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17 SUPERIOR COURT OF THE STATE OF CALIFORNIA

18 COUNTY OF SAN FRANCISCO

19 SAN DIEGO COUNTY WATER AUTHORITY,

No. CPF-10-510830

20 Petitioner and Plaintiff,

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
METROPOLITAN WATER
DISTRICT OF SOUTHERN
CALIFORNIA'S MOTION TO
BIFURCATE VALIDATION
PROCEEDING**

21 v.

22 METROPOLITAN WATER DISTRICT OF
23 SOUTHERN CALIFORNIA; ALL PERSONS
INTERESTED IN THE VALIDITY OF THE
24 RATES ADOPTED BY THE METROPOLITAN
WATER DISTRICT OF SOUTHERN
25 CALIFORNIA ON APRIL 13, 2010 TO BE
EFFECTIVE JANUARY 2011; and DOES 1-10,

Date: January 4, 2012
Time: 1:30 p.m.
Dept.: 304
Judge: Hon. Richard A. Kramer

26 Respondents and Defendants.

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1 The Metropolitan Water District of Southern California (“MWD”) respectfully submits
2 this Memorandum of Points and Authorities in support of its motion to bifurcate the validation
3 proceeding from all other issues in San Diego County Water Authority’s (“SDCWA’s”) First
4 Amended Petition for Writ of Mandate and Complaint for Damages and Declaratory Relief
5 (“FAC”).

6 **I. INTRODUCTION**

7 This action began as a straightforward suit for reverse validation of the water rates
8 adopted by MWD in April of 2010. The single issue in SDCWA’s initial petition/complaint,
9 filed in June 2010, was a challenge to the allocation of costs recovered in MWD’s System
10 Access Rate and System Power Rate, and inclusion of its Water Stewardship Rate in its
11 transportation charges. Complaint ¶¶ 26-27. This challenge to MWD’s rates falls under the
12 statutory requirements governing lawsuits to determine the validity of public agency actions.
13 Under this statute, validation actions like the one in SDCWA’s initial petition/complaint are
14 entitled to statutory preference “to the end that such actions shall be speedily heard and
15 determined.” Code Civ. Proc. § 867 (or “the Code”). The policy behind this statutory preference
16 is to promptly resolve disputes over agency decisions so that an agency may continue to act
17 without the impairment of uncertainty hanging over its decisions.

18 Before SDCWA’s rate challenge could be resolved, however, SDCWA filed its FAC,
19 which adds breach of contract, breach of covenant, fiduciary duty, preferential rights, and Rate
20 Structure Integrity (“RSI”) claims that are unrelated to, or merely derivative of, the challenged
21 rate setting and are not part of the writ proceeding in the validation action. Separately, MWD is
22 moving to strike and demurring to four of SDCWA’s added claims – the fourth, fifth, sixth, and
23 eighth causes of action – because they should be dismissed as a matter of law. Regardless of the
24 results of the motions to strike and demurrers, the added seventh cause of action will remain in
25 the case. MWD files this motion to bifurcate the new claim(s) from the validation claims (which
26 are contained in the first through third causes of action). Code of Civil Procedure § 1048(b)
27 authorizes courts to bifurcate a lawsuit where the separation furthers convenience, expedition, or
28 economy, or avoids prejudice. Additionally, the Code authorizes the Court, upon motion by a

1 party, to order trial of any issue before trial of any other “when the convenience of witnesses, the
2 ends of justice, or the economy and efficiency of handling the litigation would be promoted
3 thereby.” Code Civ. Proc. § 598.

4 This lawsuit is the perfect candidate for bifurcation, as separation of the validation action
5 from the newly added claims in SDCWA’s FAC will further these interests as well as achieve the
6 Legislature’s goal of prompt resolution of validation actions, as codified in Code of Civil
7 Procedure § 867.

8 **First**, bifurcation is necessary to achieve the statutory preference and goal of prompt
9 determination mandated in § 867. If tried separately, the rate challenge can be resolved promptly
10 on the administrative record. Inclusion of unrelated claims, on the other hand, will involve a trial
11 with broad discovery and will therefore undermine the Legislature’s express aims by impeding
12 resolution of the rate challenge.

13 **Second**, bifurcation will further the ends of judicial economy and efficiency. SDCWA’s
14 new claims include common law breach of the implied covenant of good faith and fair dealing
15 and breach of fiduciary duty claims, as well as a statutory claim involving preferential rights to
16 water, and a challenge to RSI provisions in subsidy contracts. Those claims involve subjects that
17 are factually and legally unrelated to the validation action. The RSI provisions have no bearing
18 at all on the validity of MWD’s rates. MWD’s preferential rights calculation has nothing to do
19 with the propriety of MWD’s rates or the components of its rates because, as a matter of law,
20 none of MWD’s water rates or their components count toward preferential rights. Finally, the
21 alleged existence of an “Anti-San Diego secret cabal” made up of member agency staff – the
22 subject of SDCWA’s breach of fiduciary duty claim – is similarly unrelated to the issue of
23 whether it is reasonable for MWD to recover the SWP transportation costs through the System
24 Access Rate, the SWP power costs through the System Power Rate, and its costs for incentive
25 contracts to the member agencies through the Water Stewardship Rate. To adjudicate all of
26 SDCWA’s claims in one trial means that the straightforward task of resolving the rate challenge
27 will be hindered by discovery disputes and factual disputes over unrelated topics like meetings
28 among member agency staff members and interpretation of incentive contracts between MWD

1 and member agencies. This delay would only be increased by the fact that the new claims will
2 likely involve a different standard of review and may require a trial.

3 *Third*, bifurcation will promote economy and efficiency because SDCWA's newly added
4 breach of contract and breach of covenant claims implicate the doctrine of exclusive concurrent
5 jurisdiction. Two currently litigated proceedings have the potential to moot SDCWA's disputes
6 over the Exchange Agreement between it and MWD, contained in the fourth and fifth causes of
7 action. Under the doctrine of exclusive concurrent jurisdiction, where another court has
8 jurisdiction over a matter the resolution of which could moot the arguments before this Court, the
9 other court retains exclusive jurisdiction over the matter and this Court should refrain from
10 adjudicating the related issues until resolution in the other matter. The fact that exclusive
11 concurrent jurisdiction necessitates putting the breach of contract and breach of covenant claims
12 aside anyway is an additional reason not to complicate the validation action with other claims.
13 Additionally, SDCWA's newly added breach of contract claim is founded on allegations of
14 unlawful rates. The validity of MWD's rates will be resolved in the validation action and will
15 moot the issues involved in the new fourth cause of action. Separating the validation action from
16 the breach of contract and breach of covenant claims is an efficient and economic way to
17 organize adjudication of the issues in this case.

18 *Fourth*, bifurcating the validation proceeding from the newly added claims also avoids
19 the prejudice to MWD's member agencies that will necessarily ensue from lengthening and
20 complicating resolution of the rates' validity. By adding these unrelated claims, SDCWA is
21 attempting to transform a streamlined writ proceeding into a far-flung lawsuit, which SDCWA
22 will likely contend requires burdensome discovery and protracted litigation. Dragging out the
23 rate challenge in this way will prejudice MWD's 26 member agencies, which are public entities
24 whose budgets and water rates must in turn be set through their budgetary and rate-making
25 processes to recover what MWD charges them. The Court should give significant weight to the
26 fiscal uncertainty that will be inflicted on these member agencies, 17 of which are not parties to
27 this case, if the validation action is prolonged due to the inclusion of SDCWA's new claims.

28 In sum, bifurcating the validation proceeding will serve four important goals. It will

1 further the Legislature’s intent that preference be given to validation actions so they can be
2 speedily resolved. It will promote efficiency and expediency. And it will avoid prejudicing the
3 member agencies.

4 **II. FACTUAL BACKGROUND**

5 MWD was formed in 1928 under the Metropolitan Water District Act (“MWD Act”). It
6 is “a separate and independent political corporate entity.” *City of Pasadena v. Chamberlain*, 204
7 Cal. 653, 656 (1928). MWD’s primary purpose is to provide a supplemental supply of water for
8 domestic and municipal uses at wholesale rates to its member public agencies. MWD serves as a
9 water wholesaler and has no retail customers. FAC ¶ 16. MWD’s principal sources of water are
10 the State Water Project (“SWP”), which supplies water to MWD through a contract with the
11 State Department of Water Resources (“DWR”), and the Colorado River. *Id.* ¶ 18. MWD is
12 composed of 26 public member agencies (“MAs”). *Id.* ¶ 16. Each of MWD’s MAs is a separate
13 public agency. *San Diego County Water Auth. v. Metropolitan Water Dist. of So. Cal.*, 117 Cal.
14 App. 4th 13, 17 (2004). The MAs request water from MWD at various delivery points in
15 MWD’s system and pay at uniform rates established by the MWD Board of Directors for each
16 class of service.

17 MWD is governed by a 37-member Board of Directors.¹ Each of its member public
18 agencies is entitled to have at least one representative on the Board, plus additional
19 representatives based on the assessed valuation of property in MWD’s service area within the
20 member public agency. MWD Act §§ 51, 52 (Request for Judicial Notice In Support of MWD’s
21 Demurrer and Motion to Strike (“RJN”), filed concurrently herewith, Ex. 1). As established by
22 the Legislature, each MA has proportional voting rights, which is also based on the assessed
23 valuation within the agency. FAC ¶ 19.

24 Since 1946, SDCWA has been a MA of MWD. SDCWA currently holds four seats on
25 MWD’s Board, and controls 17.89% of the vote – the second largest block of votes of any MA.

27 ¹ Declaration of Thomas S. Hixson in Support of Metropolitan Water District of Southern
28 California’s Motion to Bifurcate Validation Proceeding (“Hixson Decl.”), Ex. 1.

1 Hixson Decl., Ex. 3, attachment 1, p.1. SDCWA purchases water and services from MWD and
2 pays the same rate as any other MA for the same class of service. FAC ¶ 27. SDCWA also has a
3 contract, the Exchange Agreement, with MWD under which SDCWA purchases water from the
4 Imperial Irrigation District (“IID”) and receives equivalent “Exchange Water” from MWD. FAC
5 ¶ 2; Ex. A ¶¶ 3.1- 3.5, 5.2. MWD provides the Exchange Water from any water source available
6 to it, not just the IID water. *Id.* ¶ 3.2(e).

7 MWD is entitled to set rates for its member districts to recoup its costs, including capital
8 costs and operating expenses. FAC ¶ 17; MWD Act § 134. MWD’s rate structure and the yearly
9 rates are determined by a vote of MWD’s Board, which includes SDCWA’s voting block.

10 MWD Act § 55, 133. The administrative process that established MWD’s current rate structure
11 began around July 1998 when MWD undertook a strategic review of its rate structure in
12 consultation with its MAs. Raftelis Report, p.3 (Hixson Decl., Ex. 2)); *see also* FAC, Ex. E, p.7.
13 The MWD Board conducted the strategic planning process for a year and a half through an open,
14 transparent, and deliberative process. Raftelis Report, p.3. MWD’s Board developed a Rate
15 Structure Framework and a cost of service (“COS”) and rate methodology that is currently in
16 place. This rate structure was approved in 2002 and has been in effect since January 2003. FAC
17 ¶¶ 25, 26; FAC, Ex. E, p.7; FAC, Ex. E, attachment 1, p.3 of 15. It includes the following rates:

- 18 • Water Supply Rates (Tier 1 and Tier 2): These rates are designed to recover
19 MWD’s water supply costs.
- 20 • System Access Rate: This rate is intended to recover a portion of the costs
21 associated with the conveyance and distribution system, including capital,
22 operating and maintenance costs.
- 23 • Water Stewardship Rate: This rate is charged on a dollar per acre-foot basis to
24 collect revenue to support MWD’s financial commitment to conservation, water
25 recycling, groundwater recovery, and other water management programs
26 approved by the Board.
- 27 • System Power Rate: This rate is charged on a dollar per acre-foot basis to recover
28 the cost of power necessary to pump water from the State Water Project and
Colorado River through the conveyance and distribution system from MWD’s

1 MAS.²

2 FAC ¶¶ 25-26. SDCWA specifically voted to approve Resolution 8796, Resolution Of The
3 Board Of Directors Of The Metropolitan Water District Of Southern California Giving Notice Of
4 Intention To Impose Rates And Charges For Fiscal Year 2002/03 And To Direct Further Actions
5 In Connection Therewith, adopted on January 8, 2002, which described the lengthy rate
6 development process and initiated adoption of the new rates. Hixson Decl., Ex. 12 at item 44752
7 (minutes approving resolution); *id.*, Ex. 13 (resolution). SDCWA did not oppose the rates
8 adopted under this rate structure in 2002 and made no objection in other years, including in 2005,
9 2006, and 2007. *Id.*, Ex. 7 at item 448121; *id.*, Ex. 9 at item 46149; *id.*, Ex. 10 at item 46593;
10 *id.*, Ex. 11 at item 47046). SDCWA specifically voted to approve rates under this structure in
11 2009 (for rates effective in January 2010). *Id.*, Ex. 8 at item 47859.

12 On April 13, 2010, MWD’s Board adopted the specific rate levels under this structure.
13 FAC ¶ 36. An independent financial consultant reviewed the rate structure and determined that
14 the 2010 “COS and rate methodology is reasonable, consistent with California law, . . . and the
15 Metropolitan Water District Act.” Raftelis Report, cover memo (Hixson Decl., Ex. 2). It is also
16 “consistent with water industry best practices, and complies with the COS and rate guidelines in
17 the American Water Works Association’s Manual M-1.” *Id.*

18 SDCWA’s original petition/complaint, filed in June 2010, was a narrow rate challenge.
19 Specifically, it alleged that MWD had mischaracterized the System Access Rate, System Power
20 Rate and Water Stewardship Rate as transportation costs for purposes of rate setting, when (in
21 SDCWA’s view) they should be characterized as supply costs. Complaint ¶¶ 21-27. This rate
22 challenge must be decided under a deferential standard of review, limited to the administrative
23 record. *Hansen v. San Buenaventura*, 42 Cal. 3d 1172, 1180, 1181 (1986) (“Rates established by
24 [a] lawful rate-fixing body are presumed reasonable, fair and lawful” and “[r]easonableness . . .
25

26 ² The current rate includes the following charges: Treatment Surcharge to recover the cost of
27 providing treated water service, and certain supply surcharges – Water Supply Surcharge and
28 Delta Supply Surcharge.

1 is the beginning and end of the judicial inquiry.”); *Brydon v. East Bay Mun. Util. Dist.*, 24 Cal.
2 App. 4th 178, 196 (1994) (“Given the quasi-legislative nature of [a water district’s] enactment of
3 the rate structure design, review is appropriate only by means of ordinary mandate where the
4 court is limited to a determination of whether the [d]istrict’s actions were arbitrary, capricious or
5 entirely lacking in evidentiary support.”) (citations and quotation marks omitted).

6 In the FAC, SDCWA now adds claims for breach of contract, breach of the implied
7 covenant, breach of fiduciary duty, preferential rights and RSI challenges. As discussed below,
8 most of the new claims have no factual or legal overlap with the rate challenge. Further, the new
9 breach of contract claim is entirely derivative of it. Accordingly, MWD now moves to bifurcate
10 the validation action from the seventh cause of action, and from any of SDCWA’s other new
11 claims if any survive the demurrers and motions to strike.

12 **III. ARGUMENT**

13 **A. Bifurcation Is A Power Of The Court And Within Its** 14 **Discretion.**

15 Bifurcation of proceedings into phases based on separate, distinct issues is a tool often
16 used by trial courts to streamline litigation. *See e.g., Du Jardin v. City of Oxnard*, 38 Cal. App.
17 4th 174, 177 (1995); *Ford v. Miller Meat Co.*, 28 Cal. App. 4th 1196, 1199 (1994); *see also*
18 *Buran Equip. Co. v. H & C Inv. Co.*, 142 Cal. App. 3d 338, 343 (1983) (trial court commended
19 for ordering that adequacy of notice issue be decided prior to any other issues). Pursuant to Code
20 of Civil Procedure section 1048(b), the Court may bifurcate issues or claims “in furtherance of
21 convenience or to avoid prejudice, or when separate trials will be conducive to expedition and
22 economy.” Under section 598 of the Code, a party may move the court to order trial of any issue
23 before trial of any other “when the convenience of witnesses, the ends of justice, or the economy
24 and efficiency of handling the litigation would be promoted thereby.” The Court also retains
25 inherent powers to control, order, and regulate the proceedings before it. *See Cottle v. Super.*
26 *Ct.*, 3 Cal. App. 4th 1367, 1377-78 (1992) (courts have inherent equity, supervisory and
27 administrative powers as well as inherent power to control litigation before them); *Bauguess v.*
28 *Paine*, 22 Cal. 3d 626, 643 (1978) (“Every court has the inherent power to regulate the

1 proceedings of matters before it and to effect an orderly disposition of the issues presented.”),
2 superseded by statute, Code Civ. Proc. § 128.5, on other grounds; Code Civ. Proc. § 128(a)(8)
3 (every court shall have the power to amend and control its process and orders so as to make them
4 conform to law and justice).

5 In fact, in situations involving validation actions like the one here, courts have used
6 bifurcation as a way to manage the proceedings. *See, e.g., County of Santa Clara v. Redev.*
7 *Agency*, 18 Cal. App. 4th 1008, 1013 (1993) (trial court severed causes of action for breach of
8 contract from validation claims); *County of Orange v. Barratt Am., Inc.*, 150 Cal. App. 4th 420,
9 425 (2007) (court bifurcated validation action regarding several city resolutions into three
10 phases); *Metropolitan Water Dist. of So. Cal. v. Imperial Irr. Dist.*, 80 Cal. App. 4th 1403, 1422
11 (2000) (trial court bifurcated validation action into two separate proceedings, one to determine
12 whether a particular rate could be set in a particular manner, the other to determine whether the
13 amount of that rate was reasonable); *N.T. Hill Inc. v. City of Fresno*, 72 Cal. App. 4th 977, 982
14 (1999) (in a validation action trial court bifurcated issue of exhaustion of administrative remedies
15 from other issues), disapproved of on other grounds by *Travis v. County of Santa Cruz*, 33 Cal.
16 4th 757, 769 n.4 (2004).

17 **B. Bifurcation Is Necessary To Achieve Prompt Determination**
18 **Of Validation Actions.**

19 In addition to the common grounds of convenience, expediency, economy, and avoiding
20 prejudice, discussed below, there is a reason why bifurcation is necessary here: to further an
21 express legislative policy.

22 Code of Civil Procedure § 867 mandates that validation actions “shall be given
23 preference over all other civil actions” to the expressly stated end that “such actions shall be
24 speedily determined.” Courts have recognized the goal of the validation statutes as being “to
25 further the important public policy of speedy determination of the public agency’s action.”
26 *McLeod v. Vista Unified Sch. Dist.*, 158 Cal. App. 4th 1156, 1166 (2008) (quoting *Embarcadero*
27 *Mun. Improvement Dist. v. County of Santa Barbara*, 88 Cal. App. 4th 781, 790 (2001)); *see also*
28 *Friedland v. City of Long Beach*, 62 Cal. App. 4th 835, 843 (1998) (“A key objective of a

1 validation action is to limit the extent to which delay due to litigation may impair a public
2 agency's ability to operate financially.") (citing *Graydon v. Pasadena Redev. Agency*, 104 Cal.
3 App. 3d 631, 644-45 (1980); see also *Friedland*, 62 Cal. App. 4th at 843 ("A validation action
4 fulfills a second important objective, which is to facilitate a public agency's financial
5 transactions with third parties by quickly affirming their legality.")). Courts recognize the policy
6 codified in the validation statutes and the fact that "lack of a prompt validating procedure would
7 impair this public agency's ability to operate and carry out its statutory purpose." *Graydon*, 104
8 Cal. App. 3d at 646.

9 Bifurcation is a tool for achieving the validation statutes' policy where, as here, separate,
10 distinct claims threaten to undermine the goal of prompt determination. In a matter with similar
11 issues, the court bifurcated plaintiff's breach of contract claims from the claim challenging the
12 validity of the agency's action. *County of Santa Clara v. Redev. Agency*, 18 Cal. App. 4th 1008,
13 1013 (1993). In *Santa Clara*, the court held that the breach of contract claims were "separate
14 and independent" from the validation action and that bifurcation was appropriate because "the
15 two sets of claims present wholly different issues" that were "completely unrelated" to one
16 another. *Id.* at 1016-17.

17 Similarly here, SDCWA's claims involving the RSI clauses in subsidy contracts,
18 preferential rights, and an alleged secret cabal are completely unrelated to and involve issues
19 wholly different from the single issue in the validation action, i.e., whether it is reasonable for
20 MWD to recover the SWP transportation costs through the System Access Rate, the SWP power
21 costs through the System Power Rate and its costs for incentive contracts to the member agencies
22 through the Water Stewardship Rate. As in *Santa Clara*, bifurcation is a way to achieve the
23 express statutory goal of § 867, and, accordingly, the Court should grant this motion.

24 **C. Bifurcation Is Conducive To Judicial Economy And**
25 **Efficiency Because Of The Nature Of The Claims.**

26 As stated in Code of Civil Procedure § 1048(b), convenience, expediency, and economy
27 are bases for bifurcation. Excluding SDCWA's new claims, this case would be a simple
28 mandate and validation action. Extra-record discovery is normally not allowed in cases like this.

1 See *San Joaquin Local Agency Formation Com'n v. Super. Ct.*, 162 Cal. App. 4th 159, 167
2 (2008) (“Extra-record evidence is generally not admissible in traditional mandamus actions
3 challenging quasi-legislative administrative decisions” and “[p]ermitt[ing] the admission of extra-
4 record evidence would also infringe upon the separation of powers.”). Moreover, this Court has
5 at least initially determined that discovery is unnecessary in the rate challenge because that
6 challenge must be resolved based on the administrative record. By itself, the validation action
7 will be a writ proceeding – there are no witnesses, and there is no traditional trial. With the
8 addition of SDCWA’s new claims, however, an adjudication without bifurcation could involve
9 multiple, unrelated issues, potentially broad discovery, different standards of review, and
10 potentially a full-blown trial. And in the case of SDCWA’s fourth cause of action, the
11 allegations of breach of contract are founded on the allegations of lawful rates in the validation
12 action. The breach of contract claim could be foreclosed by resolution of the validation action.
13 Accordingly, separation of the validation action will promote the efficient use of the Court’s
14 resources by keeping unrelated and derivative issues, and different discovery and review
15 standards, separate.

16 **1. SDCWA’s Claims Involving The RSI Clause Are**
17 **Unrelated To The Rate Challenge.**

18 SDCWA’s fifth and seventh causes of action regarding the RSI clause are unrelated to the
19 validation action challenging the rate setting. The only alleged fact common to both the
20 validation action and SDCWA’s RSI claims is the fact of the challenge itself, namely, the
21 allegation that the challenge of MWD’s rates led MWD to exercise its rights under the RSI
22 clause. Beyond that, the RSI claim and the associated implied covenant claim involve an
23 entirely different set of facts from the rate challenge.

24 **2. SDCWA’s Preferential Rights Claim Is Unrelated To**
25 **The Rate Challenge.**

26 SDCWA’s eighth cause of action concerning preferential rights also has no connection to
27 the *validation of water rates*, which is the sole subject of SDCWA’s initial action. The
28 preferential rights claim, in contrast, does not deal at all with water rates but instead with the

1 method of allocating *water supplies among member agencies* in the event of a shortage.

2 By way of background, under 135 of the Metropolitan Water District Act (“MWD Act”),
3 “in the event of a water supply shortage, each Metropolitan member public agency, including
4 San Diego, has a preferential right to a percentage of Metropolitan’s available water supplies
5 based on a legislatively established formula.” *San Diego County Water Auth. v. Metropolitan*
6 *Water Dist. of So. Cal.*, 117 Cal. App. 4th 13, 17 (2004). “That formula affords each member an
7 aliquot preference equal to the ratio of that member’s total accumulated payments toward
8 Metropolitan’s capital costs and operating expenses when compared to the total of all member
9 agencies’ payments toward those costs, excluding amounts paid by the member for ‘purchase of
10 water.’” *Id.* quoting MWD Act § 135 (RJN, Ex. 1).

11 SDCWA’s preferential rights claim asserts that payments it makes to MWD for water it
12 receives under the Exchange Agreement are not for the “purchase of water.” Therefore, the
13 payments must be included in the calculation of its preferential rights, which could increase its
14 *allocation of water* in a shortage. Even if SDCWA were to prevail on this claim, that would
15 have no effect on the validity of MWD’s water rates. Moreover, the factual and legal issues
16 involved in determining whether SDCWA’s payments under the Exchange Agreement are for the
17 purchase of water have nothing in common with the issues involved in the determination of
18 *whether MWD’s water rates are reasonable*. And looked at the other way, bifurcation and
19 determination of whether MWD’s water rates are reasonable would not implicate any of the
20 factual and legal issues that will be in issue in the preferential rights water allocation claim.

21 There is no legal or factual connection between the calculation of preferential rights and
22 the rate challenge. Because of this, adjudication of preferential rights issues alongside the rate
23 challenge will unnecessarily complicate and prolong resolution of whether MWD’s rates are
24 valid.

25 **3. SDCWA’s Fiduciary Duty Claim Is Unrelated To The**
26 **Rate Challenge.**

27 If the sixth cause of action survives MWD’s demurrer and motion to strike, there is little
28 if any relationship between SDCWA’s fiduciary duty claim and the rate challenge. The rate

1 challenge will be based entirely on the administrative record and MWD’s Board’s determination
2 that the rates are reasonable, whereas the fiduciary duty claim is based entirely on allegations of
3 conduct by the member agencies and their staff and beyond MWD’s control, outside the record
4 and relating to multiple Board decisions, including decisions unrelated to the current rate
5 challenge, such as the decisions relating to the RSI clauses. *See* FAC ¶¶ 98-107.

6 Even were any of the new claims to involve issues that have some relation to the
7 validation action, such small overlaps do not justify denial of a motion to bifurcate. *See Kaiser*
8 *Steel Corp. v. Westinghouse Electric Corp.*, 55 Cal. App. 3d 737, 746 (1976) (upholding trial
9 court’s bifurcation of proceedings into liability and damages phases because where “only a small
10 fraction of the evidence would be repeated . . . the ends of justice were served by bifurcation.”),
11 superseded by statute, Code Civ. Proc. § 2033, on other grounds.

12 **4. SDCWA’s Breach Of Contract Claim Is Derivative Of**
13 **The Rate Challenge.**

14 The issue of whether the Exchange Agreement has been breached by enactment of
15 unlawful rates is derivative of the issue to be resolved in the validation action, i.e., whether the
16 rates are valid. The goal of efficiency and economy counsels towards bifurcating the rate
17 challenge and resolving it first, because if the rates are found to be valid, the new breach of
18 contract claim will be moot and the Court will have conserved its resources.

19 **5. Bifurcation Will Promote Economy And Efficiency**
20 **Because Two Of SDCWA’s New Claims Invoke The**
21 **Doctrine Of Exclusive Concurrent Jurisdiction.**

22 Even if the Court does not bifurcate the non-validation claims from the validation action,
23 some of those non-validation claims will need to be dealt with separately in any case, due to the
24 doctrine of exclusive concurrent jurisdiction. Under this doctrine, where two courts have
25 concurrent jurisdiction over a matter and all parties involved, the first court to assume such
26 jurisdiction retains exclusive jurisdiction over the matter and all parties involved until all related
27 matters have been resolved. *People ex rel. Garamendi v. Am. Autoplan, Inc.*, 20 Cal. App. 4th
28 760, 769-70 (1993). The application of this doctrine is an appropriate issue when deciding
whether to bifurcate a matter, as “the rule of exclusive concurrent jurisdiction is a judicial rule of

1 priority or preference” and bifurcation is a tool for managing priority and preference of issues.
2 *See id.* at 764-65.

3 Here, the doctrine of exclusive concurrent jurisdiction applies because two pending
4 litigations have the potential to render SDCWA’s fourth and fifth causes of action regarding the
5 Exchange Agreement moot. *See Green v. Mt. Diablo Hosp. Dist.*, 207 Cal. App. 3d 63, 75-76
6 (1989) (refusing to compel arbitration of contractual issue because the allegations in another,
7 prior suit, if true, “would render any breach of contract issues between [the parties to the
8 arbitration] moot”).

9 The first such proceeding is the appeal of the Sacramento County Superior Court’s ruling
10 that a related agreement (the “QSA”) between MWD and Imperial Irrigation District is void ab
11 initio. Statement of Decision Following Phase 1A Trial (January 13, 2010), *QSA Coordinated*
12 *Cases*, Judicial Counsel No. 4353 (Hixson Decl., Ex. 4); Joint Notice of Appeal, *QSA*
13 *Coordinated Cases*, Judicial Counsel No. 4353 (filed Feb. 19, 2010) (Hixson Decl., Ex. 5). The
14 QSA must be in existence in order for MWD’s obligations under the Exchange Agreement to
15 take effect. *See* Exchange Agreement (FAC, Ex. A) at ¶ 8.1 (entitled “Metropolitan’s Condition
16 Precedent”) (stating “[MWD’s] obligations under this Agreement are subject to the execution
17 and delivery of the QSA”). If the lower court’s ruling is upheld, the QSA’s execution will
18 become a nullity, meaning MWD’s obligations under the Exchange Agreement will not have
19 arisen and SDCWA’s fourth and fifth causes of action will be moot. *See Platt Pacific, Inc. v.*
20 *Andelson*, 6 Cal. 4th 307, 313 (1993) (“a condition precedent is either an act of a party that must
21 be performed or an uncertain event that must happen *before the contractual right accrues or the*
22 *contractual duty arises.*”) (internal citations omitted) (emphasis added); *see also Los Angeles*
23 *Rams Football Club v. Cannon*, 185 F. Supp. 717, 721 (S.D. Cal. 1960) (no formation of contract
24 where contract included clause stating agreement became valid upon Commissioner’s approval,
25 and Commissioner had not approved).

26 The second proceeding is a federal court action challenging the water transfers
27 underlying the Exchange Agreement, and seeking to enjoin transfers based on alleged NEPA and
28 Clean Air Act violations. Complaint, *People of California ex rel. Imperial County Air Pollution*

1 *Control District v. U.S. Department of the Interior*, No. 09 CV 2233 BTM JMA (Oct. 8, 2009)
2 (Hixson Dec., Ex. 6). This action will affect SDCWA’s Exchange Agreement claims if the
3 injunction to suspend water transfers is granted. The injunction would trigger the Exchange
4 Agreement’s force majeure clause, potentially relieving MWD of future obligations to provide
5 *any* water under the agreement. See Exchange Agreement (FAC, Ex. A) at ¶ 7.2(a) (entitled
6 “Force Majeure”) (the parties’ obligations are suspended if performance is prevented “by acts or
7 failure to act of any agency, court or other government authority”).

8 Because these pending litigations could moot any potential disputes about the Exchange
9 Agreement, the Court should prioritize the validation action over SDCWA’s fourth and fifth
10 causes of action. The Court should also go a step further in the direction of streamlining the
11 issues in this case and bifurcate the validation action, because, as one can see, SDCWA’s new
12 claims introduce an entire set of issues that is complex and separate from the single challenge at
13 issue in the validation action.

14 Thus, for the sake of efficiency, the Court should adjudicate the rate challenge separately,
15 as well as first, to meet the goal of speedy determination.

16 **D. Bifurcation Will Avoid Prejudice.**

17 Potential prejudice to a party is another ground for the Court to use its discretion to
18 bifurcate the proceedings. Code Civ. Proc. § 1048(b) (the court “may order a separate trial of
19 any cause of action” in order “to avoid prejudice”).

20 SDCWA’s addition of new claims to this litigation has the potential to turn a writ
21 proceeding into a large lawsuit, which SDCWA will likely contend requires burdensome
22 discovery and protracted litigation. Dragging out the rate challenge in this way would prejudice
23 MWD’s 26 member agencies. These agencies are public entities that set their budgets and water
24 rates through budgetary and rate-making processes with an eye to recovering what MWD
25 charges them. This process is affected if the validity of MWD’s rates themselves is in contest,
26 and protracted resolution of that validity will only prolong the uncertainty. Not only will the
27 uncertainty prejudice the member agencies and therefore warrant bifurcation, it also undermines
28 the purpose of the validation statutes. See *e.g.*, *Friedland v. City of Long Beach*, 62 Cal. App.

1 4th 835, 843 (1998) (“A key objective of a validation action is to limit the extent to which delay
2 due to litigation may impair a public agency’s ability to operate financially” and “[a] validation
3 action fulfills a second important objective, which is to facilitate a public agency’s financial
4 transactions with third parties by quickly affirming their legality.”).

5 Bifurcation carries the dual result of addressing the concern for prejudice codified in
6 Code section 1048(b) as well as the concern for speedy determination of the validity of an
7 agency’s action mandated in Code section 867. The Court should grant this motion.

8 **IV. CONCLUSION**

9 The Court should grant MWD’s motions to strike and sustain its demurrers to SDCWA’s
10 fourth, fifth, sixth, and eighth causes of action because these claims are invalid as a matter of law.
11 The Court should grant this motion to bifurcate to segregate the validation claims (the first
12 through third causes of action) from the remaining new claim(s) in the case. Bifurcation is
13 proper for all the reasons stated above, as well as necessary to adhere to the statutory preference
14 and goal of prompt determination expressly mandated in Code of Civil Procedure § 867.
15 Accordingly, MWD respectfully asks this Court to issue an order bifurcating the validation
16 proceeding from the other claims in SDCWA’s FAC.

17 DATED: December 2, 2011

18 BINGHAM MCCUTCHEN LLP

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21 By:


James J. Dragna

22 Attorneys for Respondent and Defendant
23 Metropolitan Water District of Southern California
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