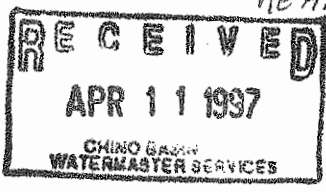


MVWB
4/29/97
REAPP



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6 MONTE VISTA WATER DISTRICT

(No Fee, Gov.
Code § 6103)

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN BERNARDINO

10 CHINO BASIN MUNICIPAL WATER)
11 DISTRICT,)
12)
13 Plaintiff,)
14 v.)
15 CITY OF CHINO, et al.,)
16 Defendants.)
17 _____)

CASE NO. RCV 51010
NOTICE OF MOTION AND MOTION TO
STRIKE MOTION TO APPOINT JUDGE
TURNER AS INTERIM WATERMASTER
DATE: April 29, 1997
TIME: 8:30 a.m.
DEPT: H
SPECIALLY ASSIGNED TO THE
HONORABLE JUDGE J. MICHAEL
GUNN

18 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

19
20 PLEASE TAKE NOTICE that on April 29, 1997, at 8:30 a.m. in Department H of
21 the above-entitled court located at 8303 North Haven Avenue, Rancho Cucamonga,
22 California, the MONTE VISTA WATER DISTRICT will move the court for an order,
23 pursuant to Code of Civil Procedure sections 435 and 436 to strike the Motion of the
24 Advisory Committee and the City of Ontario for the Appointment of the Honorable Don A.
25 Turner as Interim Watermaster.
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MCCORMICK, KIDMAN & BEHRENS, LLP
LAWYERS

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This motion is based upon this notice of motion, the attached memorandum of point and authorities, the pleadings, records and papers on file in this action, and upon such oral argument as may be presented at the hearing.

DATE: April 8, 1997

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TABLE OF CONTENTS

1		
2		PAGE
3	MEMORANDUM OF POINTS AND AUTHORITIES	
4	I. INTRODUCTION	1
5		
6	II. THE COURT MAY STRIKE ANY IRRELEVANT, FALSE, OR IMPROPER MATTER	3
7		
8	III. THE COURT'S ORDER PROHIBITS THE MOTION BROUGHT BY THE ADVISORY COMMITTEE AND THE CITY OF ONTARIO	3
9		
10	IV. NEITHER THE ADVISORY COMMITTEE NOR THE CITY OF ONTARIO HAVE PRESENTED NEW OR DIFFERENT FACTS, CIRCUMSTANCES OR LAW JUSTIFYING THE COURT RECONSIDERING ITS PREVIOUS ORDERS AND RULINGS	4
11		
12		
13	V. THE ACTIONS BY WATERMASTER SERVICES STAFF PRECLUDE JUDGE TURNER FROM SERVING AS INTERIM WATERMASTER	5
14		
15	VI. PRACTICAL CONSIDERATION REQUIRE THE COURT TO STRIKE THE MOTION TO APPOINT AN INTERIM WATERMASTER	7
16		
17	VII. THE MOTION BY THE ADVISORY COMMITTEE AND THE CITY OF ONTARIO IS A THINLY VEILED EFFORT TO TOTALLY EVISCERATE ALL POWER OF THE WATERMASTER	8
18		
19	VIII. CONCLUSION	10
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

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
26
27
28

PAGE

CASES

Gilbert v. AC Transit (1995) 32 Cal.App.4th 1494, 1499 4

STATUTES

Code of Civil Procedure § 436 3

1
2
3
4
5
6
7
8
9
10
11
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MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

Less than one week after receiving the court's order continuing the appointment of CHINO BASIN MUNICIPAL WATER DISTRICT (CBMWD) as interim watermaster, the Advisory Committee and the City of Ontario have brought a motion to remove CBMWD as interim Watermaster and replace it with retired Judge Don A. Turner. This request was already made to the court by counsel for the Department of Corrections and by counsel for the City of Ontario at the court's hearing on March 11, 1997. The court denied those oral motions at that time, and instructed the parties to limit their briefing to the issue of the appointment of a referee residing outside of San Bernardino County.

The previous motions by the Advisory Committee for the appointment of a nine-member board, including a majority of producers, as watermaster was a thinly veiled attempt by the CBMWD producers to usurp power granted to the Watermaster through the judgment. This new motion, which essentially seeks to complete the transfer of power from the Watermaster to the Advisory Committee and the Watermaster services staff, is a further effort to usurp power from the Watermaster and from this very court. In light of the court's recent rulings and comments, this motion by the CBMWD producers demonstrates significant disregard for the court's rulings.

Neither the Advisory Committee nor the City of Ontario have identified new facts or law to support their motion for the appointment of an interim Watermaster than already existed at the time that it was brought orally by counsel for the Department of Corrections and the City of Ontario. Thus, this motion violates Code of Civil Procedure section 1008(a).

///

1 As is clear from the attached exhibit, members of Watermaster Services Staff and,
2 apparently, members of the Advisory Committee, have already entered into *ex parte*
3 communications with retired Judge Turner concerning the issues before the court. This
4 alone is sufficient to make their current request for his appointment improper. Moreover,
5 as is clear from a review of the Advisory Committee's and the City of Ontario's motion,
6 these parties seek a great deal more than simply the appointment of a new interim
7 Watermaster. Rather, they seek to modify the Judgment and to complete the succession of
8 Watermaster services staff from Watermaster, leaving any future Watermaster with little
9 more than "rubber stamp" authority.

11 The court's order of March 19, 1997, clearly directed CBMWD to take no personnel
12 action with regard to Watermaster services staff. Should CBMWD threaten or attempt any
13 such action, absent leave of court, a clear and immediate remedy exists before this court.
14 Fear of such personnel action clearly does not form an adequate basis to support the motion
15 to appoint Judge Turner as interim Watermaster.

17 The Advisory Committee's motion demonstrates that the CBMWD are proceeding
18 with their efforts to remove all power from the Watermaster and placing it in the hands of
19 the Advisory Committee and Watermaster services staff under the complete control of the
20 Advisory Committee.

22 As it is clear that any motion for the appointment of an interim Watermaster brought
23 at this time is a violation of the court's recent order and procedurally improper, MONTE
24 VISTA WATER DISTRICT brings this motion to strike to avoid the filing of extensive
25 opposition papers by the various parties. Entertaining the Advisory Committee's and the
26 City of Ontario's motion at the April 29, 1997, hearing on the Court's Order to Show Cause,
27 will only serve to further confuse the issues. If these parties are insistent upon the
28

1 appointment of a new interim Watermaster, this request should be investigated by the court
2 appointed referee.

3
4 II

5 THE COURT MAY STRIKE ANY IRRELEVANT,
6 FALSE, OR IMPROPER MATTER

7 Code of Civil Procedure section 436 provides that:

8 The court may, upon a motion made pursuant to Section 435, or at any time
9 in its discretion, and upon terms it deems proper:

10 (a) strike out any irrelevant, false, or improper matter asserted in any
11 pleading;

12 (b) strike out all or any part of any pleading not drawn or filed in conformity
13 with the laws of the state, a court rule, or an order of the court.

14 III

15 THE COURT'S ORDER PROHIBITS THE MOTION
16 BROUGHT BY THE ADVISORY COMMITTEE AND THE CITY OF ONTARIO

17 The order to show cause issued by this court on March 19, 1997, clearly provides that
18 CBMWD is to serve as interim Watermaster. That order further limits the issues to be
19 considered by the court at this time to be the appointment of Ann Schneider, who resides
20 outside of the county of San Bernardino, as referee, and the adoption of the court's
21 tentative ruling on this issue.

22 The parties bringing this motion have previously requested that the court appoint
23 Judge Turner as interim Watermaster. The most recent request occurred on March 11,
24 1997. After listening to at least 15 to 20 minutes of discussion on this specific issue, the
25 court denied the request. It was after that ruling that the court ordered a limitation on the
26 issues to be considered at the April 29, 1997 hearing and limited written argument on these
27 issues to ten pages. Given the court's limitation on the issues to be considered at the
28 hearing on April 29, the motion by the Advisory Committee and the City of Ontario is a

1 violation of the court's order. Consequently, the court should strike the motion pursuant
2 to Code of Civil Procedure section 435.

3
4 IV

5 NEITHER THE ADVISORY COMMITTEE NOR THE CITY
6 OF ONTARIO HAVE PRESENTED NEW OR DIFFERENT
7 FACTS, CIRCUMSTANCES OR LAW JUSTIFYING THE COURT
8 RECONSIDERING ITS PREVIOUS ORDERS AND RULINGS

9 There is no question that the parties bringing this motion have already made a similar
10 request to the court within the last 30 days. Thus, the Advisory Committee and the City of
11 Ontario seek reconsideration by this court of its previous ruling. The exclusive avenue for
12 reconsideration of an order or ruling is set forth in Code of Civil Procedure section 1008.
13 (Gilbert v. AC Transit (1995) 32 Cal.App.4th 1494, 1499.)

14
15 Section 1008 provides that in order to establish grounds for the court to reconsider
16 its order, the moving party must demonstrate new or different facts, circumstances or law
17 than that existing at the time that the court made its initial ruling. Such a demonstration
18 must be made by affidavit by the party bringing the motion for reconsideration. The
19 Advisory Committee and the City of Ontario have violated this statute in at least two
20 respects.
21

22 There is no affidavit by either party bringing this motion (i.e., the Advisory
23 Committee or the City of Ontario) attempting to outline any new facts, circumstances or
24 law. More importantly, there are simply no new or different facts, circumstances or law
25 presented by the Advisory Committee or the City of Ontario than that which existed at the
26 time the court made its ruling regarding interim Watermaster less than one month ago.
27 Rather, the declarations submitted in support of the motion to appoint an interim
28

1 Watermaster are vague anecdotes as old as three or four years.

2 As the court will recall, on March 11, 1997, during the hearing on the appointment
3 of a nine-member panel as Watermaster, at least twenty minutes of argument was heard
4 regarding the appointment of retired Judge Turner as interim Watermaster, which included
5 discussions of PERS, tension between Watermaster services staff and the Watermaster, fear
6 by the Watermaster services staff of retaliation by the current Watermaster, and personnel
7 actions to be taken regarding Watermaster services staff. The court determined that the
8 appropriate remedy for these concerns was to include in its order a provision requiring all
9 parties to hold in abeyance personnel actions concerning Watermaster services staff.

10 Lest anyone forget, Watermaster services staff was and continues to be employees
11 of the CBMWD. The court was correct in its analysis that Watermaster services staff's
12 greatest protection from the retaliation they allegedly so fear is to keep CBMWD as interim
13 watermaster and order a stay on all personnel action concerning those employees. No new
14 facts have been presented altering this conclusion.¹

17 V

18 **THE ACTIONS BY WATERMASTER SERVICES STAFF**
19 **PRECLUDE JUDGE TURNER FROM SERVING**
20 **AS INTERIM WATERMASTER**

21
22 Contrary to the assertions made by the Advisory Committee and the City of Ontario
23 in their motion for the appointment of an interim Watermaster, at no time did MONTE
24 VISTA WATER DISTRICT ever propose Judge Turner's appointment as the mediator in
25 this matter. The reason is simple: By virtue of his previous ruling, Judge Turner has
26

27
28 ¹ Subsection d of §1008 provides that a violation of §1008 may be punished as
a contempt and with sanctions under §128.5.

1 expressed an opinion and belief as to the merits of the specific issues before the court; to
2 wit: Judge Turner's order of July 31, 1989, in this case includes dicta concerning the
3 relationship between the Advisory Committee and the Watermaster. Consequently, he is
4 disqualified under Code of Civil Procedure section 641 to serve as any type of referee,
5 including as Watermaster.
6

7 The appointment of a judge as interim Watermaster brings with it the hazards of
8 undue influence over the attorney appointed as referee. Certainly, this will be the
9 appearance given to the public.

10 Furthermore, the appointment of Judge Turner as interim Watermaster will only
11 serve to intimidate any attorney appointed as referee, and may eliminate a referee's ability
12 to be impartial in this case. Given Judge Turner's previous background in this case, should
13 he, as interim Watermaster, take a contrary position in the interpretation of the Judgment
14 than is taken by the referee, what referee would not be intimidated?
15

16 Furthermore, some of the issues before this court involve an interpretation of the
17 July 31, 1989 ruling issued by the very judge the Advisory Committee seeks to have
18 appointed as interim Watermaster. This should be reason enough to strike their motion.
19 Clearly, in another context it is per se improper. (See, e.g., (Code Civ. Proc., § 170.16(b).)
20 Certainly, it will serve to further confuse the issues before the court.
21

22 There is, however, a greater reason for striking the motion of the Advisory
23 Committee and the City of Ontario. This ground arises as a result of the actions of the
24 Advisory Committee, as well as the actions of the Watermaster services staff. Apparently,
25 as is evidenced by Exhibit 1, certain members of the Advisory Committee, and of Water-
26 master services staff, have already been in contact with Judge Turner and discussed this
27
28

1 matter with him.²

2 We can now never be assured of the fact that Judge Turner has not formed an
3 opinion with regard to the current disputes and issues before this court and before the
4 Watermaster.³ Consequently, based upon the actions of the Advisory Committee and
5 Watermaster services staff, which include ex parte communications with Judge Turner, the
6 court should strike the motion by the Advisory Committee and the City of Ontario as being
7 improper under Code of Civil Procedure section 435.
8

9 VI

10 PRACTICAL CONSIDERATION REQUIRE THE COURT TO
11 STRIKE THE MOTION TO APPOINT AN INTERIM WATERMASTER
12

13 Has anyone truly considered all the resulting effects from removing CBMWD as
14 interim Watermaster and replacing it with a retired judge? Will the current Watermaster
15 services staff members remain as employees of CBMWD if CBMWD no longer serves as
16 Watermaster, or will these individuals be rehired by the new interim Watermaster?
17

18 Will Judge Turner now be the employer for Watermaster services staff? If so, is he
19

20 ///

21 ² If any attorney was involved in this activity, it is a direct violation of that
22 attorney's rules of professional conduct. (Rules of Professional Conduct of
23 the State Bar of California, Rule 5-300(B).)

24 ³ Monte Vista Water District anticipates that the parties opposing this motion
25 to strike will argue that their communication with Judge Turner was limited
26 to securing his availability. This is doubtful, however, given the parties'
27 previous zealous actions in seeking to supplant the current interim Water-
28 master. Furthermore, it is difficult to understand how anyone could explain
to Judge Turner the amount of time he would need to dedicate to this project
without describing in some detail the current conflicts among the Water-
master, Watermaster services staff and the Advisory Committee. It is
doubtful that this explanation could be done by any party in this action
without presenting a skewed view of the issues.

1 willing to accept the liability of an employer? No retired judge should be asked to take on
2 this liability.

3 Perhaps the Advisory Committee foresees Judge Turner as a CEO of a new
4 organization called Watermaster services staff. Yet, nowhere in the Judgment is there
5 authority for such an organization. Rather, the Judgment contemplates a Watermaster
6 which is an entity or individual with employees who can perform the duties and functions
7 of Watermaster. Watermaster staff changes with the Watermaster. The Judgment does not
8 create a permanent Watermaster services staff.
9

10 VII

11 THE MOTION BY THE ADVISORY COMMITTEE AND THE CITY
12 OF ONTARIO IS A THINLY VEILED EFFORT TO TOTALLY
13 EVISCERATE ALL POWER OF THE WATERMASTER
14

15 Contrary to its title, the motion of the Advisory Committee and the City of Ontario
16 for the appointment of Judge Turner as interim watermaster seeks a great deal more. It
17 seeks to accomplish exactly what these parties were attempting to seek in their previous
18 motions to appoint a nine-member board including a majority of Chino Basin groundwater
19 producers as Watermaster. That objective is to remove all power from the person or entity
20 appointed as Watermaster, and place that power in the hands of the Advisory Committee.
21 This time any power remaining with the Watermaster will be in the hands of Watermaster
22 services staff under the authority of the Advisory Committee.
23

24 As noted in the last paragraph of the Advisory Committee's and the City of Ontario's
25 motion, the motion also seeks to amend Paragraph 18 of the Judgment to provide for
26 greater compensation to the Watermaster. This request is made without any statutory or
27 case authority allowing for it.
28

1 The modifications, however, not stop there. As is clear from the declarations
2 attached to that motion, Watermaster services staff and the Advisory Committee are seeking
3 a Watermaster who will simply "rubber stamp" the recommendations of the Advisory
4 Committee and the Watermaster services staff. As noted by Traci Stewart in her declaration
5 accompanying their motion, upon appointment of a new interim watermaster, Watermaster
6 services staff intends on:
7

8 (1) moving all financial records of the Watermaster to Watermaster services staff's
9 offices;

10 (2) creating bank accounts with signature authority held by Watermaster services
11 staff (rather than the Watermaster);

12 (3) having all accounting functions performed by Watermaster services staff
13 (presumably eliminating any future embarrassment from an independent audit);

14 (4) purchasing office supplies, newspaper notices with the daily bulletin, printing
15 and copying, office equipment, and maintenance and gasoline for the Watermaster
16 vehicle;

17 (5) completing the establishment of a PERS retirement and benefits account
18 solely for Watermaster's services staff;

19 (6) enacting a Watermaster employee handbook;

20 (7) enacting a Watermaster investment policy approved by the Advisory
21 Committee, but rejected by the current interim Watermaster;

22 (8) creating procedures to guide Watermaster services staff in performing their
23 duties; and

24 (9) creating new job descriptions for Watermaster services staff.
25
26

27 Most, if not all, of the above described activities are, according to the Judgment,
28

1 completely within the authority of the Watermaster. (See Judgment, ¶¶17-30.) In fact,
2 according to the Judgment, most of these activities are even within the advise and consent
3 functions of the Advisory Committee.

4 The Judgment provides for a Watermaster. It makes no mention of Watermaster
5 services staff, much less a Watermaster services staff answerable to the Advisory Committee.
6 The effect of the activities proposed by Traci Stewart in her declaration will be to divest
7 Watermaster of any power and authority and place that power and authority in Watermaster
8 services staff, presumably with some type of figurehead interim Watermaster.

9 Any independence and neutrality of the Watermaster is eliminated by virtue of the
10 fact that Watermaster services staff believes it is answerable to the Advisory Committee, not
11 to its proposed figurehead interim Watermaster. This is evidenced not only by the
12 declarations of the various members of the Watermaster services staff, but by the fact that
13 this motion is being brought by the Advisory Committee on behalf of Watermaster services
14 staff.

15 If the court were to grant this motion and allow the Advisory Committee and
16 Watermaster services staff to continue on its juggernaut, there will be nothing left for Ann
17 Schneider as referee to investigate or upon which to provide recommendations. The Water-
18 master will have figurehead status, and Watermaster services staff will be vested with any
19 power and authority of the Watermaster under the direct control and supervision of the
20 Advisory Committee.

21 Should Ann Schneider recommend a contrary interpretation of the Judgment, it will
22 be extremely difficult for the court to reel this back in. This is the very purpose behind this
23 motion brought by the Advisory Committee and the City of Ontario.

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VIII
CONCLUSION

While perhaps inappropriate at any time, the Advisory Committee's and the City of Ontario's motion for the appointment of a new interim Watermaster is in direct contravention of the court's recent order appointing CBMWD as interim Watermaster and limiting briefing to the issue of the appointment of Ann Schneider as referee. As the appointment of Judge Turner as interim Watermaster was already requested and denied by this court less than thirty days ago, and as no new facts have been raised, this motion is also an improper motion for reconsideration.

The selection of a new Watermaster, even on a temporary basis, should be considered by the referee. Any change by this court of the status quo limits the referee's flexibility in making her recommendations.

DATE: April 9, 1997

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MAR 17 1997
 BY: _____

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TRACI STEWART
 Chief of Watermaster Services

NOTICE OF CANCELLATION

OF THE ADJOURNED SPECIAL ADVISORY COMMITTEE MEETING MARCH 17, 1997

We did not receive any additional names and the Honorable Judge Turner has agreed to serve as the interim Watermaster.

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