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EXEMPT FROM FILING FEES
[GOVERNMENT CODE § 6103]

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, et al.

Respondents and Defendants.

Case No. CPF-12-512466

STIPULATION RE MOTION TO STRIKE PORTIONS OF THE PETITION/COMPLAINT; [PROPOSED] ORDER

Plaintiff and Petitioner San Diego County Water Authority ("SDCWA"), Defendant and Respondent Metropolitan Water District of Southern California ("MWD"), Defendant and Respondent Imperial Irrigation District ("IID"), and Real Parties in Interest City of Torrance, Three Valleys Municipal Water District, City of Los Angeles, Las Virgenes Municipal Water District, Foothill Municipal Water District, Eastern Municipal Water District, Western Municipal Water District, West Basin Municipal Water District, City of Glendale, and Municipal Water District of Orange County, by and through counsel, hereby stipulate as follows:

WHEREAS, on or about April 17, 2012, SDCWA filed its Second Amended Petition/Complaint ("SAC") in a related action known as *San Diego County Water Authority v. Metropolitan Water District of Southern California, et al.*, San Francisco Superior Court Case No. CPF-10-510830 ("*2010 Rate Action*"), in which SDCWA challenges MWD's water rates adopted on April 13, 2010;

WHEREAS, on May 22, 2012, MWD filed a motion to strike portions of the SAC in the *2010 Rate Action*, challenging three sets of allegations described in the notice of motion and motion as follows: (A) "Allegations Regarding the Working Group of Certain Member Agencies"; (B) "Allegations Regarding Proposition 13"; and (C) "Allegations Regarding Non-Constitutional Challenges to MWD's Rate Structure";

WHEREAS, the motion to strike in the *2010 Rate Action* was heard by and orally ruled upon by the Court during a hearing on July 2, 2012, the transcripts of which are attached hereto as Exhibit A;

WHEREAS, with respect to the "Allegations Regarding the Working Group of Certain Member Agencies," the Court's ruling is reflected at pages 40:26-43:1 and pages 62:27-63:6 of the July 2, 2012 transcripts;

WHEREAS, on June 8, 2012, SDCWA filed the Petition/Complaint in this action in Los Angeles County Superior Court challenging MWD's water rates adopted on April 10, 2012 ("*2012 Rate Action*");

WHEREAS, on August 6, 2012, MWD filed a motion to strike portions of the Petition/Complaint in the *2012 Rate Action* concerning allegations "regarding a working group of

certain MWD member agencies and related matters" as described in the notice of motion and motion, which raises substantially similar legal and factual issues as the part of the motion to strike portions of the SAC in the *2010 Rate Action* concerning "Allegations Regarding the Working Group of Certain Member Agencies";

WHEREAS, the *2012 Rate Action* was transferred to San Francisco Superior Court and assigned to this Court on September 13, 2012; and

WHEREAS, MWD has separately re-noticed the motion to strike in the *2012 Rate Action* to be heard by this Court.

IT IS THEREFORE STIPULATED BY THE PARTIES THAT,

(1) The Court's ruling on MWD's motion to strike portions of the Petition/Complaint in the *2012 Rate Action* concerning allegations "regarding a working group of certain MWD member agencies and related matters" may be the same as the Court's ruling on MWD's motion to strike portions of the SAC in the *2010 Rate Action* concerning the "Allegations Regarding the Working Group of Certain Member Agencies," as reflected at pages 40:26-43:1 and 62:27-63:6 in the transcript of the Court's hearing on July 2, 2012, attached hereto as Exhibit A. The Court's rulings concerning the "Allegations Regarding the Working Group of Certain Member Agencies" challenged in MWD's motion to strike portions of the SAC in the *2010 Rate Action* should apply to the allegations "regarding a working group of certain MWD member agencies and related matters" challenged in MWD's motion to strike portions of the Petition/Complaint in the *2012 Rate Action*.

(2) MWD's arguments in its motion to strike portions of the SAC in the *2010 Rate Action*, SDCWA's objections and arguments raised in response to the motion to strike in the *2010 Rate Action*, MWD's arguments and objections raised in reply in support of the motion to strike in the *2010 Rate Action*, and the parties' arguments and objections made during the July 2, 2012 hearing in the *2010 Rate Action* are preserved for appellate purposes in the *2012 Rate Action*.

(3) MWD may have 10 court days from the notice of entry of the order based on this stipulation to file an answer in response to the Petition/Complaint in the *2012 Rate Action*.

Dated: October 24, 2012

By: MORRISON & FOERSTER LLP

/s/ S. Raj Chatterjee
S. RAJ CHATTERJEE

Attorneys for Respondent and Defendant METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Dated: October 24, 2012

KEKER & VAN NEST LLP

/s/ Warren A. Braunig
By: WARREN A. BRAUNIG

Attorneys for Petitioner and Plaintiff SAN DIEGO COUNTY WATER AUTHORITY

Dated: October 24, 2012

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

/s/ Mark L. Hattam
By: MARK L. HATTAM

Attorneys for Defendant and Respondent IMPERIAL IRRIGATION DISTRICT

Dated: October 24, 2012

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/s/ Patricia J. Quilizapa
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Attorneys for Defendant and Respondent MUNICIPAL WATER DISTRICT OF ORANGE COUNTY

Dated: October 24, 2012

CITY OF TORRANCE

/s/ Patrick Q. Sullivan
By: PATRICK Q. SULLIVAN

Attorneys for Respondent and Defendant CITY OF TORRANCE

Dated: October 24, 2012

BRUNICK, McELHANEY & BECKETT

/s/ Steven M. Kennedy
By: STEVEN M. KENNEDY

Attorneys for Respondent and Defendant THREE VALLEYS MUNICIPAL WATER DISTRICT

Dated: October 24, 2012

LEMIEUX & O'NEILL

/s/ Christine Carson
By: CHRISTINE CARSON

Attorneys for Respondent and Defendant WEST BASIN MUNICIPAL WATER DISTRICT, FOOTHILL MUNICIPAL WATER DISTRICT, EASTERN MUNICIPAL WATER DISTRICT, WESTERN MUNICIPAL WATER DISTRICT, and LAS VIRGENES MUNICIPAL WATER DISTRICT

Dated: October 24, 2012

CITY OF GLENDALE

/s/ Dorine Martirosian
By: DORINE MARTIROSIAN

Attorneys for Respondent and Defendant CITY OF GLENDALE

Dated: October 24, 2012

CITY OF LOS ANGELES

/s/ Janna Sidley
By: JANNA SIDLEY

Attorneys for Respondent and Defendant CITY OF LOS ANGELES

Based on the foregoing Stipulation of the parties and good cause appearing therefor, IT IS HEREBY ORDERED THAT:

1. The Court's ruling on MWD's motion to strike portions of the Petition/Complaint in the *2012 Rate Action* concerning allegations "regarding a working group of certain MWD member agencies and related matters" is the same as the Court's ruling on MWD's motion to strike portions of the SAC in the *2010 Rate Action* concerning the "Allegations Regarding the Working Group of Certain Member Agencies," as reflected at pages 40:26-43:1 and 62:27-63:6 in the transcript of the Court's hearing on July 2, 2012, attached hereto as Exhibit A. The Court's rulings concerning the "Allegations Regarding the Working Group of Certain Member Agencies" challenged in MWD's motion to strike portions of the SAC in the *2010 Rate Action* apply to the allegations "regarding a working group of certain MWD member agencies and related matters" challenged in MWD's motion to strike portions of the Petition/Complaint in the *2012 Rate Action*.

2. MWD's arguments in its motion to strike portions of the SAC in the *2010 Rate Action*, SDCWA's objections and arguments raised in response to the motion to strike in the *2010 Rate Action*, MWD's arguments and objections raised in reply in support of the motion to strike in the *2010 Rate Action*, and the parties' arguments and objections made during the July 2, 2012 hearing in the *2010 Rate Action* are preserved for appellate purposes in the *2012 Rate Action*.

3. MWD shall have 10 court days from the notice of entry of this Order to file an answer in response to the Petition/Complaint in the *2012 Rate Action*.

Dated:

_____
HON. RICHARD A. KRAMER
San Francisco Superior Court

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO
BEFORE THE HONORABLE RICHARD A. KRAMER, JUDGE
DEPARTMENT NO. 304
---oOo---

SAN DIEGO WATER AUTHORITY, Petitioner and Plaintiffs, vs. METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; ALL PERSONS INTERESTED IN THE VALIDITY OF THE RATES ADOPTED BY THE METROPOLITAN WATER DISTRICT OF SHOUTHERN CALIFORNIA ON APRIL 13, 2010 TO BE EFFECTIVE JANUARY 2011; And DOES 1-10. Respondents and Defendants.	**CASE NO: CPF-10-510830**
	Pages 1 - 67

REPORTER'S TRANSRIPT OF PROCEEDINGS
San Francisco Superior
San Francisco, California
Monday, July 2, 2012

Reported by:
LINDA S. FORSTER, CSR No. 13286

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in Barratt was. But there was no argument in that case that any challenge to any adoption of the rate, whether it was in '71 or subsequent, was timely.

Here we have an instance where within 60 days of the readoption of the rate allocation in 2010, there was a timely challenge. That's very, very different.

Certainly, nothing in the Aughenbaugh case says that rate allocation dividing a rate into different components and putting components into different buckets, that's part of the method of financing. That's a loss that Met is putting on that. That's not in that case; that's not in any other case. In fact, in this case, it's undisputed as a matter of fact that it's not part of the covenants because none of the bondholders relied on it, and Met has told them not to rely on it.

So really what Met is arguing here is that it could make an unlawful decision ten years ago, and then it can keep remaking that decision, reinstituting those rates for one-year and two-year increments for time immemorial, and nobody can do anything about.

That's what it boils down to.

THE COURT: Thank you.

Let's go to the motion to strike now.

Do you want a tentative ruling?

MR. BROSNAHAN: Yes, your Honor.

THE COURT: I'll give you the bottom line tentative ruling on the Motion to Strike.

I think the most significant aspect aside from the

Prop 13 questions on the Motion to Strike, has to do with the scope of what will be discovery here.

I think that the Motion to Strike clearly shows the difference between a claimed reason for the alleged inappropriate decisions by Metropolitan and the decisions themselves. In other words, it might be, if I don't sustain the demurrers, that the focus of the case will be whether or not applicable legal standards for why the decisions were complied with, not why they weren't.

I think that the Motion to Strike points out throughout the Complaint places where the why part of it would be covered by the Complaint if I allowed all that language to stay in there. "Shadow government," and I can't remember some of the other terms.

MR. BROSNAHAN: "Hand in glove."

THE COURT: "Hand in glove."

MR. BROSNAHAN: "Self-interest."

THE COURT: I knew you would be able to come up with it.

MR. BROSNAHAN: Yes, your Honor.

THE COURT: So then I look at what this thing would look like if I took all those words out. It would read like a James Joyce novel, which some of you people, I think, do in your spare time anyway, but I think with a Complaint that's difficult to ascertain.

My tentative view -- apart from Prop 13, I want to hear argument on that -- would be as an alternative to striking out the offending words, issue an order that

clearly says that the nature of the supposed shadow group, and Metropolitan's view of it, has nothing to do with anything in this case, but instead, discovery will be limited to the nature of the decisions that were made and whether they comply with the applicable legal standards so that we have a clear definition of what's going to happen going forward, assuming we go forward here.

I think that would be a better way of handling it. That order would not say that the nature of the group or Metropolitan's view or participation in it is in all context irrelevant, but it would require a specific court order from me to get any discovery that falls into that category. That is probably, in my view, a heck of a lot easier than going through and chopping up the Complaint and going forward. It would certainly be easier for a discovery referee to manage what I would have in mind here.

So my tentative view is to -- tentative ruling apart from the other arguments, would be to recognize it and order that the adjectives, adverbs, and other colorful descriptions are not part of this case, but to strike them and try to recast the Complaint would be too awkward. Make a generic discovery ruling that could be followed by a discovery referee, but reserve the possibility in some context so somehow that those matters could be reasonably calculated to lead to the discovery of admissible evidence, but limit the discovery in that instance to a court order, not a referee -- to come here, not to the referee to get that discovery.

That's my tentative view.

MR. BROSNAHAN: Yes, your Honor. Thank you for that. It anticipates some of the things I was going to say. With the Court's permission, I'd like to proceed and make a couple of points.

The first one is responsive to what your Honor just said, which is the Motion to Strike is, among other things, a management tool. That is to say, when it makes sense, then it is used.

I was surprised -- I'll share this with Court -- on Saturday to hit California cases and Motion to Strike and to get 9,004 responses of which 38 were for publication. That is to say, there's a lot of them. A lot of that is a SLAPP statue, but it's a management tool when the Court is satisfied that allegations under section 436 are irrelevant. That is our first position.

Then the close cousin of irrelevant is, under B, not in conformity with law of the state. Our view is these allegations are legally colorless. They do not allege anything. I heard what your Honor said, and I won't take the Court's time to say all the things I was going to say about it, but I will say that in addition to those two grounds, the allegations that your Honor has spotted, read like a press conference, and there's a reason for that.

I find it difficult to convince the Court that improper -- which is another word in the section that should not be used -- but those allegations immediately find their way into the publications as the justification by these

plaintiffs for whatever it is that they're doing.

So it's an added, at least atmospheric, as to why we think that your Honor should consider striking the allegations.

There's three categories as your Honor referred to. The first one is the working group allegations. We attached to our motion a color-coded section. Perhaps your Honor has already used that. I brought an extra copy if your Honor wants one.

THE COURT: That was the basis of my James Joycian comment.

MR. BROSNAHAN: Yes, your Honor. It's not Dubliners, and it's not Ulysses.

THE COURT: I knew if I threw that out --

MR. BROSNAHAN: It was the Irish, if the Court please, I digress.

THE COURT: As always, I know.

MR. BROSNAHAN: They were and are a great people, as your Honor well knows.

All right. Try to regain some bar of professionalism on a Monday morning, if the Court please.

The working allegations are legally colorless, not for a minor technicality, not because we have some argument, but because the California Supreme Court and Courts of Appeal have repeatedly over and over again held what your Honor's role in a case like this is, and that is the limited review of whether there was a proper basis for the rates. Not how they're gone into, not who said what to whom, not

whether third parties -- because I wish to mark the point for your Honor's reference even in the future -- the participants of the board of Metropolitan all are separate corporations, and they have separate businesses; they have separate occupations that they do, and if they want to meet somewhere, it is legally supportable in a whole range of ways.

And the Wheeling statute, which has been referred to in this case and which is related in some ways here, is quite explicit about the burden. If the Court finds that the determination is supported by substantial evidence, that is the jurisdictional directive of the law of California, and your Honor acknowledged it when we were here in January in terms of the boxes. They have to be reviewed, and case after case -- I won't cite side all of them, but I was ready to -- cite California cases which make it very clear that the Court is not to substitute its own judgment -- there's no slight of suggestion that your Honor has any interest in doing that -- as to what makes good rates, but rather did the board have a substantial basis for what they did? This is not dart throwing; this is rather serious collections and work over many months and much though about them.

So the working group allegations, all of it which is directed away from the Court's review. As I understand it, your Honor will have to decide the rates at some point in terms of what the standard is, and we will get to all of that.

Now, the cases -- and this is interesting, I found

this. Justice Tobriner, always the scholar, in talking about the point I just made, talked about a case that I remembered from law school called Fletcher versus Peck decided in 1810 -- I'm not going to take your Honor's time -- but when government, in this case the quasi-governmental activity, is being done, at the beginning of the republic, it was decided they're not going to go into the mental state. The contract, forgive me, wreaks of mental state. What they're talking about is using terms that have already been rejected in the case law like "rubber stamping." There's actually a case that says, you can't attack a quasi-governmental activity.

So it's a huge distraction from the business that ought to cause us in this case to get to the main point and the main work that the Court has to do and get down to whether there was a substantial basis. No surprise, we think there was, of course, but that's to be determined.

So to the extent that able counsel for the plaintiffs, they were trying to lead with no remedy; that's not at all our position. Our position is that your Honor at some point will have to review the record, and there will be a little back and forth, I guess, before we're done about the record, but that's really what the Court has to do.

Now, your Honor mentioned Prop 13, and may I address that if the Court please.

Prop 13 provided a provision with regard to taxes. And the Prop 13 came along when it was suggested that Prop 13 might somehow relate to rates that were being

charged by government because government has the taxing authority, but it also engages in certain types of business in this case. Quasi-governmental groups are engaging in the water business, and water in a way is a type of business.

Two cases came along. The ones that we could find, and they said, in those cases, that the rates in question in those cases were not taxes. The first one was in 1994, and that was the Brydon case, and in that case, there was an assessment -- there was a rate structure and so forth. But the Court took its time to explain why it was that this was not a tax. One of the reasons was it was a type of service, and the service could be discontinued. It could be reduced, which as we know, you cannot reduce your taxes. Nothing is surer than taxes.

Prop 13 was explicitly argued in that case. So it was held, in that case, that what they were considering there were not taxes.

Then Rincon came along and quoted and went through it in even more detail and made the distinction between that the government is charging a lot of people or charging somebody for a service. So strong are these two cases that the plaintiffs came along and threw into their brief Prop 26, which they hadn't played. So the words about Prop 26 have no meaning in this case. They are not before your Honor, and they do not save the Motion to Strike, which we made here.

The sooner that matter is out of the case and back to the concept of management, the sooner all of us -- and I

must say including your Honor -- would be spared from all matter of motion practice, and you referred to the discovery practice -- we accept the idea of the discovery under the Wheeling statute as interpreted by your Honor subject to later proceedings or something -- but we understand that part. But here we are with full armies in the field and about to litigate something that the Courts have said is not -- cannot be litigated and should not be litigated.

THE COURT: Won't that depend on factual matters regarding the nature of this imposition?

MR. BROSNAHAN: Well, I don't think that the Complaint, which is the operative document for the purposes of the Motion to Strike, makes a case that it's a factual matter. As I stand here, I can't imagine what the facts would be that would, in the face of the law, be able to allege in good faith -- which it must be, of course, and with this lawyers would be in good faith -- that somehow the water rates established by Metropolitan for its allied agencies over a long period of time -- those agencies are quite sophisticated -- is somehow convertible into a tax.

I can't imagine that they can allege that, and they have not alleged it as a tax. It's not there. So they have argued Prop 13. They have called it that, and they have tried to argue it, but it is unsupported. It is imminently suitable for striking, and the sooner, in our view, we submit this to the Court for consideration, that your Honor strikes it, the closer we will be to getting what is the core issue for the Court. So that's our position on

that.

Now, the third point, which I will mention ever so briefly, is the striking of statutory defects and the validation that your Honor has heard very thorough and excellent arguments from both sides this morning. Your Honor has asked some questions. I will not go into that. It's an alternative way of looking at that issue.

But in terms of the validation, if your Honor would so dispose, then it's another way to look at the allegations about validation, and that's why we put it as an alternative to the demurrer. Your Honor heard that. The arguments really are the same, if the Court, pleases.

That's our argument.

THE COURT: Thank you.

MR. BROSNAHAN: Thank you.

MR. PURCELL: Taking your Honor's comments about discovery and the interplay between the Motion to Strike issue and the discovery issues that are ongoing in the case, as your Honor knows, there's another hearing set for August 3rd. It may make more sense to decide these issues in the context of that discovery hearing. The discovery requests that we propounded and the recommendations that Judge Warren has already issued, but that said --

THE COURT: I still have to rule on the Motion to Strike though.

MR. PURCELL: That's correct, but if your Honor were disposed to deny the Motion to Strike on a condition to proving those allegations relevant later on in the case,

that would be one way to go. My only point is that you're going to have an opportunity to do that in the very near future to actually evaluate the relevance of these allegations to discovery.

The first thing I want to point out here this that this is a Motion to Strike. We're talking about the pleadings. We're not talking about entitlement to discovery. We're certainly not talking about admissibility at trial, and we're not talking about summary judgment. We're talking about the pleadings. It's generally not proper to bring a Motion to Strike like this, which really is a Motion to Dismiss, a demurrer in the clothing of a Motion to Strike.

One thing that Mr. Brosnahan said is that these allegations about the working group are disconnected from the actual legal decision that's going to be made here, the basis of Met's rates. That's just wrong. The basis of Met's rates in this case was not Metropolitan's cost of service. It was not recovering what it was paying out for these particular rates. It was a deliberate arbitrary and capricious attempt to discriminate against San Diego and its rate payers.

They want to say that doesn't matter, but that was, in fact, the basis of their decision. If you discriminate against somebody for irrational reasons, that's arbitrary and capricious, and that does invalidate the rates. There's case law that says this and that deals with this.

In the case that we cited on our briefs, and our favorite is the Parr case, which your Honor might remember as the "hippies get off the grass" case from Carmel. What that case was about, was about a city ordinance that on its face was neutral. On its face, it was completely unobjectionable, but the intention behind it was to discriminate against a particular class of citizens that the Carmel City Counsel had decided were undesirable.

The Supreme Court said, no, you can't do that. It doesn't matter that the woman who was actually the plaintiff in Parr wasn't a hippie. She was a shopkeeper in Carmel who disagreed with the ordinance, and she sat down on the grass, and she was arrested. The Court said, that doesn't matter. Because you passed this legislation with the discriminatory motive, you can't do that.

Met tries to distinguish Parr in its papers by talking about, oh, well, San Diego is talking about these equal protection cases that involve protected classes. Well, not in Parr. As much as I would like them to be here in San Francisco, hippies are not a protected class. They never have been. As I said, that ordinance was completely facially unobjectionable, but the discriminatory motive still rendered it invalid.

There's a prior case from the Supreme Court, the Maxwell case, which was a pleadings case, and what the Court in Maxwell said is that where you've alleged that legislature proceeded, due to corruption or improper motive, that that's okay at the pleading stage.

They want to say that Parr and Maxwell don't matter because they're subsequent California Supreme Court cases that go the other way. None of those cases overruled Maxwell or Parr. If you look at the two cases from 1975 that they cite, they cite Maxwell and Parr in CF clauses. They say, basically, we're dealing with a different situation here. As we pointed out in our papers, the two 1975 cases came down during this period where the United States Supreme Court had said that doesn't matter -- equal protection law motivation doesn't matter, but the very next year in 1976, they handed down in Washington vs. Davis where the U.S. Supreme Court said motivation does matter. Since Washington vs. Davis where a legislature is motivated by bad intention, the intent to discriminate irrationally, that is really viewed now as the prototypical constitutional violation. It's not something that's beyond the pale of courts to consider.

Met says, well, the U.S. Supreme Court can't overrule the California Supreme Court. That's true. We're not arguing that it can. All we're saying is that the California Supreme Court, as it often does on matters of national federal constitutional importance, was taking its guidance from the U.S. Supreme Court when it handed down those two cases in 1975, and now the U.S. Supreme Court has done a 180, and we see this in many recent cases.

Again, not talking about a protected class. We're talking about rational basis and review. We're talking about the fact that it is irrational for Metropolitan to

base its decision on what it's going to negatively affect San Diego and subsidize the other member agencies.

That's part of the decision as to what is the basis for their rates, and that's why we think it's appropriate to have it in the Complaint.

THE COURT: Are you arguing against my idea? I didn't mean to sound --

MR. PURCELL: No, no, no. Your Honor, I think that taking a measured approach to this is fine. There are cases on both sides. It's a tricky issue. I'm not saying that it's simple to decide.

If your Honor wanted to defer the question, deny the Motion to Strike but then rule that you're going to make case-by-case rulings on whether any of this stuff is relevant, any of it supports discovery, certainly you're withholding any decision on whether it would be admissible at trial or whether there would be a Motion for Judgment on the pleadings down the road, that I think would make a lot of sense.

I think it's best to evaluate this in the context of specific discovery requests, so we can tailor it; we can be precise. That's what Judge Warren wanted us to do as well.

THE COURT: But if I take the questions of this alleged nefarious shadow group away from Judge Warren with a statement that focuses discovery for the discovery referee on the nature of the legal standards applicable to the administrative agency in my role in evaluating them,

wouldn't I save you tens of thousands of dollars and months of time? Wouldn't I be able to look at whether there is irrational nexus between the alleged presence of scoundrels and the behavior I'm asked to review?

MR. PURCELL: You will. You will, and as I said, there's going to be -- those issues are teed up, and Met's current request for de novo review, which is on for hearing in just a month.

THE COURT: One of the thoughts that popped in my head while I was articulating to myself what I was going to say to you folks is I want to be careful that I keep the focus on what my job is here. I want to be careful given the fulsome argument we have regarding the permissibility of discovery in the right context.

I think I have to be careful to draw a line between the use of -- and I don't mean to insult anybody by this -- the alleged presence of scoundrels cannot itself be circumstantial evidence of the existence of inappropriate administrative activity.

MR. PURCELL: I think in Parr it can, your Honor.

THE COURT: If so, then you'll get a chance to show me that, but you're questioning Mr. Brosnahan's point about if he can show any appropriate nexus between whatever the rules are -- and I'm being careful not to state what I think they are because I'm going to be called upon regularly to state them -- but if he can show any nexus between that and the decision that comes out, he says that's good enough, and you say, well, not quite. If there's an express proof

of a discriminatory purpose without any countervailing rational business or rational administrative purpose, "let's get the hippie's off the lawn" type of thing, that may be enough. It's another step away from that to say, the presence of scoundrels by itself is circumstantial evidence of an improper governmental process.

That's the distinction I'm drawing for now. Maybe open the possibility if there is later a connection between the alleged scoundrels and what you say happened, I'll review it as a matter of doing it before Judge Warren, is it?

MR. PURCELL: Correct.

THE COURT: Yeah, Judge Warren has this.

So I'll save you time and money. We will focus on A, whether the Parr -- that's P-A-R-R -- case, what is the scope and how does it apply here; and two, how does that fit in with Mr. Brosnahan's argument that if they show an appropriate administrative connection then that's enough. I'll deal with that later.

But I think I have to set the ground rules. I think I have to cue this up so that you folks can move on and get this thing over with.

So I'm not inclined to say, okay, let's wait and see as to my first review of what Judge Warren did. I want to do this inductively. I want to have a series of non-guiding principles for you that would over time define this. I want to issue an order that basically gets to the bottom line.

It's one of those "here's the deal" things that leave open the possibility because you can't always tell in advance what's reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding both side's legal arguments, I think the bottom line here has to do with the scope of discovery to a large extent.

MR. PURCELL: I think that's right, and the review that you're engaging in of Judge Warren's decision is de novo. There's going to be full briefs on that by August 3rd that does focus on this issue among others, and so, again, we just think that makes a lot of sense. The parties have gone to a lot of effort already. We're going to go to more before the third, and it seems like issuing an order after your Honor has a chance to consider it would make a lot of sense.

Initially, as you may remember from our phone call two weeks ago, we were going try to do everything here today. That ended up not happening. The only thing I want to point out is that there will be an opportunity in the very near future to resolve that issue.

I also just wanted to get in before I sit down that we're not conceding that there's anything in the administrative record that ties Met's rate allocation to its cost of service. Quite the opposite. So we're not relying solely on the presence of scoundrels.

THE COURT: Never crossed my mind that you were conceding that.

MR. PURCELL: Glad to hear it.

THE COURT: Sometimes I can figure these things out.

MR. PURCELL: Oh, yeah. Mr. Keker reminds me that the Prop 13 issue that Mr. Brosnahan had mentioned, judicial estoppel is their basis for this no a Motion to Strike, and if they thought that there was no legal basis for the challenge, they could have brought that in another way.

They brought a Motion to Strike, and they said, basically, that we made one argument in the Rincon case in 2004 and now we can't make a different argument. That's just wrong. On the law, judicial estoppel does not apply to legal argument and legal contentions. So we don't think there's any point in considering that argument any further.

THE COURT: Thank you.

MR. BROSNAHAN: Briefly if the Court pleases, of course, that's not our position at all. It's one that makes Plaintiffs' counsel more comfortable to argue.

Our position is that it's astounding they would bring the same case, the same arguments, and win it, and then file a case in which they claim they want the law to be otherwise. Plus, it's backed up by case law, which we have and they don't.

Moving to the question -- I understand your Honor's thought on the discovery, but I didn't understand Counsel's articulation of it because it was quite different. It was kind of let's have discovery and there once were hippies on the lawn based on a case.

Now, I didn't take the time to go through the

cases that support the idea of what your Honor is supposed to do here and not more, but I can briefly do that. I can be pretty quick about it, I think, and it starts with Western states, which we're not citing discovery issues. We're citing because it's, as the question before your Honor ought to be, substantial evidence and that you ought for pay deference. This is a 1995 Supreme Court California, you ought to pay deference to the decision making of the agency when you do that. That's a California Supreme Court case.

It's a question of the sufficiency of the record. It's not a question -- case after case, I mean, the Cooper case also in the California Supreme Court 1975. That's the one where it talks about what the scope of a judge's review is and cites the separation of power.

We have enormous, strong, legal principles in the State of California that tells me to my satisfaction -- and I hope your Honor comes to this point -- that you are invited by able Plaintiffs' counsel to go where no judge has ever been.

To take the word "discrimination," which has been defined in case after case at the highest court in this state, and to say what it means, which means is there a substantial basis in the record for what they did? Case after case cited here says the fact there's a difference in the rates doesn't mean anything. It doesn't mean there's a discrimination within the meaning. But to take sort of the civil rights panache and try to cover this issue with it, should not be accepted by the Court. The Hanson case is a

good case. That's the California Supreme Court, 1986. It talks about the difference between the rates that where being charged inside the city and outside the city.

And Wilson, "Any claim of prejudgment by us or prejudice in favor of this policy on the part of the four directors in acting upon the petitions is besides the point. Decisions of a governing board of quasi-legislative character are expected to reflect the majority will of its constituents on matters of quasi-legislative policy. This is the essence of representative government."

It's an interesting question. If they had -- if it was throwing darts or something else, then that's what it is. We, of course, say nothing could be farther from the truth when this board got together and did this, but that's the issue, and that's what we submit to your Honor.

Now, I hear what your Honor is thinking about in terms of the order. Cutting off discovery is a worthwhile goal, but here's another one that your Honor might reflect on, if I may suggest it to the Court.

We're going to be back. You heard what Counsel thinks your Honor said this morning, and it wasn't what I thought you said. I thought you said we were going to be saved a lot of money on things, and yet I heard from able counsel that he's heard something else and they're going to litigate the heck out of it without the slightest legal support that you can go behind the record of a quasi-legislative group when they set rates in California and with case, after case, after case that admonishes the

trial court to not do that.

So we will submit, if the Court, please. Thank you.

THE COURT: I should note this for the record that when I received Judge Warren's opinion, it surprised me because I thought I had put in place with him a mechanism whereby I won't receive anything until you folks took a look at what he had in mind. It would be a period of time where you would notify his administrator that there would be a challenge in the court here and then there would be briefing, and as part of that, I would receive what he had in mind but just for informational purposes. My decision would be de novo without regard to any deference to what he did. That didn't happen. I'm in the process of getting that order put in place.

I think all of you knew that, but if not, one of my staff attorneys is working on that with Judge Warren's administrator. That's my usual way of doing these things.

MR. BROSNAHAN: Yes, your Honor.

THE COURT: Anything further on the motion to strike?

MR. PURCELL: Well, I wanted to actually briefly address the Prop 26 issue, which I omitted to discuss a moment ago.

Counsel says that Prop 26 is irrelevant. It wasn't in the Complaint. Of course, the Complaint was filed in early 2010. Prop 26 wasn't passed until the end of 2010 during the election.

What Prop 26 does is it makes clear that, in fact, Proposition 13 does apply to water rates. That was the change in the law. So to the extent that they're taking issue with our taking a different legal position, we're taking a position that's consistent with California law currently. There is little doubt under the Howard Jarvis taxpayer's case that when the legislature passed -- sorry, when the People passed Prop 26 and when that went into effect, those rules applied to any collections of water rates or taxes that followed the proposition actually going into effect here. The proposition went into effect at the start of 2011, and as we know, this case is about water rates that were not collected, were not paid until 2011 and this year.

So again, that's the significance of Prop 26 in this case. It changed the law. It makes clear that Prop 13 does apply to water rates and particularly water rates that were collected after Prop 26 went into effect in the beginning of 2011.

THE COURT: Thank you.

MR. BROSNAHAN: I have ever so briefly in sur-surrebuttal.

Prop 26 is not before your Honor because they didn't plead it. It's not in the Second Amendment Complaint. It's not an action item for the Court. It is thrown into their brief. You heard counsel give his opinion. On another day, maybe someone more erudite on these matters than I, but I will give you the layperson's

opinion. I think it doesn't affect water rates, but that's for another day. It's not before, your Honor.

THE COURT: How can anybody be more erudite than you; a guy who reads 34,000 cases on a Saturday afternoon while the Giants are playing baseball?

MR. BROSNAHAN: I did that for the very purpose of impressing everybody in this room. I'm of an age where I'm supposed to know how to do it. I was amazed that they came out with it. Unless I got it wrong. I don't think I did. I think it's right.

THE COURT: Well, you dazzled Mr. Keker. I was watching his face there.

MR. KEKER: The number was 39,000, your Honor, not 38.

THE COURT: That's because you were busy on Sunday.

MR. BROSNAHAN: In any event, your Honor, I request permission to withdraw from the lecturn.

THE COURT: You may.

(Off the record.)

THE COURT: Okay. Back on the record.

Thank you.

The rulings are as follows:

All demurrers are overruled. Neither the statute of limitations nor the validating statute bar the allegations in the Second Amendment Complaint.

Motion to Strike, granted in part, denied in part as articulated on the record earlier.

I'm not going to chop up the Complaint in the manner that the colorful examples submitted to me suggest because to do so would render it less than useful as an administrative tool regarding matters that are going to require this Court's close attention in the very near future, and it's not necessary to do that.

I will issue a discovery order later, but it has nothing to do with the ruling on the Motion to Strike. It will further clarify both the role of the discovery referee and this Court and will provide emphasis on the appropriate standard that I will be using going forward here. That standard may be emerging as facts are developed. I don't know.

I do want to take a look at the motion that I could not hear today. But we will be considering such concepts as if there is substantial evidence in the record of appropriate administrative process and activity, and if there is substantial evidence of, say, an improper motive, what is the legal significance of that? I don't think there are tens of thousands of cases on that point, but there are certainly a Saturday's worth, if not more, on that point.

The role of this Court has, I believe, been the subject of lots of appellate authority, and we will be dealing with that as we move along.

Anything further for today?

MR. BROSNAHAN: No, your Honor.

MR. PURCELL: Not from us.

THE COURT: If anybody wants a written order, it

is not necessary. I have no intention of writing one. Then the written order on the demurrers will be as simple as I just articulated it, and the Motion to Strike granted in part, denied in part as set forth on the record.

MR. BROSNAHAN: Does your Honor's ruling cover Prop 13?

THE COURT: Yes.

MR. BROSNAHAN: Thank you.

THE COURT: Prop 13 -- thank you.

Prop 13, I think that the nature of the -- I can't remember the term I used -- but the charge, the imposition, seems to me to be material. The legal question -- and I appreciate Mr. Brosnahan telling me about all the motions we're going to have on that, but I don't get to make decisions out of expediency -- we probably will need further analysis on that, which, I believe, as a matter of the Motion to Strike -- let's not forget the standards here -- implicates at least fact questions regarding the nature of the charge involved here. That cannot be resolved on a Motion to Strike.

It may very well be readily resolvable as a matter of law and in appropriate context but not on the Motion to Strike.

MR. KEKER: Your Honor, one other clarification. I think you referred to the discovery order later. I take it you mean an order that you will make after the August 3rd hearing?

THE COURT: Maybe.

MR. KEKER: But not an order between now and the August 3rd hearing when we were going to hear -- when we're going to argue about discovery.

THE COURT: I'd be surprised if it came out before then. What you just saw and you picked up on, of course, was a judicial trick of not pinning myself down.

MR. KEKER: Well, we request you not pin yourself down until after the August 3rd hearing. I hoped everything would happen today. I understand that it's not, but we'd like to be heard on August 3rd before you issue an order about discovery.

THE COURT: No matter what I'm going to do regarding an order or orders, my present thoughts are; first, it's not going to be an inductive process. There will be some standards and guidelines.

Secondly, the situation I articulated whereby there's claimed proof of substantial evidence justifying the administrative determination combined with proof of an impermissible -- substantial evidence of an impermissible administrative determination, what's the legal impact of that?

I've done these things a lot. I'm not so brash -- well, I am -- but I'm not so brash that I think I know the answer without seeing your briefing on this.

It might very well be the reason I don't want to pin myself down that we can resolve that question and sequence discovery. I haven't made up my mind, but look first at the substantial evidence claim by the defendant,

Metropolitan, and then see as a matter of law, if there's any further material as part of this Court's role. That is one logical way of doing that.

I have to think this out a lot more, but that's what I have in mind.

MR. KEKER: Thank you.

MR. BROSNAHAN: Thanks, your Honor.

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(Whereupon, the proceedings adjourned at 12:38 p.m.)

State of California)
)
City and County of San Francisco)

I, Linda S. Forster, Pro Tem Reporter for Jan Brown & Associates in the Superior Court of the State of California, City and County of San Francisco, do hereby certify:

That I was present at the time of the above proceedings;

That I took down in machine shorthand notes of all proceedings had and testimony given;

That I thereafter transcribed said shorthand notes with the aid of a computer;

That the above and foregoing is a full, true, and correct transcription of said shorthand notes, and a full, true, and correct transcript of all proceedings had and testimony taken;

That I am not a party to the action or related to a party or counsel;

That I have no financial or other interest in the outcome of the action.

Dated: July 6, 2012

Linda S. Forster, CSR No. 13286