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EXEMPT FROM FILING FEES  
[GOVERNMENT CODE § 6103]

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
16 COUNTY OF SAN FRANCISCO  
17

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.  
24  
25  
26  
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Case Nos. CPF-10-510830; CPF-12-512466

**RESPONDENT/DEFENDANT'S MOTION  
IN LIMINE NO. 2**

**RESPONDENT/DEFENDANT  
METROPOLITAN WATER DISTRICT OF  
SOUTHERN CALIFORNIA'S NOTICE OF  
MOTION AND MOTION TO EXCLUDE  
ALL EVIDENCE RELATED TO UNPLED  
CLAIMS AND THEORIES**

Date: November 4, 2013

Time: 9:00 a.m.

Dept.: 304

Judge: Hon. Curtis E. A. Karnow

Actions Filed: June 11, 2010; June 8, 2012

Trial Date: December 17, 2013

1 **NOTICE OF MOTION AND MOTION IN LIMINE NO. 2**

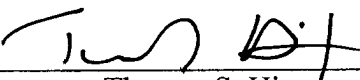
2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on November 4, 2013, at 9:00 a.m., or as soon thereafter  
4 as the matter may be heard, in Department 304 of the Superior Court of California, County of  
5 San Francisco, located at 400 McAllister St., San Francisco, California, 94102, Respondent and  
6 Defendant Metropolitan Water District of Southern California ("MWD") will and hereby does  
7 move the Court for an order in limine precluding SDCWA from presenting any reference to, or  
8 evidence of, unpled claims or theories in the final hearing/trial in both the *2010 Action* (Case No.  
9 CPF-10-510830) and the *2012 Action* (Case No. CPF-12-512466). This motion is made on the  
10 grounds that evidence related to unpled claims or theories is irrelevant and the probative value of  
11 such evidence is substantially outweighed by the danger of undue prejudice to MWD. *See Cal.*  
12 *Evid. Code* §§ 210, 350 and 352.

13 This motion will be and hereby is based on this Notice, the Memorandum of Points and  
14 Authorities in support thereof filed herewith, the concurrently filed Declaration of Thomas S.  
15 Hixson in Support of Metropolitan Water District of Southern California's Motions in Limine,  
16 all pleadings and papers on file in this action, and such argument as may be presented at the  
17 hearing.

18 DATED: October 18, 2013

Bingham McCutchen LLP

19  
20  
21 By:   
22 Thomas S. Hixson  
23 Attorneys for Respondent and Defendant  
24 Metropolitan Water District of Southern  
25 California

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Respondent and Defendant Metropolitan Water District of Southern California (“MWD”)  
3 respectfully submits this Motion In Limine to exclude all references to, or evidence of, unpled  
4 claims or theories in the final hearing/trial in both the *2010 Action* (Case No. CPF-10-510830)  
5 and the *2012 Action* (Case No. CPF-12-512466).

6 **I. INTRODUCTION**

7 Over the past three years, SDCWA has filed five complaints in this court against MWD:  
8 an initial Petition/Complaint in 2010 challenging the legality of MWD’s 2011/12 water rates,  
9 three subsequent amended versions of that Petition/Complaint, and a separate Petition/Complaint  
10 challenging MWD’s 2013/14 rates, set in 2012. These Petitions/Complaints establish the scope  
11 of SDCWA’s case against MWD and set forth the legal theories which SDCWA may pursue  
12 against MWD in both the *2010 Action* and *2012 Action*. Allowing evidence of unpled claims or  
13 theories is not permitted. SDCWA cannot introduce evidence about claims or theories of  
14 liability outside the Petitions/Complaints.

15 However, throughout this case, SDCWA has frequently shifted its theories of recovery.  
16 MWD anticipates that SDCWA will continue to raise new theories up until, and at trial, and may  
17 attempt to introduce evidence regarding such theories. Accordingly, MWD moves for an order  
18 excluding any reference to, or evidence of, unpled claims or theories on the grounds that any  
19 such evidence is irrelevant, and should therefore be excluded pursuant to California Evidence  
20 Code sections 210, 350 and 352.

21 **II. FACTUAL SUMMARY**

22 SDCWA’s initial Petition/Complaint in the *2010 Action*, filed in June 2010, asserted  
23 claims regarding MWD’s April 2010 adoption of rates for 2011/12. It challenged the legality of  
24 MWD’s rates, focusing on three rate components: (1) the System Access Rate, (2) the System  
25 Power Rate, and (3) the Water Stewardship Rate. *See* SDCWA’s Pet. for Writ of Mandate;  
26 Compl. for Decl. Relief; and Compl. for Determination of Invalidity (“2010 Compl.”), ¶¶ 21-28.

27 The gist of SDCWA’s Petition/Complaint was that MWD allegedly misallocated certain  
28 of its costs to its transportation rates, instead of to its supply rates, allegedly to SDCWA’s

1 detriment and to the benefit of other MWD member agencies. *See id.* SDCWA contended that  
2 MWD's supposed misallocation violated five laws: Metropolitan Water District Act section 134;  
3 common law; Proposition 13, *i.e.* Cal. Const. art. XIII A, § 4 and its implementing statute,  
4 Government Code § 50076; Government Code § 54999.7(a); and Water Code §§ 1810-14.  
5 *See, e.g.,* Compl. ¶¶ 36, 37-39, 53.

6 On October 27, 2011, SDCWA filed its First Amended Petition/Complaint ("FAC") in  
7 the *2010 Action*.<sup>1</sup> This amendment included a whole new theory of liability: allegations that  
8 MWD's 2011/12 rates resulted from the activities of a supposed anti-SDCWA "cabal" among  
9 MWD's member agencies. *E.g.,* FAC, ¶ 100. This Court dismissed some of the new causes of  
10 action (*see* 1/4/2012 Tr. at 27:15-20), and later ruled that SDCWA's "cabal" allegations were  
11 irrelevant and "not part of the case." *See* 7/2/2012 Tr. at 40:26-43:1 and 62:27-63:6. After the  
12 Court so ruled, SDCWA shifted its focus away from the "cabal" allegations, but declined to  
13 remove those allegations from subsequent versions of its complaints in the 2010 Action.  
14 *See, e.g.,* SDCWA's Third Am. Pet. and Compl. ("TAC"), filed January 23, 2013, ¶¶ 35-40.

15 SDCWA's rate challenges, as alleged in subsequent Petitions/Complaints in the *2010*  
16 *Action* and the Petition/Complaint in the *2012 Action*, continue to focus on SDCWA's contention  
17 that MWD misallocated certain of its costs to its transportation rates, instead of to its supply  
18 rates. *See* TAC, ¶¶ 25-28; SDCWA's Pet. for Writ of Mandate and Compl. for Determination of  
19 Invalidity, Damages and Decl. Relief ("2012 Compl."), ¶¶ 34-36.

20 However, SDCWA continuously has indicated it is considering or has argued new,  
21 different bases for liability that are not pled. Among other things, it has suggested that MWD  
22 over-collects its water rates from all member agencies, as opposed to just misallocating its costs  
23 among them. *See* 4/23/2013 Tr. at 15:9-21. SDCWA has argued MWD's Financial Planning  
24 Model, and MWD's actual calculation of its rates, is important, and has sought discovery of this.  
25 *See* SDCWA's First Set of Special Interrogs. to MWD at 5:14-15 (Interrogatory No. 17);  
26 4/23/2013 Tr. at 25:24-26:2, 26:16-22 and 30:6-17. SDCWA has also argued that MWD is  
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28 <sup>1</sup> SDCWA's First Am. Pet. and Compl., filed October 27, 2011.

1 required to “true up” its costs, and sought discovery on this subject. *See* SDCWA’s Mem. of P.  
2 & A. in Supp. of Mot. to Compel Resps. to Disc. Reqs. Served on MWD at 1:13-18, 2:15-18.  
3 However, none of the operative Petitions/Complaints (or prior versions) assert a claim that  
4 MWD supposedly over-collected rates, or miscalculated rates, nor assert a claim with respect to  
5 “truing up” or the Financial Planning Model.

6 Additionally, SDCWA included a claim about “peaking” in its Petition/Complaint in the  
7 *2012 Action*, which was filed in June 2012. Since then, SDCWA has made numerous arguments  
8 with respect to “peaking” that are not alleged in any Petition/Complaint.

9 Furthermore, SDCWA’s FAC in the *2010 Action* first alleged a cause of action that  
10 MWD’s Rate Structure Integrity provision infringed a *right to petition*. *See* FAC, ¶ 5. SDCWA  
11 alleged the same in its Second Amended Petition/Complaint (“SAC”) in the *2010 Action* (*See*  
12 SAC, ¶ 5) and operative TAC. *See* TAC, ¶ 5. Despite pleading only a claim with respect to a  
13 right to petition since September 2011, on September 20, 2013, SDCWA filed a motion for  
14 summary adjudication on this cause of action, purporting (incorrectly) to have a claim for  
15 infringement of a “*right to free speech*.” SDCWA’s Mem. of P. & A. in Supp. of Mot. for  
16 Summ. Adjudication at 7:13-17 (emphasis added).

### 17 **III. ARGUMENT**

18 “[T]rial courts regularly exercise their ‘basic power to insure that all parties receive a fair  
19 trial’ by precluding evidence.” *Peat, Marwick, Mitchell & Co. v. Super. Ct.*, 200 Cal. App. 3d  
20 272, 288 (1988) (citing *Castaline v. City of Los Angeles*, 47 Cal. App. 3d 580, 592 (1975)). “In  
21 so doing trial courts generally employ the ‘motion in limine,’ which is ‘not expressly authorized  
22 by statute’ but is within the trial court’s ‘inherent power to entertain and grant.’” *Id.* (citing 3  
23 Witkin, Cal. Evid, Intro. of Evidence at Trial, § 2011 (3d ed. 1986)).

24 A motion in limine is commonly brought at the beginning of trial when evidentiary issues  
25 are anticipated by the parties and is “designed to preclude the presentation of evidence deemed  
26 inadmissible and prejudicial by the moving party.” *Schweitzer v. Westminster Investments*, 157  
27 Cal. App. 4th 1195, 1214 (2007). “The scope of such motion is any kind of evidence which  
28 could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly

1 prejudicial.” *Peat, Marwick, Mitchell & Co.*, 200 Cal. App. 3d at 288 (quoting *Clemens v.*  
2 *American Warranty Corp.*, 193 Cal. App. 3d 444, 451 (1987)).

3 SDCWA may not seek to introduce evidence during trial supporting claims or theories  
4 not pled in its Complaints. A complaint “delimits the nature of the legal theories which plaintiff  
5 may pursue and the nature of the evidence which is admissible.” *Ostling v. Loring*, 27 Cal. App.  
6 4th 1731, 1744 (1994). “It is axiomatic that “[t]he pleadings establish the scope of an action and,  
7 absent an amendment to the pleadings, parties cannot introduce evidence about issues outside the  
8 pleadings.” *Schweitzer*, 157 Cal.App.4th at 1214; *see also Ostling*, 27 Cal. App. 4th at 1745  
9 (stating if plaintiff departs from existing complaint at hearing on damages, court should deny  
10 relief or limit to that which is appropriate considering only the evidence that is within bounds of  
11 complaint); *Hughes v. Blue Cross of Northern California*, 215 Cal. App. 3d 832, 858 (1989)  
12 (stating that evidence cannot be used to establish an issue that the parties have not made in their  
13 pleadings); *Barrere v. Soms*, 113 Cal.97, 102 (1896) (noting that it is not sufficient that  
14 evidence discloses cause of action against defendant; cause of action must be pled in complaint).

15 Evidence of or references to unpled claims or theories are irrelevant to SDCWA’s *2010*  
16 *Action* and *2012 Action*. Under California Evidence Code section 350, “[n]o evidence is  
17 admissible except relevant evidence.” Relevant evidence is defined as, “evidence . . . having any  
18 tendency in reason to prove or disprove any disputed fact that is of consequence to the  
19 determination of the action.” Cal. Evid. Code § 210. Evidence referring to or supporting unpled  
20 claims or theories does not tend to prove or disprove any disputed fact pertaining to the causes of  
21 action in SDCWA’s Petitions/Complaints. *See Cota v. County of Los Angeles*, 105 Cal. App. 3d  
22 282, 293 (1980) (“Evidence that is not pertinent to the issues raised by the pleadings is  
23 immaterial and it is error to allow introduction of such evidence.”); *see also Rainer v. Buena*  
24 *Community Memorial Hosp.*, 18 Cal. App. 3d 240, 253 (1971) (same) (citations omitted).

25 Moreover, reference to or evidence of unpled claims or theories should be excluded under  
26 California Evidence Code section 352 as evidence that will create a substantial danger of undue  
27 prejudice to MWD and will confuse the issues. California Evidence Code section 352 provides  
28 that:

1 The court in its discretion may exclude evidence if its probative  
2 value is substantially outweighed by the probability that its  
3 admission will (a) necessitate undue consumption of time or (b)  
4 create substantial danger of undue prejudice, of confusing the  
5 issues, or of misleading the jury.

6 Cal. Evid. Code § 352; *see also People v. Gonzalez*, 38 Cal. 4th 932, 950 (2006) (stating the trial  
7 court has broad discretion both in determining the relevance of evidence and assessing whether  
8 its prejudicial effect outweighs its probative value). Here, MWD has prepared to defend itself  
9 against only the claims pled in SDCWA's operative Petitions/Complaints in the *2010 Action* and  
10 *2012 Action*. However, as discussed above, SDCWA has suggested that it may raise theories of  
11 liability that are *not* contained in the Petitions/Complaints. MWD should not have to guess as to  
12 what potential claims or legal theories SDCWA may or may not seek to introduce at later phases  
13 of this litigation, and should not have to defend against claims or theories on which discovery  
14 was not obtained and a defense was not prepared. *See Hughes*, 215 Cal. App. 3d at 858 (stating  
15 that "a party must have notice of a claim and an opportunity to defend against it"). Reference to  
16 or evidence of unpled claims or theories would also confuse the issues that SDCWA actually  
17 pled in its Petitions/Complaints, and is an undue waste of time and judicial resources.

18 SDCWA has had ample opportunity, over the course of nearly three and one-half years  
19 and multiple amendments to its Petitions/Complaints, to assert the causes of action it wishes to  
20 litigate in this case. Evidence in reference to or in support of unpled claims or theories is outside  
21 the permissible scope of this case and should be inadmissible.

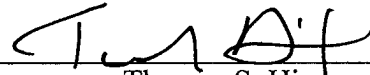
#### 22 **IV. CONCLUSION**

23 For the foregoing reasons, the Court should exclude any and all reference to or evidence  
24 of unpled claims or theories in the final hearing/trial in both the *2010 Action* (Case No. CPF-10-  
25 510830) and the *2012 Action* (Case No. CPF-12-512466).  
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27  
28

1 DATED: October 18, 2013

Bingham McCutchen LLP

2  
3 By:



4 Thomas S. Hixson

5 Attorneys for Respondent and Defendant  
6 Metropolitan Water District of Southern  
7 California

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1 *San Diego County Water Authority v. Metropolitan Water District of Southern California, et al.*,  
2 San Francisco County Superior Court Case Nos. CPF-10-510830 and CPF-12-512466

3 **PROOF OF SERVICE**

4 I am over eighteen years of age, not a party in this action, and employed in San  
5 Francisco County, California at Three Embarcadero Center, San Francisco, California 94111-  
6 4067. I am readily familiar with the practice of this office for collection and processing of  
7 correspondence for mail/fax/hand delivery/next business day Federal Express delivery, and they  
8 are deposited that same day in the ordinary course of business.

9 On October 18, 2013, I served the attached:

10 **RESPONDENT/DEFENDANT'S MOTION IN LIMINE NO. 2**

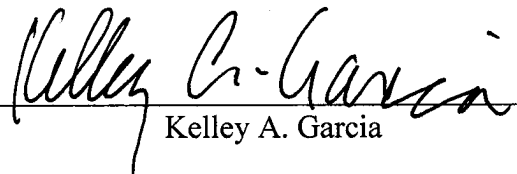
11 **RESPONDENT/DEFENDANT METROPOLITAN WATER**  
12 **DISTRICT OF SOUTHERN CALIFORNIA'S NOTICE OF**  
13 **MOTION AND MOTION TO EXCLUDE ALL EVIDENCE**  
14 **RELATED TO UNPLED CLAIMS AND THEORIES**



16 (VIA LEXISNEXIS) by causing a true and correct copy of the document(s) listed  
17 above to be sent via electronic transmission through LexisNexis File & Serve to  
18 the person(s) at the address(es) set forth below.

19 as indicated on the following **Service List**.

20 I declare under penalty of perjury under the laws of the State of California that the  
21 foregoing is true and correct and that this declaration was executed on October 18, 2013, at San  
22 Francisco, California.

23  
24  
25  
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Kelley A. Garcia

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