

NEWS

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FOR IMMEDIATE RELEASE
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County reacts to tentative ruling in corruption case

The County of San Bernardino is very encouraged by the tentative ruling issued August 4 in the County's lawsuit against those who were engaged in corrupt activities.

"Judge O'Neill did an outstanding job in hearing both sides of this matter, and the County is looking forward to the final ruling," said Chief Deputy County Counsel Michael Sachs. "The tentative decision reflects the County's goals going into this case."

A copy of the decision is attached to this release.

VENTURA
SUPERIOR COURTS
FILED

AUG 04 2004

MICHAEL D. PLANET
Executive Officer and Clerk
BY: *[Signature]* Deputy

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA**

THE COUNTY OF SAN BERNARDINO et al.

Plaintiffs,

v.

JAMES J. HLAWEK; HARRY M. MAYS, et al.

Defendants.

Case No: CIV 200803

**TENTATIVE DECISION AS TO
CAUSES OF ACTION 21, 22 AND 25
(DEFENDANTS HLAWEK,
McCOOK AND OAKRIDGE) (CRC,
Rule 232)**

AND RELATED CROSS-ACTIONS.

Introduction

As noted previously on the record, this court declines to reconsider rulings of a previously assigned judge, although this court would have ruled differently in some respects. Accordingly, it hereby issues the following tentative rulings concerning causes of action 21, 22, and 25.

Cause of Action 21: Government Code section 1090

The court finds that all elements of this cause of action have been proved. Hlawek, a public official, had a financial interest in the consent to the lease assignment, which constituted the making of a "contract" within the meaning of section 1090. Hlawek's participation was sufficient to establish

1 liability. The restitution remedy is not limited to money paid out by the county or received by the public
2 official. Indeed, no showing of damage to the county other than that which is inherent in the corruption
3 is required. See *Jackson v. Smith* (1921) 254 U.S. 586, 588; *Seminole Nation v. United States* (1942)
4 316 U.S. 286, 296; *Thomson v. Call* (1985) 38 Cal.3d 633, 650-652; *People v. Honig* (1996) 48
5 Cal.App.4th 289, 315; *People v. Vallerga* (1977) 67 Cal.App.3d 847, 864-871; *Village of Wheeling v.*
6 *Stavros* (Ill. App. 1980) 411 N.E.2d 1067, 1069. See also Restatement (First) of Restitution §§ 134,
7 138, 190, 197, 201. It follows that any profits with a substantial connection to the violation are subject
8 to recovery by the county against all persons complicit in the corruption. Accordingly, in addition to the
9 gratuities given to Hlawek (\$35,000), the county is entitled to recover McCook/Oakridge's profit,
10 consisting of the \$4.4 million received from Eller Media less the \$600,000 cost of constructing the
11 billboards. Hlawek and McCook/Oakridge are jointly and severally liable for these amounts.

12 **Cause of Action 22: Political Reform Act (Gov. Code § 87100, 87103 and 91003)**

13 The court finds all elements have been proved, including the fact that the consent to the lease
14 assignment would almost certainly not have been approved had the full truth been known. However, the
15 court is not persuaded that persons other than public officials can be sued on this theory. This court is
16 bound by *Citizens for Oxnard v. Maron* (1983) 145 Cal.App.3d 702, 706. The case of *People v. Snyder*
17 (2000) 22 Cal.4th 304, cited by plaintiffs, involved unrelated portions of the Political Reform Act, and is
18 not controlling. The court is also not persuaded that, even if McCook/Oakridge is a proper defendant,
19 restitution of his profits is permitted. If McCook/Oakridge had been a proper defendant, the court would
20 have limited the remedy to revocation of the consent to the assignment, which the county has clearly
21 indicated it is not requesting in light of the good faith of Eller Media.

22 **Cause of Action 25: Breach of Lease**


23 The court finds the express terms of the lease were breached repeatedly by inaccurate income
24 reports to the county. The county's damages are \$20,238 in underpaid rent, plus interest, against
25 McCook/Oakridge.

26 The court finds the implied covenant of good faith and fair dealing was breached by the various
27 improprieties engaged in by McCook/Oakridge and Hlawek, and that the express terms of the lease
28 allow it to be terminated for such breach.

1 The court finds that no waiver occurred, no estoppel applies, and plaintiff was not required to
2 proceed by unlawful detainer. Plaintiff may terminate the original contract as to McCook/Oakridge by
3 giving notice of default, eliminating all of McCook/Oakridge's rights to the two remaining billboard
4 sites. The contract is severable, so there is no impact on Eller Media's ongoing contractual relationship
5 with the county. In light of this direct remedy for breach of the original contract, the court is not
6 inclined to employ the somewhat "fictional" remedy of invalidating the consent to the lease assignment
7 while leaving the rights and duties of Eller Media unaffected.

8 The court is not persuaded that the county's contract damages should include
9 McCook/Oakridge's profit from selling five billboard sites to Eller. Nor is the value of the two billboard
10 sites recoverable, since the county has always received the financial consideration it bargained for, and
11 will regain possession of the two billboard sites.

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13 Dated: August 4, 2004

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17 VINCENT J. O'NEILL, JR.
18 Judge of the Superior Court
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

CASE NO. CIV 200803 County of San Bernardino v James J. Hlawek, et al

DECLARATION OF SERVICE

I, MICHAEL D. PLANET, Executive Officer and Clerk of the Superior Court of the County of Ventura, State of California, declare under penalty of perjury that I am not a party to the within action or proceeding and that on August 4, 2004, I deposited

- [X] With postage prepaid, in sealed envelopes, in the United States
Post at the City of Ventura
[] In the Interoffice mail of the County of Ventura

full, true and correct copies of the annexed document, Tentative Decision As To Causes Of Action 21, 22 And 25 (Defendants Hlawek, McCook And Oakridge) (CRC, Rule 232) enclosed in separate envelopes, one of which was addressed to each of the following-named persons, at the place hereinafter set opposite each name. Each of the places hereinafter specified is the place of residence/business of the person opposite whose name it is set, and there is a regular daily communication by the United States/Interoffice mail between the place of mailing and the place so addressed.

Leonard Gumport, Esq.
Gumport, Reitman & Montgomery
550 So. Hope St. #825
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James Hlawek
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Randall S. Waier, Esq.
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Newport Beach, CA 92660

Michael A. Sachs, Esq.
Chief County Counsel
385 N. Arrowhead Ave. 4th flr
San Bernardino, CA 92415-0140

Dated and executed at Ventura, California, on August 4, 2004.

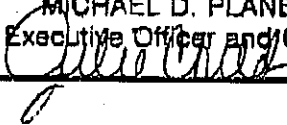
MICHAEL D. PLANET, Superior Court
Executive Officer and Clerk

By: 
Deputy Clerk

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Executive Officer and Clerk
BY:  Deputy

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA**

COUNTY OF SAN BERNARDINO, et al.

Plaintiffs,

v.

JAMES HLAWEK; HARRY M. MAYS, et al.

Defendants.

Case No: CIV200803

**TENTATIVE DECISION AS TO
CAUSES OF ACTION 1-8 AND 28-45
(DEFENDANTS HLAWEK,
MAYS/BIO-RECLAMATION
TECHNOLOGIES, INC., and
WALSH) (CRC, RULE 232)**

AND RELATED CROSS-ACTIONS.

Causes of Action 1 and 6: Breach of Fiduciary Duty

Clear and longstanding authority establishes joint and several liability of a fiduciary and any co-conspirators or aiders and abettors for appropriate damages, including all ill-gotten gains of any participant. *Savage v. Mayer*(1949) 33 Cal.2d 548, 551; *Doctors' Co. v. Superior Court*(1989) 49 Cal.3d 39, 47; *St. James Armenian Church of Los Angeles v. Kurkjian*(1975) 47 Cal.App.3d 547, 551; *Saunders v. Superior Court*(1994) 27 Cal.App.4th 832, 846; *U.S. v. Gaytan*(9th Cir. 2003) 342 F.3d 1010, 1012; *Neilson v. Union Bank of California*(C.D. Cal. 2003) 290 F.Supp.2d 1101, 1133. The court finds

1 that defendants Hlawek, Mays/Bio and Walsh did engage in such a conspiracy, and that Mays/Bio and
2 Walsh did aid and abet Hlawek's breaches of his duty to the county, in connection with the September,
3 1995 Norcal waste management contract and related matters, including (as to Hlawek and Mays/Bio) the
4 selection of Miller and Schroeder as bond underwriters. However, the court finds the Harich buyout was
5 not a product of the defendants' improper acts, even though it was a Norcal responsibility under the
6 literal contract terms. Yielding on that issue appears to have been a political and business decision of the
7 Board of Supervisors, which would have occurred in any event. Finally, the court finds that the four
8 Harich hillside parcels of land have not been shown to have sufficient connection to the unlawful
9 activities to be part of the judgment.

10 **Cause of Action 1 (Norcal).** Hlawek, Mays/Bio and Walsh are jointly and severally liable for
11 Hlawek's salary (\$774,000), Mays/Bio's unlawful gifts to Hlawek (\$90,116.17) and the Hernandez
12 kickbacks (\$205,921).

13 The Mays/Bio consulting fees paid by Norcal present a difficult issue because of the absence of
14 on-point California authority establishing liability for such profits not directly paid by the plaintiff. In
15 *Village of Wheeling v. Stavros* (Ill.App 1980) 411 N.E. 2d 1067, 1069, Stavros, who was not a public
16 official, used his influence over municipal officers to obtain favorable zoning changings and building
17 permits for a number of codefendants. The latter paid Stavros \$92,000 for his efforts. Although the
18 fiduciary duty lay with the Village officers, Stavros was convicted in a federal criminal action and was
19 held in this Illinois case to have been properly sued by the Village for his profits. Defendant Mays/Bio,
20 like Stavros, was paid by an outside party for his unlawful influence peddling, which benefited that
21 outside party.

22 The defense has countered with its strenuous argument that the basic tort requirements of
23 causation and damage are not satisfied, and that Mays/Bio's fees were fairly earned with the county's
24 blessing. The court disagrees, in part. Plaintiff has carried its burden of proof by establishing that the
25 breach of fiduciary duty was a product of the three-way conspiracy, which put the county at an unfair
26 disadvantage when it negotiated and approved the Norcal contract. Thus, the county has been damaged
27 even if a contract with Norcal would have been approved in any event. Although difficult to quantify,
28 under the circumstances the best measure of the county's damages is the portion of the consulting fees

1 paid to Mays/Bio which were contingent on the contract being approved or any aspect of its
2 performance (such as the tonnage of waste processed by Norcal, or the issuance of bonds to finance
3 waste management projects). These funds flowed from the county treasury through Norcal to the
4 defendants as a proximate result of the defendants' wrongdoing. In the court's view, fees which would
5 have been earned by Mays/Bio even if the contract had *not* been approved are *not* ill-gotten gains. The
6 court invites comment by counsel as to the amount shown by the evidence to fit this description, for
7 which Mays/Bio, along with Walsh and Hlawek, will be jointly and severally liable.

8 **Cause of Action 6: (Miller and Schroeder).** The stock option given to Hlawek belongs to the
9 county, and has been held by Hlawek in a constructive trust for the county. Hlawek and Mays/Bio are
10 jointly and severally liable for the consulting fees paid to Mays(\$325,000).

11 **Cause of Action 2: Fraud**

12 The court finds all elements of this cause of action have been proved, and that Hlawek, Mays/Bio
13 and Walsh are liable to pay the county for the same damages assessed in Cause of Action 1.

14 **Causes of Action 3 and 7: Unfair competition (B&P 17200)**

15 **Cause of Action 3 (Norcal).** The court finds the elements of this cause of action have been
16 proved, and that restitution is a statutory remedy. However, case law (*Korea Supply Co. v. Lockheed*
17 *Martin Corp.* (2003) 29 Cal.4th 1134) indicates restitution must be money that came from the plaintiff
18 or to which the plaintiff has a vested ownership interest. The court is not convinced by plaintiff's
19 argument that any damages or restitution recoverable through other causes of action in this case give the
20 county such a vested ownership interest. Hlawek is liable for his salary (\$774,000). Hlawek, Mays/Bio
21 and Walsh are jointly and severally liable for the Mays payments to Hlawek (\$90,116.17) and the
22 amount of the Hernandez kickbacks (\$205,921). The court is not persuaded the county can recover the
23 Mays/Bio consulting fees pursuant to this cause of action because they do not qualify under the *Korea*
24 *Supply* case.

25 **Cause of Action 7 (Miller and Schroeder).** The court concludes that, although the elements of
26 this cause of action have been proved, the Mays/Bio consulting fees are not recoverable restitution
27 pursuant to Business and Professions Code section 17200 as limited by *Korea Supply*.
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Cause of Action 4: False Claims Act (Govt.Cd. 12650 et seq.)

Here the county seeks over \$6 million in treble damages associated with the Harich buyout, along with over \$600,000 associated with the Hernandez Trucking fees paid by the county. The county cites authority requiring the False Claims Act to be construed broadly and liberally to promote the public interest. The county provides no authority specifying the boundaries of such broad construction, and the court is not persuaded that the Harich buyout or the amount of the Hernandez kickbacks qualify as false claims.

Causes of Action 5 and 8: Constructive Trust/Unjust Enrichment

The court finds that constructive trust does apply to all monies and other items of value for which the defendants have been found liable. The court also concludes that the theory of unjust enrichment applies to all monies actually received by any defendant.

Set Offs

The court disagrees with defense contentions regarding set offs for settlements paid by Norcal, Hernandez Trucking, and any other defendants, except defendants Mays/Bio and Walsh are entitled to credit for the \$277,000 paid as criminal restitution in connection with the Hernandez kickbacks.

Punitive Damages

The court does find beyond any doubt that the tort liability of all defendants as described above was malicious, oppressive and fraudulent so as to subject each defendant to liability for punitive damages.

Causes of Action 28-33: Hlawek, Tisdale and BCI

The court finds for the county on each of these causes of action and imposes joint and several liability on Hlawek, Tisdale and BCI in the amount of \$387,783. The court also imposes a constructive

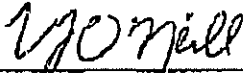
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1 trust and liability for punitive damages on these causes of action.

2 **Causes of Action 34-45: Hlawek, Canham and Welsh/O'Donnell**

3 The court finds Hlawek liable on these causes of action in the amount of \$75,000, jointly and
4 severally with codefendants who have settled.

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6 Dated: August 4, 2004

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9 VINCENT J. O'NEILL, JR.
10 Judge of the Superior Court

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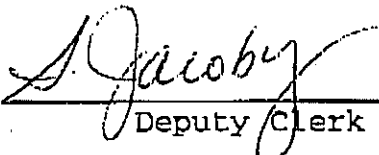
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 Executive Officer and Clerk

By: 
 Deputy Clerk

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