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SUPERIOR COURT OF THE STATE OF CALIFORNIA

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

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S REPLY IN SUPPORT OF ITS DEMURRER TO AND MOTION TO STRIKE PORTIONS OF THE FIRST AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

I. INTRODUCTION

San Diego County Water Authority's ("SDCWA") Opposition to the Metropolitan Water District of Southern California's ("MWD") motion to strike and demurrer misrepresents the law, conceals controlling authority, mischaracterizes MWD, and evades the multiple grounds for dismissal articulated in the motion. It invites grave, unprecedented error that must be rejected.

Contrary to SDCWA's mischaracterizations, MWD is a full-fledged governmental public agency[1] with quasi-legislative powers—like other public agencies—not a "quasi-government entity," not a homeowners' association, not a private stock corporation. MWD is formed under and governed by its enabling act, the Metropolitan Water District Act ("MWD Act"), which vests broad discretion in its legislative body, the MWD Board, to determine its water rates. 72B West's Ann. Wat. Code–Appen. (1995 ed.) § 109-133. As a matter of law, MWD engages in a democratic, *legislative process* when it determines its rate structure and water rates.[2] The MWD Board (including SDCWA's representatives) went through that process in determining the rate structure and the water rates at issue here. Unhappy with the results, SDCWA seeks judicial relief from MWD's Board of Directors' decision. To do so, the proper legal vehicle is mandamus review (however styled), in which a highly deferential standard of review applies and evidence is limited to the administrative record. Ignoring well-settled law, SDCWA instead purports to conjure up a tort claim for breach of fiduciary duty against MWD for the manner in which it and its MAs engaged in the quasi-legislative process. The only purpose of this tort claim, apparently, is to attempt to circumvent the deferential standard and evidentiary limitations of a mandamus action. SDCWA's attempt is futile.

First, the Government Claims Act's (the "Act") immunity bars the breach of fiduciary

[1] MWD is a "public agency." *Metro. Water Dist. v. Super. Ct.*, 32 Cal. 4th 491, 497 (2004) (MWD is "a public agency engaged in procuring, storing, and delivering water").

[2] *See Brydon v. E. Bay Muni. Util. Dist.*, 24 Cal. App. 4th 178, 196 (1994) ("Given the quasi-legislative nature of [a water district's] enactment of the rate structure design, review is appropriate only by means of ordinary mandate where the court is limited to a determination of whether the [d]istrict's actions were arbitrary, capricious or entirely lacking in evidentiary support"); *Durant v. Beverly Hills*, 39 Cal. App. 2d 133, 139 (1940) ("the matter of fixing water rates is . . . legislative in character"); *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 277 (1994) ("When performed by an administrative agency, ratemaking has uniformly been considered a quasi-legislative action").

duty tort claim. Gov. Code § 810 *et., seq.* SDCWA does not dispute that Government Code § 815 bars common law tort claims and applies facially here. Indeed, § 815 states that tort liability must be based on statute, and SDCWA concedes that *no statute applies*.

SDCWA, however, argues that it circumvented § 815 tort immunity by seeking only equitable ("declaratory") relief, so its suit is allowed under Government Code § 814. Not so. SDCWA concealed *Schooler v. State of California*, 85 Cal. App. 4th 1004 (2000), which rejected this very same attempt to circumvent immunity through § 814 and forecloses SDCWA's argument here. Other problems with SDCWA's circumvention argument abound: Section 815 applies to *liability* for tort claims, regardless of the remedy; "declaratory relief" is not an available remedy for a ripe breach of fiduciary duty tort claim; judicial review by mandamus, applying substantial evidence review to the administrative record, is the exclusive vehicle for the relief SDCWA seeks, not a tort claim; and SDCWA in fact seeks money for the conduct at issue in its tort claim. Indeed, SDCWA is on the horns of a dilemma, its tort claim either seeks (or must seek) damages, which implicates § 815 immunity even under SDCWA's view; or, it seeks equitable relief to vacate MWD's rate decision, for which judicial review by mandamus is the exclusive vehicle. Either way, the claim fails.

Second, no legal basis exists for a common law fiduciary duty from MWD to any particular member agency ("MA"). SDCWA made that up. *SDCWA cites no case holding that a public agency owes a common law fiduciary duty.* Instead, SDCWA cobbles together selective quotations from inapposite, decades-old decisions regarding homeowners' associations and private corporations that are irrelevant to governmental agencies. In the decades since those decisions, *no court has extended them to impose a fiduciary duty on a governmental agency.*

For good reason: aside from immunity, extending those decisions in the manner SDCWA suggests would mean that all government agencies would potentially owe a fiduciary duty to a minority constituency that lost in the democratic process. Under SDCWA's view of the law, the California Legislature could owe a fiduciary duty to any district whose representative voted in the minority. So, too, could the San Francisco Board of Supervisors. Like MWD, "the city and county of San Francisco is a municipal corporation." *Blum v. San Francisco*, 200 Cal. App. 2d

639, 644 (1962). These and many other public entities regularly engage in a democratic, legislative process where a constituency might be in the minority on any issue. The alternative would be a requirement of unanimous vote, whereas by statute MWD must follow majority voting. If, for example, aggrieved constituents in one city district could sue the city each time they felt a council vote was unfair—as SDCWA suggests—the courts would be flooded with tort claims asking the judiciary to second-guess the legislative and executive branches. The invasion into the legislative process would create an unprecedented, grave, and momentous violation of the separation of powers and lead to absurd and dangerous results. The fiduciary duty asserted by SDCWA does not exist.

Third, MWD's anti-SLAPP motion is well taken. SDCWA evades the point that its tort claim attacks the public's ability to communicate with MWD's Board and for the Board to listen to its constituents during the legislative process. Indeed, all it attacks is legal conduct. SDCWA's principal case, *San Ramon Valley Fire Prot. Dist. v. Contra Costa Cnty. Emps'. Retirement Ass'n*, 125 Cal. App. 4th 343 (2004), is inapposite: it was a mandamus case—not a tort claim—and the fiduciary duty there was based on statute.

Similarly, SDCWA's fourth and fifth causes of action for breach of contract and breach of the implied covenant must be dismissed. They fail to comply with the claims presentation requirements of the Act. The principal allegations are time-barred. And, the implied covenant claim fails to state a cause of action.

Finally, SDCWA's response on "preferential rights" evades the central point: the broad interpretation of "purchase of water" in MWD Act § 135 by *San Diego Cnty. Water Auth. v. Metro. Water Dist.t of S. Cal.*, 117 Cal. App. 4th 13 (2004) ("*SDCWA*"), includes the water rates that SDCWA places at issue here, foreclosing its claim.

II. SDCWA'S BREACH OF FIDUCIARY DUTY CLAIM MUST BE DISMISSED

A. Government Code § 815 Precludes a Tort Claim Here

SDCWA does not dispute that its claim for breach of fiduciary duty is a tort claim. Nor does it dispute that the plain language of § 815 bars its tort claim. And, SDCWA has no substantive response to *Fidge v. Lake Cnty. Bd. of Supervisors*, which dismissed a fiduciary duty

tort claim under the Act. No. C 10-03953, 2011 U.S. Dist. LEXIS 39132 *5 (N.D. Cal. Apr. 11, 2011). Because MWD is a public entity, the Act bars SDCWA's common law tort claim.

SDCWA's assertion that "there is no rule that public entities only have fiduciary duties expressly imposed by statute" is wrong and not supported by SDCWA's citations.[3] Supreme Court authority contradicts that assertion. *See, e.g.*, *Guzman v. Cnty. of Monterey*, 46 Cal. 4th 887, 897 (2009) (holding that § 815 abolishes common-law tort claims); *see also*, *In re Groundwater Cases*, 154 Cal. App. 4th 659, 688 (2007) ("Of course there is no common law tort liability for public entities in California; such liability is wholly statutory."). Indeed, courts have broadly applied the Act's immunity to dismiss common law tort claims not based on statute.[4]

SDCWA does not dispute that a fiduciary duty must be found in a contract or imposed by law. SDCWA, however, cites no such contract. And, SDCWA does not contend that the MWD Act or any other statute creates a fiduciary duty. Instead, SDCWA invents a common law duty of government, unrecognized in California law and anathema to the Act's express purpose.

1. Government Code § 814 Does Not Save the Tort Claim

Given § 815's immunity, SDCWA seeks refuge in Government Code § 814, which states, "[n]othing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity." SDCWA's argument that its tort claim is saved by § 814 because SDCWA purports to seek "declaratory relief"—not damages—as a remedy for the liability its tort claim would impose (Opp'n at 15-16) is wrong for multiple reasons.

First, the remedy SDCWA seeks is irrelevant because § 815, on its face, abolishes *liability* for tort claims, not just *damages*. *See Miklosy v. Regents of Univ. of Cal.*, 44 Cal. 4th

[3] *Cohen v. Kite Hill Cmty. Assn.*, 142 Cal. App. 3d 642 (1983), cited by SDCWA, did not involve a public agency, and the duty there was based on a written covenant. The other cited decisions involved a clear statutory basis for liability and, in any event, *predate* the 1963 passage of § 815. *Cnty. of Los Angeles v. Super. Ct.*, 17 Cal. 2d 707, 709 (1941); *Pomona City Sch. Dist. v. Payne*, 9 Cal. App. 2d 510, 511 (1935).

[4] *See, e.g., Searcy v. Hemet Unified Sch. Dist.*, 177 Cal. App. 3d 792, 802 (1986) (dismissing common law claim for negligence); *Schooler v. State of California*, 85 Cal. App. 4th 1004, 1011-12 (2000) (nuisance); *Miklosy v. Regents of the Univ. of Cal.*, 44 Cal. 4th 876, 898-99 (2008) (wrongful termination); *Gillian v. City of San Marino*, 147 Cal. App. 4th 1033, 1050 (2007) (defamation and intentional infliction of emotional distress); *Fish v. Regents of the Univ. of Cal.*, 246 Cal. App. 2d 327, 330 (1966) (malicious prosecution); *Masters v. San Bernardino Cnty. Emps. Retirement Ass'n*, 32 Cal. App. 4th 30, 39-40 (1995) (misrepresentation).

876, 899 (2008) ("[O]ur own decisions confirm that section 815 abolishes common law tort liability for public entities"). The Act's purpose was to *limit liability* (as well as damages), to enforce the separation of powers by barring creation of new common law duties, and to limit judicial review of discretionary legislative actions to the confines of traditional mandamus actions under Code of Civil Procedure § 1085. *See Brown v. Poway Unified Sch. Dist.*, 4 Cal. 4th 820, 829 (1993) (holding that the purpose of the Act was "to confine potential governmental liability to rigidly delineated circumstances: immunity is waived only if the various requirements of the act are satisfied"); *Wood v. Cnty. of San Joaquin*, 111 Cal. App. 4th 960, 972 (2003) ("This immunity is necessary to protect the essential governmental function of making laws, so that the judiciary does not question the wisdom of every legislative decision through tort litigation."). [5]

Second, Schooler rejected SDCWA's tactic here. There, the plaintiff sued for nuisance seeking an injunction due to erosion of a state-owned bluff adjacent to his house. 85 Cal. App. 4th 1004. Just as § 815 provides immunity from the tort claims here, another part of the Act, § 831.25, provided immunity from the plaintiff's nuisance claim. The plaintiff argued that "section 814 bars the immunity provided under section 831.25 because he s[ought] injunctive relief, not money damages." *Id.* at 1013. Rejecting that argument, *Schooler* held that § 814 "cannot be applied in such a way as to circumvent either its own underlying legislative policy or that of another section in the Tort Claims Act." *Id.* The court held, "[W]ith respect to 'relief other than money or damages,' the type of relief covered cannot circumvent the underlying policies behind the governmental tort liability for money damages; any 'relief' allowed under section 814 cannot create duties that immunity provisions guard against." *Id.* at 1014. *Schooler* is controlling. As in *Schooler*, SDCWA argues that it seeks only "declaratory relief," not money damages, but granting such relief would circumvent the immunity provisions in § 815 and "create duties" and

[5] SDCWA's reference to MWD Act § 160 is irrelevant. It states, "A district may sue and be sued in all actions and proceedings and in all courts and tribunals of competent jurisdiction." This is a general capacity statute but does not expressly create any specific statutory liabilities or waive immunity provided by the Act. *See Wright v. State of California*, 122 Cal. App. 4th 659, 671-72 ("[T]he immunity provisions of the [Act] . . . will generally prevail over any liabilities established by statute. [Citations.] In short, sovereign immunity is the rule in California; governmental liability is limited to exceptions specifically set forth by statute.").

legal burdens that are otherwise barred. Like the plaintiff in *Schooler*, SDCWA cannot use § 814 to create a duty here.

Third, "declaratory relief" is not available as a remedy for a breach of fiduciary duty tort claim. SDCWA's citations do not support its assertion that declaratory relief "is an appropriate remedy for breach of fiduciary duty."[6] Opp'n at 16. On the contrary, California law is the opposite as shown by SDCWA's citation to *Canova v. Trs. of Imperial Irrigation Dist. Emp. Pension Plan*. There, the plaintiffs brought a breach of fiduciary duty claim and sought declaratory relief. 150 Cal. App. 4th 1487, 1491 (2007). Upholding dismissal of the declaratory relief claim, the court held: "Declaratory relief operates prospectively to declare future rights, rather than to redress past wrongs. [Citation] Where, as here, a party has a fully matured cause of action for money, the party *must seek the remedy of damages*, and not pursue a declaratory relief claim." *Id.* at 1497 (emphasis added);[7] *see also Cal. Ins. Guarantee Ass'n v. Super. Ct.*, 231 Cal. App. 3d 1617, 1623 (1991) ("Generally, an action in declaratory relief will not lie to determine an issue which can be determined in the underlying tort action"). Here, SDCWA alleges that its breach of fiduciary duty tort claim has matured and that it has damages. Opp'n at 17-21.

Fourth, SDCWA admits that "damages" are an essential element of a breach of fiduciary duty claim. Opp'n at 9. SDCWA's inability to seek damages means its claim must fail.

Fifth, SDCWA, in fact, seeks monetary recovery for the conduct challenged by its tort claim. SDCWA's FAC seeks to invalidate MWD's rates retroactively to April 13, 2010; it alleges a $30 million per year overcharge under those rates (FAC § 38); and it seeks to set new rates under its preferred method, which it seeks to apply retroactively. SDCWA seeks a refund of the difference, effectively seeking money from MWD for the conduct at issue. (By this motion, MWD does not address any rights to obtain money under the mandamus cause of action.)

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[6] *Cohen* does not even mention declaratory relief as the plaintiff sought "damages and a mandatory injunction." 142 Cal. App. 3d at 647. *Austin v. Turrentine*, 30 Cal. App. 2d 750, 752 (1939), did not involve a breach of fiduciary duty claim, but a declaration under an *oil lease*.

[7] This proposition is well-established. *See., e.g., Jackson v. Teachers Ins. Co.*, 30 Cal. App. 3d 341, 344 (1973) (dismissal of action for declaratory relief when plaintiff had a "matured cause of action for money"); *Travers v. Louden*, 254 Cal. App. 2d 926, 931 (1967) (affirming dismissal of "declaratory relief" that sought only to "declare that [plaintiff] is entitled to a judgment for $2,500").

2. SDCWA's Exclusive Remedy Is a Mandamus Action

The tort claim must be dismissed because the exclusive vehicle for the relief SDCWA seeks—an invalidation of MWD's rate structure and rates—is mandamus review (whether styled as a declaratory relief or validation action). *See W. States Petroleum Ass'n v. Super. Ct.*, 9 Cal. 4th 559, 567 (1995) ("[W]here an agency is exercising a quasi-legislative function, judicial review must proceed under ordinary or traditional mandamus") (citation omitted). A breach of fiduciary duty claim brought to review a public agency decision improperly attempts to bypass the walls separating governmental policy-making from *de novo* review in the courts. As one court held, "[Plaintiff's] causes of action [including breach of fiduciary duty] are no more than challenges to the administrative decision of a state agency. . . . The proper method of obtaining judicial review of most public agency decisions is by instituting a proceeding for a writ of mandate." *Bunnett v. Regents of Univ. of Cal.*, 35 Cal. App. 4th 843, 848 (1995) (citations omitted). *City of Dinuba*, cited by SDCWA, is consistent. 41 Cal. 4th 859 at 870 (overruling a demurrer to contractual claims and allowing a writ of mandate claim only). Government Code § 814's Legislative Committee Comments agree: "The appropriate way to seek review of discretionary governmental actions is by an action for specific or preventive relief to control the abuse of discretion, not by tort actions for damages."

This is significant. Mandamus review is highly deferential and limited to the administrative record. *Western States*, 9 Cal. 4th at 574, 576. SDCWA must show that MWD's decision was arbitrary, capricious, or without evidentiary support. *See, e.g.*, *Brydon*, 24 Cal. App. 4th 178, 196; *Poway Royal v. Poway*, 149 Cal. App. 4th 1460, 1479 (2007). And, courts decline to inquire into thought processes or motives, but evaluate the decision on its face because legislative discretion is not subject to judicial control and supervision. *See San Joaquin Local Agency Formation Comm'n v. Super. Ct.*, 162 Cal. App. 4th 159, 171 (2008). SDCWA cannot circumvent those standards through a fiduciary duty tort claim seeking declaratory relief.

B. MWD Has No Common Law Fiduciary Duty to Any Particular MA

Aside from § 815, SDCWA's claim fails because no common law fiduciary duty applies.

1. Homeowners' Association Decisions Are Irrelevant

SDCWA leans heavily on loose dicta in *Cohen* for its argument that MWD has a common law fiduciary duty towards each of its MAs. *Cohen* is wholly inapposite: *First*, unlike the homeowners' association in *Cohen*, MWD is a public agency—specifically a municipal corporation—not a private association with "quasi-governmental" responsibilities. As such, MWD is immune under § 815, and any liability for a fiduciary duty claim must be explicitly established by statute, not by analogy. *Cohen* did not involve a public entity and made no mention of immunity under § 815, making *Cohen* irrelevant.

Second, the homeowners' association in *Cohen* was a nonprofit corporation formed under the California Corporations Code, which directly imposes fiduciary duties on directors. *See Oakland Raiders v. NFL*, 131 Cal. App. 4th 621, 636 (2005) ("[T]he *nature of the entity* in *Cohen* was entirely different . . . As a nonprofit corporation, there were fiduciary obligations *imposed by statute* upon the officers and directors of the homeowners' association."). The Corporations Code does not apply here. In contrast, the MWD Act, which governs here, *creates no fiduciary duty.*

Third, the court held that the homeowners associations' duties in *Cohen*—whether "fiduciary" or otherwise—were based solely on the documents governing the plaintiff's relationship with the homeowners' association, called the "Declaration": "The fundamental question presented here is . . . did the complaint allege facts sufficient to establish that the Association owed a duty to plaintiffs . . . ? *Such a determination must be based on the terms and conditions of the Declaration.*" 142 Cal. App. 3d at 647, 648-54 (emphasis added). In contrast, here, no document (contract or statute) from which any fiduciary duty could emanate exists.

Finally, the language in *Cohen* stating that a private homeowners' association owes "a fiduciary duty . . . to act in good faith and to avoid arbitrary action," and that the association was "quasi-governmental," was dicta that is inapplicable here. *Id.* at 655, 651.

2. Private Corporation Fiduciary Duty Cases Are Inapposite

SDCWA attempts to apply to MWD the principle that majority shareholders in a stock corporation owe a fiduciary duty to minority shareholders to avoid self-dealing, relying on cases, such as *Jones v. H. F. Ahmanson & Co.*, 1 Cal. 3d 93 (1969). SDCWA argues that because

MWD is a municipal corporation, it must owe the same fiduciary duties to its MAs that a private corporation would to its minority shareholders. Opp'n at 9. Wrong again. *First*, municipal corporations are legally distinct from private corporations, despite sharing the name "corporation." *See* McQuillin, 1 Municipal Corporations § 2:3 (2010) ("[A] public corporation is one that is created for political purposes only, with political powers to be exercised for purposes connected with the public good in the administration of civil government, as distinguished from a private corporation, which is one created for purposes other than those of government."). Indeed, private stock-corporations do not engage in public, representative, quasi-legislative processes, and there is no concern about separation of powers in that context.

Second, these decisions are inapposite because MWD lacks the organizational structure of a private corporation. *Raiders* recognized this same point: "[T]he discussion of fiduciary duties in *Jones* was premised on the existence of a *corporation, controlling shareholders, and minority shareholders*. No such organizational structure is presented in the instant appeal." *Raiders*, 131 Cal. App. 4th at 635. The same reasoning applies here. All MAs are "minority" MAs, and no MA has a majority voting interest. SDCWA's 18% is the second largest voting interest. Majorities and minorities shift depending on the issue before the Board. Further, in a stock-corporation, minority shareholders have an expectation of a profitable return on their investment. MWD does not have shareholders. It does not exist to maximize the investment returns of any shareholders. Rather, it is a nonprofit public agency tasked to serve a broad constituency of approximately 19 million water users in Southern California.[8]

C. The MWD Act and Public Policy Preclude a Fiduciary Duty Here

SDCWA evades the point that the MWD Act as well as *Raiders preclude* a fiduciary duty here (Opening Brief ("OB") at 12-15): Because the majority vote requirement under the MWD Act *requires* the Board to act at times against the desires of MAs in the minority, MWD cannot

[8] Courts have refused to extend fiduciary duties in a corporate stock-corporation context to government agencies. *See, e.g.*, *City of Falls City v. Nebraska Muni. Power Pool*, 279 Neb. 238, 249 (Neb. 2010) (no fiduciary duty claim against quasi-municipal corporation, stating "[i]nterlocal agencies entrusted with a duty to the public at large are not judged under the same principles governing private, for-profit corporations.").

have a duty to protect the best interest of any single MA. SDCWA's response is to point to *the common law of private corporations*, which neither applies nor can be harmonized with the MWD Act. Opp'n at 11.[9] SDCWA's response to the ethics guide is similarly evasive and convoluted. OB at 13. The guide shows that MWD Board members do not have duties to other districts. *Id.* Elsewhere, SDCWA admitted that MWD's Board's "fiduciary duty is to MWD–not the member agencies." Reply RJN at 1. SDCWA's position here cannot be reconciled.

D. MWD Asserted that SDCWA Failed to Allege Breach of Duty

Contrary to SDCWA's assertion, MWD contested breach, showing that the conduct alleged to have been a breach *was legal*. OB at 15:24-16:13. SDCWA has no effective counter.

E. The Anti-SLAPP Statute Bars the Fiduciary Duty Claim

Although SDCWA's fiduciary duty claim is meritless, SDCWA seeks to burden MWD with attorneys' fees and costly discovery to discourage MAs from meeting, communicating, and advocating positions to MWD's Board—hallmarks of a SLAPP suit. *See Graffiti Protective Coating, Inc. v. City of Pico Rivera*, 181 Cal. App. 4th 1207, 1215 (2010) ("[A] common characteristic[] of a SLAPP suit is its lack of merit. . . . the plaintiff does not expect to succeed" but wants to "tie up the defendant's resources.").

SDCWA argues that its fiduciary duty claim is not barred because it "is not based on ***anyone's*** speech or petitioning activity," but on MWD's rate-setting action. Opp'n at 7. If true, then its action sounds exclusively in mandamus—not a tort claim. *See Bunnett*, 35 Cal. App. 4th at 848. For this reason, *San Ramon* is inapposite: the claim there was for mandamus, claiming a breach of a fiduciary duty established by statute. 125 Cal. App. 4th at 347. The anti-SLAPP motion failed because "the Board was not sued based on the content of speech" but rather on the substance of its legislative decision. *Id.* at 357. Here, SDCWA's mandamus cause of action challenges the substance of MWD's rates, and is not challenged by MWD's anti-SLAPP motion.

But SDCWA's tort claim attacks the legislative process directly. It insinuates that "letters

[9] *Am. Motors Sales Corp. v. New Motor Vehicle Bd.*, 69 Cal. App. 3d 983 (1977), and *Roussey v. Burlingame*, 100 Cal. App. 2d 321 (1950), are irrelevant, as neither involved fiduciary duty claims, and the constitutional validity of the MWD Act or MWD's Board is not at issue.

addressed to the Metropolitan Board" from the MAs, meetings between MA staff and their MWD representative and MWD staff with the MAs, and ultimately the MWD Board's decision to vote for policies that run counter to SDCWA's preferences all constitute "undue influence and control"—all while failing to assert a single violation of a statutory enactment prohibiting the alleged conduct. FAC ¶ 100. This aspect of SDCWA's claim is a direct challenge to "the Council engaging in the business of governing, with the accompanying exercise of speech and petition rights," which was found to be protected under *Holbrook v. City of Santa Monica*, 144 Cal. App. 4th 1242, 1249 (2007), as well as the MWD Board's right to receive information from its MAs. *See Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 485 (2000) (California Constitution affords freedom of speech rights "not only to one who speaks but also to those who listen."). If SDCWA now claims it solely challenges the validity of MWD's rates under statute, then its claim is for mandamus. If, as it appears, SDCWA challenges the purported "undue influence" caused by the MAs' lawful exercise of their right to petition and of free speech, then its meritless SLAPP suit must be stricken.[10]

III. SDCWA'S CONTRACT AND IMPLIED COVENANT CLAIMS FAIL

A. The Exchange Agreement Does Not Excuse Compliance with the Act

SDCWA contends that Exchange Agreement Sections 5.2 and 11.1 contain claims presentation requirements that supplant the Act. Opp'n at 23-25. Not true. To supplant the Act's procedures, a contract must contain its *own* claims presentation procedures and indicate that they supplant the Act. Gov't Code §§ 930.2, 930.4; *see also Arntz Builders v. City of Berkeley*, 166 Cal. App. 4th 276, 280 (2008). The *Arntz* contract, for example, had a multi-faceted, explicit claims procedure and stated that "the Contractor's sole and exclusive remedy is to file a claim in accordance with this Paragraph." *Id.* at 280. In contrast, neither Sections 5.2 nor 11.1 mentions claims presentation procedures. Section 5.2 only references the contract price, a 5-year stand still provision, and an attorneys' fees clause. FAC, Ex. A at 16-17. Section 11.1 merely requires the

[10] SDCWA's claim for attorneys' fees is unwarranted under Civ. Proc. Code § 425.16(c)(1) and procedurally flawed under Civ. Proc. Code § 128.7(c)(1), which requires a request for sanctions to be filed "separately from other motions."

parties to negotiate disputes. *Id.* at 24.

1. MWD Did Not Admit that Claims Presentation Was Satisfied

MWD did not, as SDCWA contends, concede in a May 27, 2010 email and a July 7, 2010 letter that SDCWA satisfied the Act's requirements. The May 27 email, and the July 7 letter stated that SDCWA had exhausted its administrative remedies regarding MWD's adoption of its water rates. Jackson Decl., Exs. S, A. Neither stated that SDCWA had satisfied the requirement of submitting a *claim* regarding those rates. *Id.* The references to Exchange Agreement Sections 5.2 and 11.1 are irrelevant as neither section concerns claims presentation.

2. SDCWA's Did Not Trigger the "Defense-Waiver" Provision

SDCWA argues that its May 3, 2010 and February 10, 2011 letters disclosed the existence of their breach of contract claim and thus must be treated as "claim[s] as presented" under MWD's Administrative Code's "defense-waiver" provision and that MWD waived any defects. Opp'n at 25. This is wrong. To trigger the "defense-waiver" provision, the "claim" must make "it readily discernible by the entity that [its intended purpose] is to [assert] a compensable claim [for damages] which if not otherwise satisfied, will result in litigation." *Green v. State Ctr. Cmty. Coll. Dist.*, 34 Cal. App. 4th 1348, 1358 (1995). Neither letter qualifies.

May 3 Letter: The May 3 letter is an invitation to negotiate a rate dispute—it is entitled "Request for Negotiation" and requests that MWD advise SDCWA "whether [MWD] is interested in negotiating this dispute." Jackson Decl., Ex. R. A request to negotiate does not trigger the "defense-waiver" provision. *Schaefer Dixon Assocs. v. Santa Ana Watershed Project Auth.*, 48 Cal. App. 4th 524, 533-34 (1996) (letter was a "request [for] negotiation of an ongoing dispute" and did not trigger the "defense-waiver" provision); *Dilts v. Cantua Elementary Sch. Dist.*, 189 Cal. App. 3d 27, 37-38 (1987) (same as to settlement letter threatening suit). Also, a letter demanding a response in less time than the applicable Administrative Code allows cannot trigger the "defense-waiver" provision because it demonstrates that even the *plaintiff* did not view it as a "claim." *Schaefer*, 48 Cal. App. 4th at 534, 537 (letters demanding responses in less time than Code allows did not trigger "defense-waiver" provision). Here, the letter demanded a

response in 11 days, while the Code allows 20. *Id.* Ex. R; MWD Admin. Code § 9303.[11]

February 10 Letter: A contract-based claim is barred when the purported claim that preceded it fails to mention the alleged contractual obligation. OB at 17-18; *Doe 1 v. City of Murrieta*, 102 Cal. App. 4th 899, 920-21 (2002). The February 10 letter here mentions neither the Exchange Agreement nor any breach. Jackson Decl., Ex. T.

MWD did not "waive" defects. Where, as here, the ostensible claims were insufficient to trigger the "defense-waiver" provision, no waiver occurs when the recipient fails to point out any defects in them. *Schaefer*, 48 Cal. App. 4th at 536 ("The contractor's contention that the agency waived its right to object to any defects in the November 15 letter as a claim" when the letter was insufficient to trigger the "defense-waiver" provision, "is thus revealed to be absurd").

3. SDCWA Did Not Present an Implied Covenant Claim

SDCWA argues that its August 26, 2011 purported Government Code claim encompasses its breach of the implied covenant in the Exchange Agreement claim. Opp'n at 26. To encompass a contract-based cause of action, the claim must, at a minimum, mention the contract containing the supposed obligation. OB at 17; *Murrieta*, 102 Cal. App. 4th at 920-21; *Crow v. State of California*, 222 Cal. App. 3d 192 at 200-202 (1990). *Stockett v. Ass'n of Cal. Water Agencies Joint Powers Ins. Auth.*, 34 Cal. 4th 441 (2004), does not say otherwise; it did not even involve a contract-based claim. The August 26 letter mentions neither the Exchange Agreement, nor any purported implied covenant breach under the Exchange Agreement, nor any intent to sue for related damages. *See* Jackson Decl., Ex. U. Because no Government Code claim encompasses the implied covenant claim, it is barred.

B. The Breach of Contract Claim Is Time-Barred

SDCWA's claim for breach of contract is time-barred, because SDCWA failed to present

[11] SDCWA's argument that it made "a claim as presented" concedes that the letters failed to substantially comply with the Act. *See Phillips v. Desert Hosp. Dist.*, 49 Cal. 3d 699, 708 (1989). The "doctrine of substantial compliance [] cannot cure total omission of an essential element from the claim." *Loehr v. Ventura Cnty. Cmty. Coll. Dist.*, 147 Cal. App. 3d 1071, 1083 (1983). SDCWA's May 2010 letter fails to give a general description of the damages incurred, or the amount claimed. *See* Jackson Decl., Ex. R; MWD Admin. Code § 9302(d), (e). SDCWA's February 2011 letter fails to state the date, place and other circumstances of the occurrence which gave rise to the claim asserted. *See* Jackson Decl., Ex. T; MWD Admin. Code § 9302(c).

a Government Claim within one year of the alleged breach. OB at 18-19. SDCWA's only response is that the statutory claims procedures do not apply, and that if they do, SDCWA complied with them. Opp'n at 26. As explained above, those arguments fail.

C. SDCWA's Breach of the Implied Covenant Claim Fails

SDCWA misstates both the law and MWD's argument regarding breach of the implied covenant. "'The implied covenant of good faith and fair dealing is limited to assuring compliance with the *express terms of the contract.*'" *Pasadena Live v. City of Pasadena*, 114 Cal. App. 4th 1089, 1094 (2004) (emphasis added; quoting Witkin). SDCWA's sole argument for breach of the implied covenant is that MWD allegedly deprived SDCWA of the right to sue MWD under the Exchange Agreement after the five-year stand-still period by invoking the RSI Clause. Opp'n at 27:18-26. This argument fails. *First*, SDCWA cites no express term permitting SDCWA to sue MWD.[12] *Second*, MWD did not prevent or preclude SDCWA from suing under the Exchange Agreement. Indeed, SDCWA *has sued* MWD for breach of the Exchange Agreement in the fourth cause of action in the FAC. SDCWA's argument is both legally and factually impossible.

D. SDCWA's Allegations in FAC Paragraph 93 Are Time-Barred

SDCWA argues that the allegations in FAC Para. 93 are not time-barred because the Exchange Agreement supplants the Act's presentation requirements and that it complied with the Act. This fails for the reasons stated above. It also fails because SDCWA failed to submit a "claim" within a year of the alleged "breaches." Even its August 26, 2011 letter was far too late.

IV. THE DECLARATORY RELIEF CLAIM FOR PREFERENTIAL RIGHTS FAILS

SDCWA does not deny that *SDCWA* interpreted the phrase "purchase of water" in MWD Act § 135 to encompass *all water rate payments*, whether for transportation costs or supply costs. 117 Cal. App. 4th at 26.[13] OB at 22. That broad definition of "purchase of water" includes any

[12] The Exchange Agreement contains no express provision permitting SDCWA to sue after the stand-still period. It clarifies that, after the five-year standstill, "nothing herein shall preclude SDCWA from contesting in an administrative or judicial forum whether [MWD's rates] have been set in accordance with applicable law and regulation." FAC, Ex. A at 16-17 (emphases added). MWD did nothing affecting compliance with that provision.

[13] MWD's interpretation of MWD Act § 135 is entitled to great weight. *See SDCWA*, 117 Cal. App. 4th 13, 17, 22 (2004) (citing rule that "the judiciary . . . accords great weight and respect to the administrative construction" regarding MWD's interpretation of the MWD Act).

water rate, including the price for MWD's delivery of water under the Exchange Agreement at issue here, which SDCWA refers to as a "transportation rate." *See* FAC ¶¶ 3, 25, 26; FAC Ex. A. ¶ 3.2(a). SDCWA fails to contradict this fundamental point. Indeed, SDCWA does not deny that it wrongfully attempts to equate "purchase of water" under § 135 with "Supply Rate" under MWD's unbundled rate structure. "Purchase of water" under § 135 includes "Supply Rate" as well as other unbundled rate elements that include transportation costs, including those here.

SDCWA's claim that the "previous case was about MWD water; this case is about third-party water that MWD transports" is both beside the point and false. Where the water comes from is irrelevant for the definition of "purchase of water" under *SDCWA*; and the water MWD provides under the Exchange Agreement can come from any source. FAC, Ex. A, §§ 1.1(m) and 3.2. SDCWA's assertion regarding whether MWD's rates were unbundled when the lawsuit was started is both irrelevant and misleading. *SDCWA* recognized that MWD had unbundled its rates during the course of the litigation. *Id.* at 24 n.5. Contrary to SDCWA's misrepresentations: MWD has provided transportation services since its wheeling rate was established in January 1997, prior to *SDCWA*; and MWD did not state in its initial disclosures that the "Price" under the Exchange Agreement is not for the "purchase of water" under § 135, but rather that the components of its Transportation Charge are not dependent on the "actual supply of water." (MWD's Initial Disclosures at 21:6-16.) SDCWA's eight cause of action should be dismissed.

V. CONCLUSION

Based on its opening papers and the foregoing, MWD respectfully requests the Court to sustain the demurrer and grant the motion to strike.

Dated: December 27, 2011

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