21 East Carrillo Street Santa Burbara, CA 93101-2706	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25		28976) ECK, LLP  F THE STATE OF CALIFORNIA  ERNARDINO, RANCHO CUCAMONGA  Case No. RCVRS 51010  Assigned for All Purposes to the Honorable Stanford E. Reichert  EX PARTE APPLICATION TO CONTINUE HEARING ON MOTION TO REVISE SECTION 5 OF THE 2013 RECHARGE MASTER PLAN UPDATE AND RESTATED JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES  Date: October 2, 2013 Time: 8:30 a.m. Dept.: R6  [Filed concurrently with Declaration of Bradley J. Herrema in Support Thereof and [Proposed] Order]
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EX PARTE APPLICATION TO CONTINUE HEARING DATE

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#### TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE THAT on October 2, 2013 in Department R6 of the San Bernardino County Superior Court, located at 8303 Haven Avenue, Rancho Cucamonga, California, Chino Basin Watermaster ("Watermaster") will and does hereby make this Ex Parte Application to Continue Hearing on Motion to Revise Section 5 of the 2013 Recharge Master Plan Update and Restated Judgment ("Application") as to the Motion to Revise Section 5 of the 2013 Recharge Master Plan Update and Restated Judgment ("Motion") filed on September 24, 2013 by the City of Fontana ("Fontana"). Watermaster seeks to have the hearing on the Motion, currently scheduled for October 25, 2013, continued to December 13, 2013 at 1:30pm in Department R6, which is the date and time Watermaster has reserved for the Court's consideration of approval of the entire 2013 Amendment to 2010 Recharge Master Plan Update. There have been no prior continuances granted with respect to the Motion.

This Application is based on the grounds that Fontana's Motion is a premature opposition to this Court's approval of the 2013 Amendment to the 2010 Recharge Master Plan Update ("2013 Amendment"). Fontana's Motion challenges an intermediate Watermaster Board approval of only one section among many contained in the 2013 Amendment that will be presented to this Court on December 13, 2013.

Moreover, the challenged language of the section at issue will have any effect unless and until the entire 2013 Amendment is adopted by the Board, obtains the approval of the Inland Empire Utilities Agency (IEUA), and obtains the approval of this Court.<sup>1</sup>

Watermaster has not yet moved this Court for approval of the 2013 Amendment, but has reserved a December 13, 2013 hearing date for this purpose. While Watermaster has no objection to Fontana's Motion being considered as an opposition to the adoption of the Amendment, for the convenience of the Court and the Parties they should be able to hear the entire presentation of all matters pertinent to the entire 2013 Amendment rather than piece-meal claims concerning only one section.

Section 8.1 of the Peace II Agreement provides that the Recharge Master Plan will be updated and amended, with the concurrence of Watermaster and IEUA, with this Court's approval.

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There is no known specific prejudice to Fontana or any party in having this matter continued.

This Application is based on this Notice of Ex Parte Application and Application, the memorandum of points and authorities in support thereof, the Declaration of Bradley J. Herrema in support thereof and any argument or evidence presented at hearing. This Application has not been refused in whole or in part in connection with any prior application. (See Cal. Rules of Court, rule 1202(b).)

In compliance with California Rules of Court, rule 3.1202(a), the names and email addresses of the designated agents for service for each party to this action are attached hereto as Exhibit A.

#### NOTICE OF HEARING ON THIS APPLICATION

Counsel for Chino Basin Watermaster provided notice to counsel for all parties to this action, by electronic mail through the regular Watermaster service mechanism, at 11:19 a.m. on September 30, 2013. (Declaration of Bradley J. Herrema in Support of Ex Parte Application ("Herrema Declaration"), ¶ 11.)

The notice included the nature of the relief requested, as well as the date, time and place of this hearing on this Application. (Cal. Rules of Court, rule 3.1204(a)(1).) Counsel also attempted to determine whether any parties would appear to oppose the exparte application. (Herrema Declaration, ¶ 12; Cal. Rules of Court, rule 3.1204(a)(2).)

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# Santa Barbara, CA 93101-2706

#### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **INTRODUCTION** T.

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This Application requests that the Court continue its hearing of Fontana's Motion for review of a single section of the 2013 Amendment, to the date and time Watermaster has reserved for the Court's consideration of the approval of the 2013 Amendment in its entirety. Fontana's requested review is premature pending Watermaster's motion to this Court for such approval. Moreover, Section 5 of the 2013 Amendment cannot be considered in a vacuum, apart from the context of the document of which it is a part. Having contacted legal counsel for Fontana, Watermaster is unable to identify any prejudice to Fontana that would result from the requested continuance.

#### II. FACTUAL BACKGROUND

On October 8, 2010, this Court issued an Order Approving Watermaster's Compliance with Condition Subsequent Number Eight and Approving Procedures to be Used to Allocate Surplus Agricultural Pool Water in the Event of a Decline in Safe Yield, which approved the 2010 Recharge Master Plan Update ("2010 RMPU") as compliant with the Court's condition subsequent number eight to approval of the Peace II Measures, and ordered Watermaster to undertake certain additional work in order to complete that work begun in the development of the 2010 RMPU. Specifically, the Court ordered that Watermaster form a committee to develop the monitoring, reporting and accounting practices to estimate stormwater recharge, to refine analyses of certain recharge projects in the 2010 RMPU and to develop an implementation and financing plan for those projects. The 2010 RMPU represented that this additional work could be completed and a proposed amendment formulated within three years. (Herrema Declaration, ¶ 3.)

At its November 15, 2012 regular meeting, after reviewing progress made toward completion of the amendment to the 2010 RMPU, the Watermaster Board unanimously approved a schedule providing for the completion of compliance with the Court's October 2010 Order, and filing of the document representing such compliance with the Court by October 2013. In order that the 2013 Amendment could be timely completed, the schedule additionally provided for intermediate approvals of individual sections of the Amendment by the Watermaster Advisory 038350\0038\10753125.8

Committee and Board in order to create a roadmap for incremental progress toward completion of the larger 2013 Amendment. (Herrema Declaration, ¶ 4.)

On June 27, 2013, the Watermaster Board approved what is Section 5 of the 2013

Amendment as later adopted by the Watermaster Board. Section 5 contains the recommended monitoring, reporting and accounting practices to estimate stormwater recharge, as required by the Court's October 2010 Order. At the Board's June 27, 2013 meeting, representatives of the City of Fontana appeared and requested that the Board not approve Section 5 absent a portion of the language Fontana's Motion requests be added to Section 5 of the Amendment. (Herrema Declaration, ¶ 5.)

On September 26, 2013, consistent with the schedule approved by the Watermaster Board in November 2012, the Watermaster Board adopted its Resolution 2013-06 finding that the 2013 Amendment to the 2010 Recharge Master Plan Update is responsive to the Court's October 2010 Order, adopting the 2013 Amendment as the guidance document for the further development of recharge facilities within the Chino Basin, and directed Watermaster legal counsel to move this Court for approval of the 2013 Amendment . (Herrema Declaration,  $\P$  6.)

On September 24, 2013, Watermaster staff, on behalf of the City of Fontana, filed and served the City's Motion, pursuant to Watermaster's ordinary service mechanism. The City reserved a hearing date of October 25, 2013 for the Court's consideration of the Motion. (Herrema Declaration, ¶ 8.) Based on the dates of the consideration of the 2013 Amendment for approval by the Watermaster and IEUA Boards, the notice requirements for the Court's hearing of a motion for approval of the Amendment, and the Court's schedule, Watermaster has reserved a hearing date and time of December 13, 2013 at 1:30 p.m. for the Court's consideration of whether to approve the 2013 Amendment. (Herrema Declaration, ¶ 7.)

### III. FONTANA'S MOTION IS PREMATURE AND IS ONLY PROPERLY CONSIDERED AS PART OF WATERMASTER'S FORTHCOMING MOTION FOR APPROVAL OF THE 2013 AMENDMENT

Fontana's Motion is, in essence, a premature opposition to Watermaster's yet to be filed motion requesting this Court's approval of the 2013 Amendment, and Fontana's Motion should be considered in the context of Watermaster's forthcoming motion for such approval. Fontana's 038350\0038\10753125.8

Motion requests review of the Watermaster Board's intermediate approval of only a portion of the entire 2013 Amendment. The challenged approval of the section was part of a larger schedule of tasks and milestones created to ensure that the 2013 Amendment could be timely completed. This June 27, 2013 approval was one of many intermediate steps taken toward the finalization of the entire 2013 Amendment, which the Watermaster Board approved on September 26, 2013 through its adoption of its Resolution 2013-06. The challenged language of Section 5 of the 2013 Amendment would not be of any effect until the entire 2013 Amendment was adopted by the Board and subsequently approved by this Court. (Peace II Agreement, § 8.1.)

Knowing that the Court must consider the 2013 Amendment for approval, and respecting the Court's schedule, Watermaster previously reserved a December 13, 2013 hearing date for the Court's consideration of approval of the 2013 Amendment.<sup>2</sup> However, as the proposed 2013 Amendment must also be approved by IEUA, and the IEUA Board will consider approval on October 16, 2013, Watermaster's motion to this Court for approval of the 2013 Amendment has not yet been filed. As described above, Fontana's Motion was filed not only before Watermaster has moved this Court for approval of the 2013 Amendment, but also prior to the Watermaster Board's own adoption of the 2013 Amendment and direction to legal counsel to move the Court for approval of 2013 Amendment. (Herrema Declaration, ¶¶ 6, 8.)

Watermaster recognizes that Fontana would almost certainly oppose Watermaster's request for the Court's approval of the 2013 Amendment without the language changes it has requested, but if Fontana's Motion is considered to be such an opposition, the Motion should not be considered by this Court separately from Watermaster's own motion for approval of the 2013 Amendment in its entirety. Moreover, the specific language in Section 5 that Fontana wishes to see redrafted cannot be considered in a vacuum and should be considered by this Court in light of the language of the entire 2013 Amendment and in light of the evidence before the Watermaster Board when it determines whether to adopt the 2013 Amendment.

Counsel for Fontana has declined to stipulate to the continuance of the Court's

<sup>&</sup>lt;sup>2</sup> This date was included in draft pleadings that were circulated to the parties at the time of the Pool Committee meetings in early September 2013.

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Amendment in its entirety. (Herrema Declaration, ¶ 9.) Fontana's counsel has represented that this declination is based on the opinion that Fontana's Motion and the pending Watermaster motion will not involve the same issues, as Fontana's Motion "is focused on discrete deficiencies with section 5 of the [2013 Amendment], while the Watermaster's motion is for the Court's general review and consideration of the [2013 Amendment] as a whole." (Herrema Declaration, ¶ 10 and Exhibit A.) As described above, Watermaster believes there can be no review of section 5 of the 2013 Amendment separately from review of the entire 2013 Amendment, which is not effective until approved by this Court.

Fontana's counsel additionally states that pushing consideration of its Motion back to December 13, 2013 would not be consistent with its goal of achieving a prompt resolution of its concern regarding Section 5, referring to a process pursuant to which it is developing stormwater recharge projects that are contingent upon the confirmation of its position as to Section 5.

However, Fontana's counsel refers only generally to projects claimed to be contingent on the resolution of this issue, and none of Fontana's Motion, its supporting materials, or its counsel's correspondence provide reference to or evidence of any specific project being pursued by Fontana, nor any timelines or deadlines related to any such project. (See Motion, Herrema Declaration, Exh. A.) In the absence of any such information, it is difficult to see how Fontana would be prejudiced by the consideration of its concerns less than two months after its scheduled hearing date, and within 90 days of the filing of its Motion.

#### IV. CONCLUSION

As described above, Fontana's Motion is a premature opposition to Watermaster's forthcoming motion for the Court's approval of the 2013 Amendment. Watermaster believes it is it is the best interests of the Court and the Parties that there be a complete presentation of the entire 2013 Amendment in its entirety when the Court is asked to make any determination regarding a specific section thereof. Watermaster will make such a presentation at the December 13, 2013 hearing, which will provide a context to assist the Court in better understanding the relevance of Section 5, as well as Fontana's objection. Simply put, Watermaster desires to avoid 038350\0038\10753125.8

1	a piecemeal determination on a single component of a multi-faceted planning document. As the
2	delay is insubstantial and without prejudice, Watermaster respectfully requests that the Court
3	continue its hearing of Fontana's Motion until December 13, 2013.
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6	Dated: October 1, 2013 BROWNSTEIN HYATT FARBER
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8	Denter O. How
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#### I, Bradley J. Herrema, declare:

- I am an attorney duly admitted to practice before all of the courts of this State, and am a shareholder in the law firm of Brownstein Hyatt Farber Schreck, LLP, counsel of record for Chino Basin Watermaster ("Watermaster"). I have personal knowledge of the facts stated in this declaration, except where stated on information and belief, and if called as a witness, I could and would competently testify to them under oath. I make this declaration in support of the abovereferenced application.
- 2. As legal counsel for Watermaster, I am familiar with Watermaster's practices and procedures, as well as actions taken by the Pool Committees, Advisory Committee and Board of Directors ("Board").
- 3. On October 8, 2010, this Court issued an Order Approving Watermaster's Compliance with Condition Subsequent Number Eight and Approving Procedures to be Used to Allocate Surplus Agricultural Pool Water in the Event of a Decline in Safe Yield, which ordered Watermaster to undertake certain additional work in order to complete that work begun in the development of the 2010 Recharge Master Plan Update ("2010 RMPU"). The 2010 RMPU represented that this additional work could be completed and a proposed amendment formulated within three years.
- At its November 15, 2012 regular meeting, after reviewing progress made toward completion of the amendment of the 2010 RMPU, the Board unanimously approved a schedule providing for the completion of compliance with Court's October 2010 Order, and filing of the document representing such compliance with the Court by October 2013 ("2013 Amendment"). In order that the goal for completion of the 2013 Amendment could be timely achieved, the schedule additionally provided for approval of individual sections of the 2013 Amendment by the Watermaster Advisory Committee and Board in order to create an expectation for incremental progress toward completion of the broader amendment.
- 5. On June 27, 2013, the Watermaster Board approved Section 5 of the 2013 Amendment. At the Board's June 27, 2013 meeting, representatives of the City of Fontana appeared and requested that the Board not approve Section 5 without including a portion of the 038350\0038\10753806.3

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language Fontana's Motion requests be added to Section 5 of the 2013 Amendment.

- On September 26, 2013, consistent with the schedule approved by the Watermaster Board in November 2012, the Watermaster Board adopted its Resolution 2013-06 finding that the 2013 Amendment to the 2010 Recharge Master Plan Update is responsive to the Court's October 2010 Order and adopting the 2013 Amendment as the guidance document for the further development of recharge facilities within the Chino Basin. The Watermaster Board also directed Watermaster legal counsel to move this Court for approval of the 2013 Amendment. At the September 26, 2013 Board meeting, the Board additionally approved the minutes of its June 27, 2013 meeting.
- 7. Section 8.1 of the Peace II Agreement requires that both Watermaster and the Inland Empire Utilities Agency (IEUA) approve updates and amendments to the Recharge Master Plan. I have been informed that the IEUA Board will consider the approval of the Amendment at its regularly scheduled October 16, 2013 meeting. Based on the dates of the consideration of the Amendment for approval by the Watermaster and IEUA Boards, the notice requirements for the Court's hearing of a motion for approval of the Amendment, and the Court's schedule, Watermaster previously reserved a hearing date and time of December 13, 2013 at 1:30 p.m. for the Court's consideration of the 2013 Amendment for approval.
- 8. On September 24, 2013, Watermaster staff, on behalf of the City of Fontana ("Fontana"), filed and served Fontana's Motion, pursuant to Watermaster's ordinary service mechanism. Fontana's Motion indicates that Fontana had reserved a hearing date of October 25, 2013 for the Court's consideration of the Motion.
- 9. On September 26, 2013, I spoke via telephone with Nicholas Jacobs, counsel for the City of Fontana, to request Fontana's concurrence in the consolidation of the October 25, 2013 hearing on Fontana's Motion with the December 13, 2013 hearing date Watermaster has reserved for the Court's consideration of the 2013 Amendment. Mr. Jacobs indicated that Fontana would not consent to such a continuance.
- 10. On September 27, 2013, Mr. Jacobs transmitted to me, via electronic mail, the letter attached hereto as Exhibit A, which Mr. Jacobs indicated was intended to set forth the 038350\0038\10753806.3

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reasons why Fontana declined to stipulate to continuance of the October 25, 2013 hearing.

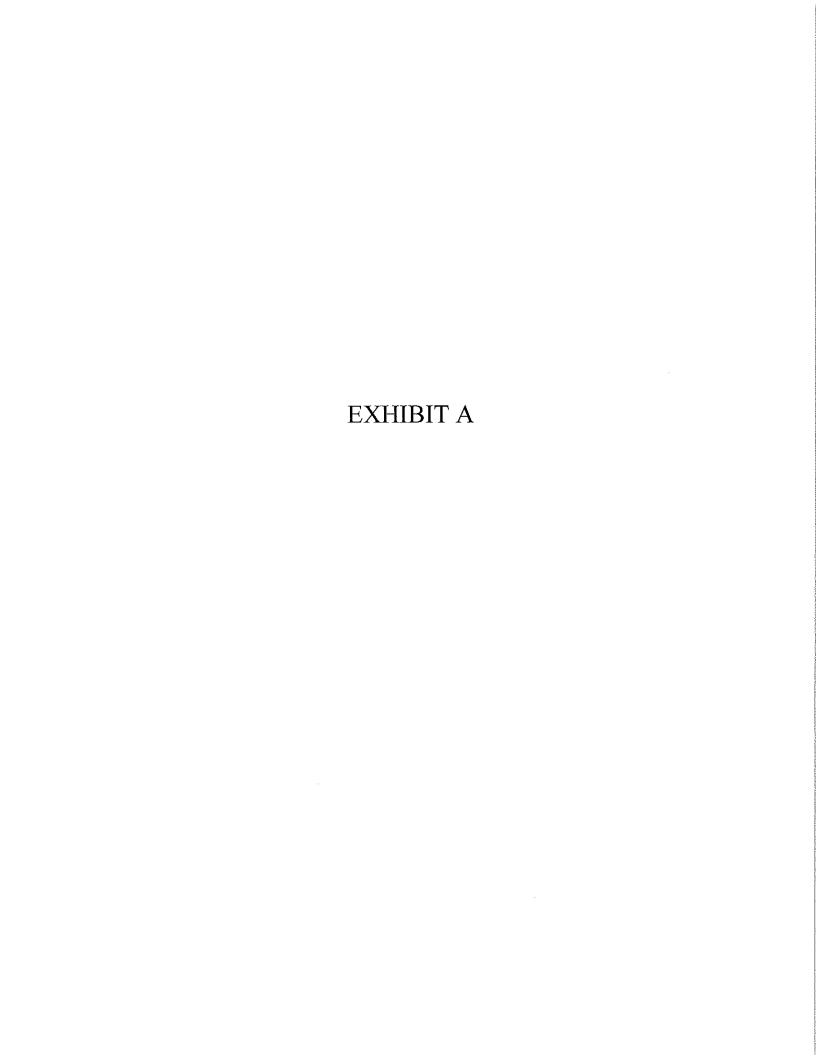
- 11. On September 30, 2013 at 11:19 a.m., at my request and on my behalf, Watermaster staff notified all parties to this action, via Watermaster's regular electronic mail service procedures, of the hearing on Watermaster's Application. The notice included the nature of the relief requested, as well as the date, time and place of the hearing on this Application. A true and correct copy of the notice transmitted by Watermaster's staff to all parties to this action is attached as Exhibit B.
- 12. The notice provided on September 30, 2013 also inquired whether any parties would appear to oppose the Application.
- 13. As of filing of this Application, no parties have indicated they will appear to oppose this Application.

Dated: October 1, 2013

BROWNSTEIN HYATT FARBER SCHRECK, LLP

Attorney for

CHINO BASIN WATERMASTER





A PROFESSIONAL CORPORATION ATTORNEYS AT LAW

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SOMACHLAW.COM

September 27, 2013

Via E-Mail and First Class Mail

Bradley Herrema Brownstein Hyatt Farber Schreck 21 E. Carrillo Street Santa Barbara, CA 93101-2706

Re: Chino Basin Watermaster

Dear Mr. Herrema:

During our phone call yesterday, you stated your intent to file an ex parte motion to consolidate the hearings on the motions by the City of Fontana and Watermaster regarding the 2013 Recharge Master Plan Update (RMPU). Fontana's motion is currently set for oral argument on October 25, 2013, while the Watermaster's motion is not set to be heard until December 13, 2013. I write to set forth my reasons for declining to stipulate to moving Fontana's hearing date to December 13, 2013. I am out of the office Monday and Tuesday of next week, and so I would appreciate if you could include this letter with your ex parte submission to the Court.

After consideration, I do not believe the Fontana motion and Watermaster motion involve the same issues. Fontana's motion is focused on discrete deficiencies with section 5 of the RMPU, while the Watermaster's motion is for the Court's general review and consideration of the RMPU as a whole. To the extent you believe there is overlap, it seems apparent that any briefing in opposition to Fontana's motion could be used in support of the Watermaster's motion. As such, there should not be duplication of effort.

In addition, and as we discussed yesterday, Fontana is in the process of developing Chino Basin stormwater recharge projects that are contingent upon Fontana's ability to receive allocations from the Watermaster for the recharged water. It is imperative that Fontana resolve all outstanding legal issues associated with the recharge projects so that Fontana can determine whether to expend monies and resources pursuing beneficial recharge projects for the Chino Basin. The recharge associated with MS4 projects is the focus of Fontana's pending motion with the Court, set for hearing on October 25, 2013. Pushing the hearing on Fontana's motion back two months is not consistent with Fontana's goal of achieving a prompt resolution of these recharge allocation issues.

Bradley Herrema Re: Chino Basin Watermaster September 27, 2013 Page 2

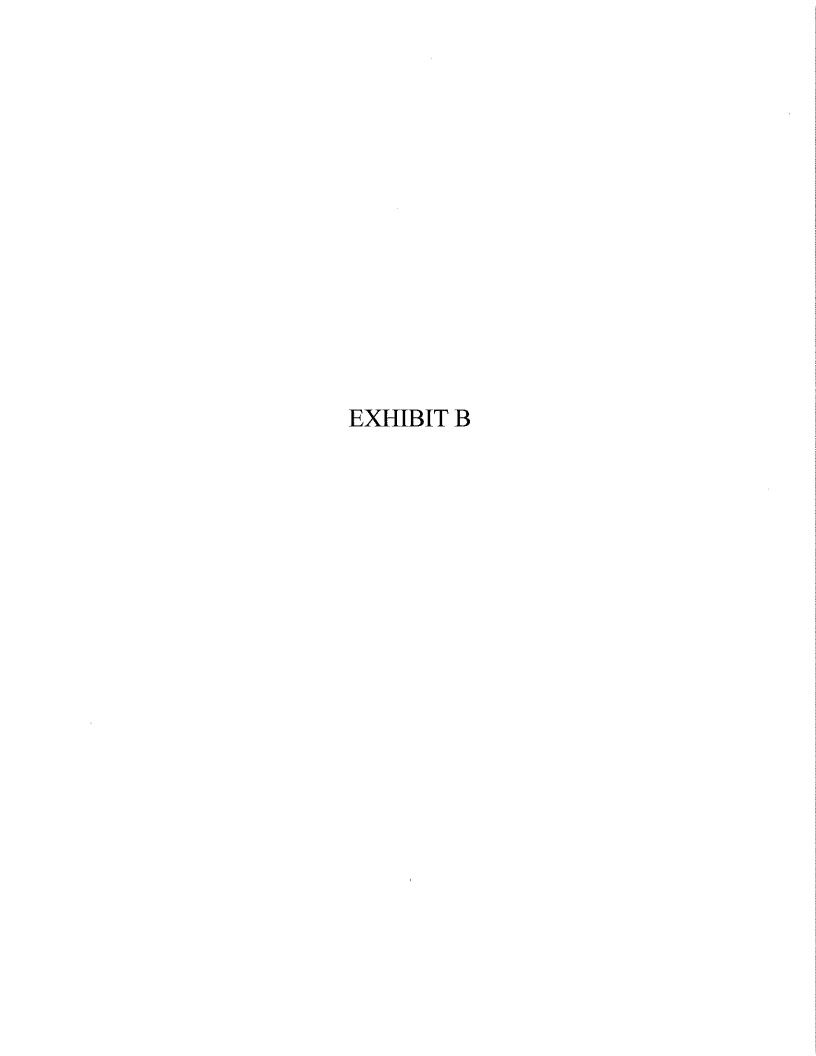
Thank you for including this letter along with your submission to the Court, and please do not hesitate to call with any questions.

Very truly yours,

Nicholas A. Jacobs

Attorney

NAJ:cr



#### **Davis, Courtney**

From: Janine Wilson < JWilson@cbwm.org >

Sent: Monday, September 30, 2013 11:19 AM

Subject: Notice of Ex Parte Application to Continue Hearing on Motion to Revise Section 5 of

the 2013 Recharge Master Plan Update and Restated Judgment

Please take notice that at 8:30 am on Wednesday, October 2, 2013 in Department R6 of the San Bernardino Superior Court, located at 8303 Haven Avenue, Rancho Cucamonga, California, Chino Basin Watermaster will make an *Ex Parte* Application to Continue Hearing on Motion to Revise Section 5 of the 2013 Recharge Master Plan Update and Restated Judgment. Watermaster will request that the Court continue its hearing of the City of Fontana's Motion to Revise Section 5 of the 2013 Recharge Master Plan Update and Restated Judgment from the presently scheduled October 25, 2013 date until 1:30 pm on December 13, 2013.

Pursuant to this notice, it is requested that any party that will appear to oppose the Application provide notice of such intent to Watermaster legal counsel Brad Herrema, at either (805)882-1493 or <a href="mailto:bherrema@bhfs.com">bherrema@bhfs.com</a>.

Thank you,

Janine Wilson Chino Basin Watermaster 9641 San Bernardino Road Rancho Cucamonga, CA 91730 Ph (909) 484-3888 Fx (909) 484-3890 jwilson@cbwm.org

[PROPOSED] ORDER GRANTING CHINO BASIN WATERMASTER'S EX PARTE APPLICATION TO CONTINUE HEARING

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Chino Basin Watermaster's Ex Parte Application to Continue Hearing on the Motion to				
Revise Section 5 of the 2013 Recharge Master Plan Update and Restated Judgment ("Motion")				
came before this Court on October 2, 2013 at 8:30 a.m., the Honorable Stanford E. Reichert				
presiding.				
Bradley J. Herrema of Brownstein Hyatt Farber Schreck, LLP, appeared on behalf of				
Chino Basin Watermaster.				
The Court having read, reviewed and considered all pleadings filed in support and				
response, if any, to the Application, including all declarations attached thereto and the argument				
of counsel:				
IT IS HEREBY ORDERED that the Hearing Date on the Motion currently set for October				
25, 2013 is continued to December 13, 2013 at 1:30 p.m.				
IT IS SO ORDERED.				
Dated: JUDGE OF THE SUPERIOR COURT				

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## CHINO BASIN WATERMASTER Case No. RCV 51010 Chino Basin Municipal Water District v. The City of Chino

#### **PROOF OF SERVICE**

#### I declare that:

I am employed in the County of San Bernardino, California. I am over the age of 18 years and not a party to the within action. My business address is Chino Basin Watermaster, 9641 San Bernardino Road, Rancho Cucamonga, California 91730; telephone (909) 484-3888.

On October 1, 2013 I served the following:

- 1. EX PARTE APPLICATION TO CONTINUE HEARING ON MOTION TO REVISE SECTION 5
  OF THE 2013 RECHARGE MASTER PLAN UPDATE AND RESTATED JUDGMENT;
  MEMORANDUM OF POINTS AND AUTHORITIES
- 2. DECLARATION OF BRADLEY J. HERREMA IN SUPPORT OF CHINO BASIN WATERMASTER'S EX PARTE APPLICATION TO CONTINUE HEARING ON MOTION TO REVISE SECTION 5 OF THE 2013 RECHARGE MASTER PLAN UPDATE AND RESTATED JUDGMENT
- 3. [PROPOSED] ORDER GRANTING CHINO BASIN WATERMASTER'S EX PARTE APPLICATION TO CONTINUE HEARING ON MOTION TO REVISE SECTION 5 OF THE 2013 RECHARGE MASTER PLAN UPDATE AND RESTATED JUDGMENT

/ <u>X</u> _/	BY MAIL: in said cause, by placing a true copy thereof enclosed with postage thereon fully prepaid, for delivery by United States Postal Service mail at Rancho Cucamonga, California, addresses as follows:  See attached service list: Mailing List 1
//	BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee.
//	BY FACSIMILE: I transmitted said document by fax transmission from (909) 484-3890 to the fax number(s) indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting fax machine.
<u>/ X_</u> /	BY ELECTRONIC MAIL: I transmitted notice of availability of electronic documents by electronic transmission to the email address indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting electronic mail device.

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

Executed on October 1, 2013 in Rancho Cucamonga, California.

By: Janine Wilson

Chino Basin Watermaster

me Wilson

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Cheyanne Resek - Francis

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