

<p>DISTRICT COURT, EL PASO COUNTY, COLORADO Address: 270 South Tejon Colorado Springs, CO 80903 ----- 719-448-7577</p>	<p>EFILED Document CO El Paso County District Court 4th JD Filing Date: Mar 13 2008 1:24PM MDT Filing ID: 18983144 Review Clerk: Sharon Robinson</p>
<p>Plaintiff: CHEROKEE METROPOLITAN DISTRICT</p> <p>V.</p> <p>Defendant: PETER M. SUSEMIHL</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Lee Rosenbaum, Esq. Attorney for Plaintiff 1902 West Colorado Avenue, #110 Colorado Springs, CO 80904 Phone Number: (719)634-0102 Fax Number: (719)634-0103 E-mail: rosenbaumpc@pcisys.net Atty. Reg. #: 14411</p>	<p>Case Number:</p> <p>Div.: Ctrm.:</p>
<p style="text-align: center;">COMPLAINT</p>	

COMES NOW Plaintiff Cherokee Metropolitan District (hereinafter referred to as Plaintiff), by and through its Attorney, LEE K. ROSENBAUM, P.C., and for its Complaint against Peter M. Susemihl (hereinafter referred to as Defendant), hereby states and alleges as follows:

GENERAL ALLEGATIONS

1. Defendant Peter M. Susemihl is an attorney licensed to practice law in the State of Colorado admitted to the Colorado Bar in 1969. Defendant is a resident of El Paso County and his principal business address is: Susemihl, McDermott & Cowan, P.C., 660 Southpointe Court, Suite 210, Colorado Springs, CO 80906.

2. Plaintiff is a metropolitan district organized pursuant to Title 32 of the Colorado Revised Statutes and it provides water, sewer, park and streetlight services to customers within and without the boundaries of the district.

3. Defendant began representing the Plaintiff and its predecessor entities in approximately 1975. He continued his representation of Plaintiff until approximately July, 2006 at which time his representation was terminated by Plaintiff.

4. Defendant represented Plaintiff in all special district matters, including water and water rights related matters before the Colorado Ground Water Commission and in the Water Court for Water Division No. 2.

5. In October, 1997 and March, 1998, on behalf of the Plaintiff, Defendant negotiated two separate contracts for Cherokee to purchase certain conditional water rights located in the Upper Black Squirrel Creek Designated Ground Water Basin (the "Upper Black Squirrel Basin") known as the Sweetwater water rights (Sweetwater water rights"). The total purchase price of the Sweetwater water rights was \$5,900,000.00.

6. The first contract for the purchase by Plaintiff of the Sweetwater water rights was dated October 16, 1997 between Plaintiff and seller Drieeenhied-Kapitaal, V.O.F, a 30% owner of the Sweetwater water rights (the "Morreale Contract"). The purchase price was \$900,000.00 and closing on the 30% share of the Sweetwater water rights was scheduled to occur on October 22, 1997.

7. The second contract for the purchase by Plaintiff of the Sweetwater water rights was dated March 30, 1998 between Plaintiff and Joseph M. Farmer, Edna I. Farmer, Farmer Pipeline Company, LLC., Daniel L. Farmer, Jerry R. Farmer and Joseph M. Farmer, Jr., the owners of 70% of the Sweetwater water rights (the "Farmer Contract"). The purchase price was \$5,000,000.00 and closing on the 70% share of the Sweetwater water rights was scheduled to occur no later than May 1, 1998.

8. Defendant, on behalf of the District, failed to include adequate guarantees or contingencies prior to closing of the Morreale Contract or Farmer Contract of the physical and legal availability of the Sweetwater water rights and the extent to which those water rights were exportable outside of the boundaries of the Upper Black Squirrel Basin.

9. Defendant did not adequately investigate and complete due diligence regarding the physical and legal availability of the Sweetwater water rights and the extent to which those water rights were exportable outside of the boundaries of the Upper Black Squirrel Basin during the time between the execution of either the Morreale Contract or the Farmer Contract and their respective closings.

10. Upon the advice of Defendant, Plaintiff closed on the purchase of 30% of the Sweetwater water rights under the Morreale Contract on October 22, 1997 and the 70% of the Sweetwater water rights under the Farmer Contract on April 30, 1998.

11. In addition to the \$5,900,000.00 paid by Plaintiff to purchase the Sweetwater water rights under the Morreale and Farmer Contracts, upon Defendant's recommendation, Plaintiff also paid \$3,500,000.00 to the Pikes Peak Water Company for termination of a water service agreement

purportedly held by the Pikes Peak Water Company entitling it to receive up to 1130 acre feet of water per year from the Sweetwater water rights.

12. The Sweetwater water rights purchased by Plaintiff were conditional water rights. Colorado law and previous decrees of the Water Court for the Sweetwater water rights required that Plaintiff prove that the Sweetwater water rights were being developed with reasonable diligence or the water rights would be terminated. On May 15, 1998, Defendant, representing the Plaintiff, filed an application for Sexennial Finding of Reasonable Diligence in connection with the Sweetwater water rights, Case Number 98CW080, District Court, Water Division No. 2.

13. Prior to Plaintiff's purchase of the Sweetwater water rights and at all times since, Defendant has consistently represented to Plaintiff that the Sweetwater conditional water rights were a) fully exportable outside the boundaries of the Upper Black Squirrel Basin in their decreed amounts, b) not subject to the jurisdiction of the Upper Black Squirrel Creek Groundwater Management District or the Colorado Ground Water Commission, and c) that no water court or Ground Water Commission change of use or place of use proceedings were required in order for Plaintiff to export the water rights.

14. On May 1, 1998, the day following the purchase by Plaintiff of the 70% interest in the Sweetwater water rights under the Farmer Contract, the Upper Black Squirrel Creek Groundwater Management District notified Defendant that Cherokee's export of the Sweetwater water rights was subject to change of use approval by the Colorado Ground Water Commission or the Division 2 Water Court.

15. The Upper Black Squirrel Creek Groundwater Management District filed a Statement of Opposition and Request for Declaratory Judgment in opposition to the 98CW080 Application asserting that the Upper Black Squirrel had authority to approve or disapprove of the export of the Sweetwater water rights and that Plaintiff was required to pursue a change of use proceeding before the Colorado Ground Water Commission and the Upper Black Squirrel District for the Sweetwater water rights in order for legal export of those water rights to occur. *See*, ¶¶ 19, 20, June 16, 1998 "Statement of Opposition and Petition for Declaratory Judgment" filed by the Upper Black Squirrel District in Case No. 98CW080.

16. In the course of the pendency of 98CW080, Mr. Susemihl recommended to Plaintiff that it enter into a Settlement Agreement with the Upper Black Squirrel Management District and the State of Colorado who were objectors to Plaintiff's diligence case. A copy of the "Stipulation and Release" is attached hereto and incorporated herein by this reference as "Exhibit 1". In the Stipulation and Release executed January 25, 1999, Mr. Susemihl recommended, and Plaintiff upon said recommendation, entered into an agreement whereby it agreed to restrictions on the Sweetwater water rights and to limit the exportability of Cherokee Wells No. 1-8, unrelated to the Sweetwater water rights, in exchange for an agreement that the Sweetwater water rights would be exportable outside the boundaries of the Upper Black Squirrel Basin.

17. Prior to Plaintiff's development of the Sweetwater water rights, Cherokee Wells No. 1-8 constituted the Plaintiff's principal water supply. Cherokee Wells 1-8 were unrestricted in their exportability outside of the Upper Black Squirrel Basin and approximately 1500 to 2000 acre feet of water from the wells had been exported by Cherokee for in excess of 20 years.

18. Defendant represented to Plaintiff that the Stipulation and Release would have no effect on the District's ability to continue to pump Cherokee Wells No. 1-8 to meet its present and future water needs and commitments.

19. Following the execution of the Stipulation and Release, the Water Court entered a decree in Case No. 98CW080 dated March 11, 1999 incorporating the terms of the restrictions upon export of Cherokee Wells No. 1-8 as agreed upon in the Stipulation and Release. A copy of the Water Court's 98CW080 decree is attached as Exhibit 2.

20. Following the entry of the decree in Case No. 98CW080, Defendant repeatedly advised Plaintiff that it could continue to make new water service commitments for new projects and that the water from Cherokee Wells No. 1-8 was available for export outside the boundaries of the Upper Black Squirrel Basin to meet those new commitments.

21. In reliance upon the Defendant's advice regarding the continuing right to rely upon the exportability of Cherokee Wells No. 1-8, Plaintiff entered into new water service commitments and sold portions of its water rights portfolio to third parties.

22. Following the entry of the decree in Case No. 98CW080 and with Cherokee's continuing issuance of new water service commitments, a dispute arose between Plaintiff, the State of Colorado and the Upper Black Squirrel District regarding the interpretation of the Stipulation and Release and Plaintiff's export of water from Cherokee Wells No. 1-8 outside the boundaries of the Upper Black Squirrel Basin which had continued since 1999.

23. Defendant advised Plaintiff to seek judicial intervention in the dispute over Plaintiff's continued export of water from Cherokee Wells No. 1-8 and in April, 2003, Defendant, representing the Plaintiff, filed a motion in Water Court in Case No. 98CW080 for entry of an order enforcing Defendant's interpretation of the Stipulation and Release regarding Cherokee's right to continue to export water from Cherokee Wells No. 1-8.

24. Trial to the Water Court on Plaintiff's Motion in Case No. 98CW080 occurred on December 16 and December 19, 2005 and Defendant testified at the trial.

25. By Order dated March 17, 2006, the Water Court in Case No. 98CW080 determined that Defendant was erroneous in his advice to Plaintiff that Cherokee Wells 1-8 would not be affected by the terms of the Stipulation and Release. A copy of the March 17, 2006 Order is attached as Exhibit 3. Contrary to Defendant's advice, the Water Court determined that water from Cherokee Wells No. 1-8 may be exported outside of the Upper Black Squirrel Basin "only for the purposes of

emergency and backup when its Sweetwater Wells are unable to produce a sufficient supply of water to meet the commitments that existed at the time the parties entered into the Stipulation.” Cherokee’s water service commitments as of the date of the execution of the Stipulation and Release was 2,683 acre feet annually.

26. The March 17, 2006 Order in Case No. 98CW080 was affirmed by the Colorado Supreme Court in Case No. 06SA095, Cherokee Metropolitan District v. Simpson, 148 P.3d 142 (Colo. 2006). As a result of the Supreme Court’s affirmation of the March 17, 2006 Order, Cherokee Wells No. 1-8 are not available for export by Plaintiff except in cases of emergency and backup, and where Plaintiff’s water supply from the Sweetwater Wells is less than 2,683 acre feet annually, minus other water sources available to Plaintiff at the time of the Stipulation.

27. Following the Water Court’s March 17, 2006 Order, Mr. Susemihl again fell below the standard of care by advising Plaintiff to continue to pump Cherokee Wells No. 1-8 for export even after the Water Court had ruled that such export was prohibited except in cases of emergency to meet the level of Plaintiff’s water supply commitments that existed in 1999.

FIRST CLAIM FOR RELIEF
PROFESSIONAL NEGLIGENCE

28. Plaintiff incorporates by reference all prior averments.

29. Mr. Susemihl’s actions fell below the standard of care: a) in recommending that the Morreale Contract and the Farmer Contract be executed and closed without the proper due diligence and confirmation as to physical supply and legal availability of the water rights for export; b) in recommending to the District that it enter into the Stipulation in 98CW080 restricting the exportability of Cherokee Wells 1-8 to cases of emergency and backup as defined in the Stipulation and Release; c) by agreeing to restrictions on the Sweetwater water rights, including requirements to abandon non-absolute portions of the water rights; and, d) by recommending that Plaintiff continue to issue new water supply commitments despite the restrictions on Cherokee Wells 1-8 in the Stipulation. Absent Defendants advice and the execution by Plaintiff of the Stipulation, Cherokee Wells No. 1-8 were not subject to any contingencies or restrictions on exportability outside the boundaries of the Upper Black Squirrel Basin.

30. Following the Water Court’s March 17, 2006 Order, Mr. Susemihl again fell below the standard of care by advising Plaintiff to continue to pump Cherokee Wells No. 1-8 for export even after the Water Court had ruled that such export was prohibited except in cases of emergency and to meet the level of Plaintiff’s water supply commitments that existed in 1999.

31. Defendant’s advice to continue using Cherokee Wells No. 1-8 for export even after the March 17, 2006 Order led to the issuance of a contempt citation by the Water Court in Case No. 98CW080 which Plaintiff was required to defend.

32. The Defendant was negligent.

33. The Defendant's negligence was a cause of Plaintiff's damages and losses.

WHEREFORE, Plaintiff Cherokee Metropolitan District prays that judgment be entered against Defendant Peter M. Susemihl as follows:

1. Replacement costs for water to produce the same amount of water that Plaintiff lost from the stipulated curtailed pumping of Cherokee Wells No. 1-8 in the approximate amount of \$15,000,000 to \$20,000,000.00;
2. Attorney fees and costs incurred in procuring alternate water supplies for the Plaintiff in lieu of water from Cherokee Wells No. 1-8;
3. For all costs, fees, penalties incurred by Plaintiff defending the contempt citation proceedings instituted in Case No. 98CW080.
4. For all of Plaintiff's costs and attorneys fees incurred in this action;
5. For such other and further relief as the Court deems as just and proper.

Respectfully submitted this 13 day of March, 2008.

THE LAW FIRM OF LEE K. ROSENBAUM, P.C.



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