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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 COUNTY OF SAN FRANCISCO

18 SAN DIEGO COUNTY WATER AUTHORITY,

19 Petitioner and Plaintiff,

20 v.

21 METROPOLITAN WATER DISTRICT OF
22 SOUTHERN CALIFORNIA; et al.,

23 Respondents and Defendants

Case No. CPF-10-510830

**METROPOLITAN WATER
DISTRICT OF SOUTHERN
CALIFORNIA'S MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO
COMPEL FURTHER RESPONSES
TO REQUESTS FOR PRODUCTION
TO SAN DIEGO COUNTY WATER
AUTHORITY, SET ONE**

24 Date: May 10, 2013
25 Time: 9:00 a.m.
26 Dept: 304
27 Judge: Hon. Curtis E. A. Karnow

Action Filed: June 11, 2010
Trial Date: Not Set

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1 **I. INTRODUCTION**

2 Respondent and Defendant the Metropolitan Water District of Southern California
3 (“MWD”) brings this motion to compel further responses by Petitioner and Plaintiff San Diego
4 County Water Authority (“SDCWA”) to MWD’s First Set of Requests for Production of
5 Documents (“RFPs”). MWD’s RFPs seek documents that are discoverable under the Code of
6 Civil Procedure according to the Court’s rulings and are also within the scope of this Court’s
7 September 17, 2012 Order, based in part on SDCWA’s own arguments. MWD objected that
8 discovery is improper in a case challenging MWD’s rates set by quasi-legislative action, but
9 given SDCWA’s successful arguments, MWD is required and entitled to seek discovery using the
10 same standards.

11 **II. BACKGROUND**

12 Formed in 1928 under the Metropolitan Water District Act (“MWD Act”),¹ MWD is a
13 water wholesaler that provides a supplemental supply of water for domestic and municipal uses at
14 wholesale rates to its member public agencies. MWD’s principal sources of water are the State
15 Water Project (“SWP”), which supplies water to MWD through a contract with the State
16 Department of Water Resources (“DWR”), and the Colorado River. (Third Amended
17 Complaint/Petition (“TAC”) ¶ 17.) MWD is composed of 26 separate public member agencies
18 (“MAs”). (*Id.* ¶ 15.) The MAs request water from MWD at various delivery points in MWD’s
19 system and pay at uniform rates established by MWD’s Board of Directors for each class of
20 service. MWD Act § 134.

21 MWD is governed by a 37-member Board of Directors. Each of its MAs is entitled to
22 have at least one representative on the Board, plus additional representatives based on the
23 assessed valuation of property in MWD’s service area that is within the MA. MWD Act §§ 51,
24 52. By statute, each MA has proportional voting rights, which are also based on the assessed
25 valuation within the agency. (TAC ¶ 18.) Under state law, MWD’s Board must act by a majority
26 vote of its MAs, which includes SDCWA’s voting block. MWD Act § 55, 133.

27 _____
28 ¹The MWD Act is in Volume 72B of West’s Annotated California Water Code–Appendix (1995
ed.) § 109-1, *et seq.*, and Deering’s California Water Code–Uncodified Act § 570.

1 SDCWA has been a MA since 1946 and currently holds four seats on MWD’s Board,
2 controlling 17.89% of the vote – the second largest block of votes of any MA. SDCWA
3 purchases water and water service from MWD and pays the same rate as any other MA for the
4 same class of service. (TAC ¶ 26-27.) SDCWA also has a contract, the Exchange Agreement,
5 with MWD under which SDCWA exchanges purchased water from the Imperial Irrigation
6 District (“IID”) for an equivalent quantity of “Exchange Water” from MWD. (TAC ¶ 29; TAC
7 Ex. A §§ 3.1- 3.5, 5.2.) MWD provides the Exchange Water from any available source, not just
8 the IID water. (*Id.* § 3.2.)

9 MWD is entitled to set rates sufficient to recoup its costs, including capital costs and
10 operating expenses. (TAC ¶ 16; MWD Act § 134.) MWD’s rate structure and its annual (or,
11 most recently, biennial) adoption of rates based on that structure are determined by a vote of
12 MWD’s Board. MWD Act § 55, 133. MWD’s determination of its rate structure and its
13 enactment of its water rates are quasi-legislative acts.²

14 MWD’s Board adopted a rate structure in 2001 that has been effective since January 2003.
15 It includes the following rate components:

- 16 • **Water Supply Rates (Tier 1 and Tier 2):** These rates are designed to recover
17 MWD’s water supply costs.
- 18 • **System Access Rate:** This rate is intended to recover a portion of the costs
19 associated with the conveyance and distribution system, including capital,
20 operating, and maintenance costs.
- 21 • **Water Stewardship Rate:** This rate is charged on a dollar per acre-foot basis to
22 collect revenue to support MWD’s financial commitment to conservation, water
23 recycling, groundwater recovery, and other water management programs approved
24 by the Board.
- 25 • **System Power Rate:** This rate is charged on a dollar per acre-foot basis to recover
26 the cost of power necessary to pump water from the State Water Project and
27 Colorado River through the conveyance and distribution system.

28 (TAC ¶ 25). SDCWA voted to approve rates under this structure in 2008 (for rates effective in

²See *Brydon v. E. Bay Mun. Util. Dist.*, 24 Cal. App. 4th 178, 196 (1994) (water district’s “enactment of the rate structure design” is of a “quasi-legislative nature”); *Durant v. Beverly Hills*, 39 Cal. App. 2d 133, 139 (1940) (“the matter of fixing water rates is . . . legislative in character”); see also *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 277 (1994) (“When performed by an administrative agency, ratemaking has uniformly been considered a quasi-legislative action”).

1 January 2009) and 2009 (for rates effective in September 2009). In other years, SDCWA made
2 no objection to this rate structure, including in 2005, 2006, and 2007.

3 **A. SDCWA's Challenge to MWD's Rate Structure**

4 SDCWA challenges MWD's rates adopted in 2010 for calendar years 2011 and 2012 by
5 claiming that the 2001 allocation of costs between the supply (Supply Rates) and transportation
6 (System Access, Water Stewardship, and System Power Rates) components of MWD's rate
7 structure is invalid. (TAC ¶¶ 24-29.) SDCWA claims that the 2001 rate structure improperly
8 allocates the fixed and unavoidable costs of MWD's take-or-pay contract with the State Water
9 Project to the System Access and System Power Rates. (TAC ¶ 75.) SDCWA further claims that
10 MWD improperly includes the Water Stewardship Rate in the rate charged to transport non-
11 MWD water (called "wheeling"). (TAC ¶ 76.) Among other claims, SDCWA alleges that this
12 cost allocation violates the Wheeling Statute, Water Code § 1810, *et seq.*³

13 **B. SDCWA's Breach of Contract Claim**

14 SDCWA alleges breach of the October 10, 2003 Exchange Agreement. (TAC ¶¶ 98-102.)
15 In 2003, SDCWA entered into a contract with MWD under which MWD exchanges water that
16 SDCWA purchases from IID under a separate agreement called the "Transfer Agreement" for an
17 equivalent quantity of "Exchange Water" from MWD. (TAC ¶ 2; TAC Ex. A §§ 3.1- 3.5, 5.2.)
18 In this action, SDCWA claims that MWD "breached section 5.2 [of the Exchange Agreement] by
19 setting rates for the conveyance of [SDCWA's] purchased water that violate applicable laws and
20 regulations, by incorporating Metropolitan's costs of obtaining its supply of DWR/State Water
21 Project water and its costs to subsidize local conservation and water development projects, into
22

23 ³The Wheeling Statute provides that a public agency may not deny a bona fide transferor of water
24 the use of a water conveyance facility which has unused capacity, when capacity is available, if
25 fair compensation is paid for that use, subject to certain exceptions. Cal. Wat. Code § 1810.
26 "Fair compensation" means the reasonable charges incurred by the owner of the conveyance
27 system, including capital, operation, maintenance, and replacement costs, increased costs from
28 any necessitated purchase of supplemental power, and including reasonable credit for any
offsetting benefits for the use of the conveyance system. *Id.*, § 1811(c). The statute further
provides that, "In any judicial action challenging any determination made under this article the
court shall consider all relevant evidence In any such case the court shall sustain the
determination of the public agency if it finds that the determination is supported by substantial
evidence." *Id.*, § 1813.

1 the 'transportation rate' charged to the Water Authority." (TAC ¶ 101.) Section 5.2 of the
2 Exchange Agreement describes the "Price" SDCWA was obligated to pay for each acre-foot of
3 Exchange Water. (Scott Decl., Ex. F, §§ 5.1-5.2.) SDCWA's theory of breach is identical to its
4 challenge to MWD's rate structure.

5 C. SDCWA's Challenge to the RSI Provision

6 SDCWA seeks declaratory relief regarding a term called the "Rate Structure Integrity"
7 provision that is included in certain contracts for MWD to fund water conservation and other
8 local water development programs, which SDCWA and other participating MAs voluntarily
9 requested and executed. SDCWA alleges that the RSI provision provides that if any member
10 "initiates litigation or supports legislation related to Metropolitan's rates," MWD may terminate
11 the agreement. (TAC ¶ 30.) SDCWA admits that it agreed to execute certain contracts with
12 MWD, but claims it did so reluctantly. SDCWA seeks declaratory relief claiming that the RSI
13 provision is an unconstitutional condition that deprives SDCWA of the right to petition and
14 violates Civil Code § 1668. (TAC ¶¶ 105-106.)

15 III. PROCEDURAL HISTORY

16 On January 6, 2012, the Court granted a motion brought by IID, and joined by SDCWA,
17 to allow discovery in this case under the Wheeling Statute. The Court ordered that discovery
18 would not require a response unless and until the Court ordered it. (Chatterjee Decl., Ex. N,
19 2/17/12 Tr. at 40:20-22; 41:1-14.) The Court directed the parties to work with a Discovery
20 Referee, and after briefing and hearing, on June 5, 2012, the Discovery Referee issued his
21 recommendations. MWD and the MA parties then sought de novo review. After hearings and
22 various rulings on that motion on August 3, September 5, and September 11, 2012, the Court
23 issued its September 17, 2012, discovery Order. (*Id.*, Ex. R.) On October 29, 2012, MWD
24 propounded its first set of RFPs on SDCWA and IID. (*Id.*, Exs. A and B.) SDCWA identified
25 several areas where it would agree to produce documents, but objected to a number of requests.
26 (*Id.*, Ex. C.) The parties have met and conferred and have been unable to resolve disputes on a
27 number of categories. (*Id.*, ¶¶ 6-16, Exs. E-L.)
28

1 **IV. THE COURT SHOULD ORDER SDCWA TO SERVE FURTHER**
2 **RESPONSES TO PRODUCE THE REQUESTED DOCUMENTS**

3 For discovery purposes, information is relevant if it might reasonably assist a party in
4 evaluating its case, preparing for trial, or facilitating a settlement. *Gonzalez v. Super. Ct.*, 33 Cal.
5 App. 4th 1539, 1546 (1995). The “scope of permissible discovery is one of *reason, logic and*
6 *common sense.*” *Lipton v. Super. Ct.*, 48 Cal. App. 4th 1599, 1612 (1996). The Court has held
7 that, where it has authorized document production including under the Wheeling Statute,
8 production will be ordered where requests seek information that is either relevant or reasonably
9 calculated to lead to the discovery of admissible evidence. The Court ordered MWD to produce
10 documents based on this standard. (Chatterjee Decl., Ex. O, Tr. 8/3/12, 15:25-16:1 (stating in
11 regard to the “reasonably calculated to lead to the discovery of admissible evidence” standard:
12 “That’s the standard”)); Code Civ. Proc. § 2031.010. The Court should compel SDCWA to serve
13 further responses agreeing to produce documents responsive to the following requests:

14 **A. RFPs regarding SDCWA’s rate practices**
15 **(RFPs 21-23, 32-36, 39, 40, 55, 70)**

16 These requests seek documents regarding SDCWA’s own rate setting practices, including,
17 for example, costs SDCWA allocates to supply versus transportation (RFP 21); costs that form
18 SDCWA’s wheeling rate (RFP 22); and SDCWA’s allocation of its costs to particular rate
19 components (RFP 32). (Chatterjee Decl., Ex. A.) Like MWD, SDCWA sets water rates for its
20 own member agencies in the San Diego area and must allocate costs in setting its own water rates,
21 including its wheeling rate. SDCWA’s own rate setting practices in areas where SDCWA
22 challenges MWD’s rates are pertinent to SDCWA’s Wheeling Statute and breach of contract
23 claims. For example, if SDCWA sets rates and allocates cost components in the same manner as
24 MWD, that tends to show that MWD’s cost allocations as challenged in this action are reasonable
25 and that MWD’s rates charge “fair compensation,” particularly under the “all relevant evidence”
26 standard in the Wheeling Statute that SDCWA and IID relied upon to obtain discovery. Another
27 party’s conduct can be evidence of reasonableness. *See Maughan v. Google Tech., Inc.*, 143 Cal.
28 App. 4th 1242, 1250 (2006). As a matter of fairness and reason, *SDCWA cannot claim that what*

1 MWD did is unfair, unreasonable, and illegal if SDCWA has done the same thing.

2 These documents are discoverable under SDCWA's own arguments. SDCWA argued and
3 the Court agreed that information regarding what the staff of a party, MA, or entity in the water
4 industry has stated about a party's position or issue in this case is probative. (See Chatterjee
5 Decl., Ex. Q, 9/11/12 Tr. at 25:20-27:15.) SDCWA asked for documents internal to a MA,
6 claiming that "member agencies and the consultants are themselves experts in setting water rates"
7 and are "constantly evaluating the rate allocation, the rate structure, cost recovery"; SDCWA also
8 claimed that MAs' documents regarding what MWD should or should not do is probative. (*Id.*,
9 Ex. P, 9/5/12 Tr. at 71:11-77:12.) MWD's requests seek SDCWA's actual *practice* regarding its
10 own rates and rate allocations, which under SDCWA's logic, should be more probative than what
11 a party or other industry member *states*. If SDCWA's rate allocations are similar to MWD's,
12 then that evidence undercuts SDCWA's allegations that MWD's rate allocations are improper.

13 SDCWA's rate setting documents are also probative of industry standards. SDCWA
14 argued and the Court agreed that discovery regarding industry standards on subjects at issue is
15 relevant. (*Id.*, Ex. P, 9/5/12 Tr. at 56:10-22; Ex. Q 9/11/12 Tr. at 23:24-24:24.) SDCWA also
16 argued that MWD's MAs—a group that includes SDCWA itself—are "experts" in setting water
17 rates. (*Id.*, Ex. P, 9/5/12 Tr. at 71:11-77:12.)

18 These RFPs also are pertinent to MWD's unclean hands defense. "Any conduct that
19 violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to
20 invoke the doctrine." *Kendall-Jackson Winery, Ltd. v. Super. Ct.*, 76 Cal. App. 4th 970, 979
21 (1999). The doctrine applies where the conduct relates directly to the cause at issue or the subject
22 matter involved. *Id.* at 979; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists*,
23 227 Cal. App. 2d 675, 728 (1964). Indeed, unclean hands applies in cases where the plaintiff
24 "has engaged in precisely the same type of conduct about which it complains."
25 *Trafficschool.com, Inc. v. Edriver, Inc.*, 633 F. Supp. 2d 1063, 1084 (C.D. Cal. 2008). For
26 example, if SDCWA has the same cost allocation or rate structure practice that it alleges does not
27 conform to industry standards or is unlawful, then that practice would be probative of MWD's
28 unclean hands defense because it relates directly to the subject matter involved in this case. To

1 allow a plaintiff relief based on a practice that it itself engages in would constitute “double
2 recovery”—once from the litigation and once through its own inequitable conduct. *See Emco,*
3 *Inc. v. Obst*, 2004 U.S. Dist. LEXIS 12118, at *16 (C.D. Cal. May 7, 2004).

4 **B. RFPs re SDCWA-IID Transfer Agreement**
5 **(RFPs 37, 42-43, 51-53)**

6 These requests seek documents regarding the Transfer Agreement between SDCWA and
7 IID, including SDCWA’s compliance with the law with regard to the Transfer Agreement and the
8 cost to SDCWA of the water transfers under the Transfer Agreement. The Exchange Agreement
9 is interrelated with and refers to the Transfer Agreement, and the Transfer Agreement was the
10 reason that SDCWA entered the Exchange Agreement. (TAC ¶ 2; Scott Decl., ¶ 2; Exs. A, B.)
11 Documents regarding the Transfer Agreement are probative of interpreting the Exchange
12 Agreement, MWD’s defenses to the breach of contract claim, and damages. Indeed, interrelated
13 contracts “must be read together for purposes of interpretation.” *Heston v. Farmers Ins. Group*,
14 160 Cal. App. 3d 402, 417 (1984); *Corson v. Brown Motel Investments, Inc.*, 87 Cal. App. 3d
15 422, 425 (1978) (holding that three related contracts between different parties “are part of one
16 large transaction, and each should be construed in light of the others”). This is true when the
17 contracts, like the Exchange Agreement and the Transfer Agreement, refer to one another. *See*
18 *Payton v. Kuhn-Murphy, Inc.*, 253 Cal. App. 2d 278, 281 (1967) (“[W]here one contract
19 specifically refers to the provisions of another contract the two contracts insofar as there are
20 applicable and controlling provisions must be read together”).

21 *As to some background:* The Transfer Agreement is a parallel agreement to the Exchange
22 Agreement. (Scott Decl., ¶ 2.) The Exchange Agreement contains numerous provisions
23 referencing the Transfer Agreement, and the Price in the Transfer Agreement (Base Contract
24 Price formula) is based on MWD’s rates, as is the Exchange Agreement’s Price provision. (*Id.*,
25 ¶¶ 2, 5, Exs. A, B.) The Exchange Agreement is necessary to make the Transfer Agreement work
26 because it is the agreement through which SDCWA receives the water it has purchased from IID
27 pursuant to the Transfer Agreement, by an exchange for MWD water supplies. (*Id.*, ¶ 4.)

28 The original 1998 Transfer Agreement, before MWD unbundled its rates, contained the

1 Base Contract Price formula based on MWD's rate structure. (*Id.*, ¶ 5.) The 1998 Exchange
2 Agreement included provisions to adjust its Price (a discount rate) based on changes in the Price
3 SDCWA was to pay IID under the Transfer Agreement, so that the sum of the Price SDCWA
4 paid IID under the Transfer Agreement and the Price it paid MWD under the Exchange
5 Agreement would remain unchanged. (*Id.*) Soon after MWD's Board approved unbundling
6 MWD's rates in 2001, SDCWA and IID disagreed about how to apply the new unbundled rate
7 structure – which is at issue in this case – to the Transfer Agreement. (*Id.*, ¶ 6.) SDCWA and IID
8 began negotiating an amendment to the Transfer Agreement because of MWD's unbundled rate
9 structure. (*Id.*)

10 When SDCWA and MWD entered into the 2003 Exchange Agreement based on the
11 unbundled rate structure, SDCWA and IID entered into a Revised Fourth Amendment to the
12 Transfer Agreement that retained the Base Contract Price formula, but deferred it to 2017 in favor
13 of a substitute price schedule, which applied unless either party opted to revert to the Base
14 Contract Price formula. (*Id.*, ¶ 10.) The 2003 Exchange Agreement does not contain the overall
15 sum-neutral provision that appears in the 1998 Exchange Agreement. (*Id.*, ¶ 9.)

16 SDCWA and IID entered into a Fifth Amendment to the Transfer Agreement in 2009 in
17 settlement of their multi-year dispute about calculation of the Transfer Agreement's Price based
18 on MWD's unbundled rate structure and correlation to the Exchange Agreement. (*Id.*, ¶ 14.)
19 SDCWA and IID requested data and input from MWD to assist the discussions, and SDCWA
20 reported that it was relying on "the best available information provided by MWD" to both
21 SDCWA and IID. (*Id.*, ¶ 12.) IID identified issues in dispute, regarding what the Transfer
22 Agreement Price should be, such as: How to utilize MWD's two-tier and disaggregated rate
23 structure in a Price that references a singular rate; how to treat the canal lining water (that
24 SDCWA received due to the 2003 Exchange Agreement) in the MWD rate formula; and whether
25 the exchange of water from IID under the Transfer Agreement for Exchange Water from MWD
26 under the Exchange Agreement at an "exchange price" involves payment of a wheeling rate. (*Id.*,
27 ¶ 13.) The 2009 Transfer Agreement again contains the Base Contract Price formula, but defers it
28 to 2035 in favor of a substitute price schedule. (*Id.*, ¶ 16.)

1 Accordingly, documents regarding the Transfer Agreement are probative of the validity of
2 MWD's rate structure challenged by SDCWA and are pertinent to SDCWA's claim for breach of
3 the Exchange Agreement for a number of reasons. For example, IID and SDCWA could have
4 based the Transfer Agreement's Price provision on anything they chose, and yet they chose to
5 base it on MWD's rate structure and sought from 2002 to 2009 to apply to their agreement
6 MWD's unbundled rate structure that they now attack as unlawful. That SDCWA and IID
7 elected to base the Price provision on MWD's rate structure is probative of the lawfulness of
8 MWD's rate structure and SDCWA's and IID's understanding that those rates are lawful, which
9 directly addresses SDCWA's claim for breach of the Exchange Agreement's "Price" provision.
10 Documents regarding the reason IID and SDCWA based the Transfer Agreement Price provision
11 on MWD's rate structure, including the omission of any concerns about the validity of MWD's
12 rate structure, are probative.

13 **C. RFP 54 (regarding the 2009 renegotiation of the Transfer Agreement)**

14 This request seeks documents regarding the renegotiation of the Transfer Agreement in or
15 about 2009. SDCWA and IID renegotiated the Transfer Agreement in 2009, which resulted in
16 SDCWA paying IID significantly more. (Scott Decl., ¶ 15.) SDCWA then, suddenly and
17 coincidentally, filed this suit challenging MWD's rates. Information regarding the 2009 Transfer
18 Agreement is probative of SDCWA's reasons for challenging MWD's rates. For example, these
19 documents are pertinent to show that SDCWA's challenge to MWD's rates is a pretext for its
20 desire to pay less to MWD in order to compensate for its higher payments to IID, and to achieve
21 the overall sum-neutral result that the 1998 Exchange Agreement had guaranteed to SDCWA but
22 that the 2003 Exchange Agreement did not. This information is probative to show that there has
23 been no breach of the Exchange Agreement, that MWD's rates are valid, and that SDCWA has
24 unclean hands with regard to its breach of Exchange Agreement claim.

25 **D. RFPs regarding SDCWA's entry into the 1998 Exchange Agreement
26 and the 2003 Exchange Agreement (RFPs 44-48)**

27 These requests seek documents regarding SDCWA's decision to enter into the 1998 and
28 2003 Exchange Agreements, and its consideration of whether or not to amend the Exchange

1 Agreement. These RFPs concern the interpretation of the Exchange Agreement, particularly the
2 Price provision in Section 5.2 that SDCWA claims MWD breached. What SDCWA staff
3 analyzed, understood, and recommended regarding entering into the 2003 Exchange Agreement is
4 pertinent to interpret the Price provision at issue. (*See* TAC ¶ 29.)

5 SDCWA and MWD entered into the original 1998 Exchange Agreement with a term of
6 many decades, with a discounted Price provision. (Scott Decl., ¶ 7.) In 2003, SDCWA's Board
7 considered two options regarding the 1998 Exchange Agreement: Option 1 to retain the existing
8 1998 Exchange Agreement; and Option 2 to enter into the 2003 Exchange Agreement in its place,
9 which had the Price provision at issue in this case. (*Id.*, Exs. C, D, and E.) Entering into the 2003
10 Exchange Agreement required SDCWA to pay a higher price, but SDCWA would receive
11 additional benefits and consideration. For example, MWD would assign to SDCWA
12 \$235 million in state funding and give it 110 years of nearly-free canal lining water. (*Id.*)
13 SDCWA selected Option 2. (*Id.*, ¶¶ 7-8, Ex. E.)

14 SDCWA's interpretation of the 1998 Exchange Agreement, particularly the Price
15 provision, is pertinent to interpreting the 2003 Exchange Agreement that replaced it. How
16 SDCWA interpreted and understood the 2003 Exchange Agreement, particularly the Price
17 provision, that it claims MWD breached is certainly probative. These documents are also
18 probative to show that SDCWA knew exactly what it was bargaining for and knowingly agreed to
19 the terms in the Exchange Agreement that it now challenges. For example, documents showing
20 what SDCWA understood the 2003 Exchange Agreement Price meant in relation to MWD's
21 unbundled rate structure, approved in 2001 and effective in January 2003, would show that there
22 was no breach of contract. And, such information would be relevant to MWD's affirmative
23 defenses of waiver, unclean hands, laches, and estoppel, among others.

24 **E. RFP 41 (regarding IID's purported right to transfer water)**

25 This request seeks documents regarding IID's purported legal right to sell water to other
26 entities. This request is probative of the scope of SDCWA's Wheeling Statute claim. The
27 Wheeling Statute claim challenges the rate for wheeling third-party water through MWD's
28 system. MWD asserts that IID has no legal right to sell or transfer water outside of its service

1 area other than to SDCWA, and documents discussing this subject would support limiting the
2 scope of the Wheeling Statute claim.

3 **F. RFPs re agreements with RSI-type provisions (RFPs 56-58)**

4 These requests seek documents regarding agreements that SDCWA entered or sought to
5 enter that have provisions similar to, or more restrictive than, the RSI provision. The requests
6 seek documents regarding agreements that require a party to forbear from filing litigation, or from
7 making another form of complaint. The requests also seek documents regarding any agreement to
8 which SDCWA is or was a party, in which a party agreed that if it filed a complaint or challenge
9 to an administrative agency, regulatory agency, or other entity, the agreement would be
10 terminated or consideration or a benefit would be affected. These provisions are similar to, or
11 more restrictive than, those that SDCWA has put at issue in this case and are probative of a
12 number of issues. SDCWA has alleged the RSI provision is unlawful and has put Section 11.1 of
13 the Exchange Agreement (regarding forbearance) at issue. (TAC ¶¶ 103-110.) SDCWA's
14 entering or seeking to enter other agreements containing similar or more restrictive provisions is
15 probative to show that those provisions are not invalid. These requests are probative of the
16 legality of the RSI provision and Section 11.1, as well as MWD's unclean hands defense.

17 **G. RFP re reports concerning cost of water in San Diego area (RFP 20)**

18 This request seeks documents that reflect SDCWA's participation in any study or report
19 concerning the cost of water in the San Diego area. This request mirrors RFP 20 in the
20 September 17 Order, which seeks documents regarding MWD's participation in a study regarding
21 the cost of water in San Diego prepared by the Los Angeles County Economic Development
22 Corporation ("LAEDC"). SDCWA claims that the LAEDC economic study regarding the cost of
23 water in San Diego is relevant because it was—it contends—commissioned by MWD and certain
24 MAs to discredit SDCWA's position in this litigation. (Chatterjee Decl., Ex. P, 9/5/12 Tr. at
25 64:10-25; 65:20-66:11; 67:16-68:10; Chatterjee Decl., Ex. H at 4.) But other studies or reports
26 sought by MWD's RFP 20 concerning the cost of water in the San Diego area are pertinent to the
27 same subject. For example, if another report affirms conclusions in the LAEDC study, that report
28 and related documents would be relevant to rebut SDCWA's argument. Similarly, SDCWA's

1 participation in reports or studies on this topic would be probative of SDCWA's contention that
2 such participation is not acceptable, and could show that SDCWA sought to discredit the LAEDC
3 report, MWD's rate structure, or MWD's position in this litigation.

4 **H. RFPs re contracts that have RSI provision (RFPs 59, 60)**

5 These requests seek documents regarding whether SDCWA should enter into a voluntary
6 contract containing an RSI provision and SDCWA's decision to do so. SDCWA seeks
7 declaratory relief regarding contracts that contain an RSI provision and attacks that provision to
8 which SDCWA agreed. These requests are clearly appropriate. Responsive documents regarding
9 these agreements that have no discussion of the RSI provision show an absence of any issue
10 regarding the RSI provision at the time the contracts were negotiated, which is probative.

11 **I. RFPs regarding MWD's unbundled rate structure (RFP 27)**

12 This request seeks documents from January 1, 2001 to the present regarding MWD's
13 unbundled water rate structure that was approved by MWD's Board of Directors in 2001 and
14 effective in January 2003. This request goes to the heart of SDCWA's allegations. SDCWA
15 challenges MWD's rates under the Wheeling Statute based on MWD's unbundled rate structure
16 approved in 2001 and in place since 2003. (See TAC ¶¶ 24-29.) This same rate structure is
17 pertinent to the 2003 Exchange Agreement, which is the subject of SDCWA's breach of contract
18 claim. (See TAC ¶¶ 29.) In 2008 and 2009, SDCWA voted to approve MWD's rates based on
19 the very same rate structure SDCWA challenges in this action.

20 **J. RFPs regarding price of wheeling transactions (RFPs 29 and 31)**

21 These requests seek documents regarding the price charged for any wheeling transaction,
22 water exchange, or water transfer in California. SDCWA alleges that MWD's rate structure
23 violates the Wheeling Statutes. (TAC ¶ 72.) The Wheeling Statute standard is "fair
24 compensation." This request seeks comparable rate information to evaluate "fair compensation."
25 *San Paolo United States Holding Co. v. 816 S. Figueroa Co.*, 62 Cal. App. 4th 1010, 1026 (1998)
26 (considering comparable sales is a proper way to assess the fair value of property). This
27 information is also probative in determining if the Exchange Agreement Price is reasonable.
28

1 **K. RFP re breach of the 2003 Exchange Agreement (RFP 49)**

2 This request seeks documents that discuss any alleged breach of the 2003 Exchange
3 Agreement. Discussion of any alleged breach of the 2003 Exchange Agreement, by any party, is
4 discoverable. Among other things, MWD is entitled to know when SDCWA first believed there
5 was a breach. Any discussion of breach of other sections than Section 5.2 is probative as well.
6 Although SDCWA alleged a breach of only Section 5.2, SDCWA also sought discovery on
7 Section 11.1 and put other provisions of the Exchange Agreement at issue. Documents
8 discussing whether SDCWA itself breached the Exchange Agreement are pertinent to whether
9 SDCWA can establish the required elements of its breach of contract claim. *Amelco Electric v.*
10 *City of Thousand Oaks*, 27 Cal. 4th 228, 243 (2002) (elements of breach of contract claim
11 includes plaintiff’s performance of contract). They are also pertinent to MWD’s defenses,
12 including unclean hands.

13 **L. Documents that evidence or discuss any damage or harm (RFP 50)**

14 This request seeks documents that discuss any damage or harm SDCWA incurred because
15 of the alleged breach of the Exchange Agreement. (*See* TAC Prayer ¶ 4 (seeking “compensatory
16 and general damages”.) Damages are an element of a breach of contract claim. *Amelco Electric*,
17 27 Cal. 4th at 243. This request is clearly appropriate. MWD is entitled to full discovery on
18 purported damages or harm from any alleged breach of contract.

19 **M. Documents discussing SDCWA’s position on and involvement in local
20 water development programs (RFPs 63, 64)**

21 These requests seek documents discussing SDCWA’s consideration, negotiation, or
22 execution of any local water development program agreement, or its position regarding such a
23 program. These documents are probative of SDCWA’s unconstitutional condition claim
24 regarding the RSI provision. (*See* TAC ¶ 105). An unconstitutional condition claim requires that
25 the plaintiff is a potential recipient of a government benefit; a condition placed by the government
26 on receipt of the benefit implicates a constitutional right; and the condition impinges on the
27 identified constitutional right as measured by the substantive standards applicable to a direct
28 violation of that right. If all of this is established, then the court considers whether the condition

1 reasonably relates to the purposes of the legislation that confers the benefit, the value accruing to
2 the public from the imposition of the condition outweighs any resulting impairment of the
3 constitutional right, and there are no available alternative means that could maintain the integrity
4 of the benefits program. *See, e.g., Robbins v. Superior Court*, 38 Cal. 3d 199, 213 (1985).
5 Although MWD does not believe the RSI provision even implicates a government benefit or other
6 threshold requirements of an unconstitutional condition claim, MWD needs this discovery to
7 address SDCWA's claim. The RSI provision was instituted in order to assure funding stability
8 for water conservation, local resources, and seawater desalination projects, all of which provide
9 substantial benefits to the public. (Chatterjee Decl., Ex. T.) What SDCWA discussed in
10 considering or entering agreements for such local water development programs, and its position
11 about these programs, is pertinent to the broad, policy-based evidence and balancing of interests
12 involved in SDCWA's claim.

13 **N. Documents discussing benefits of local water development programs**
14 **(RFPs 65, 67, 68)**

15 These requests seek discoverable documents regarding the regional, water supply
16 reliability, and other benefits of local water development programs and MWD's water supply
17 plan. These RFPs seek information probative of SDCWA's unconstitutional condition claim, and
18 the broad, policy-based evidence relevant to that claim and the balancing of interests involved. In
19 adjudicating that claim, the benefits of local water development programs and water supply
20 reliability, and the need to assure the stability of program funding, are to be balanced and
21 considered. Further, these requests are also probative of the validity of the Water Stewardship
22 Rate that SDCWA challenges. (*See* TAC ¶ 25(c).) The Water Stewardship Rate funds these
23 programs based on regional benefit and water supply reliability benefit policies.

24 **O. Documents regarding the Carlsbad desalination project (RFP 66, 69)**

25 These requests seek documents regarding the Carlsbad desalination project. These
26 documents are pertinent to the elements of the unconstitutional condition claim, and the broad,
27 policy-based evidence and balancing of interests involved. The Carlsbad project never went
28 forward as a MWD-funded project. Had MWD funded it as SDCWA requested, it would have

1 been the largest funding of such a desalination or local resource program in the country. The
2 amount of money that would have been involved illustrates the need for the RSI provision, in
3 order to protect the source of the funding—the Water Stewardship Rate. These RFPs also are
4 pertinent to SDCWA’s challenge to that rate. For example, SDCWA has argued that a MA
5 should receive equal funding to what it paid on the Water Stewardship Rate, or otherwise the rate
6 is unlawful. These documents show that SDCWA wanted MWD to fund the Carlsbad project in a
7 manner that would have given SDCWA far more funding than what SDCWA had paid.

8 **P. Recordings of pertinent meetings (RFP 78)**

9 This request (as MWD agreed to narrow it) seeks non-privileged documents, including
10 audio and video recordings, of meetings or conversations regarding this litigation, MWD’s rate
11 structure, rate allocations, 2010 rate adoption, or 2011-2012 rates, the Exchange Agreement, or
12 the RSI provision. This information pertains to the core issues in this case, and there is no basis
13 for SDCWA to withhold these documents.

14 **Q. RFPs to which SDCWA agreed to produce responsive documents**
15 **during meet and confer (RFPs 6-10, 18, 25, 26, 28, 30, 62, 71, 72)**

16 SDCWA’s responses to these RFPs were inadequate. But during the meet and confer,
17 MWD and SDCWA reached agreement on the scope of these requests. Although MWD
18 requested that SDCWA serve supplemental responses agreeing to produce the documents the
19 parties agreed upon, SDCWA has not yet done so. There should be no dispute as to these
20 requests, and SDCWA should serve appropriate supplemental responses.

21 **V. CONCLUSION**

22 The Court should compel SDCWA to serve further responses agreeing to produce the
23 requested documents at issue.

24 Dated: March 27, 2013

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