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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.

Case No. CPF-12-512466

**REPLY BRIEF 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 **I. INTRODUCTION**

2 Metropolitan Water District of Southern California's ("MWD") Motion for Summary
3 Adjudication regarding San Diego County Water Authority's ("SDCWA") breach of contract
4 claim rested primarily on the following facts, which, as pointed out in MWD's Memorandum of
5 Points and Authorities in Support of MWD's Motion for Summary Adjudication ("Opening Brief"
6 or "OB"), are undisputed:

- 7 • The initial \$253 Price SDCWA paid under the 2003 Exchange Agreement¹ was
8 legal. (Separate Statement of Undisputed Material Facts in Support of MWD's
9 Motion for Summary Adjudication ("U.F." 10.)
- 10 • When SDCWA first entered into the 2003 Exchange Agreement in 2003, it saw no
11 violation of the law in MWD's rates for the conveyance of water on behalf of its
12 member agencies. (U.F. 11.)
- 13 • After the 2003 Exchange Agreement's execution in 2003, continuously each year
14 MWD billed SDCWA using the same rate structure that was in effect at the time
15 the 2003 Exchange Agreement was executed, and SDCWA paid those bills. (U.F.
16 12.)
- 17 • According to SDCWA, MWD first breached the 2003 Exchange Agreement when
18 it adopted, in the spring of 2008, water rates for 2009. (U.F. 13.)

19 SDCWA does not dispute that, *if* those facts are true, this Court should grant summary
20 adjudication. SDCWA instead argues that it has presented evidence that undercuts those facts, or
21 at least puts those facts in dispute.

22 SDCWA is wrong. SDCWA's own "Person Most Knowledgeable" ("PMK") witnesses on
23 the 2003 Exchange Agreement, among others, testified that each of the above facts was true.
24 SDCWA's attempts to argue otherwise are flawed. SDCWA's efforts to undercut its own sworn

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

1 admissions with *other* purported evidence are likewise flawed. SDCWA's cited evidence on these
2 issues is simply off-point. (See MWD's Reply in Support of Separate Statement of Undisputed
3 Facts in Support of Motion for Summary Adjudication ("MWD's Reply ISO U.F.").)
4 Accordingly, this Court should grant MWD's Motion for Summary Adjudication.

5 **II. ARGUMENT**

6 SDCWA designated two PMK witnesses on issues related to the 2003 Exchange
7 Agreement. Scott Slater testified the initial \$253 Price SDCWA paid under the 2003 Exchange
8 Agreement was legal. (See OB at 2:14-15, 4:10-11; *see also* U.F. 10.) He also admitted that
9 SDCWA saw no violation of the law in MWD's rates for the conveyance of water on behalf of its
10 member agencies. (See OB at 2:16-18; *see also* U.F. 11.) Dennis Cushman admitted that,
11 according to SDCWA, MWD did not breach the 2003 Exchange Agreement until 2008, when it
12 set rates for 2009. (See OB at 2:23-24, 4:16-18; *see also* U.F. 13.) The testimony of SDCWA's
13 PMK witnesses binds it. *Dart Indus., Inc. v. Commercial Union Ins. Co.*, 28 Cal. 4th 1059, 1077
14 (2002) ("[W]hatever is said by an agent . . . is, in legal effect said by his principal . . .").
15 Moreover, absent a compelling explanation, SDCWA may not contradict its own admissions to
16 avoid summary judgment. *Shin v. Ahn*, 42 Cal. 4th 482, 500, fn. 12 (2007) ("A party cannot create
17 an issue of fact by a declaration which contradicts his prior discovery responses."); *Alvis v. Cnty.*
18 *of Ventura*, 178 Cal. App. 4th 536, 549 (2009) ("We cannot accept as substantial evidence of a
19 triable issue of fact a declaration that directly contradicts the declarant's prior statement, where the
20 contradiction is unexplained."). SDCWA has offered no such compelling explanation here.

21 MWD's rate structure, including those allocations that SDCWA now says are illegal, has
22 been the same in each year since the Agreement's inception in 2003. (See OB at 2:4-9, 2:19-22,
23 3:22-4:15; *see also* U.F. 6-8, 12.) Indeed, SDCWA's 2010 Petition/Complaint *admits* that MWD
24 set its current rate structure in January 2003, which rate structure, SDCWA alleges, included the
25 same treatment of costs with which SDCWA now takes issue. (Third Amended Petition and
26 Complaint, Case No. CFP-10-510830, ¶ 25.) In SDCWA's Response to MWD's Separate
27 Statement of Undisputed Material Facts, SDCWA *again concedes* that MWD implemented the
28 rate structure it now has in place in January 2003. (SDCWA's Response to MWD's Separate

1 Statement of Undisputed Facts in Support of Motion for Summary Adjudication (“SDCWA’s
2 Response to U.F.”) 7.) SDCWA is bound by those admissions. *See St. Paul Mercury Ins. Co. v.*
3 *Frontier Pac. Ins. Co.*, 111 Cal. App. 4th 1234, 1248 (2003) (“In summary judgment or summary
4 adjudication proceedings, admissions of material facts made in an opposing party’s pleadings are
5 binding on that party as judicial admissions.”) (alterations and internal quotation marks omitted).

6 Thus, either of Mr. Slater’s or Mr. Cushman’s admissions, alone, is fatal to SDCWA’s
7 contract claim:

- 8 • *If, as Mr. Slater admits, the rates SDCWA pays under the 2003 Exchange*
9 *Agreement were legal in 2003, then they must be legal now, and MWD has never*
10 *breached the 2003 Exchange Agreement. (See OB at 4:8-15.)*
- 11 • *Alternatively, if, as Mr. Cushman admits, MWD did not breach the 2003 Exchange*
12 *Agreement in any of the years from 2003 through 2007, that means MWD has*
13 *never breached the 2003 Exchange Agreement. (See OB at 4:16-5:6.)*

14 SDCWA responds, first, that Mr. Slater never admitted that the initial Price under the 2003
15 Exchange Agreement was legal, but instead merely testified that this Price complied with MWD’s
16 Administrative Code. (See SDCWA’s Opposition to MWD’s Motion for Summary Adjudication
17 (“Opposition” or “Opp.”) at 6:7-9.) That is untrue. At his deposition, Mr. Slater was asked
18 directly whether the initial contract Price was a “legal rate,” *not* whether it complied with MWD’s
19 Administrative Code. (West Decl., Ex. B (Deposition of Scott Slater (“Slater Depo.”)) at 36:25-
20 37:8.) He responded: “Yeah.” (*Id.* at 37:9.) He went *on* to testify that the rate was properly
21 adopted by MWD’s Administrative Code (*see id.* at 37:9-11), but his doing so does not change the
22 fact that he admitted MWD’s initial rate was legal. Moreover, Mr. Slater never retracted this
23 admission.

24 SDCWA’s brief ignores another of Mr. Slater’s key admissions; it says nothing about Mr.
25 Slater’s admission that SDCWA saw no violation in MWD’s rates when it entered into the 2003
26 Exchange Agreement. (See OB at 2:16-18; *see also* U.F. 11.) SDCWA’s Response to MWD’s
27 Separate Statement of Undisputed Material Facts tries to address that admission, but fails to show
28 any dispute as to it. SDCWA merely contends in conclusory fashion that “Mr. Slater did not

1 testify that [SDCWA] saw no violation of the law in MWD's rates" (SDCWA's Response to
2 U.F. 11.) SDCWA then cites testimony, none of which contradicts or raises any doubt as to the
3 meaning of Mr. Slater's unambiguous admission. (*Compare id.* (referencing testimony related to,
4 among other things, SDCWA's consent to pay and not to challenge MWD's rates for five years,
5 the 2003 Exchange Agreement's compliance with MWD's Administrative Code, a hypothetical
6 breach of contract by SDCWA in the event it had brought suit challenging MWD's rates prior to
7 2008, and SDCWA's ability to challenge MWD's rates *if* they violated applicable law) *with*
8 MWD's Reply ISO U.F. 11 (explaining how none of the testimony cited by SDCWA disputes Mr.
9 Slater's testimony).)

10 SDCWA also contends that its PMK witness' explicit concession that the 2003 Price was
11 legal is somehow contradicted by the "standstill" provision in the 2003 Exchange Agreement
12 barring suit for breach of that Agreement in its first five years. (*See* Opp. at 8:21-9:22.) But the
13 issue of when SDCWA could first *sue* MWD for breach is irrelevant to the issue at hand, which is
14 whether the undisputed evidence establishes that MWD has not breached the contract. SDCWA's
15 most knowledgeable witnesses have admitted that MWD's rates were legal when they were
16 adopted and they have not changed—so based on SDCWA's own admissions, SDCWA has no
17 basis for claiming a breach at any time.

18 SDCWA also misstates the deposition testimony of Mr. Slater and Brian Thomas (MWD's
19 PMK on the 2003 Exchange Agreement). SDCWA contends that "both parties' representatives
20 agree that [SDCWA] never conceded MWD's 2003 rates were lawful" (Opp. at 9:3-6), and asserts
21 further that Mr. Thomas testified that he "knew [SDCWA] believed [MWD's] rates were
22 unlawful" when the parties executed the 2003 Exchange Agreement. (*Id.* at 5:21-23.)

23 However, none of this testimony even hints that SDCWA "never conceded MWD's 2003
24 rates were lawful." (*See* West Decl., Ex. B (Slater Depo.) at 68:21-69:6 (indicating only that Mr.
25 Slater did not understand "applicable law and regulation" to refer to just MWD's Administrative
26 Code), 71:2-5 (in Mr. Slater's opinion, "there were some laws that would touch the subject of"
27 MWD's rates and that "whatever [MWD] did would have to be consistent with that"), 103:1-19
28 (testifying that, for SDCWA's protection, MWD's rates must be set "in accordance with whatever

1 administrative procedures are established uniformly pursuant to its code” and that SDCWA would
2 have the right to challenge MWD’s rates *if* “the law evolved”), 179:19-180:2 (suggesting that Mr.
3 Slater was uncertain what laws applied to the 2003 Exchange Agreement but that he did not want
4 to “negotiate a deal that didn’t account for change in circumstance”); *see also* MWD’s Reply ISO
5 U.F. 10.)

6 Also, Mr. Thomas did not testify that he “knew [SDCWA] believed [MWD’s] rates were
7 unlawful.” (Opp. at 5:21-23.) He instead testified merely that SDCWA had “*raised a concern*
8 about the allocation of costs that would be included in the system access rate, including the State
9 Water Project Costs.” (*See* West Decl., Ex. D (Deposition of Brian Thomas (“Thomas Depo.”)) at
10 133:21-24 (emphasis added); *see also id.* at 135:25-136:10 (testifying that SDCWA could and did
11 “raise their *concerns* [about MWD’s rates]”) (emphasis added); MWD’s Reply ISO U.F. 10.)
12 SDCWA’s raising concerns about some elements of the rates is a far cry from their saying
13 MWD’s rates were unlawful.

14 Further, Mr. Cushman, SDCWA’s other PMK witness on the 2003 Exchange Agreement,
15 admitted that according to SDCWA, MWD did not breach the 2003 Exchange Agreement until
16 2008, which too is fatal to SDCWA’s contract claim. (*See* OB at 2:23-24, 4:16-5:6; *see also* U.F.
17 13.) SDCWA responds that, under the standstill provision in the 2003 Exchange Agreement,
18 SDCWA “agreed not to sue until 2008, when the five-year timeout expired.” (Opp. at 9:28-10:1.)
19 This provision, according to SDCWA, somehow means that there could *not* have been a breach of
20 the 2003 Exchange Agreement until 2008, and thus, Mr. Cushman’s admission does not defeat its
21 contract claim. (*Id.* at 10:2-3.) SDCWA devotes several pages of its Opposition to explaining
22 how everyone knew about this standstill provision and how everyone understood that it allowed
23 SDCWA to sue beginning in 2008, and makes the remarkable assertion that MWD engaged in
24 “deception” by not bringing this provision to this Court’s attention (even though the 2003
25 Exchange Agreement is Exhibit A to the Petition/Complaint and this provision has been much-
26 discussed in the case). (*Id.* at 2:9-5:21, 10:21-23.)

27 But the standstill provision is completely irrelevant to this issue. SDCWA’s inability to
28 *sue* for breach of the 2003 Exchange Agreement until 2008 does not mean that there could not

1 have *been* a breach of that Agreement until 2008.

2 Again, since MWD's rate structure has been the same in every year since the Agreement's
3 inception in 2003, either Mr. Cushman's, or Mr. Slater's, admissions are fatal to SDCWA's
4 contract claim. (*See* OB at 4:8-5:17.) And while SDCWA's Opposition is silent on the question
5 of whether MWD's rate structure has been the same every year since 2003, SDCWA's Response
6 to MWD's Separate Statement of Undisputed Material Facts tries to claim that this fact is in
7 dispute, citing testimony of two MWD witnesses. (*See* SDCWA's Response to U.F. 8, 12.) That
8 effort, however, fails.

9 In support of this undisputed fact, MWD cited the declaration of the manager of MWD's
10 Budget and Financial Planning Section, who declared unequivocally that MWD did not change the
11 rate structure at issue in this case in any year since its adoption in January, 2003. (*See* U.F. 8, 12
12 (citing Declaration of June Skillman in Support of MWD's Motions for Summary Adjudication at
13 ¶ 3.) MWD also cited the testimony of Mr. Slater and Mr. Cushman, both of whom agreed with
14 Ms. Skillman on this issue. (*See* U.F. 12 (citing West Decl., Ex. B (Slater Depo.) at 137:22-
15 138:14, Ex. C (Cushman Depo.) at 382:23-384:4.) Neither of the witnesses whose testimony
16 SDCWA cites to purportedly undercut this undisputed fact—namely, Stathis Kostopoulos and
17 Arnout Van den Berg—testified to the contrary. To begin with, neither was designated as a PMK
18 witness on MWD's rate structure. (*See* SDCWA's Response to U.F. 8, 12.) Moreover, neither
19 Mr. Kostopoulos nor Mr. Van den Berg testified that they knew either way whether MWD's rate
20 structure has changed since 2003. The cited testimony of these witnesses demonstrates merely
21 that MWD updates its Financial Planning Model regularly to account for the allocation of *new*
22 *costs*. (*See* Declaration of Warren A. Braunig in Support of SDCWA's Opposition to MWD's
23 Motions for Summary Adjudication ("Braunig Decl."), Ex. P (Deposition of Arnout Van den Berg
24 ("Van den Berg Depo.)) at 231:18-239:21 (testifying that new line item costs were evaluated to
25 determine how they should be categorized), Ex. Q (Deposition of Stathis Kostopoulos
26 ("Kostopoulos Depo.)) at 22:6-27:25 (testifying he was unaware of any specific changes to
27 MWD's cost allocations over time, and generally any updates consisted of reviewing new cost
28 items in order to determine to which cost function each belonged); *see also* MWD's Reply ISO

1 U.F. 8, 12.) To the extent that the testimony of these two witnesses even bears on whether
2 MWD’s rate structure was the same since 2003, their testimony supports the fact that it has been
3 the same. (See Braunig Decl., Ex. P (Van den Berg Depo.) at 232:21-23 (“allocation of the State
4 Water Project was already predetermined by the Raftelis study, so that’s been kept the same”), Ex.
5 Q (Kostopoulos Depo.) at 26:1-3 (“most of the existing line items typically stayed in the
6 functional allocation that they were in the first original cost of service”); see also MWD’s Reply
7 ISO U.F. 8, 12.) There is no dispute that MWD’s rate structure is the same now as it was in 2003.
8 (SDCWA’s Response to U.F. 7; Third Amended Petition and Complaint, Case No. CFP-10-
9 510830, ¶ 25.)

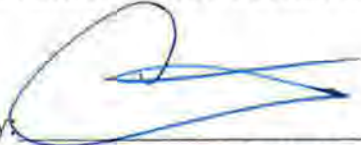
10 The facts in support of MWD’s summary adjudication motion are, in fact, undisputed.
11 This Court should thus grant MWD’s summary judgment motion.

12 **III. CONCLUSION**

13 For all of the foregoing reasons, the Court should grant MWD’s Motion for Summary
14 Adjudication as to SDCWA’s breach of contract cause of action because SDCWA’s deposition
15 admissions preclude SDCWA from establishing a breach.

16
17 DATED: November 21, 2013

BINGHAM MCCUTCHEN LLP

18
19 By 

20 Colin C. West
21 Attorneys for Respondent and Defendant
22 Metropolitan Water District of Southern California
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28

3
4 **PROOF OF SERVICE**

5 I am over eighteen years of age, not a party in this action, and employed in San
6 Francisco County, California at Three Embarcadero Center, San Francisco, California 94111-
7 4067. I am readily familiar with the practice of this office for collection and processing of
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10 On November 21, 2013, I served the attached:

11 **REPLY BRIEF IN SUPPORT OF METROPOLITAN WATER**
12 **DISTRICT OF SOUTHERN CALIFORNIA'S MOTION FOR**
13 **SUMMARY ADJUDICATION**

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

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

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

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