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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'S MOTIONS *IN LIMINE* FOR THE SECOND PHASE OF TRIAL

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

Dates Filed: June 11, 2010
June 8, 2012

Trial Date: March 30, 2015

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INTRODUCTION

Pursuant to the Court's December 2, 2014 Case Management Order, plaintiff San Diego County Water Authority ("San Diego") hereby moves *in limine* for orders excluding the following evidence that defendant Metropolitan Water District of Southern California ("Met") may otherwise seek to introduce in the second phase of trial to decide the damages resulting from Met's breaches of the parties' Exchange Agreement and Met's affirmative defenses.

First, San Diego moves *in limine* for an order excluding speculation about hypothetical rates, rate structures, or cost allocations.

Second, San Diego moves *in limine* for an order excluding evidence of the purported benefits listed in paragraph 23 of Met's Answer.

Third, San Diego moves *in limine* for an order excluding further evidence on Met's defenses of waiver, estoppel, or consent.

I. MOTION *IN LIMINE* NO. 1: TO EXCLUDE SPECULATION ABOUT HYPOTHETICAL RATES, RATE STRUCTURES, OR COST ALLOCATIONS

The Court should exclude speculation about hypothetical rates, rate structures, or cost allocations. As an initial matter, the Court already denied Met's motion to reopen expert discovery into "the myriad potential rate structures" and "charges [that] ***could have been set*** by MWD's Board, with the benefit of the Court's ruling and reasoning." Declaration of Dan Jackson ("Jackson Decl.") Ex. A at 7 (emphasis in original). Met's motion violated the Court's instructions that Met not ask the Court "to conduct a trial on a theory of damages which it contends [the Court has] no power or jurisdiction to do." Dec. 4, 2014 Order at 2. Met has since doubled down on its position, arguing that this Court is powerless to determine damages resulting from Met's breaches of the Exchange Agreement. *See* Met's Jan. 9, 2015 Mot. to Dismiss. Met is wrong, as San Diego will show in its opposition to Met's motion to dismiss, and at trial. But given that Met persists in taking positions that are flatly inconsistent with its presentation of evidence about alternative rates, rate structures, or cost allocations, *see id.*, Met should be precluded from doing so. As the Court already held, Met "should not propose a theory or procedure on contract damages which it simultaneously contends [the Court] must not undertake

(as a result of arguments on jurisdiction, power, comity, or other grounds)." Nov. 4, 2014 Order at 1-2.

Furthermore, such evidence is inadmissible for the fundamental reason that "[e]vidence leading only to speculative inferences is irrelevant in light of Evidence Code section 210, which requires that evidence offered to prove or disprove a disputed fact must have a tendency in reason for such purpose." *Oakland Raiders v. Nat'l Football League*, 93 Cal. App. 4th 572, 591 (2001). Speculation is particularly objectionable where, as here, a defendant seeks to avoid or reduce an award of contract damages by speculating about what might have happened if it had not breached the contract. *See, e.g.*, *Depalma v. Westland Software House*, 225 Cal. App. 3d 1534, 1544-46 (1990). In *Depalma*, the plaintiff sued for breach of contract because computer equipment the defendant installed did not function as promised. At trial—as here, a bench trial—the defendant offered evidence of the plaintiff's tax returns in an effort to prove offsetting tax benefits related to the transaction. The trial court excluded that evidence, and the Court of Appeal affirmed. It is "very complicated and speculative to predict" tax consequences, and "even the most sophisticated attempts to make a prediction" may "result in only guesswork which has little probative value." *Id.* at 1544. Even in a bench trial, Evidence Code § 352 gives the trial court "the means to facilitate judicial economy" by excluding evidence that will consume more time, or cause more confusion, than its probative value warrants. *Id.* at 1544. Because "even the most accurate predictions of the tax consequences would result in mere approximations," based on "complicated, time consuming and confusing" evidence, "any reasonable trial judge would rule against the admission of such evidence under Evidence Code section 352, and [the Court of Appeal] would uphold an exercise of discretion in that direction." *Id.* at 1545.

The *Depalma* court not only noted that "the rule that damages must be reasonably certain in their nature and origin applies with equal force to claimed offsets to damages," it actually applied that rule to the claimed offsets with ***even greater force*** because "[t]here is a deterrent value against breaching a contract if contracting parties know they must compensate the other party in full, without being able to subtract any [speculative] benefits the other party might receive." *Id.* at 1540, 1545 (citation and quotation marks omitted). As this Court has recognized,

"[e]ven if ***damages*** are difficult to determine, a trial court should nevertheless attempt to do so if there is liability." Nov. 4, 2014 Order at 2 n.2 (citing *Meister v. Mensinger*, 230 Cal. App. 4th 381 (2014)) (emphasis added). But that principle does ***not*** apply to difficulties in proving ***offset*** because the law "favors parties who honor their promises, not those who breach them." *Depalma*, 225 Cal. App. 3d at 1546.[1]

Met may not prove an offset, or unjust enrichment, or otherwise avoid paying damages, by offering its present-day speculation about how it hypothetically might have changed its rates or rate structure had it known when it set its rates that San Diego would ultimately prove the rates invalid for the very reasons San Diego has warned Met about all along. Met has admitted that "***there is no evidence in the record as to the rate or rates that MWD's Board would or could have properly set under the Exchange Agreement and consistent with the Statement of Decision***." Jackson Decl. Ex. B at 10 (emphasis added). In fact, the administrative record shows, as the Court already found, that "[p]reviously, Met allocated SWP costs to supply, and ***none to transportation*** (including the SWP costs that DWR bills as its own transportation costs). ***No reasonable basis appears in the record as to why this has changed***." Statement of Decision at 53 (footnote omitted) (emphases added). The administrative record is also devoid of any basis for including any part of the Water Stewardship Rate ("WSR") in any hypothetical lawful transportation or wheeling rate. *See id.* at 58-61; *cf., e.g., id.* at 41 ("Bartle Wells explained that the service function [of the WSR] was to increase water supply, so the cost should be allocated to supply rates."). Indeed, as the Court noted in its Statement of Decision, Met judicially admitted "that it does not calculate the proportional benefits that individual member agencies receive from its Water Stewardship Rate or the programs it funds, neither on the basis of individual programs, nor in the aggregate"; and that it "'has never calculated the regional benefit to MWD created by the aggregate group of local water supply projects, seawater desalination projects, or conservation

[1] *See also, e.g., Ward v. Taggart*, 51 Cal. 2d 736, 744 (1959); *Kashmiri v. Regents of Univ. of Calif.*, 156 Cal. App. 4th 809, 849 (2007); *Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, 226 Cal. App. 3d 442, 458-59 (1990); *GHK Assocs. v. Mayer Group, Inc.*, 224 Cal. App. 3d 856, 873-74 (1990); *A&M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 570-71 nn.11-12 (1977); *Benard v. Walkup*, 272 Cal. App. 2d 595, 605-06 (1969); *Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists*, 227 Cal. App. 2d 675, 703-05 (1964); Cal. Civ. Code § 3517.

programs funded or subsidized with revenue collected through the Water Stewardship Rate in a given calendar year.'" *Id.* at 59-60 (citing PTX-237-A** (RFA) Nos. 20 & 32, and quoting No. 38).[2] At best for Met, the record might support the notion that "to some unspecified extent, some portion" of the WSR is "causally linked to some avoided transportation costs," but that cannot justify including such costs in any hypothetical wheeling rate—particularly because "the costs and avoided costs attributable to the demand management programs relate to the transportation needs to provide purchased water," ***not wheeled water***. *Id.* at 60-61. The only alternative to Met's unlawful rates that is supported by the administrative record is that Met should have allocated ***all*** SWP costs to supply, as it formerly did; and should have either allocated ***all*** of the WSR to supply as well, or eliminated that unnecessary and unfounded charge altogether. *See id.* at 31-44, 53-61 (discussing, *inter alia*, the 1969 Study, RMI Reports, Bartle Wells Letters, and FCS Report); *see also, e.g.*, Met's First Pretrial Br. at 75, 81 (Met concedes that it could "eliminate its Water Stewardship Rate").[3]

Having conceded that there is no evidence in the administrative record to support lawful alternative transportation rates that include SWP costs and the WSR, what can Met possibly offer? Met's answer must be extra-record evidence. *See* Jackson Decl. Ex. B at 10. But if the question is what Met might have done to fix its illegal transportation rates, it makes no sense to consider extra-record evidence, which by definition was never before the Met Board and thus couldn't possibly have been the basis of an alternative Board decision. *See Shapell Indus., Inc. v. Governing Bd.*, 1 Cal. App. 4th 218, 244 (1991); *Warmington Old Town Assocs., L.P. v. Tustin Unified Sch. Dist.*, 101 Cal. App. 4th 840, 867 (2002); *Cresta Bella, LP v. Poway Unified Sch. Dist.*, 218 Cal. App. 4th 438, 453 (2013). While extra-record evidence is admissible for some

[2] As in the Court's Statement of Decision, "**" indicates that the trial exhibit (though admitted) is not in the administrative record.

[3] It is important to bear in mind that, as Met admits, it is not required to subsidize demand-management programs. *See* Met's First Pretrial Br. at 75 (Met concedes that it could "discontinu[e] its investment in local conservation and resource development projects"). And Met certainly need not collect funds for such subsidies through the WSR or any other water rate—particularly given its admitted failure to even consider the proportional or regional benefits of "water stewardship," which is not a "service" at all, but merely a euphemism for collecting money from all of its member agencies (including San Diego), which Met distributes however it sees fit (but not to San Diego).

issues related to the contract claim, such as dismantling Met's baseless waiver defense, it would be speculation by definition to use such evidence to justify some alternative cost allocation or rate structure. Met's administrative record includes everything that was before its Board at the time of the relevant decision, as Met itself successfully argued in opposing San Diego's motion to augment the record. *See* Met's Oct. 28, 2013 Opp'n at 3; Nov. 5, 2013 Pretrial Rulings at 5-9. Anything outside that record would be made-for-litigation speculation and thus inadmissible. *See, e.g., Sargon Enters., Inc. v. USC*, 55 Cal. 4th 747, 779-80 (2012) (although reliable pre-litigation estimates of profits may be admissible, post-litigation speculation is not).

Met's extra-record alternative-rates hypotheses are not only speculative and inadmissible because they were never presented to Met's Board, Met ***admits*** that such evidence is pure speculation. Because Met refuses to acknowledge that it could have "direct[ed] that charges previously allocated to transportation rates be instead allocated to supply rates," it argues that there are, instead, "myriad potential rate structures that MWD's Board would be permitted to choose to comply with the Court's Decision," and that it "may have to consider entirely new methodologies of recovering its costs." Jackson Decl. Ex. A at 7-8. Yet Met and its expert admit that, aside from the record-based option of reallocating SWP and WSR charges to supply (or eliminating the WSR), it is "speculative" and "impossible" to say how Met might have set lawful rates. *Id.* Ex. C (Woodcock Report) at 25-26; *see also id.* Ex. D (Woodcock Dep.) at 258-63. Met's expert disputes that Met would have allocated 100% of the SWP and WSR charges to supply, but, again, that is the only alternative supported by the record. In any case, no amount of speculation can change the fact that Met incurred SWP and WSR costs in order to develop ***water supplies*** for Met and its other member agencies, ***not to transport IID water to San Diego under the Exchange Agreement***.

Not only is evidence about Met's "myriad potential rate structures" admittedly speculative, and thus already inadmissible, that evidence could be relevant only if the potential alternative rate structures are lawful. But this Court has already ruled that no witness may offer testimony on the legal question whether rates are lawful. "[I]t is a legal issue (and so not subject to testimony) as to what the lawful *components* are for wheeling services.… The default ruling

then is that extra-record evidence" is inadmissible "if it purports to state what the components of those wheeling charges ought to be." Dec. 10, 2013 Order (emphasis in original); *see also* Trial Tr. at 4:20-5:11 (applying the same rule to Mr. Woodcock). Likewise, to allow Met to offer attorney argument about its "myriad" alternatives would be to invite an unknown number of attorney presentations similar to those that took up so much of the first phase of trial on Met's ***actual***, ***adopted*** rates, but this time addressing ***hypothetical*** rates, instead. The Court should not allow it. *See id*; *Depalma,* 225 Cal. App. 3d at 1544-46.

Met's speculation about how it might have adopted lawful transportation rates including some or all of the WSR is particularly irrelevant. After San Diego complained about the very illegalities that form the basis for the Court's Statement of Decision, Met invoked its so-called Rate Structure Integrity (RSI) clause to ban San Diego from receiving WSR-funded subsidies for local water supply projects. PTX-202**. That ban was in place throughout the relevant damages period, and remains in force. It is absurd for Met to contend that San Diego would be unjustly ***enriched*** by the refund of payments from which San Diego was unjustly ***denied*** any benefit. And if Met is allowed to speculate about hypothetical lawful rates, that necessarily raises the question what offsetting benefits San Diego might have received if it had not been forced to challenge Met's unlawful rates, thereby incurring the RSI ban. San Diego must have the same evidentiary leeway as Met, but the Court is better served by avoiding this type of speculation entirely. *See Depalma*, 225 Cal. App. 3d at 1544-46.

Although Met has argued that San Diego would have paid more for water supply if the SWP costs and WSR had been removed from the transportation rates, that is irrelevant because the Exchange Agreement Price is based on Met's transportation rates, not its supply rates. *See* Jackson Decl. Ex. E (Exchange Agr.) § 5.2. What San Diego might have paid in supply rates that are outside the scope of the Exchange Agreement is irrelevant. *See, e.g., R. M. Sherman Co. v. W. R. Thomason, Inc.*, 191 Cal. App. 3d 559, 568 (1987) (purported offset cannot "arise from a wholly separate and unrelated transaction"). Met's argument is also completely inconsistent with its own contention that it might ***not*** have increased supply rates, given its allegedly "myriad" other options. *See* Jackson Decl. Ex. A at 7-8; Ex. D (Woodcock Dep.) at 258-63. Met cannot

contend that it would have reallocated the costs to its supply rates in order to argue that San Diego has not proven a corresponding supply offset (which is Met's burden to prove in any case), while simultaneously denying that it would have reallocated the costs to supply and speculating about other hypothetical alternatives instead.

In any event, the amount of any alleged supply offset—even if relevant to the Exchange Agreement, which it is not—is uncertain precisely because Met breached its obligation to set valid rates in the first place. If Met had faced up to the challenge of proving a cost-causation basis for the WSR, Met might have abandoned that elective program completely; or collected funds for conservation programs from property taxes; or on a per-project basis. San Diego also might have wheeled more non-Met water given a lower, lawful wheeling rate. And if Met had increased its supply rates, it would have had to increase and collect supply rates from ***all 26*** of its member agencies for the rate years at issue, not just from San Diego. *See* Water Code Appendix § 109-134 (Met must set rates that are "uniform for like classes of service throughout the district"). By the same token, the transportation rates for all other member agencies would have decreased, perhaps resulting in still more wheeling of non-Met water. Met's irrelevant contention that San Diego would have paid more in extra-contractual supply rates would mire the Court in "guesswork which has little probative value," if any, and drag the Court into Met rate-making. *Depalma*, 225 Cal. App. 3d at 1544.

Thus, the Court should exclude speculation about hypothetical rates, rate structures, or cost allocations.

II. MOTION *IN LIMINE* NO. 2: TO EXCLUDE EVIDENCE ABOUT THE PURPORTED BENEFITS LISTED IN PARAGRAPH 23 OF MET'S ANSWER

San Diego also moves *in limine* for an order excluding evidence about the purported benefits listed in paragraph 23 of Met's Answer, none of which are relevant. *See* Jackson Decl. Ex. F (Met's Answer) ¶ 23. These alleged benefits fall into two basic categories.

The first category consists of alleged benefits that Met ***concedes*** are unrelated to the Exchange Agreement. *See id.* ¶¶ 23a, 23c-j; *cf. id.* ¶ 23b. In particular, this category comprises Met's allegations about the supposed benefits of the "Postage Stamp" Rate; Salinity Goal;

Readiness-to-Serve ("RTS") Charge Base; Interim Agricultural Water Program; Skinner Treatment Plant Module 7; Surface Storage Operating Agreement; Point of Delivery and Cost of San Diego Pipelines 1 to 5; Conservation Funding; and Supply Allocation Plans. *Id.* ¶¶ 23a, 23c-j. Assuming, *arguendo*, that there are benefits associated with these Met programs, they all result from Met Board policy decisions that apply generally to all member agencies and have nothing to do with the Exchange Agreement. *See id.* Because they "arise from a wholly separate and unrelated transaction"—namely, San Diego's status as a member agency, as opposed to its status as a party to the Exchange Agreement—these purported benefits are irrelevant and evidence about them should be excluded. *See R.M. Sherman*, 191 Cal. App. 3d at 568.

The second category consists of the following alleged benefits, which Met contends are somehow related to the "Exchange Agreement and related agreements": (i) State Funding; (ii) Canal Lining Water; (iii) Assured Deliveries; (iv) Blended Exchange Water; (v) System Power Rate; (vi) RTS Charge;[4] (vii) Exchange Water as a Local Supply; and (viii) Ownership of Colorado River Supply. Answer ¶ 23b. But only two of these—assured deliveries and the local-supply provision (iii & vii)—arguably correspond to actual terms of the Exchange Agreement, and to the extent those are benefits, Met agreed that they would be covered by a valid wheeling rate. *See* Exchange Agr. § 5.2. Having failed to establish such a rate, Met cannot retroactively unravel the agreement by arguing that ancillary alleged benefits must now be considered separately. The other alleged benefits are neither terms of, nor required by, the Exchange Agreement. *Compare* Answer ¶¶ 23b.i-ii, iv-vi, viii *with* Exchange Agr. For example, Met's own expert admitted that neither the Exchange Agreement nor geography require Met to provide ***any*** SWP or "blended" water to San Diego: Met chooses "the water they provide in exchange," and "a drop of water that came in at Lake Havasu to get to San Diego would not have to go through the State Water Project system." Jackson Decl. Ex. D (Woodcock Dep.) at 154:5-155:7; *see also* Exchange Agr. §§ 3.2(e), 3.6 ("[I]n no event shall SDCWA be deemed to have any right

[4] Met's characterization of the RTS charge as a "benefit" of the Exchange Agreement is absurd. *See* Answer ¶ 23b.vi. In the first phase of trial, Met emphasized that it never included the RTS in its wheeling rate. Trial Tr. at 474:5-6. Rightly so, because the RTS charge admittedly has nothing to do with wheeling, transporting, or exchanging water, and is plainly irrelevant.

to receive Exchange Water of better quality than the Conserved Water and/or Canal Lining Water."). Likewise, nothing in the Exchange Agreement requires Met to charge its System Power Rate rather than marginal power costs. *See* Exchange Agr. § 5.2. Met does so for its own convenience. *See, e.g.*, PTX-78**. As the Court already recognized, alleged benefits that are "not required by wheeling agreements" are irrelevant. Statement of Decision at 53; *see also R. M. Sherman*, 191 Cal. App. 3d at 568; *Coughlin v. Blair*, 41 Cal. 2d 587, 603 (1953).

Many of the alleged benefits Met falsely attributes to the Exchange Agreement arise (if at all) from ***other*** agreements in the "Quantification Settlement Agreement [QSA], a historic collection of agreements," ***not*** from the Exchange Agreement itself. Answer ¶ 23b.viii; *see also id.* ¶¶ 23b.i-ii. Those separate QSA agreements are irrelevant here. *See, e.g., R. M. Sherman*, 191 Cal. App. 3d at 568. Indeed, this Court held during discovery that the Transfer Agreement, one of the QSA agreements, is "not relevant to whether Metropolitan's rates were set 'pursuant to applicable law and regulation,' which is the central issue in this suit." May 13, 2013 Order at 3-4. Similarly, the Court held that "San Diego's intent in entering the 1998 and 2003 Exchange Agreements and any benefit San Diego received as a result" are irrelevant except as ultimately reflected in the Exchange Agreement itself. *Id.* at 4-5. The consideration for the Exchange Agreement is that Met would set lawful rates, and San Diego would pay them. San Diego has upheld its end of the bargain. Met has not, as the Court has already found. To search through ***other*** QSA agreements for ***other*** purported consideration would be to open a large can of irrelevant worms—on both sides[5]—with the Court being asked not only to speculate about the respective motivations of both San Diego and Met, but to weigh and assign a value to the

[5] If Met is allowed to delve into ancillary benefits of the QSA, San Diego must be allowed to do the same. For example, in 1997, Met calculated that "without a California Plan for Colorado River supplies Metropolitan may have to raise its water rates by as much as $65 per acre-foot in order to maintain a full Colorado River Aqueduct." PTX-25** Met suppressed that fact because it did not want to be "in a position where SDCWA can say, 'See the SDCWA/IID Transfer is worth $1.41/mo to $2.82/mo for Southern Californians.'" *Id.* Met's negotiating committee for the Exchange Agreement similarly concluded that Met could offer San Diego "a discount of more than 50%" on its wheeling rate and that would still leave Met in "substantially the same economic position" as if it acquired and stored the water itself. PTX-26** at MWD2010-00264791. And Met's former CFO Brian Thomas stated that "**Metropolitan's member agencies** benefit from a full Colorado River Aqueduct," and "the additional supplies of surplus water at near zero cost." PTX-30** at MWDPRA014981 (emphasis in original).

consideration received and paid by San Diego and Met (including its 25 other member agencies), as well as the other parties to the QSA. One need only glance at the 104-page decision *In re QSA Cases*, 201 Cal. App. 4th 758 (2011), to see what an impossible task this would be, asking the Court to second-guess the legislative determinations of not one, not two, but four public water agencies, the State of California, and the United States Department of the Interior.

Thus, the Court should exclude evidence about the purported benefits listed in paragraph 23 of Met's Answer.

III. MOTION *IN LIMINE* NO. 3: TO EXCLUDE FURTHER EVIDENCE ON MET'S WAIVER, ESTOPPEL, AND CONSENT DEFENSES

San Diego also moves *in limine* for an order excluding further evidence on Met's defenses of waiver, estoppel, and consent. Met has indicated that it intends to prove those defenses by introducing evidence that: (1) the parties "understood, intended, and agreed" that Met could charge illegal transportation rates, and (2) Met detrimentally relied on San Diego's "actions and failures to act." *See* Jackson Decl. Ex. G (Nov. 25, 2014 CMC Statement) at 13-14. These defenses all turn on the notion that despite entering into a contract specifically preserving its right to sue beginning in 2008, and despite repeatedly objecting to Met's illegal rates between 2003 and the filing of the first of these lawsuits in 2010, San Diego somehow waived its right to sue, consented to being charged Met's illegal rates, and is estopped from bringing this action. This is nonsense that the Court has already heard and rejected. It was the subject of Met's failed demurrer and motion for summary adjudication, extensive deposition testimony, and yet more testimony and evidence during the first phase of trial. Any additional evidence on these issues should be excluded because it is irrelevant under the plain terms of the Exchange Agreement, wrong as a matter of law, and cumulative.

First, Met concedes that it has no evidence of any express waiver by San Diego. Instead, Met intends to introduce evidence that San Diego's "actions and failures to act" amounted to an implied waiver, estoppel, and consent. *See id.* at 14. But any such evidence of San Diego's supposed conduct is irrelevant because ***the Exchange Agreement explicitly precludes these defenses***: "No waiver of a breach, failure of condition, or any right or remedy contained in or

granted by the provisions of this Agreement is effective unless it is in writing and signed by the Party waiving the breach, failure, right or remedy." Exchange Agr. § 13.9. The Exchange Agreement further specifies that any delay by San Diego in exercising its rights or remedies under the Exchange Agreement does ***not*** constitute a waiver. *See id.* § 12.5 ("If the non-breaching party fails to exercise or delays in exercising such right or remedy, [it] does not thereby waive that right or remedy."). Accordingly, any evidence of San Diego's purported waiver, estoppel, or consent by conduct is irrelevant in light of the Exchange Agreement's non-waiver provisions, and should be excluded. *See* Evid. Code § 350; *Ceja v. Dep't of Transp.*, 201 Cal. App. 4th 1475, 1482 (2011) (affirming trial court's *in limine* ruling excluding irrelevant evidence); *Hersch v. Citizens Sav. & Loan Ass'n*, 146 Cal. App. 3d 1002, 1009-10 (1983) (trial court properly refused to instruct jury on waiver or estoppel in light of contractual non-waiver provision stating that any "delay or omission … in exercising any right or remedy" would not be deemed to be a waiver); *Karbelnig v. Brothwell*, 244 Cal. App. 2d 333, 342-43 (1966) (reversing trial court's finding of waiver as inconsistent with written non-waiver provision).

Consistent with these non-waiver provisions, San Diego specifically preserved its right to challenge Met's unlawful rates and the Price term in the Exchange Agreement following a five-year litigation timeout, during which San Diego agreed not to contest in any "administrative or judicial forum" whether Met's transportation rates and the Price term were set "in accordance with applicable law and regulation." *See* Exchange Agr. §§ 5.2, 11.1. This defeats any attempt to establish waiver through parol evidence, because San Diego's compliance with the five-year standstill "was not clearly contrary to the terms of the written contract." *Garrison v. Edward Brown & Sons*, 25 Cal. 2d 473, 480 (1944).

The five-year ceasefire was a bargained-for compromise. During the negotiation of the Exchange Agreement, Met proposed that San Diego be forever barred from legally challenging Met's rates; San Diego countered that there be no waiting period to sue. *See* PTX-392** (Thomas Dep.) at 126:15-127:2. The parties ultimately settled on the five-year truce memorialized in the Exchange Agreement. *See* Exchange Agr. at §§ 5.2, 11.1. Having struck that bargain, Met cannot now seek to reform the agreement in litigation by claiming that San

Diego is barred from asserting Met's breach because San Diego honored its promise to wait five years before filing the first lawsuit in 2010. This is especially true considering that, had San Diego filed suit during the five-year litigation timeout, Met would have claimed that San Diego breached the agreement. *See* PTX-392** (Thomas Dep.) at 135:25-136:10, 143:13-144:16.

Indeed, as the Court found in connection with Met's failed motion for summary adjudication, "the five-year cooling off period in the Exchange Agreement … supports the inference that San Diego intended to retain the ability to challenge [Met's] rates under applicable law after the end of that period." Dec. 4, 2013 Order at 4 n.9. The Court further found that the fact that "San Diego paid its bills under the contract and did not bring a legal challenge to the 2003-2007 rates … is not a concession that the rates complied with law, only that San Diego was complying with the five year hiatus agreement." *Id.* at 4. Met's bargain for a five-year litigation timeout with explicit non-waiver provisions would be both meaningless and inequitable if, as Met now baselessly asserts, San Diego's right to allege a breach under that contract evaporated before the five years was up.

Second, it has long been established in continuing-obligation cases that "a waiver of a breach up to a certain time does not necessarily preclude the promisee from asserting a subsequent breach." *Bowman v. Santa Clara County*, 153 Cal. App. 2d 707, 713 (1957). This rule dates back a century to the California Supreme Court's decision in *Woodward v. Glenwood Lumber Co.*, 171 Cal. 513 (1915), and it has been applied consistently since.[6] In *Woodward*, a lumber company contracted with a landowner to cut down timber, manufacture it into lumber, and ship it. The company stopped performing under the contract, but the landowner waited for two years before bringing suit. Nevertheless, the court refused to find a waiver. "Every day's failure, without justification, to resume operations was a new breach of the contract and the fact that plaintiff may have waived the breach up to a given time did not preclude him from asserting

[6] *See, e.g.*, *Romano v. Rockwell Int'l, Inc.*, 14 Cal. 4th 479, 489-90 (1996); *Citizens for Goleta Valley v. HT Santa Barbara*, 117 Cal. App. 4th 1073, 1077-78 (2004); *Call v. Alcan Pac. Co.*, 251 Cal. App. 2d 442, 447-48 (1967); *Budaef v. Huber*, 194 Cal. App. 2d 12, 20 (1961); *Extension Oil Co. v. Richfield Oil Corp.*, 52 Cal. App. 2d 105, 110 (1942); 1 WITKIN, SUMMARY OF CAL. LAW § 857(2).

a subsequent breach." *Id.* at 523.

Likewise here, Met has a continuing obligation under the Exchange Agreement to provide water to San Diego at a Price comprised of lawful transportation rates. *See* Exchange Agr. §§ 5.1, 5.2. Moreover, each Met rate-setting cycle constitutes an independent legal event, subject to new legal challenge. *See Barratt Am. Inc. v. City of Rancho Cucamonga*, 37 Cal. 4th 685, 703-04 (2005); *Arcadia Dev. Co. v. City of Morgan Hill*, 169 Cal. App. 4th 253, 262-64 (2008). As such, each time Met enacts unlawful transportation rates, a new breach of the Exchange Agreement occurs. Even if Met could establish waiver, estoppel or consent with regard to water rates set prior to 2010 that are not challenged in this litigation—which it cannot—San Diego still would not be precluded from asserting subsequent breaches based on Met's unlawful 2011-2014 rates. *See Woodward*, 171 Cal. at 523; *Bowman*, 153 Cal. App. 2d at 713. Not only is this clear as a matter of law, it is expressly stated in the Exchange Agreement itself: "no waiver will constitute a continuing waiver unless the writing so specifies." Exchange Agr. § 13.9.

Third, even assuming that Met's purported evidence of waiver, estoppel, and consent has some marginal relevance, any further testimony on these issues should nevertheless be excluded because it would be cumulative of the evidence already before the Court. *See* Evid. Code §§ 350, 352. The Court can and should exclude evidence that is irrelevant or cumulative, and "expedite proceedings which, in the court's view, are dragging on too long without significantly aiding the trier of fact." *Hernandez v. Kieferle*, 200 Cal. App. 4th 419, 438 (2011) (internal quotation marks omitted). This rule applies in a bench trial. *See Depalma*, 225 Cal. App. 3d at 1544. "A trial court acts within its discretion when excluding cumulative and time consuming evidence." *Aguayo v. Crompton & Knowles Corp.*, 183 Cal. App. 3d 1032, 1038 (1986).

Throughout this action, Met has repeatedly, and unsuccessfully, advanced several variations of these same defenses. First, Met unsuccessfully demurred to San Diego's Second Amended Complaint, arguing that San Diego's breach of contract claim was time-barred because San Diego did not sue within 60 days of Met's 2002 adoption of its "rate structure." *See* Met's Mem. ISO Demurrer to SAC at 2; July 2, 2012 Hearing Tr. at 62:23-26 (overruling demurrer). Next, Met moved for summary adjudication of the contract claim, arguing that San Diego had

effectively admitted that Met's transportation rates were legal. The Court reviewed the contemporaneous documents and deposition testimony of both parties' negotiators, and based on that review decisively rejected Met's position. *See* Dec. 4, 2013 Order at 3-5. Specifically, the Court found that Met's arguments relied on an "artificially blinkered view of the evidence," which ignored the plain text of the contract and the testimony of San Diego's contract negotiator, Scott Slater. *Id.* at 3-4. The Court concluded that Met had not even presented enough evidence to satisfy its initial burden, and that San Diego had "more than adequately" refuted Met's showing. *Id.* at 5. Undeterred, Met once again revived these same arguments throughout the first phase of trial, repeatedly claiming that its rates are lawful because Met's "rate structure" was adopted in 2001 and San Diego was "fully aware" of the rates. *See, e.g.*, Met's First Pretrial Brief at 4-5; Met's Closing Brief at 11-13, 21.

The record regarding Met's waiver, estoppel, and consent defenses has been fully developed and is already before the Court. Evidence regarding the negotiation of the Exchange Agreement, San Diego's repeated complaints about Met's unlawful rates, the parties' understanding of the five-year litigation timeout provision, and much more is already in the trial record or within the administrative record. Dennis Cushman, San Diego's Assistant General Manager, testified—and Met extensively cross-examined him—about these issues during the first phase of trial. *See, e.g.*, Trial Tr. at 219-222, 224-232, 258-265. The parties submitted the deposition testimony of each side's person most knowledgeable and principal negotiator of the Exchange Agreement—Brian Thomas for Met and Scott Slater for San Diego. *See* PTX-392** (Thomas excerpts); DTX-709** (Slater excerpts). And Met repeatedly presented evidence regarding the Exchange Agreement throughout the first phase of trial. *See, e.g.*, Trial Tr. at 130-140, 480-483, 497-499; Met's Opening Presentation Slides at 40-50; Met's Administrative Record Presentation Slides at 130-131, 156-157.

Despite all this, Met apparently seeks to rehash the same evidence in support of its futile waiver, estoppel, and consent defenses. The only evidence Met has identified—the supposed "undisputed facts" and "remaining issues" outlined in Met's recent CMC Statement—has already been covered. *See* Jackson Decl. Ex. G (Nov. 25, 2014 CMC Statement) at 13-14. For example,

Met cites evidence that (1) the first Exchange Agreement, executed in 1998, included a set price, (2) Met unbundled its rates effective 2003, and (3) San Diego entered into the Exchange Agreement knowing that Met was required to set a Price based on lawful transportation rates. *Id.* But all of that is already in the record. In any event, such evidence has nothing to do with whether San Diego preserved its ability to sue following the expiration of the five-year truce.

Met also points to supposed evidence that San Diego failed to object to Met's rates; that San Diego's delegates on Met's Board occasionally voted in favor of Met's rates; and that San Diego delayed filing suit. *See id.* Again, these arguments have all been heard—and refuted—before. In fact, Met conceded in its first pretrial brief that San Diego "openly threatened to litigate" over Met's rates during the Exchange Agreement negotiations, and that San Diego "reserved its right to challenge the validity" of those rates:

> ***[T]he threat of future litigation was made explicit by SDCWA in the context of negotiating its 35-year exchange agreement ('Exchange Agreement') with MWD in late 2003***. In negotiating the Exchange Agreement's Price provision, SDCWA agreed not to challenge MWD's water rates for a period of five years after its execution. ***Thereafter, SDCWA reserved its right to challenge the validity of MWD's rates "in an administrative or judicial forum.***" In that context, ***SDCWA openly threatened to litigate over MWD's existing rate structure and destabilize MWD's rates***.

Met's First Pretrial Br. at 14 (emphases added). The testimony and evidence presented in the first phase of the trial confirms that San Diego has been consistently complaining about Met's illegal rates, in both correspondence and in meetings, for the same reasons asserted in this action "as far back as the 1990s." *See, e.g.*, Trial Tr. 219:25-221:6, 258:9-263:17 (Cushman); *see also* PTX-22, PTX-38**, PTX-44**, PTX-55**, DTX-49 at AR2012-7121-23, AR2010-11454-64 (detailing San Diego's history of complaints to Met about improper rate allocations dating back to the 1990s).[7] Following the expiration of the five-year truce, San Diego attempted to work in good faith with Met to resolve San Diego's concerns about Met's rates without litigation. Trial Tr. 221:16-222:3. When those efforts failed and Met again enacted unlawful rates in 2010, San Diego promptly sued. Even Met's June Skillman admitted that Met expected San Diego to sue

[7] For the Court's convenience, these admitted trial exhibits are compiled as Jackson Decl. Ex. H.

after the five-year standstill was up and that the standstill was the only reason San Diego hadn't sued over Met's rates already. *See* Trial Tr. at 718:21-719:3 (Skillman) ("Q: But in any event, when you got this, this draft, you were expecting to be sued? A: My recollection is that the 5-year standstill was up. Q: And therefore you expected to be sued because the only reason they hadn't sued you before was the 5-year standstill; right? A: Approximately, yes."). More witnesses and trial time dedicated to these issues, on which the Court already has a fully developed record, would be cumulative and unnecessary, particularly in light of the Court's stated desire to complete the second phase of trial in three Court days.

For all of these reasons, the Court should exclude any further evidence or testimony regarding Met's defenses of waiver, estoppel and consent.

Dated: January 12, 2015

Respectfully submitted,
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