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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY,

Petitioner and Plaintiff,

v.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; et al.,

Respondents and Defendants

Case Nos. CPF-10-510830; CPF-10-512466

RESPONDENT/DEFENDANT'S MOTION IN LIMINE NO. 3

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S NOTICE OF MOTION AND MOTION *IN LIMINE* NO. 3 TO EXCLUDE ALL EVIDENCE RELATED TO THE WORKING GROUP OF MWD MEMBER AGENCIES AND THE MOTIVE, MENTAL PROCESSES, OR ALLEGED BIAS OF MWD'S BOARD OF DIRECTORS

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

NOTICE OF AND MOTION *IN LIMINE* NO. 3

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 4, 2013, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department 304 of the Superior Court of California, County of San Francisco, located at 400 McAllister St., San Francisco, California, 94102, Respondent and Defendant Metropolitan Water District of Southern California ("MWD") will and hereby does move the Court for an order *in limine* to exclude all evidence and argument in the final hearing/trial in both the *2010 Action* (Case No. CPF-10-510830) and the *2012 Action* (Case No. CPF-12-512466) regarding:

(1) Any working group of certain MWD member agencies, "shadow government," "secret society," or "cabal" as alleged in the Third Amended Petition/Complaint (collectively, "working group allegations"); or

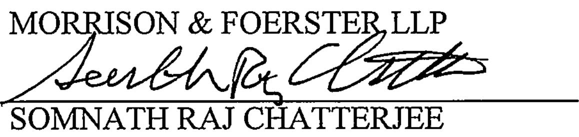
(2) The motive, mental processes, or alleged bias of MWD's Board of Directors.

This motion is made on the grounds that (1) the Court already ruled that the working group allegations are irrelevant in these actions; (2) the San Diego County Water Authority abandoned the working group allegations as a basis for its claims; (3) these issues are irrelevant under Evidence Code sections 210 and 350; (4) these issues are unduly prejudicial and will result in undue consumption of time under Evidence Code section 352; and (5) inquiry into these issues are barred by the separation of powers doctrine and the deliberative process privilege.

This motion will be and hereby is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities in support thereof filed herewith, the Declaration of Somnath Raj Chatterjee in support of this motion, all pleadings and papers on file in this action, and such argument or other matter as may be presented at or before the hearing.

Dated: October 18, 2013

MORRISON & FOERSTER LLP



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MEMORANDUM OF POINTS AND AUTHORITIES

Respondent and Defendant Metropolitan Water District of Southern California ("MWD") hereby moves *in limine* for an order in Case Nos. CPF-10-510830 ("*2010 Action*") and CPF-12-512466 ("*2012 Action*") precluding Petitioner and Plaintiff San Diego County Water Authority ("SDCWA") and Defendant Imperial Irrigation District from introducing at trial any evidence or argument regarding:

(1) Any working group of certain MWD member agencies, "shadow government," "secret society," or "cabal" as alleged in the Third Amended Petition/Complaint ("TAC") (collectively, "working group allegations"); or

(2) The motive, mental processes, or alleged bias of MWD's Board of Directors.

I. INTRODUCTION

The Court removed the above-identified issues, in substance, from the operative complaints in both the *2010* and *2012 Actions* by granting in part MWD's motions to strike the working group allegations. As a result, no discovery against MWD has been allowed or taken on these allegations or issues. And, after the Court granted, in part, MWD's motions to strike, SDCWA in discovery abandoned those working group allegations as a purported factual basis on which to challenge MWD's rates, the Rate Structure Integrity ("RSI") provision, or MWD's calculation of preferential rights, or on which to base its claims of breach of the Exchange Agreement.

By this motion, MWD seeks to enforce for purposes of the final hearing/trial the Court's Orders striking the working group allegations and SDCWA's abandonment of those allegations. The Court should exclude any purported evidence or argument on these issues on multiple grounds: (1) the Court already ruled the working group allegations are irrelevant in these actions; (2) SDCWA abandoned the working group allegations as a basis for its claims; (3) these issues are irrelevant under Evidence Code sections 210 and 350; (4) these issues are unduly prejudicial and will result in undue consumption of time under Evidence Code section 352; and (5) inquiry into these issues is barred by the separation of powers doctrine and the deliberative process privilege.

II. FACTUAL SUMMARY AND COURT'S RULING CONCERNING THE WORKING GROUP

In its First Amended Petition/Complaint ("FAC"), filed on October 27, 2011, SDCWA asserted a cause of action against MWD for breach of fiduciary duty, attacking MWD's rates based on an alleged "cabal" of MWD member agencies conspiring against SDCWA. (*See* FAC ¶¶ 94-107.) The Court sustained MWD's demurrer to that claim without leave to amend. (Chatterjee Decl., Ex. 1, 1/4/2012 Tr. at 27:15-28.) In ruling, the Court rejected the notion that "whether or not there is, as [SDCWA] put it, a cabal" mattered, observing that the "[b]ottom line of this is whether what's been done is appropriate." (*Id.* at 19:9-11.) The Court determined that SDCWA's allegations that the working group was corrupt had no bearing on the rate challenge. (*Id.* at 20:19-25) ("You want to go beyond the decision that was made and its impact on your clients, and you want me to determine that irrespective of the propriety of the decisions that the respondent acted corruptly, make a finding to that effect, and then you want the judiciary to fix that. How would I do that?").

Undeterred, SDCWA repackaged its failed breach of fiduciary duty claim in its Second Amended Petition/Complaint ("SAC"), filed April 17, 2012, by interposing the working group allegations into SDCWA's other claims. In short, SDCWA alleged that certain member agencies formed a working group in 2009. (SAC ¶ 35.) SDCWA alleged that the working group's staff held meetings without inviting SDCWA, met with MWD staff, coordinated lobbying of the MWD Board, and developed self-interested arguments that SDCWA does not like to convince the MWD Board to vote in their favor. (*Id.*, ¶¶ 35-40.) Allegedly, the working group has "captured" and "controls" the MWD Board, apparently by presenting its "recommendations" to the Board, which the MWD Board "dutifully follows . . . with only perfunctory Board consideration of the issues." (*Id.* ¶ 36.) The working group allegedly convinced the Board to pass rates "designed to advantage the other member agencies at [SDCWA's] expense." (*Id.* ¶ 28.)

On May 22, 2012, MWD moved to strike those allegations from the SAC on the basis that the mental processes of MWD's Board of Directors, including their alleged biases, prejudices, and considerations when voting on MWD matters, were irrelevant to these proceedings, and judicial

inquiry into the mental process of legislators is absolutely prohibited. (*See* Mot. at 1.) The Court on July 2, 2012, granted MWD's motion in part and denied the motion in part. The Court struck the allegations in substance, ruling that "the nature of the supposed shadow group, and Metropolitan's view of it, has nothing to do with anything in this case"; but the Court did not cross-out the allegations from the SAC because striking the "offending words" and "colorful descriptions" from the complaint would be "too awkward." (Chatterjee Decl., Ex. 2, 7/2/12 Tr. at 41:26-42:5, 42:17-21.)

Though stricken in substance from the SAC, SDCWA reasserted the working group allegations verbatim in the TAC, filed January 23, 2013. On March 22, 2013, based on the parties' stipulation, the Court ordered that the Court's July 2, 2012, ruling on MWD's motion to strike applied to the "the same allegations" in the TAC. (*See* Chatterjee Decl., Ex. 3, March 22, 2013 Order Granting Stipulation at 2.)

SDCWA also asserted the working group allegation in the Petition/Complaint in the *2012 Action*. Accordingly, MWD filed a motion to strike the working group allegations in that Petition/Complaint, which tracked MWD's motion to strike in the *2010 Action*. Pursuant to the parties' stipulation, the Court ordered that its ruling on MWD's motion to strike in the *2012 Action* concerning allegations "regarding a working group of certain MWD member agencies and related matters" is the same as the Court's ruling on MWD's motion to strike allegations in the SAC in the *2010 Action*. (*See* Chatterjee Decl., Ex. 4, Notice of Entry of Order re Stipulation re Motion to Strike Portions of the Petition/Complaint.)

III. SDCWA ABANDONED ITS WORKING GROUP ALLEGATIONS IN DISCOVERY

After the Court granted MWD's motion to strike in part in the *2010 Action*, MWD served comprehensive contention interrogatories in the *2010* and *2012 Actions* asking SDCWA to identify all facts that SDCWA contends support its claims challenging MWD's rates, the RSI provision, and MWD's calculation of preferential rights and its claims of breach of the Exchange Agreement. In its responses, SDCWA purported to set forth the factual basis for its claims, but did not identify any purported facts regarding the working group allegations. (*See* Chatterjee

Decl., Ex. 5, SDCWA's Response to MWD's First Set of Special Interrogatories in *2010 Action*, Nos. 1, 4, 7, 10, 13, 63, 72, 75, 78, and 81; *Id.*, Ex. 6, SDCWA's Response to MWD's First Set of Special Interrogatories in *2012 Action*, Nos. 1, 4, 7, 10, 13, 16, 19, 34.) Accordingly, SDCWA abandoned its working group allegation theory in discovery.

Courts regularly exclude evidence on issues not identified in response to interrogatories. *See Estate of Luke*, 194 Cal. App. 3d 1006, 1021 (1987) (removing issues in case that were not identified in response to contention interrogatories because by answering interrogatories "in the negative, no issue … remained to be determined at the hearing"); *Deeter v. Angus*, 179 Cal. App. 3d 241 (1986) (court excluded audio tape that was not produced or identified in interrogatories); *Campain v. Safeway Stores, Inc.*, 29 Cal. App. 3d 362 (1972) (court reversed the trial court's ruling admitting plaintiff's testimony that contradicted her interrogatory responses). The Court should do the same here by excluding all evidence regarding the working group allegations given SDCWA's failure to state any such purported facts as a basis for any of its claims.

IV. THE WORKING GROUP ALLEGATIONS AND THE MOTIVE, MENTAL PROCESSES, AND ALLEGED BIAS OF MWD'S BOARD OF DIRECTORS ARE IRRELEVANT

A. In Granting MWD's Motion to Strike, the Court Determined that the Working Group Allegations Are Irrelevant

By granting MWD's motion to strike, the Court already determined that the working group allegations and any evidence regarding motive, mental processes, or alleged bias of MWD's Board are irrelevant to these proceedings. (*See* Chatterjee Decl., Ex. 3, 7/2/2012 Order.) The Court's ruling applied a rigorous standard permitting the Court to strike "any irrelevant, false, or improper matter inserted in any pleading." Cal. Code Civ. Proc. § 436. Under that standard, an "irrelevant matter" includes allegations that are (1) "not essential to the statement of a claim or defense," and/or (2) "neither pertinent to nor supported by an otherwise sufficient claim or defense." Code Civ. Proc. § 431.10(b). One consequence of the motion to strike was "to authorize the excision of superfluous or abusive allegations." *Ferraro v. Camarlinghi,* 161 Cal. App. 4th 509, 528 (2008). Applying this standard, the Court determined that "the nature of the supposed shadow group, and Metropolitan's view of it, *has nothing to do with anything in this*

case." (Chatterjee Decl., Ex. 2, 7/2/12 Tr. at 42:1-3 (emphasis added).)

The Court's Orders substantively removed the working group allegations and issues regarding motive, mental processes, or alleged bias of the MWD Board from these actions. To enforce its prior rulings, the Court should exclude from the final hearing/trial any evidence regarding the working group allegations and the motive, mental processes, or alleged bias of the MWD Board. *See* Cal. Evid. Code § 350 ("No evidence is admissible except relevant evidence"); Cal. Evid. Code § 352 (Court may exclude evidence that "create[s] substantial danger of undue prejudice").

B. The Working Group Allegations Are Irrelevant as a Matter Of Law, as Set Forth In MWD's Motions To Strike

Evidence regarding the working group allegations or motive, mental processes, or alleged bias of the MWD Board is irrelevant for the reasons set forth in MWD's motion to strike.

The working group allegations do not establish an independent cause of action and, recognizing this, SDCWA has not tried to add any such claim in lieu of SDCWA's failed claim for breach of fiduciary duty. The working group allegations also do not provide a theory of relief under the causes of action pled. SDCWA does not claim that the working group allegations result in any legal violations. SDCWA alleges neither that MWD Board meetings were held in secret, that legislative action was ever taken by MWD outside of formal, publicly noticed hearings, that the public was unable to participate in the legislative process, nor that MWD failed to follow any required procedures. It is beyond any real dispute that MWD's rate structure and rates were established through quasi-legislative actions.[1] The working group allegations do no more than describe the normal functioning of the legislative process in a representative, democratic government: Different people or groups may have different views, and may discuss and advocate

[1]Under the MWD Act, MWD's Board of Directors—its legislative body—is mandated to set rates and has been granted the discretion to set water rates at the levels it determines to be necessary or appropriate. MWD Act, §§ 109-133. MWD's determination of its rate structure and its enactment of its water rates are quintessentially quasi-legislative acts. *See 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"). California law requires the MWD Board to act by majority vote. MWD Act, § 57.

these views. The only purpose of any evidence regarding the working group allegations would be to impugn the motives of MWD's Board of Directors, charging bias, and delving into the mental processes of MWD's Board—which is prohibited by the California Supreme Court.

1. The Working Group Allegations and Evidence of Motive, Mental Processes, or Alleged Bias of MWD's Board, a Quasi-Legislative Body, Are Irrelevant to SDCWA's Challenge to MWD's Rates and Rate Structure Under the First, Second, and Third Causes of Action

As an initial matter, the working group allegations have no relevance to the adoption of MWD's rate structure as a matter of chronology. SDCWA alleges that certain member agencies formed a working group in 2009 that colluded in secret as part of a lobbying effort to convince the MWD Board to set rates in a manner that harmed SDCWA. (TAC ¶¶ 35-40.) MWD, however, adopted its current rate structure by majority vote of its Board of Directors in October 2001, and that rate structure has been operative since January 2003. (TAC ¶¶ 25.) A working group formed in 2009 has no bearing on a rate structure that has been operative since 2003.

Aside from this fatal chronological flaw, evidence regarding the working group allegations and of the motive, mental processes, and alleged bias of MWD's Board is irrelevant to SDCWA's challenge to MWD's rates and rate structure under controlling California law.[2] The California Supreme Court has long "preclud[ed] judicial inquiry into the motivation or mental processes of legislators in enacting legislation." *Cnty. of Los Angeles v. Super. Ct.*, 13 Cal. 3d 721, 723 (1975). Even a claim of "duress and coercion" does not justify judicial inquiry into the legislators' motivation or mental processes. *Id.* at 724. The Supreme Court has further held: "Given this general rule that the validity of legislation does not turn on legislative motive, the mental processes of individual legislators becomes *irrelevant* to the judicial task." *Id.* at 727-28 (emphasis added). Similarly, the Supreme Court has affirmed the rule that a "'legislative act cannot be [nullified] because . . . it was or might have been the result of improper considerations'" and held that "the validity of legislative acts must be measured by the terms of the legislation itself, and not by the motives of, or influences upon, the legislators who enacted

[2]Evidence is relevant only if it has a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Cal. Evid. Code § 210.

the measure." *San Francisco v. Cooper*, 13 Cal. 3d 898, 912-13 (1975).[3]

This rule is particularly apt where the Court is called upon to review quasi-legislative actions, such as the rate setting at issue here, which are judged under a deferential standard and limited to review of the administrative record. Cal. Code Civ. Proc. § 1085; *Western States Petrol. Ass'n v. Super. Ct.*, 9 Cal. 4th 559, 573 (1995). The California Supreme Court has stated the "well settled" rule that "extra-record evidence is generally not admissible in . . . traditional mandamus actions challenging quasi-legislative administrative decisions." *Western States*, 9 Cal. 4th at 574. In other words, a court should "consider *only* the administrative record" in determining whether a quasi-legislative decision was reasonable. *Id.* at 573 (emphasis added); *see also Am. Coatings Ass'n v. S. Coast Air Quality Dist.*, 54 Cal. 4th 446, 460 (2012) (when evaluating the validity of a quasi-legislative decision, courts "consider only the administrative record before the agency at the time [the decision was made]"). The Court's review of the administrative record is limited to determining whether the outcome of the Board's process was reasonable, and "does not depend on the subjective motivation of its draftsmen but rests instead on the objective effect of the legislative terms." *Cnty. of Los Angeles v. Super. Ct.*, 13 Cal. 3d at 727.

Bd. of Supervisors v. Super. Ct. is instructive. 32 Cal. App. 4th 1616 (1995). There, the Los Angeles County Municipal Judges' Association brought a declaratory relief action against the board of supervisors challenging consolidation of certain judicial services into the sheriff's office rather than the marshall's office. Plaintiffs alleged that notwithstanding their own advisory recommendation, as well as a public hearing, the board had already pre-determined its choice through secret meetings. The Court of Appeal rejected the distinction between the plaintiffs'

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[3]*See also San Joaquin Local Agency Formation Comm'n v. Super. Ct.*, 162 Cal. App. 4th 159, 171 (2008) ("Prohibiting inquiry into thought process of [agency] commissioners exercising quasi-legislative powers comports with the separation of powers. In an ordinary mandamus review of a legislative or quasi-legislative decision, courts decline to enquire into thought process or motives, but evaluate the decision on its face because legislative discretion is not subject to judicial control or supervision."); *City of Santa Cruz v. Super. Ct.*, 40 Cal. App. 4th 1146, 1148 (1995) ("[D]iscovery into the subjective motives or mental processes of legislators is forbidden."); *Oxnard Harbor Dist. v. Local Agency Formation Comm'n*, 16 Cal. App. 4th 259, 271 (1993) ("It is not proper for the judiciary to probe the motivations of lawmakers, and this rule applies to local legislators as well as to members of the state Legislature or of Congress.").

1 claim that they "do not seek to discover legislative thought processes, but only whether the Board
2 predetermined, before the hearing required by statute, to select the sheriff to provide court-related
3 services" and thus did not comply with the law. *Id.* at 1626-1627. Moreover, the Court held that
4 evidence regarding "whether Board members had arrived at their positions before the hearing are
5 barred because they are irrelevant; such positions would not disqualify the supervisors from
6 voting or invalidate their decision. Neither would the acquisition of information outside the
7 hearing room concerning the proposed consolidation." *Id.* at 1627.

8 None of SDCWA's working group allegations is relevant to determining whether there is
9 a reasonable basis for MWD's rate structure and rates. As stated, MWD adopted its rate structure
10 and set its rates through a quasi-legislative process. MWD's 26 member agencies, including
11 SDCWA, are separate public entities, many of which have their own Board of Directors. Each
12 has representatives on MWD's Board. SDCWA has four representatives on the MWD Board and
13 controls about 17.4% of the Board's vote. If any separate entities wish to meet to discuss water
14 strategy, their staff can hold meetings and engage in advocacy in the legislative process like any
15 other interested party. Far from a "cabal," the working group is nothing more than the legislative
16 process at work, albeit seen through the eyes of the party that cast its votes in the minority. The
17 Court has observed that whether the working group acted in secret, or with nefarious motives, is
18 irrelevant to determining whether MWD's rate structure or rates are valid. As the Court put the
19 question to SDCWA: "But if what was done was done lawfully, that is, all of your causes of
20 action were to lose, would the how it was done matter? Or to flip the thing around, if what they
21 did was not lawful, do we even need to get to whether or not there is, as you put it, a cabal?
22 Bottom line of this is whether what's been done is appropriate, right?" (Chatterjee Decl., Ex. 1,
23 1/4/12 Tr. at 19:5-11). SDCWA had no answer then, and it has no grounds now to submit any
24 evidence regarding the working group allegations.

25 **a. The "Shadow Government" Allegations Are Irrelevant and**
26 **Improper**

27 Any evidence regarding SDCWA's allegations that the working group forms a "shadow
28 government" that has somehow "captured" or now "controls" the MWD Board would be

similarly irrelevant and legally improper for the reasons described above. These allegations go exclusively to the mental processes of MWD's Board, claiming nothing more than that MWD's Board of Directors "rubber stamped" recommendations made by others. The only issue any such evidence would concern is, "What were MWD's Board members really thinking and considering when they voted on MWD's rates?" Judicial inquiry into that question, however, is absolutely barred by *Cnty. of Los Angeles* and related authority.

Further, other courts have rejected the very same theory of liability proposed by SDCWA. For example, the plaintiff in *Margulis v. Myers* alleged that the Director of the Department of Health Services had improperly delegated her authority by "rubber-stamping" a staff proposal:

> Appellant protests that the letter signed by the director informing appellant of the decision to place him on prior authorization was written by a subordinate of the director . . . and that it was only after SUR discovered that the letter would have no legal effect without the director's signature that such was obtained. Appellant further complains that uncontroverted evidence shows that the director 'had absolutely no substantive input whatsoever' in the decision to implement prior authorization.

122 Cal. App. 3d 335, 344 (1981). The court rejected this claim, holding that such a decision was proper so long as it was issued by the proper authority: "In the instant case, the decision requiring prior authorization was announced by the director; her name was signed to the letter and she alone in her official capacity assumed responsibility for the decision. . . . Although subordinates may have 'decided' prior authorization was warranted, the official decision was made by the director as required by law." *Id.* at 344-45.

In any event, agencies "may delegate the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action." *Cal. Sch. Emps. Ass'n v. Pers. Comm'n of Pajaro Valley Unified Sch. Dist.*, 3 Cal. 3d 139, 144 (1970). It is also well established that "a public agency may choose between differing expert opinions. [citations.] An agency may also rely upon the opinion of its staff in reaching decisions, and the opinion of staff has been recognized as constituting substantial evidence." *Anthony v. Snyder*, 116 Cal. App. 4th 643, 660-661 (2004) (citation omitted).

b. Purported Evidence of "Misconduct" or "Procedural Irregularities" Are Irrelevant and Improper

Evidence regarding the working group allegations would also be irrelevant to show alleged "misconduct" or "procedural irregularities." *See Bd. of Supervisors v. Super. Ct.*, 32 Cal. App. 4th 1616 (1995). Absent a violation of a statutory or other legal right, a generic claim of misconduct is legally meaningless. *See, e.g.*, *Cooper*, 13 Cal. 3d at 915 (holding that "in the absence of some overriding constitutional, statutory or charter proscription, the judiciary has no authority to invalidate duly enacted legislation"). A generic claim for "misconduct"—even if there was one in the case—would simply be a disguised attempt to investigate the MWD Board's mental processes. *See Cnty. of Los Angeles v. Superior Court*, 13 Cal. 3d 721 (1975).

City of Santa Cruz v. *Super. Ct.*, a discovery case, is instructive. 40 Cal. App. 4th 1146, 1155 (1995). In challenging a city's adoption of a general plan, the plaintiff challenged "the propriety of the procedure by which the decision" was made; he sought discovery as to whether board members "predetermined" their decision before a board meeting; whether "off the record" premises drove the board's decision; and whether "certain events occurred (i.e., meeting and agreements)." The court rejected this theory of liability, holding that "discovery into the subjective motives or mental processes of legislators is forbidden." *Id.* at 1148.

> [W]e reject [plaintiff's] argument that it is merely inquiring into the procedural irregularities in the general plan approval process. We are persuaded that what it is truly attempting to discover is when the council members decided to designate the greenbelt properties as agricultural and whether they maintained open minds at the time of the public hearings. Such inquiry is clearly forbidden. *Id.* at 1157.

The same analysis applies here.[4] Evidence offered to show alleged procedural misconduct or

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[4]SDCWA cannot circumvent this rule by relying on inapposite decisions addressing a *right to an unbiased decision maker* on review of a *quasi-judicial* action under California Code of Civil Procedure § 1094.5, such as *Clark v. City of Hermosa Beach,* 48 Cal. App. 4th 1152, 1159 (1996). *Clark* and similar decisions are inapplicable here on this proposition because this case involves a *quasi-legislative action* under Code of Civil Procedure § 1085 in which there is no right to "fair trial" and no possibility of "independent review" of the factual record. *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 211 (1974) ("[I]t is black letter constitutional law that due process requires 'notice and hearing' only in quasi-judicial or adjudicatory settings and not with respect to the adoption of general legislation."). Moreover, the California Supreme Court has determined that section 1094.5 "was not intended" to apply to "any quasi-legislative acts of an administrative body." *Pitts v. Perluss*, 58 Cal. 2d 824, 833 (1962).

irregularities has no place in these proceedings and should be excluded.

c. Evidence Regarding the Working Group Allegations or Mental Processes Is Not Relevant to Show Rate Discrimination Against SDCWA

Evidence regarding the working group allegations is also irrelevant to show any alleged rate discrimination because that would be just another attempt to improperly expand the judicial inquiry into motives and alleged bias.

Under California law, it is irrelevant that an allegedly discriminatory rate applies to only one party: "[S]ubject to the general requirements of reasonableness . . . [an agency may] make separate rates for each class or group, *even though there is but one customer included therein*." *City & Cnty. of San Francisco v. W. Air Lines, Inc.*, 204 Cal. App. 2d 105, 140 (1962) (emphasis added). To prove illegal rate discrimination, SDCWA must show both that there is a discriminatory distinction (which it cannot, due to MWD's uniform rates) and that the distinction it challenges has *no reasonable basis*. In assessing a water rate challenge on the grounds that the rates were illegally discriminatory, the California Supreme Court in *Hansen* held, "[I]t is the court's role to decide only whether a reasonable basis exists for charging different rates and whether the rates themselves are reasonable." *Hansen v. City of San Buenaventura,* 42 Cal. 3d 1172, 1190 (1986). In that analysis, "[r]easonableness . . . is the beginning and end of the judicial inquiry." *Id.* at 1181. Any judicial review of a utility's rate-setting action "is limited to a determination of whether [the agency's] actions were arbitrary, capricious or entirely lacking in evidentiary support." *Brydon v. E. Bay Mun. Util. Dist.*, 24 Cal. App. 4th 178, 196 (1994).

Evidence of alleged "bias" is irrelevant. *See Wilson v. Hidden Valley Mun. Water Dist.*, 256 Cal. App. 2d 271 (1967). In *Wilson*, the petitioners alleged that a quasi-legislative policy improperly discriminated against them. *Wilson* rejected the argument that legislative bias was relevant to such a claim: "Any claim of prejudgment, bias or prejudice" "*is beside the point*" as "[d]ecisions of a governing board of a quasi-legislative character are expected to reflect the majority will of its constituents on matters of quasi-legislative policy. *This is the essence of representative government*." *Wilson*, 256 Cal. App. 2d at 286-87 (emphasis added).

2. Evidence Regarding the Working Group Allegations Is Irrelevant to SDCWA's Claims Regarding the RSI Provision, the Calculation of Preferential Rights, and the Exchange Agreement

Evidence regarding the working group allegations is irrelevant to SDCWA's fourth through sixth causes of action challenging the RSI provision and the calculation of preferential rights, and asserting breach of the Exchange Agreement.

SDCWA's fourth cause of action for breach of contract alleges that MWD breached the Exchange Agreement by setting rates in an unlawful manner. SDCWA's fifth cause of action for declaratory relief alleges that the RSI provision in project contracts that SDCWA voluntarily entered imposes unconstitutional conditions on SDCWA's ability to petition the government under the California Constitution and violates Civil Code section 1668. SDCWA's sixth cause of action for declaratory relief challenges MWD's methodology for calculating preferential rights under section 135 of the Metropolitan Water District Act ("MWD Act"). Neither the working group allegations nor evidence of MWD's motive, mental processes, or alleged bias are relevant to establishing whether MWD breached a contract, whether the RSI provision imposes an unconstitutional condition or violates section 1668 or whether MWD properly calculates preferential rights under section 135 of the MWD Act.

Indeed, the working group allegations are also irrelevant to these claims solely as a matter of chronology. SDCWA alleges that the working group was formed in *2009* (TAC ¶ 35). Yet, the RSI provision was approved by the MWD Board of Directors in *2004* and incorporated into the project contracts in *2005* (TAC ¶ 32); the California Legislature established preferential rights in 1931;[5] and the decision that payments under the Exchange Agreement did not count towards preferential rights calculations occurred in *2003,* after the Exchange Agreement was executed. (TAC, Ex. A.) A working group formed in *2009* has no bearing on an RSI provision approved in 2004, or preferential rights decisions made in *2003*.

[5] *San Diego Cnty. Water Auth. v. Metro. Water Dist. of S. Cal.*, 117 Cal. App. 4th 13, 19 (2004).

V. EVIDENCE REGARDING THE WORKING GROUP ALLEGATIONS SHOULD BE EXCLUDED ON THE GROUNDS THAT IT IS PREJUDICIAL

The Court should also exclude evidence regarding the working group allegations and the motive, mental processes, and alleged bias of MWD's Board under Evidence Code section 352 because such evidence would be unduly prejudicial and a waste of time. "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the [fact finder]." Cal. Evid. Code § 352.

Here, any evidence regarding the working group allegations or of motive, mental processes or alleged bias of MWD's Board would both be a waste of time and create a substantial danger of undue prejudice and confusion. The Court has already declined to allow discovery into either the working group allegations or the motives of MWD's Board because "the nature of the supposed shadow group, and Metropolitan's view of it, has nothing to do with anything in this case." (Chatterjee Decl., Ex. 2, 7/2/12 Tr. at 42:1-5) ("[D]iscovery will be limited to the nature of the decisions that were made and whether they comply with the applicable legal standards."). The Court also recognized that the allegations regarding the working group are nothing more than a sideshow. "[T]he alleged presence of scoundrels cannot itself be circumstantial evidence of the existence of inappropriate administrative activity." (*Id.* at 54:17-19.) So there is no reason to waste time on these issues.

VI. EVIDENCE REGARDING THE MOTIVE, MENTAL PROCESSES, AND ALLEGED BIAS OF LEGISLATORS IS BARRED BY THE SEPARATION OF POWERS DOCTRINE AND DELIBERATIVE PROCESS PRIVILEGE

The Court should exclude all evidence regarding the decision-making process of MWD's Board because inquiry into the motive, mental processes, and alleged bias for quasi-legislative decisions violates the separation of powers doctrine and the analogous deliberative process privilege.[6]

[6] For its part, SDCWA has argued repeatedly that the deliberative process privilege precludes discovery into the legislative process of its own Board. *See* Chatterjee Decl., Ex. 7, SDCWA's Amended Response to MWD's Requests for Production of Documents (Set No. One), April 4,

As discussed above, the California Supreme Court affirmed that a "fundamental, historically enshrined legal principle ... precludes any judicially authorized inquiry into the subjective motives or mental processes of legislators." *Cnty. of Los Angeles v. Super. Ct.*, 13 Cal. 3d at 726 (collecting cases dating to 1855). This principle is a "corollary of the related legal principle which establishes that the validity of a legislative act does not depend on the subjective motivation of its draftsmen but rests instead on the objective effect of the legislative terms." *Id.* at 727. Thus, the Supreme Court held:

> [E]ven assuming that the ulterior purpose behind the enactment *is* relevant to the ordinance's validity, [plaintiff] still may not prove such ulterior purpose by requiring legislators to testify about their reasoning process or by questioning others about the factors which may have led to the legislators' votes. Even under such circumstances, the principle barring judicially authorized inquiry of legislators' motivation remains intact.

Id. at 729.

Along these lines, the deliberative process privilege grants quasi-legislative actors a "qualified, limited privilege not to disclose or to be examined concerning not only the mental processes by which a given decision was reached, but the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated." *San Joaquin Cnty. Local Agency Formation Comm'n v. Super. Ct.*, 162 Cal. App. 4th 159, 170 (2008) (privilege applicable to San Joaquin County Local Agency Formation Commission). The deliberative process privilege is analogous to the principle barring inquiry into legislative motives, and serves the same purpose. *See Sutter's Place Inc. v. Superior Court*, 161 Cal. App. 4th 1370, 1377-1378 (2008). The privilege precludes evidence of "what information [the agency] had when it made the decision and what information was necessary to change the minds of the [board members]." *San Joaquin Cnty. Local Agency Formation Comm'n*, 162 Cal. App. 4th at 172.

VII. CONCLUSION

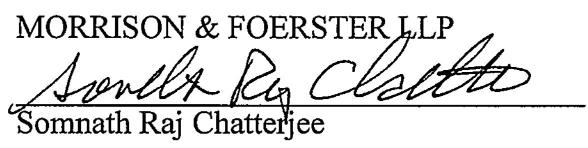
For the foregoing reasons, MWD respectfully requests that the Court grant its motion *in*

2013, at 2; *Id.*, Ex. 8, SDCWA's Amended Response to MWD's Requests for Production of Documents (Set Two), July 24, 2013 at 2.

limine to preclude all references to, or evidence of, the working group of MWD member agencies, or the motive, mental processes, or alleged bias of MWD's Board of Directors in the final hearing/trial in the *2010 Action* (Case No. CPF-10-510830) and the *2012 Action* (Case No. CPF-12-512466).

Dated: October 18, 2013

MORRISON & FOERSTER LLP



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