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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
MOTION TO BIFURCATE
VALIDATION PROCEEDINGS**

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,
19
20 Respondents and Defendants.

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

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1 I. INTRODUCTION

2 Metropolitan Water District of Southern California's ("MWD") insistence that this action
3 must be bifurcated in order to avoid delays is curious, to say the least, given MWD's conduct
4 over the past year. First, when plainly interested third parties—an irrigation district that supplies
5 water to the San Diego County Water Authority ("SDCWA") and representatives of individual
6 ratepayers who ultimately pay MWD's inflated water rates—sought to intervene and participate
7 in this case, MWD opposed, forcing extensive briefing and a trial on those parties' standing. The
8 Court concluded the intervenors had standing. Then, despite the fact that California law strongly
9 favors amendment of pleadings, MWD refused to stipulate to SDCWA's request for leave to
10 amend its complaint and insisted on forcing another time-consuming round of motion practice.
11 Even then, MWD's challenges to SDCWA's proposed amendment relied almost entirely on
12 demurrer-style arguments that have no place in consideration of a motion for leave to amend.
13 Again, the Court rejected MWD's position. Now, after causing several unnecessary delays in
14 pursuit of a litigation advantage, MWD insists that the Court must subdivide the case in order to
15 avoid further delays.

16 Not only is MWD's asserted rationale for bifurcation inconsistent with its conduct, but
17 there is no need to bifurcate to ensure prompt resolution of all SDCWA's claims. Contrary to
18 MWD's repeated claims, which cite nothing SDCWA has ever said, SDCWA has no interest in
19 stringing this case out. It, like MWD, favors prompt resolution. To that end, the Court should be
20 able to set a schedule under which all claims are tried and resolved by the end of 2012, so that all
21 parties have some degree of certainty by the time MWD sets its 2014 rates in April 2013.

22 More generally, bifurcation is an exceptional course disfavored by the courts, and MWD
23 cannot meet its burden of showing that such an exceptional course is warranted here. The goal
24 of the validation statutes is to promptly and efficiently settle *all questions* about the validity of
25 agency action. Stringing out SDCWA's challenges to MWD's rate-setting into multiple,
26 piecemeal proceedings would disserve that goal and create more uncertainty. Because
27 SDCWA's claims involve overlapping questions of law and fact, and all of its claims will require
28 some measure of discovery, allowing them to proceed together is the most efficient way to

1 resolve the dispute.

2 In addition, the balance of prejudice weighs heavily against bifurcation. MWD suffers no
3 delay or increased uncertainty from litigating all claims together. But, if the Court bifurcates, not
4 only will SDCWA suffer significant prejudice from being forced present its claims in multiple,
5 redundant proceedings rather than in a unified, coherent fashion, but all interested parties will
6 suffer uncertainty, because resolution of the validation claims will not finally determine the
7 validity of MWD's rates. The Court should deny this motion.

8 **II. MWD'S "FACTUAL BACKGROUND" IS BOTH IRRELEVANT TO THE**
9 **BIFURCATION ISSUE AND FULL OF MISSTATEMENTS**

10 Even though it has no bearing on any issue relevant to bifurcation, MWD's brief includes
11 a "Factual Background" section filled with misleading and inaccurate factual assertions.
12 SDCWA briefly responds to the most obvious misstatements below.

13 *First*, MWD contends that SDCWA holds "the second largest block [*sic*] of votes" of any
14 MWD member agency. *See* MWD MPA at 4. Of course, the MWD directors appointed by
15 SDCWA are not beholden to SDCWA, but, regardless, their modest voting power makes no
16 difference. The share of votes wielded by SDCWA's appointed directors still represents less
17 than 18% of the total votes on the MWD Board. The entire point of this lawsuit is that the San
18 Diego region is a minority interest within MWD, which interest has been systematically
19 disadvantaged and exploited by MWD and the other member agencies. The managers of more
20 than a dozen member agencies, including all the other large member agencies,¹ have formed a
21 bloc that directs MWD policy and MWD Board decisions, in violation of the MWD Enabling
22 Act and in order to force San Diego's ratepayers to subsidize the bloc's financial interests.
23 SDCWA has already tried to work within MWD's broken and corrupted process to obtain the
24 relief it seeks through this lawsuit—and, not surprisingly, it was ignored.

25 _____
26 ¹ This bloc of member agencies includes, among others, the City of Los Angeles (19.5% of
27 votes), Municipal Water District of Orange County (17% of votes), West Basin Municipal Water
28 District (7% of votes), Inland Empire Utilities Agency (4% of votes) and Western Municipal
Water District (3.6% of votes). *See* Jackson Decl. in Support of SDCWA's Opp. to Demurrer
and Mot. to Strike, Ex. G.

1 *Second*, MWD’s assertion that it has set its rates through an “open, transparent, and
2 deliberative process” is plainly false. As the First Amended Complaint states, and MWD itself
3 admits, *see* MWD Demurrer at 6–7, the member agency managers who control the MWD Board
4 and MWD policy have routinely met behind closed doors (without inviting SDCWA) to
5 determine MWD policy. As detailed in the First Amended Complaint, SDCWA has been closed
6 out of the true rate-making process because a group of self-interested member agencies have co-
7 opted a majority of the MWD Board. MWD, by asserting in its demurrer the purported free-
8 speech rights of its member agency managers (which are not implicated, for reasons stated in
9 SDCWA’s opposition to that demurrer), appears to concede some sort of identity between itself
10 and the agency managers. But if MWD and the member agency managers are one and the same,
11 then the closed-door meetings of member agency managers to direct MWD policy violate the
12 Brown Act, Cal. Gov’t Code § 54950, which bars public entities from setting policy outside of
13 the watchful eye of the voting public.

14 Finally, MWD attempts to prop up its unlawful rate setting with misleading references to
15 its consultant’s report (“the Raftelis Report”). *See* MWD MPA at 6. MWD’s discussion implies
16 that the Raftelis Report is a long-standing decision of an unbiased third party fully blessing the
17 legality of its current, unlawful rate allocation. *See id.* In reality, MWD did not commission
18 this report until March 2010, shortly before it set its 2011 and 2012 rates. Even then, MWD
19 commissioned the Raftelis Report only in response to SDCWA’s placing into the administrative
20 record an expert report concluding that MWD’s rate allocation was arbitrary and unlawful.
21 Furthermore the Raftelis Report did not conclude, as MWD suggests, that *MWD’s rates* are
22 “consistent with California law . . .” MWD MPA at 6:14. MWD’s brief inserts an ellipsis to
23 conceal that the Raftelis Report affirmed MWD’s compliance with “specifically Government
24 Code § 54999.7 (requiring a [Cost of Service] study be done every 10 years).” *See* Hixson Decl.,
25 Ex. 2, at 1. In other words, the Raftelis Report merely found that that MWD complied with the
26 requirement that it generate a cost-of-service study. Of course, SDCWA is not seeking to
27 invalidate MWD’s rates because MWD failed to do a cost-of-service study, but rather because
28 MWD violates numerous provisions of California law requiring that its rates be fair, reasonable,

1 and not greater than the cost of the services provided to its customers. The Raftelis Report gives
2 no cover to MWD as to *any* of these substantive requirements of California law.²

3 III. ARGUMENT

4 Bifurcation is the exception, rather than the rule, under California law. Particularly with
5 respect to actions involving the validation statutes, Cal. Code Civ. Proc. § 860, *et seq.*,
6 bifurcation is heavily disfavored. The validation statutes “place[] great importance on the need
7 for *a single dispositive final judgment.*” *Friedland v. City of Long Beach*, 62 Cal. App. 4th 835,
8 842 (1998) (quoting *Committee for Responsible Planning v. City of Indian Wells*, 225 Cal. App.
9 3d 191, 197–98 (1990)) (internal quotation marks omitted) (emphasis added). California law
10 requires that “[t]he validati[on] statutes should be construed so as to uphold their purpose, i.e.,
11 ‘the acting agency’s need to settle promptly *all questions* about the validity of its action.’” *Id.*
12 (quoting *Millbrae School Dist. v. Superior Court*, 209 Cal. App. 3d 1494, 1499 (1989))
13 (emphasis added).

14 More generally, the California Legislature designed its rules governing bifurcation and
15 severance to reflect the presumption against bifurcation contained in the Federal Rules of Civil
16 Procedure. *See* Comments, Cal. Code of Civ. Pro. § 1048; *Rodriguez v. Bethlehem Steel Corp.*,
17 12 Cal. 3d 382, 408 n.28 (1974) (noting that California’s procedural rule with respect to
18 consolidation and bifurcation is “based on” Federal Rule of Civil Procedure 42). Because the
19 California code at issue was based on a federal rule, “federal case law construing [the federal
20 rule] is persuasive authority with regard to the meaning of [the California rule].” *Day v.*
21 *Collingwood*, 144 Cal. App. 4th 1116, 1125 n.3 (2006). Both the federal and state rules disfavor
22 bifurcation. *See People v. Ochoa*, 19 Cal. 4th 353, 409 (Cal. 1998) (noting that the “the law
23 prefers” consolidation or joinder of related actions because it “promotes efficiency”); *Trading*
24 *Technologies Int’l, Inc. v. eSpeed, Inc.*, 431 F. Supp. 2d 834, 836 (N.D. Ill. 2006) (noting that,

25 _____
26 ² The claim in the Raftelis report that MWD’s cost of service approach “is consistent with water
27 industry best practices,” Hixson Decl., Ex. 2, at 1, is also inaccurate. As SDCWA will prove at
28 trial, MWD’s allocation of costs deviates substantially from the American Water Works
Association (AWWA) standards, as well as those standards laid out by the National Association
of Regulatory Commissioners.

1 because courts should act to secure speedy and inexpensive resolutions, “bifurcation remains the
2 exception, not the rule”); *Laitram Corp. v. Hewlett-Packard Co.*, 791 F. Supp. 113, 115 (E.D.
3 La. 1992) (courts should not bifurcate “unless such a disposition is clearly necessary” (internal
4 citation omitted)).

5 Because the rules favor a single proceeding, MWD, as the party seeking bifurcation, has
6 the burden of proving that bifurcation of the “validation claims”³ (defined by MWD as causes of
7 action One, Two, and Three in the First Amended Complaint) from the “non-validation claims”
8 (SDCWA’s remaining causes of action), would promote judicial economy and avoid prejudice.
9 *Trading Technologies*, 431 F. Supp. at 837; *Real v. Bunn-O-Matic Corp.*, 195 F.R.D. 618, 620
10 (N.D. Ill. 2000); *Spectra-Physics Lasers, Inc. v. Uniphase Corp.*, 144 F.R.D. 99, 101 (N.D. Cal.
11 1992). MWD has not come close to meeting that burden.

12 **A. Bifurcation is contrary to the goals of the validation statutes and to principles of**
13 **judicial economy.**

14 MWD argues that bifurcation is necessary under the validation statutes and would
15 promote judicial economy. *See* MWD MPA at 8–14. These positions have no merit. In fact,
16 both the purposes of the validation statutes and judicial economy would be far better by
17 resolving all claims together.

18 **1. Bifurcation would be inconsistent with the goals of the validation statutes.**

19 As noted above, bifurcation runs directly contrary to the validation statutes’ goal of
20 resolving challenges to agency action in a single, dispositive judgment. If this Court were to
21 bifurcate this case, and assuming that the validation claims could be resolved at the lightning-
22 speed rate that MWD suggests (which they could not), MWD’s rates nonetheless would remain
23 subject to effective invalidation under SDCWA’s other claims. For example, if MWD is
24 eventually found to have breached the 2003 Amended and Restated Agreement for the Exchange
25 of Water (“Transportation Agreement”) or its fiduciary duties to SDCWA and its ratepayers, the
26 result would be an injunctive order directing MWD to set rates in compliance with its duties. In

27 _____
28 ³ Without conceding that MWD has correctly characterized SDCWA’s claims in this proceeding
as “validation claims” and “non-validation claims,” SDCWA adopts those terms in this brief.

1 other words, a resolution in the “validation case,” without a decision on SDCWA’s other claims,
2 would not finally decide the legality of MWD’s rates. Accordingly, bifurcation would create
3 disjointed, piecemeal litigation and a non-dispositive judgment vulnerable to future revision,
4 thereby frustrating the prompt and final resolution of **all** questions regarding the validity of
5 MWD’s actions. The goals of the validation statutes are better served by trying all claims
6 together.

7 In fact, MWD’s lead case, *County of Santa Clara v. Redevelopment Agency*, 18 Cal. App.
8 4th 1008 (1993), supports SDCWA’s position and demonstrates why bifurcation would be
9 inappropriate here. There, the Court of Appeal affirmed a decision to bifurcate validation claims
10 from contract claims that were “separate and independent” from the validation issues. *Id.* at
11 1016. The validation claims challenged the agency’s issuance of an \$80 million bond for a
12 development project, whereas the contract claims alleged that the agency had failed under a prior
13 agreement to pay the county a portion of “increment revenues” generated from the development.
14 *Id.* In the appellate court’s view, the two sets of claims presented “wholly different issues” that
15 were “completely unrelated.” *Id.* at 1016–17. The complete independence of the contract claims
16 was what rendered the trial court’s decision to bifurcate permissible (although certainly not
17 required). But here, the shoe is on the other foot; MWD not only admits, but **expressly bases its**
18 **bifurcation motion** on the premise that the SDCWA’s breach of contract claim, far from being
19 “separate and independent” from its validation claims, is **identical** to those claims. MWD goes
20 so far as to argue that, if it wins the validation action, that would preclude the contract claim.
21 *See* MWD MPA at 12. That alone illustrates why *Santa Clara* supports the **denial** of MWD’s
22 motion. Moreover, regardless of MWD’s conclusory arguments to the contrary, **all** of
23 SDCWA’s remaining claims have a close factual tie to the validation claims, *see* Part III.A.2,
24 *infra*, thereby rendering bifurcation inappropriate under *Santa Clara*.

25 Neither is there any merit to MWD’s argument that Code of Civil Procedure Section 867
26 somehow **requires** bifurcation. *See* MWD MPA at 8–9. Section 867 prescribes no particular
27 case-management strategy for lawsuits involving both validation and non-validation claims; it
28 merely states that, in setting hearings and trials, cases that include validation claims should be

1 given preference over other lawsuits. Cal. Code Civ. Pro. § 867.⁴

2 Indeed, not one of the cases cited by MWD suggests that compliance with Section 867
3 requires causes of action brought under the validation statutes to be carved out from, or governed
4 by procedures different from those that apply to, related causes of action brought in the same
5 lawsuit. In the cases MWD cites, courts phased litigation to resolve discrete, preliminary legal
6 issues—such exhaustion of remedies or questions of statutory interpretation—before addressing
7 the validity of the underlying action. *See County of Orange v. Barratt Am. Inc.*, 150 Cal. App.
8 4th 420, 425 (2007); *Metropolitan Water Dist. of So. Cal. v Imperial Irr. Dist.*, 80 Cal. App. 4th
9 1403, 1422 (2000); *N.T. Hill Inc. v. City of Fresno*, 72 Cal. App. 4th 977, 982 (1999). In *Hill*,
10 for example, the trial court bifurcated the initial inquiry of whether the plaintiff had, pursuant to
11 a statutory requirement, exhausted his administrative remedies before filing his lawsuit. *Hill*, 72
12 Cal. App at 982. But the court did not attempt to phase or bifurcate the eight causes of action
13 alleged in the plaintiff’s complaint. *Id.* at 981. Here, the validation and non-validation claims
14 involve both overlapping legal challenges and overlapping factual disputes with respect to
15 MWD’s action. As such, the bifurcation MWD requests here finds no support in the case law,
16 nor does it make sense from a case management perspective.

17 It is unsurprising that MWD fails to provide any legal authority that supports its request
18 for bifurcation. After all, the validation provisions seek a prompt resolution of *all* questions
19 regarding the validity of an agency’s action, not just those brought directly through the particular
20 lens of the validation statutes. Bifurcation would directly undermine this sensible goal.

21 **2. Bifurcation would not serve the goals of judicial economy and efficiency.**

22 Not only would bifurcation contravene the express purposes of the validation statutes, it
23 would frustrate, rather than promote, judicial economy and efficiency. Allowing all claims to
24 proceed together ensures that the parties can engage in an efficient and streamlined discovery

25 _____
26 ⁴ Indeed, while many courts have stressed the importance of settling challenges to agency action
27 quickly, they have done so by reference to the validation statutes’ 60-day statute of limitations,
28 not Section 867. *See, e.g., McLeod v. Vista Unified School Dist.*, 158 Cal. App. 4th 1156, 1166
(2008) (“The validating statutes contain a 60-day statute of limitation to further the important
public policy of speedy determination of the public agency’s action” (quoting *Embarcadero
Mun. Improvement Dist. v. County of Santa Barbara*, 88 Cal. App. 4th 781, 790 (2001))).

1 process that allows the court to consider all relevant information at one time. *See Ochoa*, 19 Cal.
2 4th at 409 (noting that joinder of related claims ordinarily avoids “waste of public funds which
3 may result if the same general facts were to be tried in two or more separate trials”); *Real v.*
4 *Bunn-O-Matic Corp.*, 195 F.R.D. 618, 624 (N.D. Ill. 2000) (noting that a single lawsuit “tends to
5 lessen the delay, expense, and inconvenience to all concerned”). In this case, there is substantial
6 legal and evidentiary overlap among the SDCWA’s claims. Thus, allowing this case to proceed
7 wholesale, rather than in a disjointed, piecemeal fashion, is the best way to avoid wasteful,
8 inefficient, and duplicative effort. *See Shade Foods, Inc. v. Innovative Sales & Mktg., Inc.*, 78
9 Cal. App. 4th 847, 913 (2000) (noting that separate trials involving the same factual
10 determinations create “duplicative adjudications with a consequent waste of judicial time”);
11 *Brown v. Toscano*, 630 F. Supp. 2d 1342, 1347 (S.D. Fla. 2008) (noting that courts should not
12 order bifurcation when it would result in unnecessary delay).

13 MWD’s argument that bifurcation is necessary to efficiently resolve this dispute because
14 SDCWA’s non-validation claims are “completely unrelated to and involve issues wholly
15 different from” the validation action, *see* MWD MPA at 9–12, is baseless. MWD advanced this
16 same argument in unsuccessfully opposing SDCWA’s request to amend its Complaint. It is as
17 incorrect and unpersuasive now as it was then. All of SDCWA’s causes of action against
18 MWD—including its fiduciary duty claim, its claims challenging MWD’s unconstitutional Rate
19 Structure Integrity (“RSI”) clause, and its claims regarding calculation of its preferential rights to
20 water—address the systematic abuse of power by MWD and its Board to advantage other MWD
21 member agencies at the sole and considerable expense of SDCWA. *See* FAC ¶¶ 94–120.
22 SDCWA’s contract, fiduciary duty, and preferential-rights claims have ***the same fundamental***
23 ***factual basis*** as its validation claims—every one of these claims is a direct challenge to MWD’s
24 arbitrary, capricious, and unlawful classification of charges for the supply and transportation of
25 water. And the RSI claims are likewise factually related to the validation claims, because MWD
26 imposed and enforced the RSI clause in express retaliation for SDCWA’s assertion of its
27 contractual and constitutional rights by filing the initial complaint. MWD has never confronted,
28 much less disentangled, the obvious connections among all these claims.

1 Indeed, MWD’s own brief demonstrates that SDCWA’s claims are related. Specifically,
2 MWD argues that a resolution of the validation claims could moot and preclude SDCWA’s
3 contract claim. *See* MWD MPA at 10, 12. As a preliminary matter, this is an insufficient basis
4 for bifurcation. A defendant “may not rely on the mere possibility that resolution of [one claim]
5 may preclude” another as the basis for bifurcation. *Woods v. State Farm Fire & Cas. Co.*, No.
6 2:09-cv-482, 2010 WL 1032018, at *3 (S.D. Ohio March 16, 2010) (citing cases). But even if
7 MWD were correct that the resolution of the validation claims would moot SDCWA’s breach of
8 contract claim, that would only mean those claims are *not* independent of one another, and thus
9 *must* be tried together to avoid prejudice to SDCWA. *See* Part III.C.2, *infra*; *see also* *Trading*
10 *Technologies*, 431 F. Supp. 2d at 841 (noting that “where issues to be presented in two trials
11 sufficiently overlap, bifurcation should be denied” (citing cases)).

12 **3. Bifurcation would not reduce evidentiary complexity because the Court will**
13 **have to evaluate evidence beyond the administrative record regardless of**
14 **how this case proceeds.**

15 MWD also asserts that bifurcation is warranted because, unlike the non-validation claims,
16 the validation claims require no discovery and can be resolved on the administrative record
17 alone. *See* MWD MPA at 9–10. This is simply incorrect. Regardless of how the case proceeds,
18 the resolution of each and every cause of action will require some measure of discovery.

19 *First*, the court is *required* by statute to look beyond the administrative record, even with
20 respect to SDCWA’s validation claims. SDCWA brings its challenge under the Wheeling
21 Statute, which explicitly instructs the Court to consider “all relevant evidence” in determining
22 whether the rates charged for wheeling are “reasonable” and “fair,” and whether Metropolitan
23 has acted “in a reasonable manner consistent with the requirements of law.” Cal. Water Code §§
24 1810-13. As explained in Imperial Irrigation District’s Motion to Allow Discovery under Water
25 Code Section 1813, filed on December 2, 2011, such statutory language constitutes an express
26 instruction from the Legislature that courts should consider *all facts* related to an important issue
27 of public policy—in this case, the efficient transportation of water. Thus, such relevant evidence
28 would inevitably include many of the same documents and much of the same testimony as are
necessary for SDCWA’s non-validation claims, which also challenge MWD’s unlawful behavior

1 in setting its rates.

2 *Second*, because MWD and its Board have engaged in a decision-making process that is
3 biased, corrupt, and intentionally designed to prejudice the interests of SDCWA, *see* FAC ¶¶ 20–
4 21, 94–107, the Court’s review necessarily must extend beyond the administrative record.
5 Ample California precedent explains that, where an agency’s processes have broken down due to
6 bias or corruption, evidence of such bias and corruption—from outside the administrative
7 record—is discoverable and admissible in evaluating the agency’s decision-making. It could not
8 be otherwise—an agency will never include evidence of its own misconduct in its official record.
9 *See, e.g., Nasha L.L.C. v. City of Los Angeles*, 125 Cal. App. 4th 470, 485 (2004) (where party
10 contests procedural fairness of administrative process, court should consider evidence outside the
11 administrative record); *Nightlife Partners v. City of Beverly Hills*, 108 Cal. App. 4th 81, 89–90
12 (2003); *Tiholiz v. Northridge Hosp. Found*, 151 Cal. App. 3d 1197, 1205 (1984) (holding that
13 courts exercise “independent judgment” over claims of procedural unfairness and bias).

14 Thus, regardless of how the Court manages this case, none of SDCWA’s claims will be
15 resolved purely on a narrow administrative record,⁵ and the parties will engage in some
16 discovery as to every one of them. Bifurcation would only result in duplicative and inefficient
17 discovery, a process that would be far more burdensome than would a single, streamlined
18 exchange of information. *See Kos Pharma., Inc. v. Barr Labs.*, 218 F.R.D. 387, 393 (S.D.N.Y.
19 2003) (noting that bifurcation would result in “duplication of effort due to the overlapping
20 evidence required to establish” the multiple claims in the suit).

21 **B. The doctrine of exclusive and concurrent jurisdiction does not support bifurcation.**

22 Next, MWD offers the red-herring argument that the doctrine of concurrent jurisdiction
23 requires bifurcation. *See* MWD MPA at 12–14. The Court should disregard it. The rule of

24 _____
25 ⁵ Contrary to MWD’s assertion, MWD MPA at 10:4–7, the Court has not “initially determined
26 that discovery is unnecessary” to resolving the rate challenge. Instead, on April 18, 2011, the
27 Court merely removed SDCWA’s motion to compel discovery from its calendar pending further
28 case management-related filings from the parties. The Court stated on the record that the parties
were free to propound discovery requests, and that the issue would be taken up at the case
management conference on January 4, 2012. *See* Motion to Amend Hearing Transcript, October
27, 2011. Thus, until IID’s Motion, filed on December 2, 2011, the issue had never been briefed
to the Court.

1 concurrent jurisdiction applies where two cases involve the same subject matter and all the same
2 parties; it is designed to prevent contradictory rulings with respect to one controversy. *See*
3 *People ex rel. Garamendi v. Am. Autoplan, Inc.*, 20 Cal. App. 4th 760, 769–70 (1993). No other
4 court has jurisdiction over this dispute or all the parties involved in it, and the doctrine of
5 concurrent jurisdiction is therefore completely inapposite.

6 Neither of the collateral lawsuits mentioned by MWD supports bifurcation of this action.
7 First, MWD’s argument that a lawsuit regarding the validity of the Quantification Settlement
8 Agreement (“QSA”) between MWD and the Imperial Irrigation District could affect the status of
9 the Transportation Agreement between MWD and SDCWA, *see* MWD MPA at 13, is now a
10 moot point. In that litigation, MWD and SDCWA were on the same side in defending the
11 validity of the QSA, which has been operative for almost a decade. On December 7, 2011, the
12 California Court of Appeal issued its decision overturning the trial court and **affirming** the
13 validity of the QSA and the system of transferring Colorado River water that underlies the
14 Transportation Agreement. *See In re Quantification Settlement Agreement Cases*, No. C064293,
15 --- Cal. Rptr. 3d ---, 2011 WL 6091097 (Cal. Ct. App. Dec. 7, 2011). MWD’s speculation about
16 the potential invalidity of the QSA is now a non-issue.

17 MWD’s argument that a NEPA challenge, *People of California ex. rel. Imperial County*
18 *Air Pollution Control District v. U.S. Department of Interior*, No. 09-CV-2233-AJB-PCL (Oct.
19 8, 2009) (the “NEPA Case”)—may implicate SDCWA’s claims in this case, *see* MWD MPA at
20 13–14, is similarly unpersuasive. MWD suggests that the NEPA Case **may** result in an
21 injunction that **could** implicate the validity of the Transportation Agreement and “potentially”
22 relieve MWD of its contractual obligations to SDCWA. But MWD has been delivering water to
23 the SDCWA under the Transportation Agreement for more than 8 years, and SDCWA has been
24 paying the disputed 2011-12 water rates for a year now. Regardless of the outcome of the NEPA
25 Case, MWD’s overcharges still will be at issue here, as will the disposition of the contested
26 millions of dollars SDCWA has paid to date, which MWD has been required to escrow under the
27 terms of the Transportation Agreement. In any event, particularly given the complexity of the
28 issues in the NEPA Case, no one knows when or how that case will be resolved, or whether that

1 resolution will affect the Transportation Agreement.⁶ The mere existence of the NEPA Case is
2 not a legitimate case-management consideration. If courts managed their dockets depending on
3 these sorts of hypothetical possibilities, our justice system would grind to a halt.

4 Furthermore, even if the Court were to indulge MWD's series of speculative assumptions
5 about the theoretical outcomes of other, independent cases, it is not clear why this would support
6 bifurcation here. MWD does not suggest that the NEPA Case has any bearing on SDCWA's
7 fiduciary duty claim, RSI claims, or preferential-rights claims. Instead, the thrust of MWD's
8 logic is that this Court should delay rendering any decision as to the lawfulness of MWD's
9 actions under the Transportation Agreement because MWD hopes that it might, at some
10 uncertain point in the future, escape its contractual obligations altogether. But, given that the
11 parties have thus far been operating under the Transportation Agreement and SDCWA seeks
12 recovery for contract damages, this mere unlikelihood should not preclude SDCWA from
13 litigating now its claim of breach, much less its claims that do not derive directly from the
14 Transportation Agreement. The Court should reject MWD's attempt to manipulate this Court's
15 docket to protect itself from liability.

16 **C. Bifurcation will create, rather than avoid, prejudice.**

17 **1. MWD suffers no prejudice from litigating all of SDCWA's claims together.**

18 Litigating all the related claims in this case in a single proceeding will not cause MWD to
19 suffer any prejudice. MWD's primary basis for asserting prejudice is, yet again, its assumption
20 that a single proceeding would result in "protracted litigation" that would delay the resolution of
21 the parties' disputes. *See* MWD MPA at 14. This has it exactly backwards. Regardless of
22 whether they are bifurcated, all claims in this dispute require some measure of discovery in order
23 to be resolved. Bifurcation will only create inefficiencies in this process and further delay final
24 resolution. At this point, trying SDCWA's suit, the entirety of which arises from a common set
25 of facts, as a whole is the best way to ensure that the Court can resolve this dispute as promptly

26 _____
27 ⁶ The parties in the NEPA Case are currently briefing cross-motions for summary judgment. A
28 hearing on these motions has been scheduled for late March 2012. That hearing could very well
result in additional briefing. It is unclear how long after that the court will render its decision,
which will likely be issued in the form of one or more lengthy orders.

1 and efficiently as possible.

2 Moreover, MWD vastly overstates (if not entirely invents) the uncertainty this suit would
3 cause it to suffer. In reality, if SDCWA prevails and obtains a lawful rate allocation, that result
4 will be **100% revenue-neutral to MWD**, because the charges that are currently and
5 disproportionately assessed against SDCWA will simply be reallocated among the other member
6 agencies. MWD's own controller has admitted as much in testimony before a committee of the
7 MWD Board, testifying that, from a financial perspective, MWD is "indifferent" to the outcome
8 of the rate case. *See* Jackson Decl. in Support of Opp. to MWD's Demurrer & Mot. to Strike,
9 Ex. D. However its rates are allocated, MWD will continue to collect the exact same amount of
10 revenue for selling water, but those payments will be borne fairly among all its member
11 agencies, rather than disproportionately by SDCWA as is now the case. *Id.*

12 To the extent that this litigation creates uncertainty as to MWD's future rates, bifurcation
13 will do nothing to alleviate it. Whether this case proceeds as a unified whole or just on the
14 validation claims, the legality of MWD's rates cannot possibly be settled by April 2012, when
15 MWD plans to set its rates for calendar year 2013. This state of affairs is due in large part to
16 MWD's pursuit of quixotic oppositions to the intervenors' right to participate in this action and
17 to SDCWA's right to amend its Complaint. MWD lost on the merits on both issues, but it did
18 succeed in placing the validation case in a holding pattern for months. Indeed, MWD continues
19 to take action to postpone a decision on the merits of SDCWA's claims. Just recently, MWD
20 unilaterally and without warning filed with the Court a 40-volume "administrative record." As
21 MWD failed to consult with SDCWA before doing so, SDCWA must now resort to motion
22 practice with respect to the administrative record, which will only result in further delay.

23 Finally, MWD's purported concern about prejudice to, and uncertainty for, its 26 member
24 agencies would best be alleviated with a single trial that addresses all of the claims in SDCWA's
25 Complaint. Regardless of whether bifurcation is granted, the 26 member agencies will
26 experience some degree of uncertainty until all of SDCWA's claims are resolved. MWD's
27 request to bifurcate would only slow things down and prolong uncertainty for all interested
28 parties.

1 **2. Bifurcation will prejudice SDCWA.**

2 While MWD suffers no prejudice from defending against a single suit, bifurcation would
3 significantly prejudice SDCWA. First, bifurcation would deprive SDCWA of the ability to
4 present its claims, which derive from a common set of facts, in an organized, coherent fashion.
5 As detailed in the First Amended Complaint, each of SDCWA’s claims overlaps with the others.
6 Accordingly, only by litigating its claims jointly can SDCWA present a full and accurate picture
7 of the extent of MWD’s abuses. SDCWA should not be deprived of its right to present its claims
8 in the most efficient and persuasive manner. *See Moreau v. San Diego Transit Corp.*, 210 Cal.
9 App. 3d 614, 620 (1989) (noting that the plaintiff is the “master” of his complaint and he may
10 present his causes of action however he chooses).

11 Second, forcing SDCWA to present its claims in a piecemeal fashion would waste the
12 time and resources of the parties and the court, and result in redundant presentations of identical
13 or similar evidence. Even if MWD were correct that the validation claims would require only
14 limited discovery (and it is not), that would not tip the scale for bifurcation. Whether MWD
15 violated the Transportation Agreement by improperly categorizing and allocating supply costs to
16 “transportation” charges is a question that must be decided on the basis of all facts, including
17 those derived from discovery—a reality that MWD does not dispute. Thus, bifurcating would
18 mean trying the same issue on two alternative factual records, an absurd and prejudicial outcome.
19 *See Trading Technologies*, 431 F. Supp. 2d at 841 (denying bifurcation that would result in
20 prejudice to the plaintiff by substantially delaying a final determination of the action and forcing
21 the plaintiff to “present the same evidence in two separate trials”). Moreover, during the
22 inevitable delay created by this inefficient process, SDCWA would continue to pay MWD’s
23 unlawful rates for the transportation of water to its constituents.

24 Finally, bifurcation would prolong the acute uncertainty that currently faces SDCWA and
25 all other MWD member agencies. SDCWA would like to see all of its disputes with MWD
26 resolved quickly and efficiently so that it can have finality with respect to its present and future
27 financial burdens. Contrary to MWD’s repeated (and baseless) claim that SDCWA wants to
28 drag this case out for years, SDCWA intends to propose a case management plan that would

1 enable the Court to resolve all claims by the end of calendar year 2012. Because there is no way
2 to complete this case by April 2012 (when MWD sets its rates for 2013), and because MWD
3 need not set its rates for 2014 in 2012, completing the case by the end of 2012 will prevent any
4 party from suffering any prejudice that is not already unavoidable. Because bifurcation would
5 create more hardships and uncertainty than it would cure, it makes no sense from a practical,
6 case-management perspective.

7 **D. If things change, the Court can order bifurcation at a later time.**


8 At the very least, the court should deny bifurcation now and allow all claims to proceed
9 together during the initial phases of motion practice and discovery. If, at a later time, and with
10 more information before it, this Court determines that some of SDCWA's claims are truly
11 independent of and severable from the rate dispute, it can request additional briefing on the issue
12 of severance or bifurcation. *See, e.g., McLellan v. McLellan*, 23 Cal. App. 3d 343, 353 (1972)
13 (indicating that a court can order severance of issues at any time, even during the trial itself);
14 *Gaffney v. Fed. Ins. Co.*, No. 5:08-cv-76, 2008 WL 3980069, at *3 (N.D. Ohio Aug. 21, 2008)
15 (holding that a motion for bifurcation was premature where there was yet to be discovery or
16 motion practice and many of factors relevant to assessing propriety of bifurcation were
17 unknown). At this preliminary stage, the Court should allow these claims to proceed together.

18 **IV. CONCLUSION**

19 Neither judicial efficiency nor the balance of prejudice supports the exceptional course of
20 bifurcation in this case. The Court should deny MWD's motion to bifurcate.

21
22 Dated: December 20, 2011

KEKER & VAN NEST LLP

23
24 By: 
25 JOHN W. KEKER
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SAN DIEGO COUNTY WATER
AUTHORITY

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 MOTION TO BIFURCATE**
7 **VALIDATION PROCEEDINGS**

8 by regular **UNITED STATES MAIL** by placing a true and correct copy in a sealed envelope
9 addressed as shown below. I am readily familiar with the practice of Kecker & Van Nest LLP for
10 collection and processing of correspondence for mailing. According to that practice, items are
11 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.

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

15 **SEE ATTACHED SERVICE LIST**

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

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

19 

20 MAUREEN L. STONE

1 PROOF OF SERVICE LIST

2 SAN DIEGO COUNTY WATER AUTHORITY

3 V.

4 METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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