



MCCORMICK, KIDMAN & BEHRENS, LLP  
ARTHUR G. KIDMAN, Bar No. 61719  
DAVID D. BOYER, Bar No. 144697  
695 Town Center Drive, Suite 1400  
Costa Mesa, California 92626-1924  
(714) 755-3100

Attorneys for Defendants  
MONTE VISTA WATER DISTRICT

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN BERNARDINO

CHINO BASIN MUNICIPAL WATER )  
DISTRICT, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
CITY OF CHINO, et al., )  
 )  
Defendants. )

CASE NO. RCV 51010  
  
EX PARTE APPLICATION TO STRIKE  
REPLY TO OPPOSITION TO MOTION  
FOR APPOINTMENT OF NINE-MEMBER  
BOARD AS WATERMASTER FILED BY  
THE LAW FIRM OF NOSSMAN,  
GUTHNER, KNOX & ELLIOTT, LLP  
  
DATE: April 14, 1997  
TIME: 8:30 a.m.  
DEPT: H

SPECIALLY ASSIGNED TO THE  
HONORABLE JUDGE J. MICHAEL  
GUNN

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

MONTE VISTA WATER DISTRICT hereby files its ex parte application to strike  
the Reply to Opposition to Motion for Appointment of a Nine-Member Board as  
Watermaster filed by the law firm of Nossman, Guthner, Knox & Elliott, LLP, based upon  
Code of Civil Procedure sections 435 and 436, and based upon the fact that the law firm  
Nossman, Guthner, Knox & Elliott had no standing to file this Reply.

MCCORMICK, KIDMAN & BEHRENS, LLP  
LAWYERS

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In the alternative, MONTE VISTA WATER DISTRICT requests that the court specially set this matter for hearing and shorten time for service.

This ex parte application is based upon this application, the attached memorandum of points and authorities and declaration of David D. Boyer, all pleadings, records and papers on file in this action, and upon such argument as may be presented at the hearing.

DATE: April 9, 1997

MCCORMICK, KIDMAN & BEHRENS, LLP  
ARTHUR G. KIDMAN  
DAVID D. BOYER

By: \_\_\_\_\_  
DAVID D. BOYER  
Attorneys for Defendants MONTE  
VISTA WATER DISTRICT

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 INTRODUCTION

4 On February 3, 1997, the Advisory Committee, having previously failed to have itself  
5 appointed as watermaster, brought its second motion for the appointment of a nine-member  
6 watermaster board to be composed mainly of Chino Basin groundwater producers. The  
7 hearing date was set for March 11, 1997. Oppositions to the motion were filed and served  
8 in a timely fashion by Chino Basin Municipal Water District (CBMWD), the City of Chino,  
9 the Agricultural Pool Committee, and the MONTE VISTA WATER DISTRICT.

10 For unknown reasons, the law firm of Nossman, Guthner, Knox & Elliott and the  
11 office of Watermaster services chose to delay serving the reply to these oppositions until  
12 after the hearing on the motion on March 11, 1997. Due to the untimely service of this  
13 reply, the court should not consider these papers in any subsequent hearing.

14 The court has now set a hearing on its statement of intended decision and on an  
15 order to show cause regarding the appointment of Ann Schneider as referee in this matter  
16 for April 29, 1997. All parties have been limited to ten pages of argument. It is clear that  
17 some parts of the intended decision were influenced by the reply from the law firm of  
18 Nossman, Guthner, Knox & Elliott. Yet, according to declaration of David D, Boyer,  
19 attorneys for MONTE VISTA WATER DISTRICT did not even receive the reply papers  
20 until more than one week after the March 11 hearing. MONTE VISTA WATER  
21 DISTRICT had no opportunity whatsoever to present argument as to the misinterpretations  
22 set forth in the reply papers and picked up in the intended decision.

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II

**GOOD CAUSE EXISTS FOR HEARING THIS  
MOTION TO STRIKE AS AN EX PARTE APPLICATION**

Any papers filed concerning the order to show cause issued by the court are due to be filed on or before April 15, 1997. Clearly the parties opposing the motion for an appointment of a nine-member board and supporting the appointment of Ann Schneider as referee would like to address the Reply filed by the law firm of Nossman, Guthner, Knox & Elliott if that reply will be considered by the court. Furthermore, given that the reply was mailed on the date of the hearing, and not received by the parties in this matter until at least one week after that hearing, insufficient time existed for MONTE VISTA WATER DISTRICT to have this motion set for a regularly scheduled hearing heard before April 15, 1997. Consequently, good cause exists for the court to decide this matter on an ex parte basis.

In the alternative, MONTE VISTA WATER DISTRICT requests that the court specially set this matter for hearing before April 29, 1997, and shorten time for service of this motion to strike upon all parties.

III

**THE COURT MAY STRIKE ANY IRRELEVANT,  
FALSE, OR IMPROPER MATTER**

Code of Civil Procedure section 436 provides that:

- The court may, upon motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper:
- (a) strike out any irrelevant, false, or improper matter asserted in any pleading;
  - (b) strike out all or any part of any pleading not drawn or filed in conformity with the laws of the state, a court rule, or an order of the court.

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III  
THE COURT SHOULD STRIKE THE IMPROPERLY  
FILED AND SERVED REPLY

California Rules of Court, Rule 317(a) provides that all reply papers must be filed and served at least two court days before the time appointed for the hearing.

San Bernardino Superior Court Rules, Rule 511.3 provides that service of responsive papers should be by personal delivery whenever service by mail has not occurred more than 72 hours prior to the time of the hearing.

As is established by the proof of service, which is attached as Exhibit 2, the reply by the law firm of Nossman, Guthner, Knox & Elliott was served by mail on March 11, 1997, the very day of and probably after the hearing on this matter. That reply is subject to being struck by the court pursuant to Code of Civil Procedure section 436.

Additionally, the court has found that at the time the law firm of Nossman, Guthner, Knox & Elliott served and filed their reply, they had no client in this matter. Thus, that law firm lacked standing to file or serve a reply, again making that reply improper and subject to an order striking it.

It is important to note that the reply by the law firm of Nossman, Guthner, Knox & Elliott had attached to it over fifty pages of exhibits, many of which MONTE VISTA WATER DISTRICT had never seen, and some of which were edited and submitted completely out of context. Additionally, the reply contained references to documents, reports and declarations with which MONTE VISTA WATER DISTRICT has never been provided.

It is completely unfair to place MONTE VISTA WATER DISTRICT, or any other party in this matter, in a position of having to reply to this purported evidence under any

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circumstances, let alone when such evidence was submitted to the court in such an untimely and improper fashion.

IV  
THE COURT'S TENTATIVE RULING WAS INFLUENCED  
BY THE IMPROPERLY SERVED REPLY

There is no question that the court's tentative ruling was influenced by the improperly served reply. It was from this reply that the court drew the incorrect conclusion that the Advisory Committee is the sole policy making body in the basin and that this conclusion is supported by Judge Turner's previous ruling. As will be demonstrated in MONTE VISTA WATER DISTRICT's response to the court's order to show cause, the Advisory Committee has taken Judge Turner's ruling completely out of context in using it to support this conclusion. Furthermore, this conclusion is completely contrary to Paragraph 41 of the Judgment which provides that "Watermaster, with the advice of the Advisory and Pool Committees, is granted discretionary powers in order to develop an optimum basin management program for Chino Basin, including both water quantity and quality considerations."

It was also from this improperly served reply that the court first became aware of purported PERS issues and assertions that employees are being held hostage." Both issues completely caught the opposing parties by surprise at the hearing, as they received no notice that such issues were being brought before the court. Had they had an opportunity to respond to these issues, they would have established that these assertions are completely false.

Perhaps most amazing is the fact that attached to the reply were segments of documents, taken out of context, without complete copies being provided. Furthermore, in

1 this Reply there are extensive quotes from documents, which are not attached to any  
2 pleading currently before the court.

3 The court has made it clear that its tentative ruling is much more than tentative.  
4 Rather, the court noted on March 11, 1997, that it would enter the tentative ruling as its  
5 final order unless a party could dissuade it from its initial conclusions. It is difficult enough  
6 for the parties to have to respond in ten pages to the 15-page Tentative Ruling. Absent the  
7 court's striking the reply by the law firm of Nossman, Guthner, Knox & Elliott, the parties  
8 will also have to rebut sixteen pages of spurious argument, and over fifty pages of exhibits  
9 and declarations. This is simply unfair.  
10

11 V

12 CONCLUSION

13 MONTE VISTA WATER DISTRICT, pursuant to Code of Civil Procedure sections  
14 435 and 436, as well as pursuant to general concepts of equity, justice and fairness,  
15 respectfully requests that this court strike the reply filed by the law firm of Nossman,  
16 Guthner, Knox & Elliott.  
17

18 DATE: April 9, 1997

MCCORMICK, KIDMAN & BEHRENS, LLP  
ARTHUR G. KIDMAN  
DAVID D. BOYER

19 By: 

20 DAVID D. BOYER  
21 Attorneys for Defendants MONTE VISTA  
22 WATER DISTRICT  
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DECLARATION OF DAVID D. BOYER

I, David D. Boyer, declare as follows:

1. I am an attorney at law duly licensed to practice law before all the courts in the state of California, and am an associate with the law firm of McCormick, Kidman & Behrens, LLP, attorneys of record for MONTE VISTA WATER DISTRICT.

2. I have personal knowledge of the below stated facts and could and would competently testify thereto if required.

3. Attached as Exhibit 2 is a true and correct copy of the proof of service of the Reply by the law firm of Nossman, Guthner, Knox & Elliott, LLP. This proof of service reflects that the Reply was not served by mail until March 11, 1997, the date of the hearing regarding the motion for the appointment of a nine-member board as watermaster. Our offices did not receive this reply until March 17, 1997.

4. On Wednesday, April 9, 1997, I had my secretary serve upon all parties, by first-class mail, a copy of the letter attached as Exhibit 1 and a copy of this ex parte application. On that date I also had my secretary send by facsimile transmission a copy of this letter to the following counsel:

- a. Jean Cihigoyenette, Esq. 909.483.1840
- b. Robert Dougherty, Esq. 909.391.6762
- c. James Markman, Esq. 714.990.6230
- d. Jimmy Gutierrez, Esq. 909.628.9803
- e. Gene Tanaka, Esq. 909.682.4612
- f. Dan G. McKinney, Esq. 909.686.2415
- g. Thomas H. McPeters, Esq. Fax: 909.792.6234

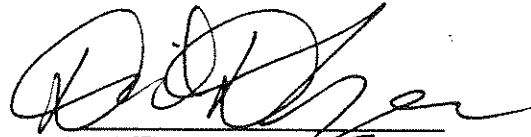
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- h. Timothy J. Ryan, Esq. 818.448.5530
- i. Arnold Alvarez-Glasman, Esq. 909.620.3609
- j. Marilyn Levin, Esq. 213.897.2802

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 9th day of April 1997, at Costa Mesa, California.



DAVID D. BOYER

