MANATT, PHELPS & PHILLIPS, LLP
Phillip R. Kaplan (SBN 76949)
Barry W. Lee (SBN 88685)
One Embarcadero Center, 30th Floor
San Francisco, California 94111
Telephone: (415) 291-7450
Facsimile: (415) 291-7474
Email: pkaplan@manatt.com
Email: bwlee@manatt.com

MORGAN, LEWIS & BOCKIUS LLP
Colin C. West (SBN 184095)
Thomas S. Hixson (SBN 193033)
One Market, Spear Street Tower
San Francisco, California 94105-1596
Telephone: (415) 422-1000
Facsimile: (415) 422-1101
Email: colin.west@morganlewis.com
Email: thomas.hixson@morganlewis.com

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
Marcia Scully (SBN 80648)
Heather C. Beatty (SBN 161907)
Patricia J. Quilizapa (SBN 233745)
700 North Alameda Street
Los Angeles, California 90012-2944
Telephone: (213) 217-6834
Facsimile: (213) 217-6890
Email: pquilizapa@mwdh2o.com

Attorneys for Respondent and Defendant
THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Exempt from filing fee pursuant to Government Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY,

Petitioner and Plaintiff,

vs.

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

Respondents and Defendants.

Case No.: CPF-10-510830
Related Case No.: CPF-12-512466

Assigned for all purposes to the Honorable Mary E. Wiss, Department 305

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S RESPONSE TO SAN DIEGO COUNTY WATER AUTHORITY'S OPENING BRIEF ON THE SCOPE OF THE REMAND

Hearing Date: July 18, 2018
Time: 10:30 a.m.

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STATUTES

The Court of Appeal remanded the 2010/2012 Actions with narrow instructions "for recalculation of damages, entry of declaratory relief on the Rate Structure Integrity clause, redetermination of the prevailing party, and other proceedings consistent with the views expressed in [its] opinion." *San Diego Cty. Water Auth. v. Metro. Water Dist. of S. California*, 12 Cal. App. 5th 1124, 1166 (2017), *as modified on denial of reh'g* (July 18, 2017), *review denied* (Sept. 27, 2017) ("*COA Opinion*"). This binds the parties and this Court (*Hampton v. Super. Court*, 38 Cal. 2d 652, 655 (1952)), and precludes the new issues SDCWA seeks to advance.

I. THE COURT IS TO REDETERMINE DAMAGES BASED ON THE WATER STEWARDSHIP RATE.

SDCWA insists, contrary to the Court of Appeal's express instructions, that this Court's *redetermination* of damages is not a determination at all; it is a ministerial entry of judgment for an *already determined* amount: $28,678,191, plus 10% interest. *See* SDCWA Op. Br., 14:22-15:17. The crux of SDCWA's flawed approach is that the first trial court already did the math, MWD opposed the first determination, and therefore, the parties and this Court are locked into an already computed number "by the remand and the law of the case." *Id.*, 15:9-10.[1] SDCWA misrepresents the Court of Appeal's remand instructions and is wrong on the law.

The Court of Appeal expressly remanded for a "redetermination," not the ministerial entry of a predetermined damages award. MWD Op. Br., 10:21-11:16. SDCWA concedes that its damages computation was part of the trial and appellate records. SDCWA Op. Br., 15:2-3. Indeed, SDCWA included its damages computation in its appellate briefing and asked the Court

[1] SDCWA did not conduct a law of the case analysis. "The law of the case doctrine states that when, in deciding an appeal, an appellate court 'states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal.'" *Kowis v. Howard*, 3 Cal. 4th 888, 892-93 (1992). Supplemental expert testimony on lawful charges *outside* transportation rates is entirely consistent with the Court of Appeal's holding that the record did not support the WSR's inclusion in transportation rates. *COA Opinion*, 12 Cal. App. 5th at 1152. MWD seeks to present evidence consistent with that holding—what could have lawfully been charged. As to SDCWA's contention that the denial of MWD's new trial motion somehow precludes this evidence, the law of the case doctrine is limited to rules and principles stated by appellate courts. *See, e.g.*, *Kowis*, 3 Cal. 4th at 892-93. And, remand removes the procedural barrier that prevented MWD from introducing the expert report at trial. Here, the law of the case is that this Court is to make a damages redetermination that does not include the WSR as a component of MWD's transportation rates.

of Appeal to affirm it. *See* SDCWA's Responding and Opening Brief, 80, 107-08. The Court of Appeal declined. Had it intended to limit remand to entry of damages for $28,678,191, the Court of Appeal could have said that, modifying the judgment to reflect the new amount or remanding with instructions to the trial court to do the same. *See, e.g., New W. Charter Middle Sch. v. Los Angeles Unified Sch. Dist.*, 187 Cal. App. 4th 831, 848 (2010) (where amount of correct damages was apparent from record, Court of Appeal modified award from $175,630.72 to $187,356, then affirmed the balance of the judgment). Instead, the Court of Appeal expressly called for a redetermination—the relief that MWD requested.

MWD asked the Court of Appeal to reverse on grounds that would dispose of SDCWA's contract claims in their entirety. Alternatively, MWD requested a retrial on damages and also reminded the court that such a remand would automatically reopen discovery. *See* Appellants' Opening Brief, 119, n.28 (citing *Fairmont v. Super. Court*, 22 Cal. 4th 245, 250 (2002); *Hirano v. Hirano*, 158 Cal. App. 4th 1, 6-7 (2007)). Against that backdrop, the Court of Appeal did not affirm the damages award; nor did it modify the amount to reflect a pre-computed number. Instead, the Court of Appeal reversed and remanded for a *redetermination* of damages.

SDCWA relies exclusively on *Rice v. Schmid*, 25 Cal. 2d 259, 263 (1944), for the proposition that MWD is barred from presenting evidence on the amount it could have lawfully charged SDCWA and the delta between that amount and the amount SDCWA actually paid. SDCWA Opening Br., 15:11. But *Rice* takes exactly the opposite position. Like these cases, *Rice* involved a remand "with directions to the trial court to *determine* [contract] damages." *Rice*, 25 Cal. 2d at 261 (emphasis added). On remand, the trial court needed to determine the difference between the market price (what defendant could have lawfully charged) and the price term (what defendant did charge) for 200 barrels of flour—the delta being the proper measure of damages. *See id.* at 261, 263. Upon remittitur, plaintiff attempted the same strategy SDCWA now advances; asking the trial court to simply "compute" damages pursuant to the Court of Appeal's instruction. *See id.* at 261. The court denied that request and instead, permitted the parties to submit "additional evidence" just as MWD requests here. *See id.* When the *Rice* trial court again failed to resolve the market price issue, the Court of Appeal remanded a second time with express

instructions to ascertain the delta between market price and contract price. *Id.* at 264. *Rice* establishes that MWD's proposed contract damages measure is the well-settled approach.

On remand, MWD is entitled to present a supplemental expert report on the difference between the WSR amounts MWD charged SDCWA under the Exchange Agreement, and the amount MWD could have lawfully charged SDCWA for its share of demand management costs. *See* Cal. Civ. Code § 3358 ("Except as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides."); *Guzman v. Super. Court*, 19 Cal. App. 4th 705, 707 (1993) (permitting designation of new expert on remand for reexamination of damages). Such a report is essential to prevent an unlawful windfall to SDCWA because MWD is statutorily obligated to recover its costs from member agencies, including SDCWA. *See* Wat. Code appen., § 109-134; *Mission Springs Water Dist. v. Verjil*, 218 Cal. App. 4th 892, 920-21 (2013). Nothing in the Court of Appeal opinion suggests otherwise. *Cf. COA Opinion*, 12 Cal. App. 5th at 1152, n.16 (nothing in the holding precludes inclusion of the WSR in MWD's full-service rate). MWD's proposed expert report will discuss one or more lawful alternate charges such as the reallocation of demand management costs to MWD's supply rates or a fixed charge.[2] *See, e.g., Rice*, 25 Cal. 2d at 261, 263 (on remand parties permitted to present competing market value theories); *SCI Cal. Funeral Servs., Inc. v. Five Bridges Found.*, 203 Cal. App. 4th 549, 566 (2012) (when market value not easily determined, court "may consider any valuation methodology that is just, equitable, and not inconsistent with California law").

At bottom, MWD's proposed supplemental expert opinion evidence is essential to meet MWD's statutory obligations, prevent an unlawful windfall to SDCWA, and inform this Court's "redetermination" of damages consistent with the Court of Appeal's remand instructions.

[2] SDCWA has repeatedly acknowledged that MWD may lawfully recover a portion of its demand management costs from SDCWA as part of MWD's supply rates or through a fixed charge. *See, e.g.*, AA_05412 (Deposition of Dennis Cushman, SDCWA person most knowledgeable, Vol. III), 425:14-426:9 (overcharges reallocated to supply); Reporter's Transcript, Vol. XXXIII, 2100:7-13 (Jan. 23, 2014) (SDCWA's Phase 1 closing argument: "Met doesn't have to recover these conservation costs by volumetric rates if it doesn't want to; that's their choice. And if they don't, they don't necessarily have to quantify benefits in terms of transportation versus supply. The Met Act gives them explicit statutory authority to impose a standby charge.").

II. "OFFSETTING BENEFITS" ARE OUTSIDE THE SCOPE OF REMAND.

A. SDCWA no longer claims damages for offsetting benefits.

SDCWA's opening brief resolves SDCWA's inconsistency on whether it seeks contract damages for offsetting benefits. Consistent with the Court of Appeal's direction, SDCWA concedes the only damages within the scope of the remand are those attributable to the WSR charges. SDCWA Opening Br., 12.

B. SDCWA's request for a writ based on offsetting benefits is beyond the scope of the remand.

1. The Court of Appeal's remand directions do not authorize this Court to issue a writ of mandate.

The Court of Appeal vacated the trial court's writ of mandate and did not direct this Court to enter a new writ. *COA Opinion*, 12 Cal. App. 5th at 1156. A new writ of mandate is not within the scope of the remand, regarding offsetting benefits or any other subject.[3]

2. SDCWA's contrary argument is not consistent with the Court of Appeal opinion.

Undeterred, SDCWA contends this Court should issue a writ compelling MWD to "calculate 'offsetting benefits' and remit to [SDCWA] the corresponding 'reasonable credit'" pursuant to Water Code Section 1811(c). SDCWA Opening Br., 23:5-6, 4:23-24, 19:23-27. Even if SDCWA's request was not barred (*see infra*), its argument is not "consistent with the views expressed in [the Court of Appeal's] opinion." Indeed, the opinion never even discusses offsetting benefits.

a. Nothing in the Court of Appeal opinion indicates offsetting benefits are available.

Most certainly, the Court of Appeal did not hold SDCWA is entitled to an offsetting

[3] SDCWA's requested writ concerning the WSR (SDCWA Opening Br., 18:26-19:4) is unwarranted. The Court of Appeal found that the administrative record did not support inclusion of the WSR in transportation rates and the wheeling rate for 2011-2014 only; there were no other findings of rate invalidity. There was no prospective finding about future years, nor could there have been because only the record for 2011-2014 was before the Court. This WSR ruling solely impacted the payments SDCWA made in 2011-2014 under the Exchange Agreement, because the agreement's price term was MWD's transportation rates including the WSR. That matter is completely addressed by the Court's finding of contract breach and its remand direction to redetermine contract damages due to WSR overcharges in 2011-2014. A retroactive writ about the WSR would be duplicative and unnecessary, and a prospective writ about the WSR would find no support in the Court's opinion, which rests on the record for 2011-2014.

benefits credit against the Exchange Agreement price term. "Offsetting benefits" were not appealed nor addressed in the opinion. Rather, the upshot of the opinion is that, for the years 2011-2014, the proper price under the Exchange Agreement was the System Access Rate plus the System Power Rate. The Court of Appeal did not hold the Exchange Agreement is a wheeling contract (it held the opposite); did not hold the wheeling statutes govern the Exchange Agreement; did not hold the Exchange Agreement requires MWD to charge "fair compensation" under the wheeling statutes; and did not hold the Exchange Agreement price violated the wheeling statutes. SDCWA's position is inconsistent with the Court of Appeal's opinion.[4]

b. The Court of Appeal found the Exchange Agreement is *not* a wheeling contract.

The Court of Appeal correctly held the Exchange Agreement is *not* a wheeling contract: "Metropolitan and [SDCWA] failed to reach a wheeling agreement but they did reach a functionally related water exchange agreement." *COA Opinion*, 12 Cal. App. 5th at 1135. "While functionally related, wheeling and exchange agreements are not the same."[5] *Id*. at 1136.

The wheeling statutes[6] do not prevent a system owner and a party from entering into an

[4] SDCWA incorrectly argues *California Trout v. Superior Court*, 218 Cal. App. 3d 187 (1990) gives this Court the power on remand to issue a writ compelling MWD to perform "ministerial functions" required by the Court of Appeal's opinion. SDCWA Opening Br., 4:17-24, 19:24-21:13. The *Trout* Court specifically directed the trial court to issue "appropriate writs" requiring the State Water Resources Control Board "to exercise its *ministerial* duty" under a statute to impose conditions on certain water appropriation permits. *California Trout*, 218 Cal. App. 3d at 194-195. The remand scope expressly included the power to issue a writ, which included the power "to fashion an ancillary judicial remedy" to enforce the writ. *Id*. at 203. Here, in contrast, the Court of Appeal did not find MWD failed to perform any ministerial duty, and did not direct this Court to issue a writ requiring MWD to do anything. In fact, the Court vacated the writ with no direction for a new writ. Thus, the remand scope does not include the power to issue any writ, much less relating to offsetting benefits, which the parties and the Court did not address.

[5] Indeed, SDCWA argued to the State Water Resources Control Board, and to both the trial and appellate courts in another case that the Exchange Agreement did "not trigger application of the Wheeling Statutes" because it did "not pertain to the forced use of unused capacity in" Metropolitan's conveyance system. *See* DTX-1143, 154; DTX-078, 20:5-6 (SDCWA argues "the MWD-SDCWA Exchange Agreement falls outside the scope of the Wheeling Law"), 21:4 (SDCWA argues "[t]he Wheeling Law does not apply to the MWD-SDCWA Exchange Agreement"), 22:11-12 (SDCWA argues "the parties' actions under the Exchange Agreement are governed by the contract between the parties and not limitations under the Wheeling Law"); *In re Quantification Settlement Agreement Cases*, 201 Cal. App. 4th 758, 838-40 (2012) ("*QSA Cases*"). SDCWA did so because it wanted to avoid the potential bar to the transaction of the economic and/or environmental impact. *See id.* at 839-42; *see also* Wat. Code § 1810(d).

[6] The wheeling statutes (Water Code §§ 1810-1814) "prohibit the owner of a water conveyance facility that has unused capacity . . . from denying a bona fide transferor of water the use of that

exchange transaction (which is not covered by the wheeling statutes) rather than a wheeling transaction. Among other terms and significant consideration, under the Exchange Agreement, SDCWA received committed capacity and assured consistent deliveries, benefits not available in a wheeling transaction. SDCWA also avoided an economic and/or environmental impact analysis that could have blocked the transaction altogether if the wheeling statutes applied. As to compensation, SDCWA received $235 million and 110 years of canal lining water. The consideration package was part of the larger, extensive QSA agreements. *COA Opinion*, 12 Cal. App. 5th at 1136-37; *QSA Cases*, 201 Cal. App. 5th at 788, 839-42; Water Code § 1810(d).

c. The Court of Appeal did not apply the wheeling statutes to the Exchange Agreement price.

The Exchange Agreement's price term—MWD's conveyance charges generally applicable to MWD's member agencies—means MWD's three transportation rates: the System Access Rate, System Power Rate, and WSR. *COA Opinion*, 12 Cal. App. 5th at 1139. A key dispute in the trial court and on appeal was whether the three transportation rates on which the Exchange Agreement price term is based were lawful conveyance charges and thus properly chargeable to SDCWA under the agreement. The Court of Appeal referred to these as the "exchange agreement transportation rates." *See, e.g.*, *id.* at 1511. This is different than MWD's wheeling rate, which is: the System Access Rate, actual power (or the party provides its own power), the WSR, and an administration fee. MWD Admin. Code § 4405. SDCWA also made a facial challenge to the wheeling rate as part of its Phase 1 rate challenge.

In addressing the WSR, the Court of Appeal first considered the inclusion of the WSR as part of MWD's pre-set wheeling rate under the wheeling statutes. *COA Opinion*, 12 Cal. App. 5th at 1150-51. This analysis is not relevant to the exchange agreement transportation rates. Next, the Court of Appeal looked at the inclusion of the WSR in both the wheeling rate *and in the "exchange agreement transportation rates"* under *the common law*. *Id.* at 1151. The Court held the WSR's inclusion in the wheeling rate and in the "exchange agreement transportation rates"

facility," provided that, among other conditions, unused capacity is available and fair compensation is paid for use of the system. *QSA Cases*, 201 Cal. App. 4th at 841 (emphasis omitted); *see also COA Opinion*, 12 Cal. App. 5th at 1135-36.

violated the common law. *Id.* at 1152.

Therefore, the sole basis for Exchange Agreement breach was that the inclusion of the WSR in the "exchange agreement transportation rates" violated the common law (and not the wheeling statutes). *Id.* at 1151-52. SDCWA's requested offsetting benefits writ under the wheeling statutes is not consistent with this holding.

3. A writ of mandate is not available for contract relief.

SDCWA insists that because the Court of Appeal held the price MWD charged under the Exchange Agreement in 2011-2014 included the WSR, "a peremptory mandate must also be awarded without delay" to include offsetting benefits. SDCWA Opening Br., 19:3-10, 19:28, 23:5-6. SDCWA contends, in effect, a writ must issue granting SDCWA further monetary relief for a separate breach of the Exchange Agreement which the Court did not address.

Aside from the fact a writ is beyond the scope of the remand and barred, the requested writ for contract relief is not available. *300 DeHaro St. Inv'rs v. Dept of Housing and Cmty. Dev.*, 161 Cal. App. 4th 1240, 1254-55 (2008) ("'As a general proposition, mandamus is not an appropriate remedy for enforcing a contractual obligation against a public entity.'"); *Wenzler v. Mun. Court of Pasadena Jud. Dist.*, 235 Cal. App. 2d 128, 132-33 (1965) (same; "mandamus is generally said not to be an appropriate remedy for recovering money" unless the remedy by civil action is inadequate).[7] SDCWA's recourse for monetary compensation under the Exchange Agreement was to file an action for breach of contract, which it did not do with respect to offsetting benefits. No writ can issue to provide this contract relief.[8]

[7] Two reasons justify this rule. First, "contracts are ordinarily enforceable by civil actions, and the writ of mandamus is not available unless the remedy by civil action is inadequate." *Wenzler*, 235 Cal. App. 2d at 132; *see also Coombs v. Smith*, 17 Cal. App. 2d 454, 455 (1936) ("the extraordinary remedy provided by a writ of *mandamus* will not be permitted where there is other relief afforded by law."). Second, the purpose of a writ of mandate is to enforce an officer or a board's duty under the law, not an entity's duty under a contract. *Wenzler*, 235 Cal. App. 2d at 132; *see also McPherson v. City of Los Angeles*, 8 Cal. 2d 748, 749 (1937) ("the office of the writ of mandate is to compel performance of an act specifically enjoined by law, . . . it does not lie to enforce the obligations of contract"); *Kings Cty. v. Johnson*, 104 Cal. 198, 201 (1894) (a writ of mandate "can only compel the performance of a duty enjoined by law").When a public entity (like a private party) fails to comply with a contract, the recourse is a breach of contract action. *300 Deharo*, 161 Cal. App. 4th at 1254-55; *Wenzler*, 235 Cal. App. 2d at 132-33.

[8] To the extent SDCWA seeks a writ to compel MWD to modify its pre-set wheeling rate to account for offsetting benefits (SDCWA Opening Br., 18:26-19:10), this is unjustified and superfluous. Such a writ is unjustified because the Court of Appeal did not find MWD's wheeling

C. SDCWA waived any claim to a credit for offsetting benefits and it is barred.

SDCWA's explanation for waiting until long after the conclusion of trial and the appeal to claim over $160 million in "offsetting benefits" is that it was an "alternative" to SDCWA's other claims against MWD. *See* SDCWA Opening Br., 21-22. SDCWA's explanation is incredible and erroneous. The nine-figure offsetting benefits claim was a *different and additive* claim that could have been pursued and was not. The claim has been waived and is barred by the law of the case doctrine.

1. SDCWA waived the claim.

After failing to plead offsetting benefits, SDCWA initially raised the matter during the Phase 1 trial as part of its rate challenge and then abandoned it at the time of the Statement of Decision and its appeal. These are dispositive waivers. *See Simmons v. Ware*, 213 Cal. App. 4th 1035, 1049 (2013) (petition defines the issues); *In re Marriage of Arceneaux*, 51 Cal. 3d 1130, 1133-34, 1138 & n.6 (1990) (party cannot raise on appeal issue on which it did not request statement of decision); *Baratt Am. Inc. v. Trans Ins. Co.*, 102 Cal. App. 4th 825, 839 (1997) (issue not presented on appeal cannot be raised on remand); *De Angeles v. Roos Bros., Inc.*, 244 Cal. App. 2d 434, 442-43 (1966) (issue strategically abandoned at trial is waived). No rate challenge writ is available for this abandoned issue.

In Phase 2 of the trial, SDCWA did not request contract damages or a credit for offsetting benefits, and sought only "$188,295,602 in damages, plus interest" based on cost allocation, which the trial court awarded in full. SDCWA's Post-Trial Brief for Phase 2, 40:23-24 (May 22, 2015). SDCWA did not request a contract credit for offsetting benefits until it filed its petitions for rehearing and review. *See* MWD Opening Br., 18; SDCWA Opening Br., 22 (acknowledging SDCWA "did not initially press the issue of offsetting benefits on appeal"). SDCWA waived any claim for a credit under the Exchange Agreement. *See* MWD Opening Br., 19-21.

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rate was unlawful for failing to account for offsetting benefits, a subject the parties did not brief and the Court of Appeal did not address. And the writ is superfluous because the resolution supporting the pre-set wheeling rate (quoted at page 7 of SDCWA's brief) specifically provides that the rate will be reduced "on a case-by-case basis in response to a particular wheeling transaction" to reflect offsetting benefits. SDCWA Opening Br., 7:12-14. (For more on MWD's pre-set wheeling rate, see MWD Opening Br., 2, 4, n.2, 15-16, n.12.)

SDCWA resists these conclusions on several grounds. None has merit.

First, SDCWA argues its damages case "followed directly from [the] Phase I rulings," which "invalidated Metropolitan's conveyance rates for improperly including SWP [State Water Project] and [WSR] costs." SDCWA Opening Br., 22:3-6. The suggestion seems to be that because the Court's Phase 1 ruling did not address offsetting benefits, SDCWA was prevented from claiming breach or seeking relief based on offsetting benefits in Phase 2. That is nonsense. The parties' expert reports on contract damages were due before the Phase 1 trial. SDCWA chose not to include offsetting benefits in its expert's report. *See* Expert Witness Decl. Regarding Daniel A. Denham, Ex. B (Calculation of Contractual Damages), 1-2 (Oct. 28, 2013) ("Denhman Decl."). After SDCWA first raised offsetting benefits—only as a rate challenge issue—during Phase 1, it failed to object to the trial court's exclusion of the issue from its Phase 1 tentative decision and did not include the exclusion from the Phase 1 final decision in its appeal. *See* Notice of Cross-Appeal; SDCWA's Responding and Opening Brief, 94-108; Cross-Appellant's Reply Brief, 1-39. In Phase 2, SDCWA sought contract damages based on the cost allocation in its expert report and nothing on offsetting benefits. Denham Decl., 1-2. SDCWA was free in the trial court: (1) to pursue offsetting benefits as part of its Phase 1 rate challenge—but raised and then abandoned it; and (2) to pursue monetary relief based on offsetting benefits under the Exchange Agreement, and it never did. Nothing about the trial court's rulings foreclosed a separate, additive claim for offsetting benefits. SDCWA's choice not to pursue offsetting benefits waived the claim.

Second, SDCWA claims it was "sensible" not to litigate offsetting benefits until the Court of Appeal identified what MWD's "conveyance system includes." SDCWA Opening Br., 22:22. This argument too is nonsense. SDCWA's offsetting benefits claim is not dependent on the definition of MWD's conveyance system. *See* SDCWA Opening Br., 22:23-23:6 (requesting credit calculated "in the same manner as such benefits are calculated for use in the [LRP]"). In any event, the resolution supporting MWD's pre-set wheeling rate already defined MWD's conveyance system in the same way the Court of Appeal ultimately defined it. *See* AR4228 (Res. 8520). Yet, SDCWA chose to never even plead in its petitions/complaints an alleged entitlement

to offsetting benefits. From the time it filed its initial petition/complaint in 2010 and throughout the litigation, SDCWA had all the information it needed to seek the credit. Having failed to do so, it waived the claim.

Third, SDCWA argues "[t]he party that prevailed at trial is not required to seek relief at trial, or on appeal, that its own victory made unnecessary, and therefore cannot be precluded, if its victory is partially overturned on appeal, from seeking appropriate relief on remand, consistent with the law of the case . . . ." SDCWA Opening Br., 21:19-22. SDCWA cites authority stating that, "having 'prevailed at the first trial,' a party 'may be assumed to have supposed she need not rely on' alternative arguments." *Id*. at 21:24-25 (citing *Brookhouser v. California*, 10 Cal. App. 4th 1665, 1682 (1992)). Offsetting benefits is not an "alternative" argument. If SDCWA believes there is a deficiency in MWD's pre-set wheeling rate based on the wheeling statutes' offsetting benefits provision, that is wholly separate from and not dependent on the other issues it chose to litigate. SDCWA claims it did not need to argue offsetting benefits to invalidate the wheeling rate, if it could invalidate that rate based on cost allocation. But an invalidation based on cost allocation would not solve any purported deficiency in the wheeling rate with respect to offsetting benefits. And, as to monetary relief under the Exchange Agreement, the over $160 million SDCWA belatedly contends is due in an offsetting benefits credit is wholly separate from the contract damages SDCWA did pursue. SDCWA waived any monetary compensation claim based on offsetting benefits.

2. Offsetting benefits are barred by the law of the case doctrine.

The parties have already litigated—and the Court of Appeal has already decided—the issue of whether MWD's 2011-2014 transportation rates and wheeling rate were lawful, and compensation due under the Exchange Agreement. *See COA Opinion*, 12 Cal. App. 5th at 1165-66. SDCWA had its chance to persuade the Court of Appeal that the wheeling rate was unlawful for failing to account for offsetting benefits, or to seek offsetting benefits under the Exchange Agreement. Indeed, SDCWA belatedly raised these very issues in its petitions for rehearing and review—unsuccessfully. *See* COA PFR, 38, 39-40. The Court of Appeal's holdings with respect to the transportation rates (which are also the Exchange Agreement charges) and the wheeling

rate, are now the law of the case. Those holdings leave no room for SDCWA to continue arguing that the wheeling rate is unlawful for any other reason, or that additional monetary compensation is owed under the Exchange Agreement. *Kowis*, 3 Cal. 4th at 892-93; *Estate of Horman*, 5 Cal. 3d 62, 73 (1971).

III. SDCWA'S REQUESTED RSI RELIEF IS OUTSIDE THE SCOPE OF REMAND.

Although the Court of Appeal remanded for "entry of declaratory relief on the Rate Structure Integrity clause," (*COA Opinion*, 12 Cal. App. 5th at 1166), SDCWA contends for the first time in its opening brief that the Court should award it restitution in the amount of $25,928,537. SDCWA's argument fails for four reasons:

First, SDCWA concedes it never pleaded any request for restitution, arguing instead that it is entitled to *unpleaded* restitution following the Court of Appeal's reversal based on an unlawful detainer case, *Beach Break Equities, LLC v. Lowell*, 6 Cal. App. 5th 847 (2016). Under *Beach Break*, however, a successful appellant may be entitled to unpleaded restitution where necessary to make whole "[a] person whose property *has been taken under a judgment*" that has been reversed or set aside (*id.* at 852-53); nothing in *Beach Break* suggests that a plaintiff may seek unpleaded restitution simply because a reviewing court reverses an adverse judgment on its claim as originally pleaded. In other words, the *Beach Break* rule provides for unpleaded restitutionary relief only where the erroneous judgment itself caused the harm to be redressed. *See, e.g.*, *id.* at 852 ("The fundamental rule guiding the court in [such] proceeding[s] [i]s, so far as possible, to place the parties in as favorable position as they could have been in *had the judgments not been enforced pending appeal*." (quotations and citations omitted; emphasis added)).[9]

[9] *See also id.* at 854 ("right of the defendant to restoration of benefits *lost by virtue of the erroneous judgment*" upon reversal); *id.* at 855 ("The existence of the power to restore benefits after reversal flows from the rule that upon reversal the action *is as though it had never been tried*, and the court will, where justice requires it, place the parties as nearly as may be in the condition in which they stood previously" (quotations and citations omitted); *accord* Code Civ. Proc. § 908 ("When the judgment or order is reversed or modified, the reviewing court may direct that the parties be returned so far as possible *to the positions they occupied before the enforcement of or execution on the judgment or order.* In doing so, the reviewing court may order restitution on reasonable terms and conditions *of all property and rights lost by the erroneous judgment or order*, so far as such restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored."

Thus, in *Beach Break*, where the plaintiff evicted the defendant based on and pending an appeal of an erroneous summary adjudication of possession in the trial court, the Court of Appeal held (specifically in the context of unlawful detainer litigation) that the defendant was entitled to seek restitution even though he had no pending claim for restitution (and, in fact, had pleaded no claims at all) because he had been evicted as a result of the erroneous judgment that had been reversed.[10] Here, there are no such consequences of the Court's summary adjudication of SDCWA's RSI cause of action; upon reversal, the parties are in the same position as they were before the Court entered judgment. Indeed, the Court of Appeal's remand for "entry of declaratory relief on the Rate Structure Integrity clause," (*COA Opinion*, 12 Cal. App. 5th at 1166), provides SDCWA with the precise relief it sought in its cross-motion for summary adjudication of its entire RSI cause of action below. *See* MWD Opening Br., 23-25.[11] There is no basis for allowing SDCWA to pursue unpleaded restitutionary relief under *Beach Break*.

Second, apparently recognizing that the Court should find *Beach Break* is not applicable, SDCWA argues that "even if the Court were to decide that the rule in *Beach Break* does not apply here . . . a similar yet independent rule provides that where . . . 'through no fault of the plaintiff, specific performance cannot be decreed, the court having obtained jurisdiction of the subject matter, properly within its cognizance, may grant monetary relief'" instead, relying on *Engasser v. Jones*, 88 Cal. App. 2d 171 (1948), *Crouser v. Boice*, 51 Cal. App. 2d 198 (1942), and *Kessloff*

(emphasis added)).

[10] Although the *Beach Break* Court found it was not an essential prerequisite, the appellate division of the superior court, in reversing the erroneous summary adjudication of possession in that case, explicitly remanded the matter "for further proceedings consistent with its opinion, 'including appropriate restitution hearings and orders to restore [the defendant tenant] so far as possible to the position [he] occupied before the enforcement or execution of the judgment.'" 6 Cal. App. 5th at 851 (internal quotations omitted). Here, of course, the Court of Appeal merely remanded for "entry of declaratory relief on the [RSI] clause" and made no reference at all to restitution, in sharp contrast to *Beach Break*. *COA Opinion*, 12 Cal. App. 5th at 1166.

[11] The time between 2011 and 2018 does not constitute harm arising from the trial court's summary adjudication ruling that could warrant unpleaded restitution on remand. Even if the trial court had held in favor of SDCWA on its motion, all SDCWA asked for was a declaration of invalidity and for MWD to not enforce RSI. The court would not have entered judgment until 2015, and restitution would not have been part of that judgment. If MWD had appealed, restitution still would not have been at issue. The passage of time is simply a continuation of the status quo under SDCWA's chosen declaratory relief claim, not harm arising from an erroneous judgment. Moreover, SDCWA never pled restitutionary relief despite amending its pleading a number of times. *Compare, e.g.*, First Am. Compl. (filed Oct. 27, 2011 and first alleging RSI cause of action), *with* Third Am. Compl. (filed Jan. 23, 2013).

v. Pearson 37 Cal. 2d 609 (1951). None of these cases assists SDCWA. In both *Engasser* and *Crouser*, the plaintiff—unlike SDCWA—had prayed for restitution in the event specific performance was unavailable. *Engasser*, 88 Cal. App. 2d at 173; *Crouser*, 51 Cal. App. 2d at 202.

And, although SDCWA claims *Kessloff* holds that a "plaintiff may obtain an accounting and a money judgment on a declaratory-relief claim," the plaintiff in *Kessloff* had sought an accounting of his employer's earnings and expenses and a determination of the net earnings and amounts due to him under the contract in the complaint, (39 Cal. 2d at 611, 613 ("[T]he complaint in any event states a cause of action against the defendants for an accounting pursuant to the alleged contract and for a money judgment.")), making *Kessloff* completely distinguishable from this case where SDCWA sought *only* declaratory relief, which it subsequently narrowed to a request for a declaration that the RSI provision is invalid and unenforceable. *See* MWD Opening Br., 23-25.

Moreover, all of these cases involved contracts that were found to have been *breached*; the issue in SDCWA's RSI cause of action is not whether any contract was breached but whether a contractual provision was enforceable (SDCWA having chosen not to plead breach). Thus, it makes sense that SDCWA (unlike the plaintiffs in these cases) did not pray for restitution or monetary relief, and it should not be heard to do so now.[12]

Finally, as detailed in MWD's opening brief, SDCWA has waived any restitution claim in this case by failing to plead or pursue it; and under the law of the case doctrine, the complete relief available on the RSI cause of action is that which SDCWA requested and the Court of Appeal ordered: a declaration that the RSI clause is invalid and unenforceable. SDCWA's new request in its opening brief for $25,928,537 in restitution—which it suggests this Court should simply award now without further proceedings (*see* SDCWA Opening Br., 15, n.8)—was never

[12] None of the cases cited by SDCWA involved claims against government entities subject to the Government Claims Act and certainly none suggest that a post-remand claim that restitution is now more appropriate than the previously-requested declaratory can effect an end-run around the Government Claims Act's claim requirements or the statute of limitations. To the contrary, the law is clear that equity cannot correct such defects. *See, e.g.*, *City of Stockton v. Super. Court*, 42 Cal. 4th 730, 743 (2007) (claim for restitution subject to Claims Act claim requirements); MWD Opening Br., 26, n.14.

pled, litigated, or addressed by the trial or appellate courts in this case. It cannot be raised now.[13]

IV. CONCLUSION

The Court of Appeal issued narrow remand instructions limited to three issues, which do not include those SDCWA seeks to present.

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MANATT, PHELPS & PHILLIPS, LLP

By: */s/ Phillip R. Kaplan*
Phillip R. Kaplan
Attorneys for Respondent and Defendant
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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[13] The numerous reasons why SDCWA's offsetting benefits and restitution claims fail on the merits, and factual misrepresentations throughout SDCWA's brief, are beyond the scope of this briefing on the remand's parameters. But it bears mentioning how deeply flawed SDCWA's new $25,928,537 theory is: it rests on a recoupment of WSR payments in the full-service rate, which the Court of Appeal expressly did not invalidate (*COA Opinion*, 12 Cal. App. 5th at 1152, n.16); invents a dollar-for-dollar approach that contradicts SDCWA's own positions in the past and currently; and ignores the significant demand management funding that SDCWA and its service area have received through the present, as among the highest recipients of such funding.