SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY, Plaintiff/Petitioner, vs. METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA, et al. Defendants/Respondents.	Case No. CFP-10-510830 ORDER GRANTING IN PART AND DENYING IN PART MOTION OF METROPOLITAN WATER DISTRICT TO COMPEL RESPONSES TO REQUESTS FOR PRODUCTION SERVED ON SAN DIEGO COUNTY WATER AUTHORITY AND ON IMPERIAL IRRIGATION DISTRICT

The captioned motions came on regularly for a hearing May 10, 2013. The parties appeared through counsel.

BACKGROUND

The case concerns, in brief, the reasonableness of rates set by Metropolitan Water District of Southern California. On April 13, 2010, Metropolitan adopted new water rates for 2011/12. San Diego County Water Authority challenges rates set in 2010 to be effective 2012, as well as Metropolitan's 2013/14 rates. Among other claims, San Diego also challenges unilateral termination ("RSI") clauses in certain Metropolitan-San Diego water conservation project

contracts. Metropolitan now moves to compel further responses to certain Requests for Production propounded on both San Diego and Imperial Irrigation District.[1]

Many of the requests seem animated by the old saw, 'what's good for the goose is good for the gander,' i.e., that it is only fair to impose on San Diego discovery demands that San Diego earlier made on Metropolitan. But this is not true, because the case targets Metropolitan's rates, not those of San Diego.

DISCUSSION

Requests re: San Diego's rate practices

SD REQUEST 21-23; SD REQUEST 32; SD REQUEST 33-36, 39-40; SD REQUEST 55; SD REQUEST 70; IID REQUEST 32; IID REQUEST 33-34, 39-40

These requests relate to San Diego's and Imperial's costs allocation as to the rates *they* charge to their member agencies and customers.

Metropolitan contends that San Diego and Imperial cannot claim that Metropolitan's water rates are unreasonable if they calculate their own rates in a similar manner. But of course they can. Their rates are not at issue. San Diego and Imperial's cost calculations do not bear on whether Metropolitan's rates are reasonable: these entities have different costs and other factors.

Metropolitan also suggests these documents relate to "industry standards". Under this reasoning any water authority's (or equivalent entity that sets rates) costs or cost methods would be relevant. Most generally speaking I suppose they are—or they would be if we had *all* of them, or a statistically useful sample—but the marginal utility of one or two authorities' documents on this subject is very low. The sample of San Diego and Imperial have no more

[1] I have ignored evidentiary objections filed by Imperial, as not contemplated by the applicable code or rules.

demonstrated relevance than the same information provided by any other vaguely similar entity in the state (or elsewhere, for that matter).

Metropolitan suggests the discovery relates to its unclean hands defense. *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal.App.4th 970, 978 (1999). Metropolitan believes that the doctrine applies here because, if San Diego and Imperial have rate setting practices similar to those used by Metropolitan, it is "unfair" for San Diego to "profit" from these practices and challenge them at the same time. But "[t]he unclean hands doctrine does not apply if the inequitable conduct did not occur in the transaction to which the relief sought relates." *O'Flaherty v. Belgum*, 115 Cal.App.4th 1044, 1060 (2004); *see also Brown v. Grimes*, 192 Cal.App.4th 265, 282-83 (2011). The defense does not assist Metropolitan here.

While Imperial has taken a different tack in opposing Metropolitan's motion, the reasoning above applies; these requests are not sufficiently designed to lead to discoverable evidence.

Requests re: the San Diego-Imperial Water Transfer Agreement

SD/IID REQUEST 37; SD/IID REQUEST 42-43; SD/IID REQUEST 51-52;SD/IID REQUEST 53; SD/IID REQUEST 54

These requests relate to the Transfer Agreement, by which Imperial agreed to sell a portion of its water to San Diego, and amendments to that agreement. The Transfer Agreement is not at issue in this lawsuit. The Exchange Agreement, the mechanism by which Imperial gets water to San Diego as per the Transfer Agreement, is at issue here. While the agreements are related, this is not enough to suggest that discovery on one is required because the other is at issue. The reasons why Imperial and San Diego chose to enter into the Transfer Agreement and disagreements regarding the appropriateness of certain of its provisions are not relevant to

whether Metropolitan's rates were set "pursuant to applicable law and regulation," which is the central issue in this suit.

Requests re: San Diego's entry into the 1998 and 2003 Exchange Agreements

SD REQUEST 44; SD REQUEST 45-48

These requests seek documents discussing San Diego's intent in entering the 1998 and 2003 Exchange Agreements and any benefit San Diego received as a result of its decision to enter into the 2003 Exchange Agreement. Metropolitan claims generally that this information is relevant to interpreting the 2003 Exchange Agreement, at issue here. But usually only the objective intent, evidenced by the contract, controls. *Cedars-Sinai Medical Center v. Shewry*, 137 Cal.App.4th 964, 979-80 (2006). I agree that 'surrounding circumstances' *might* be discoverable, but usually only where there is a dispute on the meaning of a term and the term is "reasonably susceptible" to an interpretation asserted by a party. *Id.* Metropolitan has not explained how the sought for material would assist in such an enquiry, nor indeed identified any such enquiry or disputed term.

Metropolitan also asserts that these requests seek documents relevant to its affirmative defenses of "waiver, unclean hands, laches, and estoppel, among others." Metropolitan does not explain how the sought-for documents might assist these defenses. It does suggest that if San Diego knew about Metropolitan's rate structure, believed that rate structure would lead to the setting of unlawful rates, and nonetheless chose to base the Exchange Agreement's price provision on that rate structure, it waived (or might otherwise be barred from asserting) the unlawfulness of Metropolitan's rates. But the Exchange Agreement imposed a five-year moratorium prohibiting San Diego from disputing Metropolitan's rates, and states that "nothing herein shall preclude [San Diego] from contesting in an administrative or judicial forum whether

such charge or charges have been set in accordance with applicable law and regulation" after the moratorium ends.

Finally, San Diego has already agreed to produce "[a]ll documents from January 1, 1999 to the present that discuss the negotiation of the terms ultimately memorialized as Sections 5.2 and 11.1 of the 2003 Exchange Agreement." This is a reasonable compromise.

Requests re: Imperial's right to transfer water

SD/ IID REQUEST 41

Metropolitan believes that Imperial "has no legal right to sell or transfer water outside of its service area other than to San Diego[,]" and that this fact is relevant because it "would support limiting the scope of the Wheeling Statute claim." Metropolitan does not explain what "limiting the scope" of San Diego's Wheeling Statute claim means in this context or how the unlawfulness of *any* water transfers, let alone water transfers that are not directly at issue in this case, achieve the desired "limiting" result. San Diego notes that Metropolitan *may* be arguing that it should not have to factor the cost of unlawful water transfers into its wheeling rates. Absent elaboration, Metropolitan has not met its burden of showing that this request is reasonably calculated to lead to the discovery of admissible evidence.

Requests re: water-related studies

IID REQUEST 55; SD REQUEST 20

IID request 55 is directly pertinent to San Diego's claims in this lawsuit. Any studies concerning the San Diego-Imperial water transfer (and related statements made by Imperial) may cover cost issues implicated here. The word "reflect" in the request's phrase "documents that reflect Imperial's participation in any study or report. . ." is ambiguous and overbroad, however. The demand should be responded to as if the word "discuss" were used instead.

SD REQUEST 20 covers similar territory, but is too broad. For example, water studies that discuss purely internal issues regarding allocation of resources amongst San Diego's own member agencies would not be pertinent to this lawsuit. The request should be responded to, but construed as a request for documents that discuss San Diego-Imperial water transfer-related costs.

Requests re: RSI provisions and RSI-like provisions

SD/IID REQUEST 56-57; SD/IID REQUEST 58; SD REQUEST 59-60

The Rate Structure Integrity (RSI) clauses at issue here as a general matter allow Metropolitan to cease funding certain programs, including water conservation programs, or prevent San Diego from participating in those programs if San Diego challenges Metropolitan's water rates. Metropolitan's requests fall into two categories: (1) documents discussing agreements with RSI-type clauses that San Diego and Imperial have entered into with *third* parties; and (2) documents discussing any of the agreements at issue in this lawsuit that contain RSI provisions.

Both San Diego and Imperial object to category (1). With respect to category (2), San Diego has agreed to produce documents that discuss the RSI provisions, but objects that the request for documents discussing *any agreements* containing RSI clauses is overbroad.

Metropolitan believes that category (1) documents are discoverable because, to the extent that San Diego and Imperial sought to impose or agreed to RSI-like provisions in other contracts, these activities are probative of whether *Metropolitan's* RSI clauses are lawful. This does not follow. Documents about RSI clauses that are not at issue here are irrelevant.

Metropolitan asserts that category (2) documents are discoverable because the *Robbins* test[2] requires an examination of "the value accruing to the public from the imposition of the condition" and whether "alternative means . . . could maintain the integrity of the benefits program." The category (2) requests as worded go beyond documents discussing just the benefit provided by the various projects covered by Metropolitan's RSI provisions. In particular, the requests seem to ask for documents discussing San Diego's internal decision-making process when entering into *any* agreement containing an RSI provision. Documents regarding the perceived benefits of contracts with *and as a result of* RSI clauses and San Diego's decision to avail itself of those benefits may lead to the discovery of admissible evidence relevant to the *Robbins* test, and as limited the category (2) requests describe categories of documents with sufficient particularity to allow those documents to be identified. San Diego has argued that the Requests are burdensome, but does not provide much to support its position.

Documents re: Metropolitan's unbundled water rates

SD REQUEST 27

Documents concerning the manner in which Metropolitan breaks down its water rates into supply- and transportation-related costs are relevant to San Diego's claims. San Diego concedes as much, but argues that the requests are unduly burdensome, in that it would be required to search through documents related to eight "rate cycles" in addition to documents related to the 2011/12 and 2013/14 rates at issue in this lawsuit. As a compromise, San Diego has offered to produce documents relating to the 1998-2003 process in which Metropolitan unbundled its water rates, but this is less than Metropolitan wants.

Judge Kramer, earlier assigned to these cases, permitted San Diego to propound similar discovery requests on Metropolitan covering a broader period than San Diego is willing to

[2] *Robbins v. Superior Court,* 38 Cal.3d 199, 213 (1985).

include in its production now. Because we focus on Metropolitan's rates, it is true that fairness now counsels equivalent treatment. Accordingly these documents should be produced:

> All documents created on or before April 13, 2010, that discuss the effect on any Metropolitan member agency of any proposed or actual changes to Metropolitan's water rates, particularly (but not limited to) changes to the allocation of Metropolitan's costs from one rate component (*e.g.*, system access rate) to another (*e.g.*, system supply rate), and all documents created after April 13, 2010, that discuss this subject matter in connection with Metropolitan's 2011-2012 water rates. (Chatterjee Decl. Ex. R – REQUEST 11.)
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> All documents created on or before April 13, 2010, that discuss Metropolitan's allocation into rate categories (*e.g.*, supply, system access rate, system power rate) of charges or costs associated with Metropolitan's purchase of State Water Project water from the California Department of Water Resources, and all documents created after April 13, 2010, that discuss this subject matter in connection with Metropolitan's 2011-2012 water rates. (*Id.* Ex. R – REQUEST 14.)
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> All documents created on or before April 13, 2010, that discuss whether the Water Stewardship Rate should be charged as part of Metropolitan's rates for the wheeling or transportation of Non-Metropolitan water, and all documents created after April 13, 2010, that discuss this subject matter in connection with Metropolitan's 2011-2012 water rates. (*Id.* Ex. R – REQUEST 15.)

Requests re: wheeling prices

SD REQUEST 29; SD/IID REQUEST 31

Metropolitan claims that these requests are relevant because the documents show that its wheeling rates are reasonable by comparing them to similar rates charged by other entities. This argument is similar to the "industry standard" argument made by Metropolitan discussed above, and it suffers from the same problems regarding sample size and contextual relevance. The parties are already producing general "industry standard" documents such as treatises and studies. Moreover, insofar as Metropolitan would like to discover the actual *prices* of other wheeling and transfer transactions, these requests go well beyond those standards. These requests are overbroad.

Requests re: breach of contract and damages

SD REQUEST 49; SD REQUEST 50

To the extent that request 49 seeks the production of documents that discuss any breach of contract *alleged in San Diego's complaint*, it covers relevant documents that should be produced. However, all other potential breaches by Metropolitan are irrelevant, and in any event, no party has identified any such breaches.

Request 50, while covering relevant subject matter, does not describe a category of documents with reasonable particularity. The category of documents that "evidence" harm could cover every financial document in San Diego's possession. The request is overbroad.

Documents re: Local Water Projects

SD REQUEST 63-64; SD REQUEST 65-68; SD REQUEST 69; IID REQUEST 66

As with requests covering conservation program agreements with RSI provisions, discussed above, Metropolitan believes this information is needed to show "the value accruing to the public from the imposition of the [allegedly unconstitutional] condition" and whether "alternative means . . . could maintain the integrity of the benefits program" under the *Robbins* test. San Diego has agreed to produce documents that "discuss any benefit (region-wide or to [Metropolitan] or any member agency) from programs funded through the Water Stewardship Rate, from July 1, 2008 to the present." (San Diego Opp. at 13:24-14:2.)

However, Metropolitan seeks all documents *discussing agreements and negotiations* regarding any conservation, local resource, or desalination program or *proposed* program. No benefits were secured from these unconsummated proposals, and their relevance is thus marginal. This is a reasonable compromise. No further production should be required.

Requests re: Recordings of Pertinent Meetings

SD REQUEST 78/IID REQUEST 72

The request is overbroad. Metropolitan has apparently agreed to limit its request to documents relating to meetings or conversations regarding certain core issues in this action, including its rate structure and rate allocations, the 2010 rate adoption and 2011/12 rates, the Exchange Agreement, and any RSI clauses. San Diego did not brief a response to this request; Imperial claims that it has produced all responsive documents. In any event, as narrowed, the request asks for documents reasonably calculated to lead to the discovery of admissible evidence.

CONCLUSION

The parties should make such discovery as they have agreed pursuant to meet and confer. Nothing in this order should be construed to supersede those agreements. In this order, I have also expressly approved some of the compromises offers made by a party {albeit not accepted by the other party}.

Ruling	SAN DIEGO (SD)	IMPERIAL (IID)
Denied, or denied beyond what has been offered as indicated above	21-23; 29; 31-37; 39-44; 51-55; 70; in part: 57, 27, 49-50	31-34; 39-41; 51-54; 45-48; in part: 56
GRANT or as offered in compromise (indicated above), or as construed or narrowed, (indicated above)	20, 27, 49, 56, 58-60, 78	55-58, 72

Dated: May 13, 2013

Curtis E.A. Karnow
Judge Of The Superior Court