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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE 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-12-512466

SAN DIEGO'S OPPOSITION TO MWD'S MOTION FOR SUMMARY ADJUDICATION

Date: December 3, 2013
Time: 9:00 a.m.
Dept.: 304
Judge: Hon. Curtis E.A. Karnow

Date Filed: June 8, 2012
Trial Date: December 17, 2013

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I. INTRODUCTION

MWD's motion for summary adjudication of San Diego's breach of contract claim comes from an alternate reality. MWD argues that San Diego cannot sue MWD for breaching the parties' 2003 Exchange Agreement now, because it failed to sue back in October 2003, when the agreement was signed, instead paying MWD's unlawful rates for several years. But sections 5.2 and 11.1 of the Exchange Agreement expressly provided that San Diego ***could not*** sue for five years, until October 2008. MWD does not even mention these terms of the contract, much less account for them. MWD's corporate designee testified that, if San Diego had sued before January 2008, San Diego would have been in breach of the five-year timeout. In other words, according to MWD, San Diego couldn't sue in 2003 (or 2004, 2005, 2006, or 2007) because it would have been too soon, and could not sue after 2008 because it was too late. But as MWD's Person Most Qualified designee testified, MWD ***always*** understood that San Diego reserved its right to sue after five years and likely would unless MWD fixed its cost allocation, which San Diego ***always*** believed was illegal.

MWD's motion also manufactures purported "admissions" by San Diego's Person Most Qualified designee, none of which are accurate. San Diego's designee, who negotiated the contract, never admitted MWD's rates were "legal" in 2003; he said only that those rates complied with the MWD Administrative Code, an issue San Diego has never contested. San Diego's designee explained that, because of the five-year timeout, San Diego agreed not to sue MWD for any violation ***other than*** the Administrative Code—such as the constitutional and statutory violations at issue here—until January 2008. Likewise, the five-year timeout meant that MWD could not breach the Exchange Agreement until January 2008, because the parties agreed San Diego had no right to sue until then. MWD distorts San Diego's testimony and ignores the plain language of sections 5.2 and 11.1 and the testimony of MWD's own witnesses. Its motion is meritless.

II. FACTUAL BACKGROUND

A. The plain language of the Exchange Agreement makes clear that MWD could not have been in breach, and San Diego could not have sued for breach of contract, until 2008 at the earliest.

San Diego's breach of contract claim alleges that MWD violated section 5.2 of the parties' October 10, 2003 Exchange Agreement. That section requires MWD to charge San Diego a price "equal to the charge or charges set by Metropolitan's Board of Directors pursuant to applicable law and regulation and generally applicable to the conveyance of water by Metropolitan on behalf of its member agencies." Declaration of Warren A. Braunig ("Braunig Decl.") Ex. F (Exchange Agreement) § 5.2, at 16-17. But MWD and San Diego agreed San Diego could not enforce the price term for five years. Section 5.2 initially provides that "[f]or the term of this Agreement, neither SDCWA nor Metropolitan shall seek or support in any legislative, administrative, or judicial forum, any change in the form, substance, or interpretation of any applicable law or regulation" pertaining to the price term. *Id.* at 17. But later in the same paragraph, the parties made clear this bar on suing was just temporary: "provided, further, that (a) after the conclusion of the first five (5) Years, nothing herein shall preclude SDCWA from contesting in an administrative or judicial forum whether such charge or charges have been set in accordance with applicable law and regulation." *Id.* "Year" is a defined term, *id.* § 1.1(bb), at 7, and under that definition the five-year period expired after December 31, 2007, giving San Diego the right to sue starting in 2008.

The parties were so determined to provide for and enforce a five-year cooling-off period that they repeated that provision, belt and suspenders style, in section 11.1. Braunig Decl. Ex. F § 11.1, at 24. That section provided that "SDCWA shall not dispute whether the Price determined pursuant to Paragraph 5.2 for the first five (5) Years of the Agreement was determined in accordance with applicable law or regulation," and also required the parties to use "reasonable best efforts to resolve all disputes, including Price disputes." *Id.* But "[i]n the event negotiation is unsuccessful, then the Parties reserve their respective rights to all legal and equitable remedies." *Id.*

B. The testimony of San Diego's negotiator, Scott Slater, makes clear both parties understood San Diego could and would sue over MWD's rates.

There was no confusion between the parties about how these provisions were intended to work. As San Diego's negotiator and PMQ designee, Scott Slater, made clear:

> Q. ... I was asking you more—you got into the reasons why you decided to adopt [the five-year timeout in section 5.2]. I was asking more what you understand that provision to do, just generally.
>
> A. I think that Met would set—set the wheeling charge, the conveyance charge, within its administrative code section. And that charge would be valid provided that it was also complying with any state, statutory, or Constitutional provisions pertinent to that section.
>
> Q. What about during the five years?
>
> A. Well, during the five-year period, there was a peace treaty; right? So we wouldn't do anything during the five-year period, and we were consenting.
>
> So, again, going to my hold-your-nose analogy, that the—in the first five years, it was going to be whatever it was. And at the end of the five years, if you didn't like it, if you thought it was inappropriate, you had an opportunity to challenge it.

Braunig Decl. Ex. K (Slater Depo.) at 97:3-22. San Diego's negotiators not only directly discussed their right to sue after five years with MWD, but made clear this right was central to their willingness to enter into the contract at all:

> Q. Do you recall anybody on the San Diego side conveying a belief that they would sue after the five years under any circumstances?
>
> A. I do believe they conveyed the belief that if the rate was not set in accordance with applicable law, they would avail themselves of their remedies, whatever they may be.
>
> Q. Which would be suing?
>
> A. It could be.
>
> Q. Who said that, in your recollection?
>
> A. On the negotiating team, each of the three people in the negotiating team, Jim Taylor, [General Manager] Maureen Stapleton, [Chief Financial Officer] Bob Campbell. ***And it was part of the rationale for why they could accept the arrangement***, because they would not be discriminated against by Metropolitan if the law provided that conveyance should be provided at a certain price.

Id. at 101:15-102:6 (emphasis added).

C. The testimony of MWD's designee, Brian Thomas, and numerous contemporaneous documents, make clear both parties understood San Diego could and would sue over MWD's rates.

MWD's designee on the Exchange Agreement negotiations, Brian Thomas, confirmed all of these points at his deposition. Thomas admitted that MWD understood San Diego had a right to do exactly what it has done: sue MWD on its water rates after the five-year timeout expired.

> Q. And Metropolitan's understanding, at the time it signed the Exchange Agreement, was that after five years, the Water Authority could file a lawsuit to challenge its rates?
>
> A. That's what it said, that the Water Authority would be afforded that opportunity to address its concerns.
>
> Q. That was Met's understanding at the time it signed the Exchange Agreement?
>
> A. Yes, and that's what it says.
>
> Q. So this Section 5.2 allows the Water Authority to do what it has done in this case, so long as it waited five years to do so?
>
> A. Yes.

Braunig Decl. Ex. E (Thomas Depo.) at 122:6-123:1. MWD likewise understood the converse was also true and the contract precluded San Diego from filing any lawsuit for five years:

> Q. In seeking and obtaining, as part of the Exchange Agreement, the five-year limitation on filing a lawsuit, Metropolitan prevented the Water Authority from filing a lawsuit about State Water Project costs for five years; isn't that right?
>
> A. Yeah. It was agreed that they would not file a lawsuit, but they could raise their concerns, and they obviously did.

Id. at 135:25-136:10. In fact, MWD believed that any suit by San Diego before the expiration of the five-year timeout would have been a breach of the contract. *See id.* at 143:13-144:5 (filing a lawsuit from 2004-2007 "would have violated the Exchange Agreement").

MWD also conceded the five-year timeout was a negotiated compromise, and a right that San Diego insisted on as a material condition of signing the contract. *Id.* at 143:4-11 (five-year term was material). As Mr. Thomas testified:

> Q. Did—in the negotiation process, did Metropolitan seek to prohibit any legal challenge to Metropolitan's rate over the entire course of the—the entire lifetime of the Exchange Agreement?

A. That was our initial offer.

Q. Okay. And how did the Water Authority respond to that offer?

A. They sought a shorter time period.

Q. Okay. And they sought five years?

A. I believe they sought zero to start with.

Q. Okay. And the parties compromised at this five-year period during which the Water Authority couldn't bring suit to challenge Metropolitan's rates; correct?

A. Yes.

Id. at 126:15-127:2. All the contemporaneous documents make equally clear that MWD always knew San Diego had the right to sue after five years. Specifically:

- A ***June 18, 2004 memo*** from then-MWD General Manager Ron Gastelum admits that San Diego "reserv[ed] their [*sic*] right to challenge Metropolitan's uniform wheeling rates after five years from the date of execution of the QSA." Braunig Decl. Ex. A.
- A ***June 29, 2004 memo*** from Kevin Hunt of the Metropolitan Water District of Orange County to MWD Board members asserts that San Diego's General Manager Maureen Stapleton told Hunt that, "absent any negotiated changes," San Diego "would be pursuing legal or legislative remedies at the end of the 5 years' QSA delay." *Id.* Ex. L.
- A ***July 30, 2004* letter** from Mr. Gastelum to Ms. Stapleton affirms that, although San Diego had "no plans to challenge Metropolitan's rate structure" at that time, San Diego had made a "reservation [of rights] to challenge by the Authority in the Quantification Settlement Agreement (QSA) to challenge Metropolitan's rate structure after five years." *Id.* Ex. M.
- A ***November 18, 2004 memo*** from Mr. Gastelum explains that San Diego "is not willing to agree not to challenge Metropolitan's rate structure in a manner that would reduce Metropolitan's wheeling rate." *Id.* Ex. N.

In fact, MWD not only always knew San Diego contended MWD's rates were unlawful, it knew San Diego believed those rates were unlawful for the same reasons at issue in this case.

Q. ... At the—at the time that the parties entered into the Exchange Agreement, MWD knew that the Water Authority had some existing concerns about the allocation of costs in Met's rates; right?

A. Yes.

Q. There was a dispute that had been going on that the Water Authority had—the Water Authority had raised before about the allocation of State Water Project costs into the system access rate?

A. In terms of as Metropolitan set its unbundled rate structure, they raised a concern about the allocation of costs that would be included in the system access rate, including the State Water Project costs.

Braunig Decl. Ex. E (Thomas Depo.) at 133:6-24.

D. MWD's invented "admissions" are a fiction, and San Diego has never conceded MWD's rates were legal or proper.

MWD's sole basis for arguing San Diego has conceded the "legality" of MWD rates is a snippet of testimony from Mr. Slater, which snippet MWD does not even quote, much less place in context. Mr. Slater testified only that San Diego believed the initial contract price adopted by MWD in 2003 complied with MWD's Administrative Code—nothing more.

Q. The 2003 agreement, there was a[n initial] price provision for roughly $253 [per acre foot of water], in addition.

Do you recall that?

A. Yeah.

Q. To your understanding, was that a legal rate at the time?

A. Do I understand that was a legal rate?

Q. To your understanding, was that a legal rate?

A. Yeah. Look, I think the rate was properly adopted by [MWD's] administrative code, and I think we agreed to pay it.

Braunig Decl. Ex. K (Slater Depo.) at 36:25-37:11. This "admission" has nothing to do with this case. San Diego is not suing under MWD's Administrative Code. It has never contended that MWD failed to follow the procedural requirements in that code. As Mr. Slater made equally clear, the "applicable law and regulation" provision of section 5.2 was intended to incorporate not only (1) the MWD Administrative Code; but also (2) any other applicable legal provision.

Q. If you look at the second sentence, it says—it refers to "Pursuant to applicable law and regulation and generally applicable to the conveyance of water."

A. Right.

Q. What do you understand—at this point in time, in connection with your negotiation of the contract, applicable law and regulation referred just to Met's administrative code?

A. No.

Id. at 68:21-69:6. Slater went on to explain that "applicable law" meant any laws that "touch the subject of conveyance, pricing." *Id.* at 71:2-5. Slater explained that he told MWD that

> We had to have some definition about how that process was going to work. So we found comfort in the existence of the administrative code. And that put that issue, which is effectively responsive to—let's call it due process, how the rate would be set.
>
> ***And then secondly, there was an overarching standard under which the Met activity as a regulatory body would be operating.*** And it couldn't be—in my opinion, it could not just be whatever the Met Board decided to kick out; that there had to be some side boards on it.
>
> And we wanted to—again, referencing my earlier discussions about where the law is evolving and what the rights of an entity like Metropolitan would be, I felt that it was important to be saying that that rate—that ***that administrative code responsibility has to be understood in a broader context of what is applicable law.***
>
> ***And not only as it existed in that moment in time, but in an evolving area as—over a 35, 50-year, 70-year, 100-year agreement, it had to account for whatever is going to happen in the law.***

Id. at 178:19-179:13 (emphases added); *see also id.* at 103:1-19 (describing separate protections of MWD Administrative Code and any other applicable law). Mr. Slater testified that he expressly told MWD's General Counsel Jeff Kightlinger that the "applicable law" term was broader than just the Administrative Code. *Id.* at 179:14-180:2. As Mr. Slater explained, he informed Mr. Kightlinger that San Diego "received protection and comfort in knowing that you're going to set the rate pursuant to the [Administrative] code. But, again, there has—you can't be setting rates that are ***otherwise violating some provision of the law.***" *Id.* at 180:3-15 (emphasis added). MWD's designee witness, BrianThomas, admitted at his deposition that MWD's obligations extended beyond the Administrative Code, and that the Exchange Agreement permitted San Diego to sue under "all laws affecting MWD's rates and charges, whatever they might be." *Id.* Ex. E (Thomas Depo.) at 131:15-21.

III. ARGUMENT

MWD's motion asserts only one basis for summary adjudication: supposedly, San Diego "cannot establish one essential element of its breach of contract claim, namely, breach." MWD Mot. at 3. MWD offers two related (and equally meritless) arguments for why this is so: (1) San Diego "admitted" that MWD's rates were "legal" in 2003, and even since then MWD's rates have

been set under the same rate allocation; and (2) San Diego's designee witness testified that MWD first breached the Exchange Agreement in 2008. MWD's first argument is invented and its second argument is 100% consistent with a timely breach of contract suit under sections 5.2 and 11.1 of the Exchange Agreement. MWD does not contend in its motion that San Diego failed to sue within the four-year statute of limitations for breach of contract, *see* Cal. Code Civ. Proc. § 337, or that San Diego's claim is barred by laches, estoppel, or any other equitable defense.

First, as set forth above, San Diego's contract negotiator Scott Slater never said that the rate MWD initially charged San Diego in 2003 when the Exchange Agreement was signed was "legal," or that San Diego ever conceded the legality or propriety of that rate. As is clear from his testimony, he said only that San Diego agreed that MWD's 2003 rate complied with the modest procedural requirements in MWD's Administrative Code. Braunig Decl. Ex. K (Slater Depo.) at 36:25-37:11. Slater made equally clear that section 5.2's "applicable law and regulation" provision was much broader than just the Administrative Code, *id.* at 103:1-19, 178:19-179:13, as he made clear to MWD during negotiations. *Id.* at 179:14-180:2. MWD's PMQ witness Brian Thomas conceded the same—that "applicable law" meant "all laws affecting Metropolitan's rates and charges, whatever they might be." Braunig Decl. Ex. E at 131:15-21. Even MWD, which has denied that any of the myriad cost-of-service limitations in California law apply to its rates, concedes it is bound by law beyond just its Administrative Code; at the very least, MWD acknowledges it is also obligated to follow the MWD Act and the common law. MWD Reply ISO Demurrer (March 18, 2013) at 6; MWD First Pretrial Br. at 41-43.

MWD's argument that San Diego conceded the 2003 rate was "legal" is also contradicted by both the language of the contract and the undisputed testimony of the designee witnesses. Both sections 5.2 and 11.1 explicitly provide that San Diego had a right to sue under the contract ***only*** after expiration of the five-year peace treaty. Braunig Decl. Ex. F (Exchange Agreement) §§ 5.2, 11.1. It would be nonsensical for San Diego to bargain for and obtain (as it did) the explicit right to sue starting in 2008, *id.* Exs. K (Slater Depo.) at 101:15-102:6 & E (Thomas Depo.) at 126:15-127:2, if it agreed that MWD's rate was lawful in 2003 when it signed the contract. The parties bargained for a five-year timeout, but the very structure of the contract is not a concession

of "legality" by San Diego or a waiver of other rights that the contract expressly grants, such as the right to be charged a lawful conveyance rate under section 5.2.

Regardless of what MWD's lawyers say now, both parties' representatives agree that San Diego never conceded MWD's 2003 rates were lawful—then or ever. *Id.* Ex. K (Slater Depo.) at 68:21-69:6; 71:2-5; 103:1-19; 178:19-180:2; *id.* Ex. E (Thomas Depo.) at 133:6-24, 135:25-136:10. MWD even admits that San Diego explicitly told MWD, and MWD understood, that San Diego objected to MWD's rates on exactly the same grounds asserted now in this case, including MWD's misclassification of its State Water Project supply costs to its transportation rates. *Id.* Ex. E (Thomas Depo.) at 133:6-24. While MWD trumpets false "admissions," MWD's corporate designee actually conceded that "Section 5.2 allows the Water Authority to do what it has done in this case." *Id.* at 122:6-123:1.

The unstated (and absurd) premise of MWD's argument is that, if San Diego really had a complaint about MWD's rates, it should have filed suit immediately, in 2003, as soon as the ink was dry on the Exchange Agreement. But again, San Diego had agreed to a compromise, promising not to sue until 2008 at the earliest. Not only did MWD understand that San Diego agreed not to sue until 2008, *see* Braunig Decl. Ex. E (Thomas Depo.) at 135:24-136:10, but MWD believes that any suit by San Diego before then would have breached the Exchange Agreement. *Id.* at 143:13-144:5. Had San Diego filed suit before January 2008, MWD would have countersued for breach of contract and argued for specific performance of the five-year peace treaty and dismissal of San Diego's suit. Fundamentally, MWD is arguing that San Diego could not have sued then (because it would have been too soon) and cannot sue now (because it is too late). This is a catch-22, not a legal standard.

Second, and relatedly, MWD argues that San Diego cannot allege an actionable breach of contract because it admitted that MWD first breached the Exchange Agreement in 2008, when it passed its rates for 2009. Again, MWD uses the same flawed logic: because MWD's "rate structure" was the same in 2003 as 2008, any breach in 2008 must have been a breach in 2003. If San Diego concedes there was no breach in 2003, there cannot have been a breach in 2008 either. This gotcha argument ignores sections 5.2 and 11.1 of the Exchange Agreement, which make

clear that San Diego agreed not to sue until 2008, when the five-year timeout expired. Braunig Decl. Ex. F (Exchange Agreement) §§ 5.2, 11.1. In other words, the contract itself provides that MWD could not have been in breach until 2008 for failing to set rates in compliance with the law. San Diego simply complied with the terms of the contract. Needless to say, if San Diego had filed a breach of contract suit in 2003, MWD would have run to court to argue that the five-year grace period made it impossible for MWD to be in breach and required dismissal of San Diego's claim. *See id.* Ex. E (Thomas Depo.) at 135:24-136:10, 143:13-144:5.

Finally, although these facts make clear that San Diego never admitted MWD's rates were legal and thus conceded MWD could not be in breach, at the very least there is a triable factual dispute on that issue. To obtain summary adjudication, a defendant "must present facts to negate an essential element or to establish a defense." *MacKay v. Superior Court,* 188 Cal. App. 4th 1427, 1434 (2010). There is a triable issue of fact where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." *Id.* (quoting *Aguilar v. Atlantic Richfield Co.,* 25 Cal. 4th 826, 850 (2001)). Here, the facts cited above, including the testimony of MWD's own designee witness and contemporaneous documents, are more than sufficient to support a finding that both sides always understood San Diego had both the right under the Exchange Agreement and the intention to challenge MWD's rate allocation once the five-year timeout expired in 2008. *See* San Diego's Response to MWD's Separate Statement, Facts 40-52.

IV. CONCLUSION

MWD's motion is built on deception. First, MWD doesn't even mention the fact that the parties agreed—in two separate provisions of the Exchange Agreement—to defer litigation until five years had passed and the parties had attempted to negotiate a resolution. San Diego honored that commitment and now MWD is trying to punish it for following the rules. Second, MWD concocts a nonexistent "admission" that San Diego believed MWD's rates to be lawful. Not only does MWD mischaracterize the testimony of San Diego's witness, but any such "admission" is irreconcilable with the language of the contract (which expressly preserves San Diego's right to challenge MWD's rates as unlawful) and all the other testimony in this case from both parties.

According to MWD, San Diego is damned if it does and damned if it doesn't. But nothing in MWD's motion has any basis in reality, much less the law.

Respectfully submitted,

Dated: November 12, 2013

KEKER & VAN NEST LLP

/s/ Daniel Purcell

By: DANIEL PURCELL

Attorneys for Petitioner and Plaintiff
SAN DIEGO COUNTY WATER AUTHORITY

PROOF OF SERVICE BY ELECTRONIC TRANSMISSION AND EMAIL VIA PDF FILE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker & Van Nest LLP, 633 Battery Street, San Francisco, CA 94111-1809.

On November 12, 2013, I served the following documents described as:

SAN DIEGO'S OPPOSITION TO MWD'S MOTION FOR SUMMARY ADJUDICATION

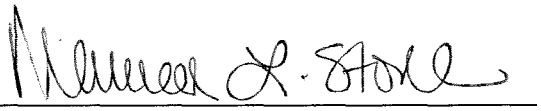
by serving a true copy of the above-described documents in the following manner:

BY LEXIS NEXIS® FILE & SERVE

On the date executed below, I electronically served the documents via Lexis Nexis® File & Serve described as on the recipients designated on the Transaction Receipt located on the via Lexis Nexis® File & Serve website.

Executed on November 12, 2013, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Maureen L. Stone