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[GOVERNMENT CODE § 6103]

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 COUNTY OF SAN FRANCISCO

18  
19 SAN DIEGO COUNTY WATER  
AUTHORITY,

20 Petitioner and Plaintiff,

21 v.

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

24 Respondents and Defendants.  
25

Case No. CPF-12-512466

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
METROPOLITAN WATER DISTRICT OF  
SOUTHERN CALIFORNIA'S MOTION  
FOR SUMMARY ADJUDICATION**

Date: December 3, 2013

Time: 9:30 a.m.

Dept.: 304

Judge: Hon. Curtis E. A. Karnow

Action Filed: June 8, 2012

Trial Date: December 17, 2013

1 The San Diego County Water Authority's ("SDCWA") Petition and Complaint  
2 ("Complaint") purports to assert a claim for breach of contract against the Metropolitan Water  
3 District of Southern California ("MWD"). MWD respectfully submits this memorandum of points  
4 and authorities in support of its motion for summary adjudication as to the fourth cause of action  
5 in the Complaint.

6 **I. INTRODUCTION**

7 The fourth cause of action alleges that MWD breached a contract it has with SDCWA, the  
8 2003 Exchange Agreement.<sup>1</sup> The undisputed facts—most particularly, the testimony of SDCWA's  
9 own "Person Most Knowledgeable" ("PMK") witnesses on the 2003 Exchange Agreement itself—  
10 establish that MWD did not breach the Agreement.

11 Absent a breach, SDCWA has no claim for breach of contract. Accordingly, this Court  
12 should grant summary adjudication on SDCWA's breach of contract cause of action.

13 **II. STATEMENT OF FACTS**

14 In October 2003, SDCWA entered into a contract with MWD—the 2003 Exchange  
15 Agreement. (Separate Statement of Undisputed Material Facts in Support of MWD's Motion for  
16 Summary Adjudication ("U.F.") 1.) Under the 2003 Exchange Agreement, SDCWA makes  
17 available water it acquires from the Imperial Irrigation District to MWD at the intake to MWD's  
18 Colorado River Aqueduct on Lake Havasu, and MWD delivers an equivalent amount of Exchange  
19 Water to SDCWA at various delivery points within San Diego County. (U.F. 2.) Exchange Water  
20 means "water that is delivered to SDCWA by Metropolitan ... in a like quantity as the quantity of  
21 water that SDCWA has Made Available to Metropolitan ...." (U.F. 3.)

22 In payment for the Exchange Water, SDCWA pays MWD a Price for each acre-foot of  
23 Exchange Water MWD delivers. (U.F. 4.) The initial Price was set in the Agreement at \$253,

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25 <sup>1</sup> The full name of the 2003 Exchange Agreement is the "Amended and Restated Agreement  
26 Between the Metropolitan Water District of Southern California and the San Diego County Water  
27 Authority for the Exchange of Water." (Declaration of Colin West in Support of MWD's Motion  
28 for Summary Adjudication ("West Decl."), Ex. A.)

1 with the Price thereafter being “equal to the charge or charges set by Metropolitan’s Board of  
2 Directors pursuant to applicable law and regulation and generally applicable to the conveyance of  
3 water by Metropolitan on behalf of its member agencies.” (U.F. 5.)

4 The Price is composed of (1) the System Access Rate, (2) the System Power Rate, and (3)  
5 the Water Stewardship Rate, each of which is a component of MWD’s water rate structure. (U.F.  
6 6.) These rates are components of the unbundled rate structure adopted by MWD in October  
7 2001, and that has remained in effect since January 2003. (U.F. 7.) MWD has not changed the  
8 method by which it calculates the rates that comprise the Price, nor the allocation of MWD’s costs  
9 that those rates recover, since implementing the unbundled rate structure in 2003. (U.F. 8.)

10 During discovery, SDCWA put forth PMK witnesses on several issues relevant to its claim  
11 for breach of the 2003 Exchange Agreement, including (1) SDCWA’s interpretation of that  
12 Agreement, (2) the parties’ obligations under it and performance of it, and (3) the alleged breaches  
13 of it. (U.F. 9.) Those witnesses admitted the following:

- 14 • The initial \$253 Price SDCWA paid under the 2003 Exchange Agreement was  
15 legal. (U.F. 10.)
- 16 • When SDCWA first entered into the 2003 Exchange Agreement in 2003, it saw no  
17 violation of the law in MWD’s rates for the conveyance of water on behalf of its  
18 member agencies. (U.F. 11.)
- 19 • After the 2003 Exchange Agreement’s execution in 2003, continuously each year  
20 MWD billed SDCWA using the same rate structure that was in effect at the time  
21 the 2003 Exchange Agreement was executed, and SDCWA paid those bills. (U.F.  
22 12.)
- 23 • MWD first breached the 2003 Exchange Agreement when it adopted, in the spring  
24 of 2008, water rates for 2009. (U.F. 13.)

### 25 **III. ARGUMENT**

26 Summary judgment or summary adjudication should be granted if the papers submitted  
27 show that there is no triable issue as to any material fact and that the moving party is entitled to  
28

1 judgment as a matter of law. Code Civ. Proc. § 437c; *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th  
2 826, 843 (2001). A party is entitled to summary judgment or summary adjudication if it disproves  
3 at least one essential element of the plaintiff's cause of action or shows that an element of the  
4 cause of action cannot be established. Code Civ. Proc. § 437c; *Aguilar*, 25 Cal. 4th at 849.

5 Here, SDCWA cannot establish one essential element of its breach of contract claim,  
6 namely, breach. *Reichert v. Gen. Ins. Co.*, 68 Cal. 2d 822, 830 (1968) (breach is an essential  
7 element of a breach of contract claim).

8 SDCWA alleges that MWD breached the 2003 Exchange Agreement by violating Section  
9 5.2's "Price" provision, "by setting rates for the transportation of the Water Authority's purchased  
10 water that violate the substantive provisions of various California laws and regulations."

11 (Complaint ¶ 103.) Specifically, SDCWA alleges that MWD breached the 2003 Exchange  
12 Agreement by billing SDCWA under that Agreement pursuant to its current rate structure.

13 (Complaint ¶¶ 5, 29, 36, 37, 103.) This structure, SDCWA alleges, violates "applicable law and  
14 regulation" because MWD: (1) includes in two of its conveyance charges—the System Access  
15 Rate and the System Power Rate—amounts MWD pays to the Department of Water Resources  
16 ("DWR") under MWD's contract with DWR for State Water Project ("SWP") Water, thus raising  
17 those conveyance rates, and (2) the Water Stewardship Rate is categorized as a conveyance  
18 charge, instead of a supply charge. (Complaint ¶¶ 7, 34-36, 50, 96.) SDCWA also alleges that  
19 MWD's supposed failure to properly account for "dry year peaking" charges somehow breached  
20 the 2003 Exchange Agreement, but does not allege that such supposed failure had any effect on  
21 the conveyance charges that are collected under that Agreement. (Complaint ¶¶ 7, 51, 65.)

22 The Price that MWD bills consists of the following components of MWD's rate structure:  
23 the System Access Rate, the System Power Rate, and the Water Stewardship Rate. (U.F. 6.)  
24 There is no dispute that in 2001 MWD approved the rate structure that SDCWA now says is  
25 illegal, and that MWD implemented that rate structure beginning January 2003. (U.F. 7.)  
26 SDCWA does not contend that MWD does anything different now, compared to 2003, with regard  
27 to how it addresses SWP costs, the Water Stewardship rate, or "dry year peaking." (U.F. 12.)  
28

1 Indeed, SDCWA's 2010 complaint *admits* that MWD set its current rate structure in January 2003,  
2 which rate structure, SDCWA alleges, included the same treatment of SWP costs and the Water  
3 Stewardship Rate with which SDCWA now takes issue. (Third Amended Petition and Complaint,  
4 Case No. CFP-10-510830, ¶ 25.)<sup>2</sup> And, as SDCWA's PMK witness on the 2003 Exchange  
5 Agreement admitted, after the 2003 Exchange Agreement's execution in 2003 and continuously  
6 each year since, MWD has billed SDCWA under the 2003 Exchange Agreement using the same  
7 rate structure as it did in 2003, and SDCWA has paid those bills. (U.F. 12.)

8 This Court should grant summary adjudication as to SDCWA's contract cause of action  
9 because SDCWA has admitted that no breach occurred.

10 According to one of SDCWA's PMK witnesses on the Exchange Agreement, the initial  
11 \$253 Price SDCWA paid under the Agreement was legal. (U.F. 10.) That witness also admitted  
12 that MWD has always billed SDCWA using the same rate structure. (U.F. 12.) Since MWD's  
13 rate structure is still in place now, and has been since 2003, then MWD's Price charged under the  
14 2003 Exchange Agreement has always been legal. These admissions alone are fatal to SDCWA's  
15 claim of breach.

16 But SDCWA's PMK witnesses made further admissions that are fatal to its contract claim.  
17 SDCWA's other PMK witness on the 2003 Exchange Agreement testified that MWD did not  
18 breach the 2003 Exchange Agreement until 2008. (U.F. 13.)<sup>3</sup> If as SDCWA testified, MWD first  
19 breached the 2003 Exchange Agreement in 2008, that necessarily means that MWD did *not* breach  
20

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21 <sup>2</sup> SDCWA is bound by those admissions. *St. Paul Mercury Ins. Co. v. Frontier Pac. Ins. Co.*, 111  
22 Cal. App. 4th 1234, 1248 (2003) ("In summary judgment or summary adjudication proceedings,  
23 admissions of material facts made in an opposing party's pleadings are binding on that party as  
24 judicial admissions. They are *conclusive* concessions of the truth of those matters, are effectively  
25 removed as issues from the litigation, and may not be contradicted, by the party whose pleadings  
are used against him or her.") (emphasis in original) (alterations and internal quotation marks  
omitted).

26 <sup>3</sup> Incidentally, that testimony is inconsistent with SDCWA's interrogatory responses, which claim  
27 that MWD first breached that Agreement in 2010. (West Decl., Ex. F, No. 66.) But in this  
28 Motion, MWD will consider SDCWA's evidence in a light most favorable to SDCWA.

1 the 2003 Exchange Agreement from 2003 through 2007. And since MWD's rate structure was the  
2 same in 2003 through 2007 as it was in each year thereafter, since MWD did not breach the  
3 Agreement from 2003 through 2007, then MWD did not breach the 2003 Exchange Agreement in  
4 any later year, including any years that might be covered by SDCWA's Complaint. In other  
5 words, since MWD's billings under the 2003 Exchange Agreement did not constitute a breach  
6 during the first several years of the contract duration, then they never constituted a breach.

7 This testimony by SDCWA's witnesses binds it. *Dart Indus., Inc. v. Commercial Union*  
8 *Ins. Co.*, 28 Cal. 4th 1059, 1077 (2002) (“[W]hatever is said by an agent ... is, in legal effect said  
9 by his principal ....”). Moreover, absent a compelling explanation—which SDCWA has not  
10 offered—SDCWA may not contradict its own admissions to avoid summary judgment. *Shin v.*  
11 *Ahn*, 42 Cal. 4th 482, 500, fn. 12 (2007) (“A party cannot create an issue of fact by a declaration  
12 which contradicts his prior discovery responses.”); *Alvis v. County of Ventura*, 178 Cal. App. 4th  
13 536, 549 (2009) (“We cannot accept as substantial evidence of a triable issue of fact a declaration  
14 that directly contradicts the declarant's prior statement, where the contradiction is unexplained.”).

15 Since SDCWA's testimony precludes a finding of breach here, SDCWA cannot prove an  
16 essential element of its breach of contract claim. Accordingly, the Court should grant summary  
17 adjudication as to the fourth cause of action.

18 **IV. CONCLUSION**

19 For all of the foregoing reasons, the Court should grant MWD's motion for summary  
20 adjudication as to SDCWA's breach of contract cause of action.

21 DATED: September 20, 2013

BINGHAM MCCUTCHEN LLP

22  
23 By: \_\_\_\_\_

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