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Committee
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN BERNARDINO

11 CHINO BASIN MUNICIPAL WATER
12 DISTRICT,

13 Plaintiff,

14 v.

15 CITY OF CHINO, ET AL.,

16 Defendants.
17

Case No. RCVRS 51010

Judgment Entered On January 27, 1978, as
Amended

**STATEMENT OF NON-
AGRICULTURAL (OVERLYING)
POOL COMMITTEE REGARDING
ROLE OF WATERMASTER AND
WATERMASTER COUNSEL**

Filed Concurrently With Reply
Memorandum of Non-Agricultural
(Overlying) Pool Committee

Date: May 14, 2010
Time: 10:30 a.m.
Dept.: Dept. C-1
Chino, California

Assigned for All Purposes to the
Honorable STANFORD E. REICHERT

1 **Introduction**

2 When Judge Gunn entered his December 21, 2007 Order approving the so-called Peace II
3 Measures¹, there was both a Watermaster and a Special Referee involved in this case. As
4 evidenced by the Order itself, Watermaster and the Special Referee were chafing over their
5 respective roles, and in pleadings that were part of the Peace II process, they were trying to
6 explain and justify their respective roles.

7 In the December 21, 2007 Order, Judge Gunn described his conclusions about the
8 respective roles of the Special Referee and Watermaster, and made his conclusions part of his
9 Order. Among other things, Judge Gunn stated:

10 As all special masters, Watermaster operates as an extension of the Court and to
11 meet the needs of the Court in carrying out its obligations under the Judgment and
12 Article X, Section 2 of the California Constitution. Although not stated in
13 Watermaster's pleadings, it is important to note that it is not Watermaster's duty
14 to be an advocate for any, or for all, of the parties. Watermaster's position with
15 respect to the parties should be neutral.²

16 Watermaster's role was to be neutral, and a fair reading of the language in the Order is that the
17 Special Referee's role was to assist the court in supervising Watermaster's actions. In 2008,
18 Judge Wade limited the role of the Special Referee, and since then the Special Referee has been
19 inactive.

20 A. **Watermaster Has Violated Neutrality**

21 In connection with matters relating to this Motion, Watermaster has violated the neutrality
22 which Judge Gunn determined to be central to Watermaster's role. The Non-Agricultural Pool's
23 Section 31 Motion is a dispute between the Appropriative Pool and the Non-Agricultural Pool,
24 two of the three Pools in the Judgment. The third Pool, the Agricultural Pool, has acknowledged
25 in its Response filed in connection with this Motion that the Agricultural Pool does not have an
26 economic interest in the outcome of the dispute.

27 ¹ The December 21, 2007 Order is included within Watermaster's Exhibits as Exhibit 6.
28 ² Watermaster's Exhibits, Exhibit 6. The quoted language appears on page 4.

1 As a party whose duty is not to be an advocate for any, or for all, of the parties to the
2 Judgment, Watermaster has no defensible basis upon which to take sides in this dispute between
3 two pools. In a brief submitted by Watermaster to Judge Gunn in January 2008, Watermaster
4 claimed that its role in connection with performance of the Peace II Option Agreement was solely
5 that of escrow agent.

6 With respect to each of the Non-Agricultural Pool transfers described in
7 the Peace II Documents, the Non-Agricultural Pool member retains the actual
8 adjudicated rights to the water with Watermaster acting in the nature of an
9 escrow agent following the prescribed procedures for distribution of the water
10 among the members of the Appropriative Pool or to offset desalter replenishment.
11 Where Watermaster is involved in a transfer it acts in the role of an intermediary,
12 either to arrange for the allocation of the water to the members of the
13 Appropriative Pool, or to dedicate the water as Desalter replenishment. . . .³

14 Despite these assurances given by Watermaster to Judge Gunn, Watermaster is not acting as an
15 escrow agent, but as a partisan for the Appropriative Pool. Watermaster has referred to the
16 Section 31 Motion as “meritless”. The Opposition Briefs of Watermaster and the Appropriative
17 Pool are substantively the same. The Watermaster’s Brief is filled with theories and arguments,
18 some stated in the alternative. The facts are argued in a manner most favorable to the
19 Appropriative Pool, and in some cases are exaggerated or misleading. The arguments are in favor
20 of the Appropriative Pool, and in many cases could fairly be characterized as requests for
21 extensions or modifications of existing law. Watermaster is not acting like a special master, or an
22 extension of this Court, or an intermediary, or an escrow agent. Watermaster is acting like a
23 litigant and an advocate for a single pool -- the Appropriative Pool.

24 B. The Dominance of the Appropriative Pool

25 Watermaster’s violation of the mandated neutrality is based upon the dominance and
26 control of the Watermaster system by the Appropriative Pool, as described in the Moving Brief,

27 ³ The January 2008 Brief submitted by Watermaster to Judge Gunn is included within
28 Watermaster’s Exhibits as Exhibit 17. The quoted language appears on page 17 of the Brief.

1 but for which some restatement and further elaboration here is appropriate.

2 The Appropriative Pool has 26 members on the 39-member Advisory Committee.
3 Bowcock Moving Decl. ¶8 and Exhibit B. Under the Judgment, the Watermaster Board is
4 compelled to act in accordance with the recommendation of the Advisory Committee, except in
5 extraordinary circumstances. Judgment, §38(b). Accordingly, through its control of the Advisory
6 Board alone, the Appropriative Pool controls Watermaster.

7 In addition to its control of the Advisory Committee, the Appropriative Pool also controls
8 the Watermaster Board. In its Opposition Brief, Watermaster claims that the Appropriative Pool
9 only has 3 members on the 9-member Board, and that 3 other members are municipal water
10 districts. Watermaster's mathematics is inaccurate, because 1 of the 3 municipal water districts is
11 itself also a member of the Appropriative Pool. Bowcock Reply Decl. ¶19. And because the
12 Appropriative Pool is composed almost entirely of municipal water providers, the 2 municipal
13 water districts that are not members of the Appropriative Pool are nonetheless not independent in
14 any relevant respect. Their relevant interests in the Chino Basin are the same as those of the
15 members of the Appropriative Pool, and they vote with their fellow municipal water providers.
16 Bowcock Reply Decl. ¶20.

17 In addition, as stated in the Moving Brief, the Appropriative Pool pays about 98% of the
18 annual assessments of Watermaster, the Agricultural Pool pays none, and the Non-Agricultural
19 Pool pays the remaining balance of about 2%. Bowcock Moving Decl. ¶¶6 & 8, Exhibit D.

20 The Appropriative Pool controls the Advisory Committee, the Watermaster Board and the
21 finances of Watermaster. As such, it dominates the Watermaster system, and Watermaster
22 counsel and staff act accordingly.

23 **C. Watermaster Counsel's Role Bears Scrutiny**

24 The law firm of Brownstein Hyatt Farber Schreck LLP styles itself as "Attorneys for
25 Chino Basin Watermaster" and as "Watermaster Counsel". Until this dispute arose, the Non-Ag
26 Pool understood that the Brownstein law firm was counsel for all of Watermaster. Bowcock
27 Reply Decl. ¶21. In fact, Scott Slater has held himself out to the public as counsel not just to
28

1 “Watermaster”, but to all parties to the Judgment. In his biography on the website of the
2 Brownstein law firm, Mr. Slater publicly claims the following experience:

3 **Peace II Agreements** (2007). As general counsel to the Chino Basin
4 Watermaster, facilitated, negotiated and drafted agreements among parties to the
5 Judgment to implement the Optimum Basin Management Program. **Represented**
6 **the parties and Watermaster** before the Court in securing approval of a basin
7 management strategy to secure hydraulic control through a coordinated
8 groundwater extraction plan and desalting.

9 Hubsch Reply Decl. ¶3, Exhibit G.

10 During the negotiation of the Peace II Agreement, the Brownstein law firm advised the
11 Chair of the Non-Ag Pool about its legal meaning and effect. Bowcock Reply Decl. ¶22. The
12 Peace II Agreement was drafted by the Brownstein law firm. Bowcock Reply Decl. ¶22. A fair
13 reading of Sections 12.1 and 12.2 of the Peace II Agreement indicates that the Brownstein law
14 firm represented the Non-Ag Pool in connection with its negotiation. Sections 12.1 and 12. of the
15 Peace II Agreement recite that each of the parties thereto were represented by counsel.⁴ But no
16 attorneys other than attorneys from the Brownstein law firm advised the Chair of the Non-Ag Pool
17 in connection with the Peace II Agreement. Bowcock Reply Decl. ¶22. The Peace II Agreement,
18 as drafted by the Brownstein law firm, acknowledges that it then represented the Non-Ag Pool.

19 During the 7-year period that Mr. Bowcock has served as Chair of the Non-Ag Pool
20 Committee until early 2010 (when the Non-Ag Pool retained the law firm of Hogan & Hartson as
21 its counsel), a Brownstein lawyer attended all or substantially all public meetings of the Non-Ag
22 Pool, sat in a chair next to or near the Chair or Vice Chair at those public meetings, and answered
23 legal questions from the Chair and others. Bowcock Reply Decl. ¶23. When legal documents
24 required the signature of the Chair of the Non-Ag Pool, a Brownstein lawyer presented them for
25 signature to the Chair. Bowcock Reply Decl. ¶23. During the period from 2003 to early 2010,
26 Mr. Bowcock considered the Brownstein law firm to be the source for legal advice on matters

27 _____
28 ⁴ The Peace II Agreement is included within Watermaster’s Exhibits as Exhibit 7. The recitals regarding representation by counsel are in Section 12.1 and Section 12.2.

1 affecting the Non-Ag Pool, and the Brownstein law firm did not state otherwise, or recommended
2 that the Non-Ag Pool retain separate counsel. Bowcock Reply Decl. ¶23.

3 The Brownstein law firm now claims that, despite all prior appearances to the contrary, the
4 firm only represents “the Watermaster Board”. Bowcock Reply Decl. ¶24. However, the lawyers
5 from the Brownstein law firm still refer to themselves as “Attorneys for Chino Basin
6 Watermaster” and as “Watermaster Counsel”. And the Watermaster Board is itself composed of
7 designees from each of the three pools, including Mr. Bowcock as designee of the Non-Ag Pool.
8 Since this dispute arose, the Brownstein law firm has acted not as if it represents the “Watermaster
9 Board”, but as if it represents the “majority of the Watermaster Board” – i.e., the interests of the
10 Appropriative Pool. The change in client identification since this dispute arose likely reflects a
11 natural desire to remain employed as Watermaster counsel. Given the dominance and control by
12 the Appropriative Pool of the Watermaster system, failure to advocate for the Appropriative Pool
13 might result in a change in Watermaster counsel, by vote of a majority of the Watermaster Board.

14 Regardless of who the Brownstein law firm currently represents, or should represent, the
15 Brownstein law firm is now adverse to a party in this matter who could fairly be characterized as a
16 prior client of the Brownstein law firm. – the Non-Ag Pool. Even more problematic, the
17 adversity arises in connection with the interpretation and enforcement of an agreement with
18 respect to which the Brownstein law firm previously advised the Non-Ag Pool.

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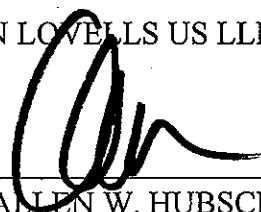
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Conclusion

The Non-Ag Pool submits this Statement with the belief that information about the role of Watermaster and Watermaster counsel is relevant to a determination of the pending Motion. At this time, the Non-Agricultural Pool does not seek to change the governance of Watermaster, or seek to disqualify Watermaster counsel. At this time, the Non-Agricultural Pool seeks only a speedy resolution of its Section 31 Motion. Action by this Court or a special referee may be appropriate to address the matters raised in this Statement, but such action should be considered separately from the pending Motion.

Date: May 10, 2010

HOGAN LOVELLS US LLP

By: 

ALLEN W. HUBSCH

Attorneys for Non-Agricultural (Overlying) Pool