

1 Petitioner/Plaintiff San Diego County Water Authority (“Water Authority”)
2 hereby responds to Respondent/Defendant Metropolitan Water District of Southern
3 California’s (“Metropolitan”) Objections to Declarations of Kelly Aviles and Edward J.
4 Donahue III (“Met. Objs.”). In brief, Metropolitan alleges that Mr. Donahue lacks the
5 expertise to offer an opinion on Metropolitan’s Financial Planning Model, and that Ms.
6 Aviles’ declaration authenticating and introducing business records and Metropolitan
7 websites suffer from a host of evidentiary infirmities. As explained below,
8 Metropolitan’s objections lack merit.

9 **A. Mr. Donahue’s Expert Testimony Is Admissible.**

10 Metropolitan objects to Mr. Donahue’s declaration on the basis that he is not
11 qualified as an expert to testify about Metropolitan’s Financial Planning Model because
12 (1) he lacks personal knowledge of the Model because he bases his testimony on a static
13 version of the Model that has had its formulas and codes removed, and (2) he allegedly
14 lacks the expertise to qualify as an expert on how to develop a rate model like
15 Metropolitan’s Financial Planning Model in Microsoft Excel. (Met. Objs., 1:15-2:8.)

16 Taking Metropolitan’s allegation that Mr. Donahue lacks technical expertise
17 first, there is no doubt that Mr. Donahue is an expert in developing rate models and
18 performing rate studies, and that he is intimately familiar with the computer software
19 programs Microsoft Excel and Visual Basic for Applications (“VBA”), which are the
20 industry standard for performing that work.

21 Mr. Donahue’s declaration attests to his long experience as a consultant to water
22 and wastewater utilities (§§ 2-3, 5-10), his work developing or overseeing the
23 development of hundreds of rate models (§ 13), and includes his resume, attached as
24 Exhibit L, which provides specific detail about his experience. Metropolitan appears
25 not to have reviewed Mr. Donahue’s resume, since it is nowhere mentioned in its
26 Objections or in the declarations of Mr. O’Brien and Mr. Giardina, the two declarants
27 upon whom Metropolitan relies to dispute Mr. Donahue’s qualifications. Had
28 Metropolitan or its declarants reviewed Exhibit L, it would have found that Mr.

1 Donahue has performed rate studies for over one-hundred and fifty utilities, and that
2 his resume includes a detailed list of 116 of the utilities for whom Mr. Donahue has
3 worked. (Donahue Dec., Ex. L, pp. 1-3.)

4 Mr. Donahue’s resume also attests to his familiarity with Microsoft Excel
5 (“When my company develops or revises a rate model, we use Microsoft Excel”), and
6 VBA, which he describes as “a service provided by Microsoft and made available
7 directly in the Excel software.” (Donahue Dec., ¶ 14.) Notably, Excel and VBA are the
8 software that Metropolitan admits to using to create the Financial Planning Model.
9 (Declaration of Richard D. Giardina, ¶¶ 19-20.)

10 Second, contrary to Metropolitan’s claim, Mr. Donahue need not have personal
11 knowledge of the Financial Planning Model to offer his expert opinion. Metropolitan
12 cites Evidence Code Section 702 for this alleged rule (Met. Objs., 1:26), however,
13 Section 801 provides an exception to Section 702.¹ Section 801(b) allows an expert to
14 base his or her opinion “on matter (including his special knowledge, skill, experience,
15 training, and education) perceived by or personally known to the witness . . . that is of a
16 type that reasonably may be relied upon by an expert in forming an opinion upon the
17 subject to which his testimony relates”² Our Supreme Court has explained, “[i]n
18 addition to matters within their own personal knowledge, experts may relate
19 information acquired through their training and experience, even though that
20 information may have been derived from conversations with others, lectures, study of
21 learned treatises, etc.” People v. Sanchez (2016) 63 Cal.App.4th 665, 675 (“Sanchez”).

22 There are limits to what an expert’s opinion may rely on. Metropolitan cites
23 People v. Moore (2011) 51 Cal.4th 386, 405 (“Moore”), for the principle that an expert’s
24 opinion “may not be based on assumptions of fact without evidentiary support.” (Met.

25 _____
26 ¹ All undesignated section (§) references are to the Evidence Code. All emphasis is
supplied unless otherwise indicated.

27 ² Metropolitan cites Bozzi v. Nordstrom, Inc. (2010) 186 Cal.App.4th 755, 761, to
28 support its claim that an expert opinion requires personal knowledge, but Bozzi
recognizes that Section 801, not 702, applies to expert opinions. Id. (citing § 801(a).)

1 Objs., Nos. 12-18, 22.) Moore concerned the use of a hypothetical question in a
2 criminal case. Moore, at 405. The Court cited the principle that an “expert’s opinion
3 may not be based on ‘assumptions of fact without evidentiary support [citation], or on
4 speculative or conjectural factors” Id. (emphasis original).

5 Mr. Donahue’s declaration does not exceed the bounds established by Sanchez,
6 Moore, and the Evidence Code. Contrary to Metropolitan’s assertions, Mr. Donahue’s
7 expert opinion is not based on assumptions, or speculative or conjectural factors, but
8 upon Mr. Donahue’s own “special knowledge, skills, experience, training, and
9 education” in developing rate models and expertise with Excel and VBA, combined
10 with his personal review of the static Financial Planning Model made available by
11 Metropolitan, which constitute the basis for the opinions he offers. § 801(b).

12 This basis also provides the foundation for Mr. Donahue’s testimony under
13 Section 403. Not only is this permissible under Section 801 and applicable caselaw
14 (see Sanchez, 63 Cal.App.4th at p. 675), but it is the *only* methodology Mr. Donahue
15 could use due to Metropolitan’s ongoing refusal to produce the Financial Planning
16 Model. After all, Metropolitan’s refusal to produce the Model is the reason the matter
17 is before the Court in the first place. It is reasonable for Mr. Donahue to rely on the
18 static Financial Planning Model, which is reasonably reliable because it was prepared
19 by Metropolitan. Any doubts concerning Mr. Donahue’s opinions based on the static
20 Financial Planning Model should go to the weight given by the trier of fact, not its
21 admissibility. People v. Phillips (1981) 122 Cal.App.3d 69, 85 (expert testimony not
22 rendered inadmissible if reports relied upon “meet the standard of reasonable
23 reliability”).

24 For the reasons explained above, Mr. Donahue’s expert testimony does not
25 qualify as lay opinion testimony under Section 800. Nor is Mr. Donahue’s testimony
26 improper speculation and conjecture under Section 403. Instead, Mr. Donahue’s
27 testimony is well-founded on his long-standing expertise and personal review of the
28 static Financial Planning Model.

1 Responses to Metropolitan’s specific evidentiary objections to Mr. Donahue’s
2 Declaration are provide in Section C.2, below.

3 **B. Ms. Aviles’ Testimony Is Admissible.**

4 **1. Ms. Aviles’ Testimony Provides Adequate Foundation and Is**
5 **Not Speculative or Conclusory.**

6 Metropolitan objects repeatedly and frequently without elaboration that certain
7 portions of her declaration are speculative, conclusory, and lack foundation. (Met.
8 Objs., ¶¶ 1-9.) Section 403 requires a declarant to bear the burden of producing
9 evidence as to the existence of a preliminary fact, including where the preliminary fact
10 is “the personal knowledge of a witness concerning the subject matter of his
11 testimony.” § 403(a)(2). Ms. Aviles satisfies this standard by attesting to her personal
12 knowledge of the pleadings and other documents in this matter, which provide an
13 adequate foundation for the challenged statements in her declaration.

14 **2. Ms. Aviles’ Testimony Does Not Constitute An Improper**
15 **Opinion.**

16 Metropolitan contends that Ms. Aviles advances opinions based on matter that
17 is not a proper basis for such an opinion (§ 803), which Metropolitan characterizes as
18 “improper legal argument.” (Met. Objs., pp. 2-4, No. 2-8.) Metropolitan actually
19 objects to Ms. Aviles’ narrative description of exhibits being introduced, which does
20 not constitute an opinion or an attempt to prove the truth of the contents of the
21 document. (Aviles Dec., ¶¶ 8-9, 11-14.) This type of narrative description does not
22 violate § 803, nor does it rise to the level of “argument” in a declaration criticized but
23 not prohibited by the court in In re Marriage of Heggie (2002) 99 Cal.App.4th 28, 30
24 n.3.

25 Metropolitan’s claim of “improper legal argument” against paragraph 10 in the
26 Aviles Declaration also fails, but for a different reason. In paragraph 10 Ms. Aviles
27 recounts her personal knowledge as the Water Authority’s counsel of record regarding
28 Metropolitan’s response to the Water Authority’s California Public Records Act

1 (“CPRA”) request. The fact that Ms. Aviles is counsel of record is documented in
 2 paragraph 1. Metropolitan’s objection to paragraph 10 on the basis of improper lay
 3 opinion (§ 800) also fails because Ms. Aviles is giving an opinion based upon her
 4 personal knowledge, which falls within the scope of § 800.

5 **3. Ms. Aviles’ Testimony Does Not Violate the Secondary**
 6 **Evidence Rule.**

7 Metropolitan argues that Ms. Aviles’ declaration violates the “Secondary
 8 Evidence Rule” (§ 1523(a)) to the extent oral testimony is being offered to prove the
 9 content of a document. (Met. Objs., pp. 2-4, No. 2-8.) Metropolitan can rest easy
 10 because close examination of paragraphs 8-14 of Ms. Aviles’ declaration shows that her
 11 statements do not violate the Secondary Evidence Rule because they are not being
 12 offered to prove the contents of a writing. Instead, Ms. Aviles’ statements excerpt
 13 small portions of the exhibits as a means of demonstrating their relevance to the
 14 proceedings, or provide her lay opinion based on her personal knowledge of
 15 Metropolitan’s document production as the Water Authority’s counsel.

16 Responses to Metropolitan’s specific evidentiary objections to Ms. Aviles’
 17 Declaration are provided in Section C.1, below.

18 **C. Specific Responses to Metropolitan’s Objections.**

19 **1. Specific Responses to Metropolitan’s Objections to the**
 20 **Declaration of Kelly Aviles.**

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No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
1.	Ex. C, copy of the transcript of the deposition of Arnout Van den Berg, taken on May 11, 2017	Speculative, conclusory and lacks foundation. (Cal. Evid. Code §§ 403, 702(a).) Hearsay. (Cal. Evid. Code § 1200.)	Mr. Van den Berg’s deposition may be introduced for any purpose because he testified as a Metropolitan employee, and is not hearsay as an authorized admission. Code Civ. Pro. (“CCP”) § 2025.620(b); Ex. C, 8:19-	Sustained: _____ Overruled: _____

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No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
			21; § 1222. Ex. C is certified by the deposition officer on p. 191, as required by CCP § 2025.540(a). Ms. Aviles took the deposition of Mr. Van den Berg, and authenticated Ex. C as a true and correct copy. § 1400.	
2.	Paragraph 8, regarding the March 4, 2016, correspondence from SDCWA	<p>Improper legal argument. (Cal. Evid. Code § 803; <u>In re Marriage of Heggie</u>, 99 Cal. App. 4th 28, 30, n.3 (2002) (“The proper place for argument is in points and authorities, not declarations”).) Speculative, conclusory and lacks foundation. (Cal. Evid. Code §§ 403, 702(a).) Hearsay. (Cal. Evid. Code § 1200.) Violates the secondary evidence rule to the extent that oral testimony is being offered to prove the content of a document. (Cal. Evid. Code § 1523(a).)</p> <p>This paragraph improperly characterizes a written document, which speaks for itself.</p>	<p>Ms. Aviles’ narrative description of Exhibit F does not constitute an opinion or an attempt to prove the truth of the contents of the document. § 803.</p> <p>Paragraph 8 is neither speculative, conclusory, or lacking in foundation because it is based on Ms. Aviles’ personal knowledge as counsel for the Water Authority. § 403.</p> <p>Paragraph 8 properly introduces Exhibit F as a business record maintained by the Water Authority. § 1271.</p> <p>Ms. Aviles’ characterization of the exhibit, including a quote, does not violate the secondary evidence rule’s prohibition against oral testimony because it is not offered to prove the contents of the writing. § 1523(a).</p>	<p>Sustained: _____</p> <p>Overruled: _____</p>

No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
3.	Paragraph 9, regarding the March 11, 2016, correspondence from Metropolitan’s General Counsel	<p>Improper legal argument. (Cal. Evid. Code § 803; <u>In re Marriage of Heggie</u>, 99 Cal. App. 4th at 30, n.3 (“The proper place for argument is in points and authorities, not declarations”).) Speculative, conclusory and lacks foundation. (Cal. Evid. Code §§ 403, 702(a).) Hearsay. (Cal. Evid. Code § 1200.) Violates the secondary evidence rule to the extent that oral testimony is being offered to prove the content of a document. (Cal. Evid. Code § 1523(a).)</p> <p>This paragraph improperly characterizes a written document, which speaks for itself.</p>	See Response to No. 2.	<p>Sustained: — Overruled: —</p>
4.	Paragraph 10, regarding Metropolitan’s production of records	<p>Improper legal argument. (Cal. Evid. Code § 803; <u>In re Marriage of Heggie</u>, 99 Cal. App. 4th at 30, n.3 (“The proper place for argument is in points and authorities, not declarations”).) Speculative, conclusory and lacks foundation. (Cal. Evid. Code §§ 403, 702(a).) Improper lay opinion. (Cal. Evid. Code § 800.) Hearsay. (Cal. Evid. Code §</p>	<p>Ms. Aviles’ narrative description of Metropolitan’s response to the Water Authority’s CPRA does not violate Section 803 because it is based on her experience as the Water Authority’s counsel. (Aviles Dec., ¶ 1.)</p> <p>Paragraph 10 is neither speculative, conclusory, nor lacking in foundation (§ 403), or improper lay opinion (§ 800) for the same reason—it is based on</p>	<p>Sustained: — Overruled: —</p>

No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
		<p>1200.) Violates the secondary evidence rule to the extent that oral testimony is being offered to prove the content of a document. (Cal. Evid. Code § 1523(a).)</p> <p>This paragraph improperly characterizes records, which speak for themselves. Furthermore, Ms. Aviles has made no showing of personal knowledge or expertise related to how the records were “maintained in the ordinary course of its business and used by Metropolitan in its budget and rate-setting process” or what “essential definitions, codes, and labels which tie the documents to one another through essential links and formulas” are used or necessary for the model.</p>	<p>her personal knowledge as counsel for the Water Authority.</p> <p>Ms. Aviles’ characterization of the documents produced by Metropolitan does not constitute hearsay (§ 1200) or violate the secondary evidence rule’s prohibition against oral testimony (§ 1523(a)) because those statements are not offered to prove the contents of the writing. Instead, they present Ms. Aviles’ personal knowledge of the document production process and her opinion—based on personal experience as counsel of record—as to the usefulness and utility of the static Financial Planning Model.</p>	
5.	Paragraph 11, regarding the March 22, 2016, correspondence from the SDCWA	<p>Improper legal argument. (Cal. Evid. Code § 803; <u>In re Marriage of Heggie</u>, 99 Cal. App. 4th at 30, n.3 (“The proper place for argument is in points and authorities, not declarations”).) Speculative, conclusory</p>	See Response to No. 2.	<p>Sustained:</p> <p>_____</p> <p>OVERRULED:</p> <p>_____</p>

No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
		<p>and lacks foundation. (Cal. Evid. Code §§ 403, 702(a).) Hearsay. (Cal. Evid. Code § 1200.) Violates the secondary evidence rule to the extent that oral testimony is being offered to prove the content of a document. (Cal. Evid. Code § 1523(a).)</p> <p>This paragraph improperly characterizes a written document, which speaks for itself.</p>		
6.	Paragraph 12, regarding the April 11, 2016, correspondence from Metropolitan’s General Counsel	<p>Improper legal argument. (Cal. Evid. Code § 803; <u>In re Marriage of Heggie</u>, 99 Cal. App. 4th at 30, n.3 (“The proper place for argument is in points and authorities, not declarations).) Speculative, conclusory and lacks foundation. (Cal. Evid. Code §§ 403, 702(a).) Hearsay. (Cal. Evid. Code § 1200.) Violates the secondary evidence rule to the extent that oral testimony is being offered to prove the content of a document. (Cal. Evid. Code § 1523(a).)</p> <p>This paragraph improperly characterizes a written</p>	See Response to No. 2.	<p>Sustained: _____ Overruled: _____</p>

No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
		document, which speaks for itself.		
7.	Paragraph 13, regarding the June 28, 2016, correspondence from the SDCWA	<p>Improper legal argument. (Cal. Evid. Code § 803; <u>In re Marriage of Heggie</u>, 99 Cal. App. 4th at 30, n.3 (“The proper place for argument is in points and authorities, not declarations”).) Speculative, conclusory and lacks foundation. (Cal. Evid. Code §§ 403, 702(a).) Hearsay. (Cal. Evid. Code § 1200.) Violates the secondary evidence rule to the extent that oral testimony is being offered to prove the content of a document. (Cal. Evid. Code § 1523(a).)</p> <p>This paragraph improperly characterizes a written document, which speaks for itself</p>	See Response to No. 2.	<p>Sustained: _____ Overruled: _____</p>
8.	Paragraph 14, regarding the July 8, 2016, correspondence from Metropolitan’s General Counsel	<p>Improper legal argument. (Cal. Evid. Code § 803; <u>In re Marriage of Heggie</u>, 99 Cal. App. 4th at 30, n.3 (“The proper place for argument is in points and authorities, not declarations”).) Speculative, conclusory and lacks foundation. (Cal. Evid. Code §§ 403, 702(a).) Hearsay.</p>	See Response to No. 2.	<p>Sustained: _____ Overruled: _____</p>

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No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
		<p>(Cal. Evid. Code § 1200.) Violates the secondary evidence rule to the extent that oral testimony is being offered to prove the content of a document. (Cal. Evid. Code § 1523(a).)</p> <p>This paragraph improperly characterizes a written document, which speaks for itself.</p>		
9.	<p>Paragraph 15, regarding the February 8, 2016, Budget and Rates Workshop of Metropolitan’s Finance and Insurance Committee</p>	<p>Irrelevant. (Cal. Evid. Code § 350.) Speculative, conclusory and lacks foundation. (Cal. Evid. Code §§ 403, 702(a).) Hearsay. (Cal. Evid. Code § 1200.)</p> <p>This paragraph improperly characterizes a recording of Metropolitan’s Budget Workshop. (See Declaration of Richard D. Giardina in Support of Metropolitan’s Opposition to SDCWA’s Motion for Writ of Mandate, Injunctive, and Declaratory Relief for Violations of the California Public Records Act (“Giardina Decl.”), ¶¶ 51-56.)</p>	<p>The recording of Ms. Skillman’s testimony at Metropolitan’s Finance and Insurance Committee (“Skillman Recording”) is relevant to show that Metropolitan’s failure to disclose the Financial Planning Model has prevented the Water Authority and the public from verifying the accuracy of Metropolitan’s rates, which goes to the core of the CPRA. (Memo. of Points and Authorities in support of the Water Authority’s Motion for Writ of Mandate, Injunctive Relief, and Declaratory Relief for Violations of the California Public Records Act at 4:27-5:11.)</p> <p>Ms. Aviles lays an adequate foundation by identifying the address where the recording is maintained on Metropolitan’s website,</p>	<p>Sustained: _____</p> <p>Overruled: _____</p>

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No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
			<p>that she has personal knowledge of the recording because she reviewed it, and at what time in the recording the relevant portion can be found.</p> <p>The Skillman Recording qualifies for an exception to the hearsay rule as an adoptive admission because Metropolitan’s declarant, Mr. Giardina, testified to the truth of the recording in his declaration. Evid. Code § 1221; Giardina Dec., ¶ 53.</p> <p>In the alternative, the Skillman Recording is not hearsay because it is not offered for the truth of the matter asserted, but rather to show that the statement was made and action taken by Metropolitan with respect to the recharacterization of costs in the Financial Planning Model. § 1200; <u>City of Santa Maria v. Adam</u> (2012) 211 Cal.App.4th 266, 294 (documents containing testimony before Congress were admissible to show “statements contained within them were made. That is not hearsay but original evidence.”)</p>	

2. Specific Responses to Metropolitan’s Objections to the Declaration of Edward J. Donahue III.

No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
10.	Paragraph 2: “I have nearly 50 years of experience, including over 40 years of management consulting.”	<p>Irrelevant. (Cal. Evid. Code § 350.) Lack of foundation. (Cal. Evid. Code § 403.) Speculative and conclusory. (Cal. Evid. Code § 403.) Improper lay opinion. (Cal. Evid. Code § 800.)</p> <p>Mr. Donahue declares that he has “50 years of experience,” but does not specify what that experience is and how it is relevant to the testimony he provided. This is vague and lacks proper foundation for his opinion. Mr. Donahue’s background does not establish him as an expert in the development of proprietary formulas and programming code qualified to opine on the creation of the proprietary computer software program that is Metropolitan’s model.</p>	<p>Mr. Donahue’s many years of experience are relevant to show his expertise, which is further demonstrated by Exhibit L and ignored by Metropolitan. Paragraph 2 cannot be read in a vacuum, but must be read in combination with Exhibit L and paragraphs 3, 5-10, and 13-14, which together provide the foundation for Mr. Donahue’s expert testimony.</p> <p>As discussed in Section A, above, Mr. Donahue is an expert and has offered an admissible expert opinion.</p>	<p>Sustained: —</p> <p>Overruled: —</p>

No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
11.	Paragraph 11: "Metropolitan's Financial Planning Model is what is commonly referred to in the utility community as a 'rate model.'"	<p>Lacks foundation (Cal. Evid. Code § 403); unqualified expert testimony (Cal. Evid. Code § 720); and lacks personal knowledge (Cal. Evid. Code § 702). Speculative and conclusory. (Cal. Evid. Code § 403.) Improper lay opinion. (Cal. Evid. Code § 800.)</p> <p>Mr. Donahue has not established any personal knowledge of the proprietary computer software program that is Metropolitan's model or how it was created. Indeed, Mr. Donahue admits that he only reviewed a "static, non-functional version," not the proprietary computer software program. (Donahue Decl., ¶ 18.) He also provides no showing of personal knowledge of what terminology if any water utilities commonly use to refer to planning models. (See Giardina Decl., ¶ 42.) Mr. Donahue's background does not establish him as an expert in the development of proprietary formulas and programming code qualified to opine on</p>	<p>See Section A and Response to No. 10, above.</p> <p>Metropolitan's objection mischaracterizes the testimony of Mr. Giardina and Mr. O'Brien. Mr. Giardina does not testify to what "terminology if any water utilities commonly use to refer to planning models," and he himself refers to Metropolitan's Financial Planning Model as a "rate model." (Giardina Dec., ¶ 42 [no testimony regarding industry terminology]; ¶ 34 [". . . rate models such as the one created by Mr. Van den Berg of Metropolitan."].) Mr. O'Brien does not attest to Mr. Donahue's qualifications to develop rate models. (O'Brian Dec., ¶¶ 36-38.)</p>	<p>Sustained:</p> <p>_____</p> <p>Overruled:</p> <p>_____</p>

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No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
		the creation of the proprietary computer software program that is Metropolitan's model. (See O'Brien Decl., ¶¶ 36-38.)		
12.	Paragraph 11: "A rate model is a file, generally a workbook in Microsoft Excel, which has a series of spreadsheets containing data, analyses, calculations, and other information that comprise or describe the manner in which costs are identified or assigned to categories of costs or to customer classes and rates are set. A rate model often contains various links to other data sources, such as budget and usage data."	Irrelevant. (Cal. Evid. Code § 350.) Lacks foundation (Cal. Evid. Code § 403); unqualified expert testimony (Cal. Evid. Code § 720); and lacks personal knowledge (Cal. Evid. Code § 702). Speculative and conclusory. (Cal. Evid. Code § 403.) Improper lay opinion. (Cal. Evid. Code § 800.) Mr. Donahue has made no showing of personal knowledge of the model or how it was created. Mr. Donahue has made no showing of personal knowledge of the water utility community or what terminology, if any, water utilities commonly use to refer to planning models. (See Giardina Decl., ¶¶ 42-43.) Mr. Donahue's background does not establish him as an expert in the development of proprietary formulas and programming code qualified to opine on the creation of the	See Section A, and Responses to Nos. 10 and 11, above. Metropolitan's objection cites paragraph 43 of Mr. Giardina testimony, which does not concern what terminology water utilities use to refer to planning models. (Giardina Dec., ¶ 43.)	Sustained: _____ Overruled: _____

No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
		<p>proprietary computer software program that is Metropolitan’s model. (See O’Brien Decl., ¶¶ 36-38)</p> <p>Opinions may not be based on assumptions of fact without evidentiary support. (Cal. Evid. Code § 800; <u>People v. Moore</u>, 51 Cal. 4th 386, 405 (2011).) As Mr. Donahue failed to provide any factual basis for his opinion on how rate models are created, his opinion is speculation and conjecture, and should be excluded.</p>		
13.	Paragraph 12: “The Financial Planning Model is an Excel Workbook file.”	<p>Lacks foundation (Cal. Evid. Code § 403); unqualified expert testimony (Cal. Evid. Code § 720); and lacks personal knowledge (Cal. Evid. Code § 702). Speculative and conclusory. (Cal. Evid. Code § 403.) Improper lay opinion. (Cal. Evid. Code § 800.)</p> <p>Mr. Donahue has not established any personal knowledge of the proprietary computer software program that is Metropolitan’s model or how it was created. Indeed, Mr. Donahue</p>	<p>See Section A, and Responses to Nos. 10 and 11, above.</p> <p>Metropolitan’s objection cites paragraph 39 of Mr. O’Brien’s testimony, which does not attest to Mr. Donahue’s qualifications to develop rate models. (O’Brien Dec., ¶ 39.)</p>	<p>Sustained: _____</p> <p>Overruled: _____</p>

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No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
		<p>admits that he only reviewed a “static, non-functional version,” not the proprietary computer software program. (Donahue Decl., ¶ 18.) Mr. Donahue’s background does not establish him as an expert in the development of proprietary formulas and programming code qualified to opine on the creation of the proprietary computer software program that is Metropolitan’s model. (See O’Brien Decl., ¶¶ 36-39.)</p> <p>Opinions may not be based on assumptions of fact without evidentiary support. (Cal. Evid. Code § 800; <u>People v. Moore</u>, 51 Cal. 4th 386, 405 (2011).) As Mr. Donahue failed to provide any factual basis for his opinion on how the proprietary computer software program that is Metropolitan’s model was created, his opinion is speculation and conjecture, and should be excluded.</p>		

No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
14.	Paragraph 15: "None of the public agencies I have worked with has claimed that its rate model can be kept from public disclosure or is in any way proprietary."	<p>Irrelevant. (Cal. Evid. Code § 350.) Lacks foundation (Cal. Evid. Code § 403); and unqualified expert testimony (Cal. Evid. Code § 720); and lacks personal knowledge (Cal. Evid. Code § 702). Speculative and conclusory. (Cal. Evid. Code § 403.) Improper lay opinion. (Cal. Evid. Code § 800.)</p> <p>Mr. Donahue provided no foundation for this statement, as he has not established how he knows that no public agency he has worked with has claimed an exemption from disclosure. (See Giardina Decl., ¶ 43.) Opinions may not be based on assumptions of fact without evidentiary support. (Cal. Evid. Code § 800; <u>People v. Moore</u>, 51 Cal. 4th 386, 405 (2011).) As Mr. Donahue failed to provide any factual basis for his opinion on how other public agencies have addressed the proprietary nature of rate models, his opinion is speculation and conjecture, and should be excluded.</p>	<p>This statement is relevant to show that Metropolitan's refusal to disclose its Financial Planning Model is unusual in the industry. The foundation for Mr. Donahue's statement and the basis for his expertise are set forth in his declaration and resume. (Donahue Dec., ¶¶ 2-3, 5-10, 13-14, Ex. L.)</p> <p>See Section A, above.</p>	<p>Sustained: _____ Overruled: _____</p>

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No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
15.	<p>Paragraph 16: “Each rate model is, of course, unique to the public agency that develops it because of individualized data and customer characteristics. Since each rate model mirrors the specific budgeting, accounting and financial reporting of the agency for which it is created, any specific rate model would necessarily be of limited use for any other water or utility agency to set its own rates.”</p>	<p>Irrelevant. (Cal. Evid. Code § 350.) Lacks foundation (Cal. Evid. Code § 403); unqualified expert testimony (Cal. Evid. Code § 720); and lacks personal knowledge (Cal. Evid. Code § 702). Speculative and conclusory. (Cal. Evid. Code § 403.) Improper lay opinion. (Cal. Evid. Code § 800.)</p> <p>These statements are vague, irrelevant, and lack proper foundation. Mr. Donahue has made no showing of personal knowledge of how water and utility agencies may use rate models.</p> <p>Mr. Donahue’s purported experience with rate models of other public agencies is irrelevant to the issue at the hand, which is the proprietary computer software program that is Metropolitan’s model.</p> <p>Also, Mr. Donahue provided no foundation for this statement, as he has not established how he knows how public agencies would use rate models. (See</p>	<p>This statement is relevant because it goes to the value Metropolitan claims that it could garner if it were to attempt to sell the Financial Planning Model on the open market.</p> <p>See Section A, above.</p>	<p>Sustained: _____ Overruled: _____</p>

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No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
		Giardina Decl., ¶ 44.) Opinions may not be based on assumptions of fact without evidentiary support. (Cal. Evid. Code § 800; <u>People v. Moore</u> , 51 Cal. 4th 386, 405 (2011).) As Mr. Donahue failed to provide any factual basis for his opinion, it is speculation and conjecture, and should be excluded.		
16.	Paragraph 17: "A rate model would be unlikely to contain anything that would be truly proprietary or could cause financial or operational injury to the agency."	<p>Irrelevant. (Cal. Evid. Code § 350.) Lacks foundation (Cal. Evid. Code § 403); unqualified expert testimony (Cal. Evid. Code § 720); and lacks personal knowledge (Cal. Evid. Code § 702). Speculative and conclusory. (Cal. Evid. Code § 403.) Improper lay opinion. (Cal. Evid. Code § 800.)</p> <p>This opinion is vague, irrelevant, and lacks proper foundation. Mr. Donahue has made no showing of personal knowledge of how water and utility agencies may use rate models.</p> <p>Mr. Donahue has not established any personal knowledge of the proprietary</p>	<p>This statement is relevant because it goes to the value Metropolitan claims that it could garner if it were to attempt to sell the Financial Planning Model on the open market.</p> <p>See Section A and Response to No. 15, above.</p>	<p>Sustained: _____</p> <p>Overruled: _____</p>

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No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
		<p>computer software program that is Metropolitan’s model or how it was created. Indeed, Mr. Donahue admits that he only reviewed a “static, non-functional version,” not the proprietary computer software program. (Donahue Decl., ¶ 18.)</p> <p>Also, Mr. Donahue provided no foundation for this statement, as he has not established how he knows that a rate model would be unlikely to contain proprietary information or could cause financial or operational injury to the agency. (See Giardina Decl., ¶ 45.) Opinions may not be based on assumptions of fact without evidentiary support. (Cal. Evid. Code § 800; <u>People v. Moore</u>, 51 Cal. 4th 386, 405 (2011).) As Mr. Donahue failed to provide any factual basis for his opinion, it is speculation and conjecture, and should be excluded.</p>		

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No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
17.	Paragraph 19: "Metropolitan has altered the Financial Planning Model from the form in which it would be used in the ordinary course of its business in its budget and rate-setting process, to a version lacking definitions, calculations, and links that tie the documents to one another. In essence, Metropolitan has disclosed a series of 'snapshots' of the various schedules that comprise its rate model, but the links between the various schedules and the data sources and files used on specific schedules and the details of the calculations reflected on specific	<p>Lacks foundation (Cal. Evid. Code § 403); unqualified expert testimony (Cal. Evid. Code § 720); and lacks personal knowledge (Cal. Evid. Code § 702). Speculative and conclusory. (Cal. Evid. Code § 403.) Improper lay opinion. (Cal. Evid. Code § 800.)</p> <p>Mr. Donahue has not established any personal knowledge of the proprietary computer software program that is Metropolitan's model or how it was created. Indeed, Mr. Donahue admits that he only reviewed a "static, non-functional version," not the proprietary computer software program. (Donahue Decl., ¶ 18.) Accordingly, Mr. Donahue is unqualified to testify about the differences between the spreadsheets that were produced and the proprietary computer software program that is Metropolitan's model. (See O'Brien Decl., ¶¶ 36-37; Giardina Decl., ¶ 46.)</p> <p>Opinions may not be based on assumptions of fact without</p>	<p>See Section A and Response to No. 11, above.</p> <p>Mr. Donahue has established expertise in rate models and rate setting, and in the Excel and VBA software used to create them. This expertise combined with his review of the static Financial Planning Model provides the basis for his expert opinion about the way Metropolitan has altered the Model.</p> <p>In addition, the objection mischaracterizes Mr. Giardina's testimony, which does not opine on Mr. Donahue's technical capabilities. (Giardina Dec., ¶ 46.)</p>	<p>Sustained:</p> <p>_____</p> <p>Overruled:</p> <p>_____</p>

No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
	schedules are not disclosed.”	evidentiary support. (Cal. Evid. Code § 800; <u>People v. Moore</u> , 51 Cal. 4th 386, 405 (2011).) As Mr. Donahue failed to provide any factual basis for his opinion, it is speculation and conjecture, and should be excluded.		
18.	Paragraph 19: “This renders the disclosed Financial Planning Model unintelligible to any user, including me, the public, and the Water Authority. This prevents anyone from verifying both the information underlying Metropolitan’s rates and charges and the methods used to identify or allocate costs to various functions or customer classes.”	Lacks foundation (Cal. Evid. Code § 403); unqualified expert testimony (Cal. Evid. Code § 720); and lacks personal knowledge (Cal. Evid. Code § 702). Speculative and conclusory. (Cal. Evid. Code § 403.) Improper lay opinion. (Cal. Evid. Code § 800.) Mr. Donahue has not established any personal knowledge of the proprietary computer software program that is Metropolitan’s model or how it was created. Indeed, Mr. Donahue admits that he only reviewed a “static, non-functional version,” not the proprietary computer software program. (Donahue Decl., ¶ 18.) Accordingly, Mr. Donahue is unqualified to testify about the differences between	See Section A and Responses to Nos. 11 and 17, above.	Sustained: _____ Overruled: _____

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No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
		<p>the spreadsheets that were produced and the proprietary computer software program that is Metropolitan's model.</p> <p>Mr. Donahue's background does not establish him as an expert in the development of proprietary formulas and programming code qualified to opine on the creation of the proprietary computer software program that is Metropolitan's model and how it should function. (See O'Brien Decl., 1 36-37; Giardina Decl., ¶ 46.)</p> <p>Opinions may not be based on assumptions of fact without evidentiary support. (Cal. Evid. Code § 800; <u>People v. Moore</u>, 51 Cal. 4th 386, 405 (2011).) As Mr. Donahue failed to provide any factual basis for his opinion, it is speculation and conjecture, and should be excluded.</p>		

No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
19.	Paragraph 19: "One of the necessary attributes of a rate model is the ability of a user of the rate model to replicate and validate the calculations embedded in the rate model. This is not possible with the materials disclosed by Metropolitan."	Irrelevant. (Cal. Evid. Code § 350.) Lacks foundation (Cal. Evid. Code § 403); unqualified expert testimony (Cal. Evid. Code § 720); and lacks personal knowledge (Cal. Evid. Code § 702). Speculative and conclusory. (Cal. Evid. Code § 403.) Improper lay opinion. (Cal. Evid. Code § 800.) This opinion is vague, irrelevant, and lacks proper foundation. Mr. Donahue's background does not establish him as an expert in the development of proprietary formulas and programming code qualified to opine on the creation of the proprietary computer software program that is Metropolitan's model and how it should function. (See O'Brien Decl., ¶¶ 36-37; Giardina Decl., ¶ 46.)	Mr. Donahue's expert opinion is relevant because it goes to the ability of the Water Authority and the public to verify the information and data underlying Metropolitan's rates and charges. See Section A and Response to Nos. 11 and 17, above.	Sustained: _____ Overruled: _____
20.	Paragraph 20: "The proprietary 'formula and code' that Metropolitan alleges exists within the spreadsheet are simply links to	Lacks foundation (Cal. Evid. Code § 403); unqualified expert testimony (Cal. Evid. Code § 720); and lacks personal knowledge (Cal. Evid. Code § 702). Speculative and conclusory. (Cal. Evid. Code § 403.) Improper	See Section A and Response to Nos. 11, and 17, above. In addition, the objection mischaracterizes Mr. Giardina's testimony, which does not opine on the factual basis upon which Mr. Donahue relied	Sustained: _____ Overruled: _____

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No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
	<p>other documents from which the spreadsheet derives information, references to other information contained within the spreadsheet, and simple mathematical calculations, such as Excel's sum function."</p>	<p>lay opinion. (Cal. Evid. Code § 800.)</p> <p>Mr. Donahue has not established any personal knowledge of the proprietary computer software program that is Metropolitan's model or how it was created. Indeed, Mr. Donahue admits that he only reviewed a "static, non-functional version," not the proprietary computer software program. (Donahue Decl., ¶ 18.) Accordingly, Mr. Donahue is unqualified to testify about the features and functions of the proprietary computer software program that is Metropolitan's model, and any such testimony is speculation. (See O'Brien Decl., ¶¶ 37, 39.)</p> <p>Opinions may not be based on assumptions of fact without evidentiary support. (Cal. Evid. Code § 800; <u>People v. Moore</u>, 51 Cal. 4th 386, 405 (2011).) As Mr. Donahue failed to provide any factual basis for his opinion, it is speculation and</p>	<p>in order to give his opinion. (Giardina Dec., ¶ 47.)</p>	


No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
		conjecture, and should be excluded. (See Giardina Decl., ¶ 47.)		
21.	Paragraph 21: "Using the fully functioning version of Metropolitan's Financial Planning Model, any person would be able to review mass data, check calculations, compare past and potential future charges, run various scenarios and see how potential changes may affect rates and charges, see the impact of decisions and options on rates and charges, see how various costs are assigned to different cost categories or customer classes, and see how Metropolitan has prepared and utilized its various	Lacks foundation (Cal. Evid. Code § 403); unqualified expert testimony (Cal. Evid. Code § 720); and lacks personal knowledge (Cal. Evid. Code § 702). Speculative and conclusory. (Cal. Evid. Code § 403.) Improper lay opinion. (Cal. Evid. Code § 800.) Mr. Donahue has not established any personal knowledge of the proprietary computer software program that is Metropolitan's model or how it was created. Indeed, Mr. Donahue admits that he only reviewed a "static, non-functional version," not the proprietary computer software program. (Donahue Decl., ¶ 18.) Accordingly, Mr. Donahue is unqualified to testify about the features and functions of the proprietary computer software program that is Metropolitan's model, and any such testimony is	See Section A and Response to Nos. 11, and 17, above. Mr. Giardina mischaracterizes Mr. Donahue's testimony. Mr. Donahue testified that "any person" would be able to review, check, compare, and see various aspects of the Financial Planning Model. (Donahue Dec., ¶ 21.) Mr. Giardina misconstrues this opinion into a statement that "any person would be able to . . . use the model." (Giardina Dec., ¶ 48.)	Sustained: _____ Overruled: _____

No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
	financial and operational forecasts.”	speculation. (See O’Brien Decl., ¶ 38.) Opinions may not be based on assumptions of fact without evidentiary support. (Cal. Evid. Code § 800; <u>People v. Moore</u> , 51 Cal. 4th 386, 405 (2011).) As Mr. Donahue failed to provide any factual basis for his opinion, it is speculation and conjecture, and should be excluded. (See Giardina Decl., ¶ 48.)		
22.	Paragraph 22: “Without access to the fully functioning version, there is no way for anyone outside of Metropolitan, even those with extreme expertise in various rate models and financial planning models, to ever replicate the rates that Metropolitan staff recommends to the Metropolitan Governing	Lacks foundation (Cal. Evid. Code § 403); unqualified expert testimony (Cal. Evid. Code § 720); and lacks personal knowledge (Cal. Evid. Code § 702). Speculative and conclusory. (Cal. Evid. Code § 403.) Improper lay opinion. (Cal. Evid. Code § 800.) This opinion is vague, irrelevant, and lacks proper foundation. Mr. Donahue’s background does not establish him as an expert in the development of proprietary formulas and programming code qualified to opine on the creation of the proprietary computer software program that	See Section A and Response to Nos. 11, and 17, above. Mr. Giardina’s testimony does not concern Mr. Donahue’s background or technical qualifications to opine on the creation of a rate model like Metropolitan’s Financial Planning Model. (Giardina Dec., ¶¶ 49-50.)	Sustained: _____ Overruled: _____

No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
	Board. One cannot confirm, for example, the mass amount of data that is entered into the spreadsheet is accurate or even if the numbers were completely fabricated.”	is Metropolitan’s model and how it should function. (See O’Brien Decl., ¶¶ 36-39; Giardina Decl., ¶¶ 49-50.)		

DATED: January 23, 2018

LAW OFFICES OF KELLY AVILES

By: 
 Kelly A. Aviles
 Attorneys for Plaintiffs/Petitioners
 SAN DIEGO COUNTY WATER AUTHORITY