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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

SDCWA'S STATEMENT IN RESPONSE TO MWD'S *EX PARTE* APPLICATION FOR ORDER REVOKING ORDER STRIKING C.C.P. § 170.6 MOTION

Date: March 23, 2018
Time: 11:30 a.m.
Dept.: 304
Judge: Hon. Curtis E.A. Karnow

Date Filed: June 11, 2010
June 8, 2012

I. INTRODUCTION

On March 16, 2018, this Court struck MWD's peremptory challenge under Code of Civil Procedure section 170.6, preliminarily concluding that MWD's motion was untimely but inviting MWD to bring "a motion to reconsider" so that the parties could fully brief the issue. MWD has now filed an *ex parte* application for reconsideration, arguing that its 170.6 challenge is timely. But even if MWD's motion is timely, there is another threshold legal issue MWD has ignored that requires full briefing and consideration before the Court may determine whether MWD can exercise a peremptory challenge: Under section 170.6, the right to make a post-appeal peremptory challenge is only triggered "if the trial judge in the prior proceeding is assigned ***to conduct a new trial*** on the matter." Code Civ. Proc. § 170.6(a)(2) (emphasis added).[1]

While the Court of Appeal's remand will require further proceedings in the trial court, those proceedings will not necessarily constitute a "new trial" within the meaning of section 170.6, because they will not require the Court to re-examine or decide again any issue that was litigated and decided in the previous trial. Accordingly, San Diego respectfully requests that the Court vacate its March 16, 2018 Order and set a full briefing schedule and hearing on MWD's peremptory challenge, including whether the proceedings on remand will constitute a "new trial."

II. ARGUMENT

A. MWD's peremptory challenge may have been timely.

MWD's initial peremptory challenge cited no case law whatsoever, and failed to point the Court to ***any*** decision addressing the timeliness of a post-appeal 170.6 motion. In its *ex parte* papers, MWD cites for the first time *Ghaffarpour v. Super. Ct.*, 202 Cal. App. 4th 1463 (2012).[2] In *Ghaffarpour*, after reversal by the Second District Court of Appeal, the case was remanded to

[1] As discussed below, MWD's suggestion in its *ex parte* papers that this Court is limited to considering whether MWD's challenge was timely is simply wrong.

[2] MWD's failure to cite the relevant authority in its original motion does not provide grounds for reconsideration. *See Gilberd v. AC Transit*, 32 Cal. App. 4th 1494, 1500 (1995) (claim that "trial court misinterpreted California law in its initial decision" did not establish that motion to reconsider was based upon new or different facts, circumstances or law as required under Code of Civil Procedure § 1008). Nevertheless, for the reasons discussed herein, San Diego believes that it would be best for the Court to vacate its prior Order and set a full briefing schedule and hearing on MWD's entitlement to bring its asserted peremptory challenge.

the Los Angeles Superior Court, which had enacted a local rule providing that, upon reversal, cases were automatically returned to the "last assigned judge," with the 60-day period to file a motion under section 170.6 running from the date of issuance of the remittitur. *Id.* at 1469–70. The Court of Appeal held that the local rule conflicted with section 170.6 and the California Rules of Court that authorized a Superior Court's presiding judge to reassign cases, concluding that:

> [T]he time to file a peremptory challenge pursuant to section 170.6, subdivision (a)(2) begins when the party who filed the appeal has been notified of the assignment, and does not begin from the date of issuance of the remittitur by the Court of Appeal.

Id. at 1471. There are some differences between the local rule at issue in *Ghaffarpour* and these cases, which were granted complex designation and assigned to this Department "for all purposes" in 2010 and 2012, respectively.[3] But if the *Ghaffarpour* case controls, San Diego does not dispute that the Court of Appeal likely would deem MWD's peremptory challenge timely.

B. The Court should set a briefing schedule and hold a hearing on whether the proceedings on remand constitute a "new trial."

1. The Court cannot grant MWD's disqualification motion without deciding whether there will be a "new trial."

MWD's *ex parte* briefing incorrectly states that, in deciding this post-appeal 170.6 challenge, "the Court's jurisdiction is limited to a timeliness determination." Mem. at 10. That is flat wrong. Even if MWD's disqualification motion was timely, a post-appeal peremptory challenge is allowed only if "the trial judge in the prior proceeding is assigned ***to conduct a new trial*** on the matter." Code Civ. Proc. § 170.6(a)(2) (emphasis added); *Paterno v. Super. Ct.*, 123 Cal. App. 4th 548, 556 (2004). "The term 'new trial' is intended to cover situations where ***the case is to be re-tried*** and not merely remanded with instructions to perform some specific task

[3] MWD suggests that it was not on notice of this Court's all-purpose assignment to this case because other cases have been assigned to Judge Wiss—but Judge Wiss assumed responsibility for those cases only because MWD asserted that they were not a "continuation" of this case, which allowed MWD to exercise a peremptory strike on this Court. *See* Oct. 18, 2016 Order. That belies MWD's current suggestion that it believed the Court would assign this case, on remand, to Judge Wiss, because the cases involve the same parties and overlapping issues.

(e.g., recalculate interest)." *Peracchi v. Super. Ct.*, 30 Cal. 4th 1245, 1258 (2003) (quoting Assem. Com. on Jud. Analysis of Assem. Bill No. 1213, as amended May 15, 1985) (emphasis in original); *see also State Farm Mut. Auto. Ins. Co. v. Super. Ct.*, 121 Cal. App. 4th 490, 496–97 (2004). The question whether post-appeal proceedings constitute a "new trial" turns on whether or not the trial court will be required to "reexamine issues litigated in the prior proceeding." *Paterno*, 123 Cal. App. 4th at 561 (2004) (denying post-appeal 170.6 challenge where proceedings on remand did not require a "new trial within the meaning of the statute"); *Peracchi*, 30 Cal. 4th at 1253 (same); *State Farm*, 121 Cal. App. 4th at 493 (same). MWD cites *Paterno* in its moving papers (see Mem. at 10), but ignores the "new trial" requirement altogether. In other words, MWD has the right to exercise a section 170.6 peremptory strike only if the scope of the proceedings on remand will involve reexamination of issues previously litigated and decided.

2. The issues for determination on remand should not require a "new trial."

Based on the Court of Appeal's decision, San Diego has identified at least four issues that need to be resolved on remand:

First, the Court of Appeal explicitly remanded for a "recalculation of damages" flowing from MWD's inclusion of the Water Stewardship Rate in its wheeling rate and the Price charged to San Diego under the Exchange Agreement. *San Diego Cnty. Water Authority v. Metropolitan Water Dist. of S. Cal*., 12 Cal. App. 5th 1124, 1166 (2017)("*SDCWA*"). This "recalculation" will not be a "new trial." The Court of Appeal's opinion unambiguously held that "Metropolitan's payments to member agencies to fund water conservation programs is not a cost of using [MWD's] conveyance system to wheel water." *Id.* at 1150. As the Court of Appeal explained: "The record fails to support Metropolitan's inclusion of the water stewardship rate as a transportation cost." *Id.* Those legal determinations are not reviewable on remand; they are the law of the case. The opinion further provides specific direction on how contract damages for the issues addressed in the previous trial should be recalculated:

> Since the water stewardship rate was unlawfully charged for the conveyance of water, there was a breach of the agreement in that respect. The Water Authority is entitled to recover damages limited to the overcharges attributable to the unlawful

inclusion of the water stewardship rate.

Id. at 1154. The appellate court thus remanded "for a redetermination of damages based solely on overcharges from inclusion of the water stewardship rate." *Id.* The trial record already reflects the "overcharges attributable to the unlawful inclusion of the water stewardship rate"—they are $28,678,191 for 2011-2014, plus prejudgment interest. *See* Trial Tr. at 1119:19–25; PTX-512. That recalculation requires no new evidence or testimony, and it is certainly not a new trial.

Second, the Court must address an issue that was briefed and argued, ***but never decided***, in the earlier trial: MWD's conceded failure to calculate "offsetting benefits" as part of setting the "lawful wheeling rate" it is obligated to charge to deliver San Diego's purchased water under the Exchange Agreement. MWD's failure to calculate or deduct "offsetting benefits" resulted in an unlawful wheeling rate and overcharges to San Diego. Because this Court never decided that issue in the original trial, resolving that issue now would not be a "re-examination" of issues already litigated that could constitute a "new trial" and allow a post-remand peremptory strike. *See Paterno*, 123 Cal. App. 4th at 560 (affirming denial of peremptory challenge where the post-remand "trial to determine the amount of damages" would not "revisit any factual or legal terrain that has thus far been traversed").

The Court of Appeal affirmed that the Wheeling Statute applies to the Exchange Agreement. *See SDCWA*, 12 Cal. App. 5th at 1154. That statute requires water agencies to make their aqueducts available for wheeling but allows them to charge "fair compensation" for the use of their facilities. Cal. Water Code § 1810. "Fair compensation" is defined as the "reasonable charges incurred by the owner of the conveyance system, including capital, operation, maintenance, and replacement costs, increased costs from any necessitated purchase of supplemental power, and ***including reasonable credit for any offsetting benefits for the use of the conveyance system***." *Id.* § 1811(c) (emphasis added).

San Diego presented evidence on "offsetting benefits" at trial and in its post-trial briefing. *See, e.g.*, 28-RT-1246:19-1247:10; 33-RT-2085:18-2087:17; SD Post-Trial Br. at 47–48. Indeed, one of the written questions asked by the Court on the eve of closing arguments was: "What evidence is there that Met gets such a benefit for wheeling?" Counsel for San Diego addressed

that issue at length during closing arguments. But because this Court determined that MWD's wheeling rate was across-the-board illegal due to its inclusion of SWP costs (a decision the Court of Appeal reversed), it had no need to reach or decide whether MWD's wheeling rate is invalid based on MWD's failure to calculate or apply the offsetting benefit to MWD created by San Diego's wheeling of third-party water. On remand, San Diego is entitled to a judicial determination of this statutory obligation. Indeed, the Court of Appeal's opinion specifically provides for "other proceedings consistent with the views expressed in this opinion." *SDCWA*, 12 Cal. App. 5th at 1166. Nothing in the Court of Appeal's opinion is inconsistent with or forecloses the Court from determining the offsetting benefits issue.

While MWD's failure to calculate "offsetting benefits"—and the damages resulting from that—will now need to be decided on remand, that will not constitute a "new trial" for disqualification purposes for two reasons. First, as discussed above, the Court never reached "offsetting benefits" and there will be no "re-examination" of a decided factual issue. *See Paterno*, 123 Cal. App. 4th at 560. Second, the question of whether MWD must account for offsetting benefits in setting a wheeling rate requires no resolution of factual disputes. That obligation is plain on the face of Water Code section 1810. Indeed, MWD's Resolution 8520—the "written findings" on which MWD relied to support its 2011–2014 wheeling rate—not only recognizes this statutory obligation but even provides for the method of assessing offsetting benefits, which "shall be calculated by Metropolitan in the same manner as such benefits are calculated for use in the Local Projects and Groundwater Recovery Program." 9-AR2010-2449.

Third, the Court of Appeal remanded the case for "entry of declaratory relief on the Rate Structure Integrity clause." *SDCWA*, 12 Cal. App. 5th at 1166. The Court will recall that it granted summary adjudication to MWD on San Diego's fifth cause of action regarding MWD's RSI clause, ruling that San Diego did not have standing to challenge the RSI clause. *See* Dec. 4, 2013 Order on Summ. Adjudication Mots. at 12–15, 24. That decision was reversed, and the Court of Appeal held that San Diego is "entitled to judgment on its declaratory relief cause of action declaring the RSI clause invalid and unenforceable as an unconstitutional condition." *SDCWA*, 12 Cal. App. 5th at 1164.

This task will not constitute a "new trial" either. The scope of declaratory and injunctive relief on San Diego's cause of action challenging MWD's RSI clause was never adjudicated because the Court summarily resolved that claim in MWD's favor. In the operative 2010 Complaint, San Diego sought not only declaratory relief of unconstitutionality but specific performance of the contracts unlawfully terminated by MWD, including reinstatement of the terminated contracts and restoration of San Diego's eligibility for subsidy programs. Third Am. Compl. ¶ 110; Prayer for Relief, para 5. However, given that at least seven years will have elapsed between when MWD invoked the RSI clause and entry of judgment, it may no longer be possible in equity to restore the parties to their positions *ex ante*. In such situations, the law allows for an award of restitution as a substitute for the initially-sought equitable relief.

In cases "where the complaint and prayer are drawn in the form of an equitable action, but equitable relief is, for some reason, unavailable," then "legal relief (damages) . . . should be awarded." 4 Witkin Cal. Proc. 5th Plead § 414 (2008). As the California Supreme Court has explained, a plaintiff's "attempt to procure a decree specifically enforcing an agreement which … cannot be specifically enforced, should not itself preclude him from obtaining relief by way of damages." *Pascoe v. Morrison*, 219 Cal. 4th 54, 58–59 (1933). Where, as here, "through no fault of the plaintiff, specific performance cannot be decreed, the court having obtained jurisdiction of the subject matter, properly within its cognizance, may grant monetary relief which in an action at law would be by way of damages." *Engasser v. Jones*, 88 Cal. App. 2d 171, 176 (1948).[4]

When MWD invoked the RSI clause, it terminated two contracts providing subsidy funds

[4] *See also Beach Break Equities, LLC v. Lowell*, 6 Cal. App. 5th 847, 854 (2016) ("[E]ven without an order from the reviewing court, the party prevailing on appeal may seek restitutionary relief through a motion in the remanded matter, rather than by filing a new cross-complaint or filing an independent action."); *City of Orange v. San Diego Cnty. Emps. Ret. Ass'n*, 103 Cal. App. 4th 45, 59 (2002) (doctrine of election of remedies did not preclude plaintiff's second action for breach of contract where plaintiff was "precluded from [obtaining contract remedy in prior action due to] trial court's order granting summary judgment"); *Walsh v. Macaire*, 102 Cal. App. 2d 435, 438 (1951) ("If plaintiffs could not have specific performance of that part of the agreement they were entitled to damages as a matter of right"); *Crouser v. Boice*, 51 Cal. App. 2d 198, 203 (1942) (where trial court found plaintiffs were entitled to specific performance, but specific performance had been rendered impossible by defendants, court properly awarded damages "not in the exercise of legal jurisdiction, but in the exercise of the equity jurisdiction of the court"); 58 Cal. Jur. 3d Specific Performance § 100.

to San Diego and one of its member agencies, and deferred execution of at least three pending agreements that would have provided additional subsidy benefits to San Diego. Those contracts cannot now be restored or executed—at least for the time period in question. Therefore, San Diego is entitled to reinstatement of contracts that may be restarted, and an award of restitution or equitable damages as to contracts that cannot be (or for the money paid by San Diego for which it was not subsidized during the intervening years)—all in order to restore it to the position that equity requires. However this determination is made, it will not be a "new trial" within the meaning of section 170.6 because the Court will not be required to "reexamine issues litigated in the prior proceeding." *Paterno*, 123 Cal. App. 4th at 561.

Fourth, in light of the various reversals and affirmances of this Court's ruling, the Court of Appeal instructed this Court to engage in a "redetermination of the prevailing party" for purposes of determining the right to recover attorneys' fees under the Exchange Agreement and for purposes of assigning costs. The Court has never held a "trial" on that issue—MWD never disputed that San Diego was the prevailing party on the contract. If a redetermination of the prevailing party after an appellate reversal were sufficient to enable disqualification of the prior trial judge, the requirement that there be a "new trial" after reversal would nearly always be satisfied and would be rendered superfluous.

In short, while there are still issues to address before entry of final judgment, none of them constitute a "new trial" that entitles MWD to a revived peremptory challenge under section 170.6. And if MWD contends the matters described above amount to a "new trial"—as it must, yet fails to address (much less establish) in its moving papers—then it should be required to explain why. Either way, fairness and due process require that San Diego be allowed to address these issues, before either this Court or another judge, to protect the rights of the 3.3 million residents of San Diego County and prevent the "misdirection of public funds." *United Educators of S.F. AFT/CFT v. Cal. Unemployment Ins. Appeals Bd.*, 247 Cal. App. 4th 1235, 1247 (2016).

3. Upon vacating the order, the Court can set a hearing at its convenience to resolve MWD's peremptory challenge.

MWD's peremptory challenge should be decided promptly—so that the parties may

proceed to litigate the remaining issues in the case (before this Court or otherwise)—but it need not be decided today. MWD's concern about the need to file a writ evaporates if the Court dissolves the order and sets MWD's section 170.6 motion for hearing in short order. San Diego is available for hearing on the dates the Court previously made available for a case management conference: April 2, 6, 9, 10, or 11.

III. CONCLUSION

For the foregoing reasons, San Diego respectfully requests that the Court vacate its March 16, 2018 Order and set a full briefing schedule and hearing on MWD's peremptory challenge, including whether the proceedings on remand will constitute a "new trial."

Dated: March 22, 2018

KEKER, VAN NEST & PETERS LLP

/s/ Warren A. Braunig

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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 March 22, 2018, I served the following document(s):

SDCWA'S STATEMENT IN RESPONSE TO MWD'S *EX PARTE* APPLICATION FOR ORDER REVOKING ORDER STRIKING C.C.P. § 170.6 MOTION

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.

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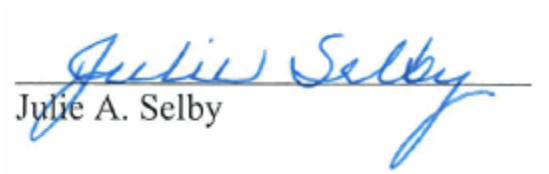
Executed on March 22, 2018, at San Francisco, California.
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



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