

1 KEKER & VAN NEST LLP
JOHN W. KEKER - #49092
2 DANIEL PURCELL - #191424
DAN JACKSON - #216091
3 WARREN A. BRAUNIG - #243884
633 Battery Street
4 San Francisco, CA 94111-1809
Telephone: (415) 391-5400
5 Facsimile: (415) 397-7188

EXEMPT FROM FILING FEES
[GOV. CODE § 6103]

6 Attorneys for Petitioner and Plaintiff
SAN DIEGO COUNTY WATER AUTHORITY
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SAN FRANCISCO
10

11 SAN DIEGO COUNTY WATER
12 AUTHORITY,
13
14 Petitioner and Plaintiff,
v.

Case No. CPF-10-510830

**SDCWA'S OPPOSITION TO MWD'S
DEMURRER AND ANTI-SLAPP
MOTION TO STRIKE SDCWA'S FIRST
AMENDED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DAMAGES AND DECLARATORY
RELIEF**

15 METROPOLITAN WATER DISTRICT OF
SOUTHERN CALIFORNIA; ALL PERSONS
16 INTERESTED IN THE VALIDITY OF THE
RATES ADOPTED BY THE
17 METROPOLITAN WATER DISTRICT OF
SOUTHERN CALIFORNIA ON APRIL 13,
18 2010 TO BE EFFECTIVE JANUARY 2011;
and DOES 1-10,

Date: January 4, 2012
Time: 1:30 p.m.
Dept: 304
Judge: Hon. Richard A. Kramer

19 Respondents and Defendants.
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

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

I. INTRODUCTION1

II. ARGUMENT3

 A. MWD’s anti-SLAPP motion is frivolous and SDCWA is entitled to its attorneys’ fees.3

 1. The anti-SLAPP statute does not apply.4

 2. Even if the anti-SLAPP statute applied—which it does not—SDCWA’s fiduciary-duty claim has more than the “minimal merit” required.8

 a. MWD owes SDCWA fiduciary duties.9

 b. MWD is liable for its *own* breaches of fiduciary duty.14

 c. Government Code section 815 does not preclude SDCWA’s claim.15

 d. SDCWA has more than enough evidence of breach and damages to satisfy its minimal burden even if anti-SLAPP applies—which, again, it does not.17

 3. SDCWA is entitled to its fees because MWD’s anti-SLAPP motion is frivolous.22

 B. MWD’s demurrer has no merit and should be overruled.22

 1. The Court should overrule MWD’s demurrer to SDCWA’s cause of action for breach of fiduciary duty.22

 2. The Court should overrule MWD’s demurrer to SDCWA’s causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing.23

 a. The Transportation Agreement’s dispute-resolution provision “exclusively governs” and supersedes the statutory claim-presentation procedures.23

 b. SDCWA satisfied the statutory claim-presentation procedures in any case.25

 c. None of SDCWA’s contract claims are time-barred.26

 d. SDCWA has stated a valid claim for breach of the implied covenant.27

 3. MWD misconstrues the prior *SDCWA* case, which does not support MWD’s effort to prevent this Court from issuing a declaration regarding preferential rights.28

TABLE OF CONTENTS
(cont'd)

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

III. CONCLUSION.....29

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Fidge v. Lake County Bd. of Sup'rs
C 10-03953 CRB, 2011 WL 1364187 (N.D. Cal. Apr. 11, 2011)16

In re Valley Health Sys.
429 B.R. 692 (Bankr. C.D. Cal. 2010).....11

State Cases

Am. Motors Sales Corp. v. New Motor Vehicle Bd.
69 Cal. App. 3d 983 (1977)13, 14

Arntz Builders v. City of Berkeley
166 Cal. App. 4th 276 (2008)23, 24

Austin v. Turrentine
30 Cal. App. 2d 750 (1939)15, 16

Baharian-Mehr v. Smith
189 Cal. App. 4th 265 (2010)8

Canova v. Trustees of Imperial Irr. Dist. Employee Pension Plan
150 Cal. App. 4th 1487 (2007)16

City of Cotati v. Cashman
29 Cal. 4th 69 (2002)3, 5

City of Dinuba v. County of Tulare
41 Cal. 4th 859 (2007)16

Clark v. City of Hermosa Beach
48 Cal. App. 4th 1152 (1996)10

Cohen v. Kite Hill Cmty. Assn.
142 Cal. App. 3d 642 (1983) *passim*

Culligan Water Conditioning v. State Bd. of Equalization
17 Cal. 3d 86 (1976)7

Fisher v. Pa. Life Co.
69 Cal. App. 3d 506 (1977)9, 15

Flatley v. Mauro
39 Cal. 4th 299 (2006)3

Gerbosi v. Gaims, Weil, W. & Epstein, LLP
193 Cal. App. 4th 435 (2011)22

Graffiti Protective Coatings, Inc. v. City of Pico Rivera
181 Cal. App. 4th 1207 (2010)5, 6, 7, 8

Guz v. Bechtel Nat'l Inc.
24 Cal. 4th 317 (2000)27

Harm v. Frasher
181 Cal. App. 2d 405 (1960)27

Holbrook v. City of Santa Monica
144 Cal. App. 4th 1242 (2006)1, 4, 22

TABLE OF AUTHORITIES
(cont'd)

		<u>Page(s)</u>
1		
2		
3	<i>Hylton v. Frank E. Rogozienski, Inc.</i>	
4	177 Cal. App. 4th 1264 (2009)	8
5	<i>I. E. Assocs. v. Safeco Title Ins. Co.</i>	
6	39 Cal. 3d 281 (1985)	3, 11, 12, 23
7	<i>Jarrow Formulas, Inc. v. LaMarche</i>	
8	31 Cal. 4th 728 (2003)	17
9	<i>Jones v. H. F. Ahmanson & Co.</i>	
10	1 Cal. 3d 93 (1969)	9, 11, 15, 19
11	<i>Locke v. Warner Bros., Inc.</i>	
12	57 Cal. App. 4th 354 (1997)	28
13	<i>Los Angeles County v. Superior Court</i>	
14	17 Cal. 2d 707 (1941)	10, 12, 13
15	<i>Morrison v. Smith Bros.</i>	
16	211 Cal. 36 (1930)	9
17	<i>MWD v. Riverside Cnty.</i>	
18	21 Cal. 2d 640 (1943)	6, 9, 11
19	<i>MWD v. Superior Court</i>	
20	2 Cal. 2d 4 (1934)	9
21	<i>Nickerson v. San Bernardino County</i>	
22	179 Cal. 518 (1918)	10
23	<i>Oakland Raiders v. National Football League</i>	
24	131 Cal. App. 4th 621 (2005)	9, 11
25	<i>Oasis W. Realty, LLC v. Goldman</i>	
26	51 Cal. 4th 811 (2011)	9
27	<i>Ochoa v. Superior Court</i>	
28	39 Cal. 3d 159 (1985)	8, 22
29	<i>People v. Hill</i>	
30	142 Cal. App. 4th 770 (2006)	11
31	<i>Phillips v. Desert Hosp. Dist.</i>	
32	49 Cal. 3d 699 (1989)	23, 25
33	<i>Pomona City Sch. Dist. v. Payne</i>	
34	9 Cal. App. 2d 510 (1935)	10, 12, 13
35	<i>PrediWave Corp. v. Simpson Thacher & Bartlett LLP</i>	
36	179 Cal. App. 4th 1204 (2009)	8
37	<i>Remillard Brick Co. v. Remillard-Dandini Co.</i>	
38	109 Cal. App. 2d 405 (1952)	11, 12, 19
39	<i>Robles v. Chalilpoyil</i>	
40	181 Cal. App. 4th 566 (2010)	8
41	<i>Roussey v. City of Burlingame</i>	
42	100 Cal. App. 2d 321 (1950)	14
43		

TABLE OF AUTHORITIES
(cont'd)

		<u>Page(s)</u>
3	<i>San Diego County Water Auth. v. Metro. Water Dist. of S. California</i>	
4	117 Cal. App. 4th 13 (2004)	28
5	<i>San Ramon Valley Fire Protection District v. Contra Costa County</i>	
6	<i>Employees' Retirement Ass'n</i> , 125 Cal. App. 4th 343 (2004)	<i>passim</i>
7	<i>Smith v. Tele-Comm'n, Inc.</i>	
8	134 Cal. App. 3d 338 (1982)	9
9	<i>Soukup v. Law Offices of Herbert Hafif</i>	
10	39 Cal. 4th 260 (2006)	4, 8, 17, 18
11	<i>Stockett v. Ass'n of Cal. Water Agencies Joint Powers Ins. Auth.</i>	
12	34 Cal. 4th 441 (2004)	26
13	<i>Turner v. Vista Pointe Ridge Homeowners Ass'n</i>	
14	180 Cal. App. 4th 676 (2009)	8
15	<i>USA Waste of Cal., Inc. v. City of Irwindale</i>	
16	184 Cal. App. 4th 53 (2010)	6, 8
17	<i>Wang v. Wal-Mart Real Estate Bus. Trust</i>	
18	153 Cal. App. 4th 790 (2007)	8
19	<i>Woodroof v. Howes</i>	
20	88 Cal. 184 (1891)	15
21	<i>Yamaha Corp. of Am. v. State Bd. of Equalization</i>	
22	19 Cal. 4th 1 (1998)	7
State Statutes		
23	Cal. Civ. Code § 47(b)	8
24	Cal. Civ. Code § 1668	28
25	Cal. Civ. Proc. Code § 425.16	<i>passim</i>
26	Cal. Code Civ. Proc. § 128.5	22
27	Cal. Corp. Code § 602	11
28	Cal. Gov't Code § 814	15, 16
29	Cal. Gov't Code § 815	2, 15, 16
30	Cal. Gov't Code § 815.6	12, 16
31	Cal. Gov't Code § 911	25
32	Cal. Gov't Code §§ 930.2, 930.4	23
33	Cal. Gov't Code § 54950	1, 6
34	Cal. Water Code § 109-46	9
35	Cal. Water Code § 109-50	19
36	Cal. Water Code § 109-126.7	12
State Regulations		
37	MWD Admin. Code § 4202	11
38	MWD Admin. Code §§ 9303-04	26

TABLE OF AUTHORITIES
(cont'd)

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(s)

MWD Admin. Code § 9304.....25, 26

MWD Admin. Code § 9309.....23

Constitutional Provisions

Cal. Const. art. I, § 31, 6

Cal. Const. art. 13C, § 1.....7

1 I. INTRODUCTION

2 In response to SDCWA’s amended complaint, MWD has filed a hybrid demurrer and
3 motion to strike, most of which is devoted to MWD’s effort to cast SDCWA’s claim for breach
4 of fiduciary duty as a “strategic lawsuit against public participation,” or “SLAPP,” so that MWD
5 can avoid answering for its breaches of fiduciary duty.¹ But SDCWA’s claim is the opposite of
6 an attempt to stifle “public participation.” SDCWA intends to bring MWD’s corrupt decision-
7 making process out of the backrooms in which MWD prefers to operate—contrary to its
8 fiduciary duties as well as the California Constitution, the Brown Act, and the legislative intent
9 underlying the anti-SLAPP statute itself²—and into the light of the courtroom.

10 Irony aside, MWD’s anti-SLAPP motion has no merit. As the court held in *San Ramon*
11 *Valley Fire Protection District v. Contra Costa County Employees’ Retirement Ass’n*, 125 Cal.
12 App. 4th 343 (2004), a cause of action arising from breaches of fiduciary duty by a government
13 agency is not a SLAPP because “[a]cts of governance mandated by law, without more, are not
14 exercises of free speech or petition.” *Id.* at 354 (emphasis added). MWD itself contends that its
15 acts at issue here are acts of governance; and MWD should be well aware of *San Ramon*,
16 although it goes unmentioned in MWD’s brief, because *San Ramon* was discussed prominently
17 in the first case MWD cites in its argument, *Holbrook v. City of Santa Monica*, 144 Cal. App. 4th
18 1242, 1248-49 (2006). MWD’s attempt to invoke the anti-SLAPP statute in the face of this clear
19 authority is frivolous, and the Court should award SDCWA the attorneys’ fees it incurred
20 opposing this motion. *See* Cal. Code Civ. Proc. § 425.16(c)(1).

21
22
23 ¹ “SDCWA” and “the Water Authority” refer to the San Diego County Water Authority, and
“MWD” and “Metropolitan” refer to the Metropolitan Water District of Southern California.

24 ² *See* Cal. Const. art. I, § 3 (“The people have the right of access to information concerning the
25 conduct of the people’s business, and, therefore, the meetings of public bodies and the writings
26 of public officials and agencies shall be open to public scrutiny.... A statute, court rule, or other
27 authority, including those in effect on the effective date of this subdivision, shall be broadly
28 construed if it furthers the people’s right of access, and narrowly construed if it limits the right of
access.”); Cal. Gov’t Code § 54950 (“[T]he Legislature finds and declares that the public
commissions, boards and councils and the other public agencies in this State exist to aid in the
conduct of the people’s business. It is the intent of the law that their actions be taken openly and
that their deliberations be conducted openly.”); Cal. Code Civ. Proc. § 425.16 *et seq.*

1 Even if SDCWA’s cause of action for breach of fiduciary duty could be considered a
2 SLAPP—which it cannot—MWD’s anti-SLAPP motion must fail. MWD’s principal argument
3 on the merits is that MWD does not owe any fiduciary duties to SDCWA, MWD’s other member
4 agencies, or even the public it purports to serve. But MWD cannot muster a single authority to
5 support this contention, which contravenes established law, public policy, and common sense.
6 Public corporations like MWD bear the same fiduciary duties as private corporations, and more.
7 Indeed, because of the special position of trust public corporations occupy, they “must be held to
8 a high standard of responsibility,” including “fiduciary duties and the requirements of due
9 process, equal protection, and fair dealing.” *Cohen v. Kite Hill Cmty. Assn.*, 142 Cal. App. 3d
10 642, 651 (1983).

11 MWD also attempts to characterize SDCWA’s fiduciary-duty claim as an effort to hold
12 MWD liable for the conduct of third parties, but, in the next breath, MWD concedes that “all of
13 the complained-of acts concern MWD’s rate-setting and contracting practices, FAC ¶¶ 98-106,
14 i.e., they are acts ‘of the public entity [MWD].’” Mot. at 11 n.4. MWD’s invocation of
15 sovereign immunity under Government Code section 815 is equally disingenuous. MWD made
16 the same argument in opposition to SDCWA’s motion for leave to amend, but at least then
17 MWD acknowledged that SDCWA does not seek damages for breach of fiduciary duty. Now,
18 MWD is silent on that crucial point. But it remains the case that section 815 does not apply
19 where, as here, the plaintiff seeks declaratory relief rather than damages.

20 MWD also recycles its previous arguments in demurring to SDCWA’s claims for breach
21 of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief
22 regarding preferential rights. MWD does not even attempt to rebut the counterarguments
23 SDCWA presented—nor can it. MWD still fails to acknowledge its own repeated concessions
24 that “*the Water Authority has taken the steps necessary to exhaust its administrative remedies*
25 *with respect to Metropolitan’s adoption of its 2010-11 rates and charges.*” Ex. A (emphasis
26 added),³ which is fatal to MWD’s contention that SDCWA failed to comply with statutory claim-

27 _____
28 ³ Exhibit references are to the accompanying Declaration of Dan Jackson unless stated otherwise.

1 presentation requirements. MWD still misconstrues SDCWA’s cause of action for breach of the
2 implied covenant, as well as the governing law. And MWD still misrepresents the parties’ prior
3 litigation over preferential rights to create the misimpression that it precludes SDCWA’s current
4 claim for declaratory relief, which raises distinct issues based on changed circumstances.

5 For these reasons and others set forth in detail below, the Court should deny MWD’s
6 demurrer and motion to strike, and should grant SDCWA its attorneys’ fees expended in
7 opposing the latter.

8 II. ARGUMENT

9 A. MWD’s anti-SLAPP motion is frivolous and SDCWA is entitled to its attorneys’ 10 fees.

11 Most of MWD’s brief is devoted to its misguided effort to shoehorn SDCWA’s claim for
12 breach of fiduciary duty into the bounds of the anti-SLAPP statute. A SLAPP is a lawsuit
13 “brought primarily to chill the valid exercise of the constitutional rights of freedom of speech
14 and petition for the redress of grievances.” *Flatley v. Mauro*, 39 Cal. 4th 299, 312 (2006)
15 (citation and quotation marks omitted). The statute establishes a two-step process for
16 determining whether a cause of action is subject to dismissal as a SLAPP. *See* Cal. Civ. Proc.
17 Code § 425.16.

18 *First*, the court decides whether the defendant has carried its burden of showing that a
19 cause of action asserted against it is one “arising from any act of that person in furtherance of the
20 person’s right of petition or free speech.” Cal. Civ. Proc. Code § 425.16(b)(1). “While a
21 defendant need only make a prima facie showing that the underlying activity falls within the
22 ambit of the statute, clearly the statute envisions that the courts do more than simply rubber
23 stamp such assertions before moving on to the second step.” *Flatley*, 39 Cal. 4th at 317. If the
24 defendant fails to carry its initial burden, the motion fails at the first step and the court does not
25 proceed to the second. *See, e.g., City of Cotati v. Cashman*, 29 Cal. 4th 69, 80-81 (2002).

26 *Second*, if, and only if, the defendant carries its burden of showing that the anti-SLAPP
27 statute applies—*i.e.*, that the plaintiff’s cause of action arises from that defendant’s protected
28 speech or petitioning—the court determines whether “the plaintiff has established that there is a

1 probability that the plaintiff will prevail on the claim.” Cal. Civ. Proc. Code § 425.16(b)(1).
2 “The plaintiff need only establish that his or her claim has *minimal merit* to avoid being stricken
3 as a SLAPP.” *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 291 (2006) (emphasis
4 added) (citation and quotation marks omitted).

5 MWD’s anti-SLAPP motion fails at both steps. Indeed, the motion is frivolous.
6 SDCWA, therefore, is entitled to its attorneys’ fees. *See* Cal. Code Civ. Proc. § 425.16(c)(1).

7 **1. The anti-SLAPP statute does not apply.**

8 The first case MWD cites in its anti-SLAPP argument, , makes clear that MWD’s motion
9 must fail under *San Ramon*: “*an anti-SLAPP motion does not lie when an action does not arise*
10 *from protected activity but from a non-speech-or-petition-related measure that merely was*
11 *adopted by majority vote.*” *Holbrook*. 144 Cal. App. 4th at 1249 (emphasis added) (citing *San*
12 *Ramon*, 125 Cal. App. 4th at 353-58).

13 *San Ramon*, like this case, concerned allegations that one public entity, the Board of a
14 retirement association, breached its fiduciary duties to another public entity, a Fire Protection
15 District. 125 Cal. App. 4th at 347-49. The Board sought to increase its members’ retirement
16 benefits by demanding substantial payments from the District. The Board and District each hired
17 actuaries who produced competing analyses of the District’s obligation for the increased
18 benefits. The Board reviewed the competing analyses at a public meeting and adopted its own
19 actuary’s analysis. The District then filed a petition for mandamus and an action for declaratory
20 relief and associated equitable remedies, alleging that the Board breached its fiduciary duty to
21 the District. *See id.* at 348-49.

22 The Board filed an anti-SLAPP motion, contending that its decision regarding retirement
23 contributions, “which occurred only after a public hearing and a majority vote of the Board’s
24 members, constituted ‘conduct in furtherance of the exercise of the constitutional right of petition
25 or the constitutional right of free speech in connection with a public issue or issue of public
26 interest.’” *San Ramon*, 125 Cal. App. 4th at 353 (quoting Cal. Code Civ. Proc. § 425.16(e)(4)).
27 The court rejected that argument, however, because the statutory definition of a SLAPP as a suit
28 “arising from” protected speech or petitioning means that the “defendant’s act underlying the

1 plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or
2 free speech.” *Id.* at 354 (emphasis in original; quoting *Cotati*, 29 Cal. 4th at 78). “That a cause
3 of action arguably may have been triggered by protected activity does not entail that it is one
4 arising from such.” *Cotati*, 29 Cal. 4th at 78.

5 Where—as here and in *San Ramon*—the conduct at issue is not that of the *petitioner* but
6 the *petitioned*, the anti-SLAPP statute simply does not apply. *See San Ramon*, 125 Cal. App. 4th
7 at 353-54. “[T]here is nothing about the Board’s collective action in requiring the District to
8 make additional contributions . . . that implicates the rights of free speech or petition.” *Id.* at 353.
9 The “fact that a complaint alleges that a public entity’s action was taken as a result of a majority
10 vote of its constituent members does not mean that the litigation challenging that action arose
11 from protected activity, where the measure itself is not an exercise of free speech or petition.”
12 *Id.* at 354. On the contrary, “[a]cts of governance mandated by law, without more, are not
13 exercises of free speech or petition.” *Id.* (emphasis added). While the Board’s vote was
14 preceded by speech and petitioning activity, and the complaint referred to such activities, the
15 complaint was not a SLAPP, but an effort to remedy the Board’s adoption of an unfair
16 contribution rate in violation of its fiduciary duties—conduct that did “not constitute the exercise
17 of the Board’s right of speech or petition.” *Id.* at 355. The Board’s argument to the contrary
18 confused “allegedly *wrongful acts* with the *evidence* that [the] plaintiff will need to prove such
19 misconduct.” *Id.* (emphasis in original; quoting *Gallimore v. State Farm Fire & Cas. Ins. Co.*,
20 102 Cal. App. 4th 1388, 1399 (2002)); accord *Graffiti Protective Coatings, Inc. v. City of Pico*
21 *Rivera*, 181 Cal. App. 4th 1207, 1214-23 (2010) (collecting cases).

22 If the anti-SLAPP statute applied to acts of governance, it “would chill the resort to
23 legitimate judicial oversight over potential abuses of legislative and administrative power,” and
24 “would also ironically impose an undue burden upon the very right of petition for those seeking
25 mandamus review in a manner squarely contrary to the underlying legislative intent behind
26 section 425.16.” *San Ramon*, 125 Cal. App. 4th at 358.⁴ The same concern applies equally to
27

28 ⁴ The irony here is even more palpable: not only does MWD seek to stifle SDCWA’s own
petitioning activity, it does so in defense of clandestine meetings that are the antithesis of “public

1 mandamus petitions, *id.*, actions for declaratory relief challenging “the validity of governmental
2 conduct,” *Graffiti*, 181 Cal. App. 4th at 1225, and other “[a]ctions to enforce, interpret or
3 invalidate governmental laws.” *USA Waste of Cal., Inc. v. City of Irwindale*, 184 Cal. App. 4th
4 53, 65 (2010). Regardless of the form of action used to challenge it, the “substance” of a
5 governmental decision is “not protected activity.” *Graffiti*, 181 Cal. App. 4th at 1224. The
6 unremarkable fact that public officials “deliberated” does not mean that the public entity itself
7 “exercised its right of petition or free speech,” and does not make any action challenging the
8 entity’s decision a SLAPP. *Id.* Further, a complaint is not a SLAPP merely because it alleges
9 speech or petitioning activity as evidence, or to “assist in telling the story,” where the plaintiff
10 does not “contend that any statement or writing by the [government agency] is actionable.” *Id.* at
11 1215, 1218.

12 Here, MWD does not and cannot point to any allegation in the FAC contending that any
13 statement or writing by MWD is actionable. *See* Mot. at 2-16. SDCWA alleges no such thing.
14 *See* FAC. In fact, MWD acknowledges that SDCWA does not allege that any **MWD** speech or
15 petitioning is actionable, asserting that, instead, “SDCWA has purported to sue MWD for the
16 alleged acts of others”—namely, the member agencies’ managers and staff who meet in secret to
17 formulate policies that benefit those agencies at SDCWA’s expense. Mot. at 8:22-26 (citing
18 FAC ¶ 100); *see also id.* at 2:24-3:5. Even if SDCWA had sued MWD for the conduct of
19 others—which it has not—SDCWA’s fiduciary-duty claim would not be a SLAPP because a
20 SLAPP, by definition, is a “cause of action **against a person** arising from any act **of that person**
21 in furtherance of **the person’s** right of petition or free speech.” Cal. Civ. Proc. Code §
22 425.16(b)(1) (emphases added). If, as MWD contends, SDCWA’s claim implicates speech or
23 petitioning by the “separate” member agencies, but not MWD’s own, *see* Mot. at 8:22-9:7, then
24 MWD has no standing to bring its anti-SLAPP motion. *See* Cal. Civ. Proc. Code § 425.16(b)(1);
25 *Graffiti*, 181 Cal. App. 4th at 1216 (“**defendant’s act** underlying the plaintiff’s cause of action

26
27 participation,” thus flouting the legislative intent behind both the anti-SLAPP statute and the
28 Brown Act, as well as the right of access to government information the California voters
recently enshrined in our Constitution. *See San Ramon*, 125 Cal. App. 4th at 358; Cal. Gov’t
Code § 54950; Cal. Const. art. I, § 3.

1 must *itself* have been an act in furtherance of the right of petition or free speech”) (emphases in
2 original); *San Ramon*, 125 Cal. App. 4th at 353, 356 (protected activities of individuals were
3 irrelevant where no individuals were sued).

4 In any event, SDCWA’s fiduciary-duty claim is not based on *anyone’s* speech or
5 petitioning activity—neither MWD’s, as it concedes, nor any member agency’s, nor that of any
6 of their managers or staff. While the communications of member agencies and their staff have
7 “evidentiary value in establishing that” MWD breached its fiduciary duties by adopting a rate
8 structure that systematically and unfairly disadvantages SDCWA, MWD’s “liability is not based
9 on the communications themselves.” *Graffiti*, 181 Cal. App. 4th at 1224. Rather, the basis of
10 SDCWA’s fiduciary-duty claim is that MWD has adopted rates and cost allocations that unfairly
11 disadvantage SDCWA and benefit the majority, which has “captured” MWD. See FAC ¶¶ 94-
12 107.⁵ As in *San Ramon*, MWD’s adoption of rates that violate its fiduciary duties “does not
13 constitute the exercise of [MWD’s] right of speech or petition.” *San Ramon*, 125 Cal. App. 4th
14 at 355.

15 MWD’s contrary position has no legal basis and is internally incoherent. Elsewhere in its
16 motion, MWD admits that SDCWA has not sued it for anyone else’s acts—of speech,
17 petitioning, or otherwise—but for its own “rate-setting and contracting practices,” which it
18 contends “are legislative activities.” Mot. at 11 n.4; see also *id.* at 14:9-15:21.⁶ By MWD’s own
19 admission, therefore, its breaches of fiduciary duty are “[a]cts of governance” and “not exercises

20
21 ⁵ SDCWA also alleges that MWD has breached its fiduciary duties by attempting to shield its
22 misconduct from judicial or political challenge, FAC ¶ 99, and by engaging in several other
23 practices that benefit the majority cabal. See *id.* ¶¶ 102-07. We need not discuss these
allegations here, however, because MWD does not contend that they involve protected
expressive activity. See Mot. at 2:24-10.

24 ⁶ SDCWA does not agree that MWD’s actions are entitled to the deference accorded to
25 legislative actions—or, indeed, any deference. MWD’s contention that it may properly
26 characterize water supply costs as “transportation” costs is “merely its litigating position in this
27 particular matter,” and thus not authoritative. *Culligan Water Conditioning v. State Bd. of*
28 *Equalization*, 17 Cal. 3d 86, 93 (1976); *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19
Cal. 4th 1, 8-9 (1998). Moreover, after the passage of Proposition 26, MWD bears the burden of
defending its rates. See Cal. Const. art. 13C, § 1. But the important point for present purposes is
that MWD admits that its actions forming the basis for SDCWA’s claim for breach of fiduciary
duty are acts of governance, which defeats its attempt to invoke the anti-SLAPP statute. See
Mot. at 11 n.4, 14:9-15:21; *San Ramon*, 125 Cal. App. 4th at 354.

1 of free speech or petition.” *San Ramon*, 125 Cal. App. 4th at 354; *see also Graffiti*, 181 Cal.
2 App. 4th at 1211-25; *USA Waste*, 184 Cal. App. 4th at 62-65. And even if MWD’s breaches
3 were not “acts of governance,” which they admittedly were, the anti-SLAPP statute does not
4 apply to claims that “allude to” petitioning activity” where, as here, “the gravamen of the claim
5 rests on the alleged violation of ... fiduciary obligations.” *Hylton v. Frank E. Rogozienski, Inc.*,
6 177 Cal. App. 4th 1264, 1274 (2009); *see also Baharian-Mehr v. Smith*, 189 Cal. App. 4th 265,
7 272 (2010); *Turner v. Vista Pointe Ridge Homeowners Ass’n*, 180 Cal. App. 4th 676, 685 (2009);
8 *PrediWave Corp. v. Simpson Thacher & Bartlett LLP*, 179 Cal. App. 4th 1204, 1226 (2009);
9 *Wang v. Wal-Mart Real Estate Bus. Trust*, 153 Cal. App. 4th 790, 810 (2007).⁷

10 SDCWA’s claim for breach of fiduciary duty, therefore, is not a SLAPP, the anti-SLAPP
11 statute does not apply, and MWD’s anti-SLAPP motion must fail.

12 **2. Even if the anti-SLAPP statute applied—which it does not—SDCWA’s**
13 **fiduciary-duty claim has more than the “minimal merit” required.**

14 Because MWD has not carried, and cannot carry, its burden of showing that SDCWA’s
15 fiduciary-duty claim arises from MWD’s protected activity, the Court need not and should not
16 consider the remainder of MWD’s anti-SLAPP arguments as such.⁸ *See, e.g., Hylton*, 177 Cal.
17 App. 4th at 1271 (“If the defendant does not demonstrate this initial prong, the court should deny
18 the anti-SLAPP motion and need not address the second step.”). In any event, SDCWA’s
19 fiduciary-duty claim has more than “minimal merit,” which is all the law requires. *Soukup*, 39
20 Cal. 4th at 291.

21
22 _____
23 ⁷ MWD’s references to Civil Code § 47(b) and the *Noerr-Pennington* doctrine are likewise
24 irrelevant because those doctrines apply only where the plaintiff seeks to hold the defendant
25 liable for its speech or petitioning, as MWD concedes, and SDCWA’s claim is not based on
MWD’s (or anyone else’s) speech or petitioning. *See Mot.* at 7:12-27, 15:24-16:9; *see also*
Robles v. Chalilpoyil, 181 Cal. App. 4th 566, 582 (2010) (“We need not reach [the litigation
privilege], however, as appellant failed to meet his initial burden in the SLAPP analysis.”).

26 ⁸ MWD demurs on the same basis, but the anti-SLAPP burden-shifting does not apply in the
27 context of a demurrer, which “admits the truth of all material factual allegations in the
28 complaint” and cannot raise “the question of plaintiff’s ability to prove these allegations, or the
possible difficulty in making such proof.” *Ochoa v. Superior Court*, 39 Cal. 3d 159, 163 (1985)
(citation and quotation marks omitted). Because MWD’s anti-SLAPP argument fails on the
merits, as shown below, its demurrer necessarily fails as well. *See* Section II.B.1, *infra*.

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

a. MWD owes SDCWA fiduciary duties.

“The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages.” *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 820 (2011). MWD does not dispute that SDCWA alleged the second and third of these elements; nor does MWD contend that SDCWA’s claim has less than “minimal merit” with respect to those elements. Instead, MWD focuses on the first element, relying primarily on *Oakland Raiders v. National Football League*, 131 Cal. App. 4th 621 (2005), for its contention that it owes no fiduciary duties to SDCWA and the millions of people SDCWA serves. *See* Mot. at 11:3-12:11. That reliance is misplaced. In fact, *Oakland Raiders* demonstrates that MWD’s argument must fail.

In *Oakland Raiders*, the court found—based on “a significant amount of evidence”⁹—that the defendant did not owe fiduciary duties to its members because it was not a corporation and did not perform “public-service functions.” *Oakland Raiders*, 131 Cal. App. 4th at 634-36 (distinguishing *Jones v. H. F. Ahmanson & Co.*, 1 Cal. 3d 93 (1969), and *Cohen*). Here, however, the opposite is true. MWD is a corporation formed for “public-service functions.” *See* Cal. Water Code § 109-46; *MWD v. Riverside Cnty.*, 21 Cal. 2d 640, 642-43 (1943); *MWD v. Superior Court*, 2 Cal. 2d 4, 8 (1934); *Morrison v. Smith Bros.*, 211 Cal. 36, 43-45 (1930); Mot. at 6 n.3.

As a corporation, MWD has a duty not to favor the majority to the detriment of the minority. *See, e.g., Jones*, 1 Cal. 3d at 110-11; *Fisher v. Pa. Life Co.*, 69 Cal. App. 3d 506, 512-13 & n.3 (1977); *Smith v. Tele-Comm’n, Inc.*, 134 Cal. App. 3d 338, 342-44 (1982). The fact that MWD is a municipal or quasi-municipal corporation, *see MWD*, 21 Cal. 2d at 642-43, does not mean that it owes any less of a fiduciary duty to the minority than a private corporation would, and certainly does not mean that MWD has no such duty at all. While MWD cites inapposite cases concerning separation of powers as purported support for the absence of

⁹ 131 Cal. App. 4th at 634 n.10. Notably, the defendant’s argument that it had no fiduciary duty failed on demurrer. The trial court only ruled on the issue of duty after the defendants produced evidence on summary judgment proving the absence of any duty beyond dispute. *See id.*

1 fiduciary duties, Mot. at 14:9-15:21, even in that context, agencies are subject to judicial review
2 where their “judgment or discretion is being fraudulently or corruptly exercised.” *Nickerson v.*
3 *San Bernardino County*, 179 Cal. 518, 522-523 (1918). And, in any event, none of MWD’s
4 cases holds that public corporations and other governmental entities do not owe fiduciary duties.
5 On the contrary, public corporations “must be held to a high standard of responsibility,”
6 including “fiduciary duties and the requirements of due process, equal protection, and fair
7 dealing.” *Cohen*, 142 Cal. App. 3d at 651 (citation and quotation marks omitted); *see also, e.g.,*
8 *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1171 (1996) (fiduciary duty “is
9 generally applicable to private agents and trustees, but to public officers it applies with greater
10 force, and sound policy requires that there be no relaxation of its stringency in any case that
11 comes within its reason.”) (citation and quotation marks omitted); *Los Angeles County v.*
12 *Superior Court*, 17 Cal. 2d 707, 716-17 (1941) (“The relationship existing between the county
13 and city is an implied or constructive trust, an involuntary trust arising by operation of law...”
14 [and] “the county becomes the bailee or trustee of tax funds of other entities deposited in its
15 treasury.”) (quoting *City of Fullerton v. Orange County*, 140 Cal. App. 464, 472 (1934)); *accord*
16 *Pomona City Sch. Dist. v. Payne*, 9 Cal. App. 2d 510, 514 (1935).

17 California courts have expressly held that quasi-governmental entities like MWD owe
18 fiduciary duties to their members. *See Cohen*, 142 Cal. App. 3d at 651-53. In *Cohen*, property
19 owners sued their community association, a nonprofit corporation, for breach of fiduciary duty.
20 The court held that the corporation owed fiduciary duties to its members because of its “quasi-
21 governmental” nature, which paralleled the “powers, duties, and responsibilities of a municipal
22 government.” *Id.* at 651. The court rejected the corporation’s argument “that its duty of good
23 faith extended only to its members as a group and not to its members individually.” *Id.* at 652.
24 The corporation, “like any government,” was required to “balance individual interests against the
25 general welfare,” and had “an obligation to reconcile in a fair and equitable way the interests of
26 the community with the interests of the individuals residing therein.” *Id.* at 652-653.

27 Here, as in *Cohen*, MWD is a “quasi-government entity.” *Cohen*, 142 Cal. App. 3d at
28 651. Indeed, MWD does not merely have duties and responsibilities “paralleling” those of a

1 “municipal government,” as the corporation in *Cohen* did—MWD *is* a municipal corporation.
2 *See id.*; *MWD*, 21 Cal. 2d at 642-43. Further, MWD has a self-declared monopoly over the
3 water-transportation services it provides. *See, e.g.*, MWD Admin. Code § 4202, *available at*
4 <http://www.mwdh2o.com/rsap/adminCode.pdf> (“Establishment of overlapping and paralleling
5 governmental authorities and water distribution facilities to service Southern California areas
6 would place a wasteful and unnecessary financial burden upon all of the people of California,
7 and particularly the residents of Southern California.”). Under the *Cohen* analysis, therefore,
8 MWD owes fiduciary duties to its members *a fortiori*. *See Cohen*, 142 Cal. App. 3d at 651.

9 Nevertheless, without citing a single pertinent authority, MWD argues that it cannot owe
10 SDCWA a fiduciary duty because “action by majority vote [is] inconsistent with the existence of
11 a fiduciary duty to ... the minority.” Mot. at 13:2-3; *see also id.* at 16:10-11. But nothing in the
12 MWD Act or any other provision of the law “automatically validates such transactions simply
13 because there has been a disclosure and approval by the majority of the stockholders.” *Remillard*
14 *Brick Co. v. Remillard-Dandini Co.*, 109 Cal. App. 2d 405, 418 (1952). “It would be a shocking
15 concept of corporate morality”—let alone government morality—“to hold that because the
16 majority directors or stockholders disclose their purpose and interest, they may strip a
17 corporation of its assets to their own financial advantage, and that the minority is without legal
18 redress.” *Id.* at 418-19. Corporations normally operate by majority vote. *See, e.g.*, Cal. Corp.
19 Code § 602. If majority vote were somehow “inconsistent” with the existence of fiduciary
20 duties, as MWD argues, that would nullify “the trust relation occupied by the corporation
21 towards its stockholders.” *Jones*, 1 Cal. 3d at 111. “That is not and cannot be the law.”
22 *Remillard*, 109 Cal. App. 2d at 418.¹⁰

23
24 ¹⁰ The only cases MWD cites in this section of its brief are *Oakland Raiders, In re Valley Health*
25 *Sys.*, 429 B.R. 692 (Bankr. C.D. Cal. 2010), and *I. E. Assocs. v. Safeco Title Ins. Co.*, 39 Cal. 3d
26 281 (1985). *Oakland Raiders* is inapposite as already discussed. *Valley Health*, a federal
27 bankruptcy case, is not authoritative here, does not suggest that the existence of majority vote is
28 “inconsistent” with fiduciary duties, and (like *Oakland Raiders*) distinguishes itself because the
entity at issue (unlike MWD) was not a corporation. *See* 429 B.R. at 715; *People v. Hill*, 142
Cal. App. 4th 770, 774 (2006) (federal case not authority on state law). *I. E. Assocs.* declined to
impose additional common law duties for notice of default in foreclosure proceedings, where the
statute covered the subject in detail, showing the legislature’s intent to “occupy the field.” 39
Cal. 3d at 285-86. Nothing in that case or the MWD Act, however, supports MWD’s “shocking”

1 MWD also misstates SDCWA's position and the law in arguing that "[f]ailing to find the
2 required statutory mandatory duty, SDCWA attempts to base its claim solely on an ethics guide
3 prepared by the MWD Ethics Office."

4 *First*, this supposed "requirement" of a mandatory duty is cut from whole cloth. MWD's
5 only purported support for such a requirement is Government Code section 815.6, but as
6 discussed further below, that section merely "declares the familiar rule, applicable to both public
7 entities and private persons, that failure to comply with applicable statutory or regulatory
8 standards is negligence unless reasonable diligence has been exercised in an effort to comply
9 with those standards." Cal. Gov't Code § 815.6 Law Revision Comm'n Cmt; *see also* II.A.2.c,
10 *infra*. Section 815.6 has no bearing on this case. Contrary to MWD's suggestion, there is no
11 rule that public entities only have fiduciary duties expressly imposed by statute; the law is
12 otherwise. *See, e.g., Cohen*, 142 Cal. App. 3d at 652-53; *Los Angeles*, 17 Cal. 2d at 716-17;
13 *Pomona*, 9 Cal. App. 2d at 514.

14 *Second*, SDCWA does not base its claim "solely" on the ethics guide, although that
15 legislatively-mandated guide certainly supports the existence of the fiduciary duty. *See* Cal.
16 Water Code § 109-126.7. As the quotation MWD provides makes clear, MWD recognizes that
17 its directors have a responsibility "to the full constituency of the MWD service area." Mot. at
18 13:16-17 (quoting Ethics Guide at 11). MWD argues that its ethics guide "*militates against* any
19 fiduciary duty by MWD (or any Board member)" because it states that directors must "carefully
20 balanc[e] the needs of their local citizens with the needs of MWD as a whole." *Id.* at 13:19-20,
21 14:3 (MWD's emphasis). But the legislature did not take the extraordinary step of mandating
22 that MWD adopt rules of ethics to "militate against" MWD's fiduciary duties; it did so to in an
23 effort to reinforce those duties after MWD previously failed to uphold them, as it has again here.
24 *See* Cal. Water Code § 109-126.7; California Bill Analysis, Senate Committee, 1999-2000
25 Regular Session, S.B. 60 Sen., Apr. 7, 1999 (California legislature mandated MWD's ethics

26
27 suggestion that the mere existence of majority vote eradicates the fiduciary duties owed by
28 corporations in general, and public corporations in particular. *See id.*; *Remillard*, 109 Cal. App.
2d at 418; *Cohen*, 142 Cal. App. 3d at 651-53.

1 guide in response to MWD’s financing of campaign against SDCWA’s transfer of water from
2 IID, and MWD’s “hiring a public relations firm to do opposition research on public officials,”
3 including then-Governor Wilson. “SB 60 enacts a reform package that makes MWD less likely
4 to engage in similar activities again. By helping to keep the MWD in check, SB 60 makes the
5 giant water district more accountable to the 16 million people who use MWD water.”).
6 Furthermore, as the court held in *Cohen*, public corporations, “like any government,” are
7 required to “balance individual interests against the general welfare,” but this in no way
8 diminishes their fiduciary duties. *Cohen*, 142 Cal. App. 3d at 652-653; *see also Los Angeles*, 17
9 Cal. 2d at 717; *Pomona*, 9 Cal. App. 2d at 514.

10 Indeed, if, as MWD contends, it somehow lacked the fiduciary duties that corporations,
11 governments, and quasi-governmental entities all owe to their minority members, the result
12 would be that MWD is “invalidly constituted” and its decisions are “a nullity because reached in
13 violation of due process.” *Am. Motors Sales Corp. v. New Motor Vehicle Bd.*, 69 Cal. App. 3d
14 983, 993 (1977). *American Motors* concerned a public administrative board consisting of nine
15 members, four of whom had to be car dealers. While that composition was not a problem when
16 the board only heard car dealers’ appeals of DMV decisions, it became a problem when the
17 board began hearing disputes between car dealers and manufacturers. *See id.* at 986-87, 991.
18 “No longer did members of a trade or occupation (dealer-Board-members) regulate only their
19 own kind; they began to regulate the economic and contractual relations of others with their own
20 kind.” *Id.* at 991. This change in circumstances rendered the board invalid, and its decisions
21 unconstitutional. *Id.* at 993.

22 Likewise, MWD originally consisted of similarly-situated members, all of whom paid
23 MWD to deliver imported water. That began to change when SDCWA diversified its water
24 sources in response to MWD’s nearly catastrophic inability (and refusal) to satisfy SDCWA’s
25 water needs in the late 1980s and early 1990s. FAC ¶ 24. Now, SDCWA—alone among
26 MWD’s member agencies—buys water from IID, which MWD then transports to SDCWA
27 facilities. *Id.* As in *American Motors*, MWD now regulates two classes of members: those who
28 do not pay for water transportation separately from supply, and SDCWA, which does. The

1 interests of these two groups diverge, because when MWD denominates costs properly allocated
2 to water supply as “transportation” costs, only SDCWA pays the inflated “transportation” costs,
3 and the other members receive a windfall in the form of subsidized supply costs. If, as MWD
4 contends, it has no fiduciary duty to SDCWA and may, instead, take actions that benefit the
5 majority to the detriment of the minority with impunity, that simply proves the invalidity of
6 MWD’s decision-making process as a general matter. *See Am. Motors*, 69 Cal. App. 3d at 993.
7 As in *American Motors*, the unfairness inherent in MWD’s structure would render its decisions
8 unconstitutional and invalid as a matter of law. *See id.* To avoid that result, MWD, like the
9 corporation in *Cohen*, must answer for its conduct and prove, if it can, that it satisfied “the
10 requirements of fiduciary duties and the requirements of due process, equal protection, and fair
11 dealing.” *Cohen*, 142 Cal. App. 3d at 651 (citation and quotation marks omitted); *see also, e.g.,*
12 *Roussey v. City of Burlingame*, 100 Cal. App. 2d 321, 324 (1950) (“If appropriate standards
13 cannot be implied, the ordinance must fall as an abortive attempt to confer arbitrary, unlimited
14 power upon the council.”).

15 **b. MWD is liable for its *own* breaches of fiduciary duty.**

16 MWD also argues that SDCWA’s claim for breach of fiduciary duty is an improper
17 attempt to hold MWD liable for the acts of third parties. *See Mot.* at 8:20-9:7. But MWD
18 concedes elsewhere in its brief that SDCWA has sued MWD for its own breaches of fiduciary
19 duty, not for the acts of others: “all of the complained-of acts concern MWD’s rate-setting and
20 contracting practices, FAC ¶¶ 98-106, i.e., they are acts ‘of the public entity [MWD].’” *Mot.* at
21 11 n.4.¹¹

22 Moreover, the court in *Cohen* rejected MWD’s argument that it is not subject to suit
23 because its breaches of fiduciary duty were instigated by the majority member agencies. *See*
24 *Cohen*, 142 Cal. App. 3d at 653 (“Nor is there merit in the argument that a homeowner aggrieved
25 by a decision of the Association with regard to a *neighbor’s* improvement should be limited to
26

27 ¹¹ MWD admits that all of the conduct at issue is its own in the context of arguing that it cannot
28 be vicariously liable for the actions of its board members because the board members were
acting for MWD. *See Mot.* at 11 n.4. This circular reasoning is irrelevant because MWD is
directly liable, as it effectively concedes. *See id.*

1 suit against that neighbor.”) (emphasis in original). As the *Cohen* court recognized, the plaintiff
2 properly sued the corporation, not just his neighbor, because if the corporation had not sided with
3 the neighbor in violation of the corporation’s fiduciary duties, “plaintiffs might never have been
4 forced to pursue a legal remedy in the first place.” *Id.* Indeed, in any “action to determine
5 whether the [corporation’s] ruling was arbitrary or sound, the [corporation] would obviously be a
6 proper, if not an indispensable, party.” *Id.*

7 Likewise, here, the fact that MWD has breached its fiduciary duties at the behest of the
8 majority cabal does not make MWD any less liable for its breaches. *See id.* On the contrary,
9 “when a number of stockholders combine to constitute themselves a majority in order to control
10 the corporation as they see fit, they become for all practical purposes the corporation itself, and
11 assume the trust relation occupied by the corporation towards its stockholders.” *Jones*, 1 Cal. 3d
12 at 110-11 (citation and quotation marks omitted). When the corporation, thus captured, breaches
13 its fiduciary duty to the minority, the corporation—not just its management or controlling
14 shareholders—is liable. *See, e.g., Cohen*, 142 Cal. App. 3d at 653; *Fisher*, 69 Cal. App. 3d at
15 510-13 & n.3 (corporation sued for breach of fiduciary duties); *Austin v. Turrentine*, 30 Cal.
16 App. 2d 750, 762 (1939) (“That a corporation is the agent and trustee of its stockholders in their
17 behalf and for their use and benefit, holding, controlling and managing the corporate property
18 and business is well settled.”); *Woodroof v. Howes*, 88 Cal. 184, 201 (1891) (“So far as the
19 corporation’s interests are concerned, it is itself a defendant.”).

20 **c. Government Code section 815 does not preclude SDCWA’s claim.**

21 MWD argues that SDCWA’s fiduciary-duty claim is barred by Government Code section
22 815, which provides for sovereign immunity except where such immunity has been waived by
23 statute. *See* Opp’n at 10-11. But, as MWD acknowledged in its opposition to SDCWA’s motion
24 for leave to amend—but ignores this time around—the sovereign immunity codified in section
25 815 does not apply to claims for relief other than money or damages. *See* Cal. Gov’t Code §
26 814; Oct. 11 Opp’n at 11:9-12. Government Code section 814 provides that “[n]othing in this
27 part”—including section 815—“affects liability based on contract or the right to obtain relief
28 other than money or damages against a public entity or public employee.” Cal. Gov’t Code §

1 814; *see also City of Dinuba v. County of Tulare*, 41 Cal. 4th 859, 867 (2007) (“[T]he immunity
2 provisions of the Act are only concerned with shielding public entities from having to pay money
3 damages for torts.”). SDCWA does not seek money or damages in connection with its claim for
4 breach of fiduciary duty. *See* FAC, Prayer for Relief ¶ 5. SDCWA asks only for declaratory
5 relief, *id.*, which is an appropriate remedy for breach of fiduciary duty. *See, e.g., Cohen*, 142
6 Cal. App. 3d at 655; *Austin*, 30 Cal. App. 2d at 752. Because SDCWA seeks only to compel
7 MWD to comply with its duties, and does not ask for damages, section 815 does not apply. *See*
8 Cal. Gov’t Code § 814; *Dinuba*, 41 Cal. 4th at 867 (government not immune where plaintiffs “do
9 not seek damages; they seek only to compel defendants to perform their express statutory duty.
10 While compliance with the duty may result in the payment of money, that is distinct from
11 seeking damages.”); *Canova v. Trustees of Imperial Irr. Dist. Employee Pension Plan*, 150 Cal.
12 App. 4th 1487, 1498 (2007) (government not immune from claim seeking declaration that
13 defendant violated its “ministerial duty”). Further, MWD has admitted in this litigation that
14 section 160 of the MWD Act is “a waiver of sovereign immunity.” MWD’s Oct. 11, 2011 Opp’n
15 to Mot. for Leave to Amend at 15:13-19 (citing Cal. Water Code § 109-160).

16 MWD attacks a straw man in its discussion of Government Code section 815.6 and its
17 reference to mandatory duties expressly imposed by “enactment.” *See* Mot. at 10:1-28.
18 SDCWA does not rely on section 815.6, which merely codifies the “familiar rule, applicable to
19 both public entities and private persons” that the unreasonable failure to comply with statutory
20 standards is negligence. Cal. Gov’t Code § 815.6 Law Revision Comm’n Cmt. SDCWA has not
21 sued MWD for negligence, so section 815.6 is irrelevant, as is MWD’s discussion of whether
22 sections 126.7 and 50 of the MWD Act constitute “enactments” that impose mandatory duties.
23 *See* Mot. at 10:1-28. SDCWA does not need to rely on section 815.6 or any other exception to
24 section 815. As already demonstrated, section 815 does not apply in the first place because
25 SDCWA does not seek damages. *See* Cal. Gov’t Code § 814; *Dinuba*, 41 Cal. 4th at 867.¹²

26 _____
27 ¹² MWD’s reliance on *Fidge v. Lake County Bd. of Sup’rs*, C 10-03953 CRB, 2011 WL 1364187
28 (N.D. Cal. Apr. 11, 2011), is similarly misplaced. A federal district court decision is not binding
here, especially on a question of California law; and, in any event, the *Fidge* district court never
considered section 814, presumably because the plaintiff there, unlike SDCWA, sought damages.

1 FAC ¶¶ 3; Ex. B. During the 2010 rate-making process, SDCWA retained independent rate-
2 making experts Bartle Wells Associates, which concluded that MWD’s allocation decisions fly
3 in the face of both industry standards and common sense. *See* Ex. B at 2. Indeed, a 1995 cost-
4 of-service study approach prepared *for MWD* broke out MWD’s service costs into supply,
5 transmission, distribution, treatment, and so on, yet categorized the “costs of purchasing water
6 from wholesale water suppliers”—such as SWP—as a purely “Supply Function.” Ex. C at 3-3.

7 MWD’s rates are the product of a “captured” agency and board of directors. MWD’s
8 rigid, no-holds-barred defense of its facially erroneous rate structure defies any other
9 explanation. MWD ought to have no dog in this fight: as MWD’s Controller and former Interim
10 Chief Financial Officer Thomas DeBacker candidly admitted in a hearing before an MWD Board
11 Committee earlier this year, MWD is financially “indifferent” to the outcome of this litigation
12 because any change in the allocation of costs to “supply” versus “transportation” will simply re-
13 allocate costs among the member agencies. Ex. D. Specifically, he testified:

14 Well, you know, the way we look at the San Diego is – is ***if we’re not going to***
15 ***get it from San Diego, we’re gonna get it from the other member agencies.*** It’ll
16 – you know, we’ll have to figure out how the – because of the Court order that
17 comes down – and it’s going to say you’ve got a new rate structure. Or not. So if
18 we don’t, we keep the money. ***And if we do lose, then it just becomes a***
reallocation of those revenues amongst customers. So at the end the day,
Metropolitan is indifferent to the – to that particular slice of the bar. Because
19 we believe that we will be getting those revenues.

19 *Id.* (emphases added).

20 Why then has MWD gone to such lengths to treat its SWP supply, and its conservation
21 and local water supply development subsidies doled out to member agencies, as “transportation”
22 costs? The answer lies in the narrow financial interests of the large MWD member agencies
23 other than SDCWA, which have co-opted MWD and its Board. In a June 1, 2010 letter to
24 MWD’s General Manager, nineteen majority member agencies explained the advantages of the
25 current rate structure in naked financial terms. Ex. E. They noted that the current rate structure
26 negatively impacts SDCWA to the tune of \$26 million per year, and that correcting it would
27 cause SDCWA’s contribution to decrease by that amount and their own contributions to increase.

28 *Id.* MWD’s present rate structure serves one purpose only: to enrich the majority member

1 agencies at SDCWA's expense. Devising a rate structure that, in contravention of industry
2 standards, punishes a single minority interest holder cannot be consistent with MWD's fiduciary
3 duties. *See Remillard*, 109 Cal. App. 2d at 418-19.

4 SDCWA's use of the term "cabal" to refer to this coalition of majority member agencies
5 is not hyperbole. Despite the statutory requirement that MWD decisions must be made only by
6 the MWD Board (*see* Cal. Water Code § 109-50), a majority group of member agencies,
7 pointedly excluding SDCWA, meets in private to establish an agreed position on votes coming
8 up before the MWD Board. MWD does not deny these meetings take place; on the contrary,
9 MWD has acknowledged they occur and claims there is "nothing improper" about it. Mot. at
10 15:25. The impropriety, however, is evident from the fact that this "work group" has combined
11 "to constitute themselves a majority in order to control the corporation as they see fit." *Jones*, 1
12 Cal. 3d at 110-11. And instead of "assum[ing] the trust relation occupied by the corporation
13 towards its stockholders," *id.* at 111, the captured MWD has violated that trust and become a
14 mechanism for self-dealing.¹⁴

15 The cabal's "Member Agency Workgroup" raises money from its members,¹⁵ hires its
16 own consultants, reviews MWD rate increases (in particular, impacts on their own agencies), and
17 asks MWD management for *private* workshops on topics such as MWD's costs associated with
18 the SWP, workshops from which SDCWA and the general public are excluded. *See* Exs. F-H.
19 The Workgroup's meetings take place at MWD's Headquarters, and have been attended by
20 MWD staff. *See* Exs. G-H. The output of these meetings includes a series of letters to MWD

21 ¹⁴ The spoils of MWD's capture by the member agencies include rich conservation and local
22 water supply development subsidies for Western Municipal Water District and West Basin
23 Municipal Water District ("West Basin") that far outstrip their contributions through the Water
24 Stewardship Rate; the sale of discounted water to the Municipal Water District of Orange County
25 ("MWDOC"), a subsidy in everything but name; and a \$40 million annual giveaway to the City
26 of Los Angeles through MWD's failure to charge Los Angeles for the true costs associated with
27 its practice of "rolling on" to MWD in dry years but rolling off the MWD system in wet years
28 when its alternative water supplies are plentiful—without paying MWD the substantial costs
associated with having "on call" hundreds of thousands of acre feet of water supply and related
infrastructure. *See* FAC ¶¶ 102-105.

¹⁵ According to an agenda item from a West Basin meeting, the working group's "administering
agency"—MWDOC—has requested contributions from those agencies that participate
consistently. West Basin and other municipal water districts have been asked to contribute
\$7,000. Ex. L.

1 management or the MWD Board, signed by most of the member agencies (but never SDCWA,
2 which is excluded) “urg[ing] Metropolitan” to take particular actions or inaction on MWD’s rate
3 structure, MWD’s Integrated Resources Plan, the Bay Delta Conservation Plan, and the other
4 vital issues before the MWD Board. *See* Exs. E, I-K.

5 Although SDCWA has not yet had the opportunity to take discovery, the information
6 SDCWA has obtained thus far indicates that MWD and its Board have improperly delegated the
7 core functions of the Board—which should be to evaluate and decide policy—to a subset of
8 favored member agencies, resulting in skewed and biased outcomes that favor the majority
9 member agencies at the expense of SDCWA, the full MWD constituency, and sound public
10 policy. For example, the MWD Board recently approved a Long-Term Conservation Plan
11 (LTCP) for the MWD service area. Ex. M at 10-12. The LTCP includes sweeping provisions
12 that will allow MWD management broad discretion to parcel out more subsidies for conservation
13 programs to favored member agencies. Ex. N at 38-45. The Board’s deliberation of this
14 important policy measure consisted only of a 10-minute presentation to the Water Planning and
15 Stewardship Committee, and less than 5 minutes of debate by the Board. Director Timothy F.
16 Brick, who represents the City of Pasadena and is the former chairman of the MWD Board,
17 summarized the extraordinary failure of process this represented:

18 We had a ten-minute presentation at the committee on what is really a cornerstone
19 of all of our planning, and there’s all sorts of unanswered questions that really
20 need Board direction. . . . Now we know that the member agency managers had
21 eleven workshops to discuss this and we’ve had . . . none, no workshops and no
22 review of this policy . . . This is not, we don’t call ourselves the Board of
23 Followers. We’re not supposed to just rubber-stamp policies that come before us
24 that we aren’t really familiar with. We’re supposed to be the Board of Directors.
25 We’re supposed to be shaping the policies and programs, and to approve policies
26 like this without that kind of discussion and without that kind of awareness of
27 what we’re doing, really, is abdicating our responsibility.

24 Ex. V. Notably, the Member Agency Workgroup held a meeting on February 26, 2011
25 specifically to address the Long-Term Conservation Plan—once again, without including
26 SDCWA. Ex. G, at 3.

27 MWD has further breached its fiduciary duties by punishing SDCWA for filing this
28 lawsuit. Along with every other MWD member agency, SDCWA has applied for—and

1 received—MWD subsidies to promote conservation programs and local water supply
2 development projects. FAC ¶¶ 5, 34-35, 91. The stated purpose of these subsidies is to improve
3 water conservation and make Southern California less dependent on imported water. *See* Ex. O at
4 1. But when SDCWA filed this lawsuit, MWD retaliated by invoking its so-called “Rate
5 Structure Integrity” provision (“RSI Clause”) in the subsidy agreements, canceling more than \$3
6 million in conservation and local supply subsidies to SDCWA, and informing SDCWA that it
7 would no longer be eligible to receive conservation and local supply subsidies. Ex. P. Thus,
8 even though SDCWA contributes more to the fund that supports these subsidies than any other
9 member agency—over \$16 million annually—it is now forbidden by MWD from even
10 participating in these programs.

11 MWD’s invocation of its RSI Clause is a purely punitive measure, a fact MWD has never
12 denied. The RSI Clause was originally devised to deter SDCWA from suing to enforce its right
13 to pay only for the services it receives, and it is now being used to punish SDCWA for filing suit.
14 *Id.* at 1-3. Indeed, in 2004, when MWD’s then-CEO Ronald Gastelum proposed adding the RSI
15 Clause to all MWD member agency contracts, he made clear that a motivating factor was the
16 approaching end of a five-year standstill between SDCWA and MWD in 2008 and the likelihood
17 that SDCWA would then challenge MWD’s indefensible rate structure. Ex. Q at 3-4. MWD’s
18 retaliation against SDCWA is an abuse of power. It is completely inappropriate for a public
19 agency to behave in such a fashion. Stripping public benefits away from a minority member’s
20 citizenry, in retaliation for that agency’s exercise of its constitutional right to petition the courts,
21 is not just inconsistent with MWD’s fiduciary duties to SDCWA and the millions of San Diegans
22 it serves, it is the antithesis of those duties.

23 In sum, this case is not a SLAPP. SDCWA’s fiduciary-duty claim does not arise from
24 MWD’s (or anyone else’s) speech or petitioning but from MWD’s victimization of SDCWA to
25 benefit a self-interested majority that has captured this public corporation. MWD’s anti-SLAPP
26 motion fails at both steps of the analysis and should be denied.

27
28

1 **3. SDCWA is entitled to its fees because MWD’s anti-SLAPP motion is**
2 **frivolous.**

3 MWD’s anti-SLAPP argument is not just meritless, it is frivolous. SDCWA, therefore, is
4 entitled to its attorneys’ fees. *See* Cal. Code Civ. Proc. § 425.16(c)(1) (“If the court finds that a
5 special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court
6 shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion, pursuant
7 to Section 128.5.”); Cal. Code Civ. Proc. § 128.5; *Gerbosi v. Gaims, Weil, W. & Epstein, LLP*,
8 193 Cal. App. 4th 435, 450 (2011) (upholding fee award for plaintiff because “motion would
9 have had merit only if predicated on a showing that [plaintiff] sued [defendant] for exercising its
10 constitutional rights, which he did not”). MWD cannot claim it was unaware of *San Ramon*,
11 which clearly applies here to defeat MWD’s argument. *See* Section II.A.1, *supra*. *San Ramon*
12 was discussed prominently in *Holbrook*, on which MWD mistakenly relies. *See Holbrook*. 144
13 Cal. App. 4th at 1248-49. Even the form of MWD’s reliance on *Holbrook*—with a “*Cf.*”—
14 signals MWD’s recognition that *Holbrook* does not apply, but *San Ramon* does. *See* Mot. at
15 3:15-19.¹⁶ Thus, the Court should award SDCWA its fees incurred in responding to MWD’s
16 frivolous anti-SLAPP motion. *See* Cal. Code Civ. Proc. § 425.16(c)(1).

17 **B. MWD’s demurrer has no merit and should be overruled.**

18 **1. The Court should overrule MWD’s demurrer to SDCWA’s cause of action**
19 **for breach of fiduciary duty.**

20 MWD’s demurrer with respect to SDCWA’s cause of action for breach of fiduciary duty
21 is an afterthought to its anti-SLAPP motion, and just as ill-considered. As discussed above, the
22 only element of the claim that MWD attacks is the existence of a fiduciary duty, and MWD’s
23 efforts to evade its duties have no merit. *See* Section A.2.a, *supra*. Because MWD’s attempt to
24 avoid the fiduciary-duty claim fail as anti-SLAPP arguments, as shown above, they certainly fail
25 under the more exacting demurrer standards. *See, e.g., Ochoa*, 39 Cal. 3d at 163.

26 _____
27 ¹⁶ In *Holbrook*, the plaintiffs sought to force the City Council to end its meetings by 11:00 p.m.;
28 unlike in *San Ramon*, their claims arose directly from protected speech activity, not from an act
of governance. 144 Cal. App. 4th at 1248-49. As shown above—and as MWD apparently
recognizes (*see* Mot. at 3:15, 11 n.4)—the opposite is true here.

1 2. **The Court should overrule MWD’s demurrer to SDCWA’s causes of action**
2 **for breach of contract and breach of the implied covenant of good faith and**
3 **fair dealing.**

4 a. **The Transportation Agreement’s dispute-resolution provision**
5 **“exclusively governs” and supersedes the statutory claim-presentation**
6 **procedures.**

7 MWD’s principal argument with respect to SDCWA’s contract and implied-covenant
8 claims is that they are barred by statutory claim-presentation requirements. But, just as it did in
9 opposing SDCWA’s motion for leave to amend to state these claims, MWD ignores section 9309
10 of its own Administrative Code, which provides that, if an agreement to which MWD is party
11 includes a provision governing the presentation and consideration of claims, that provision
12 “*exclusively governs the claims to which it relates.*” MWD Admin. Code (RJN Ex. 3) § 9309
13 (emphasis added); *see also* Cal. Gov’t Code §§ 930.2, 930.4 (same).

14 Here, sections 5.2 and 11.1 of the Transportation Agreement expressly govern the
15 presentation and consideration of claims arising out of that agreement. *See* FAC Ex. A §§ 5.2 &
16 11.1. Section 5.2 suspends disputes between the parties regarding MWD’s rates, including its
17 wheeling rate, for five years—*i.e.*, until January 1, 2008. *See id.* § 5.2. Section 11.1 provides
18 that, after the five-year moratorium, SDCWA must first present any such claims to MWD in a
19 reasonable effort to resolve the claim through negotiation. *See id.* § 11.1.

20 Section 11.1 serves the same purpose as the statutory claims procedure: to give MWD the
21 opportunity to investigate claims “and to settle them, if appropriate, without the expense of
22 litigation.” *Phillips v. Desert Hosp. Dist.*, 49 Cal. 3d 699, 705 (1989). As a matter of law,
23 therefore, Section 11.1 “exclusively governs” claims “arising out of or related to the agreement.”
24 MWD Admin. Code § 9309; Cal. Gov’t Code §§ 930.2, 930.4. Thus, the statutory claim-
25 presentation requirements do not apply. *See id.*

26 As the court observed in *Arntz Builders v. City of Berkeley*, 166 Cal. App. 4th 276
27 (2008), the legislature provided that a contractual dispute-resolution provision “exclusively
28 governs” in order to permit “a desirable flexibility in contract situations,” which “may require
 greater *or lesser* notice,” depending on the context. *Id.* at 286 (emphasis added, citation and
 quotation marks omitted). The *Arntz* court rejected the defendant’s contention that the statutory

1 claims procedures still apply “absent an express waiver by the local entity.” *Id.* at 291. On the
2 contrary, “if a local entity contract includes a claims procedure, that procedure exclusively
3 governs the claims to which it applies ***unless the contract expressly requires the presentation of***
4 ***a statutory claim as well.***” *Id.* at 292 (emphasis added).

5 MWD does not dispute that SDCWA complied with Section 11.1, as SDCWA alleged in
6 the proposed First Amended Complaint. *See* FAC ¶ 39. In fact, ***MWD repeatedly has admitted***
7 ***that SDCWA complied with that and every other administrative requirement.*** On May 3, 2010,
8 less than one month after MWD approved the 2011-12 rates, SDCWA sent MWD a letter
9 presenting its claim that those rates violate Section 5.2 of the Transportation Agreement because
10 MWD “has not set its charges pursuant to applicable law.” Ex. R. SDCWA stated that it was
11 unaware of any further administrative requirements for contesting MWD’s rates, and requested
12 that MWD advise SDCWA “immediately” of any contrary understanding. *Id.* MWD did the
13 exact opposite. In a May 27, 2010 email, its Assistant General Counsel conceded that:

14 SDCWA’s participation in the four-month process that led to adoption of water
15 rates on April 13, 2010, which included participation of SDCWA board members
16 in board and committee meetings, participation of staff in meetings for member
17 agency representatives, and submission of comments to the Business and Finance
18 Committee and the board, ***exhausted SDCWA’s administrative remedies with***
19 ***respect to the consideration and adoption of those rates.***

20 Ex. S (emphasis added). At SDCWA’s request, MWD followed up with a formal letter dated
21 July 7, 2010, again conceding that “***the Water Authority has taken the steps necessary to***
22 ***exhaust its administrative remedies with respect to Metropolitan’s adoption of its 2010-11***
23 ***rates and charges.***” Ex. A (emphasis added). MWD further acknowledged that the parties had
24 met on June 23, 2010 in an effort to negotiate their disputes, which “***satisfied the Water***
25 ***Authority’s obligation to attempt to resolve issues related to Metropolitan’s system access rate***
26 ***as required by Paragraphs 5.2 and 11.1 of the Exchange Agreement.***” *Id.* (emphasis added).

27 Further, on February 10, 2011, SDCWA put MWD on notice that SDCWA’s payments
28 under the Transportation Agreement were made under protest; demanded that MWD establish an
escrow account for those funds pursuant to Section 12.4(c) of that agreement; estimated the
amount in dispute as \$37,824,313 annually; and attached a spreadsheet detailing the basis for that

1 computation. Ex. T. On August 26, 2011, SDCWA put MWD on notice of its intent to seek
2 damages for MWD’s June 2011 enforcement of its RSI Clause. Ex. U. Because the parties’
3 disputes remained unresolved, SDCWA then sought to file its First Amended Complaint. *See*
4 Declaration of Daniel Purcell (filed Sept. 23, 2011) ¶ 6.

5 Thus, SDCWA complied with Section 11.1—and, in fact, did much more, as MWD
6 admits. Section 11.1 “exclusively governs,” superseding the statutory procedures on which
7 MWD’s claim-presentation argument depends. MWD’s argument, therefore, must fail.

8 **b. SDCWA satisfied the statutory claim-presentation procedures in any**
9 **case.**

10 Even if the statutory claim-presentation requirements applied—which they do not—
11 SDCWA satisfied them, and MWD waived any arguments to the contrary.

12 *First*, with respect to SDCWA’s claim that MWD’s rates breach the Transportation
13 Agreement, not only did SDCWA present that claim to MWD shortly after the rates were set,
14 MWD itself repeatedly conceded that “the Water Authority has taken the steps necessary to
15 exhaust its administrative remedies with respect to Metropolitan’s adoption of its 2010-11 rates
16 and charges.” Ex. A; *see also* Ex. S. Independently of that fatal admission, the law is clear that
17 any notice that discloses the existence of a claim that, if not paid or otherwise resolved, will
18 result in litigation, must be treated as a “claim as presented” within the meaning of section 9304
19 of MWD’s Administrative Code and the equivalent section 911 in the Government Code. *See*
20 *Phillips*, 49 Cal. 3d at 707-08. Section 9304, in turn, provides that “[a]ny defense based upon a
21 defect or omission in a claim as presented is waived by failure of the Board to mail notice of
22 insufficiency with respect to such defect or omission....” MWD Admin. Code § 9304; *see also*
23 Cal. Gov’t Code § 911.

24 It is beyond dispute that SDCWA’s May 3, 2010 letter disclosed the existence of
25 SDCWA’s claim that MWD’s rates violate Section 5.2 of the Transportation Agreement because
26 MWD “has not set its charges pursuant to applicable law.” Ex. R. The February 2011 letter
27 restated the factual basis for the claim and described the damages. Ex. T. Each of those letters,
28 therefore, was a “claim as presented.” *See Phillips*, 49 Cal. 3d at 707-08. Yet MWD did not

1 mail any notice that SDCWA’s claim was defective in any way. On the contrary, MWD
2 expressly conceded that SDCWA fully exhausted its administrative remedies. Exs. A and S.
3 Even if MWD now wants to disavow those admissions to assert that SDCWA’s claims as
4 presented in May 2010 and February 2011 did not comply with the provisions of its
5 Administrative Code, that assertion is waived by operation of the same Code. *See* MWD Admin.
6 Code § 9304.

7 ***Second***, with respect to SDCWA’s claim for breach of the implied covenant, MWD
8 admits in its Opposition that SDCWA’s August 26, 2011 letter was a “Government Code claim.”
9 Opp’n at 8. MWD does not argue that this claim failed to satisfy the requirements of that code—
10 and cannot, because any such argument is waived by MWD’s failure to raise it within 20 days of
11 the August 26 letter. *See* MWD Admin. Code §§ 9303-04. Instead, MWD cavils that the August
12 26 letter does not expressly refer to the implied covenant of good faith and fair dealing. Opp’n at
13 8. But the law did not require SDCWA to specifically enumerate every legal theory under which
14 it might seek redress for the basic wrong identified in the letter—MWD’s enforcement of its RSI
15 Clause. *See Stockett v. Ass’n of Cal. Water Agencies Joint Powers Ins. Auth.*, 34 Cal. 4th 441,
16 446-50 (2004). Even if the statutory claims procedures applied—which, as shown, they do not—
17 they were satisfied by the letter’s description of “the basic circumstances of that occurrence,” *id.*
18 at 446, which the letter accomplished by attaching MWD’s own correspondence regarding its
19 enforcement of the RSI Clause. *See* Ex. U. Because the proposed claim for breach of the
20 implied covenant is based on the same “fundamental facts,” SDCWA is “not precluded from
21 amending [its] complaint to include [this] theory.” *Stockett*, 34 Cal. 4th at 450.

22 **c. None of SDCWA’s contract claims are time-barred.**

23 MWD contends that SDCWA’s claim for breach of contract is time-barred, and that
24 SDCWA’s claim for breach of the implied covenant is partially time-barred. *See* Mot. at 18:10-
25 19:4, 20:6-21:14. But these arguments depend on MWD’s erroneous contentions that (a) the
26 statutory claim procedures apply to these causes of action, and (b) SDCWA did not satisfy those
27 claim procedures. *See id.* Both of those contentions are wrong, as shown above. *See* Sections
28 II.B.2.a-b, *supra*. MWD’s statute-of-limitations arguments, therefore, must fail.

1 d. SDCWA has stated a valid claim for breach of the implied covenant.

2 MWD also attempts to avoid SDCWA’s claim for breach of the implied covenant entirely
3 by arguing that that SDCWA has not alleged “that MWD breached or made impossible any
4 express term of the Exchange Agreement.” Mot. at 19:16-17. That misstates the nature of the
5 cause of action. A plaintiff need not allege breach of an “express term” to state a claim for
6 breach of the implied covenant; that conflates an *implied* covenant with an *express* contract. *See*
7 *Guz v. Bechtel Nat’l Inc.*, 24 Cal. 4th 317, 327 (2000). Nor must a plaintiff allege conduct that
8 actually rendered “performance of the contract impossible.” Mot. at 19:14-15 (quoting *Harm*
9 *v. Frasher*, 181 Cal. App. 2d 405, 417 (1960)). Such conduct certainly is sufficient, but is not
10 necessary for a breach of the implied covenant. *See Harm*, 181 Cal. App. 2d at 417. Rather,
11 such a claim is stated whenever the defendant did “*anything* which will deprive the other parties
12 thereto of the benefits of the contract.” *Harm*, 181 Cal. App. 2d at 417 (emphasis added).

13 Here, SDCWA more than adequately alleges that MWD’s conduct deprived SDCWA of
14 the benefit of one of its bargains in the Transportation Agreement. The parties agreed to a five-
15 year standstill period in which SDCWA would not sue MWD over the legality of MWD rates
16 that were applied to the transportation of IID and Canal Lining Water. They further agreed that,
17 at the conclusion of the five-year standstill period, SDCWA could sue to challenge MWD’s
18 rates. But MWD then enacted the RSI Clause, which imposes severe penalties on any MWD
19 member agency that challenges MWD rates in court or in the legislature, by allowing MWD to
20 unilaterally terminate conservation and local water-supply contracts and strip SDCWA of any
21 future benefits from MWD’s subsidy programs, while continuing to require SDCWA to fund
22 those very programs. *See* FAC ¶ 90-91. This deprives SDCWA of the benefit of its bargain with
23 respect to its ability to challenge MWD’s rates after the five-year moratorium. Indeed, *MWD*
24 *has admitted as much*, conceding that the express purpose of the RSI Clause was to prevent
25 SDCWA’s exercise of its negotiated option to challenge MWD’s rates at the conclusion of the
26 five-year period. FAC ¶ 92.

27 MWD’s imposition and enforcement of the RSI Clause in subsequent contracts had the
28 effect of depriving SDCWA of the bargained-for benefits of the Transportation Agreement. *Id.*

1 Nothing in the Transportation Agreement expressly allows MWD to condition conservation and
2 local water-supply contracts on SDCWA’s forfeiture of its constitutional rights—nor could it.
3 *See* FAC Ex. A; Cal. Civ. Code § 1668. Thus, SDCWA has stated a valid cause of action for
4 breach of the implied covenant. *See, e.g., Locke v. Warner Bros., Inc.*, 57 Cal. App. 4th 354, 367
5 (1997).

6 **3. MWD misconstrues the prior SDCWA case, which does not support MWD’s**
7 **effort to prevent this Court from issuing a declaration regarding preferential**
8 **rights.**

8 MWD’s sole argument with respect to SDCWA’s cause of action for declaratory relief
9 regarding preferential rights is that the claim is foreclosed by *San Diego County Water Auth. v.*
10 *Metro. Water Dist. of S. California*, 117 Cal. App. 4th 13 (2004). MWD is wrong, and its
11 discussion of the prior litigation is misleading. The previous case was about MWD water; this
12 case is about third-party water that MWD transports.

13 When the previous case was decided in the trial court, the parties had not yet executed the
14 Transportation Agreement; MWD had not yet unbundled its rates; and all payments to MWD
15 other than property taxes were for water supplied by MWD (unlike now, when IID and other
16 third parties compete with MWD in that market). *See id.* at 22; FAC ¶¶ 25-30. Section 135 of
17 the MWD Act provides that member agencies’ payments toward MWD’s capital costs and
18 operating expenses shall count toward their preferential rights to water in times of scarcity,
19 “excepting purchase of water.” SDCWA’s argument in the previous case was that its payments
20 for the purchase of water should nonetheless count toward preferential rights if MWD used that
21 money for capital costs and operating expenses; MWD’s contrary position was that it did not
22 matter how it *used* the money, because the payments were *for* water—which was all MWD was
23 selling, as it did not provide separate transportation services at the time. *See* 117 Cal. App. 4th at
24 24-25. The court agreed with MWD. *See id.*

25 Now, however, MWD *does* charge to transport third-party water it does not supply. That
26 money is indisputably *not* for the “purchase of water.” Indeed, in this very litigation, MWD has
27 emphatically stated that “*there is no connection between [State Water Project] capital,*
28 *operations, maintenance and overhead costs of the Transportation Charge and the actual*

1 *supply of water.*” May 27, 2011 MWD Initial Disclosures at 21:15-16 (emphasis added).
2 SDCWA’s claim for declaratory relief simply asks this Court to do what MWD refuses to do:
3 interpret the statute fairly and consistently, such that SDCWA’s transportation payments, which
4 are admittedly not for the purchase of water, count toward its preferential rights. *See* FAC ¶¶
5 116-20.


6 Thus, the prior case is inapposite, and certainly does not preclude SDCWA’s claim for
7 declaratory relief regarding preferential rights.

8 **III. CONCLUSION**

9 For the foregoing reasons, the Court should deny MWD’s demurrer and motion to strike,
10 and should grant SDCWA its attorneys’ fees expended in opposing the latter.

11
12 Dated: December 20, 2011

KEKER & VAN NEST LLP

13
14 By: 
15 _____
16 JOHN W. KEKER
17 DANIEL PURCELL
18 DAN JACKSON
19 WARREN A. BRAUNIG
20 Attorneys for Petitioner and Plaintiff
21 SAN DIEGO COUNTY WATER
22 AUTHORITY
23
24
25
26
27
28

1 **PROOF OF SERVICE**

2 I am employed in the City and County of San Francisco, State of California in the office of a
3 member of the bar of this court at whose direction the following service was made. I am over the
4 age of eighteen years and not a party to the within action. My business address is Kecker & Van
Nest LLP, 633 Battery Street, San Francisco, California 94111-1809.

5 On December 20, 2011, I served the following document(s):

6 **SDCWA'S OPPOSITION TO MWD'S DEMURRER AND ANTI-
7 SLAPP MOTION TO STRIKE SDCWA'S FIRST AMENDED
8 PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR
DAMAGES AND DECLARATORY RELIEF**

9 by regular **UNITED STATES MAIL** by placing a true and correct copy in a sealed envelope
10 addressed as shown below. I am readily familiar with the practice of Kecker & Van Nest LLP for
11 collection and processing of correspondence for mailing. According to that practice, items are
12 deposited with the United States Postal Service at San Francisco, California on that same day
with postage thereon fully prepaid. I am aware that, on motion of the party served, service is
presumed invalid if the postal cancellation date or the postage meter date is more than one day
after the date of deposit for mailing stated in this affidavit.

13 **by E-MAIL VIA PDF FILE**, by transmitting on this date via e-mail a true and correct copy
14 scanned into an electronic file in Adobe "pdf" format. I did not receive, within a reasonable time
15 after the transmission, any electronic message or other indication that the transmission was
unsuccessful.

16 **SEE ATTACHED SERVICE LIST**

17 Executed on December 20, 2011, at San Francisco, California.

18 I declare under penalty of perjury under the laws of the State of California that the above is true
19 and correct.

20 

21 MAUREEN L. STONE

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

PROOF OF SERVICE LIST
SAN DIEGO COUNTY WATER AUTHORITY
V.
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
CASE NO.: CPF-10-510830

James J. Dragna
Colin C. West
Thomas S. Hixson
Bingham McCutchen LLP
355 South Grand Avenue, Suite 4400
Los Angeles, CA 90071-3106
Email: jim.dragna@bingham.com
colin.west@bingham.com
thomas.hixson@bingham.com

Attorneys for Defendant and Respondent
The Metropolitan Water District Of Southern
California

James J. Brosnahan
S. Raj Chatterjee
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105
E-mail: jbrosnahan@mof.com
SChatterjee@Mof.com

Attorneys for Defendant and Respondent
The Metropolitan Water District Of Southern
California

Marcia Scully
James. F. Roberts
The Metropolitan Water District of Southern
California
700 North Alameda Street
Los Angeles, CA 90012-2944
Email: jroberts@mwdh2o.com
mscully@mwdh2o.com

Attorneys for Defendant and Respondent
The Metropolitan Water District Of Southern
California

John L. Fellows III
Patrick Q. Sullivan
City of Torrance
3031 Torrance Blvd.
Torrance, CA 90503-5059
Email: psullivan@TorranceCA.Gov
jfellows@TorranceCA.Gov

Attorneys for Defendant and Respondent
City of Torrance

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

Russell G. Behrens
David D. Boyer
Patricia J. Quilizapa
Kidman, Behrens & Tague, LLP
650 Town Center Drive, Suite 100
Costa Mesa, CA 92626-7187
Email: rbehrens@mkblawyers.com
dboyer@mkblawyers.com
pquilizapa@mkblawyers.com

Attorneys for Defendant and Respondent
Municipal Water District of Orange County

David A. Peffer
Utility Consumers' Action Network
3100 Fifth Avenue, Suite B
San Diego, CA 92103
Email: dpeffer@ucan.org

Attorneys for Defendant and Respondent
Utility Consumers' Action Network

Scott Howard
Christine A. Godinez
Dorine Martirosian
City of Glendale
613 East Broadway, Suite 220
Glendale, CA 91206
Email: showard@ci.glendale.ca.us
dmartirosian@ci.glendale.ca.us

Attorneys for Defendant and Respondent
City of Glendale

Steven M. Kennedy
Brunick, McElhaney & Beckett
1839 Commercenter West
San Bernardino, CA 92412
Email: skennedy@bmblawoffice.com

Attorneys for Defendant and Respondent
Three Valleys Municipal Water District

Carmen A. Trutanich
Richard M. Brown
Victor Sofelkanik
111 North Hope Street, Suite 340
P. O. Box 51111
Los Angeles, CA 90051-0100
Email: victor.sofelkanik@ladwp.com
richard.brown@ladwp.com
Carmen.trutanich@ladwp.com

Attorneys for Defendant and Respondent
City of Los Angeles

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

David L. Osias
Mark J. Hattam
Allen Matkins Leck Gamble Mallory & Natsis
501 West Broadway, 15th Floor
San Diego, CA 92101-3541

Email: dosias@allenmatkins.com
mhattam@allenmatkins.com

Attorneys for Defendant and Respondent
Imperial Irrigation District

Steven O'Neill
Christine Carson
Lemieux and O'Neill
4165 E. Thousand Oaks Blvd., Ste. 350
Westlake Village, CA 91361

Email: steve@lemieux-oneill.com
: Christine@lemieux-oneill.com

Attorneys for Defendants and Respondents
Foothill Municipal Water District; Las
Virgenes Municipal Water District and West
Basin Municipal Water District