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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 OPPOSITION TO SAN DIEGO COUNTY WATER AUTHORITY'S MOTION TO CONSOLIDATE CASES

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

I. INTRODUCTION

SDCWA's untimely[1] motion to consolidate misses the larger picture, tends to confirm that consolidation would delay resolution of the 2010 Rate Challenge, and uses inaccurate blame-casting in place of analysis. The larger picture is that because MWD adopts its rates biennially, SDCWA will presumably file a new lawsuit every two years that re-alleges the claims in the 2010 Rate Challenge, until there is a final appellate resolution of them. This is what happened in the 2012 Action, where SDCWA reasserted the first four causes of action from the 2010 Rate Challenge (with the addition of Proposition 26 and standby service allegations). This Court should resolve the 2010 Rate Challenge expeditiously, as required by statute, *see* Code Civ. Proc. § 867, to facilitate the appellate decisions that are needed to bring final resolution to these claims. Consider: If this Court somehow were to decide the merits of the 2010 Rate Challenge *today*, a final Court of Appeal or Supreme Court decision would not be expected for about two years, or after SDCWA files its *third* rate challenge in 2014. SDCWA is now insisting that discovery in the 2010 Rate Challenge should continue halfway through next year, and that its 2010 Rate Challenge, preferential rights claim, challenge to the Rate Structure Integrity (RSI) clause, and breach of contract claim should be tried together and not until the 2012 Action is also through discovery and ready for trial. If granted, this motion would make it likely that trial court proceedings in the existing cases will not be concluded before the *third* rate challenge is filed, and appellate proceedings would not be resolved until after the *fourth* rate challenge is filed. There is nothing efficient about that.

SDCWA's brief does little to dispel MWD's argument that consolidation of the two cases will delay resolution of the 2010 Rate Challenge. To the contrary, SDCWA embraces the idea that discovery in the two cases should occur on the same track, even though they were filed two

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[1] In order to be heard at the November 9 hearing, SDCWA was required to serve notice of its motion by October 16, which it did not do. *See* Code Civ. Proc. § 1005(b) ("all moving and supporting papers shall be served and filed at least 16 court days before the hearing."); *id.* § 1010.6(a)(4) ("[A]ny period of notice . . . shall be extended after service by electronic means by two court days"); S.F. Sup. Ct. Rule 2.10(Q) ("The filing and service provisions of CCP § 1010.6 . . . apply.").

years apart. Unmentioned in SDCWA's motion is the fact that discovery on its preferential rights claim in the 2010 Action has not begun at all. Delaying resolution of the 2010 Rate Challenge until the three other causes of action in the 2010 Action can be tried with them, and then insisting that this trial not happen until the 2012 Action can be resolved, means that nothing gets decided quickly – contrary to section 867.

SDCWA does not really argue otherwise, but instead contends this problem is MWD's fault. SDCWA omits to mention that a year and a half after it filed the 2010 Rate Challenge, it replaced its lawyers and entirely changed its legal strategy, adding several additional claims to the case (two of which were since dismissed) and changing the focus of its rate challenge to its new "cabal" allegations. SDCWA and IID did not even move for leave to take discovery until the end of 2011. That is, SDCWA embarked on its new legal strategy around the time that the 2010 Rate Challenge should have been wrapping up.

Consolidation of these two actions, as SDCWA requests, will unnecessarily cause further delay in the 2010 Rate Challenge. As discussed in more detail below:

- The 2012 Action involves new and different claims that will require additional briefing.
- Allowing discovery in the 2012 Action to reach the same procedural status as the 2010 Action involves resolution of the scope of discovery and a second round of document collection and production.
- There are new parties in the 2012 Action who have not yet begun the document collection process.

A stay of the 2012 Action pending a ruling on a dispositive motion on the 2010 Rate Challenge is the more appropriate course, because once this Court rules on the dispositive motion, it will then be in a place to efficiently and expeditiously decide the 2012 Action. Accordingly, this Court should deny SDCWA's motion to consolidate.

II. ARGUMENT

A. Consolidation Contravenes the Validation Statute's Requirement of Speedy Determination

SDCWA's motion to consolidate neglects to explain how consolidation "can be done without prejudice to a substantial right." *State Farm Mut. Auto. Ins. Co. v. Super. Ct.*, 47 Cal. 2d 428, 430 (1956) (finding that trial court abused its discretion in consolidating actions, stating that consolidation may not be ordered if it will prejudice a substantial right). Courts have recognized consolidation can be an efficient management tool in an appropriate case, but courts have also recognized that, when the validity of an agency's action has been challenged, that challenge is entitled to priority. *See, e.g.*, *Graydon v. Pasadena Redev. Agency*, 104 Cal. App. 3d 631, 646 (1980) (prompt resolution of challenges to agency action is vital to the agency and the public because drawn out litigation "impair[s] [a] public agency's ability to operate."). SDCWA acknowledges that the validation action contained in its 2010 Rate Challenge is entitled to speedy determination, but then spends its brief advocating a case management strategy that will delay resolution of the 2010 Rate Challenge in order to advance the 2012 Action. *See* Mtn. to Consol. at 7 (citing Section 867's requirement of speedy determination). Tellingly, not one of the cases that SDCWA cites in favor of consolidation involves a validation action.

Consolidation will delay resolution of the 2010 Rate Challenge in contravention of the Validation Statute because it will take a significant amount of time for the 2012 Action to reach the same procedural status as the 2010 Action. It has already taken the parties nearly two and a half years to litigate pleading and discovery issues and reach a point in the 2010 Action where discovery is underway. This process should be allowed to continue unhampered by the delay involved with consolidation. SDCWA's claim that the 2012 Action "will quickly catch up" is unrealistic for several reasons. Mtn. to Consol. at 7.

First, the 2012 Action involves new and different claims – the Proposition 26 claim and allegations regarding MWD's standby service – that will require additional briefing. *See, e.g.*, Petition for Writ of Mandate and Complaint for Determination of Invalidity, Damages, and Declaratory Relief, filed June 8, 2012 ¶¶ 51, 55-59. SDCWA does not address the new

allegations concerning standby service that are not present in the 2010 Rate Challenge. SDCWA's response on the Proposition 26 claim is confusing. SDCWA suggests in a footnote that Proposition 26 might not really be a new claim because Proposition 26 might apply retroactively to MWD's rates that are challenged in the 2010 Rate Challenge. *See* Mtn. to Consol. at 5 n.3 (arguing that Proposition 26 applies to MWD's 2011-12 water rates). MWD disagrees, but more to the point, SDCWA is the author of its own pleadings, and it has not even attempted to *allege* a Proposition 26 claim in the 2010 Rate Challenge. The Proposition 26 claim is alleged only in the 2012 Action. The breezy assertion that it could be added to the 2010 Rate Challenge ignores the fact that there are steps a party has to take to add a claim to a case – such as moving for leave to amend, then surviving a demurrer – that SDCWA has not attempted to take here.

Second, MWD will need to assemble a new administrative record for the 2012 Action. SDCWA's dismissal of this process as "little more than a formality" ignores California Supreme Court precedent that requires courts to "consider *only* the administrative record" when evaluating the reasonableness of a formal quasi-legislative decision. *Western States Petroleum Ass'n v. Super. Ct.*, 9 Cal. 4th 559, 573 (1995) (emphasis added). This Court has carved out an exception to this general rule based on the "all relevant evidence" language in the Wheeling Statute. Water Code § 1813. But that statutory language has nothing to do with the remaining bases for the 2010 Rate Challenge, all of which must be decided based on the administrative record. And, while the administrative record for the 2012 Action will include many of the same documents already in the administrative record lodged for the 2010 Rate Challenge, it will take time for MWD to compile all of the additional records for the 2012 Action, as it involves the process and actions relating to the 2013-2014 rates. SDCWA calls MWD's assertion that it is unable to compile this new record until it completes its current document production in the 2010 Action a delay tactic. *See* Mtn. to Consol. at 8 n. 4. This could not be further from the truth. For months MWD's legal department has been managing the collection and review of documents in response to the pending Discovery Order in the 2010 Action; responding to those document requests is the actual hindrance to compiling the administrative record for the 2012 Action.

Third, allowing discovery in the 2012 Action to reach the same procedural status as the 2010 Action will take a significant amount of time, as the parties will need to settle on the scope of allowable discovery in the new action. This Court will need to resolve any discovery disputes before the parties can begin a second round of document collection and production. While some document requests in the two actions overlap, the new document requests in the 2012 Action call for the collection and review of many different documents from a different time period, as to a different rate-setting process and Board action. The parties will still need to collect and produce numerous additional documents relating to the 2013-14 rate-setting process, the rate adoption itself, the 2013-14 water rates, and other new issues in the 2012 Action.

Fourth, there are new parties in the 2012 Action who, unlike those who have been engaged in discovery for months, have just been served their first set of discovery requests. Accordingly, the argument that additional, "mirror-image" discovery for the 2012 Action will not hamper progress in the 2010 Action is misleading. Mtn. to Consol. at 6.

Fifth, SDCWA's contention that the 2012 Action should be consolidated with the 2010 Action because the rate challenges in both are entitled to the same preference ignores the two years separating the two actions. *See* Mtn. to Consol. at 2. Resolution of the 2010 Rate Challenge should be given immediate priority and should not be hindered by a validation action filed four months ago and just transferred to this Court. This is especially true because SDCWA will presumably continue filing new rate challenges every other year until there is a final appellate resolution of its core claims. *See* Mtn. to Consol. at 9 (admitting that if the validation action is delayed, "the parties will end up fighting over MWD's 2015 and 2016 rates as well").

Sixth, the issue SDCWA identifies as a potential prejudice weighing in favor of consolidation is the risk of conflicting appellate rulings. *See* Mtn. to Consol. at 7. It is unclear how such a risk exists, given that the same Superior Court will be presiding over the entirety of both actions, and any final appellate decision applicable to one rate challenge would be binding on the parties under preclusion principles and, if published, binding precedent on other panels on the Court of Appeal.

B. A Temporary Stay Would Allow for Swift Resolution of the 2012 Action

SDCWA contends that the primary basis for seeking consolidation is the promotion of judicial economy. It warns that allowing the two actions to proceed without consolidation would send this Court and the parties "back to square one when the first trial is completed."[2] Mtn. to Consol. at 2. But in the same breath, SDCWA explains how overlapping rulings and discovery in the 2010 Rate Challenge could be used to expedite resolution of the 2012 Action. *See* Mtn. to Consol. at 3-6, 8. That argument demonstrates why consolidation is unnecessary. Since the two cases are assigned to the same judge, there should not be a risk of inconsistent legal rulings or a need to relitigate the same issues in both cases. And discovery produced in the 2010 Rate Challenge could be used in the 2012 Rate Action – or, for that matter, the inevitable 2014 rate challenge, if there is no preclusive ruling before then.

For example, this Court's ruling on the reasonableness of MWD's allocation of certain costs to, and inclusion of the Water Stewardship Rate in, its transportation rate in the 2010 Rate Challenge will presumably be dispositive of the same issues in the 2012 Rate Challenge. *See, e.g.*, Petition for Writ of Mandate and Complaint for Determination of Invalidity, Damages, and Declaratory Relief, filed June 8, 2012 ¶¶ 67-82 (alleging similar grounds for illegality of MWD's 2013-14 water rates as in the SAC). Also, the parties will benefit from time and cost savings in discovery in the 2012 Action because many documents that will be relevant in that action will have already been produced in the 2010 Action. But, SDCWA is incorrect in indicating the document requests in the two actions are identical and so MWD can easily complete them at the same time: they concern different time periods, and a different process and actions. *See* Mtn. to Consol. at 6. Furthermore, if MWD prevails on its dispositive motion, the bulk of evidence relevant to the 2012 Action could be reduced by disposing of claims related to the

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[2] SDCWA misconstrues MWD's position. MWD is not asking for a full trial on the 2010 Action before proceeding with the 2012 Action. *See* Mtn. to Consol. at 2 (claiming that the parties would have to wait until the "first trial" is completed before turning to the 2012 Action). MWD simply seeks a ruling on a dispositive motion on its 2011-12 water rates before turning to the claims in the 2012 Action.

reasonableness of MWD's water rates, substantially streamlining completion of the 2012 Action.

Finally, SDCWA's allegation that MWD has "systematically delayed resolution of the 2011-2012 case" is absurd. Mtn. to Consol. at 7. As this Court knows, this case began as a simple rate challenge to which, a year and a half later, SDCWA added several new common law claims and entirely recast the focus of the lawsuit. Since then, MWD has been continually compelled to respond to SDCWA's litigation strategies that divert from the resolution of the 2010 Rate Challenge.

III. CONCLUSION

For the reasons stated above, MWD respectfully requests that the Court deny SDCWA's motion to consolidate the 2010 and 2012 Actions and instead 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: October 29, 2012

BINGHAM MCCUTCHEN LLP

By: _____
James J. Dragna
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Metropolitan Water District of Southern California

San Diego County Water Authority v. Metropolitan Water District of Southern California, et al.,
San Francisco County Superior Court Case No. CPF-10-510830 & CPF-12-512466

PROOF OF SERVICE

I am over eighteen years of age, not a party in this action, and employed in San Francisco County, California at Three Embarcadero Center, San Francisco, California 94111-4067. I am readily familiar with the practice of this office for collection and processing of correspondence for mail/fax/hand delivery/next business day Federal Express delivery, and they are deposited that same day in the ordinary course of business.

On October 29, 2012, I served the attached:

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S OPPOSITION TO SAN DIEGO COUNTY WATER AUTHORITY'S MOTION TO CONSOLIDATE CASES

☒ (VIA LEXISNEXIS) by causing a true and correct copy of the document(s) listed above to be sent via electronic transmission through LexisNexis File & Serve to the person(s) at the address(es) set forth below.

☒ (EXPRESS MAIL/OVERNIGHT DELIVERY) by causing a true and correct copy of the document(s) listed above to be delivered by Federal Express in sealed envelope(s) with all fees prepaid at the address(es) set forth below.

as indicated on the following **Service List.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 29, 2012, at San Francisco, California.

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