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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.

No. CPF-10-510830

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S REPLY IN SUPPORT OF ITS DEMURRERS TO, OR IN THE ALTERNATIVE MOTION TO STRIKE PORTIONS OF, SAN DIEGO COUNTY WATER AUTHORITY'S THIRD AMENDED PETITION/COMPLAINT

Date: March 27, 2013
Time: 1:30 p.m.
Dept.: 304
Judge: Hon. Curtis E.A. Karnow

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I. INTRODUCTION

Did the voters intend for new Article XIIIC, Section 1, subdivision (e) (Section 1(e)) to apply to pre-existing local charges, such as MWD's rates at issue here? The initiative's text and the ballot materials—both of which are largely ignored by SDCWA—demonstrate that the voters intended the new rules to govern only *local* charges adopted, extended, or increased after passage, in contrast to *state* charges, where Proposition 26 explicitly reaches back to pre-existing charges. Since MWD's rates were adopted before the initiative's passage and have not been extended or increased since passage, SDCWA's claims grounded on Section 1(e) should be removed from the case. Given the clear evidence of intent, the Court need not invoke interpretive rules on the subject of prospective versus retroactive operation. If the Court applies those rules, however, it will see that the presumption against retroactive operation controls because Section 1(e) changes the substantive standards governing establishment of local charges. Accordingly, the demurrers should be sustained without leave to amend or the motion to strike should be granted.

II. ARGUMENT

A. SDCWA's Attempt To Change The Subject Is Unavailing.

SDCWA argues that it is not trying to apply Proposition 26 retroactively at all. There is a very good reason why SDCWA tries to change the subject: the standard for retroactive application is impossible for SDCWA to meet. As explained in MWD's moving brief, ballot initiatives have no retroactive effect unless: (1) the measure expressly provides otherwise, or (2) "it is very clear from extrinsic sources that . . . the voters must have intended retroactive application." *Strauss v. Horton*, 46 Cal. 4th 364, 470 (2009). Wholly unable to satisfy this standard, SDCWA contends it wants Proposition 26 to apply only prospectively, only to future injunctive relief, and only to affect which party holds the burden of proof at trial. As shown below, SDCWA's own arguments and its TAC prove this to be false.

B. The Voters Did Not Intend Section 1(e) To Apply To Existing Charges.

Article XIIIC prescribes voter requirements when a local agency "impose[s], extend[s], or increase[s]" a tax. Cal. Const. art. XIIIC, § 2, subds. (b) & (d). Proposition 26's Section 1(e)

expands the definition of tax, to cover charges imposed by a local government that do not meet any of the listed exceptions. Cal. Const. art. XIIIC, § 1, subd. (e); *see* RJN, Ex. 1, at 57 ("This measure expands the definition of a tax and a tax increase so that more proposals would require approval by . . . local voters."). The issue is whether the expanded definition governs water rates adopted by MWD's Board seven months before Proposition 26's passage. It does not.

In a recent appellate decision interpreting Proposition 26, the Court reiterated the rule that if the language of a voter initiative is unambiguous, the plain meaning governs. *Schmeer v. County of Los Angeles*, No. B240592, __ Cal. App. 4th __, 2013 WL 635254, at *3 (Cal. App. 2 Dist. Mar. 11, 2013). "If the language is ambiguous, [the Court] may consider the analyses and arguments contained in the official ballot pamphlet as extrinsic evidence of the voters' intent and understanding of the initiative." *Id.* In its moving brief, MWD properly focuses on voter intent as demonstrated in the text of Proposition 26 and the ballot pamphlet. *See* MPA at 5-14. While SDCWA dismisses this discussion as "a fourteen-page red herring" (Opp. at 2), voter intent is the key issue. *Schmeer*, 2013 WL 635254, at *10-11 (resolving ambiguity of the word "tax" by looking only at related text in the state constitution and the arguments in the ballot pamphlet); *see also Strauss*, 46 Cal. 4th at 470; *Californians for Disability Rights v. Mervyn's*, LLC (*CDR*), 39 Cal. 4th 223, 229-230 (2006) (invoking rules of construction where voter intent on retrospective operation not clear). Here, the text, the context, and the relevant extrinsic evidence all point to the same conclusion:

- **The Text**: Proposition 26's local provisions do not expressly provide for retroactive application. Indeed, where the drafters intended Proposition 26 to apply to established charges—as with the state provisions—they expressly said so and identified the class of charges that would be covered. *See* RJN, Ex 1 at 114-115 (Cal. Const. art. XIIIA, § 3). Section 1(e) included no such terms. *See id.* at 115.
- **The Context**: Where Article XIIIC is intended to apply to charges enacted prior to passage, it expressly so states and specifically identifies the class of charges covered. *See* Cal. Const. art. XIIIC, § 2, subd. (c). Section 1(e) includes no such terms. Moreover, in Article XIIIC, "imposed" refers to "the first enactment of a tax." *See Citizens Association of Sunset Beach v. Orange County Local Agency Formation Commission* (*Sunset Beach*), 209 Cal. App. 4th 1182, 1194-95 (2012).
- **The Findings and Declarations of Purpose**: Proposition 26 covers "new," "increased," or "expanded" charges: "[T]he measure . . . defines a 'tax' for state and local purposes so that neither the Legislature nor local governments can circumvent

[restrictions in Propositions 13 and 218] on *increasing* taxes by simply defining *new* or *expanded* taxes as 'fees.'" RJN, Ex. 1 at 114 (emphasis added).

- **The Legislative Analyst's Analysis**: Section 1(e) would not apply to charges "in existence at the time of the November 2, 2010 election . . . unless . . . [the local agency] increases or extends the fees or charges. . . ." RJN, Ex 1 at 58.
- **The Ballot Arguments**: The initiative's proponents never suggest that Section 1(e) would apply to established charges. RJN, Ex 1 at 60-61.

Here, there can be no doubt that the voters understood that Section 1(e) would apply only to local charges created or changed *after* Proposition 26's passage.

SDCWA argues that Section 1(e) applies to MWD's pre-existing rates because the rates first applied on January 1, 2011, and were collected thereafter. Opp. at 1-2, 7-8, 10. But, SDCWA agrees MWD's Board adopted the rates in April 2010; this is the event that SDCWA's TAC alleges violates Proposition 26. TAC, 2:13-16. SDCWA concedes the rates were in existence and subject to legal challenge as of that date, because it filed its original petition/complaint challenging the rates two months later, in June 2010. There is no allegation that the rates have been increased or extended since. *See, generally*, TAC. And, all evidence demonstrates that the voters did not intend Section 1(e) to apply to previously-adopted local charges. Nor would it make sense to use collection as the triggering event, since Section 1(e) is directed at the manner in which charges are established, not the manner in which they are collected. RJN, Ex. 1 at 56 ("requires that certain state and local fees be approved by two-thirds vote"); *id.* at 56-59 (Legislative Analyst focuses on "approval requirements"); *id.* at 60-61 (supporting arguments focus on approval requirements). "Approval" occurs at the time an agency adopts a charge.[1]

SDCWA argues that Section 1(e) applies to any charge *collected* on or after Proposition 26's passage because it refers to "charge[s] . . . imposed by a local government" and the Supreme

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[1] *Kennelly v. Lowery*, 64 Cal. App. 2d 903 (1944) is not to the contrary. *See* Opp. at 10. There, a superior court appointed a reporter before the effective date of the statute conferring the authority to make the appointment. *Kennelly*, 64 Cal. App. 2d at 904-05. Not surprisingly, the Court of Appeal held that the appointment was void. *Id.* at 905. Here, in contrast, MWD's Board was fully authorized to adopt the rates in April 2010. It does not follow from *Kennelly* that duly adopted water rates are without legal effect until the date they first apply or are collected.

Court purportedly "held that a tax is 'imposed' each time it is collected." Opp. at 2 (citing *Howard Jarvis Taxpayers Ass'n v. City of La Habra*, 25 Cal. 4th 809, 824); *see* Opp. at 7-9. In fact, *City of La Habra* held only that, for purposes of accrual, a challenge to a charge may accrue each time the charge is collected. *City of La Habra*, 25 Cal. 4th at 812. In that case, retroactivity was not at issue because the challenged charge was adopted *after* Proposition 62's effective date. *Id.* at 813 (Proposition 62 [Gov't Code § 53720 *et seq.*] enacted November 1986; challenged charge adopted December 1992). Here, SDCWA agrees that the MWD Board adopted the water rates before the voters passed Proposition 26. Unlike in *City of La Habra*, the pertinent question here is whether the voters intended Section 1(e) to apply to previously adopted local charges.

As explained in MWD's moving brief, *Sunset Beach* demonstrates that, as used in Article XIIIC (the Article containing Section 1(e)), "impose" refers to a charge's first adoption or enactment. *See* MPA 8-9. SDCWA's attack on *Sunset Beach* is unavailing. Opp. 9. The *Sunset Beach* court construed "impose" in Article XIIIC, section 2 to mean "a discrete, initiating event," and therefore "the first enactment of a tax." *Id.* at 1194 and n. 15. The court's analysis of "imposed" is essential to its holding. *See Sunset Beach*, 209 Cal. App. 4th at 1194-95. And, *Sunset Beach* and *City of La Habra* are *not* inconcsistent. The *Sunset Beach* court analyzed "impose" as used in Article XIIIC, section 2, whereas *La Habra* analyzed the term for purposes of Proposition 62, which modified the Government Code. And, *Sunset Beach* is not alone in its analysis. *See McBrearty v. City of Brawley*, 59 Cal. App. 4th 1441, 1450 (1997), disapproved on other grounds in *City of La Habra*, 25 Cal. 4th at 817, n.2 (in Article XIIIC, section 2 "imposed" does not refer to collection); *see also* 82 Ops. Cal. Atty. Gen. 35 ("subsequent increases," as used in Proposition 218, "refers to the legislative action of imposing an assessment as distinguished from simply the continued administrative collection of an existing assessment").[2]

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[2] Similarly misplaced is SDCWA's reliance on *Griffith v. City of Santa Cruz*, 207 Cal. App. 4th 982, 995-97 (2012). *See* Opp. at 5. As noted in MWD's moving papers, *Griffith* did not address whether Section 1(e) applies to pre-existing charges (*see Griffith*, 207 Cal. App. 4th at 995-97) and therefore cannot stand for that proposition (*Ginns v. Savage*, 61 Cal. 2d 520, 524, n. 2 (1964)).

SDCWA also disparages MWD's discussion of the practical consequences of construing Section 1(e) to govern pre-existing charges. Opp. at 11. But the practical impacts of a construction are very relevant, particularly where–as here–a construction would lead to absurd results. *See, e.g., Cummings v. Stanley* 177 Cal. App. 4th 493, 507–508 (2009); *see also McBrearty*, 59 Cal. App. 4th at 1450 (weighing undesirable impacts of proposed construction); *In re Cheri T.*, 70 Cal. App, 4th 1400, 1404 (1999) (statutes should be interpreted to avoid absurd results). The practical impacts of SDCWA's construction are several and far reaching. *See* MPA at 12-14. Given the utter lack of evidence that the voters intended Section 1(e) to govern previously adopted charges, SDCWA's construction must be rejected.

C. The "Conduct Of Trial" Exception Does Not Control Because Section 1(e) Substantially Affects Existing Rights And Obligations.

SDCWA disingenuously claims that this case is controlled by an exception for laws addressing the conduct of trials because Section 1(e) is about "burden shifting *only*." *See, e.g.,* Opp. at 1:10-12, 3:5-7. The claim is belied by SDCWA's own allegations by which it seeks to litigate whether the rates MWD's Board adopted in April 2010 satisfy *the substantive requirements of Proposition 26. See* TAC, 26:11-15, 26:17-21, 32:3-11. Further, the Court need not reach the exception because all relevant evidence demonstrates that the voters did not intend Section 1(e) to apply to pre-existing charges. If the Court reaches the exception, it will see that the exception does not control because Section 1(e) does more than address the conduct of trial.

Even so, application of new procedural or evidentiary rules is presumptively prospective, not retroactive "because [application] typically affect[s] future conduct—the future conduct of trial." *Elsner v. Uveges,* 34 Cal. 4th 915, 936 (2004).[3] Because Section 1(e) "substantially affects existing rights and obligations," it cannot be applied retroactively. *Elsner*, 34 Cal. 4th at 936-37. It creates new substantive, constitutional standards for local agencies' establishment of

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[3] "In deciding whether the application of a law is prospective or retroactive, [courts] look to function, not form. [Citations.]" *Elsner*, 34 Cal. 4th at 936-37; *see also CDR*, 39 Cal. 4th at 230-31 (same); *Quarry v. Doe I*, 53 Cal. 4th 945, 956 (2012) ("[T]he distinction between procedural and substantive rules is not particularly helpful.").

charges. It expands the definition of tax, to cover all local charges that are imposed and do not qualify for one of the listed exceptions.[4] There was no existing law that contained the substantive legal requirements newly set forth in Proposition 26. And, for a Proposition 26 claim, it eliminated the presumption of validity afforded legislative enactments and shifted the burden to local agencies. These are new and changed standards for all local agencies. The practical effect in this case, if Section 1(e) were found to apply, is that the Court would need to address these new substantive issues. Unquestionably, Section 1(e) changes and affects substantive standards, and agencies' rights and obligations.

SDCWA incorrectly argues that prior to Proposition 26 and regardless of whether it applies in this case, MWD's water rates were already subject to "substantive standard[s]" identical to those set out in section 1(e). Opp. at 1; *see also id.* at 4. Authority over MWD's rates is vested in MWD's Board, which sets rates that "result in revenue which, together with revenue from any water stand-by or availability service charge or assessment, will pay the operating expenses of the district, provide for repairs and maintenance, provide for payment of the purchase price or other charges for property or services or other rights acquired by the district, and provide for the payment of the interest and principal of the bonded debt subject to the applicable provisions of this act authorizing the issuance and retirement of the bonds." MWD Act, § 134 (Statutes 1969, ch.209, as amended; West's California Water Code – Appendix Section 109; Deering's California Water Code – Uncodified Act 570). Rates generally must "be uniform for like classes of service throughout the district." *Id.* Proposition 26's terms are different: defining which local charges are "taxes"; providing various requirements for charges to be excluded from that definition (*see* FN 4); and requiring that taxes that meet Section 1(e)'s

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[4] A charge is excepted if, for example, it is for the sale of government property; no services are provided to those not charged; the charge does not exceed reasonable costs of service as determined by the court; the amount recovered is not more than necessary to cover the reasonable costs as determined by the court; and/or "the manner in which those costs are allocated to a payor bear [sic] a fair or reasonable relationship to the payor's burden on, or benefits from, the government activity." Cal. Const. art. XIIIC, § 1, subd. (e)(1), (2), (4) & unnumbered last para.

definition be approved by voters. Cal. Const., art. XIIIC, §§ 1(e), 2. These most certainly are substantive changes.

All of the law SDCWA points to either does not apply to MWD's water rates or does not contain the same standards as Proposition 26:

- Government Code section 54999.7. Section 54999.7 on its face does not apply to MWD. It requires that rates charged to public agencies be the same as those charged to non-public agency customers; since MWD's 26 customers are all public agencies (TAC, ¶¶ 15, 16), no court has had occasion to consider whether the section applies to MWD's rates. Even assuming *arguendo* the section could apply, it does not impose the same requirements as Section 1(e).
- *Elliott v. City of Pac. Grove*, 54 Cal. App. 3d 53, 59 (1975). The *Elliott* court held that public sewer charges must not be "unreasonable, unfair, or fraudulently or arbitrarily established." *Elliott*, 54 Cal. App. 3d at 58. *Elliott* does not contain Section 1(e)'s requirements.
- Proposition 4 (Cal. Const. art. XIIIB, the Gann Initiative). Proposition 4 limits local agency expenditures and, under it, an agency may be required to establish that a fee is "reasonable." It does not contain Section 1(e)'s requirements. And, the defendant bears only a burden of production,[5] which is very different than holding the burden of proof as under Section 1(e).[6]
- Proposition 13 (Cal. Const. art. XIIIA). Proposition 13 was not intended to apply to water rates. *Rincon Del Diablo Mun. Water Dist. v. San Diego Cnty. Water Auth.*, 121 Cal. App. 4th 813, 819, 822 (2004); *Brydon v. E. Bay Mun. Util. Dist.*, 24 Cal. App. 4th 178, 194-95 (1994). SDCWA knows this well; it prevailed in an appellate case on the point. *See Rincon, supra.* Even assuming *arguendo* Proposition 13 applies to MWD's rates, it does not contain the same requirements as Section 1(e).[7]
- Government Code section 54985. Section 54985 covers certain fees charged by "a county, a county service area or a county waterworks district governed by a county board of supervisors." Because MWD is not a county or governed by a county Board of Supervisors, this does not apply. *See* Gov't Code § 54985(a); *County of Orange v. Barratt American, Inc.*, 150 Cal. App. 4th 420, 437-438 (2007).
- Water Code § 1810 *et seq.* (the Wheeling Statutes). The Wheeling Statutes require a

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[5] *See Oildale Mut. Wat. Co. v. N. of the River Mun. Wat. Dist.*, 215 Cal. App. 3d 1628, 1634 (1989).

[6] *See Homebuilders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore*, 185 Cal. App. 4th 554, 562 (2010).

[7] Under Proposition 13, fees just "must be related to the overall cost of the [government service]." *Cal. Farm Bureau Fe'n v. State Water Res. Control Bd.*, 51 Cal, 4th 421, 438 (2011). Also, the Proposition 13 plaintiff "bears the burden of proof to establish a prima facie case showing that the fee is invalid." *Id.* at 436. As with Proposition 4, a Proposition 13 defendant just holds a burden of production. *See, e.g., City of Dublin v. County of Alameda*, 14 Cal. App. 4th 264, 281-84 (1993). This is quite different than holding the burden of proof.

party to charge "fair compensation" when there is statutory available capacity in its water conveyance system and another party uses that capacity to transport water that it purchased from a third party. *See* Water Code § 1810 *et seq.* The Wheeling Statutes are nothing like Section 1(e).

Nor is *Murphy v. City of Alameda*, 11 Cal. App. 4th 14 (1992), upon which SDCWA heavily relies, controlling. *See* Opp. at 1, 6. At issue there was Evidence Code 669.5, which: (1) established a presumption that ordinances limiting residential building permits or the number of buildable lots available for residential development have an impact on the supply of residential units; (2) established that, in an action challenging such a law, the local agency bears the burden of proving that the ordinance is necessary for the protection of the local public health, safety, or welfare; and, (3) exempted from the presumption and burden provisions "[certain] voter approved ordinance[s] adopted by referendum or initiative prior to the effective date of this section. . . ." Cal. Evid. Code § 669.5. The Court of Appeal found that section 669.5 concerned the conduct of trial and, thus, could apply to ordinances adopted prior to the section's effective date. *Murphy*, 11 Cal. App. 4th at 912-13. The court held that the law's text *compelled* the conclusion: "By expressly declaring that the section should not apply only to *certain* [voter approved] ordinances . . . adopted prior to its effective date, the Legislature impliedly indicated that it should apply to *all* other ordinances, . . ."[8] *Id.* at 913 (emphasis in original).

Murphy is certainly distinguishable. First, it involves an Evidence Code provision that, by its nature, is about the conduct of trials. Proposition 26, by contrast, involves new substantive constitutional standards. SDCWA has not identified a single case in which a new constitutional rule, even a burden shifting rule, was applied to past conduct absent clear evidence of such an intent. Second, by Evidence Code section 669.5, the Legislature clearly intended for the new rule to apply to ordinances adopted prior to the statute's effective date.[9] Here, the evidence is otherwise: Proposition 26 and the relevant extrinsic sources demonstrate that the drafters and

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[8] SDCWA discusses only a portion of *Murphy*, wholly omitting the legislative intent analysis and holding. *See* Opp. 3.

[9] *Murphy*'s retroactivity analysis appears to be specific to section 669.5. It has never been cited in connection with any other statute, even as to any other provision of the Evidence Code.

voters intended Section 1(e) to apply only to "new," "increased" or "extended" charges, not charges adopted before the initiative's passage.

Also unhelpful to SDCWA is *CDR*. *See* Opp. at 3-4. Former Business & Professions Code section 17204, conferred upon private parties the right to bring claims on behalf of the general public. *CDR*, 39 Cal. 4th. at 228. CDR brought such a claim alleging that Mervyn's stores were not accessible. *Id.* at 227. While the case was on appeal, the voters enacted Proposition 64, amending section 17204 to eliminate the authority for private parties to bring claims on the public's behalf. *Id.*; *see also* Bus. & Profs. Code § 17204 (amended November 3, 2004). The store moved to dismiss. *Id.* at 227-28. The Court found that applying Proposition 64's standing provision to pending cases was a prospective application. *Id.* at 230-33. The new standing provision did not "change the legal consequences of past conduct by imposing new or different liabilities based on such conduct." *Id.* at 232. "The measure left entirely unchanged the substantive rules governing business and competitive conduct." *Id.* It only prevented uninjured persons from bringing claims by denying such persons standing. *Id.*

Here, in obvious contrast, the issue is not whether uninvolved parties retain standing to sue or not. Section 1(e) *changes* the substantive standards governing local agencies' establishment of charges. Thus, its application to MWD's and other local agencies' charges established prior to Proposition 26's passage would be impermissibly retroactive.

D. There Is No Categorical Exception For Cases Involving Prospective, Injunctive Relief.

SDCWA also contends that Section 1(e) applies to MWD's rates because SDCWA's first three causes of action are "injunctive and prospective in nature," and, under its reading of *CDR*, new statutes somehow automatically govern pending claims for injunctive relief. Opp. at 11-12. *CDR* does not support the argument. In any event, SDCWA's claims are not purely prospective.

CDR did not establish a categorical exception for injunctive claims. It merely drew on the *Elsner* line of cases to restate that (1) voter intent governs the retrospective application of new initiatives; (2) initiatives should only apply prospectively unless the text or the voters clearly express a contrary intention; and, (3) new, prospective legislation may apply to pending court

proceedings so long as it does not change the legal consequences of past actions. *CDR*, 39 Cal. 4th at 232-33. As discussed above, the voters clearly intended that Section 1(e) would apply only where a local government charge is adopted, increased, or extended after Proposition 26's passage. Additionally, Section 1(e) changes standards for establishing charges, thus the conduct-of-trial exception does not control. *CDR* does nothing to alter these conclusions.

Further, SDCWA's argument is based on a false premise. Unlike the injunctive claims in *CDR*, SDCWA's first through third causes of action are *not* "prospective in nature." Opp. at 12. By its first cause of action, SDCWA seeks to "[v]acate the rates set on or about April 13, 2010. . . ." and re-allocate the costs. TAC, 38:4-15. By its second cause of action, SDCWA requests "a declaration that the rates and charges adopted by [MWD] on April 13, 2010 are discriminatory, invalid, and must be set aside. . . ." and the costs re-allocated. TAC, 38:16-23. By its third cause of action, SDCWA seeks "an order that the rates and charges adopted by [MWD] on April 13, 2010 are invalid and must be set aside. . . ." and the costs re-allocated. TAC, 39:3-6. In short, SDCWA asks the Court to dismantle MWD's existing rate structure, invalidate charges adopted three years ago, and order MWD to pay SDCWA the re-allocated amount it believes it is owed. Thus, even if there were a categorical rule for prospective, injunctive relief, SDCWA's claims would not fall within it.

III. CONCLUSION

The demurrers should be sustained without leave to amend or, in the alternative, the motion to strike should be granted.

DATED: March 18, 2013

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