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SAN DIEGO COUNTY WATER AUTHORITY

EXEMPT FROM FILING FEES
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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-10-510830

SAN DIEGO COUNTY WATER AUTHORITY'S OPPOSITION TO MWD'S MOTION TO COMPEL FURTHER RESPONSES TO FIRST SET OF DOCUMENT REQUESTS

Date: May 10, 2013
Time: 3:00 p.m.
Dept.: 304
Judge: Hon. Curtis E.A. Karnow

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

I. INTRODUCTION

MWD's motion to compel contradicts both MWD's own prior arguments and this Court's rulings regarding the reasonable scope of discovery in this case. It would take discovery in this case back to square one. The parties spent almost the entirety of 2012 in marathon litigation and relitigation of discovery issues. In a process that began with the appointed discovery referee, the Honorable James L. Warren (Ret.) and ended with three hearings before Judge Kramer, this Court worked with the parties to establish reasonable parameters for discovery in this case. The Court approved discovery of documents pertaining to (1) MWD's 2011-12 and 2013-14 rates and how MWD allocated its costs within those rates; (2) industry standards for rate-setting and cost allocation; and (3) MWD's unconstitutional Rate Structure Integrity clause barring SDCWA from criticizing or challenging MWD's rates. At every step MWD sought to block discovery. Initially, MWD argued that there should be no discovery at all; after refighting that battle several times and losing each time, MWD then urged the Court to limit discovery to the specific MWD rates at issue in these coordinated cases. MWD expressly argued that no discovery into any rates set by any other agency, including member agencies like SDCWA, should be discoverable. SDCWA and, more importantly, the Court, accepted these limitations. The Court's September 17 and December 14, 2012 discovery orders carefully balanced SDCWA's entitlement to discovery with MWD's explicitly and repeatedly stated concerns about overbreadth and burden.

But now that MWD is the party seeking discovery, it has pivoted 180 degrees. No longer does it accept any of the limitations it fought for and won in the Court's prior orders. Instead, it seeks the exact sort of discovery free-for-all it once deplored, moving to compel production of documents on a host of topics wholly unrelated to the question whether MWD's 2011-12 and 2013-14 rates satisfy constitutional and statutory cost-of-service standards. For example:

- MWD seeks ***all documents that discuss SDCWA's own rates*** over the last four-and-a-half years**.** When the shoe was on the other foot, MWD insisted that Member Agencies' rates were irrelevant to this case. Clearly, SDCWA's ratemaking has no bearing on whether or not MWD's rates are valid. MWD's unclean-hands justification is flawed because the alleged relevant acts have nothing to do with the relationship between SDCWA and MWD, which does not pay SDCWA's rates. No SDCWA ratepayer has challenged SDCWA's rates.

- MWD seeks the ***entire negotiating and operational history of the SDCWA-IID Water Transfer Agreement***, even though MWD is not a party to that contract, that contract is not once mentioned in SDCWA's Complaint, and nothing about SDCWA's breach of contract claim would require even a glance at that contract.

- MWD seeks to obtain ***every document at SDCWA discussing MWD's unbundled rate structure over a twelve-year period***, even after MWD successfully argued to this Court that discovery should be limited only to documents related to MWD's 2011-12 and 2013-14 rates. MWD even rejected SDCWA's compromise offer to produce documents from the 1998-2002 period when MWD was in the process of unbundling rates, instead demanding SDCWA's records concerning MWD's 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010 rates as well. This would more than double the scope of discovery in this case.

In contrast to SDCWA's reasonably tailored discovery, developed collaboratively with MWD and the Court, MWD's discovery demands are a fishing expedition. They have nothing to do with whether MWD's rates have any basis in MWD's costs of service and whether a public agency may refuse to provide already paid-for services in retaliation for the filing of a lawsuit. Permitting this discovery would also blow up the well-litigated discovery limits already in place, not to mention the case schedule. To take one example, if SDCWA's rates are relevant, all the Member Agency Defendants would also have to produce documents regarding their rates.

Understandably, MWD would rather distract from the actual legal issues in the case, but the Court should reaffirm the scope of discovery in the 2012 orders and deny MWD's motion.

II. ARGUMENT

A. SDCWA has already agreed to produce documents on all topics covered by the Court's prior discovery orders or reasonably related to this case.

MWD's motion to compel barely mentions the fact that—unlike MWD, which throughout the case has always refused to provide any discovery without an explicit Court order—SDCWA has already agreed to produce broad-based discovery. Indeed, of the 78 document requests served by MWD, SDCWA agreed to 28 of them without reservation, other than privilege claims and the parties' agreement that SDCWA need not re-produce documents it already produced in response to Public Records Act requests, and to make a partial production as to another eight.

In agreeing to produce some categories of documents but objecting to others, SDCWA has explicitly followed this Court's September 17, 2012 and December 14, 2012 discovery orders.

Declaration of Daniel Purcell in Support of SDCWA's Opposition ("Purcell Decl.") Exs. A & B. These orders were not entered casually; they were the product of over nine months of litigation among SDCWA, IID, MWD, the Member Agencies, and two consultants for MWD and the Member Agencies. That process included two rounds of briefing before Judge Warren; further briefing to this Court regarding Judge Warren's recommendations; and three lengthy hearings before Judge Kramer, during which the Court worked with the parties and wordsmithed particular requests in order to impose reasonable limits and focus the requests on the MWD rates at issue.

The discovery approved by the Court covered three basic topics: "1) the manner in which MWD's 2011-2012 rates were set and whether those rates complied with applicable law; 2) the allocation of MWD costs to various rates charged by MWD; and 3) the enactment and use of the RSI provision." Purcell Decl. Ex. A at 3. SDCWA has agreed to produce documents on all of these topics, and also on other topics the parties readily acknowledge are fair game in this case, such as the negotiation and meaning of the contract provision under which SDCWA has sued, contractual damages, and the potential benefits (or lack of benefits) of projects funded by MWD's Water Stewardship Rate, which SDCWA has challenged in this case.

To answer this discovery alone, SDCWA is engaged in a document collection and review process that will take months and cost hundreds of thousands of dollars. SDCWA has had to collect paper and electronic documents from more than a dozen of its employees, and search the remaining files of at least six other former employees. All of this is on top of responding only two years ago to MWD's Public Records Act requests covering many of the same topics, in response to which SDCWA produced over half a million pages of documents.

B. MWD's remaining requests are not reasonably calculated to lead to the discovery of admissible evidence, and would unduly burden all parties and delay resolution of this litigation.

Many of MWD's current discovery demands directly contradict positions that MWD and the Member Agencies ***successfully*** advanced just a few months ago in establishing the existing scope of discovery. Now MWD seeks discovery that would send this case down multiple rabbit-holes, require substantial equivalent productions from the Member Agency Defendants, and very likely scuttle any hopes of resolving this case this year.

1. Water rates promulgated *by SDCWA, for SDCWA's own customers,* have no bearing on the validity of MWD's rates. (RFP Nos. 21-23, 32-36, 39, 40, 55, 70)

MWD has no basis for seeking any discovery regarding ***SDCWA's own water rates***, much less "all documents that discuss" those rates. For example, MWD's RFP No. 33 seeks

> All documents that discuss or demonstrate SDCWA's compliance or lack of compliance with the law in setting its water rates, including but not limited to any document that discusses the position of a SDCWA member agency on this subject.

Declaration of Raj Chatterjee ("Chatterjee Decl.") Ex. A. RFP No. 32 is only slightly less broad:

> All documents that discuss SDCWA's allocation of its costs to particular rate components, including but not limited to any document that discusses the position of a SDCWA member agency on this subject.

Id. MWD is asking for ***every document*** created over a period of four-and-a-half years[1] including any discussion of one of SDCWA's principal functions: setting and collecting rates.

Not only are these requests overbroad, the information they seek is 100% irrelevant to this case. The only rates at issue in this case are MWD's 2011-12 and 2013-14 rates. SDCWA has challenged those rates as violating California constitutional, statutory, and common law in numerous ways, but most obviously by misallocating MWD's supply costs to its transportation rates. That misallocation uniquely harms SDCWA, the only MWD member agency that wheels a substantial volume of third-party, non-MWD water through MWD's facilities.

But there is no challenge to SDCWA's rates or allocation of costs—or rates or allocations set by any other MWD Member Agency—in this case. In fact, because none of the parties to the case pay SDCWA's rates, they would not have standing to challenge those rates. Accordingly, MWD's justifies its demand for SDCWA's entire rate file by arguing that, if SDCWA disregarded its costs of service in setting rates, as MWD did, that would suggest MWD's rates are valid. This is specious. As any first-grader can tell you, two wrongs don't make a right. Even if SDCWA set rates inconsistent with its costs (which it hasn't), that would have no probative value in assessing whether MWD's rates recover MWD's costs of service. For example, SDCWA's own cost allocations are of no consequence on the question whether MWD's System Access Rate

[1] MWD's requests seek documents on SDCWA's rates from July 1, 2008 to the present.

charges more than the costs MWD incurs in providing transportation services. Even if SDCWA's rates had similar flaws (and they don't), that would mean only that one of SDCWA's ratepayers—not MWD—could potentially challenge SDCWA's rates in a separate case. By the same token, SDCWA could not and does not intend to rely on its own rates or rates set by any other MWD member agency to prove that MWD's rates are invalid.

MWD's justifications for its sideshow demand for SDCWA's rate file are spurious. *First,* MWD argues that the Water Authority's rates are relevant to determining the "industry standards" for wholesale water ratemaking. Nonsense. The behavior of any one agency does not constitute an industry standard. When MWD sought to justify its rates in advance of the 2011-2012 rate decision, it pointed not to the behavior of any other individual agency but to the broader, industry-wide "guidelines in the American Water Works Association's ("AWWA") Manual M-1, *Principles of Water Rates, Fees, and Charges*." Industry standards may be a relevant benchmark in this case; but SDCWA has already agreed to produce all "manuals, treatises, reports, memoranda, studies or white papers that discuss industry standards for the allocation of water costs to various rate components … and all documents of any type that discuss MWD's compliance or lack of compliance with such industry standards in the setting of MWD's wholesale water rates." RFP No. 12. Discovery into SDCWA's rates has nothing to do with an identification or examination of the industry standards applicable to MWD's rates.

What makes MWD's demand for SDCWA rate information all the more bizarre is the fact that its allies in this case, the Member Agency Defendants, successfully persuaded Judge Kramer last year to bar discovery into their rates, even though SDCWA had never asked for that information. SDCWA's original document requests to the Member Agencies sought documents discussing industry standards for the allocation of costs among wholesale water rates. The Member Agencies argued that, as written, this would require production of countless documents relating to their own water rates. They insisted that such documents are "completely irrelevant" in this case. As the Member Agencies explained:

> The Member Agencies are either Cities with their own City Councils and municipal water systems, or water districts with their own board of directors, as is SDCWA. ***Each of the separate and***

> ***independent Member Agencies sets its own water rates and is responsible to its own constituents pertaining to its own rate-setting process and compliance with all applicable laws and regulations***. For some Member Agencies, documents in their possession could include cost of service studies, reports, and calculations pertaining to their own rate-setting process, which even though public records, ***bear no relevance to the allegations asserted by SDCWA.*** Thus, documents maintained by the Member Agencies extend beyond MWD's rates and this litigation.

June 25, 2012 MPA of Member Agencies ISO Mot. for De Novo Review at 5 (emphasis added). Counsel for both MWD and the Member Agencies even pointed out during meet-and-confer sessions that such discovery would have to be a two-way street, and that if SDCWA asked for such documents it would also have to produce documents on its own rates. Purcell Decl. ¶ 2. Because SDCWA had not intended to seek such documents, it readily acceded to the Member Agencies' request that "industry standards" discovery be limited to general materials (treatises, white papers, etc.) and discussions of MWD's compliance with industry standards. *Id.* The Court then blessed this agreed approach in the September 17 Order. Apparently, MWD was lying in wait the entire time. But if MWD member agencies' ratemaking is relevant to whether ***MWD's*** rates are valid, this would require a discovery free-for-all involving production of documents regarding ratemaking by the __ other MWD member agencies that are parties to this suit. Such a ruling would expand the case massively and delay the possibility of resolution for many months.[2]

Second, MWD argues it is entitled to discovery concerning SDCWA's rates based on its assertion of an unclean hands defense. But to qualify as unclean hands, the conduct in question "must relate directly to ***the transaction concerning which the complaint is made***, i.e., it must pertain to the very subject matter involved and ***affect the equitable relations between the litigants***." *Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists*, 227 Cal. App. 2d 675, 728 (1964) (emphases added). It is not enough that the plaintiff allegedly did something wrong—it must have done something wrong ***to the defendant***. *See Brown v. Grimes*, 192 Cal.

[2] Contrary to its periodic lip service about speedy resolution of this litigation, MWD's discovery conduct has been the primary cause of delay. MWD refused to propound discovery in early 2012, as SDCWA and Judge Kramer suggested, which prevented the Court from being able to address all discovery issues at once. Instead, it waited until a year later, after litigating the scope of SDCWA's requests, before finally serving requests of its own that seek to enlarge that scope in every conceivable way.

App. 4th 265, 283 (2011) ("The unclean hands emanating from the Brown-Ross agreement did not directly affect or infect the relationship between Grimes and Brown, and most importantly, was not inequitable conduct towards Grimes"); *Mattco Forge Inc. v. Arthur Young & Co.*, 52 Cal. App. 4th 820, 846 (1997) (misconduct must "prejudicially effect … the rights of the person against whom the relief is sought"). Here, SDCWA has sued MWD for unlawfully inflated MWD rates unrelated to MWD's costs, which rates SDCWA pays. Because MWD does not pay SDCWA's rates, it would suffer no harm even if SDCWA set unlawful rates (which it hasn't).

Indeed, the fact that SDCWA's ratemaking cannot form the basis of any unclean hands defense is confirmed by the very case on which MWD relies: *Kendall-Jackson Winery, Ltd. v. Superior Ct.*, 76 Cal. App. 4th 970 (1999). In *Kendall-Jackson*, the issue was whether Kendall-Jackson's unclean hands defense to E & J Gallo Winery's malicious prosecution claim could go to a jury. The "unclean hands" conduct consisted of allegations that Gallo employees had illegally manipulated grocery store merchandising schematics to undercut Kendall-Jackson's business. Distinguishing cases in which the allegedly "unclean" conduct was directed at third parties, the court held that Kendall-Jackson's defense could proceed because the claim was that "Gallo actually engaged in illegal and improper practices ***directed at Kendall-Jackson***." *Id.* at 987 (emphasis added). Of course, the opposite is true here. Because MWD does not pay SDCWA's rates, those rates cannot possibly affect the equitable relationship between SDCWA and MWD and cannot be the basis for an unclean hands defense. *See Brown*, 192 Cal. App. 4th at 283; *Germo Mfg. Co. v. McClellan*, 107 Cal. App. 532, 541, 545 (1930). This discovery is not reasonably calculated to lead to admissible evidence—as MWD previously understood.

2. MWD's demand for twelve years of documents discussing MWD's rate structure (RFP No. 27) is overbroad and unduly burdensome.

The foundational principle of Judge Warren's Discovery Recommendation # 1, endorsed by this Court in the September 17 Order, was that discovery generally should be limited to the particular rates being challenged in this case. Virtually every rate-related document request in the September 17 Order is explicitly limited to MWD's 2011-12 water rates or the April 2010 process in which those rates were set. Purcell Decl. Ex. A (Sept. 17, 2012 Order) at 7-13. Once again, it

was MWD and the Member Agencies who argued successfully that SDCWA's requests should be so limited. Purcell Decl. Ex. D (Sept. 5, 2012 Tr.) at 45:1-13, 51:15-18, 54:24-55:3, 77:9-24.

MWD's RFP No. 27 again disregards this Court's prior rulings and MWD's own previous (and successful) arguments. In light of MWD's prior position that discovery must be explicitly tied to the 2011-12 rates, MWD's RFP No. 27—which requests "All documents from January 1, 2001 to the present that discuss MWD's unbundled water rate structure that was approved by MWD's Board of Directors in 2001 and 2002, and implemented in 2003"—is particularly striking. As MWD appears to interpret RFP No. 27, SDCWA would be required to produce every document that discusses MWD's rate structure or MWD's individual unbundled rates (System Access Rate, System Power Rate, etc.) over a period of twelve years.

Permitting this discovery would open yet another Pandora's Box of reciprocal discovery nightmares. Like every other MWD member agency, in every rate cycle, SDCWA reviews and comments on thousands of documents relating to MWD rates. Declaration of Dennis Cushman in Support of SDCWA's Opposition ("Cushman Decl.") ¶ 3. SDCWA maintains each year's rate cycle documents separately. *Id.* ¶ 4. Thus, in addition to searching shared-drives and paper files for the two rate cycles challenged in this lawsuit (2011-12 and 2013-14), SDCWA would have to go through the entire files for eight other rate cycles: MWD's 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010 rates.[3] This would require a four-fold increase in SDCWA's document review. Because responsive documents would date back to 2001, SDCWA would have to search the files of numerous new custodians. *Id.* ¶ 5. These requests would offer no benefits to offset these obvious burdens. SDCWA's analysis of MWD's 2005 rates is not relevant to the validity of MWD's 2011-14 rates. Even assuming that everything SDCWA has written or said over the past decade about any of MWD's rates has marginal relevance to this case, the same must be true for documents created by MWD or the Member Agency Defendants, and true *a fortiori* for MWD.

As a compromise, SDCWA has offered to produce documents relating to the 1998-2002 process in which MWD was engaged in the process of unbundling its rates. That process was the

[3] Prior to 2010, MWD set water rates one year at a time, in April of one calendar year to apply in the following calendar year, rather than two years at a time, as it did in 2010 and 2012.

first time that MWD considered using rates like the System Access Rate and Water Stewardship Rate, and MWD and the member agencies were actively discussing rate issues. SDCWA is willing to produce documents related to the initial unbundling even though it challenges MWD's 2011-2014 rates only.[4] SDCWA's production should be limited to this compromise position.

3. The Court should deny MWD's fishing expedition into SDCWA's agreement with IID (RFP 37, 41-43, 51-54).

In support of its RFP Nos. 37, 41-43, and 51-54, MWD spins a convoluted tale of how the Exchange Agreement between SDCWA and MWD—the contract on which SDCWA has sued—interrelates with the Transfer Agreement between SDCWA and the Imperial Irrigation District, under which SDCWA purchases from IID the water that MWD then transports.

This is a sideshow. The Exchange Agreement and the Transfer Agreement, together with ***34 other separate agreements***, are all part of the Quantification Settlement Agreement ("QSA"), a massive multi-party set of agreements involving SDCWA, MWD, IID, the State of California, the U.S. Department of Reclamation, the Coachella Valley Water District and others. Cushman Decl. ¶ 6. The hundreds of pages of QSA contracts address the water rights, priority interests, and myriad obligations of all these various parties to each other. *Id*.

Neither the QSA generally nor the Transfer Agreement specifically has anything to do with this litigation. Neither is mentioned even once in the Complaint. SDCWA alleges breach of only a single provision, section 5.2 of the Exchange Agreement, which sets requirements for the price MWD may charge SDCWA to deliver the water it has purchased from IID:

> 5.2 The Price. The Price on the date of Execution of this Agreement shall be Two Hundred Fifty Three Dollars ($253.00). Thereafter, the Prices shall be 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 the member agencies.

Declaration of John Scott ("Scott Decl.") Ex. F. This section does not mention IID, and certainly does not mention or implicate the Transfer Agreement. The question whether MWD breached

[4] In its last round of document requests SDCWA requested that MWD produce "documents from January 1, 1998 to December 31, 2002 that discuss MWD's development, consideration and implementation of an unbundled rate structure, including but not limited to the allocation of MWD costs into different MWD Rate Components." MWD agreed to produce such documents, so, as it has consistently done in this case, SDCWA has agreed to play by the same rules.

section 5.2 will not require interpretation of any provision of the Transfer Agreement; as MWD admits, the Court will have to determine only whether MWD set and charged rates that comply with California law. Likewise, if the Court finds that MWD breached, that would have no effect on the Transfer Agreement; it would require MWD only to pay damages and set valid rates. MWD's requests, which seek things like "documents that discuss any purported legal right that IID has to sell or transfer water to any person or entity other than SDCWA …" is far afield from the claims in this case.[5]

Not only are these requests a fishing expedition into aspects of SDCWA's business having nothing to do with the case, MWD's specific requests are unreasonably overbroad. For example, RFP No. 37 seeks all "documents that discuss or demonstrate SDCWA's or IID's compliance or lack of compliance with the law with respect to the Transfer Agreement." Of course, any document involving any aspect of the operation of the Transfer Agreement could be said to show compliance or lack of compliance with some law. In any event, SDCWA's and IID's compliance with the Transfer Agreement (or with California law in performing that agreement) is not at issue in this case. MWD cannot take sweeping discovery of SDCWA's relations with third parties just because SDCWA has challenged its rates. Also with respect to burden, the SDCWA employees who implement the Transfer Agreement with IID are not, by and large, the same employees who analyze and comment on MWD's rates. Cushman Decl. ¶ 7. And documents relating to these issues are housed separately from those pertaining MWD's ratemaking. *Id*. Allowing this discovery would impose real burdens on SDCWA for no conceivable benefit.

4. MWD has not demonstrated any reason for discovery concerning SDCWA's motives for entering the Exchange Agreement (RFP 44-48)

MWD's RFP Nos. 44-48 seek all documents regarding SDCWA's motivation for entering both the 2003 Exchange Agreement ***and*** its 1998 predecessor agreement. But SDCWA's motives for entering into a contract are not relevant to any issue in this case.

[5] For the first time in this litigation, MWD asserts, by way of justifying its RFP No. 41, that IID does not have the right to sell water outside IID's service area. Mot. at 10-11. MWD does not explain how this could possibly matter. If MWD is claiming it entered into the Exchange Agreement believing it had no obligation actually to transfer water sold to SDCWA by IID, or is free to charge whatever it wants for water transferred from IID, it should say so directly.

In interpreting contracts like the Exchange Agreement, "the intention of the parties is to be ascertained from the writing alone, if possible." Civ. Code ¶ 1639: *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (1998). "California recognizes the objective theory of contracts, under which it is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation. The parties' undisclosed intent or understanding is irrelevant to contract interpretation." *Cedars-Sinai Med. Ctr. v. Shewry*, 137 Cal. App. 4th 964, 980 (2006). Per the parties' agreement, the 2003 Exchange Agreement is a fully integrated contract, which "constitutes the final, complete, and exclusive statement of the terms of the Agreement . . . and supersedes all prior and contemporaneous understandings or agreements of the Parties." Scott Decl. Ex. F at 13.6. Accordingly, the reasons *why* SDCWA chose to enter the Exchange Agreement back in 2003, and the discussions of whether to do so, have no bearing on whether or not MWD's conduct from 2010 forward breached that contract.[6]

MWD's purported reason for this discovery—that it wants to understand how SDCWA interpreted the Price term in section 5.2—is misdirection. Only SDCWA's expressed intention during negotiations could possibly be relevant to contract interpretation, and SDCWA has already agreed to produce documents "relating to the negotiation of" Section 5.2 in response to MWD's RFP No. 6. Chatterjee Decl. Ex. K at 1. Broader discovery into motives is relevant to nothing.

5. MWD's proposed discovery of RSI-like provisions is another fishing expedition (RFP Nos. 56-58)

MWD has no logical or legal defense to its so-called RSI provision, which bars any MWD member agency from challenging MWD's rates—it prevents member agencies even from lobbying the state legislature. Under the RSI clause, in retaliation for the filing of this lawsuit, MWD has barred SDCWA from receiving any benefit for the millions of dollars ($34,417,710 in fiscal years 2011-12 alone, Cushman Decl. ¶ 11), SDCWA pays each year through MWD's Water Stewardship Rate. This is as plainly unconstitutional a restriction on core political speech as can be imagined. MWD would rather change the subject, including by serving discovery

[6] This is especially so for the 1998 Exchange Agreement (RFP No. 44, 46), which is not even at issue in this litigation.

seeking agreements where SDCWA has imposed RSI-like conditions on third parties.

MWD has no justification for this discovery. SDCWA's contracts with third parties have no bearing on whether or not the RSI provision is an unconstitutional condition. Either it is or it isn't. It will stand or fall on its own merits. As noted above, MWD cannot use SDCWA's conduct ***toward third parties*** to establish unclean hands. MWD's discovery also reaches far beyond RSI-like provisions—it demands all documents concerning any negotiations where SDCWA attempted to dissuade a party from filing a lawsuit or any settlement agreement in any lawsuit that included a covenant not to sue. To respond, SDCWA would have to examine every contract into which it has ever entered, and the case file for every lawsuit or threatened lawsuit in which SDCWA has ever been involved as a defendant; then, if, if in the course of such contract or negotiations, SDCWA ever attempted to settle the dispute or entered into an agreement with a covenant not to sue, SDCWA would have to collect and produce every document that discusses such agreement. In addition to the fact that settlements and settlement discussions are generally inadmissible, *see* Cal. Evid. Code § 1152, nothing about trying to settle a dispute before litigation, or agreeing to a covenant not to sue, is even arguably improper, much less a viable defense for MWD to the *prima facie* unconstitutionality of the RSI clause.

6. The RSI cause of action does not entitle MWD to every document that discusses *any agreement that includes* the RSI provision (RFP 59-60).

SDCWA has agreed to produce non-privileged documents that discuss the RSI provision. MWD nonetheless also seeks each and every document that discusses any ***agreement*** that includes the RSI provision. SDCWA entered into several contracts under which MWD agreed to use Water Stewardship Rate funds to subsidize local water projects, the contracts for which contained the RSI provision and were terminated by MWD once SDCWA filed this lawsuit. But the implementation of these projects—blueprints and specifications, communications with third-party contractors, and the like—plainly have nothing to do with whether the RSI clause is lawful. To the extent MWD would argue it is probative that SDCWA worked to realize these projects without discussing the RSI provision in every project-related document, that is specious. MWD is already receiving the only relevant documents—those that actually discuss the RSI provision.

7. The "cost of water in San Diego" is not relevant to this case (RFP 20).

MWD's demand for all "documents that reflect SDCWA's participation in any study or report concerning the cost of water in the San Diego area" is likewise far afield. MWD's sole basis for seeking this overbroad discovery is the fact that the Court required MWD and the Member Agency Defendants to produce documents provided by those agencies to the Los Angeles Economic Development Corporation ("LAEDC") in connection with an "economic study" they themselves commissioned. But although the LAEDC study is titled "The Cost of Water in San Diego County," it was not the "cost of water" in San Diego that made the study relevant. Rather, it was the fact—supported by documents now produced by the parties—that MWD, the Member Agencies, and their consultants secretly created that study to develop a purportedly "independent" counter-narrative to use against SDCWA in this litigation. Purcell Decl. Ex. C (MWD and member agency documents discussing litigation rationale for and creation of LAEDC study). As SDCWA explained to the Court back in September, the LAEDC document request was aimed at discovering discussions ***about the cost-of-service basis for MWD's rates and MWD's rate allocations*** in the course of defendants' discussions with LAEDC about development of that counter-narrative. *Id.* Ex. D (Sept. 5, 2012 Tr. at 64-68).[7] SDCWA has agreed to compromise, by searching for and producing all documents in its possession concerning the LAEDC study, including information it provided to LAEDC. That should be plenty.

8. The Court should place reasonable limitations on MWD's discovery concerning local water development programs. (RFP 63-68)

There is a complete disconnect between MWD's rationale for these six document requests and the requests themselves. MWD argues it needs discovery concerning the benefits SDCWA anticipated receiving from local water programs canceled using the RSI provision and documents that discuss any benefit of programs funded by the Water Stewardship Rate. Mot. at 13-14. But, as MWD omits to mention, SDCWA has ***already agreed to produce all documents that discuss***

[7] SDCWA has explained that its request targeted documents discussing the MWD rates at issue: "Again, the report is really not the issue. We have the report. … What we're looking for is the documents that went into the creation of the report that may include statements of an admission regarding the invalidity of Met's rate allocation decision." Purcell Decl. Ex. D at 68:3-9. SDCWA's discovery rationale had nothing to do with "the cost of water in San Diego."

any benefit (region-wide or to MWD or any member agency) from programs funded through the Water Stewardship Rate, from July 1, 2008 to the present. Chatterjee Decl. Ex. H (2/5 letter) at 8. MWD's actual requests sweep far broader, seeking ***any*** document discussing SDCWA's position on ***any*** proposed or implemented local program—regardless of whether that program ever came to fruition or implicates the RSI provision. MWD has approved approximately 20 local water subsidy agreements with its member agencies over the past five years. Cushman Decl. ¶ 8. MWD now demands SDCWA look for and produce every document making any mention of any of those programs. This is oppressive and highly unlikely to lead to any admissible evidence.

9. MWD's request for any documents that discuss any alleged breach of the Exchange Agreement is too broad (RFP 49).

MWD's RFP No. 49 seeks ***any*** document that discusses ***any*** breach of ***any*** provision of the Exchange Agreement over the past decade. Frankly, SDCWA has no idea what MWD is looking for. MWD has refused SDCWA's invitation to explain what other breaches it believes have occurred, so that SDCWA can consider designing a proper search. MWD has no basis for a broad request regarding all alleged breaches, and its inability to be more specific, even in meet-and-confer sessions, shows just how off-topic and speculative this request truly is.

10. SDCWA has agreed to produce documents sufficient to support its damages theory (RFP No. 50).

MWD mischaracterizes this dispute. SDCWA has never refused to produce support for its claimed contractual damages. But MWD's request for ***every*** "document that evidences or discusses any damage or harm SDCWA has incurred" since the date of MWD's breach is plainly overbroad. Harm to SDCWA is evidenced by nearly every financial document generated by SDCWA over the past three years and "discussed" in almost every document relating to this case. Moreover, SDCWA's ability to calculate damages precisely is hampered by MWD's refusal to produce its "rate model" and other documents in MWD's exclusive possession that are necessary to calculate the amount of MWD's overcharges. These documents are the subject of SDCWA's pending motion to compel. Once MWD has produced that discovery, SDCWA will be better able to calculate its damages and to identify the documents it will rely on to prove a damages amount.

11. SDCWA's Carlsbad desalination plant has nothing to do with this litigation (RFP No. 66, 69)

Perhaps MWD's most extreme overreach of all is its demand for all documents related to a desalination plant in Carlsbad, California that MWD admits "never went forward as a MWD-funded project." Mot. at 14. Before MWD barred SDCWA from receiving local project funding in retaliation for this lawsuit, SDCWA applied for MWD funds on behalf of some of its member agencies. Cushman Decl. ¶ 9. But MWD never funded the Carlsbad project. MWD speculates that, had it done so, that might have mitigated SDCWA's claim. But the validity of MWD's rates and RSI clause will turn on what MWD actually did, not what it might have done. In addition to the complete irrelevance of these documents, the Carlsbad plant is a major water-supply project managed by people who have no involvement in MWD's rates or the other topics at issue in this litigation. *Id.* ¶ 10. MWD's requests would require searching entirely new custodians and files, adding significant burden to SDCWA's document collection and review effort. *Id*.

12. MWD's discovery concerning the "price of wheeling transactions in California" should be sought elsewhere (RFP Nos. 29, 31).

Finally, MWD demands every document that discusses the price charged for wheeling, or any water transfer, by any party, at any time, anywhere in California. That is absurd in its breadth, which MWD has refused to narrow. Even if MWD had narrowed it, the request would not be calculated to gather admissible evidence anyway. MWD's rates will stand or fall on their own merits, regardless of whether some other party also set unlawful rates.

13. SDCWA has already provided amended written responses to many of MWD's requests (RFP Nos. 6-10, 18, 25, 26, 28, 30, 62, 71, 72).

There is no dispute as to these requests. Prior to MWD filing its motion, SDCWA agreed to produce responsive documents. It has served amended responses reflecting that agreement.

Dated: April 15, 2013

KEKER & VAN NEST LLP

/s/ Daniel Purcell

By: DANIEL PURCELL
Attorneys for Petitioner and Plaintiff
SAN DIEGO COUNTY WATER AUTHORITY

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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 April 15, 2013, I served the following documents described as:

SAN DIEGO COUNTY WATER AUTHORITY'S OPPOSITION TO MWD'S MOTION TO COMPEL FURTHER RESPONSES TO FIRST SET OF DOCUMENT REQUESTS

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.

by **FEDEX**, by placing a true and correct copy in a sealed envelope addressed as shown below. I am readily familiar with the practice of Keker & Van Nest LLP for correspondence for delivery by FedEx Corporation. According to that practice, items are retrieved daily by a FedEx Corporation employee for overnight delivery.

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Attorneys for Defendant and Respondent
Utility Consumers' Action Network

[Via Federal Express and Email]

Executed on April 15, 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.

JOANNE WINARS