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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

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

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

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I. INTRODUCTION

At a recent hearing, this Court made the preliminary observation that "both sides" seem to be "trying to get another bite at the apple" on remand. The Court's instincts were correct, but only in part. The damages defendant Metropolitan Water District of Southern California ("Metropolitan") owes plaintiff San Diego County Water Authority (the "Water Authority") for Metropolitan's breaches of the parties' Exchange Agreement have been fully tried and determined. Metropolitan's arguments for a damages retrial were rejected by the trial court, and then rejected again on appeal. Now, Metropolitan wants a ***fourth*** bite at that apple. In contrast, the Water Authority's claim for equitable relief from Metropolitan's unconstitutional "Rate Structure Integrity," or "RSI," clause was summarily adjudicated, so the proper relief was not addressed by the trial court; and the issue of "reasonable credit" for "offsetting benefits" under Water Code section 1811, subdivision (c), also was not addressed by the trial court or the Court of Appeal. All the Water Authority asks is to have its "first bite at the apple" on these two issues.

In *San Diego County Water Authority v. Metropolitan Water District of Southern California* (2017) 12 Cal.App.5th 1124 (*SDCWA*), the Court of Appeal ruled in part for the Water Authority and in part for Metropolitan. The Court of Appeal remanded the cases to this 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." (*Id.* at p. 1166.) This brief addresses the scope of that remand.

First, with regard to damages, this Court's task is simple: award the Water Authority ***$28,678,191***—which has already been calculated, proved, awarded by the trial court, and affirmed on appeal (see *id.* at pp. 1154–1155; Tr. 2495:1–2511:3; PTX-471; SOD II at p. 18[1])—plus prejudgment interest at 10 percent per annum, which is easy to recalculate. Those are the

[1] "Tr." references are to the Reporter's Transcript from the *SDCWA* appeal, excerpts from which are provided at Tab 1 of the accompanying Appendix. "PTX" and "DTX" references are to trial exhibits; those cited herein are provided at Tabs 2-18 of the Appendix. "SOD I" and "SOD II" refer to the Statements of Decision issued in this case by the Honorable Judge Curtis E.A. Karnow, provided at Tabs 24 and 25 of the Appendix. "AR[page]" refers to Metropolitan's 2010 administrative record, cited portions of which are provided at Tabs 19-21 of the Appendix. "LH[page]" refers to the legislative history of the Wheeling Statutes, which Judge Karnow judicially noticed (Tr. 1983:2–1984:5), and which is provided at Tab 38 of the Appendix.

established damages for Metropolitan's breaches of the Exchange Agreement, which is a cornerstone of California's statewide efforts to provide adequate water supplies to Southern California while minimizing reliance on water from the Bay Delta. The Water Authority pays a third party, the Imperial Irrigation District ("IID"), to conserve Colorado River water in the Imperial Valley, in return for the conserved water; but the only way to get that water to the Water Authority is through Metropolitan's Colorado River Aqueduct ("CRA"). The Exchange Agreement requires Metropolitan to deliver that water for no more than a lawful conveyance ("wheeling") rate. Despite Metropolitan's desire to relitigate issues it lost at trial, and then lost again on appeal, it is now the law of this case that Metropolitan cannot charge any more to deliver that water than "fair compensation," as defined in the Wheeling Statutes, Water Code section 1811, subdivision (c). (See 12 Cal.App.5th at pp. 1150–1151, 1154.)

More specifically, the law of the case is that "fair compensation" ***cannot*** include Metropolitan's "water stewardship rate," which Metropolitan uses to "fund water conservation programs" that are "not a cost of using the conveyance system to wheel water." (*Id.* at p. 1150.) "Since the water stewardship rate was unlawfully charged for the conveyance of water, there was a breach of the agreement in that respect." (*Id*. at p. 1154.) The Court of Appeal held that "fair compensation" *may* include costs Metropolitan incurs to transport State Water Project ("SWP") water from Northern to Southern California using SWP facilities, so the damages previously awarded for SWP charges must be subtracted. (See *ibid.*) That is the one issue on which Metropolitan prevailed on appeal. Otherwise, the Court of Appeal rejected Metropolitan's arguments across the board, including as to damages. (See *id.* at pp. 1154–1155.) Thus, this Court must award $28,678,191 in damages, plus 10 percent prejudgment interest. (See *ibid.*)

Second, this Court must address the appropriate remedies flowing from the Court of Appeal's decision that Metropolitan's RSI clause is unconstitutional. The RSI clause is an unconscionable provision in contracts for subsidies funded by Metropolitan's water stewardship rate, whereby Metropolitan purported to grant itself the right to punish any member agency that challenges Metropolitan's rates, by terminating existing contracts and barring future subsidies for that agency. After the Water Authority sued to challenge Metropolitan's rates, Metropolitan

invoked its RSI clause to cancel the Water Authority's subsidy contracts and deny pending and future subsidies, yet continued to collect nearly $77 million in water stewardship charges from the Water Authority from 2011 to 2014 alone—consisting of the aforementioned $28,678,191 in unlawful water stewardship charges under the Exchange Agreement, plus more than $48 million in water stewardship charges Metropolitan imposed for *Metropolitan* water—*i.e.*, water that is both supplied and delivered by Metropolitan, as opposed to Exchange Agreement water, which the Water Authority independently owns, and Metropolitan only delivers. (See PTX-506.)

Judge Karnow granted Metropolitan's motion for summary adjudication of the Water Authority's claim for relief from the RSI clause. Although Judge Karnow "found the RSI clause satisfies all elements of an unconstitutional condition" on the Water Authority's right to petition, he held "that the Water Authority lacks standing to assert the claim." (*SDCWA, supra,* 12 Cal.App.5th at p. 1158.) The Court of Appeal reversed, holding that the Water Authority has standing, and "is entitled to judgment on its declaratory relief cause of action." (*Id.* at p. 1164.)

The RSI cause of action included a prayer for equitable restoration of wrongfully-terminated contracts, and restoration of the Water Authority's rights to participate fully in the subsidy program. But seven years have passed since the Water Authority sought that relief, and it was forced to continue paying water stewardship charges while being unconstitutionally denied most program benefits. Restoration of the right to participate *going forward* cannot fully address that wrong. Thus, it is well within the scope of the remand and this Court's equitable powers to "direct the entry of a money judgment sufficient to compensate for property or rights not restored." (*Beach Break Equities, LLC v. Lowell* (2016) 6 Cal.App.5th 847, 852, 854–855.) The judgment, therefore, should provide that Metropolitan must restore "the excess of what the [Water Authority] gave [Metropolitan] over the value of what the [Water Authority] received," as further specified below. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 174.)

Third, in addition to a new judgment, a new "peremptory mandate must also be awarded without delay." (Code Civ. Proc., § 1095.) The writ, moreover, should direct Metropolitan to comply with its now-indisputable statutory duty to give the Water Authority "'reasonable credit for any offsetting benefits for the use of the conveyance system.'" (*SDCWA, supra*, 12

Cal.App.5th at p. 1144, quoting Wat. Code, § 1811, subd. (c).) Metropolitan has long refused to do so, arguing that the statutory definition of "fair compensation" does not apply to the Exchange Agreement. But the Court of Appeal rejected that argument. (See *id.* at p. 1154.) It is now indisputable that Metropolitan is required to give the Water Authority reasonable credit for offsetting benefits, and Metropolitan has already resolved to calculate those benefits "in the same manner as such benefits are calculated for use in the Local Projects and Groundwater Recovery Program" (AR2449), which is now called the Local Resources Program ("LRP").

Indeed, the record in this case establishes beyond reasonable dispute that the Water Authority's conservation efforts in the Imperial Valley are ***at least*** as valuable to Metropolitan as its other member agencies' local conservation projects. As discussed below, conservation in the Imperial Valley and transfer of the conserved water to the San Diego region, paid for by the Water Authority, are crucial to Metropolitan's statutorily-mandated efforts to reduce reliance on water from the Bay Delta while abiding by the United States Supreme Court's restriction of the amount of Colorado River water California can use. (See Wat. Code, § 85021; *Arizona v. California* (1963) 373 U.S. 546.) In any event, the Water Authority does not ask this Court to calculate the "reasonable credit." Nor does the Water Authority (unlike Metropolitan) seek to bite any pre-masticated apples. Rather, the Water Authority simply asks this Court to issue a writ of mandate directing Metropolitan to determine the Water Authority's statutorily-mandated "reasonable credit" in the first instance, consistent with the law of the case, Metropolitan's own resolution regarding fair compensation, Water Code section 1811, subdivision (c), and the established principle that "a judicial remedy exists to require [Metropolitan] to carry out its ministerial functions with respect to that rule." (*California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 203, citation omitted.) This is well within the scope of the remand for "proceedings consistent with the views expressed in this opinion." (12 Cal.App.5th at p. 1166.)

II. BACKGROUND

A. The Wheeling Statutes

In *Arizona*, the Supreme Court limited California's allotment of Colorado River water to

4.4 million acre-feet per year.[2] That total allotment is distributed among various California agencies according to a priority system. IID has a higher priority entitlement than Metropolitan, meaning that IID "is entitled to divert its full right to water before Metropolitan can divert any water at all." (*County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 19.)

Metropolitan brings water from the Colorado River to urban Southern California through its CRA, the capacity of which is approximately 1.2 million acre-feet per year. (See *In re Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 785 (*QSA*).) After *Arizona*, Metropolitan's basic entitlement to Colorado River water was reduced to only 550,000 acre-feet per year, which would leave its CRA more than half empty. (*Ibid.*) A half-empty CRA is a massive waste of sunk costs, leaves Metropolitan's member agencies highly vulnerable to drought, and requires Metropolitan to incur the costs of purchasing or conserving water elsewhere. Indeed, Metropolitan has repeatedly admitted that, if not for the Water Authority's payments to conserve water and convey it through Metropolitan's otherwise half-empty CRA, Metropolitan itself would have been required to pay for that conservation and conveyance. (See, e.g., PTX-25; PTX-26 at p. MWD2010-00264791; PTX-30.)

For decades after the 1963 *Arizona* decision, Metropolitan was still able to fill its CRA with more than its adjudicated share of Colorado River water "because Arizona and Nevada were not yet able to use their full entitlements." (*QSA*, *supra*, 201 Cal.App.4th at p. 773.) But by 1986, when the Legislature enacted the Wheeling Statutes (Wat. Code §§ 1810–1814), California's "single most pressing water problem" was replacing Metropolitan's "former Colorado River supplies now that Arizona has begun to claim its full share." (LH362.) The State Water Resources Control Board, meanwhile, had found that IID was wasting a substantial amount of its high-priority Colorado River water. (See *QSA*, *supra*, 201 Cal.App.4th at p. 787.) "At the same time, the water needs of coastal Southern California continued to grow." (*Id.* at p. 773.) And the Legislature found—in its statement of intent underlying the Wheeling Statutes—that there had "been a severe downturn in the state's agricultural economy"; that "many agricultural

[2] An acre-foot ("AF") of water is the amount that would cover one acre one foot deep.

operations and public agencies experiencing financial difficulties or facing default may desire to sell, lease, or exchange water as a means of obtaining financial relief or augmenting their income"; and that it is "the policy of the state to facilitate the voluntary sale, lease, or exchange of water or water rights in order to promote efficient use." (Stats. 1986, ch. 918, § 1; LH71–72.) To address these issues, the Legislature sought to develop a market for water transfers, thereby incentivizing conservation and providing economic relief to farmers, by requiring public agencies that operate water conveyance systems to make at least 70 percent of their unused capacity available to convey—*i.e.*, "wheel"—such water, charging no more for this service than "fair compensation." (See *ibid.*; Wat. Code §§ 1810–1814.)

"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***." (Wat. Code, § 1811, subd. (c), emphasis added.) The agency that owns the conveyance system must timely determine "fair compensation," including the "reasonable credit for any offsetting benefits." (*Ibid.*; *id.*, § 1812, subd. (b).) The agency "shall act in a reasonable manner consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange of water and shall support its determinations by written findings," subject to judicial review, in which the court "shall consider all relevant evidence, and the court shall give due consideration to the purposes and policies of this article. In any such case the court shall sustain the determination of the public agency if it finds that the determination is supported by substantial evidence." (*Id.*, § 1813.)

B. Resolution 8520: Metropolitan's "written findings" on "fair compensation"

On January 14, 1997, Metropolitan adopted Resolution 8520 as its "written findings," pursuant to section 1813 of the Wheeling Statutes, regarding "fair compensation." (See AR2446–2451.) Although Resolution 8520 is now more than two decades old, Metropolitan continues to rely on it as the "fair compensation" findings required by section 1813. (See, e.g., Tr. 1683:5–1686:13; *SDCWA*, *supra*, 12 Cal.App.5th at p. 1148.) As Metropolitan noted, it had previously entered into agreements "to transport water not owned or controlled by Metropolitan

('wheeling')" on an "ad hoc basis." (AR2446.) But in Resolution 8520, Metropolitan sought to "fix the rate or rates for use of its system for wheeling as will result in recovery of 'fair compensation'" as defined by the Wheeling Statutes. (AR2447.)

Metropolitan decided to include in its wheeling rates the costs it found to be attributable to the "transmission function," in order to "insure recovery of fair compensation for the use of the conveyance system." (AR2449 § 5.) Metropolitan defined its "conveyance system" to include "its rights to the use of the SWP conveyance system." (AR2446.) Metropolitan allocated to the transmission function the charges the State of California identifies as "transportation expenses" in its Statement of Charges to Metropolitan under the SWP contract between Metropolitan and the State, as well as "50 percent of the incentives and program costs for [Metropolitan's] Water Management programs." (AR2464.)[3] Metropolitan further resolved that:

> The wheeling rates shall be reduced to reflect the regional water supply benefits provided to Metropolitan's service area, if any, on a case-by-case basis in response to a particular wheeling transaction. The regional benefits, if any, shall be calculated by Metropolitan in the same manner as such benefits are calculated for use in the Local Projects and Groundwater Recovery Program.

(AR2449 § 10.) Under the Local Projects and Groundwater Recovery Program, now called the Local Resources Program, or LRP (see AR3152), Metropolitan previously subsidized member agency water conservation projects by up to $250 per acre-foot of water (Tr. 1785:19–1789:24; DTX-27; DTX-518), and Metropolitan currently subsidizes such projects by up to $475 per acre-foot. (See http://edmsidm.mwdh2o.com/idmweb/cache/MWD%20EDMS/003735290-1.pdf.)

After Metropolitan adopted Resolution 8520, it filed a validation action. (*Metropolitan v. Imperial Irrigation District* (2000) 80 Cal.App.4th 1403, 1408 (*Imperial Irrigation*).) The trial court invalidated Metropolitan's wheeling rates as a matter of law, but the Court of Appeal remanded for further proceedings under section 1813 of the Wheeling Statutes, directing the trial court to determine, among other things, whether Metropolitan properly included particular costs in its wheeling rates. (*Id.* at p. 1433.) But the trial court never conducted such a hearing in that case because Metropolitan moved to dismiss it. (See July 27, 2001 Order.)

[3] Metropolitan subsequently increased this percentage to 100%, in effect, by funding such programs with its water stewardship rate, and charging that as a conveyance rate.

C. The 1998 Transfer and Exchange Agreements

Meanwhile, the problem of Metropolitan's half-empty aqueduct still loomed. In 1988, Metropolitan had agreed to pay for various conservation projects in the Imperial Valley in exchange for the conserved water, but Metropolitan subsequently took the position that IID was required by law to conserve water, and that whatever IID did not use should flow to Metropolitan for free under the priority system. (See *SDCWA, supra,* 12 Cal.App.5th at pp. 1134–1135.) IID disagreed—rightly so, as it turned out. (See *id.* at p. 1134.) And Metropolitan knew that when it failed in its attempt to force Imperial Valley farmers to pay to conserve water for urban use—contrary to California public policy (see Stats. 1986, ch. 918, § 1; LH71–72)—Metropolitan's customers would pay the price. A July 10, 1997 Metropolitan analysis, which it tried to conceal from the Water Authority, showed that "Metropolitan may have to raise its water rate by as much as $65 per acre-foot in order to maintain a full Colorado River Aqueduct." (PTX-25.)

San Diego County, in particular, paid a steep price due to Metropolitan's water shortages. Because of the 1987–1992 drought, Metropolitan cut the Water Authority's water supply by approximately a third for more than a year. (Tr. 1378:8-25.) Determined to diversify its water supply—95 percent of which came from Metropolitan at the time (*ibid.*)—the Water Authority began negotiating with IID for what would be "the largest agricultural-to-urban water transfer in United States history." (*QSA, supra*, 201 Cal.App.4th at p. 788.) But the cost of delivering that water was still up in the air, as the subject of the then-ongoing *Imperial Irrigation* litigation.

In October 1997, while the *Imperial Irrigation* case was still pending, the Legislature passed emergency legislation "because the proposed transfer of conserved water from the Imperial Irrigation District to the San Diego County Water Authority is a matter of statewide interest in that it addresses a significant need for water in the southern state through the conservation of water now being consumed there." (1997 Cal. Legis. Serv. Ch. 874 (S.B. 1082 [Appx. Tab 37]), Wat. Code § 1812.5, subd. (a)(1).) The Legislature found it "of vital state interest that every effort be made to ensure that the Colorado River Aqueduct continues to operate at its full capacity at fair and reasonable terms in order to minimize statewide disruptions from diminishing Colorado River supplies." (*Id.*, subd. (a)(3).) The Legislature instructed the Director

of the Department of Water Resources ("DWR") to determine fair compensation for delivering the conserved Colorado River water to the Water Authority. (See *id.*, subd. (c)(2).)

The DWR Director issued his recommendations on January 5, 1998. (PTX-481.) The Director determined that fair compensation for wheeling would be $80 per acre-foot, based, in part, on his determination that ***the reasonable credit to the Water Authority for offsetting benefits, as required by the statutory definition of "fair compensation," was $220 per acre-foot***. (See *id.*, Table 1.) As the Director explained—***and as Metropolitan admitted in negotiations***—if the Water Authority did not pay for conservation efforts in the Imperial Valley, Metropolitan would have to do so. (See *id.*, note 3; see also PTX-26 at p. MWD2010-00264791 [Metropolitan "concluded that MWD should seek to promote the regional benefits of IID conservation and storage so long as those benefits would cost MWD's customers no more than if MWD were to undertake the same conservation and storage effort as SDCWA."].) The DWR Director further concluded that, by virtue of the Water Authority "arranging for this block of water to meet its needs," Metropolitan "does not have to develop this amount of new supply in its overall water supply program. The suggested value of $220 per acre-foot is a little more than MWD's most recent estimate of what it would have to pay IID for such an agreement, $208," but less than the $250 per acre-foot the Water Authority agreed to pay IID initially.[4] (PTX-481, note 3.)

On January 13, 1998, Metropolitan agreed to the Director's recommendations. (AR2972.) On April 29, 1998, the Water Authority and IID executed their Transfer Agreement. (PTX-28.) On November 10, 1998, the Water Authority and Metropolitan executed their initial Exchange Agreement. (PTX-31.) Metropolitan itself emphasized the benefits of those agreements:

> a. The **state** benefits because this is one piece of the larger California 4.4 Plan that will ensure that Metropolitan's Colorado River Aqueduct is full, thus reducing pressure on the Bay-Delta.[5] Stabilizing supplies on the Colorado River benefits not only Metropolitan, but Coachella and IID, as well.

[4] The price was to increase over time; in the years at issue in this case it went from $446/AF, in 2011, to $594/AF, in 2014. (PTX-28 at pp. 147–148.)

[5] As the Legislature subsequently affirmed and mandated, the "policy of the State of California is to reduce reliance on the Delta," and every region that depends on water from the Delta must "improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts." (Wat. Code, § 85021.)

b. **Metropolitan's member agencies** benefit from a full Colorado River Aqueduct, the additional supplies of surplus water at near zero cost,[6] and the resolution of longstanding disputes regarding Colorado River supplies.

c. San Diego benefits by acquiring an independent supply of water, meeting one of their stated goals.

(PTX-30, bold in original.) "After entry of the 1998 exchange agreement," however, "disputes continued among the water agencies over Colorado River water allocations that prevented water deliveries." (*SDCWA*, *supra*, 12 Cal.App.5th at p. 1136.)

D. The 2003 Amended and Restated Exchange Agreement

In 2003, the *Arizona* Court's ruling finally went into full effect. As Metropolitan's Chief Executive Officer, Jeffrey Kightlinger, testified at trial, Metropolitan went "from a full aqueduct in 2002 to roughly a half aqueduct in 2003," losing "about 5-, 600,000 acre-feet of water overnight." (Tr. 2650:7-22.) Metropolitan and the Water Authority agreed to renegotiate, amend, and restate their Exchange Agreement, as part of a larger set of agreements—collectively known as the Quantification Settlement Agreement, or QSA—which settled several disputes between numerous state and federal agencies and Native American tribes about the priority, use and transfer of Colorado River water. (See *QSA*, *supra*, 201 Cal.App.4th at p. 789.)

"Unable to agree upon the long-term price the Water Authority would be charged for water received under the agreement, the parties agreed to an initial price with future prices linked to standard water rates, lawfully set." (*SDCWA*, *supra*, 12 Cal.App.5th at p. 1136.) Specifically, "the price shall be equal to the charge or charges set by Metropolitan's board of directors pursuant to applicable law and regulation and generally applicable to the conveyance of water by Metropolitan on behalf of its member agencies." (*Id.* at p. 1136–1137, quoting PTX-65 § 5.2.) The Water Authority also "promised not to challenge conveyance charges set by Metropolitan for five years following execution of the 2003 exchange agreement but reserved the right thereafter to contest the rates as contrary to 'applicable law and regulation.'" (*Id.* at p. 1137, quoting PTX-65 § 5.2.) After that five years elapsed, and after trying but failing to convince Metropolitan to abide by applicable law without judicial intervention, the Water Authority initiated this litigation.

[6] This refers to additional surplus Colorado River water Metropolitan would obtain under the California 4.4 Plan for filling Metropolitan's CRA while abiding by the *Arizona* decision.

E. The RSI clause and the Water Authority's claim for equitable relief

In retaliation, Metropolitan invoked its RSI clause—a provision Metropolitan inserted into its subsidy contracts with member agencies, purporting to give Metropolitan the right to terminate those contracts and deny subsidies to member agencies that "file or participate in litigation or support legislation to challenge" Metropolitan's rates. (PTX-134 § 8.2.) Metropolitan terminated most of the Water Authority's existing subsidy contracts and barred the Water Authority from receiving future subsidies, yet Metropolitan continued to impose its water stewardship rate on the Water Authority. The Water Authority amended its complaint to add a cause of action 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 [San Vicente Water Recycling Project subsidy agreement ("Ramona Agreement")] between Ramona [Municipal Water District], the Water Authority and Metropolitan, which Metropolitan has terminated due to a purported violation of the RSI Clause; (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 programs on the same terms applicable to other Metropolitan member agencies.

(2010 Case Third Am. Compl. ¶ 110.)

Both parties moved for summary adjudication regarding the RSI clause. Judge Karnow found that the RSI clause would be an unconstitutional condition on the Water Authority's petitioning rights if it had standing to assert those rights, but held that the Water Authority lacked standing. (Dec. 4, 2013 Order.) The parties proceeded to trial but, because of the summary adjudication, the Water Authority was unable to pursue this claim for equitable relief.

F. The two-phase trial and Judge Karnow's decisions

Judge Karnow bifurcated the trial into two phases. The first addressed the legality of Metropolitan's conveyance rates—specifically, its system access, system power, and water stewardship rates, which it charges under the Exchange Agreement; and its general wheeling rate, which includes the system access and water stewardship rates, plus a charge for actual power rather than the system power rate. Judge Karnow found those rates unlawful and invalid because: (1) the system access and power rates include SWP costs that are not Metropolitan's conveyance costs; and (2) the water stewardship rate is not a lawful conveyance rate. (See SOD I.) The

Water Authority also argued that Metropolitan's conveyance rates exceed "fair compensation" because Metropolitan does not give any "reasonable credit for any offsetting benefits for the use of the conveyance system." (Phase I Post-Trial Br. at p. 47, quoting Wat. Code § 1811, subd. (c); see also Tr. 1246:18–1250:18.) Judge Karnow, however, never reached the issue of offsetting benefits for the use of Metropolitan's conveyance system; instead, he rejected Metropolitan's very definition of its "conveyance system" as including the SWP. (See SOD I at pp. 37, 57–58.)

The second phase of trial was primarily devoted to the Water Authority's claim for contract damages for Metropolitan's breaches of the Exchange Agreement. Metropolitan repeatedly argued that the Exchange Agreement is not a wheeling agreement, and that the Wheeling Statutes therefore do not apply. (See, e.g., Tr. 1346:4–1351:20.) Judge Karnow rejected that argument. (See SOD II at pp. 10–12.) Whether the Exchange Agreement is titled a wheeling agreement is irrelevant. Metropolitan agreed to charge no more than a lawful wheeling rate, as the Water Authority proved and Judge Karnow found. (See *ibid.*; PTX-57; PTX-62; PTX-64; PTX-65 § 5.2; Tr. 1439:21-24, 2564:13–2568:25, 2865:11–2869:22.)

Judge Karnow also found that the Water Authority proved its "damages in the amount of $188,295,602 plus interest." (SOD II at p. 18.) That consists of ***$28,678,191*** in unlawful water stewardship charges, and $159,617,411 in SWP charges:

	Exchange Volume (AF)	Actual Charges	Overcharge Credits			
			System Access	System Power	Water Stewardship	Total
Grand Total	690,352.90	$ 289,036,167.80	$ (73,307,002.90)	$ (86,310,408.60)	$ (28,678,190.90)	$ (188,295,602.40)

(PTX-471; see also Tr. 2495:1–2511:3.) Metropolitan "did not offer a competing computation," and waived its argument that those damages were excessive. (SOD II at 18; Dec. 23, 2015 Order at pp. 7–8.) Judge Karnow also found that the Water Authority is entitled to prejudgment interest at 10 percent per annum. (See Oct. 9, 2015 Order; Oct. 30, 2015 Order.) Judge Karnow awarded the Water Authority its attorneys' fees for the first phase of trial, but denied fees for the second phase, interpreting the fee provision as applying only to the challenge to the rates' validity. (See Mar. 24, 2016 Order.) Judge Karnow also issued a writ of mandate, as required by Code of Civil Procedure section 1095. (See Oct. 30, 2015 Order; Nov. 18, 2015 Order; Judgment; Writ.)

G. The Court of Appeal's decision

On appeal, the court agreed with Metropolitan that "fair compensation" for wheeling may include SWP transportation costs. (See 12 Cal.App.5th at pp. 1145–1149.) Otherwise, the court agreed with the Water Authority. (See *id.* at pp. 1150–1167.)

In particular, the Court of Appeal held that Metropolitan's water stewardship rate is "outside the scope of recoverable costs contemplated by the wheeling statutes." (*Id.* at p. 1150.) Subsidies funded by the water stewardship rate are "not a cost of using the conveyance system to wheel water. Funding conservation programs may lessen capital expenditures for system expansion in the future, as Metropolitan asserts, but that potential savings is not recoverable under the terms of the statute that permits recovery for actual conveyance costs—not avoided costs." (*Id.* at pp. 1150–1151.) Thus, as a conveyance charge, the water stewardship rate violates the Wheeling Statutes, as well as the common law. (See *id.* at pp. 1151–1152.)[7]

The Court of Appeal further held that, "to the extent that the price Metropolitan charged the Water Authority for wheeling was based on an unlawful rate, there was a breach of the amended exchange agreement." (*Id.* at p. 1154.) "Since the water stewardship rate was unlawfully charged for the conveyance of water, there was a breach of the agreement in that respect," and the Water Authority is entitled to those damages. (*Ibid.*) "Metropolitan has made several assertions on appeal denying an enforceable contract and actionable breach but none is persuasive." (*Ibid.*) Among other meritless contentions, Metropolitan argued that there was no actionable breach because the Exchange Agreement is not a wheeling agreement. (See AOB at pp. 120–121.) But "contrary to Metropolitan's arguments, the evidence sufficiently establishes a violation of the contractual price term, not just the wheeling rate, and actionable injury is shown by payment of a water stewardship rate unrelated to the transportation services provided." (12 Cal. App. 5th at p. 1154.) Metropolitan also challenged the legality and interpretation of the contract, the amount of damages, and Judge Karnow's evidentiary rulings. (See AOB at pp. 114–

[7] Having invalidated the water stewardship rate under the Wheeling Statutes and the common law, the court declined to evaluate that rate under other provisions of law, including Proposition 26, but applied Proposition 26 to Metropolitan's rates in connection with the SWP charges, finding no violation for the reasons already discussed. (See 12 Cal.App.5th at pp. 1152–1153.)

133.) But, aside from the issue of SWP costs, the court rejected all of Metropolitan's arguments about the contract, breach, damages, and interest. (See 12 Cal. App. 5th at pp. 1154–1155.)

The Court of Appeal also ruled for the Water Authority on its cross-appeal. The Water Authority is entitled to judgment on its challenge to the RSI clause, which is an unconstitutional condition on its right to petition. (See *id.* at pp. 1156–1164.) And, if the Water Authority remains the prevailing party on the contract—a question this Court must decide—the Water Authority is entitled to its attorneys' fees for both phases of trial. (See *id.* at pp. 1164–1166.)

III. ARGUMENT

On remand, the trial court must follow the directions of the appellate court. (See, e.g., *Rice v. Schmid* (1944) 25 Cal.2d 259, 263; *Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 859–860.) But the "appellate court need not expressly comment on every matter intended to be covered by the disposition." (*Ducoing Management Inc. v. Superior Court of Orange County* (2015) 234 Cal.App.4th 306, 313.) Instead, as here, the Court of Appeal may allow for "other proceedings consistent with the views expressed in [its] opinion." (12 Cal.App.5th at p. 1166.) This is not "a phrase of art with only a single meaning," but rather "must be read with the appellate opinion as a whole," in light of the law of the case doctrine. (*Eldridge v. Burns* (1982) 136 Cal.App.3d 907, 918, citation omitted.) That doctrine prevents "relitigation of issues previously decided." (*Sargon Enterprises, Inc. v. University of Southern California* (2013) 215 Cal.App.4th 1495, 1505.) It "does not apply to points of law that might have been determined, but were not decided in the prior appeal," but it "does extend to questions that were implicitly determined because they were essential to the prior decision." (*Ibid.*)

A. The Court must award $28,678,191 in damages, plus 10 percent interest.

Where, as here, "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" as to the measure of damages. (*Rice, supra*, 25 Cal.2d at 263.) Here, the Court of Appeal held that "the water stewardship rate was unlawfully charged," in breach of the Exchange Agreement, and that the Water Authority is entitled to damages for

"the overcharges attributable to the unlawful inclusion of the water stewardship rate." (12 Cal.App.5th at p. 1154.) ***Those overcharges have already been calculated, proved, awarded by the trial court, and affirmed on appeal.*** (See *ibid.*; Tr. 2495:1–2511:3; PTX-471; SOD II at p. 18.) The amount is ***$28,678,191***. (See, e.g., PTX-471.) The law of the case further mandates 10 percent prejudgment interest. (12 Cal.App.5th at pp. 1154–1155.)

Metropolitan suggested, in the recent Further CMC Statement, that it wants "discovery, briefing, and a hearing or trial on two questions: (1) what is the amount that MWD could have lawfully charged San Diego; and (2) what is the delta between the amount San Diego paid and the amount that MWD could have lawfully charged." (May 16, 2018 CMC Statement at p. 10.) But Metropolitan is foreclosed by the remand and the law of the case from relitigating those issues. (See, e.g., *Rice*, *supra*, 25 Cal.2d at 263.) Indeed, Metropolitan already moved for a new trial on damages, citing its desire to further litigate these very issues. (See Nov. 16, 2015 New-Trial Mot. at pp. 15–25.) After that motion was denied (see Dec. 23, 2015 Order at pp. 7–8), Metropolitan repeated the same arguments on appeal (see AOB at pp. 114–133), but the Court of Appeal firmly rejected Metropolitan's arguments. (See 12 Cal.App.5th at pp. 1154–1155.) Metropolitan has taken so many bites at this apple that only its gnashing teeth remain. This Court must award $28,678,191 in damages, plus 10 percent prejudgment interest. (See *ibid.*; PTX-471.)

B. The Court must enter declaratory relief for the Water Authority regarding the unconstitutional RSI clause, and that relief should include restitution.

On remand from the Court of Appeal's reversal of summary adjudication regarding Metropolitan's RSI clause, the Water Authority is entitled to the relief it prayed for, as well as "restitution for all things lost by reason of the judgment." (*Beach Break*, *supra*, 6 Cal.App.5th at p. 852.) "Even if the reviewing court has not ordered restitution, the trial court whose order or judgment has been reversed on appeal has the inherent authority to afford restitutionary relief," which the party prevailing on appeal may seek "through a motion in the remanded matter, rather than by filing a new cross-complaint or filing an independent action." (*Id.* at pp. 852, 854.)[8] The

[8] This brief is, in effect, such a motion, and the Water Authority asks the Court to treat it as such, but will file a separate noticed motion if the Court decides that is preferable or necessary.

Court "may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, . . . and may direct the entry of a money judgment sufficient to compensate for property or rights not restored." (*Id.* at p. 852, quoting Code Civ. Proc., § 908.[9])

In *Beach Break*, for example, the trial court granted summary adjudication in favor of a landlord, which evicted its tenant while the appeal was pending. The appellate court reversed, but the trial court denied restitution to the tenant on remand "because he had not filed an affirmative pleading requesting this form of relief." (*Id.* at p. 851.) The appellate court reversed again. "The party entitled to seek restitution is not required to file additional pleadings because the power to restore benefits lost exists by virtue of section 908 and the trial court's equitable powers." (*Id.* at p. 854.) Thus, the trial court was ordered to conduct a restitution hearing. (*Id.* at p. 855.)

Here, the Water Authority prayed for a judicial declaration (a) holding the RSI clause invalid and unenforceable; (b) reinstating all contracts terminated pursuant to the RSI clause; (c) reinstating, in particular, the Ramona Agreement; (d) directing Metropolitan not to enforce the RSI clause in the future; and (e) directing Metropolitan to restore the Water Authority's eligibility for any lawful Metropolitan subsidy programs on the same terms applicable to other Metropolitan member agencies. (2010 Case Third Am. Compl. ¶ 110.) The Water Authority is entitled to that relief—including restoration of its rights with regard to all wrongfully-terminated contracts, and of its right to receive program benefits associated with the water stewardship rates imposed by Metropolitan. Because the Water Authority was unlawfully barred from obtaining such subsidies for seven years, however, forward-looking relief in a judgment entered now will not suffice to put the Water Authority back in "as favorable a position" as it would have occupied if not for the erroneous summary adjudication of the Water Authority's challenge to Metropolitan's RSI clause, and Metropolitan's enforcement of that unconstitutional provision. (See *Beach Break*, *supra*, 6 Cal.App.5th at p. 847.)[10] Indeed, as a result of Metropolitan's unconstitutional conduct,

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[9] "Although this statutory provision is limited to 'the reviewing court,' a trial court whose order or judgment has been reversed on appeal has inherent authority to afford similar relief." (*Gunderson v. Wall* (2011) 196 Cal.App.4th 1060, 1065.)

[10] For example, Metropolitan terminated the Ramona Agreement referenced in the Water Authority's RSI claim. (See 2010 Case Third Am. Compl. ¶ 110; PTX-201; Tr. 2415:22–2418:28.) Denied the benefits of the subsidy program for which it was nevertheless charged, the

Metropolitan has received a windfall of tens of millions of dollars from 2011 to 2014, the rate years at issue in the 2010–2012 cases. Because restoration of future rights will not account for that windfall, the Water Authority is entitled to equitable relief in the form of monetary restitution. (See *id.* at p. 852.) This Court can and should award such relief now because, due to the erroneous summary adjudication of its RSI claim, this is the Water Authority's first opportunity to have the matter heard. (See *ibid.*)

Moreover, even if the Court were to decide that the rule in *Beach Break* does not apply here—which it does—a similar yet independent rule provides that 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" instead. (*Engasser v. Jones* (1948) 88 Cal.App.2d 171, 176.) Granting such relief is an "exercise of the equity jurisdiction of the court," and an example of "the general rule that equity having taken jurisdiction over a portion of a particular controversy it will proceed to decide the whole issue and to award complete relief." (*Crouser v. Boice* (1942) 51 Cal.App.2d 198, 203.) Restoring the wrongfully-terminated contracts and the Water Authority's right to participate in past subsidy distributions is tantamount to ordering specific performance, but if such performance "cannot be decreed," the Court should instead "grant monetary relief." (*Engasser*, *supra*, 88 Cal.App.2d at p. 176; see also, e.g., *Kessloff v. Pearson* (1951) 37 Cal.2d 609, 613 [plaintiff may obtain an accounting and a money judgment on a declaratory-relief claim].)

Because Metropolitan, by enforcing its unconstitutional RSI clause, wrongfully deprived the Water Authority of both contractual benefits and subsidy program participation benefits, Metropolitan must either restore those benefits "or else pay money in the amount necessary to

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Water Authority was left to pay the entire bill for that project. Metropolitan also barred the Water Authority from obtaining subsidies for other projects, including the Carlsbad desalination plant, which Metropolitan had previously indicated its intent to subsidize to the tune of ***$14 million per year***. (See Tr. 1799:9–1800:7, 1845:15–1848:19, 2416:9-27, 2426:20-23; PTX-179.) But there is no mechanism for retroactively reinstating subsidy participation rights and the resulting benefits for years and projects in the past. Given the passage of time and the practical inability to know what other projects the Water Authority would have asked Metropolitan to subsidize, or what Metropolitan would have done, the best measure of equitable restitution is simply "the excess of what the [Water Authority] gave [Metropolitan] over the value of what the [Water Authority] received," as discussed below. (See *Cortez*, *supra*, 23 Cal.4th at p. 174.)

eliminate unjust enrichment." (Rest.3d Restitution and Unjust Enrichment, § 1, com. a.) The Restatement Third of Restitution and Unjust Enrichment, which California follows, states that the relevant measure of restitution is "the net profit attributable to the underlying wrong." (*Id.*, § 51, subd. (4).) The Water Authority has the initial burden of providing "a reasonable approximation of the amount of the wrongful gain," but having done so, any "uncertainty in calculating net profit is assigned to" Metropolitan. (*Id.*, subd. (5)(d); accord, e.g., *Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 399; *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 894; see also *Grill v. Hunt* (1992) 6 Cal.App.4th 73, 79 [the "risk of any difficulty in proof should not inure to the benefit of the party responsible for the failure of the contract"].)

A reasonable approximation of the amount of Metropolitan's wrongful gain consists of the water stewardship charges Metropolitan collected from the Water Authority while withholding benefits based on its unconstitutional RSI clause, minus the legacy benefits the Water Authority actually received, and further subtracting the damages the Water Authority will receive for the water stewardship charges Metropolitan unlawfully collected under the Exchange Agreement (to avoid double counting). Subtracting the latter—*i.e.*, the Water Authority's $28,678,191 in damages—leaves $48,263,438 the Water Authority paid in water stewardship charges on *Metropolitan* water from 2011 to 2014 alone. Subtracting the Water Authority's legacy benefits of $22,334,901 leaves ***$25,928,537*** for 2011 to 2014.[11] (See Tr. 2415:22–2418:28; PTX-506.) That is "the excess of what the [Water Authority] gave [Metropolitan] over the value of what the [Water Authority] received" from 2011 to 2014. (*Cortez*, *supra*, 23 Cal.4th at p. 174.) This is "at least a reasonable approximation of the amount of the wrongful gain," and Metropolitan must carry the burden of proving otherwise. (*Meister*, *supra*, 230 Cal.App.4th at p. 399, quoting *Uzyel*, *supra*, 188 Cal.App.4th at p. 894.)

C. The Court must issue a new writ mandating lawful conveyance rates consistent with *SDCWA*, and should direct Metropolitan to determine the Water Authority's "reasonable credit," as required by Water Code § 1811.

Under the Court of Appeal's opinion, the Water Authority is entitled to a judgment that

[11] This does not include Metropolitan's ongoing unjust enrichment after 2014, supplemental evidence of which the Water Authority will provide to the Court as appropriate.

Metropolitan's wheeling rate, and its Exchange Agreement price, are unlawful and invalid because they include the water stewardship rate, which Metropolitan "unlawfully charged for the conveyance of water." (12 Cal.App.5th at p. 1154.) And, because the Water Authority is entitled to such a judgment, "a peremptory mandate must also be awarded without delay." (Code Civ. Proc., § 1095.) Metropolitan previously conceded as much. (See Tr. 3331:25–3332:8; Oct. 30, 2015 Order; Nov. 18, 2015 Order; Writ.)

The new writ should mandate lawful conveyance rates, and should not only mandate that Metropolitan must cease unlawfully charging its water stewardship rate as a conveyance rate, but also that Metropolitan must determine the "'reasonable credit for any offsetting benefits for the use of the conveyance system.'" (12 Cal.App.5th at p. 1144, quoting Wat. Code, § 1811, subd. (c); see also *Central San Joaquin Water Conservation District v. Stockton East Water District* (2016) 7 Cal.App.5th 1041, 1044 [upholding trial court's determination that wheeling rate failed the "fair compensation" requirement because the defendant agency "failed to consider all of the appropriate factors, including . . . the value of offsetting benefits from the wheeling"].) As discussed above, Metropolitan has refused to give the Water Authority "reasonable credit," arguing that Water Code section 1811, subdivision (c), does not apply to the Exchange Agreement. But the Court of Appeal rejected that argument. (See 12 Cal.App.5th at pp. 1150–1151, 1154.) Indeed, the court not only held that Metropolitan breached the Exchange Agreement because the water stewardship rate is not "fair compensation" for wheeling (*ibid.*), the court also expressly relied on the statutory definition of "fair compensation" in holding that Metropolitan did not breach the Exchange Agreement by including its SWP transportation costs in the price. (See *id.* at pp. 1147, 1154.) Thus, it is now the law of the case—for better or worse, on both sides—that the Exchange Agreement price is governed by the Wheeling Statutes.

The Wheeling Statutes require Metropolitan to determine the "reasonable credit" for "offsetting benefits," as part of its "fair compensation" determination, in a timely and "reasonable manner consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange of water." (Wat. Code, §§ 1810–1813.) This Court can and should specify in the writ—which, again, must be issued in any event—that Metropolitan must "carry out its ministerial functions

with respect to that rule." (*California Trout*, *supra*, 218 Cal.App.3d at 203, citation omitted; see also, e.g., *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 539 [a writ of mandate is the correct method for compelling compliance with a "ministerial legal obligation," including the statutory obligation "to reimburse local agencies"]; *California Assn. for Health Services at Home v. State Dept. of Health Care Services* (2012) 204 Cal.App.4th 676, 683 ["mandamus may issue to compel an official both to exercise his or her discretion (if he or she is required by law to do so) and to exercise it under a proper interpretation of the applicable law"].)

Metropolitan may argue that a writ requiring it to determine reasonable credit for offsetting benefits is beyond the scope of the remand, but the court rejected a similar contention in *California Trout*, *supra*, 218 Cal.App.3d 187. In a prior opinion, the *California Trout* court had held that the State Water Resources Control Board (Water Board) must condition water-appropriation licenses to the Los Angeles Department of Water and Power on its compliance with statutory requirements to release sufficient water for fisheries damaged by the diversion of water. (*Id.* at p. 194.) On remand, the superior court allowed the Water Board to defer imposition of those conditions while it studied the issue, and the superior court denied the petitioners' request for ancillary injunctive relief. That was error. "An administrative agency has no discretion to engage in unjustified, unreasonable delay in the implementation of statutory commands," and even if it may take time for the agency to exercise its discretion, "in such a case the duty would ordinarily devolve on the court to fashion an ancillary judicial remedy upon request. The court cannot ignore the ongoing violation of a statutory mandate on the ground that the violation will eventually be halted by untimely administrative action." (*Id.* at p. 203.) Thus, the superior court "should have responded to petitioners' request for ancillary relief by enjoining interim compliance with" the relevant statute, "or by directing the Water Board to do so. That a hearing might be appropriate in either event does not prevent judicial relief." (*Id.* at p. 211.)

Furthermore, the *California Trout* court rejected the Water Board's argument that the petitioners could not seek such ancillary relief on remand because it was not in their original writ petition or the remittitur. "The petitioners, having pled and established the facts undergirding a primary right" under the relevant statute, "were entitled to any remedy appropriate to enforcement

of the right, including interim injunctive relief. That petitioners originally prayed for a different remedy does not preclude the court from granting an appropriate remedy not made the subject of the prayer." (*Id.* at p. 204, citations omitted.) "Nor is the claim tenable that our prior opinion tied the hands of the respondent superior court and precluded ancillary relief." (*Id.* at p. 202, fn. 2.) Accordingly, the appellate court ordered the superior court to "promptly issue a writ commanding the Water Board to exercise its ministerial duty without further delay," and also ordered the superior court to "entertain and expeditiously resolve an application by the petitioners for injunctive relief," even though such relief had neither been requested in the initial writ petition, nor mentioned in the prior remittitur. (*Id.* at pp. 212–213; see also *id.* at pp. 195, 202–204 & fn. 2; *Housing Authority v. City of Los Angeles* (1953) 40 Cal.2d 682, 688 [ordering annexation even though "the question of annexation was not specifically presented in the mandate proceeding"]; *Stoneham v. Rushen* (1984) 156 Cal.App.3d 302, 310 [trial court has inherent power to issue additional writ relief "in the same mandamus proceeding" after remand].)

Indeed, it is black letter law that when relief granted by the trial court is reversed on appeal, the plaintiff is not precluded from "availing himself of the proper remedy" on remand. (*Atchison, T. & S. F. R. Co. v. Superior Court of Contra Costa County* (1939) 12 Cal.2d 549, 555.) That the proper legal theory and remedy presented "a difficult problem is indicated by the fact that the trial court" ruled one way, whereas the appellate court "ruled otherwise. A mere mistake of judgment should not result in depriving one of valuable rights." (*Ibid.*) The party that prevailed at trial is not required to seek relief at trial, or on appeal, that its own victory made unnecessary, and therefore cannot be precluded, if its victory is partially overturned on appeal, from seeking appropriate relief on remand, consistent with the law of the case—even if, unlike here, the plaintiff "abandoned" that relief at trial. (*Id.* at p. 557; see also, e.g., *Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1682 [having "prevailed at the first trial," a party "may be assumed to have supposed she need not rely on" alternative arguments].)

Here, the Water Authority pleaded that Metropolitan violated the law and breached the Exchange Agreement by charging more than "fair compensation" as defined by the Wheeling Statutes, and argued at trial that Metropolitan's conveyance rates are invalid because

Metropolitan failed to give reasonable credit for offsetting benefits. (See 2010 Case Third Am. Compl. ¶¶ 72, 96, 101; 2012 Case Compl. ¶¶ 73, 98, 103; Phase I Post-Trial Br. at pp. 47–48; Tr. 1246:18–1250:18.) ***But Judge Karnow never decided that issue***. Instead, in Phase I, Judge Karnow invalidated Metropolitan's conveyance rates for improperly including SWP and water stewardship costs. (See SOD I.) In Phase II, the Water Authority's damages case followed directly from those Phase I rulings, and did not rely on offsetting benefits, although the Water Authority reminded Judge Karnow about them. (See Phase II Post-Trial Br. at pp. 9, 21–23, 32–33.) Having prevailed at trial, the Water Authority did not initially press the issue of offsetting benefits on appeal; ***nor was it required to do so***. (See *Atchison*, *supra*, 12 Cal.2d at pp. 550–557; *Brookhouser*, *supra*, 10 Cal.App.4th at pp. 1681–1682.) In its petition for rehearing on appeal, the Water Authority noted that the issue remained unaddressed and undecided, but the Court of Appeal still declined to address it, so the issue was not "decided in the prior appeal," and the law of the case doctrine "does not apply." (*Sargon*, *supra*, 215 Cal.App.4th at p. 1505.)[12]

As it turns out, moreover, it was sensible to first litigate the propriety of Metropolitan's definition of its conveyance system as including its SWP rights, before determining—whether in court or through the administrative process—the amount of offsetting benefits for the use of Metropolitan's conveyance system. Knowing what Metropolitan's conveyance system includes is presumably a prerequisite to determining the reasonable credit for offsetting benefits for the use of that conveyance system. Judge Karnow rejected Metropolitan's definition of its conveyance system as including its SWP rights, but the Court of Appeal has now, in effect, upheld Metropolitan's resolution that its conveyance system includes its "rights to the use of the SWP conveyance system." (AR2446.)

That same resolution, however, promises that Metropolitan's "wheeling rates shall be

[12] More precisely, the law of the case doctrine does not preclude the Water Authority from seeking a writ commanding Metropolitan to carry out its statutory duty to determine reasonable credit for offsetting benefits. Such a writ is within the scope of the "other proceedings" the Court of Appeal allowed, "consistent with the views expressed in [its] opinion." (12 Cal.App.5th at p. 1166.) The law of the case doctrine does, however, preclude Metropolitan's argument that the statutory definition of "fair compensation" does not apply to the Exchange Agreement. Again, the Court of Appeal rejected that argument. (See *id.* at pp. 1150–1151, 1154.)

reduced to reflect the regional water supply benefits," which "shall be calculated by Metropolitan in the same manner as such benefits are calculated for use in the [LRP]." (AR2449 § 10; see also AR3152.) Metropolitan has yet to calculate those benefits, whether in the same manner as it calculates LRP benefits or otherwise. Under the Wheeling Statutes, the law of the case, and Metropolitan's own resolution, it must calculate "offsetting benefits" and remit to the Water Authority the corresponding "reasonable credit." (See *ibid.*; Wat. Code, § 1811, subd. (c); 12 Cal.App.5th at pp. 1144–1151, 1154.) This Court "cannot ignore" Metropolitan's "ongoing violation" of this "statutory mandate." (*California Trout*, *supra*, 218 Cal.App.3d at p. 203.)

Thus, the Court should issue a writ commanding Metropolitan to determine lawful conveyance rates limited to "fair compensation," which must include "reasonable credit for any offsetting benefits for the use of the conveyance system." (Wat. Code, § 1811, subd. (c).)

D. The parties will address issues relating to attorneys' fees in later proceedings.

Finally, as the Court indicated at the Case Management Conference, the parties will address attorneys' fees in later proceedings, after the Court decides what to do on remand. At this point, the Water Authority merely notes that it will show, at the appropriate time, that it is the prevailing party on the contract, and thus entitled to its fees for both phases of trial on that basis. And, perhaps depending on whether and to what extent the Water Authority receives monetary restitution for Metropolitan's enforcement of its RSI clause, the Water Authority also may seek public-interest attorneys' fees for its successful challenge to that unconstitutional provision.

IV. CONCLUSION

For the foregoing reasons, the Court should (a) award $28,678,191 in damages, plus prejudgment interest at 10 percent per annum; (b) award declaratory relief for Metropolitan's unconstitutional RSI clause, including monetary restitution compensating for rights pleaded in the Water Authority's declaratory-relief claim that cannot practically be calculated or restored; and (c) issue a writ mandating lawful conveyance rates limited to "fair compensation," which must include "reasonable credit for any offsetting benefits for the use of the conveyance system." (Wat. Code, § 1811, subd. (c).) Those matters, and the determination of attorney's fees, are the remaining scope of this proceeding.

Respectfully submitted,

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