeles County Waterworks District
22 No. 40 vs. Diamond Farming Company, a
23 corporation., Superior Court of California,
County of Kern, Case No. S-1500-CV-254-
348;

24 Wm. Bolthouse Farms, Inc. vs. City of
25 Lancaster, Diamond Farming Company, a
26 corporation, vs. City of Lancaster, Diamond
27 Farming Company, a corporation vs.
Palmdale Water District, Superior Court of
California, County of Riverside, Case Nos.
RIC 353840, RIC 344436, RIC 344668.

**AMENDED STATEMENT OF
UNDISPUTED FACTS IN SUPPORT OF
ANTELOPE VALLEY - EAST KERN
WATER AGENCY'S MOTION FOR
SUMMARY ADJUDICATION**

Date: January 27, 2014
Time: To be determined
Room: To be determined
Judge: Hon. Jack Komar

Trial Date: February 10, 2014 (Phase V)
Time: 9:00 a.m.

1 The following amended statement of undisputed facts and supporting evidence is
2 submitted in support of the AVEK's motion for summary adjudication. The only changes to
3 AVEK'S statement of undisputed facts and supporting evidence which are made herein are set
4 forth in bold print in the evidentiary statements offered in support of undisputed Fact Nos. 40,
5 43, 44 and 45 below.

6 **MOVING PARTY'S UNDISPUTED**
7 **MATERIAL FACTS**

SUPPORTING EVIDENCE

- | | |
|---|------------------------------------|
| 8 1. In 1959, residents of Kern, Ventura and | 1. Dan Flory dec., ¶ 2. |
| 9 Los Angeles Counties formed AVEK for | |
| 10 the purpose of contracting with the State for | |
| 11 the purchase and delivery of supplemental | |
| 12 State Water Project [SWP] water for use in | |
| 13 AVEK's service area within the Antelope | |
| 14 Valley (California Water Code Appendix | |
| 15 98-1, et seq.) | |
| 16 2. In 1962, AVEK signed a Water Supply | 2. Dan Flory dec., ¶ 3; Exhibit 1. |
| 17 Contract with the State (Exhibit 1 hereto) to | |
| 18 insure delivery of SWP water to supplement | |
| 19 Antelope Valley groundwater. | |
| 20 3. Of the 29 State Project Water | 3. Dan Flory dec., ¶ 4. |
| 21 Contractors, AVEK has the third largest | |
| 22 water entitlement, which allows AVEK to | |
| 23 take an annual maximum entitlement of up | |
| 24 to 141,000 AF of Imported Water. | |
| 25 4. Due to environmental, supply and | 4. Dan Flory dec., ¶ 5. |
| 26 climate limitations inherent in the State | |
| 27 Water Project, AVEK's contract with the | |
| 28 State of California has a delivery reliability | |
| factor of approximately 60% of AVEK's | |
| annual entitlement of \$141,000 AF. | |
| 5. By far, AVEK imports more SWP water | 5. Dan Flory dec., ¶ 6. |
| into the area of adjudication than does any | |
| other State Water Contractor. | |
| 6. Initial funds for the construction of the | 6. Dan Flory dec., ¶ 7. |
| State Water Project facilities were obtained | |
| through a \$1.75 billion bond issue, ratified | |
| by California voters in 1960. | |
| 7. AVEK's taxpayers have paid a total of | 7. Dan Flory dec., ¶ 8. |
| \$475,777,218.84 to insure participation in | |
| the California State Water Project, and to | |
| construct the "infrastructure" needed to | |
| import, transport, treat and deliver AVEK | |
| imported water to its customers. | |

1 8. All direct payments to the State of
2 California have been paid by AVEK (and
3 indirectly by its taxpayers) for the required
4 infrastructure construction, and for the
purchase and importation of the SWP water
contracted for by AVEK.

8. Dan Flory dec., ¶ 9.

5 9. AVEK's customers (including the Public
6 Water Suppliers) have not made any direct
payments to the State of California for the
SWP water contracted for by AVEK.

9. Dan Flory dec., ¶ 10.

7 10. AVEK services a land area of 2,400
8 square miles in the three counties, including
land areas both inside and outside the area
of adjudication.

10. Dan Flory dec., ¶ 11.

9 11. The adjudicated boundaries in this
10 action represent 58% of the total land area
serviced by AVEK.

11. Dan Flory dec., ¶ 12.

11 12. AVEK's imported SWP water is
12 pumped from the Sacramento Delta down
the 444 mile aqueduct.

12. Dan Flory dec., ¶ 13.

13 13. After crossing the Techachapis, the
14 aqueduct divides into the East and West
branches; AVEK receives its imported
15 SWP water through the aqueduct's East
Branch.

13. Dan Flory dec., ¶ 14.

16 14. In 2011 and 2012 alone, AVEK
17 delivered to its agricultural, industrial and
municipal customers within the area of
18 adjudication a total of 100,718 AF of
imported SWP water.

14. Dan Flory dec., ¶ 15.

19 15. [Not used.]

15. [Inapplicable.]

20 16. AVEK taxpayers also have directly
21 paid for, and continue to pay for,
construction of the internal treatment and
22 distribution systems whereby AVEK's SWP
imported water is eventually delivered to
23 AVEK's agricultural, industrial and
municipal customers, both within and
outside the area of adjudication.

16. Dan Flory dec., ¶ 16.

24 17. The bulk of AVEK's SWP imported
25 water is treated and distributed to AVEK
customers through the Domestic-
26 Agricultural Water Network (DAWN)
Project facilities.

17. Dan Flory dec., ¶ 17.

- 1 18. The DAWN Project consists of: more 18. Dan Flory dec., ¶ 18.
2 than 100 miles of distribution pipeline; four
3 water treatment plants; four eight-million
4 gallon storage reservoirs near Mojave; one
5 three-million gallon capacity reservoir at
6 Vincent Hill Summit; and one one-million
7 gallon reservoir at Godde Hill Summit.
- 8 19. The DAWN Project was financed by a 19. Dan Flory dec., ¶ 19.
9 local \$71 million bond issue authorized by
10 AVEK voters in 1974.
- 11 20. The first bond issue, Series A, of \$23 20. Dan Flory dec., ¶ 20.
12 million was used for project start-up
13 construction. AVEK taxpayers have
14 completely repaid the Series A bonds.
- 15 21. The second bond issue in 1976, Series 21. Dan Flory dec., ¶ 21.
16 B, of \$19 million has also been completely
17 repaid by AVEK taxpayers.
- 18 22. In 1977, the \$18 million Series C bond 22. Dan Flory dec., ¶ 22.
19 issue authorized Phase Three of the DAWN
20 facilities construction; the Series C bonds
21 have been completely repaid by AVEK
22 taxpayers.
- 23 23. In August, 1986, the final Phase of the 23. Dan Flory dec., ¶ 23.
24 DAWN Project construction commenced
25 when AVEK's Board of Directors
26 authorized expenditure of the remaining
27 \$11 million in Series D bonds; these funds
28 were used to construct internal local
facilities to distribute AVEK Imported
Water.
24. AVEK's map depicts existing AVEK 24. Dan Flory dec., ¶ 24, Exhibit 2.
owned facilities, and improvements under
construction including future water banking
improvements.
25. AVEK's Water Supply Stabilization 25. Dan Flory dec., ¶ 25.
Project No. 2 (WSSP2) is a groundwater
banking project that will increase the
reliability of the Antelope Valley Region's
water supplies by storing excess water
available from the SWP during wet periods
and recovering it to serve to customers
during dry and high demand periods or
during a disruption in deliveries from the
SWP.
26. By banking excess water for future use, 26. Dan Flory dec., ¶ 26.
the WSSP2 will significantly reduce the
Region's dependence on constant water
deliveries of SWP water from the Delta.

1 27. The WSSP2 will also help to stabilize
2 the groundwater in the area of adjudication
3 and preserve agricultural land and open
4 space.

27. Dan Flory dec., ¶ 27.

5 28. From 2011 through 2012, AVEK has
6 spread and banked a total of approximately
7 36,502 AF, and claims the right to recapture
8 90% of that amount, or 32,851 AF, as the
9 return flow resulting therefrom.

28. Dan Flory dec., ¶ 28.

12 29. When deemed necessary by AVEK due
13 to water supply shortfalls from SWP water
14 or other operational strategies, AVEK will
15 recover not more than 90% of the volume
16 of water that is put into the groundwater
17 bank.

29. Dan Flory dec., ¶ 29.

20 30. Recovery operations will take place
21 with the construction of 10 groundwater
22 recovery wells with depths averaging about
23 600 feet; well yields will range between 500
24 gpm to 2,800 gpm.

30. Dan Flory dec., ¶ 30.

25 31. Since inception of the State Water
26 Project, AVEK taxpayers have paid a total
27 of \$475,777,218.84 to insure participation
28 in the SWP, and to construct AVEK's
treatment and distribution systems for the
delivery of AVEK's imported SWP water.

31. Dan Flory dec., ¶ 31.

32. AVEK is both a wholesaler and retailer
of its SWP imported water - wholesaling
water to the Public Water Suppliers, and
retailing water to end users, including
AVEK's agricultural and other private
customers.

32. Dan Flory dec., ¶ 32.

33. AVEK has not assigned or transferred
to any other person any portion of AVEK's
SWP "entitlement," or its right to recapture
or use the return flows resulting from
AVEK's SWP imported water.

33. Dan Flory dec., ¶ 33.

34. AVEK has not abandoned or otherwise
relinquished its claimed right to recapture
and use return flows resulting from
AVEK's SWP imported water.

34. Dan Flory dec., ¶ 34.

1 35. AVEK's Board of Directors has
2 determined that, except when AVEK's
3 allocation of SWP water is insufficient to
4 meet the critical needs of its customers
5 (requiring AVEK to recapture return flows
6 to meet those needs), AVEK's preference is
7 to maintain all return flows in the
8 groundwater, to thereby gradually augment
9 and increase the groundwater supply in the
10 area of adjudication.

11 36. This practice will benefit AVEK's
12 existing and future customers and
13 taxpayers, both inside and outside the area
14 of adjudication.

15 37. AVEK's Cross-Complaint contends:
16 "The rights of Cross-Defendants, if any, are
17 limited to the Native Supply of the Basin
18 and/or their own Imported Water. Cross-
19 Defendants' rights, if any, do not extend to
20 water imported into the Basin by [AVEK]"
21 (AVEK Cross-Complaint, ¶ 32); "As the
22 primary importer of supplemental State
23 Project water in the Basin, [AVEK] has the
24 sole right to recapture Return Flows
25 attributable to its State Project water. The
26 rights of Cross-Defendants, if any are
27 limited to the native supply of the Basin
28 and/or to their own imported water, and do
not extend to groundwater attributable to
[AVEK's] return flows" (Id., ¶ 38).

38. The Metropolitan Water District
(MWD) was formed in 1929 of 13 original
member agencies, including the cities of
Los Angeles, Glendale and Burbank.

39. Burbank, Glendale, and Los Angeles
are all "member agencies" of MWD; their
representatives are members of MWD's
Board of Directors; and each is directly
involved in the governance and policy
decisions of MWD, including determining
the rates they must pay for MWD water.

40. As a practical matter, MWD does not
have any existence separate from its
member agencies.

35. Dan Flory dec., ¶ 35.

36. Dan Flory dec., ¶ 36.

37. See AVEK's cross complaint filed in
this action.

38. Findings of Fact and Conclusions of
Law [FFCL], dated January 26, 1979,
22:23-24:1, Exhibit 1 to Request for
Judicial Notice (RJN) filed concurrently
herewith.

39. The Metropolitan Water District Act,
Sections 133 and 135 (Exhibit 3 to RJN);
MWD's "History and First Annual Report,
Commemorative Edition," June 2011, pages
311-312 (Exhibit 2 to RJN).

40. See Exhibits 1, 2, 3, and 4 of RJN,
and declaration of Kathy Kunysz, ¶2
[MWD was organized for the purpose of
providing imported water supplies to its
member agencies] (Exhibit 1 to
Supplemental Brief posted December 4,
2013).

1 41. In the case at bar, the Public Water
2 Suppliers are not "member agencies" of
3 AVEK, their representatives do not sit on
4 AVEK's Board of Directors, and they do
not determine the rates paid for the SWP
imported water they receive from AVEK.

5 42. The PWS are merely customers of
6 AVEK.

7 43. During the period of time relevant to
8 the decision in *City of Los Angeles v. City*
9 *of San Fernando*, i.e., from 1955 through
10 1968, MWD did not intend to recapture, or
11 claim a right to recapture return flows
12 resulting from imported water MWD
13 delivered to its member agencies, Burbank,
14 Glendale, Los Angeles and San Fernando,
15 in the Upper Los Angeles River Area
16 ("ULARA").

41. Dan Flory dec., ¶ 37.

42. Dan Flory dec., ¶ 38.

43. See Remand Procedure Order No. 1,
Exhibit 14 of Request for Judicial Notice
["The complaint . . . was filed on
September 30, 1955; "final arguments
ended July 20, 1967;" "On March 14, 1968,
comprehensive findings of fact and
conclusions of law were signed and filed . .
. The Judgment was entered the following
day, March 15, 1968"]; July, 1962 Report
of Referee, Vol. I, Exhibit 11 of Request for
Judicial Notice, p. 90 ["Metropolitan has
urged the member municipalities to acquire
adequate storage and maintain existing
ground water pumping facilities for
emergency service and to provide for
peaking during the periods of extraordinary
demand"]; and declaration of Kathy
Kunysz, ¶¶ 3-6 [from 1950 through 1968,
(1) MWD did not own or operate any
groundwater wells within the ULARA,
(2) MWD did not spread or bank
imported water within the ULARA, and
(3) MWD did not adopt or hold any
position on whether it had the right to
recapture or use return flows resulting
from water it delivered to its member
agencies in the ULARA] (Exhibit 1 to
Supplemental Brief posted December 4,
2013).

1 44. During the period of time relevant to the
2 decision in *City of Los Angeles v. City of*
3 *San Fernando*, i.e., from 1955 through
4 1968, MWD did not own or operate water
5 production wells within the ULARA which
6 could be used to recapture return flows.

44. See Remand Procedure Order No. 1,
Exhibit 14 of Request for Judicial Notice
[“The complaint . . . was filed on
September 30, 1955; “final arguments
ended July 20, 1967;” “On March 14, 1968,
comprehensive findings of fact and
conclusions of law were signed and filed . .
. The Judgment was entered the following
day, March 15, 1968”]; DWR Bulletin No.
181-69, Watermaster Service in ULARA
for October 1, 1968 through September 30,
1969, Exhibit 13 to Request for Judicial
Notice, pp. 29, 57, 58, 72-75 [identifying
parties who have made “ground water
extractions,” none of which include MWD,
and stating on page 34: “To the best of the
Watermaster’s knowledge, and information
on hand, the Western Oil and Gas
Association is the only nonparty extracting
groundwater within the ULARA”]; July,
1962 Report of Referee, Vol. II, Exhibit 12
of Request for Judicial Notice, pp. I-12 to I-
57, which identifies parties with wells in the
San Fernando Basin, none of which include
MWD; and declaration of Kathy Kunysz,
¶¶ 3 and 4 [from 1950 through 1968,
MWD did not own or operate any
groundwater wells within the ULARA]
(Exhibit 1 to Supplemental Brief posted
December 4, 2013).

1 45. During the period of time relevant to
2 the decision in *City of Los Angeles v. City*
3 *of San Fernando*, i.e., from 1955 through
4 1968, MWD did not spread or inject water
5 for underground storage within the
6 ULARA.

17 46. MWD did not join, and was not made a
18 party to the proceeding in *City of Los*
19 *Angeles v. City of San Fernando*

21 47. AVEK owns wells which can be used
22 to recapture return flows from AVEK's
23 SWP imported water; AVEK is currently
24 drilling additional wells, and is
25 contemplating purchasing other property
26 with water well production capability.

45. See July, 1962 Report of Referee, Vol. I, Exhibit 11 of Request for Judicial Notice, p. 141 ["Owens River water delivered by the Los Angeles Aqueduct is the only import supply of which a part is spread for direct recharge of the ground water"], p. 215 ["Imported Water has been spread only by the City of Los Angeles"], and p. 90 ["Metropolitan has urged the member municipalities to acquire adequate storage and maintain existing ground water pumping facilities for emergency service and to provide for peaking during the periods of extraordinary demand"]. See DWR Bulletin No. 181-69, Watermaster Service in ULARA for October 1, 1968 through September 30, 1969, Exhibit 13 to Request for Judicial Notice, pp. 7, 14, 15, which identify the parties spreading water in the Basin, of which MWD is not one. See, also, ULARA Watermaster Report for water year 1978-1979, Exhibit 10 to Request for Judicial Notice, p. 35, showing that water was then being spread by MWD's member agencies only; and **declaration of Kathy Kunysz, ¶¶ 3 and 5 [from 1950 through 1968, MWD did not spread or bank imported water within the ULARA] (Exhibit 1 to Supplemental Brief posted December 4, 2013).**

46. Court's Findings of Fact and Conclusions of Law, pp. 7-10 (Exhibit 1 to Request for Judicial Notice), and Attachments "B," "C," and "D;" and Judgment entered January 26, 1979, pp. 21-22 (Exhibit 4 to Request for Judicial Notice), and Attachments "B," "C," and "D" thereto.

47. Dan Flory dec., ¶ 39.

1 48. DWR has never claimed a right to
2 return flows resulting from AVEK's SWP
3 imported water; DWR has never manifested
4 an "intent" to recapture such return flows;
5 and DWR does not have production wells in
6 the area of adjudication capable of
7 capturing return flows.

48. Dan Flory dec., ¶ 40.

5 49. From the inception of AVEK's
6 participation in the State Water Project,
7 AVEK's taxpayers have paid a total of
8 \$475,777,218.84 to insure participation
9 therein, and to construct, maintain and
10 operate the "infrastructure" needed to
11 import, transport, treat and deliver AVEK
12 imported water to its customers.

49. Dwayne Chisam dec., ¶2.

13 50. AVEK also has incurred and paid
14 energy and related costs related to the actual
15 transportation of SWP water which total
16 \$331,663,051.00.

50. Dwayne Chisam dec., ¶3.

17 51. Accordingly, the total cost incurred and
18 paid by AVEK and its taxpayers to obtain,
19 transport, treat and deliver SWP water to its
20 customers is \$807,440,269.84 (i.e.,
21 \$475,777,218.84 + \$331,663,051.00).

51. Dwayne Chisam dec., ¶4.

22 52. From 1972 (when AVEK first began
23 importing SWP water) through 2012,
24 AVEK has imported a total of 1,976,971 AF
25 of SWP water.

52. Dwayne Chisam dec., ¶5.

26 53. Some loss unavoidably results during
27 the transportation, treatment and delivery
28 stages; as a result, AVEK delivered to its
customers during the same time period a
total of 1,923,039 AF.

53. Dwayne Chisam dec., ¶6.

54. Accordingly, the average total cost per
acre feet to AVEK and its taxpayers for the
water delivered to AVEK customers from
1972 through 2012 is \$419.88 per AF (i.e.,
\$807,440,269.84 ÷ 1,923,039).

54. Dwayne Chisam dec., ¶7.

55. During the same time period, AVEK
has delivered to Waterworks District #40 a
total of 808,790 AF.

55. Dwayne Chisam dec., ¶8.

1 56. The total cost incurred and paid by
2 AVEK and its taxpayers in procuring and
3 delivering the SWP water that was sold and
4 delivered to Waterworks District #40 is
approximately \$339,594,745.20 (i.e.,
808,790 AF x \$419.88 per AF).

56. Dwayne Chisam dec., ¶9.

5 57. Waterworks District #40 has paid a
6 total of only \$177,693,610.00 for the
7 aforesaid 808,790 AF of SWP water it
8 purchased and received from AVEK, or
\$219.70AF (i.e., $\$177,693,610.00 \div$
808,790 AF).

57. Dwayne Chisam dec., ¶10.

9 58. Thus, for the water received by it,
10 Waterworks District #40 paid \$200.28AF
11 less than the actual cost of the water (i.e.,
\$419.88 - \$219.70) or only 52% of the total
12 cost of the water it received (i.e.,
\$177,693,610.00 \div \$339,594,745.20).

58. Dwayne Chisam dec., ¶11.

13 59. Therefore, AVEK and its taxpayers
14 have subsidized the cost of the water
15 delivered to Waterworks District #40, by
16 paying the additional cost of such water in
the amount of \$161,901,135.20 (i.e.,
\$339,594,745.20 - \$177,693,610.00).

59. Dwayne Chisam dec., ¶12.

17 60. Considered in a slightly different way,
18 Waterworks District #40 received 42% of
19 the total water delivered to AVEK's
20 customers (i.e., 808,790AF \div
1,923,039AF), but paid only 22% of the
21 total cost of that water (i.e., $\$177,693,610 \div$
\$807,440,269.84).

60. Dwayne Chisam dec., ¶13.

22 61. The amount of money paid directly by
23 Waterworks District #40, combined with
24 the payments made by taxpayers located
within the area of adjudication serviced by
both Waterworks District #40 and AVEK,
is still less than the total actual cost of the
water AVEK delivered to Waterworks
District #40.

61. Dwayne Chisam dec., ¶14.

25 62. Some of Waterworks District #40's
26 customers are located outside of both
27 AVEK's service area and the area of the
28 adjudication; accordingly, those customers
of Waterworks District #40 do not pay
property taxes which support AVEK's
importation of SWP water at all.

62. Dwayne Chisam dec., ¶15.

1 63. Many of AVEK's taxpayers are "non-
2 users," i.e., they either take water from
3 wells or leave their properties fallow; as a
4 result, such non-users do not benefit
5 directly from the SWP, although their
property taxes significantly subsidize the
SWP water purchased by Waterworks
District #40 and other AVEK customers.

63. Dwayne Chisam dec., ¶16.


6 Dated: December 4, 2013

BRUNICK, McELHANEY & KENNEDY

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8
9 By _____

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