KEKER, VAN NEST & PETERS LLP
JOHN KEKER - # 49092
jkeker@keker.com
DANIEL PURCELL - # 191424
dpurcell@keker.com
DAN JACKSON - # 216091
djackson@keker.com
WARREN A. BRAUNIG - # 243884
wbraunig@keker.com
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

MARK J. HATTAM - # 173667
mhattam@sdcwa.org
General Counsel
SAN DIEGO COUNTY WATER AUTHORITY
4677 Overland Avenue
San Diego, CA 92123
Telephone: (858) 522-6600
Facsimile: (858) 522-6566

Attorneys for Petitioner and Plaintiff
SAN DIEGO COUNTY WATER AUTHORITY

EXEMPT FROM FILING FEES
[GOVERNMENT CODE § 6103]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY,

Petitioner and Plaintiff,

v.

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 2011; and DOES 1-10,

Respondents and Defendants.

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

SAN DIEGO COUNTY WATER AUTHORITY'S RESPONSIVE BRIEF ON THE SCOPE OF THE REMAND

Date: July 18, 2018
Time: 10:30 a.m.
Dept.: 305
Judge: Hon. Mary E. Wiss

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. INTRODUCTION

Metropolitan's opening brief on the scope of the remand misapplies the law of the case doctrine, and egregiously misstates the law of this case. The law of the case doctrine promotes finality by preventing relitigation of issues already decided. It does not apply to points of law that might have been, but were not, decided in the prior appeal; but it does extend to questions that were implicitly determined because they were essential to the prior decision. (See, e.g., *Sargon Enterprises, Inc. v. University of Southern California* (2013) 215 Cal.App.4th 1495, 1505.) As the Water Authority explained in its opening brief and explains further below, Metropolitan wrongly seeks to relitigate issues that were already decided, whereas the Water Authority rightly seeks to obtain ***initial*** decisions from this Court on issues that have ***not*** been decided yet—neither by the Court of Appeal nor the trial court, and neither explicitly nor implicitly.[1]

II. ARGUMENT

A. The Court must award $28,678,191 in WSR damages, plus 10% interest.[2]

As the Water Authority explained in its opening brief, this Court's task on remand with regard to damages is simple: award the Water Authority $28,678,191, plus interest. This is the amount of "the overcharges attributable to the unlawful inclusion of the water stewardship rate," for 2011 to 2014—as already proven at trial, decided by Judge Curtis E.A. Karnow, and sustained on appeal. (See 12 Cal.App.5th at p. 1154.) Indeed, Judge Karnow not only awarded this exact

[1] These briefs address issues the parties contend this Court should hold further proceedings to decide; they do not address everything that has already been decided and must be included in the final validation judgment and writ of mandate. For example, the Water Authority is indisputably entitled to judgment on the issue of preferential rights. (See *SDCWA v. Metropolitan* (2017) 12 Cal.App.5th 1124, 1155–1156.) Similarly, it is undisputed that the judgment must declare Metropolitan's so-called "Rate Structure Integrity," or "RSI," clause "invalid and unenforceable." (*Id.* at p. 1164). If this Court declines to order equitable monetary restitution for Metropolitan's enforcement of that unconstitutional provision, the Court should at least declare the Water Authority's restored eligibility for all benefits it has been wrongfully denied since Metropolitan first imposed this punitive measure on the Water Authority, on June 23, 2011, so that the Water Authority may apply retroactively for those benefits. The writ, moreover, must prohibit Metropolitan from charging its water stewardship rate ("WSR") as "a component of the wheeling rate and exchange agreement transportation rates," because doing so violates the wheeling statutes and the common law. (*Id.* at pp. 1150–1152.) The Water Authority assumes all such matters will be addressed in subsequent briefs about the form of the final judgment and writ.

[2] Although Metropolitan seeks to relitigate other issues it lost on appeal, as discussed below, it apparently does not dispute that the Court of Appeal affirmed Judge Karnow's ruling that the Water Authority is entitled to 10% prejudgment interest. (See 12 Cal.App.5th at pp. 1154–1155.)

amount in WSR damages, but also expressly found that Metropolitan waived its arguments to the contrary. On appeal, Metropolitan tried to revive its waived and meritless challenges to the amount of damages Judge Karnow awarded. But, aside from agreeing with Metropolitan that State Water Project ("SWP") costs should be subtracted from the prior award—the ***only*** issue the Court of Appeal decided in Metropolitan's favor—the court rejected all of Metropolitan's arguments: "***none is persuasive***." (*Ibid.*, emphasis added.)

At trial, the Water Authority proved that the amount of "overcharges on the water stewardship rate," from 2011 to 2014, is "$28,678,191." (Tr. 2510:26-28.)[3] Judge Karnow found that this is "a reasonable computation," and that Metropolitan "did not offer a competing computation." (SOD II at p. 18.) Indeed, when Judge Karnow asked whether Metropolitan intended to present a competing computation, including any offset, Metropolitan's trial counsel replied, "***Not my problem***." (Tr. 3291:13, emphasis added.) As Judge Karnow warned Metropolitan and ultimately held, however, it ***was*** Metropolitan's burden to prove any offset at trial. (See SOD II at p. 17, fn. 24.) Thus, Judge Karnow awarded the Water Authority exactly the amount of WSR damages it proved: $28,678,191. (See *id.* at p. 18; Tr. 2510:25-28; PTX-471.)

Metropolitan moved for a new trial, belatedly seeking an offset, and arguing that the damages award—including the WSR portion of the award—"exceeds the detriment caused by the alleged breach and gives SDCWA more compensation than it would have received by full performance of the Exchange Agreement." (New Trial Mot. at pp. 15–17.) These are precisely the same arguments that Metropolitan now proposes to relitigate on remand. (See Metropolitan's Opening Brief ("MOB") at pp. 8–13.) But Judge Karnow found these same arguments "***plainly waived***." (Dec. 23, 2015 Order at p. 8, emphasis added.) Metropolitan "refused to present a damages calculation or methodology because it hoped that its reasoning would actually lead to a dismissal," and then reversed its position after losing at trial, seeking "to retry the case." (*Ibid.*)

[3] This is Metropolitan's WSR per acre-foot (AF) for each of the four years at issue, multiplied by the volume of Exchange Agreement water for those years. In 2011, the WSR was $41/AF, on 143,242.90 AF, totaling $5,872,958.90. For 2012, the numbers are: $43/AF x 186,861 AF = $8,035,023; for 2013: $41/AF x 180,256 AF = $7,390,496; for 2014: $41/AF x 179,993 AF = $7,379,713. The total is $28,678,191. (See Tr. 2495:1–2511:3; PTX-471; PTX-506–512.)

Allowing a retrial "would create exactly the wrong incentives." (*Ibid.*) That is still true now.

Indeed, Metropolitan itself emphasizes that "***issues abandoned at trial as a matter of strategy are waived***" on remand. (MOB at p. 19, citing *De Angeles v. Roos Bros., Inc.* (1966) 244 Cal.App.2d 434, 442–443, emphasis added.) In *De Angeles*, the court stated that it "would be hard pressed to imagine a more emphatic and complete waiver of the issue of mitigation" of damages, because the defendants there not only failed to introduce any evidence to prove such an offset, their attorney "flatly stated" that the defendants purposely refrained from introducing such evidence. (244 Cal.App.2d at p. 442.) "It is one thing to allow a litigant on appeal to reopen a simple factual matter subject to easy computation where it is inadvertently omitted below," but "quite another matter to extricate a litigant who, as a matter of strategy and purely for his own advantage, has chosen to abandon a material issue at the trial level." (*Ibid.*)

Metropolitan's waiver was at least as "emphatic and complete." (*Ibid.*) Judge Karnow gave Metropolitan every opportunity to present its damages theories at trial, but Metropolitan refused, not because of inadvertence or mistake, but based on its deliberate trial strategy, as Judge Karnow explicitly found. (Dec. 23, 2015 Order at p. 7.) Where, as here, such a strategy "results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error." (*Ibid.*, quoting *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.) As in *De Angeles*, it is "not in the interest of justice to allow appellants to play fast and loose with the decisional process by now granting a second trial on the issue of damages." (244 Cal.App.2d at p. 443.) To permit such a "change in the theory of a defense to a suit for damages based upon the breach of a written contract, after an unfavorable reversal of a judgment on appeal, would create a dangerous precedent which might encourage deception and injustice." (*Dressler v. Johnston* (1933) 131 Cal.App. 690, 697.)

In any case, Metropolitan's damages arguments are not only waived, but prohibited by the law of the case. On appeal, Metropolitan argued that Judge Karnow erred by refusing to reopen damages discovery and refusing to grant a damages retrial. (See Appellant's Opening Brief ("AOB") at pp. 114–130; Appellant's Reply Brief ("ARB") at pp. 100–114.) But the Court of Appeal rejected Metropolitan's arguments. As the Court of Appeal held, because "the price

Metropolitan charged the Water Authority for wheeling was based on an unlawful rate," Metropolitan breached the Exchange Agreement. (12 Cal.App.5th at p. 1154.) "Since the water stewardship rate was unlawfully charged for the conveyance of water," the Water Authority is "entitled to recover damages" for "the overcharges attributable to the unlawful inclusion of the water stewardship rate." (*Ibid.*) The Court of Appeal further held that "Metropolitan has made several assertions on appeal denying an enforceable contract and actionable breach but none is persuasive." (*Ibid.*) Those arguments included Metropolitan's challenges to the established amount of unlawful WSR overcharges, which Metropolitan now proposes to relitigate on remand. (Compare MOB at pp. 8–13, with AOB at pp. 114–130, and ARB at pp. 100–114.) Because Metropolitan's arguments failed on appeal, however, they ***cannot*** be relitigated on remand. (See, e.g., *Sargon*, *supra*, 215 Cal.App.4th at pp. 1505–1506.)

Indeed, Metropolitan concedes that where, as here, the Court of Appeal remands "with directions to determine damages in accordance with the rules set forth in its opinion and to enter judgment for the plaintiff, the trial court is bound by the directions given and has no authority to retry any other issue or to make any other findings." (MOB at p. 15, quoting *Rice v. Schmid* (1944) 25 Cal.2d 259, 263.) "Any proceedings had or judgment rendered contrary to such specific directions would be void." (*Ibid.*, quoting *Carter v. Superior Court* (1950) 96 Cal.App.2d 388, 391.) In *Carter*, for example, the case had been remanded for the trial court to determine damages for the plaintiff, but the trial court allowed the defendant to pursue claims for an offset. That was error because the remand did not mention any offset, and there was "no reason to doubt that the court intended to confine further proceedings in the trial court" to the plaintiff's damages, as opposed to the defendant's offset. (96 Cal.App.2d at p. 392.) The same is true here *a fortiori*. Whereas the offset issue in *Carter* was "entirely foreign to the issues that had been litigated and which were under review on appeal" (*ibid.*), Metropolitan explicitly raised on appeal the offset issue it now seeks to relitigate on remand, and expressly sought a retrial and further discovery, but the Court of Appeal rejected all of Metropolitan's arguments. Thus, the damages discovery and retrial Metropolitan seeks now "would be void." (*Id.* at p. 391.)[4]

[4] Unlike Metropolitan, the Water Authority does not seek to relitigate or retry damages, nor does

Metropolitan tries to evade the terms of the remand by misstating it, asserting that the Court of Appeal granted "the relief requested by" Metropolitan—namely, a "remand for a retrial on damages." (MOB at p. 11, quoting AOB at p. 119, fn. 28.) But that is false. Instead of remanding "for a retrial on damages," as Metropolitan requested (*ibid.*), the Court of Appeal remanded "for recalculation of damages" limited to the WSR overcharges plus interest—*i.e.*, subtracting the SWP charges from the prior damages award. (12 Cal.App.5th at p. 1166.) Contrary to Metropolitan's unsupported assertions, that was ***not*** a remand for a "retrial." For example, in *Frankel v. Four Star International, Inc.* (1980) 104 Cal.App.3d 897, 902, the court held that "redetermination of the amount of the award" meant redetermination "from the evidence previously introduced." Like Metropolitan, the defendant in *Frankel* had moved to reopen the case "for the purpose of introducing additional evidence on the issue of mitigation of damages," but the appellate court upheld the trial court's denial of that motion. (*Id.* at p. 903.) "This holding made clear that the evidence presented at the first trial on the issue of damages was full and complete," and that the remand to redetermine damages was ***not*** a remand for "a retrial on the issue of breach-of-contract damages." (*Ibid.*) Similarly, in *South Bay Senior Housing Corp. v. City of Hawthorne* (1997) 56 Cal.App.4th 1231, 1237, the court explicitly distinguished between recalculation and retrial, remanding "with directions to recalculate the amount of damages, if possible," and to conduct a retrial ***only*** to the extent recalculation was ***not*** possible. And in *Sanchez v. Brooke* (2012) 204 Cal.App.4th 126, 143, the court made clear that "recalculation of damages" did not require a retrial, but only "a limited hearing." By contrast, when the Court of Appeal intends to remand for a retrial on damages, it says so explicitly—especially where, as here, the appellant moved in the trial court for a retrial, and then argued for a retrial on appeal.

---

it seek to reopen discovery on that or any other issue. As discussed below, the Water Authority does not seek additional damages, but a writ of mandate that Metropolitan must comply with its statutory duty to determine the reasonable credit for offsetting benefits, and equitable restitution for the enforcement of the unconstitutional RSI clause. Those issues are well within the scope of the remand, whereas Metropolitan's proposal to reopen discovery and retry damages is not. Also, Metropolitan's offset theory depends on the purported "legality of the water stewardship fee as a component of Metropolitan's full-service water rate," a question the Court of Appeal declined to decide. (12 Cal.App.5th at p. 1152, fn. 16.) This further shows that the Court of Appeal did not intend to resuscitate Metropolitan's waived and meritless offset theory; if that had been the court's intent, it would have decided that legality issue, which is the *sine qua non* of any offset.

(See, e.g., *Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 857; *Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 780.)

Metropolitan further misstates the record in arguing that the "Court of Appeal was aware of the component of damages attributable to the WSR, but declined SDCWA's invitation to affirm the damages figure attributable to the WSR, and instead remanded for a 'redetermination of damages.'" (MOB at pp. 10–11, citation omitted.) In fact, the Water Authority did ***not*** separately identify the amount of WSR damages on appeal, because the Water Authority "asked the Court of Appeal simply to affirm the [entire] damages award." (*Id.* at p. 10.) Nor is there any basis for Metropolitan's assertion that the Court of Appeal was "aware of the damages figure attributable to the WSR." (*Ibid.*) Metropolitan cites footnote 9 of the appellate opinion for that proposition, but that footnote only states the WSR for 2011, and does not state the volume of water delivered under the Exchange Agreement in that or any other year. (See 12 Cal.App.5th at p. 1141, fn. 9.) To calculate damages, one must know the WSR for each of the four years at issue, and the volume of water delivered under the Exchange Agreement in those years. (See PTX-471.) As explained above, the Water Authority presented that calculation at trial, and Judge Karnow decided that the Water Authority proved WSR damages of $28,678,191, plus 10 percent prejudgment interest. (See *ibid.*; SOD II at p. 18; Oct. 9, 2015 Order.) Because that amount was not identified for the Court of Appeal, however, it remanded for this Court to redetermine damages and recalculate 10 percent interest based on the proven WSR overcharges. (See 12 Cal.App.5th at pp. 1154–1155.) Metropolitan argues that if the Court of Appeal had not intended a retrial "its remand instruction would have so stated" (MOB at p. 10), but the opposite is true. If the court had agreed with any of Metropolitan's arguments for reopening discovery and retrying the case, it would have said so. Instead, it remanded for a "redetermination," which, as in *Frankel*, is limited to "the evidence presented at the first trial." (104 Cal.App.3d at pp. 902–903.)

Nevertheless, Metropolitan seeks to reopen discovery to relitigate whether the Water Authority is entitled to "any" damages. (MOB at p. 8.) But that is plainly barred by the remand and the law of the case that the "Water Authority is entitled to recover damages." (12 Cal.App.5th at p. 1154.) Moreover, any discovery in pursuit of Metropolitan's attempt to reduce

damages below $28,678,191, plus interest, is also barred, because that is the amount of "overcharges attributable to the unlawful inclusion" of the WSR in Metropolitan's charges "for the conveyance of water" pursuant to the Exchange Agreement—which, as discussed above, was proved and decided at trial, and sustained on appeal. (*Ibid.*; see also SOD II at p. 18; PTX-471.)

None of Metropolitan's cases support its contention that discovery may be reopened. In *Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 247, and *Hirano v. Hirano* (2007) 158 Cal.App.4th 1, 8, discovery was reopened automatically because those cases were remanded ***for trial***. And in *Guzman v. Superior Court* (1993) 19 Cal.App.4th 705, 707, the trial court itself granted "a new damages trial." Here, as already discussed, the trial court denied Metropolitan's motions to reopen discovery and for a new trial, and the Court of Appeal rejected Metropolitan's challenges to those rulings. This Court, therefore, must likewise deny Metropolitan's requests to reopen discovery and retry damages. (See, e.g., *Frankel*, *supra*, 104 Cal.App.3d at p. 903.)

B. The Court must issue a new writ, and should direct Metropolitan to determine the "reasonable credit" required by Water Code § 1811(c).

As the Water Authority explained in its opening brief, this Court is required by statute to issue a "peremptory mandate . . . without delay." (Code Civ. Proc., § 1095; see also Oct. 30, 2015 Order at pp. 1–2 ["[B]ecause the underlying action was for writ of mandate, and because judgment [must be] entered in [the Water Authority's] favor, a peremptory writ of mandate, too, should now issue."].) Metropolitan does not seem to dispute this—nor can it reasonably do so, given that it conceded the point before Judge Karnow. (See Tr. 3331:25–3332:8.) Yet Metropolitan repeatedly and mistakenly contends that "the Court of Appeal held the wheeling rate was lawful, except to the extent it included the WSR in the years 2011-2014." (MOB at pp. 18, 22.) The Court of Appeal held no such thing. On the contrary, it held that Metropolitan's wheeling rate is ***unlawful***—not just for 2011 to 2014, but ever since, and for as long as it still includes the WSR, or any other such charge to fund "payments to its members to encourage water conservation," because such charges are "***outside the scope of recoverable costs contemplated by the wheeling statutes***," and their "***inclusion as a component of the wheeling rate and exchange agreement transportation rates is also unlawful under the common law***." (12 Cal.App.5th at

pp. 1150–1152, emphases added.) Until Metropolitan's conveyance rates exclude all such charges, those rates will remain unlawful under the law of this case. (See *ibid.*) Accordingly, a "peremptory mandate" must issue "without delay," commanding Metropolitan to cure its violations of the Wheeling Statutes and the common law. (See *ibid.*; Code Civ. Proc., § 1095.)

Metropolitan continues to try to evade its duties under the Wheeling Statutes and the law of this case by repeatedly asserting that the Court of Appeal "held that the amended Exchange Agreement is not a wheeling agreement." (MOB at p. 5; see also *id.* at pp. 2–4.) But that is ***not*** the court's holding. The court *noted* that "wheeling and exchange agreements are not the same," but nonetheless agreed with Judge Karnow in ***holding*** that the legality of ***all*** of the conveyance rates at issue—not just the wheeling rate, but specifically including all of the rates Metropolitan charges under the Exchange Agreement, is "***determined under the wheeling statutes***." (12 Cal.App.5th at pp. 1136, 1144, emphasis added.) Metropolitan agreed to charge "standard water rates, lawfully set." (*Id.* at p. 1136.) With regard to SWP costs, the court expressly relied on the Wheeling Statutes in holding that, because "these costs are incurred by Metropolitan, so too must they be recovered." (*Id.* at p. 1147, citing Wat. Code, § 1811, subd. (c).) And, with regard to the WSR, the court expressly relied on the same statutory provision in holding that Metropolitan's "payments to its members to encourage water conservation is outside the scope of recoverable costs contemplated by the wheeling statutes." (*Id.* at p. 1150.) The court explicitly affirmed Judge Karnow's ruling that "to the extent that the price Metropolitan charged the Water Authority for ***wheeling*** was based on an unlawful rate, there was a breach of the amended exchange agreement." (*Id.* at p. 1154, emphasis added.) "That construction of the contract has been adjudicated and becomes the law of this case." (*Dressler*, *supra*, 131 Cal.App. at pp. 695–696.)

It is remarkable that Metropolitan, in its attempt to avoid its statutory duty to determine the reasonable credit for offsetting benefits, would contend to this Court that it need not comply with the statutory requirements for "fair compensation" in Water Code section 1811, subdivision (c). The appellate opinion is expressly predicated on precisely that section and subdivision of the Wheeling Statutes, citing and applying it no less than ***six times***, including in the part of its opinion holding that "fair compensation" may include Metropolitan's SWP costs—the one issue

on which Metropolitan prevailed on appeal. (See 12 Cal.App.5th at pp. 1144, 1147, 1150, 1151.) Metropolitan violates not only the law of this case but basic principles of responsible advocacy by continuing to argue that this statutory provision does not apply. In particular, Metropolitan persists in offering its revisionist history of the Exchange Agreement and the consideration the Water Authority purportedly received, and relying on self-serving language Metropolitan put into its administrative code. (See MOB at pp. 3–5, 15–16, fn. 12.) But Judge Karnow and the Court of Appeal rejected Metropolitan's contentions about those topics because "***none is persuasive***." (12 Cal.App.5th at p. 1154, emphasis added; cf. AOB at pp. 114–130; ARB at pp. 100–114; see also SOD II at pp. 5–25; Water Authority's Phase II Post-Trial Brief at pp. 11–19; Water Authority's Responding and Opening Brief on Appeal at pp. 31–33, 75–82.) Metropolitan's intransigence violates the law of this case, and this Court should put an end to it.

The writ of mandate must order Metropolitan to comply with its statutory duty to charge only lawful conveyance rates limited to "fair compensation," which, under the law of this case, must exclude the WSR. (12 Cal.App.5th at pp. 1150–1152, 1154.) "Fair compensation" also must include "reasonable credit for any offsetting benefits for the use of the conveyance system." (*Id.* at p. 1144, quoting Wat. Code, § 1811, subd. (c).) Metropolitan must determine that "reasonable credit" in a timely and "reasonable manner consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange of water." (Wat. Code, §§ 1810–1813.) On remand, this Court certainly has the jurisdiction—and, indeed, the duty—to mandate Metropolitan's compliance with its statutory obligations. (See *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 201–213.) This is particularly imperative given Metropolitan's refusal to acknowledge the law of this case regarding "fair compensation," and its clear intent to persist in its "ongoing violation of [that] statutory mandate." (See *id.* at p. 203.)

Metropolitan's argument to the contrary relies, first, on the *Rice* and *Carter* cases. (See MOB at p. 15.) But those cases are only relevant to the judgment for ***damages***. As already discussed, it is Metropolitan, not the Water Authority, that seeks to "retry" damages contrary to the Court of Appeal's "specific directions." (*Rice*, *supra*, 25 Cal.2d at p. 263; *Carter*, 96 Cal.App.2d at p. 391.) The relief the Water Authority seeks with regard to the "reasonable credit

for any offsetting benefits" is ***not*** damages. Instead, the Water Authority simply asks this Court to mandate that Metropolitan must itself act to determine that credit in the first instance. That writ relief—like the equitable RSI relief the Water Authority seeks, as discussed below, but ***unlike*** Metropolitan's improper request to reopen discovery and retry damages—is fully consistent with entry of a judgment for damages consisting of "the overcharges attributable to the unlawful inclusion of the water stewardship rate." (12 Cal.App.5th at p. 1154.)

With regard to the writ, the relevant language from the appellate disposition is not the remand for recalculation of damages, but the remand for "other proceedings consistent with the views expressed in [the] opinion." (*Id.* at p. 1166.) That returns jurisdiction to this Court to grant the requested relief and to "close the whole controversy." (*Raun v. Reynolds* (1860) 15 Cal. 459, 472; see also, e.g., *Pillsbury v. Superior Court* (1937) 8 Cal.2d 469, 471–472; *California Trout, supra*, 218 Cal.App.3d at pp. 201–213.) This Court is bound by the law of the case, of course, but that "does not apply to points of law that might have been determined, but were not decided in the prior appeal." (*Sargon, supra,* 215 Cal.App.4th at p. 1505.) The Court of Appeal did not decide in the prior appeal whether this Court should issue a writ mandating Metropolitan's compliance with its statutory duty to determine the reasonable credit for offsetting benefits. But what it did decide, *i.e.*, that the wheeling law applies, fully supports the Water Authority's request for a writ consistent with the appellate opinion. That opinion certainly does not preclude the requested writ, as Metropolitan wrongly contends. On the contrary, the Court of Appeal not only held that Metropolitan's charges under the Exchange Agreement must comply with the statutory definition of "fair compensation," but also stated that this requires "reasonable credit for any offsetting benefits for the use of the conveyance system." (12 Cal.App.5th at p. 1144, quoting Wat. Code, § 1811, subd. (c).) That specific requirement is not mentioned in the remittitur, but that does not deprive this Court of the jurisdiction to issue the requested writ, which is entirely consistent with the appellate opinion. Indeed, as in *California Trout*, this Court not only has the jurisdiction but the obligation to mandate compliance with statutory obligations, including in ways not explicitly spelled out in the remittitur. (See 218 Cal.App.3d at pp. 201–213 & fn. 2.)

Metropolitan contends that its contrary position "is confirmed by the Court of Appeal's

treatment of SDCWA's petition for rehearing" (MOB at p. 18), but a decision not to rehear the appeal does not in any way diminish this Court's power and duty to prohibit "the ongoing violation of a statutory mandate." (*California Trout, supra*, 218 Cal.App.3d at p. 203.) "Nor is the claim tenable that" the remittitur, which expressly allows for other proceedings consistent with the views expressed in the Court of Appeal's opinion, somehow "tied the hands" of this Court regarding appropriate writ relief. (See *id.* at p. 202, fn. 2.) Metropolitan's reliance on the California Supreme Court's denial of the Water Authority's petition for review is similarly misplaced. The courts have repeatedly warned against "attempting to draw meaning from the Supreme Court's denial of hearing." (*Jennings v. Superior Court* (1980) 104 Cal.App.3d 50, 57.)

Metropolitan also contends that the issue of reasonable credit for offsetting benefits was *implicitly* decided against the Water Authority because the Court of Appeal addressed specific challenges to the validity of Metropolitan's conveyance rates. (MOB at pp. 21–22.) In deciding those challenges to Metropolitan's allocation of SWP and WSR costs (ruling for Metropolitan as to the former, but for the Water Authority as to the latter, and everything else), the Court of Appeal did not rule on other invalidity issues that "might have been determined, but were not decided." (*Sargon, supra*, 215 Cal.App.4th at p. 1505.) Again, to the extent the Court of Appeal specifically addressed reasonable credit for offsetting benefits, it noted that "fair compensation" must include such credit. (12 Cal.App.5th at p. 1144.) Moreover, as Metropolitan itself apparently recognizes, this and the prior case about Metropolitan's wheeling rates addressed the ***facial*** invalidity of those rates, but that is a distinct issue from their invalidity "***as applied***," which may be addressed ***after*** resolution of the parties' disputes about the rates' facial invalidity. (See MOB at pp. 15–16, fn. 12, quoting *Metropolitan v. IID* (2000) 80 Cal.App.4th 1403, 1434 (*IID*), Metropolitan's emphasis.) Now that the Court of Appeal has finally resolved the parties' longstanding disputes about the facial invalidity of Metropolitan's conveyance rates, Metropolitan must, at long last, "modify" those rates "***as applied***" to account for "offsetting benefits." (See *ibid.*; *IID, supra*, 80 Cal.App.4th at p. 1434.) Metropolitan's reasons for refusing to do so in the past—in particular, its intransigent argument that the wheeling law does not apply to the Exchange Agreement—were rejected by the Court of Appeal. (See 12 Cal.App.5th at pp. 1144,

1150–1151, 1154.) The issue is now ripe for determination. And, as discussed at length in the Water Authority's opening brief (pp. 4, 7, 22–23), Metropolitan's own resolution regarding "fair compensation" expressly promises that Metropolitan's "wheeling rates shall be reduced to reflect the regional water supply benefits," which "shall be calculated by Metropolitan in the same manner as such benefits are calculated for" other conservation projects. (AR2449 § 10.)

Metropolitan further contends that the Water Authority waived the issue of reasonable credit for offsetting benefits, but that contention is frivolous. Unlike Metropolitan—which, as discussed above, Judge Karnow expressly found to have waived precisely the same damages arguments it now seeks to relitigate, after failing to revive those same waived arguments on appeal—the Water Authority never waived the issue of reasonable credit for offsetting benefits. On the contrary, the Water Authority petitioned for a writ on the basis that, among other violations, Metropolitan's conveyance rates exceed "fair compensation." (2010 Case Third Am. Compl. ¶¶ 72, 96, 101; 2012 Case Compl. ¶¶ 73, 98, 103.) The Water Authority thus "pled and established the facts undergirding a primary right," and this Court has the power to grant "an appropriate remedy," even if it was "not made the subject of the prayer" or the remittitur. (*California Trout*, *supra*, 218 Cal.App.3d at p. 204; see also *id.* at p. 202, fn. 2.)[5] Moreover, although Metropolitan falsely suggests that the issue of reasonable credit for offsetting benefits was "not presented to the trial court" (MOB at p. 19, citation omitted), in fact, the Water Authority presented this issue in both phases of trial. (Phase I Post-Trial Br. at pp. 47–48; Phase II Post-Trial Br. at pp. 9, 21–23, 32–33; Tr. 1246:18–1250:18.) After prevailing at trial—obtaining a judgment that ***invalidated all of Metropolitan's conveyance rates in their entirety***, and awarded nearly $200 million in damages—the Water Authority was not required to object to Judge Karnow's decisions in its favor.[6] Nor was the Water Authority required to raise the issue

[5] Although amendment is unnecessary, it is also worth noting that "proceedings not inconsistent with the views expressed by the District Court of Appeal may in a proper case contemplate the granting of permission to file an amended pleading." (*Pillsbury*, *supra*, 8 Cal.2d at p. 472.)

[6] Metropolitan's argument to the contrary relies on *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, but that case held that failure to object to a statement of decision "results in drawing the inference in favor of the prevailing party." (*Id.* at p. 1136.) As the prevailing party, the Water Authority was not required to object to inferences in its own favor, and did not waive anything.

of reasonable credit on appeal. (See Water Authority's Opening Brief on Remand at pp. 20–23; *Atchison, T. & S. F. R. Co. v. Superior Court* (1939) 12 Cal.2d 549, 550–557; *California Trout*, *supra*, 218 Cal.App.3d at p. 204; *Brookhouser v. California* (1992) 10 Cal.App.4th 1665, 1681–1682.) But now, in light of the Court of Appeal's opinion resolving the parties' facial invalidity disputes, reasonable credit for offsetting benefits must be determined.

Thus, the writ must command Metropolitan to charge only "fair compensation" for conveyance, which must exclude the WSR, under the law of this case, and also must include "reasonable credit for any offsetting benefits," which Metropolitan must determine in a timely and "reasonable manner consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange of water." (See 12 Cal.App.5th at p. 1144; Wat. Code, §§ 1810–1813.)

C. The Court must enter declaratory relief for the Water Authority on the RSI clause, and that relief properly includes equitable restitution.

The Court of Appeal reversed Judge Karnow's summary adjudication for Metropolitan on its RSI clause, and remanded for "entry of declaratory relief on the Rate Structure Integrity clause . . . and other proceedings consistent with the views expressed in this opinion." (12 Cal.App.5th at p. 1166.) According to Metropolitan, the upshot of this ruling that the Water Authority ***is*** entitled to declaratory relief on the RSI clause is somehow that the Water Authority is ***not*** entitled to the declaratory relief it actually sought, which included restitution of all rights and benefits of which it was wrongfully deprived by Metropolitan's enforcement of its RSI clause. Metropolitan's nonsensical argument is contrary to established law. "***Even if the reviewing court has not ordered restitution, the trial court whose order or judgment has been reversed on appeal has the inherent authority to afford restitutionary relief.***" (*Beach Break Equities, LLC v. Lowell* (2016) 6 Cal.App.5th 847, 852, emphasis added.) Metropolitan enforced its unconstitutional RSI clause for more than ***six years***, and does not even pretend to be able or willing to restore now the benefits it wrongfully denied the Water Authority in those past years, so the Water Authority is entitled to an equitable "money judgment sufficient to compensate for property or rights not restored." (*Ibid.*, citation omitted; cf. MOB at p. 8, fn. 8.)

This principle was established in *Raun v. Reynolds*, *supra*, 15 Cal. 459. In an earlier

appeal, the California Supreme Court had reversed a decree of foreclosure and held that a sale made pursuant to the foreclosure should be set aside. "The question as to rents and profits received," however, "was not passed upon . . . because the amount was considerable, and the point had not been fully argued." (*Id.* at p. 468.) On remand, the trial court ordered restitution, "appointing a referee to take an account of the rents and profits." (*Ibid.*) That order was challenged in a second appeal as, in effect, a new award of damages beyond the scope of the remand. (See *id.* at pp. 461–462). But the Supreme Court held that its omission of the issue of rents and profits from its remittitur "did not prevent [the trial court] from taking such a course of proceedings as would give full effect to the *principles* of the opinion of this Court." (*Id.* at 468, emphasis in original.) The trial court, therefore, did not err in granting additional equitable relief on remand. "Upon a mere question of remedy, the right being clear, we do not feel inclined unnecessarily to complicate and prolong this protracted controversy by affirming a right, and then doing justice piecemeal by sending the petitioners to another forum for the determination of this matter of account," which "may be considered not so much as compensation, as restitution." (*Id.* at p. 469.) Thus, the trial court properly exercised its equity jurisdiction to "close the whole controversy, by settling and adjusting the accounts of these parties." (*Id.* at p. 472.)

Raun refutes Metropolitan's assertion that the relief the Water Authority seeks on remand is an "improper request for restitutionary damages," which, according to Metropolitan, is inconsistent with the Court of Appeal's remand for "a redetermination of damages based *solely* on overcharges from inclusion of the Water Stewardship Rate." (MOB at p. 24, quoting 12 Cal.App.5th at p. 1154, Metropolitan's emphasis.) As in *Raun*, the equitable relief the Water Authority seeks is ***not*** damages, or "compensation," but "restitution." (*Raun*, *supra*, 15 Cal. at p. 469.) Equitable restitution is well within the scope of the remand for "entry of declaratory relief" on the RSI clause, "and other proceedings consistent with the views expressed in [the Court of Appeal's] opinion." (12 Cal.App.5th at p. 1166; see *Raun*, *supra*, 15 Cal. at p. 468 [equitable relief not specifically addressed in the opinion or remittitur was nonetheless "in pursuance of the principles of the opinion"]; see also, e.g., *Beach Break*, *supra*, 6 Cal.App.5th at pp. 852–855.)

Metropolitan admits that the Water Authority stated a claim for an order reinstating

terminated contracts and "directing Metropolitan to restore the Water Authority's eligibility for any lawful Metropolitan subsidy program," yet Metropolitan insists the Water Authority "wholly failed to ever plead or otherwise raise a claim for restitution or an injunction." (MOB at pp. 24–25.) That makes no sense. The Water Authority's claim for relief reinstating contracts and directing Metropolitan to restore eligibility ***is*** a claim for restitution and injunctive relief. Declaratory relief is not limited to declarations of rights, but may include "other relief." (Code Civ. Proc., § 1060). That includes the relief the Water Authority prayed for, as well as the equitable monetary relief it seeks now, to the extent the relief it prayed for is no longer feasible. Such relief "falls well within the provision of the section allowing 'a declaration of rights or duties, either alone or *with other relief*.'" (*Tolle v. Struve* (1932) 124 Cal.App. 263, 269, court's emphasis, quoting § 1060.) "The complaint having stated a cause of action for declaratory relief," this Court has "jurisdiction of the entire matter ***and jurisdiction to render the money judgment***." (*California Bank v. Diamond* (1956) 144 Cal.App.2d 387, 390, emphasis added.)

Metropolitan also argues that the Water Authority "made a strategic decision to pursue more narrow relief" in its motion for summary adjudication (MOB at p. 24), but that is wrong. The Water Authority's summary adjudication brief did not purport to set forth everything the declaratory judgment should include. Nothing in that brief limited the Water Authority's remedies for Metropolitan's enforcement of its unconstitutional RSI clause. That brief certainly does not contain any "emphatic and complete waiver" of the relief the Water Authority specified in its complaint—unlike in *De Angeles*, on which Metropolitan mistakenly relies, which describes Metropolitan's own waiver of its damages arguments, as discussed above, but bears no resemblance to anything in the Water Authority's brief. (See 244 Cal.App.2d at pp. 442–443.)

On the contrary, in its summary adjudication brief—which, again, did not purport to set forth the form of the ultimate judgment, much less waive any of the relief specified in the complaint—the Water Authority not only asked the trial court to invalidate the RSI clause, but to order Metropolitan "to cease enforcing it." (MOB at pp. 24–25, quoting Water Authority Br. at p. 16.) Because the trial court erroneously granted summary adjudication for Metropolitan, however, Metropolitan continued enforcing its unconstitutional RSI clause, depriving the Water

Authority of benefits that, again, Metropolitan does not suggest it is able or willing to restore. Thus, the proper and well-established equitable remedy is restitution in the form of "a money judgment." (*Beach Break*, *supra*, 6 Cal.App.5th at p. 852, citation omitted; see also, e.g., *Raun*, *supra*, 15 Cal. at pp. 468–469; *Stockton Theatres, Inc. v. Palermo* (1953) 121 Cal.App.2d 616, 621–622 [upholding award "of the profits of the business, as well as a restitution of the physical property involved," because "no less a measure of recovery would have been responsive to the just demands" of the plaintiff]; accord *Erickson v. Boothe* (1954) 127 Cal.App.2d 644, 650.)

Metropolitan also asserts that Judge Karnow's summary adjudication order "emphasizes that any issues not reached below were due to SDCWA's own narrowing of its requested relief in seeking summary adjudication of its RSI cause of action." (MOB at p. 25, fn. 13.) Metropolitan cites nothing in support of that assertion, because nothing in Judge Karnow's order supports it. On the contrary, Judge Karnow found that, if the Water Authority has standing—which it does, as the Court of Appeal held, and as is now the law of the case—the Water Authority "wins on the merits of the claim." (Dec. 4, 2013 Order at p. 15.) Nothing in Judge Karnow's order indicates that, having won on the merits of its claim, the Water Authority is not entitled to the relief it explicitly prayed for in that claim. The Water Authority ***is*** entitled to that relief, as the Court of Appeal held. (See 12 Cal.App.5th at p. 1166.) And, again, to the extent the rights specifically identified in the Water Authority's claim for declaratory relief can no longer be restored, the proper equitable remedy is "a money judgment." (*Beach Break*, *supra*, 6 Cal.App.5th at p. 852.)

There is also no merit to Metropolitan's argument that, on appeal, the Water Authority somehow waived its right to restitution. The issue on appeal was whether Judge Karnow erred in ruling that the Water Authority lacks standing to pursue the declaratory relief pleaded in its complaint. The Court of Appeal held that the Water Authority has standing, and remanded for "entry of declaratory relief on the Rate Structure Integrity clause . . . and other proceedings consistent with the views expressed in this opinion." (12 Cal.App.5th at p. 1166.) The Water Authority did not waive, nor did the Court of Appeal limit, the full scope of relief the Water Authority expressly prayed for in its claim for "declaratory relief on the Rate Structure Integrity clause." (*Ibid.*; see Operative 2010 Petition/Complaint ¶ 110.) Nor did the Water Authority

waive its right to equitable monetary restitution for "rights not restored." (*Beach Break, supra*, 6 Cal.App.5th at p. 852.) The Water Authority is clearly entitled to that relief, ***even though*** "the reviewing court has not ordered restitution." (*Ibid.*)

Metropolitan argues that the Court of Appeal "implicitly decided" that the Water Authority is not entitled to the declaratory relief it seeks because denying that relief is somehow "essential to the decision on the prior appeal." (MOB at p. 26, quoting *Estate of Horman* (1971) 5 Cal.3d 62, 73.) As in *Horman*, however, the full scope of declaratory relief on remand "was not raised by either party and was not expressly determined by the court. Neither can it fairly be said that determination of the issue was essential to the decision." (5 Cal.3d at p. 74.) Nothing in the remand or the law of the case precludes equitable restitution here. On the contrary, equity requires it. (See, e.g., *Beach Break*, *supra*, 6 Cal.App.5th at pp. 852–855.)[7]

Finally, if for any reason this Court does not allow equitable monetary restitution, it should, at the very least, restore the Water Authority's eligibility for subsidies as of June 23, 2011 (the date the Water Authority's eligibility was unconstitutionally revoked), so that the Water Authority can retroactively apply for such benefits. Otherwise, Metropolitan will surely receive an unconscionable windfall, contrary to the principles of equity and the law of this case.

III. CONCLUSION

Accordingly, this Court should conduct further proceedings on remand as described above and in the Water Authority's opening brief, followed by a final judgment and writ of mandate, the form of which (like attorneys' fees) will be addressed in subsequent briefing. (See fn. 1, *supra*.)

---

[7] Contrary to Metropolitan's erroneous argument in its final footnote, the Water Authority's request for monetary restitution does not subject its claim for declaratory relief to the claim-presentation requirements of the Government Claims Act. (See MOB at pp. 26–27, fn. 14.) The "requirements for presentation of claims apply only to 'claims for money or damages' and not to claims for other forms of relief," including the equitable relief the Water Authority seeks here. (*Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 117, quoting Gov. Code, § 905; see also, e.g., *Eureka Teacher's Assn. v. Board of Education* (1988) 202 Cal.App.3d 469, 471; *Beach Break, supra*, 6 Cal.App.5th at 852; *California Bank, supra*, 144 Cal.App.2d at p. 390.) In any event, the Water Authority did submit a claim letter to Metropolitan challenging Metropolitan's "unlawful enforcement" of its RSI clause, disputing "all payments" made "on or after June 23, 2011" for Metropolitan's water stewardship rate, and seeking, among other things, a "[f]ull refund" of those payments. (Kaplan Decl., Ex. A at pp. 1–2.). Once again, the only waiver here is Metropolitan's, because it failed to advise the Water Authority of any purported deficiencies in the claim letter. (See *Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1234.)

Respectfully submitted,

Dated: June 27, 2018

KEKER, VAN NEST & PETERS LLP

/s/ Dan Jackson

By: DAN JACKSON

Attorneys for Petitioner and Plaintiff
SAN DIEGO COUNTY WATER AUTHORITY

PROOF OF SERVICE

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

On June 27, 2018, I served the following document(s):

SAN DIEGO COUNTY WATER AUTHORITY'S RESPONSIVE BRIEF ON THE SCOPE OF THE REMAND

by serving a true copy of the above-described documents in the following manner:

BY FILE & SERVEXPRESS

On the date executed below, I electronically served the documents described above via File & ServeXpress on the recipients designated on the Transaction Receipt located on the via File & ServeXpress website.

Phillip R. Kaplan
Barry W. Lee
Manatt, Phelps & Phillips, LLP
One Embarcadero Center, 30th Floor
San Francisco, CA 94111
pkaplan@manatt.com
bwlee@manatt.com

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

James J. Dragna
Colin C. West
Thomas S. Hixson
Morgan, Lewis & Bockius LLP
One Market, Spear Street Tower
San Francisco, CA 94105
Email: jim.dragna@morganlewis.com
thomas.hixson@morganlewis.com
colin.west@morganlewis.com

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

Marcia Scully Heather C. Beatty Patricia Quilizapa The Metropolitan Water District of Southern California 700 North Alameda Street Los Angeles, CA 90012-2944 Email: mscully@mwdh2o.com hbeatty@mwdh2o.com	Attorneys for Defendant and Respondent The Metropolitan Water District Of Southern California
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
David J. Aleshire Stephen R. Onstot Christine M. Carson Aleshire & Wynder, LLP 18881 Von Karman Avenue, Suite 1700 Irvine, CA 92612 Email: daleshire@awattorneys.com sonstot@awattorneys.com ccarson@awattorneys.com	Attorneys for Defendant and Respondent Municipal Water District of Orange County
David A. Peffer Donald M. Kelly Utility Consumers' Action Network 3405 Kenyon Street, Suite 401 San Diego, CA 92110-5007 Email: dpeffer@ucan.org don@ucan.org	Attorneys for Defendant and Respondent Utility Consumers' Action Network
Michael J. Garcia Christine A. Godinez Dorine Martirosian City of Glendale 613 East Broadway, Suite 220 Glendale, CA 91206 Email: cgodinez@glendaleca.gov dmartirosian@ci.glendale.ca.us	Attorneys for Defendant and Respondent City of Glendale

Steven M. Kennedy Brunick, McElhaney & Kennedy P.O. Box 13130 San Bernardino, CA 92423-3130 Email: skennedy@bmblawoffice.com	Attorneys for Defendant and Respondent Three Valleys Municipal Water District
Michael N. Feuer, City Attorney Joseph A. Brajevich Tina Shim Julie C. Riley Melanie A. Tory 221 North Figueroa Street, Suite 1000 Los Angeles, CA 90051-0100 Email: joseph.brajevich@ladwp.com julie.riley@ladwp.com tina.shim@ladwp.com melanie.tory@ladwp.com	Attorneys for Real Party in Interest City of Los Angeles
Amrit S. Kulkarni Gregory J. Newmark Julia Bond Meyers, Nave, Riback, Silver & Wilson 555 12th Street, Suite 1500 Oakland, CA 94607 Email: akulkarni@meyersnave.com gnewmark@meyersnave.com jbond@meyersnave.com	Attorneys for Real Party in Interest City of Los Angeles
Patrick J. Redmond Law & Resource Planning Associates, P.C. 201 Third Street NW, Suite 1750 Albuquerque, NM 87102 Email: pr@lrpa-usa.com	Attorneys for Defendant and Respondent Imperial Irrigation District
Steven P. O'Neill Michael Silander Lemieux and O'Neill 4165 E. Thousand Oaks Blvd., Ste. 350 Westlake Village, CA 91361 Email: steve@lemieux-oneill.com michael@lemieux-oneill.com	Real Parties in Interest Foothill Municipal Water District; Las Virgenes Municipal Water District and West Basin Municipal Water District; Eastern Municipal Water District; Western Municipal Water District

Executed on June 27, 2018, at San Francisco, California.

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

Maria S. Canales