

APPENDIX L
MCWRA Letter of October 5, 2011



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MONTEREY COUNTY



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October 5, 2011

PRIVILEGED AND CONFIDENTIAL MEDIATION AND SETTLEMENT COMMUNICATION

Via U.S. Mail & E-Mail
rmoore@allenmatkins.com

Robert R. Moore
Allen Matkins Leck Gamble Mallory & Natsis LLP
Three Embarcadero Center, 12th Floor
San Francisco, CA 94111-4074

Re: Letter Dated September 28, 2011 Terminating Agreements

Dear Mr. Moore:

The Monterey County Water Resources Agency ("MCWRA") has reviewed your letter dated September 28, 2011 ("your letter"), which you handed personally to representatives of MCWRA and Marina Coast Water District ("MCWD") at the close of the fourth day of mediation among MCWRA, MCWD, and California American Water Company ("CalAm"). Your letter asserts that MCWRA "or its counsel has declared in letters dated July 7, 2011, July 20, 2011, and August 22, 2011 that the Water Purchase Agreement and related agreements (collectively, 'Agreements') are void . . ." and apparently contends that those letters constitute a "repudiation" and "anticipatory breach" of the Agreements. MCWRA does not agree with the facts or analysis of the law contained in your letter.

First, each of the three letters you reference was a confidential settlement communication, a fact made clear both by the heading and content of each letter, setting forth positions concerning disputes among MCWRA, MCWD and CalAm. Thus, the July 7, 2011, letter stated the "position of MCWRA" that the Agreements are void under Government Code Section 1090 and other applicable law. The July 20, 2011 letter indicates that "MCWRA asserts the WPA is void." The August 22, 2011 letter notes that MCWRA's "position" in the past has been that the Agreements are void. Notably, during the same time period MCWD and CalAm also sent letters as part of the settlement process stating their positions regarding the disputes among the parties. In fact, as settlement communications, none of the letters from any of the parties would be admissible to prove liability for or defense of a claim.

Second, your letter cites *Durbin v. Hillman* (1920) 50 Cal.App.377 but misses its import here. *Durbin* states: "A void contract is a nullity – of no effect. It cannot be ratified and any attempted ratification must in itself be the equivalent of an original contract." *Id.* at 379. The obvious conclusion from this language, which your letter ignores, is that if a "void contract is a nullity – of no effect," then there is no contract to repudiate or anticipatorily breach. It is a non sequitur to claim a contract that is of no effect in the eyes of the law can be anticipatorily breached, and your letter cites no cases so holding. Thus, even if MCWRA had declared what your letter claims – that the Agreements *are* void – no repudiation occurred if the Agreements truly are void.

This leads to a third and related point. Despite the claims in your letter, MCWRA has not "made clear it will not and cannot perform under the Agreements," nor would MCWRA have done so even if it had stated that the Agreements *are* void. MCWRA has asserted the position that the Agreements are void. It has not said it will not and cannot perform under Agreements that are not void. If the mediation is unsuccessful and the parties proceed to litigation, a court, not MCWRA, MCWD, or CalAm, will determine whether the Agreements are void. If a court determines the Agreements to be void, then the point above holds: a contract that is of no effect cannot be breached. If a court determines the Agreements not to be void, MCWRA has made no declaration that it will not or cannot perform under a legally valid contract.

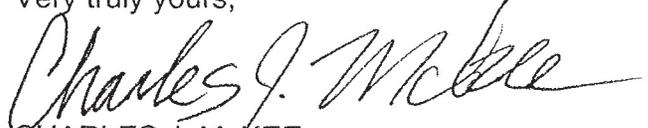
Fourth, MCWRA suggests CalAm consider whether under the circumstances, your letter itself is in fact an anticipatory repudiation, since CalAm has now purported to terminate Agreements it considers legally valid. The reasons for this repudiation are more apparent from reports in the September 30, 2011 *Carmel Pine Cone* that CalAm has already arrived at alternatives to the Regional Project in conjunction with Monterey Peninsula cities, alternatives CalAm plans to publicly promote the day after the mediation is scheduled to end. These reports and CalAm's legally unsupportable claim of repudiation by MCWRA call into question CalAm's good faith in both contract performance and the current mediation. In order to evaluate the import of your alternatives to the WPA, we request that you immediately forward to all mediation participants your proposed alternatives and analysis as well notify your fellow WPA parties of all meetings on alternatives.

Finally, your letter states CalAm "is prepared to continue with the mediation process in an effort to amicably resolve any disputes resulting the repudiation [sic] and the subsequent termination of the Agreements." MCWRA hopes this statement is merely incomplete rather than an effort to narrow the scope of the ongoing mediation which, as CalAm knows, has never been as narrow as stated in your letter. MCWRA was disappointed not only in the content but also the manner and timing of the distribution of your letter, all of which were counterproductive to the constructive continuation of the mediation, and this disappointment only deepened with the September 30 *Pine Cone* article. Nonetheless, MCWRA would also like to avoid litigation of the various disputes among the parties. MCWRA has participated in good faith in the mediation so far, including, as CalAm knows, being willing if resolution can be reached to arrive at mutually agreeable actions to resolve the issue of whether the Agreements are void.

Robert R. Moore
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MCWRA looks forward to returning to the mediation process when we all meet again on
October 14, 2011.

Very truly yours,



CHARLES J. McKEE
County Counsel

cc: Anthony J. Cerasuolo
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