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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY,

Petitioner and Plaintiff,

vs.

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

Respondents and Defendants.

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

Assigned for all purposes to the Honorable Mary E. Wiss

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S OPENING BRIEF REGARDING THE SCOPE OF REMAND PROCEEDINGS

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

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STATUTES

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In the 2010/2012 Actions, the Court of Appeal reversed the judgment, vacated the writ of mandate, and remanded the cases "to the trial court for recalculation of damages, entry of declaratory relief on the Rate Structure Integrity clause, redetermination of the prevailing party, and other proceedings consistent with the views expressed in [its] opinion." *San Diego Cty. Water Auth. v. Metro. Water Dist. of S. California*, 12 Cal. App. 5th 1124, 1166 (2017), *as modified on denial of reh'g* (July 18, 2017), *review denied* (Sept. 27, 2017) ("*COA Opinion*"). These narrow instructions bind the parties and this Court. *See Hampton v. Super. Court*, 38 Cal. 2d 652, 655 (1952) ("When there has been a decision upon appeal, the trial court is reinvested with jurisdiction of the cause, but only such jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void."). The Metropolitan Water District of Southern California ("MWD") addresses each of the three remanded issues below.

I. BACKGROUND.

MWD is a voluntary cooperative of 26 member agencies (including San Diego County Water Authority ("SDCWA")) to which MWD delivers wholesale water from two principal sources: the Colorado River via the Colorado River Aqueduct and the State Water Project ("SWP") via the California Aqueduct. The Colorado River Aqueduct, SWP and MWD's in-basin distribution system are interconnected, providing operational flexibility that benefits all users, including SDCWA. In accordance with state statute, MWD generally delivers a blend of Colorado River and SWP water. Wat. Code appen., § 109-136.

A. MWD's Rate Components.

MWD is required by statute to establish rates that will generate sufficient revenue to pay its expenses. Wat. Code appen., § 109-134. To replace an earlier bundled rate, MWD's Board of Directors ("Board") voted to adopt an unbundled rate structure, effective January 2003, allocating charges to separate components, including supply and transportation.

MWD's *supply rates* recover MWD's costs of obtaining water supply from the SWP and the Colorado River, as well as maintaining and developing additional water supplies. MWD's *transportation rates* recover the costs of constructing, operating and maintaining MWD's

integrated water conveyance infrastructure. As described by the Court of Appeal:

> A 'system access rate' is designed to recover the capital, operating, and maintenance costs associated with transportation facilities, including 'conveyance' facilities that transport water from the [SWP] and Colorado River Aqueduct and 'distribution' facilities that transport water within [MWD's] service area. (Admin. Code, § 4123.) A 'system power rate' recovers the cost of pumping water through the [SWP] and Colorado River Aqueduct to Southern California. (Admin. Code, § 4125.) A 'water stewardship rate' is designed to recover the costs of conservation programs and other water management programs that reduce and defer system capacity expansion costs. (See Admin. Code, § 4124.) The transportation rates are so-called postage-stamp rates, which are the same no matter how far the water is transported or which transportation facilities are used.

COA Opinion, 12 Cal. App. 5th at 1138. *Metropolitan Water Dist. v. Imperial Irrigation Dist.* ("*IID*"), upheld MWD's system-wide postage stamp rates. 80 Cal. App. 4th 1403, 1433 (2000).

MWD provides two services to its member agencies for which it charges established rates: (1) full-service water service in which MWD supplies and transports water; and (2) "wheeling" service, in which MWD transports water supplied by others. MWD's wheeling rate applies only to wheeling by member agencies for up to one year; the charges for other wheeling transactions (and exchange agreements) are negotiated. MWD establishes rates for full-service water and wheeling service based on the components described above. The rate for full-service water includes the supply and transportation rates. The wheeling rate includes the System Access Rate and Water Stewardship Rate ("WSR"), but not the System Power Rate or any supply rates. *See* Appellant's Opening Brief, 27-33 (May 5, 2016).

B. <u>The 1998 Exchange Agreement.</u>

In 1998, the Imperial Irrigation District ("IID") agreed to transfer up to 200,000 acre-feet of conserved Colorado river water per year to SDCWA, contingent upon SDCWA obtaining MWD's agreement to accept delivery of the "transfer water" from IID at Lake Havasu and "wheel" it to San Diego. SDCWA and MWD never entered into a wheeling agreement. *See* Appellant's Opening Brief, 34-35; MWD's Phase 2 Trial Brief, 6-9 (Mar. 23, 2015).

Instead, MWD and SDCWA entered into a 30-year "Exchange Agreement." SDCWA

agreed to pay only $90 per acre-foot, with annual increases capped at 1.55% per year for the first 20 years. For years 21 through 30, SDCWA agreed to pay $80 per acre-foot, with yearly increases limited to 1.44%. The agreement was conditioned on the State Legislature's appropriation of $235 million to MWD to line the earthen All-American and Coachella Valley Canals in order to conserve a water supply ("canal lining water") that would otherwise be lost through seepage into the soil, and other projects.[1] Under federal legislation, MWD had the rights to 77,700 acre-feet of canal lining water per year for 110 years. To facilitate the Exchange Agreement, the State Legislature allocated the $235 million funding to MWD. *See* Appellant's Opening Brief, 34-35.

As the Court of Appeal explained, the Exchange Agreement was fundamentally different from a wheeling agreement:

> . . . wheeling and exchange agreements are not the same. A wheeling agreement calls for the transportation of water when there is available capacity in the water conveyance system. An exchange agreement promises the delivery of a specified quantity of water. Water is not wheeled unless available, but an exchange agreement requires delivery of an agreed-upon quantity of water every month. . . . As the trial testimony in the present case established, the parties here preferred an exchange agreement to a wheeling agreement. [SDCWA] wanted guaranteed delivery. . .

COA Opinion, 12 Cal. App. 5th at 1136. "Unused capacity" is the cornerstone of a wheeling agreement. *See* Water Code § 1810 *et seq*. In contrast, the Exchange Agreement guaranteed MWD's delivery of an agreed-upon quantity of exchange water to SDCWA each month without regard to system capacity; and without regard to whether IID had delivered to SDCWA, and SDCWA had made available to MWD at Lake Havasu, an equivalent amount. The Exchange Agreement also included the flexibility needed to guarantee delivery—MWD could use all of its facilities and water resources, including SWP water, to perform the contract.

[1] The $235 million appropriation bridged the gap between the fixed price term that Metropolitan considered a below-cost discounted price, and the total amount MWD considered appropriate compensation for the exchange. MWD would not agree to the discounted price term without the $235 million appropriation to make it whole.

C. The 2003 Amended Exchange Agreement.

Between 1998 and 2003, SDCWA obtained no water from IID because of an ongoing dispute affecting IID's entitlement to Colorado River water. In 2003, state and national government agencies, Native American tribes, water agencies, irrigation districts and local governments entered into a series of agreements (collectively, the "Quantification Settlement Agreement" or "QSA") to quantify all parties' rights to Colorado River water, making it possible for IID to transfer water to SDCWA as contracted. *See* Appellant's Opening Brief, 35-38; MWD's Phase 2 Trial Brief, 9-10.

In mid-2003, to address certain QSA requirements, SDCWA and MWD amended the Exchange Agreement. Although the QSA requirements did not necessitate any price change, SDCWA proposed two price term options. Under option one, the price term would remain unchanged. Under the second, MWD would assign to SDCWA its $235 million legislative appropriation for canal lining and other projects, as well as MWD's right to 77,000 acre-feet of conserved canal lining water per year for 110 years. In return, rather than $90 per acre-foot (adjusted over time), SDCWA would pay MWD's unbundled transportation rates (System Access Rate, System Power Rate and WSR) which, on the date of execution, totaled $253 per acre-foot.[2] Thereafter, the price would be "equal to the charge or charges set by [MWD's] Board of Directors pursuant to applicable law and regulation and generally applicable to the conveyance of water by [MWD] on behalf of its member agencies." *See COA Opinion*, 12 Cal. App. 5th at 1136-37.

MWD's Board permitted SDCWA to choose between the two options that SDCWA had proposed. SDCWA selected the second—a higher price term consisting of specific rate components in consideration for MWD assigning to SDCWA its $235 million legislative

[2] In the parties' Further Joint CMC Statement, SDCWA incorrectly stated that the Exchange Agreement required MWD to charge SDCWA its wheeling rate. *See* Further CMC Statement, 4:2 (May 16, 2018). Not so. MWD's wheeling rate, which is applicable to wheeling to member agencies for up to one year (MWD Admin. Code § 4119) and which SDCWA did not propose as the basis for the price term in the Exchange Agreement, includes MWD's System Access Rate and WSR, but not the postage stamp System Power Rate which is an average of power costs across MWD's system. As the Court of Appeal noted, "[a] recipient of wheeling service does not pay the system power rate but pays only the actual cost of the power used to transport the water it receives from a third party" (*COA Opinion*, 12 Cal. App. 5th at 1138), unless the wheeler provides its own power (MWD Admin. Code § 4405). The wheeling rate also includes an administration fee. *Id.*

appropriation and its right to the canal lining water for 110 years. MWD accepted this consideration package, including SDCWA's offered price term. As agreed, MWD assigned to SDCWA its rights to the $235 million legislative appropriation and the canal lining water. Thus, SDCWA received $235 million *and* 77,700 acre-feet of water per year for 110 years, *worth well over $1 billion*.[3] *See* Appellant's Opening Brief, 37-38.

The Court of Appeal again held that the amended Exchange Agreement is not a wheeling agreement. First, the 2003 amendment, like its 1998 counterpart, guarantees delivery regardless of capacity or the amount of actual transfer water available from IID. Second, whereas MWD's wheeling rate includes only actual system power cost to wheel third-party water (unless the wheeler provides its own power), the price term that SDCWA proposed and MWD accepted includes MWD's postage stamp System Power Rate. *See COA Opinion*, 12 Cal. App. 5th at 1138-39 ("Under the exchange agreement as amended in 2003, [SDCWA] agreed to pay charges 'generally applicable to the conveyance of water by [MWD] on behalf of its member agencies' **which, the parties agree**, are the system access rate, water stewardship rate and, unlike the situation under a standard wheeling agreement, the system power rate." (emphasis added)).

D. Demand Management Contracts And The Rate Structure Integrity Clause.

MWD and SDCWA have also entered into certain demand management contracts. Unique to MWD, the State Legislature has instructed MWD to "expand water conservation, water recycling, and groundwater recovery efforts" and mandated that MWD "shall place increased emphasis on sustainable, environmentally sound, and cost-effective water conservation, recycling, and groundwater storage and replenishment measures." Wat. Code appen., § 109-130.5. In accordance with state law, MWD has two demand management programs premised on the regional benefits: (1) the Local Resource Program (LRP), in which MWD contracts with its member agencies and their sub-agencies to incentivize these agencies' development of local

[3] The QSA, including the 2003 Exchange Agreement, is a collection of over 30 agreements. The 2003 Exchange Agreement refers to the QSA's allocation agreement transferring the $235 million state appropriation and the rights to the canal lining water to SDCWA as part of its consideration. It also references other agreements as consideration, including the earlier 1998 Exchange Agreement, the transfer agreement between SDCWA and IID, and the master QSA itself. *See* 2003 Exchange Agreement, 3 (attached to operative 2010 Petition/Complaint as Exhibit A). The consideration MWD provided for the 2003 Exchange Agreement price term was substantial.

water resources through recycling, groundwater recovery, and other projects; and (2) the Conservation Credits Program (CCP), in which MWD provides funding to member agencies and consumers to incentivize water conservation, such as through device rebates and turf removal.[4] *See* Appellant's Opening Brief, 75. Member agencies are not guaranteed LRP contracts; rather, they apply by submitting proposals, which are evaluated for compliance with program criteria and submitted for MWD Board approval at its discretion. Under the LRP contracts, MWD pays the member agency based on the acre-feet of water produced, often over a 20-plus year term. The demand management programs are funded by the WSR.[5]

In 2004, after considering comments from member agencies, the Board voted to include a "Rate Structure Integrity" ("RSI") clause in all demand management contracts. The RSI clause permitted the Board to terminate contract payments in the event that a member agency disputed MWD's rates in litigation rather than through administrative channels, as this impacted MWD's ability to make contract payments. *See COA Opinion*, 12 Cal. App. 5th at 1156-57. Between 2007 and 2010, MWD entered into six contracts with SDCWA containing the RSI clause.

In 2010 and 2012, SDCWA filed the present actions against MWD, alleging that MWD's transportation rates and wheeling rate are unlawful.[6] After SDCWA initiated the 2010 Action, MWD's Board, relying on the RSI clause, terminated two demand management contracts with SDCWA and ceased payments on two more. The remaining two of SDCWA's six contracts with the RSI clause were fully performed. The Board also directed the General Manager not to execute pending agreements absent further Board action and direction. Other earlier demand management contracts that did not include the RSI clause remained in effect and continued to be performed with millions of dollars of payments to SDCWA. SDCWA then amended its Petition/Complaint in the 2010 Action to include a claim for declaratory relief, requesting a declaration that the RSI clause is "invalid and unenforceable."

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[4] MWD previously had a third demand management program – the Seawater Desalination Program (SDP). The LRP now includes desalination projects.

[5] *See* Appellant's Reply and Cross-Respondent's Responding Brief, 121-23 (Sept. 23, 2016).

[6] Case No. CFP-10-510830 (the "2010 Action") challenged MWD's 2011-2012 water rates; Case No. CFP-12-512466 (the "2012 Action") challenged MWD's 2013-2014 water rates. The superior court informally coordinated the 2010/2012 Actions for most purposes, including trial. The parties agree that they should remain informally coordinated during remand proceedings.

Prior to amending, SDCWA sent a Notice of Payment Under Protest and Claim for Refund (the "Claim Notice") to MWD. *See* Kaplan Decl., Ex. A (Claim Notice). The only RSI-related damages sought were for "breach/unlawful termination" of the San Vicente Water Recycling Project LRP contract. *Id*.

E. Relevant Procedural History.

The 2010/2012 Actions challenged two aspects of MWD's transportation rates and its wheeling rate for the years 2011-2014: (1) allocation of MWD's SWP transportation costs to transportation (the System Access Rate and System Power Rate); and (2) allocation of demand management program costs to transportation (the WSR). SDCWA contended the SWP transportation costs and demand management costs should be allocated to the supply rate. In each case, SDCWA also asserted a claim for breach of the Exchange Agreement, alleging that because the System Access Rate, System Power Rate and WSR were unlawful, so too was the price term. The 2010 Action also included the claim for declaratory relief with respect to the RSI clause. The parties cross-moved for summary adjudication of SDCWA's request for declaratory relief regarding the RSI clause. The court granted MWD's motion concluding that SDCWA lacked standing to challenge the clause. As to SDCWA's other claims, the court bifurcated trial into two phases: (1) the rate challenges; and (2) contract breach.[7] Following Phase 1, the court issued its Statement of Decision on Rate Setting Challenges ("Phase 1 SOD") on April 24, 2014. The court held that the administrative record did not support MWD's inclusion in its transportation rates and wheeling rate of 100% of its SWP transportation costs and 100% of its demand management program costs.

Following Phase 2, the court issued a second Statement of Decision on August 28, 2015 ("Phase 2 SOD"). The court found that MWD had breached the price term of the Exchange Agreement because it charged SDCWA a price based on unlawful transportation rates. The court awarded SDCWA the entirety of its requested damages ($188,295,602 plus prejudgment interest), equal to the total amount SDCWA paid under the Exchange Agreement from 2011-2014 for (1)

[7] Phase 2 also included SDCWA's preferential rights claim, which the parties agree is not at issue on remand.

SWP transportation costs included in the System Access Rate and System Power Rate; and (2) the WSR. The court acknowledged that the award "may overcompensate [SDCWA]" but opined that "[t]here was no viable alternate methodology available." Phase 2 SOD, 16-17.

The court entered Final Judgment, including a broad writ of mandate on the rates challenges, on November 18, 2015. The court also awarded San Diego $320,084 in costs and $8,910,354.20 in attorney fees. MWD appealed the Final Judgment and attorney fees award. SDCWA cross-appealed, disputing the court's order granting summary adjudication on its RSI claim and attorney fees award.

On June 21, 2017, the Court of Appeal held that MWD's inclusion of SWP transportation costs in its transportation rates and wheeling rate was lawful; but based on the record before it, inclusion of the demand management costs in the transportation rates and wheeling rate (the WSR) was unlawful and breached the Exchange Agreement. On the RSI clause, the Court of Appeal found that SDCWA had standing and that the clause was an unconstitutional condition. *COA Opinion*, 12 Cal. App. 5th at 1166.[8] The Court of Appeal reversed the judgment, vacated the writ and remanded the action "to the trial court for recalculation of damages [based solely on overcharges from inclusion of the WSR], entry of declaratory relief on the Rate Structure Integrity clause, redetermination of the prevailing party, and other proceedings consistent with the views expressed in [its] opinion." *Id.*

II. ISSUES WITHIN THE COURT OF APPEAL'S REMAND INSTRUCTIONS.

A. Redetermination Of Damages Based Solely On Water Stewardship Rate.

1. Overview Of MWD's Position.

The Court of Appeal remanded for "redetermination of [contract] damages based solely on overcharges from inclusion of the WSR]." *COA Opinion*, 12 Cal. App. 5th at 1154 (emphasis added). As shown below, the Court's direction requires proceedings sufficient to "redetermine" damages focused solely on the issue of the amount, if any, by which SDCWA was overcharged as the result of the inclusion of the WSR in the price term of the Exchange Agreement.

[8] In light of the Court of Appeal's ruling, MWD no longer includes the RSI clause in new contracts, nor does it enforce it in existing contracts. *See* Kaplan Decl. Ex. B (email from Jeffrey Kightlinger, Metropolitan General Manager, to Member Agency Managers (Sept. 29, 2017)).

First, contract damages cannot put SDCWA in a better position than it would have been in had the contract been performed. The WSR portion of the price that SDCWA was charged under the Exchange Agreement is only the starting point of this calculation. MWD is entitled to show what SDCWA could have been lawfully charged for recovery of its share of demand management costs and that such lawful charges must be deducted from damages to avoid a windfall to SDCWA. Second, the remand on this issue encompasses the reopening of discovery and the opportunity to present new evidence—here, MWD expects to develop and present additional expert opinion evidence on the proper amount of damages, including showing that the demand management costs at issue, if not charged as a transportation rate, would lawfully have been recoverable from SDCWA through other rates and charges, and that damages must be reduced to reflect such lawful rates and charges.

2. The WSR And The Prior Rulings.

As stated, as part of the legislative direction that MWD "expand water conservation, water recycling, and groundwater recovery efforts" (Wat. Code appen., § 109-130.5), MWD funds demand management programs that develop and conserve local water resources. To recover the costs of its programs, MWD, as statutorily required, developed the WSR and provided for its recovery in its transportation rates and wheeling rate. The Court of Appeal held that MWD's inclusion of the WSR in its transportation rates and wheeling rate was not supported by the administrative record for the years 2011-2014 and was therefore unlawful and breached the Exchange Agreement.[9] Because this was MWD's only breach, the Court of Appeal remanded for "redetermination of [contract] damages based solely on overcharges from inclusion of the [WSR]." *COA Opinion*, 12 Cal. App. 5th at 1154. This "redetermination" requires the Court to assess: (1) the amount that MWD could have recovered from SDCWA through lawful rates and charges for demand management costs; and (2) the delta between that amount and the amount

[9] Demand management programs have the effect of reducing the need to import water into MWD's service area, thereby reducing the costs of expanding and maintaining existing conveyance facilities, which would have been allocated to transportation rates. For example, industry studies, not found in the administrative record in the 2010 and 2012 cases, recognize and confirm this benefit. However, this issue will not be addressed on remand; it is an issue for review of the administrative record supporting rates set in later years.

SDCWA actually paid. This approach is correct for three reasons.

First, the Court of Appeal *did not* limit this Court to the ministerial action of entering a damages award equal to 100% of SDCWA's WSR payments under the Exchange Agreement. That computation had already been introduced and was part of the trial and appellate records. Had the Court of Appeal intended remand to be limited to entering a damages award on this already-known number and applying interest, its remand instruction would have so stated. It did not.

Second, it is well settled that the correct measure of damages in a contract dispute is the difference between the benefit bargained for and the benefit conferred. Here, the parties bargained for a price term in the Exchange Agreement based on MWD's lawful conveyance charges generally applicable to the conveyance of water for its member agencies. The parties did not bargain to immunize SDCWA from the obligation to pay its share of costs through other rates and charges, even if they were not allocated to transportation and recoverable through the Exchange Agreement price. In contrast, SDCWA seeks a 100% refund of the WSR portion of the amounts paid under the Exchange Agreement, which would be a windfall to SDCWA, far exceeding the benefit it bargained for. For example, SDCWA argued the demand management costs should have been allocated to supply; if so, SDCWA would have paid a higher supply rate on its full service water deliveries in 2011-2014.

Third, it is equally well settled that remand automatically reopens discovery on remanded issues and allows for the presentation of new evidence. MWD is entitled to present expert opinion evidence on the amount for demand management costs it could have legally charged to SDCWA.

3. The Court Of Appeal Expressly Remanded For A "Redetermination."

There is no reason to conclude that the remand on this issue was constrained to adopting SDCWA's previous calculation of the amount that it was charged for the WSR under the Exchange Agreement, plus interest. In fact, that approach was urged by SDCWA and rejected by the Court of Appeal. Specifically, SDCWA outlined its damages ($188,295,602, computed by removing SWP costs and the WSR from the price it paid) and asked the Court of Appeal simply to affirm the damages award. *See* SDCWA's Responding and Opening Brief, 80, 107-08 (Aug. 3, 2016). The Court of Appeal was aware of the component of damages attributable to the WSR (*see*

COA Opinion, 12 Cal. App. 5th at 1141, n.9 (detailing the rate adjustment, including $41 per acre foot for the WSR, on which damages were based)), but declined SDCWA's invitation to affirm the damages figure attributable to the WSR, and instead remanded for a "redetermination of damages."

By contrast, MWD asked the Court of Appeal to reverse on grounds that would dispose of SDCWA's contract claims in their entirety, *or in the alternative, to reverse and remand for a retrial on damages, which would automatically reopen discovery*:

> [I]n the event this Court does not reverse on grounds that dispose of San Diego's contract claims in their entirety, the Court should reverse and remand for a retrial on damages. Such a decision would automatically reopen discovery. (*See, e.g., Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 250; *Hirano v. Hirano* (2007) 158 Cal.App.4th 1, 6-7.)

Appellants' Opening Brief, 119, n.28. The Court of Appeal—aware of SDCWA's computation method and the rule that discovery reopens on remand—elected to neither affirm the damages award nor instruct the trial court to award SDCWA an amount present in the existing record. *See Ayyad v. Sprint Spectrum, L.P.*, 210 Cal. App. 4th 851, 859-60 (2012). Instead, the Court of Appeal expressly remanded for a "redetermination of damages," the relief requested by MWD.

4. Contract Damages May Not Exceed The Bargained-For Benefit.

Under California law, damages for breach of contract must "seek to approximate the agreed-upon performance." *Lewis Jorge Const. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 34 Cal. 4th 960, 967 (2004) (quoting *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 515 (2004)). SDCWA is entitled to the benefit of its bargain with MWD and no more. *See Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, 226 Cal. App. 3d 442, 468 (1990). The correct measure of damages, therefore, is the delta between (1) the amount MWD could have lawfully charged SDCWA for demand management other than as a transportation rate; and (2) the WSR payments that SDCWA made under the Exchange Agreement.

Indeed, MWD is required to recoup its costs. Rate-setting is a zero-sum proposition—if one rate is reduced, others must be increased to cover MWD's costs. *See* Wat. Code

appen., § 109-134; *Mission Springs Water Dist. v. Verjil*, 218 Cal. App. 4th 892, 920-21 (2013). In Phase 2, the trial court acknowledged that SDCWA's request for 100% of its WSR payments under the Exchange Agreement may overcompensate SDCWA, but opined that "[t]here was no viable alternate methodology available." Phase 2 SOD, 16-17; *see also COA Opinion*, 12 Cal. App. 5th at 1141.

On remand, MWD has the right to make that showing by presenting evidence on fair and reasonable alternatives available to MWD to recover demand management costs and what MWD could properly have charged SDCWA in light of the Court of Appeal's decision. That determination is consistent with the remand instruction to redetermine damages based solely on overcharges from the inclusion of the WSR in the contract price term. The alternative is to give SDCWA more than it bargained for—a windfall that is impermissible as a matter of law.

5. The Remand Reopens Discovery And Requires New Expert Evidence.

On remand, MWD is entitled to develop and present a supplemental expert report on the difference between the WSR amounts MWD charged SDCWA under the Exchange Agreement, and the amount MWD could have lawfully charged SDCWA for its share of demand management costs. During the first trial, MWD was unable to adduce expert testimony regarding the amount of a lawful alternative in order to calculate damages during the initial expert discovery period, which concluded before Phase 1, until the parties knew to what extent and on what basis, if at all, the trial court determined MWD's rates to be invalid. *See* MWD's MPA In Support of its Motion to Reopen Discovery for Limited Purpose, 5:1-14 (July 1, 2014).[10] MWD therefore moved to reopen discovery prior to Phase 2 for the limited purpose of augmenting its expert designation and providing supplemental expert reports to inform the damages determination based on the Phase 1 decision. *See id.*[11] The court denied the motion.

[10] Neither party's expert had rendered, nor could have rendered, an opinion that applied the trial court's Phase I decision to the facts of the case, as expert discovery ended before the Phase I trial began. MWD's designated expert, Christopher Woodcock, explained that "until the Court rules [on the legality of MWD's rates], it is impossible to determine what the damages are, if any," from any alleged breach of the Exchange Agreement. Woodcock Expert Report, 25 (Oct. 28, 2013). SDCWA's person most knowledgeable on damages agreed that calculating damages prior to the court's Phase 1 determination would not be possible. *See* Dennis Cushman Deposition, Vol. III at 422:7-10, 14-19, 443:20-444:2.

[11] *See* Order Denying Metropolitan's Motion to Reopen Expert Discovery (Dec. 4, 2014).

As mentioned above, the procedural barrier that prevented MWD from submitting additional expert evidence during Phase 2 is removed by the remand. In *Fairmont*, the California Supreme Court held that reversal and remand automatically reopens discovery and permits litigants to present new evidence. *See Fairmont v. Super. Court*, 22 Cal. 4th 245, 247 (2002) (remand automatically reopens discovery with deadlines set based on new trial date); *Beverly Hospital v. Super. Court*, 19 Cal. App. 4th 1289, 1292 (1994) (same); *see also Hirano v. Hirano*, 158 Cal. App. 4th 1, 6 (2007) ("It is now well settled that discovery automatically reopens following a mistrial, order granting new trial, or reversal on appeal."). MWD is entitled to present new expert opinion evidence on the proper amount of damages.

The Court of Appeal has already decided the precise issue. In *Hirano*, the trial court precluded a plaintiff from introducing new expert testimony during remand proceedings for failure to comply with an expert witness demand during the initial trial. *Hirano*, 158 Cal. App. 4th at 6. The Court of Appeal reversed, holding that the rule in *Fairmont*—discovery automatically reopens on remand—"is particularly applicable to expert witness discovery" because "the parties are not limited to the evidence introduced at a prior trial, but are entitled to introduce additional evidence." *Id.* at 9. *Hirano* is dispositive because remand restarts the time for expert discovery even if a party was precluded from introducing expert testimony on timeliness grounds during the initial trial. Here, MWD seeks only to introduce supplemental expert opinion evidence on a discrete issue—the amount it could have lawfully charged SDCWA for its share of demand management costs, and the resulting appropriate damages award.

The Court of Appeal has also held that the type of remand here—a reexamination of damages—automatically reopens expert discovery and permits parties to designate new experts. In *Guzman*, the trial court granted a new trial on damages only, but denied plaintiff's request to designate a new expert. *Guzman v. Super. Court*, 19 Cal. App. 4th 705, 707 (1993). The Court of Appeal reversed, explaining that the new trial was a reexamination of a fact issue (damages) that required the presentation of evidence, including new evidence not introduced at the prior trial. *Id.* at 707-08. Like in *Fairmont* and *Guzman*, this remand requires a redetermination of an issue of fact (damages) about which MWD is entitled to present new expert opinion evidence.

B. Entry Of Declaratory Relief On The Rate Structure Integrity Clause.

SDCWA "sought a declaratory judgment declaring invalid and unenforceable the RSI clause." *COA Opinion*, 12 Cal. App. 5th at 1157. The Court of Appeal held that SDCWA "is entitled to judgment on its declaratory relief clause of action declaring the RSI clause invalid and unenforceable as an unconstitutional condition." *Id.* at 1165. The Court of Appeal's remand instructions plainly require "entry of declaratory relief on the Rate Structure Integrity clause" as requested, and nothing more. *Id.* at 1166. This is a ministerial act that does not require any additional examination of issues. SDCWA incorrectly argues that the Court must also adjudicate and award other forms of relief on its declaratory relief cause of action. That approach, which is outside the scope of remand, is discussed in Section III.B, below.

C. Redetermination Of The Prevailing Party.

The Court of Appeal's remand instructions require redetermination of the prevailing party and, if there is a prevailing party, attorney fees: "On remand, the trial court must determine if one of the parties 'recovered a greater relief in the action on the contract' than the other (Civ. Code, § 1717, subd. (b)(1)) or if the results of the litigation are sufficiently mixed that no party may be said to have prevailed." *COA Opinion*, 12 Cal. App. 5th at 1164 (citing *Hsu v. Abbara*, 9 Cal. 4th 863, 874-76 (1995)). The Court of Appeal held that the rate challenges and the breach claims are within the fees clause (whereas the RSI and preferential rights claims are not). *Id.* at 1165-66.

The prevailing party and attorney fee determinations require resolution of two issues: (1) which party, if either, obtained greater relief based on a comparison of the relief awarded on each claim within the attorney fee clause and "the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements and similar sources" (*Hsu*, 9 Cal. 4th at 876); and (2) if there is a prevailing party, what constitutes a reasonable attorney fees award based on the lodestar—*i.e.*, the number of hours reasonably expended multiplied by the reasonable hourly rate. *PLCM Grp. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000), *as modified* (June 2, 2000). The first issue will require briefing by each party and the Court's review of relevant portions of the trial record. The second issue, if reached, will require discovery on the prevailing party's fees and additional briefing. The parties appear to agree that

the determination of prevailing party if any, and the amount of fees if applicable, should occur after resolution of contract damages on remand.

III. ISSUES OUTSIDE THE REMAND THAT SDCWA HOPES TO INTRODUCE.

A. "Offsetting Benefits" Are Outside the Scope of Remand.

1. The Court of Appeal's Directions Limit This Court's Authority On Remand and Preclude SDCWA From Seeking Any Relief Based on Offsetting Benefits.

"Where a reviewing court reverses a judgment 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. Its authority is limited wholly and solely to following the directions of the reviewing court." *Rice v. Schmid*, 25 Cal. 2d 259, 263 (1944); *see also Hampton*, 38 Cal. 2d at 655. "Any proceedings had or judgment rendered contrary to such specific directions would be void." *Carter v. Super. Court*, 96 Cal. App. 2d 388, 391 (1950).

Here, the Court of Appeal examined the price term in the parties' Exchange Agreement, which provides that "the price shall be equal to the charge or charges set by MWD's board of directors pursuant to applicable law and regulation and generally applicable to the conveyance of water by MWD on behalf of its member agencies." *COA Opinion*, 12 Cal. App. 5th at 1136-37. The court held the price MWD charged SDCWA under the Exchange Agreement was consistent with law and regulation, including the wheeling statutes (Wat. Code § 1810 *et seq.*), except to the extent the price included the WSR in the years 2011 through 2014. *Id.* at 1144-52. Accordingly, the Court of Appeal reversed the judgment and remanded the case "for a redetermination of damages based **solely** on overcharges from inclusion of the [WSR]" in the years 2011-2014. *COA Opinion*, 12 Cal. App. 5th at 1154 (emphasis added).

In Phase 2, the contract damages phase, SDCWA did not claim damages based on supposed offsetting benefits under Water Code Section 1811(c).[12] *See* Joint CMC Statement for

[12] The owner of a conveyance system is entitled to "fair compensation" for providing wheeling service through its system. Wat. Code § 1810. "'Fair compensation' means 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

December 2, 2014 CMC, 3-8 (Nov. 25, 2014) (SDCWA explains how its damages should be measured; no mention of offsetting benefits); Trial Exh. PTX-471 (Summary of Contract Damages Under Exchange Agreement (2011-2014)); Expert Witness Declaration Regarding Daniel A. Denham, Ex. B (Calculation of Contractual Damages), 1-2 (Oct. 28, 2013); SDCWA's Post-Trial Brief for Phase II (May 22, 2015), 9:13-14, 21:22-23:15 (explaining damages calculation), 32:11-14, 32:28-33:10.

In a post-remand filing, however, SDCWA asserted it intended to seek contract damages based on offsetting benefits. SDCWA's Opp. to MWD's Motion for Peremptory Disqualification, 8:28-9:1 (Apr. 4, 2018). But, any claim for damages based on offsetting benefits is beyond the scope of the remand. The Court of Appeal did not direct or authorize any proceedings to determine SDCWA's contract damages under any claim or theory other than WSR overcharges.

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supplemental power, ***and including reasonable credit for any offsetting benefits for the use of the conveyance system***." *Id.* § 1811(c) (emphasis added).

Leaving aside the reasons that offsetting benefits are not within the scope of the remand, as explained in this brief, there are numerous additional reasons that SDCWA's offsetting benefits position fails on the merits. These include, among other reasons: (1) the Court of Appeal already ruled in 2000 that offsetting benefits need not be included in MWD's pre-set wheeling rate; (2) the pre-set wheeling rate has limited application only to short-term transactions (MWD Admin. Code §§ 4119, 4405); (3) it is not the Exchange Agreement price term, which SDCWA proposed and MWD accepted (*COA Opinion*, 12 Cal. App. 5th at 1138-39); and (4) the Exchange Agreement is not a wheeling agreement (*Id.* at 1136).

MWD's pre-set wheeling rate applies only to water transfers by member agencies lasting up to one year. MWD Admin. Code §§ 4119, 4405. All other wheeling transactions (to member agencies for a term of over one year, or to third parties for any duration) are individually negotiated, which would include any offsetting benefits. In transactions where the pre-set wheeling rate applies, MWD need only modify that rate, including as to offsetting benefits, when a particular wheeling transaction is proposed and the details are known. *See IID*, 80 Cal. App. 4th at 1434 ("[MWD] need only modify the fixed rate ***as applied*** to a proposed wheeling transaction after considering any necessitated power costs, treatment costs, replacement costs, or offsetting benefits" (emphases added)).

The pre-set wheeling rate does not apply to the Exchange Agreement because it is a multi-decade agreement to exchange water and includes a negotiated price term that was part of a consideration package (that SDCWA proposed and MWD accepted). The agreed Exchange Agreement price means the System Access Rate, System Power Rate and Water Stewardship Rate (the conveyance charges generally applicable to member agencies). MWD's pre-set wheeling rate for short-term wheeling to member agencies is the System Access Rate, the actual power cost unless the member agency provides its own power, the WSR, and an administrative fee.

SDCWA agrees: "[t]he only damages issue here" on remand "is the [WSR]." Kaplan Decl., Ex. C (Reporter's Transcript of Proceedings (May 21, 2018) ("CMC Tr.")), 17:18-19.

Recently, SDCWA changed course, asserting it will seek a writ of mandate to compel MWD to calculate offsetting benefits. Further Joint CMC Statement, 7:22-24; *see also* CMC Tr., 18:9-16, 18:23-25, 20:11-14. SDCWA's new claim for writ relief rests on the premise that MWD's wheeling rate is unlawful because it does not account for offsetting benefits. Further CMC Statement, 7:23-24; *see also* SDCWA's Statement in Response to MWD's Ex Parte Application for Order Revoking Order Striking C.C.P. § 170.6 Motion, 4:10-11 (Mar. 22, 2018) ("MWD's failure to calculate or deduct 'offsetting benefits' resulted in an unlawful wheeling rate."). SDCWA seeks "a writ directing MWD to perform the statutorily required calculation, and accordingly adjust the wheeling rate." Further CMC Statement, 7:22-23.

Like its belated (and apparently now abandoned) claim for damages based on offsetting benefits, SDCWA's belated claim for writ relief based on offsetting benefits is beyond the scope of the remand. The Court of Appeal concluded its opinion with the following disposition: "The judgment is reversed and the peremptory writ of mandate vacated. The matter is remanded to the trial court for recalculation of damages, entry of declaratory relief on the Rate Structure Integrity clause, redetermination of the prevailing party, and other proceedings consistent with the views expressed in this opinion." *COA Opinion*, 12 Cal. App. 5th at 1166.

Thus, the Court of Appeal vacated the writ of mandate issued by the trial court (which did not direct MWD to calculate offsetting benefits) and directed this court to conduct three proceedings on remand: recalculate damages based on WSR overcharges, enter declaratory relief concerning the RSI clause, and redetermine the prevailing party. The Court of Appeal did not authorize this Court to determine whether MWD has complied with Water Code Section 1811(c) with respect to its wheeling rate, or whether a writ of mandate should issue to compel compliance.

SDCWA might respond that writ proceedings are authorized because they would be "consistent with the views expressed in [the] opinion." *COA Opinion*, 12 Cal. App. 5th at 1166. Not so. The opinion did not suggest MWD's wheeling rate was unlawful for failing to account for

offsetting benefits, nor did it suggest that MWD must calculate offsetting benefits. To the contrary, the Court of Appeal held the wheeling rate was lawful, except to the extent it included the WSR in the years 2011-2014. The writ proceedings SDCWA contemplates would be inconsistent with the Court of Appeal's opinion and beyond the scope of the remand.

This conclusion is confirmed by the Court of Appeal's treatment of SDCWA's petition for rehearing. In that petition, SDCWA specifically asked the Court of Appeal to direct this court to determine "the proper amount of damages" based on offsetting benefits, which SDCWA suggested could be as much as $163,904,523 for 2011-2014 (Petn. for Rehearing ("COA PFR"), 39-40), and to determine "the legality of Met's wheeling rate" under Water Code Section 1811(c) (*Id.* at 38 ("the trial court, on remand, must consider the Water Authority's 'reasonable credit' under Section 1811(c), as it affects both the legality of Met's wheeling rate and the proper amount of damages"); 9 (asking the Court of Appeal to "remand for a determination of the 'reasonable credit' to which the Water Authority is entitled 'for any offsetting benefits for the use of the conveyance system'"). SDCWA's petition prompted the Court of Appeal to modify its opinion in certain respects. But, the court did not accept SDCWA's proposal to revise the directions to the trial court. The Court of Appeal denied SDCWA's petition.

In its petition for review to the Supreme Court ("SC PFR"), SDCWA asserted the Court of Appeal's "failure to consider the offsetting benefits that MWD obtains by wheeling Imperial water on the Water Authority's behalf offers an independent reason for review"; evidence at trial showed MWD violated the statutory requirement that it "give the Water Authority 'reasonable credit for any offsetting benefits for the use of [its] conveyance system' in its wheeling rate"; "evidence at trial showed that these benefits totaled *over $160 million* during the four years in question—an amount that would very significantly affect the Water Authority's damages for MWD's breach of the Exchange Agreement"; and "Yet the Court of Appeal did not address offsetting benefits or direct the Superior Court to calculate them on remand." SC PFR), 23, 30 (emphasis original). The Supreme Court summarily denied SDCWA's petition.

In sum, any claim for relief based on offsetting benefits, whether in the form of contract damages or in the form of a writ directing MWD to calculate offsetting benefits in its wheeling

rate, is beyond the scope of the remand. This Court has no authority to entertain such a claim or to make any findings on it. *Rice*, 25 Cal. 2d at 263.

2. SDCWA Waived Any Claim For Writ Relief Or Damages Based On Offsetting Benefits By Not Seeking Those Remedies At Trial Or On Appeal.

SDCWA's claims for writ relief or damages based on offsetting benefits are beyond the scope of the remand for another, independent reason. They were waived.

First, just as a complaint defines the issues to be tried, a petition for writ of mandate defines the issues in controversy in the writ proceeding. *See, e.g.*, *Simmons v. Ware*, 213 Cal. App. 4th 1035, 1049 (2013); *Bell v. City of Mountain View*, 66 Cal. App. 3d 332, 342 (1977) (petitioner seeking mandate relief must allege "the specific facts from which the conclusions entitling him to relief would follow"). In neither the 2010 Action nor the 2012 Action did SDCWA allege it was entitled to damages based on offsetting benefits or to a writ directing MWD to calculate offsetting benefits. *See* Operative 2010 Petition/Complaint, 26:2-3, 28:19-20, 38:4-15; Operative 2012 Petition/Complaint, 24:10, 27:13-14, 32:25-33:13.

Second, "[g]enerally, issues not presented to the trial court are deemed waived" (*Steele v. Totah*, 180 Cal. App. 3d 545, 551 (1986)) and cannot be raised on appeal (*In re Marriage of Hinman*, 55 Cal. App. 4th 988, 1002 (1997); *In re Aaron B.*, 46 Cal. App. 4th 843, 846 (1996)). A fortiori, issues not presented at trial or on appeal cannot be raised for the first time on remand after the appeal. *Barratt Am., Inc. v. Trans. Ins. Co.*, 102 Cal. App. 4th 848, 868 (2002); *see also Amato v. Mercury Cas. Co.*, 53 Cal. App. 4th 825, 839 (1997) (party waived affirmative defense by failing to assert it at trial or on first appeal); *De Angeles v. Roos Bros., Inc*., 244 Cal. App. 2d 434, 442-43 (1966) (material issues abandoned at trial as a matter of strategy are waived: "It is 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**." (emphasis added)).

SDCWA did not ask the trial court to grant writ relief (in Phase 1) or to award damages (in Phase 2) based on offsetting benefits. Consequently, the peremptory writ of mandate that the trial court ultimately issued (the language of which was discussed by the parties and then submitted to the trial court to resolve the parties' differences, and SDCWA never sought inclusion

of offsetting benefits) did not direct MWD to calculate offsetting benefits (Peremptory Writ of Mandate, 1-2 (Nov. 18, 2015)), and the damages the trial court awarded did not include damages for offsetting benefits (Final Judgment).

SDCWA asserts it raised the issue of offsetting benefits "in the trial as an alternative basis for invalidity of the rates as something basically that Met is required to do by the wheeling statute, and it hasn't done." CMC Tr., 17:24-18:2. SDCWA did not raise the issue of offsetting benefits until during the Phase 1 trial, on the rate challenge. And then, SDCWA made a strategic decision to abandon this issue. At the close of Phase 1, SDCWA submitted objections to the trial court's tentative statement of decision on the rate challenges. The court's tentative statement had not addressed offsetting benefits, and SDCWA's objections did not alert the court to the omission. The court's final statement of decision on the rate challenges did not address offsetting benefits. The issue was waived. *See In re Marriage of Arceneaux*, 51 Cal. 3d 1130, 1133-34, 1138 & n.6 (1990) (party cannot raise on appeal issue on which party did not request statement of decision; where party fails to alert trial court to omission of an issue from statement of decision, Court of Appeal implies findings favorable to party who prevailed on the issue).

SDCWA did not pursue offsetting benefits whatsoever in Phase 2, the contract and damages phase. As noted, after the conclusion of both phases, when the language of the writ was adjudicated, SDCWA never pursued inclusion of the offsetting benefits issue in that writ. SDCWA never requested the remedy it now seeks—a writ requiring MWD to do what "it hasn't done," namely calculate offsetting benefits. SDCWA waived that remedy by not seeking it at trial. SDCWA cannot seek that remedy for the first time on remand.

Likewise, in its cross-appeal from the judgment, SDCWA did not assert it was entitled to either writ relief or damages based on offsetting benefits. *See* SDCWA's Responding and Opening Brief, 94-108 (Aug. 3, 2016); Cross-Appellant's Reply Brief, 1-39 (Sept. 23, 2016). SDCWA cross-appealed only on the RSI and the attorney fees rulings. *See* Notice of Cross-Appeal from Judgment (Dec. 7, 2015). SDCWA confined the briefing on its cross-appeal to the RSI issue and attorney fees. *See* Responding and Opening Brief, 94-108; Cross-Appellant's Reply Brief 1-39. Likewise, in its responding brief on MWD's appeal, SDCWA did not present any

argument based on offsetting benefits. Responding and Opening Brief, 1-93.

If SDCWA believed it was entitled to writ relief or damages based on offsetting benefits, SDCWA could have and should have pursued the point in the trial court or on its cross-appeal from the judgment. It did not. As noted above, SDCWA first raised the damage claim based on offsetting benefits (which it valued at more than $163,000,000) in its petition for rehearing; aside from its Phase 1 trial arguments about invalidity which it then abandoned, SDCWA did not raise wheeling rate invalidity based on offsetting benefits until its petition for rehearing; and SDCWA first requested a "writ directing [MWD] to perform the statutorily required calculation, and accordingly adjust the wheeling rate" on remand. The claims were forfeited. *Singh v. Lipworth*, 132 Cal. App. 4th 40, 43, n.2 (2005) (issue raised for first time on rehearing and unaccompanied by an explanation for the delay is "forfeited"); *De Angeles*, 244 Cal. App. 2d at 442-43 (material issues abandoned at trial as a matter of strategy are waived).

3. The Law Of The Case Doctrine Bars SDCWA From Seeking Any Writ Relief Or Damages Based On Offsetting Benefits.

SDCWA contends that the issue of offsetting benefits "goes to the validity of MWD's rates" (CMC Tr., 17:23-24), which SDCWA apparently believes can be retried on remand. As explained, SDCWA also recently claimed that on remand it is entitled to damages for offsetting benefits.Any claim that MWD's rates are invalid for violating Water Code Section 1811(c) based on offsetting benefits, and any derivative request for a writ stating or correcting the alleged violation, or damages for breach of the Exchange Agreement, is barred by the law of the case.

"The law of the case doctrine states that when, in deciding an appeal, an appellate court 'states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal.'" *Kowis v. Howard*, 3 Cal. 4th 888, 892–93 (1992). Thus, where an issue of law is presented to and actually resolved by the Court of Appeal, that determination will bind the trial court on remand. *People v. Murtishaw*, 51 Cal. 4th 574, 589 (2011); *Tally v. Ganahl*, 151 Cal. 418, 421 (1907). "[T]he doctrine is also held applicable to questions not expressly decided but implicitly decided because they were essential to the decision

on the prior appeal." *Estate of Horman*, 5 Cal. 3d 62, 73 (1971); *accord Sargon Enters., Inc. v. Univ. of S. Cal*., 215 Cal. App. 4th 1495, 1505 (2013).

A party cannot avoid the law of the case on remand by advancing a theory or argument that it could have presented but withheld from the Court of Appeal on an issue the court resolved. "Litigants are not free to continually reinvent their position on legal issues that have been resolved against them by an appellate court. 'It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.'" *Yu v. Signet Bank/Virginia*, 103 Cal. App. 4th 298, 312 (2002), *disapproved on other grounds in Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 4 Cal. 5th 637 (2018). The law of the case doctrine is "designed to preclude the possibility of this type of multiple litigation of the same issue." *People v. Shuey*, 13 Cal. 3d 835, 841 (1975), *disapproved on other grounds in People v. Bennett*, 17 Cal. 4th 373, 389 n.4 (1988).

A central issue before the Court of Appeal on MWD's appeal in the 2010 and 2012 Actions was whether MWD's transportation rates and wheeling rates were lawful, and "whether charges in the exchange agreement were 'set in accordance with applicable law and regulation.'" *COA Opinion*, 12 Cal. App. 5th at 1165-66. The Court of Appeal held the transportation rates and wheeling rate were lawful, and the charges in the Exchange Agreement were set in accordance with applicable law and regulation (*id.* at 1130, 1149), except for the inclusion of the WSR in the years 2011-2014 (*id.* at 1150-1151, 1154).

Thus, the parties have already litigated—and the Court of Appeal has already decided—the issue of whether MWD's 2011-2014 transportation rates and wheeling rate were lawful. SDCWA had its chance to persuade the Court of Appeal that the wheeling rate was unlawful for failing to account for offsetting benefits. Indeed, SDCWA belatedly raised that very issue in its petition for rehearing: "[T]he trial court, on remand, must consider the Water Authority's 'reasonable credit' under Section 1811(c), as it affects both the legality of Met's wheeling rate and the proper amount of damages." COA PFR 38.

Likewise, the parties have already litigated—and the Court of Appeal has already decided—the issue of whether the charges in the Exchange Agreement complied with the law.

SDCWA had its chance to persuade the Court of Appeal that the charges were unlawful for omitting a credit for offsetting benefits. And, SDCWA belatedly raised that very issue in its petition for rehearing as well. COA PFR, 38, 39-40.

The Court of Appeal's holdings with respect to the transportation rates, wheeling rate, and Exchange Agreement charges are now the law of the case. Those holdings leave no room for SDCWA to continue arguing that MWD's wheeling rate is unlawful for any other reason, or Exchange Agreement damages are available for any other reason, such as failing to account for offsetting benefits. The law of the case thus forecloses SDCWA's claim for writ relief, which rests on the theory that the wheeling rate was unlawful for failing to account for offsetting benefits. The law of the case also forecloses any claim for breach of the Exchange Agreement or damages based on the same theory.

B. RSI Relief Is Outside The Scope Of Remand.

1. The Court Of Appeal's Directions Preclude SDCWA From Seeking RSI Relief On Remand Other Than Entry Of The Requested Declaration.

The Court of Appeal ordered precisely the relief on the RSI cause of action that SDCWA requested—nothing more. The trial court's authority is limited to these directions. *Rice,* 25 Cal. 2d at 263; *Hampton*, 38 Cal. 2d at 655; *Carter*, 96 Cal. App. 2d at 391. As explained above, SDCWA "sought a declaratory judgment declaring invalid and unenforceable the RSI clause." *COA Opinion*, 12 Cal. App. 5th at 1157. SDCWA asked for nothing further. *See, e.g.*, SDCWA's Responding and Opening Brief, 98 (asking Court of Appeal to "hold that Met's RSI clause is invalid and unenforceable"). The Court of Appeal agreed with SDCWA's position that it "is entitled to judgment on its declaratory relief cause of action declaring the RSI clause invalid and unenforceable as an unconstitutional condition." *COA Opinion*, 12 Cal. App. 5th at 1165. The Court of Appeal remanded for "entry of declaratory relief on the Rate Structure Integrity clause." *Id.* at 1166.

Notwithstanding the targeted relief it sought and obtained in the Court of Appeal, SDCWA now contends that "the scope of declaratory and injunctive relief to which San Diego is entitled" remains to be decided on remand (Further CMC Statement, 7-8), and SDCWA's prior

briefing makes clear that the relief SDCWA is attempting to shoehorn into this case at this late stage is actually an unpleaded and improper request for restitutionary damages. But the Court of Appeal made no mention of considering any such restitutionary damages and, in fact, ordered "a redetermination of damages based *solely* on overcharges from inclusion of the Water Stewardship Rate" (*COA Opinion*, 12 Cal. App. 5th at 1154), without any suggestion that additional damages related to the RSI declaratory relief claim should be factored into the calculation. Any greater RSI relief than SDCWA successfully obtained in the Court of Appeal, including any damages, would not be "consistent with the views expressed in [the] opinion." *Id.* at 1166.

The Court of Appeal's decision that SDCWA is entitled to a declaration that "the RSI clause is invalid and unenforceable" is binding in the remanded proceedings. *See, e.g.*, *Hampton*, 38 Cal. 2d at 655 ("The trial court is empowered to act only in accordance with the direction of the reviewing court."); *Ayyad*, 210 Cal. App. 4th at 859-60 ("if the reviewing court does not direct the trial court to take a particular action or make a particular determination, the trial court is not authorized to do so").

2. SDCWA Waived Any Claim For Any Greater RSI Relief.

In SDCWA's complaint in the 2010 case, SDCWA's declaratory relief cause of action regarding the RSI clause stated a request for "a judicial declaration (a) holding that the RSI Clauses are invalid and unenforceable; (b) reinstating all Project Contracts between the Water Authority and Metropolitan, which Metropolitan has terminated due to purported violation of the RSI Clauses; (c) reinstating the Ramona [San Vicente] Agreement, . . . (d) directing Metropolitan not to enforce any RSI Clauses in any of its contracts in the future; and (e) directing Metropolitan to restore the Water Authority's eligibility for any lawful Metropolitan subsidy program on the same terms applicable to other Metropolitan member agencies." Operative 2010 Petition/Complaint ¶ 110.

SDCWA then made a strategic decision to pursue more narrow relief. SDCWA's cross-motion for summary adjudication—which sought judgment on the entire RSI cause of action—sought an order only on items (a) and (d) in its complaint, quoted above. *See, e.g.*, SDCWA's MPA in Support of Mot. for Summary Adjud., 16:23-25 (Sept. 20, 2013) ("[T]he Court should

grant [San Diego's] motion for summary adjudication of its Fifth Cause of Action, invalidate the RSI Clause, and order MWD to cease enforcing it against SDCWA or anyone else.").[13]

In its cross-appeal, SDCWA narrowed its focus further and only sought a declaration that the RSI clause is "invalid and unenforceable." After seeing the Court of Appeal's remand instructions, SDCWA did not request modification or review in either its petition for rehearing to the Court of Appeal or its petition for review to the California Supreme Court to clarify that it is entitled to anything more than the ministerial act of entry of a declaratory judgment that the RSI clause is invalid and unenforceable. SDCWA has waived the other forms of declaratory relief pled as (b) through (e) in its complaint. *Tiernan v. Tr. of Cal. State Univ. & Colleges*, 33 Cal. 3d 211, 216, n.4 (issue raised by party in trial court but not on appeal may be deemed waived); *De Angeles*, 244 Cal. App. 2d at 442-43 (material issues abandoned at trial as a matter of strategy are waived). As this procedural history also shows, SDCWA's narrow requested relief from the Court of Appeal was not, as SDCWA now suggests, merely a function of the procedural posture in which it was appealed.

Furthermore, SDCWA wholly failed to ever plead or otherwise raise a claim for restitution or an injunction with respect to the RSI clause, in the trial court or the Court of Appeal, as SDCWA now seeks to pursue on remand. Those claims and requests for relief have never existed in the case. *Ochoa v. Pac. Gas & Elec. Co*., 61 Cal. App. 4th 1480, 1488 n.3 (1998) ("It is axiomatic that arguments not asserted below are waived."); *Boehm & Assocs. v. Workers' Comp. Appeals Bd.*, 108 Cal. App. 4th 137, 148 (2003) ("Issues and arguments not addressed in the briefs on appeal are deemed waived.").

[13] Indeed, in denying SDCWA's motion for summary adjudication and granting MWD's cross-motion on the basis of lack of standing, the trial court made additional holdings on all of the necessary elements of SDCWA's fifth cause of action for declaratory relief because, although it found the standing issue "disposes of the 'unconstitutional conditions' attack on the RSI clause, appellate review may be aided by a discussion of the other elements of that claim, in particular because if SDCWA does have standing, it wins on the merits of the claim." Dec. 4, 2013 Order, 15. The trial court's 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.

And SDCWA did not plead alternate remedies, as it could have done and as the plaintiffs did in cases SDCWA has previously cited in support of its theory that it can pursue restitutionary damages for the first time on remand. *See, e.g.*, *Engasser v. Jones*, 88 Cal. App. 2d 171, 172, 176 (1948) (finding jurisdiction to award monetary damages instead of specific performance where plaintiffs expressly "pray[ed] that if specific performance [could] not be enforced[,] judgment be awarded . . . for damages [plaintiffs] sustained by reason of the breach of the agreement"); *Crouser v. Boice*, 51 Cal. App. 2d 198, 201-02 (1942) (seeking specific performance and damages in the alternative). Restitution and an injunction have been waived.

3. The Law Of The Case Doctrine Bars SDCWA From Seeking Any Greater RSI Relief.

As explained, when an appellate opinion states a principle or rule of law necessary to the decision, it becomes the law of the case, including being binding on remand (*Kowis*, 3 Cal. 4th at 892–893; *Murtishaw,* 51 Cal. 4th at 589; *Tally*, 151 Cal. 418 at 421), and this bar extends to "questions not expressly decided but implicitly decided because they were essential to the decision on the prior appeal" *Horman*, 5 Cal. 3d at 73; *accord Sargon Enters., Inc.*, 215 Cal. App. 4th at 1505.

A party cannot avoid the law of the case on remand by withholding a theory or argument from the Court of Appeal on an issue it resolved. *Yu*, 103 Cal. App. 4th at 312. The Court of Appeal considered and decided the relief to which SDCWA was entitled on its RSI claim, based on the cross-appeal that SDCWA decided to present. SDCWA cannot choose "not to argue a point on a first appeal" and then "stand better as regards to the law of the case than one who had argued and lost." *Id.*

SDCWA is barred on remand from pursuing any form of declaratory relief other than the one form that the Court of Appeal directed, and it is barred from pursuing restitution or an injunction.[14]

[14] Even if the scope of the remand on the RSI claim were not limited for the reasons explained here, the additional relief SDCWA now seeks would fail on the merits for several reasons. For example, SDCWA failed to satisfy the Government Claims Act with respect to any damages relief other than on the San Vicente Agreement. Cal. Gov't Code § 945.4; *id.* § 910 *et seq.* ("no

IV. CONCLUSION

The Court of Appeal issued narrow remand instructions limited to three issues: redetermination of damages based solely on the WSR, entry of declaratory relief on the RSI clause, and redetermination of the prevailing party. For the reasons detailed above, these issues do not include the issues that SDCWA hopes to present on remand.

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suit for money or damages may be brought against a public entity on a cause of action" unless the claim has been presented to the public entity first); *City of Stockton v. Super. Court*, 42 Cal. 4th 730, 743 (2007) (restitution claims are subject to claim presentation requirements). SDCWA then made a choice not to go forward with including in its lawsuit a claim for breach of contract or restitutionary damages with respect to the San Vicente Agreement, and its statute of limitations to do so has long expired.