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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

DEFENDANT AND RESPONDENT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE EVIDENCE OF SPECIAL DAMAGES

Hon. Curtis E.A. Karnow
Dept.: 304
Hearing Date: February 5, 2015
Hearing Time: 9:00 a.m.

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

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MEMORANDUM OF POINTS AND AUTHORITIES

Preliminary Statement

SDCWA has suggested yet another theory of damages—consequential damages. This theory is apparently based on the terminations of other, unrelated contracts and/or on contracts that were never entered into at all. Although SDCWA has made reference to these alleged damages in some of its filings,[1] it has never pleaded these damages, nor disclosed them in discovery.

MWD enters into contracts with its member agencies for certain types of local water projects. These contracts have a clause, known as the "Rate Structure Integrity (RSI) provision." That provision permits MWD to terminate the contracts in the event the other party to the contract files litigation challenging MWD's rates. Contracts with the RSI provision did not exist at the time the 2003 Exchange Agreement was signed. Indeed, the RSI provision itself did not exist in 2003. It was the year after the 2003 Exchange Agreement was executed that MWD's Board of Directors first adopted a policy that would limit future contracts that funded local water projects to member agencies that were not litigating the very rates that funded those projects. Four years later, in 2007, SDCWA first entered into a contract with a RSI provision.

SDCWA now asserts that the unknown benefits it might have received for local water projects – but did not because of the RSI provision -- are "consequential damages" of the alleged breach of the 2003 Exchange Agreement. SDCWA reasons that if MWD had correctly set the conveyance rate, then SDCWA would not have had to sue, and if it had not had to sue, it would not have been disqualified from contracts with the RSI provision.

Preliminarily, there are fatal procedural flaws to SDCWA's advancing this theory at the 11th hour. Special damages must be specially pleaded, which SDCWA did not do, and they must be disclosed in discovery, which SDCWA also did not do.

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[1] As the Court may recall, SDCWA had a cause of action for termination of contracts with the RSI provision, but those claims were summarily adjudicated against SDCWA. (Order on Summary Adjudication Motions entered Dec. 4, 2013 at 14-15.) SDCWA's new theory that the RSI provision has resulted in consequential damages was mentioned in its opening brief on Section 12.4(c) as a measure of damages filed September 12, 2014 (SDCWA Opening Brief at 13), and again asserted as part of the measure of contract damages in its CMC statement filed November 25, 2014 (CMC Statement at 3).

Substantively, SDCWA's new theory fails because special damages for breach of contract must have been foreseeable *at the time the contract was made.* Here the provision that would lead to SDCWA's disqualification from local water projects did not exist when the 2003 Exchange Agreement was executed. MWD's Board had not adopted (or even considered) the policy for termination provisions in future local water projects until the following year. No contract with SDCWA had the termination provision until 2007 at the earliest, as SDCWA has admitted. It is logically impossible for the parties to have foreseen damages based on a RSI provision that did not exist in 2003.

Additionally, as to the projects for which SDCWA never had any contract at all, SDCWA concedes that there is "no way" to know what those contracts might have been worth. That admission of failure of proof is yet another independent reason why the new damages theory fails as a matter of law.

Accordingly, the Court may and should rule *in limine* that any evidence of alleged consequential damages arising from the termination of contracts other than the Exchange Agreement is inadmissible.

Argument

I. SDCWA CANNOT RECOVER SPECIAL DAMAGES AS A MATTER OF LAW

A. Special Damages Must Be Reasonably Foreseeable at the Time the Contract Was Entered

Civil Code section 3300 provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Cal. Civ. Code § 3300. "Contractual damages are of two types—general damages (sometimes called direct damages) and special damages (sometimes called consequential damages)." *Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 34 Cal. 4th 960, 968 (2004).

Special damages are not recoverable for loss that the party "had no reason to foresee as the probable result of its breach *when it made the contract*." *Id.* at 977 (emphasis added), citing *Coughlin v. Blair*, 41 Cal. 2d 587, 603 (1953). "Special damages for breach of contract are limited to losses that were either actually foreseen … or were 'reasonably foreseeable' when the contract was formed." *Id.* at 970. In *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503 (1994), the California Supreme Court explained:

> Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectations of the parties are not recoverable.

Id. at 515; s*ee also Ash v. North Am. Title Co.*, 223 Cal. App. 4th 1258, 1268 (2014) (contract damages are limited to those within contemplation of the parties or reasonably foreseeable by them at the time the contract was entered into). The standard jury instructions provide that defendant must have known, or should have known, of the special circumstances leading to harm *"when the parties made the contract"*:

> [To recover special damages, plaintiff] "must prove that when the parties made the contract, [the defendant] knew or reasonably should have known of the special circumstances leading to the harm."

CACI No. 351.

Appellate courts have explained the reason for the requirement of knowledge at the time of contracting:

> The requirement of knowledge or notice as a prerequisite to the recovery of special damages is based on the theory that a party does not and cannot assume limitless responsibility for all consequences of a breach, and that at the time of contracting he must be advised of the facts concerning special harm which might result therefrom, in order that he may determine whether or not to accept the risk of contracting.

Martin v. U-Haul Co. of Fresno, 204 Cal. App. 3d 396, 409 (1988) (internal citation and emphasis omitted.); *see also Erlich v. Menezes*, 21 Cal. 4th 543, 560 (1999) ("A contracting party cannot be required to assume limitless responsibility for all consequences of a breach and must be advised of any special harm that might result in order to determine whether or not to accept the risk of contracting.").

B. The Parties Could Not Foresee Contracts and Provisions That Did Not Exist at the Time the 2003 Exchange Agreement Was Made

SDCWA contends that "[b]ecause Met set illegal rates, San Diego was forced to file these meritorious lawsuits, which in turn caused Met to disqualify San Diego from receiving any new funding for ***any*** local water-supply programs." Joint CMC Statement for December 2, 2014 Case Management Conference at 3.

When the parties entered into the 2003 Exchange Agreement, SDCWA did not have a contract with a RSI provision. According to SDCWA's own pleadings, the idea of including such a provision in contracts was presented to the MWD Board in 2004, and not adopted until December 14, 2004, and then only for future contracts executed after April 15, 2005. SDCWA Third Amended Complaint,¶ 32; Deposition of Dennis Cushman at 119:21-120:19; 123:2-124:4, attached to Declaration of Eric J. Emanuel as Exhibit A. SDCWA first agreed to a contract with a RSI provision in 2007. *Id.* at 130:20-131:6. The parties could not possibly have foreseen damages arising out of a provision that did not even exist at the time it entered into the 2003 Exchange Agreement.

II. SDCWA HAS WAIVED ITS RIGHT TO SEEK SPECIAL DAMAGES

A. SDCWA Did Not Plead Special Damages

SDCWA's claim for consequential damages fails for an additional, independent reason. Special damages must be "pled with particularity." *Lewis Jorge*, 34 Cal. 4th at 975; *see also Greenwich S.F., LLC v. Wong*, 190 Cal. App. 4th 739, 754 (2010); *Mitchell v. Clark*, 71 Cal. 163, 168 (1886) ("The general damages which are implied from a breach of contract, and which need not be pleaded, must not be confused with special damages, which will not be presumed from the

mere breach, but yet may have occurred by reason of injuries following from it. Such special injuries, if they have occurred, *must be averred, in order that the defendant may have notice of, and be prepared to contest, them*." (emphasis added)).

SDCWA not only failed to plead special damages with particularity, it failed to plead special damages at all. Despite amending its complaint three times in the 2010 action and filing an additional complaint in the 2012 action, SDCWA never alleged special damages arising from the alleged breach of the Exchange Agreement. In each of its complaints and amended complaints, SDCWA did not pray for an award of special damages but only for "an award of compensatory and general damages." FAC Prayer for Relief ¶ 4, SAC Prayer for Relief ¶ 4, TAC Prayer for Relief ¶ 4, 2012 Complaint Prayer for Relief ¶ 4. SDCWA made no mention at all of "special" or "consequential" damages. The only damage SDCWA alleged for the breach of the 2003 Exchange Agreement was that "Metropolitan's unlawful misallocation of costs has caused Water Authority to pay excess charges for its transportation of Non-Metropolitan Water, in an amount to be determined according to proof." FAC ¶ 86, SAC ¶ 102, TAC ¶ 102; *see also* 2012 Complaint ¶ 105 ("Metropolitan's imposition of unlawful rates has caused the Water Authority to pay excess charges for its transportation of IID and Canal Lining Water, in a precise amount to be determined according to proof."). In its multiple complaints and amended complaints, SDCWA never mentioned damages arising from the termination of other contracts or the failure to obtain other contracts. SDCWA's failure to plead special damages bars SDCWA from pursuing this theory at trial.[2]

B. SDCWA Did Not Disclose a Special Damages Theory in Discovery

SDCWA further failed to disclose any theory of special damages during discovery. In response to MWD's interrogatory asking for "all damages sought by SDCWA under the Fourth Cause of Action, SDCWA's response made no mention of any consequential damages. The entire response is attached as an exhibit but the gravamen of the claimed damages was overcharges:

[2] The relevant case law does not require that MWD prove prejudice as the result of SDCWA's failure to plead damages. Nonetheless prejudice is obvious. MWD has not had any discovery on the projects and funding SDCWA asserts it was disqualified from.

> SDCWA seeks damages in the amount by which it has been overcharged by MWD for transportation under the Exchange Agreement due to MWD's improper allocation of costs to its System Access Rate, System Power Rate, and Water Stewardship Rate.

SDCWA's Responses to MWD's First Set of Special Interrogatories, No. 68, dated July 24, 2013, pertinent excerpt attached to Declaration of Eric J. Emanuel as Exhibit B.

SDCWA cannot pursue a new theory of damages that was not disclosed in discovery. *Burke v. Superior Court*, 71 Cal. 2d 276, 281-82 (1969) (a party can be required through discovery "to disclose not only the evidentiary facts underlying his affirmative defenses [] but also whether or not he makes a particular contention, either as to the facts or as to the possible issues in the case."); *Coy v. Superior Court*, 58 Cal. 2d 210, 219 (1962) ("The function of the [interrogatory] is twofold. It not only ferrets out relevant information which may lead to other admissible evidence, but it immediately and conclusively binds the answering party to the facts set forth in his reply.")

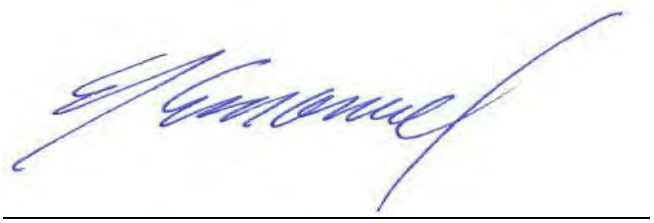
III. SDCWA CONCEDES IT HAS "NO WAY OF KNOWING" WHAT ITS SPECIAL DAMAGES MIGHT BE

In addition to the fatal substantive and procedural flaws in SDCWA's claim for special damages, SDCWA admits to an evidentiary impossibility as well. As SDCWA puts it, "there is no way of knowing the amount of money [it] might have received" if it had been eligible for certain subsidies for conservation and local water supply development. San Diego County Water Authority's Opening Brief re: Section 12.4(c), dated September 12, 2014 at 13 ("San Diego—like some other agencies—***might*** have gotten more money back than its total WSR payments for Exchange Water and MWD water combined."). An admission that there is "no way" of knowing the amount of damages precludes recovery of damages. Cal. Civ. Code § 3301 ("No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."); *see also Lewis Jorge Const. Mgmt,* 34 Cal. 4th at 975 (special damages must "be proven to be certain both as to their occurrence and their extent.").

Conclusion

For the foregoing reasons, MWD's motion *in limine* to preclude SDCWA from seeking special damages should be granted.

Dated: January 12, 2014



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