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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 FOR THE COUNTY OF SAN FRANCISCO

18 SAN DIEGO COUNTY WATER  
19 AUTHORITY,

20 Petitioner and Plaintiff,

21 vs.

22 METROPOLITAN WATER DISTRICT OF  
SOUTHERN CALIFORNIA; ALL PERSONS  
INTERESTED IN THE VALIDITY OF THE  
23 RATES ADOPTED BY THE  
METROPOLITAN WATER DISTRICT OF  
24 SOUTHERN CALIFORNIA ON APRIL 10,  
2012 TO BE EFFECTIVE JANUARY 1, 2013  
25 AND JANUARY 1, 2014; and DOES 1-10,

26 Respondents and Defendants.

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

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
RESPONDENT AND DEFENDANT  
METROPOLITAN WATER DISTRICT  
OF SOUTHERN CALIFORNIA'S  
MOTION TO DISMISS FOR LACK OF  
SUBJECT MATTER JURISDICTION**

Hon. Curtis E.A. Karnow  
Dept.: 304

Hearing Date: February 5, 2015  
Hearing Time: 9:00 a.m.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2  
3 **INTRODUCTION**

4 This motion presents the purely legal question of whether a court has jurisdiction to set  
5 water rates. This issue arises because of a unique price provision in the agreement at issue. The  
6 parties agreed – and of course SDCWA has alleged – that the amount MWD would charge  
7 SDCWA would be “equal to the charge or charges *set by Metropolitan’s Board of Directors*  
8 *pursuant to applicable law and regulation and generally applicable to the conveyance of water by*  
9 *Metropolitan* on behalf of its member agencies.” 2003 Exchange Agreement, §5.2 (emphasis  
10 added). For its damages, SDCWA is seeking the difference between the rate it paid and a lawful  
11 rate that MWD’s Board of Directors should or could have set. Therefore, SDCWA is asking the  
12 Court to determine lawful water conveyance rates for 2011, 2012, 2013 and 2014.

13 A court, however, does not have jurisdiction to determine water rates. The California  
14 Supreme Court, other appellate courts and indeed this Court all have recognized that rate setting is  
15 quasi-legislative and that courts simply do not have the authority to perform the quasi-legislative  
16 function of setting a rate.

17 Because this Court does not have jurisdiction to set rates, it cannot determine an amount of  
18 damages, and because damage is an essential element of SDCWA’s causes of action for breach of  
19 contract, those causes of action should be dismissed without prejudice.

20  
21 **LEGAL STANDARDS GOVERNING MOTION**

22 Lack of subject matter jurisdiction is so basic a defect that it can be raised at any time,  
23 even for the first time on appeal, and failure to raise the matter in the pleadings does not waive the  
24 defect. As such, it follows that no specified procedural vehicle is required to bring the matter to  
25 the court’s attention. *Great W. Casinos, Inc., v. Morongo Band of Mission Indians*, 74 Cal. App.  
26 4th 1407, 1417-18 (1999). Moreover, “[s]ubject matter jurisdiction cannot be conferred by  
27 consent, waiver or estoppel.” *Hagan Eng’g, Inc. v. Mills*, 115 Cal. App. 4th 1004, 1008 (2003).

1 Without subject matter jurisdiction, a court has no power to determine the case. *Barnick v. Longs*  
2 *Drug Stores, Inc.*, 203 Cal. App. 3d 377, 379 (1988).

3  
4 **ARGUMENT**

5  
6 **I. CALCULATING DAMAGES UNDER THE UNIQUE CONTRACT TERM IN THIS**  
7 **CASE REQUIRES DETERMINATION OF LAWFUL RATES**

8 The compensatory measure of damages is well known, and has been extensively briefed.  
9 Compensatory damages put a plaintiff in the position it would have been in *if the promise had*  
10 *been performed*. *Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, 226 Cal. App. 3d  
11 442,468 (1990); *see also Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 34 Cal.  
12 4th 960, 967-68 (2004).

13 Here, SDCWA has alleged that MWD promised to provide exchange water to SDCWA at  
14 a price equal to the conveyance rate set by MWD’s Board of Directors pursuant to law:

15 [T]he Price shall be equal to the charges or charges set by Metropolitan’s Board of  
16 Directors pursuant to applicable law and regulation and generally applicable to the  
conveyance of water by Metropolitan on behalf of its member agencies.

17 2003 Exchange Agreement, §5.2; *see also* 2010 Third Amended Complaint, ¶ 101; 2012  
18 Complaint, ¶ 103. SDCWA has alleged that MWD breached that promise and that SDCWA  
19 overpaid. 2010 Third Amended Complaint, ¶¶ 101, 102; 2012 Complaint, ¶¶ 103, 105.

20 To determine whether SDCWA has in fact overpaid, and if so by how much, the Court  
21 must determine what MWD’s performance should have been. The amount SDCWA actually paid  
22 is only half the equation. SDCWA’s damages, if any, would be the difference between what it  
23 paid and what it would have paid if the promise to set rates pursuant to applicable law and  
24 regulation had been performed. SDCWA is necessarily asking the Court to determine what rates  
25 should or could have been under “applicable law and regulation” for each of the four years. But  
26 the only way to determine those rates is to step into the shoes of the MWD Board and do the  
27 quasi-legislative tasks of identifying costs, analyzing their purpose, determining causal or  
28 beneficial effect and then allocating the costs. All costs must be zeroed out; and every cost

1 allocation has effects elsewhere in the rate structure. Section 134 of the MWD Act effectively  
2 mandates that rates be set to cover all the operating expenses and debt service of the district, so  
3 that a reduction in one rate must necessarily be offset by an increase in another. There are  
4 multiple ways for public agencies to recover the costs of providing public services. MWD must  
5 determine how to recover its costs of acquiring, developing, storing, transporting, treating, and  
6 delivering water and water-related services, not only through volumetric water rates, but also  
7 through imposition of property taxes, benefit assessments, capacity charges, and availability of  
8 service charges. MWD Act, §§ 124, 130, 133, 134.5, and 134.6. Notably, when MWD’s Board  
9 does these things, it does so in compliance with the notice and open meeting laws applicable to all  
10 local public agencies. Cal. Gov’t Code §§ 54950 *et seq.*

11 SDCWA has suggested that determining contract damages is not determining rates. But in  
12 this case it does require determining rates. The parties could have agreed to a fixed price with  
13 agreed upon increases. That would not have required rate setting. Indeed, the parties in a previous  
14 version of the agreement had such a fixed price. But they replaced that agreement with the one at  
15 issue, and in so doing they agreed that the price “shall be equal to” lawful charges for the  
16 conveyance of water. The contract does not provide a formula for determining lawful conveyance  
17 rates. Nor is determining the cost of conveyance a simple task. MWD’s conveyance system is  
18 enormous. It includes a 242 mile aqueduct across the Mojave Desert, with its siphons and pumps,  
19 and a distribution system of 830 miles of pipelines and tunnels to serve an area of 5,200 square  
20 miles with a population of nearly 19 million. The only way to determine MWD’s conveyance rate  
21 for such a goliath system is to set one, like MWD’s Board does, as part of a complex rate-making  
22 process.

23

24 **II. COURTS DO NOT HAVE JURISDICTION TO DETERMINE WHAT LAWFUL**  
25 **RATES SHOULD HAVE BEEN**

26 As noted by the California Supreme Court, “ratemaking has uniformly been considered a  
27 quasi-legislative action.” *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 277 (1994); *see*  
28 *also Cal. Hotel & Motel Ass’n v. Indus. Welfare Comm’n*, 25 Cal. 3d 200, 211 (1979); *People v.*

1 *Western Air Lines, Inc.*, 42 Cal. 2d 621, 630 (1954); *Am. Toll Bridge Co. v. R.R. Comm'n of Cal.*,  
2 12 Cal. 2d 184, 191 (1938); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S.  
3 350, 371 (1989). This is true with respect to both “[t]he fixing of a rate in the first instance” and  
4 “the reducing of that rate” subsequently. *Pac. Tel. & Tel. Co. v. Pub. Util. Comm'n*, 62 Cal. 2d  
5 634, 647, 652 (1965). Furthermore, courts have expressly recognized that setting urban water  
6 rates “is a vastly complex mechanism” and is quasi-legislative in nature. *Brydon v. E. Bay Mun.*  
7 *Util. Dist.*, 24 Cal. App. 4th 178, 196, 201 (1994); *see also Carlton Santee Corp. v. Padre Dam*  
8 *Mun. Water Dist.*, 120 Cal. App. 3d 14, 18-19 (1981).

9       Accordingly, when an agency’s rates are held to be deficient, the matter must be returned  
10 to that agency for appropriate action. As stated by the Court of Appeal:

11       The universal rule is that in these circumstances *the court is not a rate-fixing body,*  
12 *that the matter of fixing water rates is not judicial,* but is legislative in character,  
13 and that the limit of its function and jurisdiction is to find, upon a proper showing,  
14 that the rates fixed are unreasonable and unfair. . . . If upon such finding it is  
15 adjudged that the established rates shall not be collected, *the court is not permitted*  
16 *to fix another and different rate, but this function must be left with the proper rate-*  
17 *fixing body.*

18 *Durant v. City of Beverly Hills*, 39 Cal. App. 2d 133, 139-140 (1940) (emphasis added and  
19 citations omitted); *see also San Luis Coastal Unified Sch. Dist. v. City of Morro Bay*, 81 Cal.  
20 App. 4th 1044, 1051 (2000) (“Mandate may compel an exercise of discretion, but not control it. . .  
21 . . . Mandate may not order the exercise of discretion in a particular manner unless discretion can be  
22 lawfully exercised only one way under the facts.”) (citation omitted).

23       In light of such authority, it is not surprising that in its Statement of Decision after Phase I  
24 this Court acknowledged that MWD’s ratemaking is a quasi-legislative action. *See* Statement of  
25 Decision on Rate Setting Challenges, p. 17. Nor should it be surprising that SDCWA’s own  
26 “person most knowledgeable” as to the alleged harm SDCWA has suffered as a result of MWD’s  
27 alleged breaches of contract testified at his deposition that the result in this case would be, if  
28 SDCWA prevailed, that the matter would be sent back to MWD to set rates:

      This litigation seeks to invalidate the rates Metropolitan adopted for 2011 and  
      2012, subsequent case, ‘13 and ‘14.

1 Presuming the Water Authority prevails on that, *the judge will invalidate*  
2 *Metropolitan's rates, and Metropolitan will have to go back and set and adopt*  
3 *lawful rates.*

4 *How Metropolitan goes back and adopts lawful rates and charges is at this point*  
5 *unknown.* So, how it might affect the Water Authority's payments is unknown.

6 Cushman Dep. 443:17-444:2 (emphasis added).

7 Moreover, rate setting is not the simple arithmetic of subtracting challenged cost  
8 components from the wheeling rate. Someone has to pay those costs. SDCWA's own expert  
9 acknowledged that a reduction in the conveyance rate would increase the supply rate for  
10 purchasers of water. Denham Dep. 91:1-10. If too large an amount is deducted from the  
11 conveyance rate or rate for wheeling service, then wheelers are undercharged and buyers are  
12 overcharged. Just as it is improper to overcharge wheelers of water, it is also improper to  
13 overcharge buyers of water. Wheelers are not entitled to a windfall at the expense of those who  
14 buy water. Setting rates, so that both buyers and wheelers pay lawful rates, is the function and  
15 duty of ratemaking entities. Courts do not have the jurisdiction to do so.

16 Because this Court lacks jurisdiction to determine the rate that it needs in order to  
17 determine damages, the Court cannot award damages, an essential element of the fourth cause of  
18 action for breach of contract.

### 19 **III. SDCWA IS NOT LEFT WITHOUT A REMEDY**

20 It does not follow that a lack of jurisdiction to set a rate would mean SDCWA has no  
21 remedy. If the Court grants this motion, then the breach of contract cause of action would be  
22 dismissed without prejudice. The remaining cause of action challenging preferential rights does  
23 not present issues that will require significant trial time. A final judgment could be expeditiously  
24 issued and the matter could, and certainly would, be appealed.

25 If the Appeal Court reverses, holding the rates valid, then there is no wrong to be  
26 remedied.

27 If the Court of Appeal affirms, in whole or in part, then the Board would set new rates, as  
28 directed by the Court, and this Court would have the information needed to determine the



1 difference between what SDCWA was actually charged and a lawful rate. This Court would not  
2 need to function as both the judicial and legislative branches of government.

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**CONCLUSION**

For the foregoing reasons, MWD’s motion to dismiss the fourth cause of action should be  
GRANTED.

DATED: January 9, 2015

QUINN EMANUEL URQUHART &  
SULLIVAN, LLP

By/s/ John B. Quinn  
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**PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017-2543.

On January 9, 2015, I served true copies of the following document(s) described as

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT AND DEFENDANT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

on the interested parties in this action as follows:

**SEE ATTACHED LIST**

**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 January 9, 2015, at Los Angeles, California.

  
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