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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.

Nos. CPF-10-510830 & CPF-12-512466

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S REPLY IN SUPPORT OF ITS MOTION TO STAY SAN DIEGO COUNTY WATER AUTHORITY'S 2012 ACTION PENDING A DISPOSITIVE MOTION ON THE 2010 RATE CHALLENGE, OR IN THE ALTERNATIVE FOR COORDINATED CASE MANAGEMENT

Date: November 9, 2012
Time: 1:30 p.m.
Dept.: 304
Judge: Hon. Richard A. Kramer

I. INTRODUCTION

MWD has presented to this Court the reasons why a limited stay of the 2012 Action, or alternatively coordinated case management of the two pending cases, is necessary to promptly resolve the 2010 Rate Challenge, and SDCWA has not offered any convincing arguments to the contrary. As this Court is aware, the challenge SDCWA brought against MWD's water rates nearly two and a half years ago is entitled to preference under the Validation Statute. The 2010 Action has just recently reached a stage where MWD can soon bring a dispositive motion on the 2010 Rate Challenge, and now SDCWA is asking this Court to take several steps backwards. This is both illogical and detrimental to the goal of speedy determination of the validity of MWD's rates.

Mindful that it has filed two briefs already addressing these issues, MWD will not repeat here the arguments it has set forth already in its moving papers and in its opposition to SDCWA's motion to consolidate. Below MWD responds only to the new issues raised by SDCWA's opposition brief.

II. ARGUMENT

SDCWA does not really dispute the premise of MWD's motion, which is that the failure to stay the 2012 Rate Action pending a ruling on a dispositive motion in the 2010 Rate Challenge, or alternatively to order coordinated case management, will further delay resolution of the 2010 Rate Challenge. Mostly, SDCWA argues that (1) it is not important, or is impossible, to resolve the 2010 Rate Challenge quickly; and (2) a stay would delay resolution of the 2012 Action. Neither contention has merit.

A. The 2010 Rate Challenge Should be Resolved Promptly

1. SDCWA's Blame-Casting Is Inaccurate

SDCWA's first argument for why it is not important to resolve the 2010 Rate Challenge promptly is that MWD has supposedly delayed doing so. In making this argument, SDCWA fails to acknowledge that its own change of legal strategy a year and a half into the case – with the addition in the First Amended Complaint of the "cabal" allegations and the preferential

rights, Rate Structure Integrity ("RSI") and breach of contract claims; and the attempted addition of breach of fiduciary duty and breach of the covenant of good faith and fair dealing claims – is the principal reason why the 2010 Rate Challenge has not already been resolved.

SDCWA asserts that MWD has engaged in a "series of procedural gambits" that have caused delay (SDCWA Opp. at 3), but this list does not withstand scrutiny. MWD did challenge IID and UCAN's ability to participate in this action, as neither entity pays, or has ever paid, MWD's rates that are the subject of this litigation. But MWD filed its demurrer and motion to strike that challenged IID and UCAN's standing right out of the gate – when the case was still pending in Los Angeles Superior Court. *See* MWD's Demurrers to and Motion to Strike Imperial Irrigation District's and Utility Consumers' Action Network's Answers, filed Sept. 1, 2010 (Case No. BS 126888). Then, MWD renewed its demurrer and motion immediately after the case was transferred to San Francisco Superior Court. *See* MWD's Demurrers to and Motion to Strike Imperial Irrigation District's and Utility Consumers' Action Network's Answers, filed Sept. 1, 2010 (Case No. CPF-10-510-830). The Court decided that a bench trial was the preferable vehicle to resolve the standing question. Feb. 22, 2011 Hearing Tr. 16:4-12. SDCWA identifies nothing in the case that should have happened earlier but that happened later due to the bench trial. Indeed, although UCAN prevailed in the standing trial, it has not participated in the case in any way since then.

Nor was there anything improper about MWD's opposing the amendment of SDCWA's Complaint. The amended Complaint did in fact significantly slow down resolution of the 2010 Rate Challenge by broadening the claims at issue, and MWD's brief opposing the amendment cited that predicted delay as a reason for disallowing the amendment. And MWD sought to dismiss the invalid breach of fiduciary duty and covenant claims at the earliest opportunity, which was proper since the Court sustained the demurrers without leave to amend, and this reduced the case's scope.

Then, a year and a half into the case, IID and SDCWA argued for the first time that the Wheeling Statute permits discovery, and sought discovery from not only MWD, but the eight member agency parties and two third parties. MWD disagreed; and, it appears a legitimate

disagreement to have had since the Court of Appeal considered and requested briefing on MWD's writ petition before declining to rule substantively one way or another. MWD's writ petition argued that SDCWA's and IID's Wheeling Statute claim – like the rest of the 2010 Rate Challenge – is required to be decided based on the administrative record and without discovery, which also would have sped up resolution of the 2010 Rate Challenge.

It is true that MWD joined SDCWA and IID in agreeing with the Court's recommendation to use a discovery referee who would issue reports and recommendations that would then be reviewed by the Court *de novo*. Jan. 6, 2012 Hearing Tr. 6:14-17. SDCWA's accusation that MWD "refus[ed] to produce any discovery whatsoever until Judge Warren recommended, and this Court ordered, that it do so," (SDCWA Opp. at 3) is just a complaint that MWD followed the procedure the Court established.

Moreover, SDCWA fails to recognize that by using the Court's procedure, MWD succeeded in narrowing the scope of the discovery that was sought from all forms of discovery to just document requests, as well as narrowing the scope of the document requests. MWD's and the other responding parties' efforts allowed the document productions to be more focused and occur more quickly.

2. The Rate Challenge Significantly Affects MWD's Member Agencies

MWD explained in its motion that "it is vitally important to MWD's operation as a municipal water district that the validity of its cost-recoupment method (its water rates) be determined as soon as possible" to fulfill MWD's statutory responsibility "to provide wholesale water service to its 26 member agencies throughout Southern California." MWD Motion at 1-2. Instead of offering a substantive response, SDCWA argues that it is not important to resolve the 2010 Rate Challenge promptly because "this lawsuit will have no effect on MWD's revenues or finances regardless of who prevails." SDCWA Opp. at 2. It is technically true that the 2010 Rate Challenge should not affect MWD's *own* overall water revenues, which recover its aggregate costs of service to all member agencies. But that response evades the important point, explained in the motion, that the 26 member agencies throughout Southern California that pay MWD's wholesale water rates are significantly affected by the outcome of this lawsuit. All of

the member agencies are public entities and of course face economic challenges in the current economy. For nearly two and a half years the member agencies have had to set their own budgets, and the water rates they charge to their millions of customers, in a state of uncertainty about MWD's rates. And each month the rate challenge remains pending and unresolved, the amount of MWD's potential repayment grows, increasing the magnitude of rate adjustments and the length of time needed to recoup this repayment. SDCWA has stated that the amount at issue in the 2010 Rate Challenge is between $1.3 billion and $3 billion. *See* Decl. of Thomas S. Hixson in Support of Motion to Stay ("Hixson Decl."), Ex. 1. Such a sum would come from the member agencies. Despite MWD's every confidence that its rates will be upheld, the pendency of the litigation has necessarily introduced risk concerning a significant expense for these cities and water districts and their ratepayers. SDCWA does not address this argument but ignores it.

3. The 2010 Rate Challenge Can Be Resolved Quickly

Next, SDCWA argues that prompt resolution of the 2010 Rate Challenge is impossible. SDCWA argues that the Court should not hear a dispositive motion in the 2010 Rate Challenge until discovery on all claims (rate challenge and non-rate challenge) is complete, and SDCWA provides a lengthy description of the discovery it wants to take well into 2013. SDCWA's argument is flawed. In the 2010 Rate Challenge – meaning, the first three causes of action for a writ of mandate, declaratory relief and reverse validation – the Court permitted discovery *only* on SDCWA's Wheeling Statute claim based on the determination that Water Code section 1813 contains an exception to the ordinary rule that the review of a quasi-legislative agency action is limited to the administrative record.[1] No party has ever argued, and the Court has not held, that Proposition 13, MWD Act § 134, Government Code § 54999.7 or the common law have comparable exceptions, and the Court has not ordered any discovery on these other rate challenge claims. For these four claims, a dispositive motion could be heard promptly based on

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[1] The Court also permitted discovery on SDCWA's breach of contract and RSI claims. *See* Order Re: Motions For *De Novo* Review of Discovery Management Recommendation # 1, RFPs 6, 18, 19. However, the contract and RSI claims are not part of the 2010 Rate Challenge contained in the first three causes of action, to which MWD plans to file a dispositive motion.

1 the administrative record.

2 Further, as to the Wheeling Statute, MWD recognizes that the Court has not yet issued a
3 final determination concerning what the full scope of discovery will be, but there is no reason to
4 assume it is as broad as SDCWA hopes. The Court has already ordered the production of
5 documents on the Wheeling Statute claim, and that document production is now occurring. The
6 Court has not yet decided if there will be any further Wheeling Statute discovery. On the merits,
7 the Court's review under the Wheeling Statute is limited to determining whether MWD's
8 adoption of its wheeling rate was supported by "substantial evidence." Water Code § 1813.
9 What the City of Los Angeles' document retention policies are, or what non-decisionmaking
10 witnesses say in depositions taken years after MWD's Board adopted its rates in April 2010, has
11 no discernible relevance to this inquiry. In any event, if the Court takes a broader view of the
12 appropriate scope of Wheeling Statute discovery, that portion of the dispositive motion could be
13 heard later. Fundamentally, SDCWA's position that the Court should not decide the merits of
14 any of the legal issues raised by the 2010 Rate Challenge until some distant time in the future has
15 no basis and is inconsistent with SDCWA's assertion that it wants either case decided quickly.

16 **4. Consolidating the Two Actions Would Cause Delay**

17 SDCWA claims the newly-served discovery in the 2012 Action covers "identical issues"
18 to those in the 2010 Rate Challenge and that, if allowed to proceed, the 2012 Action will be
19 ready for trial on the same schedule. SDCWA Opp. at 4-5. This is incorrect and unrealistic.
20 While the document requests in the 2012 Action for the most part do use the same terminology
21 as those approved by the Court in the 2010 Action, SDCWA ignores the fact that these requests
22 still deal with different documents: it is a different time period, different rate-setting process,
23 different Board action, and different rates. There are also new claims in the 2012 Action
24 (Proposition 26 and standby service) that are not present in the 2010 Rate Challenge, altering the
25 scope. MWD needs to search for, collect, and review a new universe of documents. The new
26 member agency parties in the 2012 Action (which SDCWA fails to mention) will need to collect
27 documents for the first time. If MWD and the others must engage in discovery in both cases at
28 this time, it will push back resolution of the 2010 Rate Challenge.

SDCWA's claims that MWD should already be engaged in responding to document requests in the 2012 Action, and should have prepared the administrative record months ago, are without merit and disingenuous. MWD has a Court-imposed deadline to produce documents in the 2010 Action, and is fully occupied in meeting that deadline, and the document requests in the 2012 Action were just recently served, days after the Court issued its Discovery Order in the 2010 Action. Nor would it have been logical for MWD to prepare the administrative record in the 2012 Action before SDCWA filed its complaint in June 2012, particularly before MWD knew what the claims were. *See* SDCWA Opp. at 5 (stating that MWD had "six months following the 2013-14 rate decision" and "wonder[ing] why MWD didn't assemble the 2013-14 administrative record" earlier).

SDCWA's new contention that the administrative record in the 2012 Action should already have been assembled is interesting because SDCWA has never even *mentioned* this record to MWD. As the Court knows, SDCWA often pronounces that there is no administrative record in the 2010 Action. However, MWD conferred with SDCWA and IID about the contents of that record over the course of a year, added many documents that SDCWA and IID requested be added except obviously misplaced ones such as lawsuit pleadings, and SDCWA and IID never sought to augment that record or identify what they thought should be added to it. MWD still has no idea what SDCWA thinks should be added to the 2010 Action record. Now MWD has learned, for the first time in SDCWA's opposition, that SDCWA allegedly wanted MWD to have already prepared the 2012 Action record without any contact from SDCWA. This is not the conduct of a party that wants to cooperate on a record and promptly resolve a rate challenge.

As discussed in MWD's Opening Brief, if the 2012 Action is not stayed for a limited period as MWD requests, or alternatively if the two pending cases are not managed in a way that allows the 2010 Rate Challenge to proceed promptly, there will undoubtedly be a significant delay in that adjudication. MWD would have to compile a new administrative record; MWD and the new parties would need to search for, compile, and produce new documents; and, this Court would need to resolve any new discovery disputes or dispositive motions in the 2012 Action. *See* MWD Opening Brief at 5-7. During this time, the 2010 Rate Challenge would be stalled.

This is not speedy or efficient, and surely was not what the Legislature had in mind when enacting the Validation Statute.

B. A Stay, or Alternatively Case Management That Allows the 2010 Rate Challenge to Proceed, Will Not Delay Resolution of the 2012 Action

SDCWA also asserts that a stay or the alternatively requested case coordination without consolidation would unduly delay resolution of the 2012 Action, but that is incorrect as well.

1. SDCWA Misrepresents the Requested Stay and Pending Discovery, and Resolving the 2010 Rate Challenge Will Streamline the 2012 Action

SDCWA argues that a stay will delay resolution of the 2012 Action "indefinitely." SDCWA Opp. at 2-8. First of all, that argument misrepresents the relief MWD is seeking. MWD has only requested a limited stay: through a decision on a dispositive motion in the 2010 Rate Challenge. This Court has not yet issued rulings on the governing legal questions that arise in both the 2010 Rate Challenge and the 2012 Rate Action, such as the standard of review, whether Government Code § 54999.7 applies to MWD at all, whether the type of rate challenge SDCWA raises even implicates MWD Act § 134, and so on. A dispositive motion in the 2010 Rate Challenge will provide a vehicle for this Court to decide those threshold questions.

Second, if the motion is granted in whole or in part, that would resolve or narrow the 2010 Rate Challenge and provide significant guidance for the 2012 Rate Action – guidance the parties do not have now. All of the 2010 Rate Challenge claims are raised again (as to a later Board action) in the 2012 Action. The 2012 Action then adds new rate challenge allegations too. A prompt resolution of the 2010 Rate Challenge in MWD's favor could mean very limited discovery in the 2012 Action and then a very limited rate adjudication in the 2012 Action, of just the new Proposition 26 and the standby service allegations.

But in any event, MWD is requesting a stay only until the Court can rule on those issues presented in a dispositive motion, or alternatively coordinated case management that does not delay that ruling.

2. A Stay or Coordinated Management Will Not Cause the Relitigation of Issues or Confusion

SDCWA calls MWD's request for a stay unreasonable because it claims that, once the

limited stay is lifted, MWD plans to relitigate every discovery issue in the 2012 Action that has already been litigated in the 2010 Rate Challenge. This misrepresents what MWD has already communicated to SDCWA, which is that MWD has no desire to relitigate any discovery issues that have already been decided. *See* Hixson Decl., Ex. 2; *see also* Ex. 3.

Furthermore, contrary to SDCWA's assertion, there is nothing confusing about the parties and this Court addressing issues in the 2012 Action after core, long-standing legal issues in the 2010 Action have been resolved. *See* SDCWA Opp. at 9 (SDCWA claims that it is concerned a stay would be "confusing" because this Court will "have to track how every discrete issue was decided in one case versus the other."). This Court is fully capable of managing two similar cases, and determining the rulings in the 2010 Action that have a dispositive effect in the 2012 Action. This is true whether the Court grants the stay or the alternative coordinated case management.

Indeed, the Court and the parties would benefit from this Court making some of the legal determinations that will be raised by a dispositive motion in the 2010 Rate Challenge, such as the applicable standard of review and what statutes apply, as those issues are in dispute. If, as MWD contends, Proposition 13 and Government Code § 54999.7 are wholly inapplicable here, and the requirements of MWD Act § 134 are not implicated by SDCWA's claims, that could only speed resolution of the 2012 Rate Action. There are significant legal issues in dispute that a prompt dispositive motion would provide a useful vehicle to resolve.

C. SDCWA's Remaining Arguments on Consolidation Do Not Have Merit

Finally, SDCWA asserts that MWD "gets it wrong on the law, three separate times" in describing the potential effects of consolidation. SDCWA Opp. at 9. Not so.

As to the first and second issues MWD supposedly got wrong, MWD was simply responding to SDCWA's then-current position on consolidation, which has changed at least twice. On September 25 and October 3, SDCWA stated that it wanted the two cases consolidated for pretrial purposes. On October 10, SDCWA stated that instead it would seek to have the cases consolidated for both pretrial and trial purposes. Then, after having received MWD's motion, which explained the potential appellate consequences of consolidating the two

cases, SDCWA argued for the first time in its motion to consolidate (filed two days later) that the Court should not order complete consolidation. Even now in its opposition brief, SDCWA alternates between arguing that "[f]ull consolidation is the much wiser course" on page 9 of its brief, and, by contrast, that "[t]he Court can, and should, consolidate the cases without merging the causes of action" on page 10.

First of all, neither the 2010 Rate Challenge (meaning the first three causes of action in that case) nor the 2012 Rate Action is subject to having a "trial" in the normal sense of the word. The Court will be reviewing a quasi-legislative agency action to determine if it is arbitrary and capricious or supported by substantial evidence, not making findings of fact. *See Western States Petroleum Assn. v. Super. Ct.*, 9 Cal. 4th 559, 573 (1995) ("the substantiality of the evidence supporting [quasi-legislative] administrative decisions is a question of law").

Second, the particular type of consolidation ordered by the Court may indeed affect appellate rights, as MWD explained. The Supreme Court has held that "there are thus two types of consolidation: a consolidation for purposes of trial only, where two actions remain otherwise separate; and a complete consolidation or consolidation for all purposes, where the two actions are merged into a single proceeding under one case number and result in only one verdict or set of findings and one judgment." *Hamilton v. Asbestos Corp., Ltd.*, 22 Cal. 4th 1127, 1147 (2000). In the case of a complete consolidation, the single final judgment appears to preclude piecemeal appeals until the entirety of the action is resolved. *See, e.g., Committee for Responsible Planning v. City of Indian Wells*, 225 Cal. App. 3d 191 (1990). Accordingly, *if* the Court orders consolidation, MWD agrees with the position stated on page 10 of SDCWA's opposition that the Court should *not* order complete consolidation.

Finally, SDCWA contends that MWD failed to identify a substantial right that would be prejudiced by consolidation. That is incorrect. Rather, the speedy determination of the 2010 Rate Challenge, as required by Code of Civil Procedure § 867, is a substantial right. The 26 member agencies that pay MWD's rates have a significant financial stake in the outcome of this case. Moreover, the pendency of this case for nearly two and a half years (so far) jeopardizes the ability of these 26 public entities to determine and project their own budgetary costs and the rates

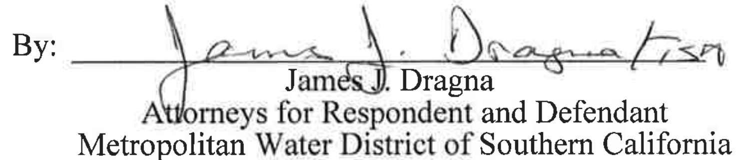
they will need to charge their millions of ratepayers throughout Southern California. Section 867 and considerations of public policy strongly counsel in favor of resolving a dispositive motion in the 2010 Rate Challenge promptly, and doing so will not unduly delay resolution of the recently filed 2012 Action.

III. CONCLUSION

For the reasons stated above, MWD respectfully requests that the Court stay the 2012 Action pending a ruling on a dispositive motion as to the 2010 Rate Challenge; or, in the alternative, coordinate the management of the 2010 and 2012 Actions in a way that does not delay resolution of the validity of MWD's 2011-2012 water rates.

DATED: November 2, 2012

BINGHAM MCCUTCHEN LLP

By: 
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