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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.

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 10, 2012 TO BE EFFECTIVE JANUARY 1, 2013 AND JANUARY 1, 2014; and DOES 1–10,

Respondents and Defendants.

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

RESPONDENT AND DEFENDANT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S REPLY BRIEF RE MEASURE OF DAMAGES

Hon. Curtis E.A. Karnow
Dept.: 304
Hearing Date: November 3, 2014
Hearing Time: 2:00 p.m.

Actions Filed: June 11, 2010; June 8, 2012

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Preliminary Statement

Notably absent from SDCWA's brief is any response to a point that MWD has made repeatedly: A liquidated damages clause must *liquidate* the damages; that is, it must state a specific sum as the amount of damages. Of course no such amount was specified in the contract. In the absence of a sum certain in the contract, SDCWA continues to argue that MWD must pay the "set aside" amount that SDCWA specified (years later) -- even if it is provably unjustified, rife with errors, excessive or punitive. SDCWA has not cited, and cannot cite, any case where a court upheld a clause that failed to liquidate the damages in the contract.

In the alternative, SDCWA characterizes the clause as a "*sui generis*" measure of damages. Truly it would be. In this context, "*sui generis*" means that it is wholly unprecedented and inconsistent with statute and case law governing the measure of damages for breach of contract. As discussed in MWD's opening brief, there are only two measures of contract damages in California, compensatory and liquidated. SDCWA is asking this Court to override the Civil Code and create a new measure of damages.

SDCWA has cited so-called "refund cases," but those cases have nothing to do with the measure of contract damages. Furthermore, none of them has anything to do with whether one party can simply pick the amount it thought should be refunded. SDCWA's authorities concern the assessment of fees on developers under certain Government Code statutes. The law and facts of those cases are not remotely related to the issue here.

SDCWA faults MWD for not including alternative rates either in the administrative record or in the Phase I trial. It argues that without such evidence SDCWA is entitled to recover what it asserts the rates should be. But there was no logical reason for MWD to have put alternative rates into the administrative record or into evidence during Phase I. In setting rates, it would make no sense to include in the administrative record alternative rates just in case its rates were invalidated. In Phase I of the trial, the issue was the validity of the *existing* rates only, not alternative rates. Phase II is the trial of a common law cause of action for breach of contract which puts into issue what the rates should have been if the contract had been performed. In Phase II the evidence is not limited to the administrative record or what was relevant to the rate setting challenges in Phase I.

Argument

I. THE ADMINISTRATIVE RECORD AND THE RECORD IN PHASE I HAVE NOTHING TO DO WITH THE ENFORCEABILITY OF §12.4(c)

SDCWA argues repeatedly that it is entitled to the amount it unilaterally asserted was disputed under §12.4(c) because MWD failed "to establish *in its administrative record* any basis for paying San Diego anything less." SDCWA Brief at 9 (emphasis added); *see also* pp. 1, 7, 12, & 13. MWD, according to SDCWA, was required to anticipate potential rate challenges – even before any rate challenge was filed – and put evidence of alternative rates in the administrative record and then submit them into evidence during Phase I, to support an alternative measure of damages. There was never any logical reason for MWD to engage in such a speculative exercise. In setting rates, MWD had no need to offer evidence of possible alternative rates just in case the rates set were later found to be invalid. During Phase I of these proceedings, the issue was limited to the validity of the existing rates; evidence of alternative rates was not relevant. In fact, none of the contract issues were litigated in Phase I, and therefore neither party presented evidence of damages.

If SDCWA's argument were accepted, the burden of proving damages would be shifted. In a breach of contract action, the burden is on the plaintiff to prove damages. A defendant has no obligation put on evidence of damages. SDCWA cannot win by default. It must prove its damages, and it does SDCWA no good to point out that MWD never did what it was never required to do; that is, include in the administrative record or the record in Phase I alternative rates to support a measure of damages.

SDCWA relies on three mandamus cases in which, it asserts, courts awarded full refunds because the administrative record did not contain evidence supporting partial refunds. In fact, the opposite occurred. Partial refunds were awarded. All three cases involved fees imposed on developers pursuant to the Government Code. None involved a breach of contract, nor the measure of damages for breach. But if school fee refund cases were analogous, they show that a prevailing developer does not receive all it asks for. In *Cresta Bella, LP v. Poway Unified Sch. Dist.*, 218 Cal. App. 4th 438, 454 (2013) the "School Facilities Needs Analysis" did not justify the

imposition of the entire amount of school impact fees. The developer received a partial refund. In *Warmington Old Town Assoc., L.P. v. Tustin Unified Sch. Dist.*, 101 Cal. App. 4th 840, 867 (2002), there were errors in a fee study and the developer received a partial refund of the fees. In *Shapell Industries, Inc. v. Governing Bd. of the Milpitas Unified Sch. Dist.*, 1 Cal. App. 4th 218, 248 (1991), the School Board's calculations of fees were "flawed" and the developer was refunded the difference between the correct amount and the amount charged him.

Simply put, the administrative record and the record in Phase I do not shift the burden of proof, do not change the measure of damages, do not prove that what SDCWA has claimed is in fact its actual damages, and do not alter the indisputable fact that §12.4(c) does not state a liquidated amount of damages.

II. SECTION 12.4(c) IS NOT AN ENFORCEABLE LIQUIDATED DAMAGES CLAUSE

A. There Is No Liquidated Amount in §12.4(c).

SDCWA tacitly concedes by silence that the law requires that a liquidated damages clause contain a "liquidated" amount, *i.e.*, a sum "fixed and certain by agreement." SDCWA argues that the "disputed amount" it later claimed satisfies this requirement. The first flaw in that argument is that SDCWA chose the disputed amount almost eight years *after* the Exchange Agreement was made. The liquidated damages amount must be specified *at the time* the contract was made. SDCWA acknowledges that the enforceability of a liquidated damages clause under Civil Code §1671(b) is determined as of the time the contract was made. SDCWA Brief at 11:16-17. In fact, SDCWA cites The Law Revision Commission Comments to the 1977 Amendment to §1671, which confirm the point:

> [§1671(b)] limits the circumstances that may be taken into account in the determination of reasonableness to those in existence '*at the time the contract was made*.' The validity of the liquidated damages provision depends upon its reasonableness *at the time the contract was made and not as it appears in retrospect*."

13 Cal. Law Revision Comm'n 1736, 1751 (1976) (emphasis added); s*ee also* Civil Code §1671(b); *Ridgley v. Topa Thrift & Loan Ass'n*, 17 Cal. 4th 970, 977 (1998). Thus, the "disputed

amount" SDCWA chose in 2011 is irrelevant to the determination that must be made as of 2003, when the Exchange Agreement was made.

The second flaw in SDCWA's argument is that the liquidated amount must be *agreed* upon by the parties. *See Chodos*, 292 F.3d 992, 1003 (9th Cir. 2002) (sum must be fixed and certain "by agreement"); *see also Ruwe v. Cellco P'ship*, 613 F. Supp. 2d 1191, 1196–97 (N.D. Cal. 2009) (same). SDCWA cites *Utility Consumers' Action Network, Inc. v. AT&T Broadband of Southern California, Inc.*, 135 Cal. App. 4th 1023 (2006) ("*UCAN*"), to refute an argument that MWD has not made. SDCWA cites *UCAN* for the proposition that parties need not "expressly *negotiate* the amount of liquidated damages." SDCWA Brief at 14 (emphasis added). MWD makes no argument about the need *to negotiate*; MWD argues that there is a need *to agree*, which is what *UCAN* holds. *UCAN* involved 500,000 form contracts, and while the Court held that AT&T did not have to *negotiate* with each of its 500,000 customers individually, nevertheless the parties still had to *agree* "ahead of time" to a "certain sum." *Id*. Similarly, in *Atkinson v. Pacific Fire Extinguisher Co*., also cited by SDCWA, the California Supreme Court held that a party seeking to enforce a liquidated damages clause "must show that the parties to the contract '*agree therein upon an amount*.'" 40 Cal. 2d 192, 196 (1953) (emphasis added).

Here, the "disputed amount" was chosen unilaterally by SDCWA in 2011. The Exchange Agreement was made in 2003. At that time -- the relevant time -- no amount was either "certain" or "agreed." Without a certain and agreed amount, the "*sine qua non*" of liquidated damages, §12.4(c) is not a valid liquidated damages clause. *See ABI,* 153 Cal. App. 3d at 684–85. SDCWA cites no authority to the contrary.

SDCWA also argues for an exception, *i.e.*, that an agreed upon certain amount is unnecessary if "ascertaining the amount to be paid does not require judicial determination based on conflicting evidence," citing a footnote in *Chodos v. West Publishing Co*. 292 F.3d at 1002 n.11. SDCWA Brief at 14-15. Preliminarily, the footnote dealt with pre-judgment interest, not liquidated damages. In any event, *Chodos* did not create an exception to the requirement of a fixed and certain liquidated amount. To the contrary, as noted in MWD's Opening Brief, the Court held it was required. In *Chodos*, the plaintiff entered into a contract for 15% of the revenues

from a book he wrote. The defendant never published the book and breached the contract. One issue in the case was whether the damages were certain. The Ninth Circuit found that "the revenues to which that percentage figure is to be applied cannot be calculated with reasonable certainty" and, therefore, there was no "certain or readily ascertainable figure" in the contract. *Id.* at 1002. The Court also held that the clause did not provide for liquidated damages because no amount was "fixed and certain by agreement." *Id*.

B. SDCWA Misleadingly Cites Testimony To Assert the Parties Intended a Liquidated Damages Clause

As shown in MWD's opening brief, the testimony of each party's "person most knowledgeable" pertaining to the negotiation, drafting and terms of the Exchange Agreement showed that neither party intended §12.4(c) to be a liquidated damages clause. SDCWA proffers only snippets of deposition testimony taken out of context to suggest otherwise. SDCWA quotes Scott Slater: "I *guess* you could characterize it as a liquidated damages provision." SDCWA Brief at 5. But SDCWA omits two important portions of the same answer. After his "guess," Mr. Slater said: "*But I never gave that much thought*." He further testified: "And whether that's liquidated damages, *I don't know*." Slater Depo. at 147:17–24, attached to Borden Decl. as Ex. N (emphasis added). Slater's testimony – "don't know," "never gave it much thought" and his after the fact "guess" -- is not evidence of an intent *at the time the Exchange Agreement was made* that §12.4(c) be a liquidated damages clause.

Furthermore, if there were any doubt as to the parties' intent, SDCWA's own person most knowledgeable made it clear, and remarkably SDCWA has quoted him in its brief. Brian Thomas testified repeatedly that under §12.4(c) MWD would pay SDCWA *only the amount on which SDCWA prevails*.[1] SDCWA Brief at 4; *see also id.* at 5:7 (MWD will pay "t*he portion of the disputed amount* on which [San Diego] prevails").

SDCWA points out that the parties have complied with §12.4(c) in that SDCWA has paid the disputed amount and MWD set it aside in an interest bearing account. MWD is at a loss to

[1] *See also* Thomas Depo. at 156:16–158:11; 163:17–164:1, Ex. O to Borden Decl.

understand how compliance with this provision proves or disproves whether §12.4(c) is a liquidated damages clause. As explained in MWD's opening brief, the parties' performance secures satisfaction of the ultimate judgment.[2] It is hard to see how that arrangement proves that a disputed amount, unilaterally chosen years after the contract was made, is instead a mutually agreed amount of liquidated damages.

C. SDCWA Failed to Plead Liquidated Damages.

MWD has previously shown that (i) SDCWA never pleaded liquidated damages but, instead, affirmatively sought general compensatory damages "in an amount to be determined according to proof," and (ii) it repeatedly represented to the Court that it required discovery to calculate and prove the amount of its damages. SDCWA has no explanation for its failure to allege liquidated damages or its affirmative representations that it would prove compensatory damages

SDCWA does, however, quarrel with immaterial details, pointing out that some cases cited by MWD pre-dated amendments to the Civil Code or were consumer cases. But nowhere does SDCWA cite a case that changed the pleading requirement. In fact, the pleading requirement was reaffirmed this year. *Purcell v. Schweitzer*, 224 Cal. App. 4th 969, 975 (2014) ("a litigant seeking the benefits of a clause purporting to fix liquidated damages *must plead* and prove that the clause is valid under the facts which then existed.") (emphasis added).

D. §12.4(c) Has None of the Language of Liquidated Damages Clauses.

SDCWA also admits, *sub silentio*, that §12.4(c) does not contain the core terms of liquidated damages clauses (*e.g.*, it has no liquidated amount or reference to liquidated damages, *etc.*). *See* MWD Opening Brief, §IV.B. SDCWA notes that the failure to use the words "liquidated damages" is not "controlling." SDCWA Brief at 15. That is not MWD's contention.

[2] SDCWA writes that MWD told investors the funds set aside are "transferable to SDCWA if it prevails in the litigation." Indeed, MWD will return to SDCWA that portion of its deposits on which it prevails, if any; but that does not mean that the entire "disputed amount" must be paid if SDCWA does not prove damages in that amount or that §12.4(c) is a liquidated damages clause. SDCWA also writes that MWD did not "challenge" the disputed amount in correspondence; however, there is no procedure under §12.4(c) to "challenge" SDCWA's designation of the amount it claims is in dispute. The forum for determining contract damages is this action.

MWD pointed out that the phrase is typically used when sophisticated parties make an agreement with a liquidated damages clause. Its absence is not controlling but it is probative as to whether the Exchange Agreement "clearly expressed" an intention that §12.4(c) be a liquidated damages clause. *See ABI*, 153 Cal. App. 3d at 685 (contract must "clearly express" the intention to provide for liquidated damages).[3] As confirmed by the testimony of SDCWA's "person most knowledgeable" and its pleadings, the language of §12.4(c) does not express an intent to provide for liquidated damages.

E. Even If §12.4(c) Were a Liquidated Damages Clause, It Would Be Unenforceable.

SDCWA agrees that under Civil Code §1671 a liquidated amount in a contract must bear a "reasonable relationship to the range of actual damages" anticipated at the time the contract was made. *See Ridgley*, 17 Cal. 4th at 977-78. Section 12.4(c) plainly has no liquidated amount. SDCWA asserts it was "impossible" to anticipate the range of actual damages at the time the contract was made. *See* SDCWA Brief at 11. But a reasonable relationship to the range of actual damages is required. Without one, a liquidated damages clause is invalid. If, as SDCWA now contends, it was "impossible" to estimate the range of damages, then it necessarily follows that nothing in the clause could bear the required "reasonable relationship" to an anticipated range of actual damages. There could be no "reasonable relationship" because there is no liquidated amount and the parties did not and could not anticipate a damage range.

SDCWA argues that because it was impossible to compare actual and liquidated damages, it would "defeat the very purpose of liquidated damages" to require a "reasonable relationship" here. *Id.* The statute however requires a reasonable relationship. If it was impossible to comply with Civil Code §1671, then §12.4(c) cannot be an enforceable liquidated damages clause. *See Purcell*, 224 Cal. App. 4th at 974 (in absence of a reasonable relationship between liquidated

[3] SDCWA asserts that in *ABI*, the Court held the clause at issue was unenforceable because "it did not require 'breach of some contractual obligation.'" SDCWA Brief at 10–11. Likewise, §12.4(c) does not require a breach of a contractual obligation, only a "price dispute." Accordingly, §12.4(c) is unenforceable for this reason as well.

damages and anticipated actual damages, liquidated damages clause "will be construed as an unenforceable penalty").

After admitting that there was not and could not be an estimate of damages in 2003, SDCWA then argues that the amount of "disputed" damages it selected in 2011 bears a "reasonable relationship" to damages. As stated before, the "disputed amount" in 2011 is irrelevant because the issue concerns the amount of damages anticipated in 2003, when the contract was made.[4]

SDCWA cites *Weber, Lipshie & Co. v. Christian*, 52 Cal. App. 4th 645, 656 (1997), for the proposition that a liquidated damages clause "is not invalid merely because it is intended to encourage a party to perform, so long as it represents a reasonable attempt to anticipate the losses to be suffered." MWD, however, has not argued that §12.4(c) is invalid for the reason SDCWA is rebutting. It is invalid for other reasons, beginning with the parties' failure to agree on a fixed and certain amount in 2003.

SDCWA also mischaracterizes MWD contentions by asserting that MWD claims §12.4(c) is unreasonable because MWD "can conceive various alternate universes where it set different, lawful rates." SDCWA Brief at 1. Once again, that is not MWD's argument. Section 12.4(c) is invalid because, *inter alia*, it does not state a fixed and certain amount agreed upon by the parties in 2003. Whatever MWD may show as to a proper measure of SDCWA's compensatory measure of damages has nothing to do with whether §12.4(c) is a valid liquidated damages clause.

F. Section 12.4(c) Is a Security Provision, Not a Liquidated Damages Clause.

SDCWA points out that under §12.4(c) the disputed amount shall be paid forthwith to the prevailing party. That is why it is a security provision. Whoever prevails, recovers the amount of any monetary judgment. The contract does not say that the prevailing party would recover more than it was damaged. If that is its meaning, then it is, as MWD has pointed out, an invalid

[4] SDCWA also asserts that MWD benefited from §12.4(c) because it supposedly allows MWD to keep millions of dollars paid under the rates in existence from 2003 to 2008. That is not only irrelevant, it is untrue. Section 12.4(c) has nothing to do with those payments.

measure of damages because there are only two – compensatory and liquidated – and SDCWA's interpretation of the clause supports neither.

SDCWA argues §12.4(c) can be both a security and a liquidated damages provision. SDCWA Brief at 15. But as shown above, §12.4(c) does not meet the requirements of a valid liquidated damages clause. It is not in fact both. It is only a provision to secure payment to SDCWA and/or MWD.

III. CALIFORNIA LAW DOES NOT AUTHORIZE "*SUI GENERIS* DAMAGES CLAUSES" AS MEASURES OF CONTRACT DAMAGES

Civil Code §3300 mandates that the measure of damages for breach of contract be compensatory unless another provision in the Civil Code "expressly" provides for a different measure. Ignoring this statute, SDCWA argues that §12.4(c) is a "*sui generis* damages clause," citing a 90-year old case, *Chanan Singh v. P.B. Cross*, 60 Cal. App. 309 (1922). In that case, the plaintiffs leased land from the defendant to grow rice. The defendant agreed to supply water and, if he failed to do so, plaintiffs had an option to terminate the lease and receive payment for their costs of improving the land plus 10%. The defendant argued that was not a lawful liquidated damages clause, but conceded that it was enforceable as an option even if it were unenforceable as liquidated damages. The Court held that, given the defendant's concession of enforceability, it was "immaterial . . . whether the provision be sustained as one for liquidated damages or as a provision granting to the plaintiffs an option." *Id.* at 319. It did not discuss "*sui generis* damages clauses."

SDCWA's other authority for a *sui generis* measure of damages is an arbitration case, *Bowers v. Raymond J. Lucia Cos.*, 206 Cal. App. 4th 724 (2012). *Bowers* also did not involve a "*sui generis* damages clause." It concerned the enforceability under Code of Civil Procedure §664.6 of an alternative dispute resolution agreement providing for a "baseball arbitration." In a "baseball arbitration," each party submits evidence of damages and, "*after a full hearing,*" the arbitrator decides which party's requested amount is appropriate. *Id.* at 734 (emphasis added). *Bowers* has nothing to do with liquidated damages clause, or, for that matter, the contract measure of damages in civil action.

If a party could invoke "*sui generis"* whenever a clause failed to satisfy the requirements of Civil Code §1671, the entire body of law concerning the enforceability of liquidated damages clauses would be superfluous. Every invalid liquidated damages clause could then instead be characterized as a "*sui generis"* damages clause. Parties, like SDCWA, could always argue that any invalid clauses were "enforceable according to their own terms." If an invalid liquidated damages clause would be a valid "*sui generis"* measure of damages, then all the law specifying the requirements of liquidated damages clauses would be irrelevant.

IV. SDCWA'S CONSTRUCTION OF SECTION 12.4(c) WOULD CONSTITUTE A FORFEITURE

SDCWA argues that its unilateral choice of a "disputed amount" cannot be a forfeiture because the implied covenant of good faith and fair dealing prevents it from disputing an unreasonable amount. But the prohibition against forfeiture has nothing to do with a party's state of mind. Even if SDCWA has an honest but mistaken belief that it is entitled to all it has asked for, the law still would prevent it from receiving more than compensatory damages.

Furthermore, as shown in MWD's opening brief, SDCWA's "disputed amount" was arguably in bad faith in that SDCWA made no effort to determine how much SDCWA would have paid had there been no breach of contract, *i.e.* the benefit of the bargain. It did not, for example, account for the increase in the price of "full service" water that SDCWA purchased if costs were re-allocated, a flaw its own expert concedes. *See* MWD Opening Brief, § II.B.

Thus, §12.4(c) would cause a forfeiture if enforced as a measure of damages.[5]

Conclusion

For the foregoing reasons, §12.4(c) is not enforceable as a measure of damages; the proper measure of damages is general compensatory damages under Civil Code §3300.

[5] SDCWA also argues that if using §12.4(c) as the measure of damages would cause a forfeiture, the remedy would be to reform the clause. But SDCWA relies solely on a Seventh Circuit case applying Illinois law, *XCO Int'l Inc. v. Pac. Scientific Co.*, 369 F.3d 998, 1005 (7th Cir. 2004). There is no such authority under California law.

DATED: October 3, 2014

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RESPONDENT AND DEFENDANT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S REPLY BRIEF RE MEASURE OF DAMAGES

on the interested parties in this action as follows:

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BY FILE & SERVEXPRESS: by causing a true and correct copy of the documents(s) listed above to be sent via electronic transmission through File & ServeXpress to the person(s) at the address(es) set forth below.

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

Executed on October 3, 2014, at Los Angeles, California.

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