SUPERIOR COURT 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 Case No. CFP-12-512466 ORDER ON SUMMARY ADJUDICATION MOTIONS

Introduction

Before the Court are three summary adjudication motions. These relate to San Diego's claims arising out of a 2003 agreement with Metropolitan under which San Diego supplies water it purchases from other entities to Metropolitan and pays Metropolitan various volumetric rates to receive an equal quantity of exchange water; as well as a Rate Structure Integrity (RSI) clause, which terminates a contract if the party contracting with Metropolitan (here, San Diego) challenges Metropolitan's existing rate structure in court or through legislation.

The motions relate to two cases, the 2010 case and the 2012 case, corresponding to San Diego's separate challenges to the water rates Metropolitan set in 2010, and those set in 2012. The motions involve three causes of action: (1) San Diego's request for a judicial declaration of the invalidity of the RSI clause; (2) San Diego's request for a judicial declaration that Metropolitan violates the Metropolitan Water District Act (MWD Act) by failing to include San Diego's payments under the 2003 Exchange Agreement in computing San Diego's preferential rights; and (3) San Diego's cause of action for breach of the 2003 Exchange Agreement. San Diego alleged all three causes of action in the 2010 case. The third cause of action is alleged also in the 2012 case. San Diego moves for summary adjudication on its RSI clause claim. Metropolitan moves for summary adjudication on the three listed causes of action.[1]

I heard argument December 3, 2013.

Below, I first discuss the contract claim, then the preferential rights issue, and then the RSI clause.

Request for Judicial Notice

In conjunction with the 2010 Motion, Metropolitan requests judicial notice of one court document and a piece of legislative history.[2] These are unopposed and granted.

Other Evidence

The relevant evidence is generally not in dispute. The pertinent evidence is discussed below in context, and objections to the evidence relied on here are overruled.

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[1] The three motions at issue here are identified as follows: (1) "San Diego Motion," (2) "2010 Motion" (Metropolitan's motion in the 2010 case); and (3) "2012 Motion" (Metropolitan's motion in the 2012 case).
[2] Request for Judicial Notice, 2; Declaration of Somnath Raj Chatterjee, Exs. 5-6.

Discussion

1. **Breach of Contract**

In both the 2010 and 2012 cases, San Diego alleges a cause of action for breach of contract on the theory that Metropolitan breached § 5.2 of the 2003 Exchange Agreement by setting rates (for 2011-12 and 2013-14, respectively) for the conveyance of water purchased by San Diego that violate applicable laws.[3]

Metropolitan moves for summary adjudication on both claims, arguing that San Diego cannot establish a breach of contract. Metropolitan notes the current rate structure has been in effect since January 2003, at which time (Metropolitan asserts) San Diego agreed the price under the agreement was legal. Metropolitan argues that, because the rate structure has not changed since then, San Diego has in effect admitted that the rate structure it challenges now is lawful.

Metropolitan also says that San Diego takes the position through its PMK witness that Metropolitan first breached the Exchange Agreement in 2008 when it set its water rates for 2009. This is tantamount to San Diego's concession that there was no breach in 2004-2007, and a concession that those rates are legal.

But Metropolitan's arguments rely on artificially blinkered view of the evidence.

A fair reading of the testimony of Scott Slater, San Diego's PMK, does not suggest he admitted that the rate structure enacted in 2003 complies with California law in all respects. Metropolitan relies on two statements from the deposition:

> Q: The 2003 Agreement, there was a price provision for roughly $253, in addition. Do you recall that?
> A: Yeah.
> Q: To your understanding, was that a legal rate at the time?
> A: Yeah. Look, I think the rate was properly adopted by their administrative code, and I think we agreed to pay it.
> ...

[3] *See* 2010 Complaint, ¶ 103; 2012 TAC, ¶ 101.

> Q: [I]n 2003, you had not identified any particular law or reg- -- law or regulation that Met's then-existing rate structure might be in violation of?
> A: We did – we knew that there were laws that could be pertinent, but we did not see a violation.[4]

The first statement can reasonably be read to say nothing more than that the 2003 rate was legally adopted in the sense of following certain procedures, not that it was legal in every sense. In the Exchange Agreement, San Diego agreed not to dispute whether the price determined in accordance with applicable law or regulation for a period of five years.[5] The second statement says nothing more than a particular set of violations had not then been identified.[6]

These are not admissions in any useful sense.[7]

Metropolitan asserts that Dennis Cushman, another San Diego PMK, conceded that no breach occurred until 2008.[8] This testimony however is also consistent with a reading that, given the five year bargained-for hiatus, no suit could be filed until that time.

To be sure, San Diego paid its bills under the contract and did not bring a legal challenge to the 2003-2007 rates. But this is not a concession that the rates complied with law, only that San Diego was complying with the five year hiatus agreement.[9]

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[4] Declaration of Colin West in Support of 2012 Motion, Ex. B at 36:19-37:11; 72:25-73:7.
[5] Declaration of Warren Braunig in Support of San Diego Oppositions, Ex. F at §§ 5.2, 11.1 (Exchange Agreement).
[6] *See* Braunig Declaration, Ex. K at 71:15-25; West Declaration, Ex. B at 72:1-24 (Slater's discussion of the motivation for the five-year cooling off period, including statements that can be interpreted to mean that San Diego did not in 2003 analyze whether Metropolitan's conveyance rates were valid under any provisions beyond the administrative code).
[7] Typically parties prove incontestable admissions through the use of a response to a request for admissions; or perhaps with a judicial admission (M. Simons, CALIFORNIA EVIDENCE MANUAL §2: 28 (2013 ed.)) or a reference to the pleadings. Other sorts of evidence such as interrogatory responses and usually depositions are subject to being contradicted and so may set up a factual dispute requiring the denial of a motion for summary judgment. *See generally*, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL §§ 10:155.5 *et seq.* (2013).
[8] West Declaration, Ex. C. at 339:1-340:2.
[9] Braunig Declaration, Ex. F at §§ 5.2, 11.1; West Declaration, Ex. C at 339:1-340:2. Moreover, the five-year cooling off period in the Exchange Agreement is supports the inference that San Diego intended to retain the ability to challenge the rates under applicable law after the end of that period. *See* Braunig Declaration, Ex. K at 97:13-22 ("Well, during the five-year period, there was a peace treaty; right? So we wouldn't do that during the five-year period, and we were consenting. So, again, going to my hold-your-nose analogy, that the -- in the first five years, it

Even were I to conclude that Metropolitan sustained its burden as moving party, it is more than adequately met by San Diego's evidence[10] showing that San Diego has not admitted that Metropolitan's rates were lawful.

2. **Preferential Rights**

In the 2010 case, San Diego seeks a judicial declaration that Metropolitan's methodology of computing preferential rights violates § 135 of the MWD Act because it excludes San Diego's payments relating to the conveyance of water San Diego purchases from other sources.[11]

San Diego makes payments to Metropolitan pursuant to the terms of a 2003 Exchange Agreement entered between San Diego and Metropolitan, and discussed in more detail below.

Section 135 includes this:

> Each member public agency shall have a preferential right to purchase from the district ... a portion of the water served by the district which shall, from time to time, bear the same ratio to all of the water supply of the district as the total accumulation of amounts paid by such agency to the district on tax assessments and otherwise, excepting purchase of water, toward the capital cost and operating expense of the district's works shall bear to the total payments received by the district on account of tax assessments and otherwise, excepting purchase of water, toward such capital cost and operating expense.

As explained by our Court of Appeal:

> Under section 135, in the event of a water supply shortage, each Metropolitan member public agency, including San Diego, has a preferential right to a percentage of Metropolitan's available water supplies based on a legislatively established formula. That formula affords each member an aliquot preference equal to the ratio of that member's total accumulated payments toward Metropolitan's capital costs and operating expenses when compared to the total of all member agencies' payments toward those costs, excluding amounts paid by the member for "purchase of water."

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was going to be whatever it was. And at the end of the five years, if you didn't like it, you thought it was inappropriate, you had an opportunity to evaluate it then.").

[10] This is set forth in in its Opposition to Metropolitan's Motion for Summary Adjudication (contract claim) at 3 *et seq.*

[11] 2010 Complaint, ¶ 115.

San Diego County Water Authority v. Metropolitan Water Dist., 117 Cal.App.4th 13, 17 (2004) (*SDCWA*).

Metropolitan contends that *SDCWA* disposes of the key legal issue here and entitles it to adjudication of San Diego's sixth cause of action.

Under *SDCWA*, the preferential rights calculation includes all payments for capital costs and operating expenses, excluding those payments that were tied to the "purchase of water." All payments for the purchase of water are excluded from the preferential rights calculation, even if those payments include money earmarked (or ultimately used) to recover Metropolitan's capital costs and operating expenses.

Metropolitan's collateral estoppel argument will not work, for the question now is whether San Diego *purchased water* from Metropolitan.[12] San Diego contends it doesn't 'purchase water,' rather, it pays distinguishable transportation charges. We can fairly infer from the wording of § 135 that member agencies pay various sorts of money to Metropolitan: some for the 'purchase of water' and perhaps other money for other things, and this stage we don't know whether the 'Price' San Diego pays under the Exchange Agreement is for the 'purchase' of water. And until we know whether or not San Diego 'purchases water' from Metropolitan, *SDCWA* is not useful, for *SDCWA* neither tells us that San Diego here *is* 'purchasing water' nor does it otherwise inform the analysis needed here.

Metropolitan's approach is to (i) note that *SDCWA* viewed the combination of four elements (charges for system power rates, water stewardship, cost of water, and systems access rates) as bundled water rates which in turn comprised the 'purchase of water', then (ii) examine the "Price" San Diego is charged under the Exchange Agreement here which includes three of those four elements (charges for system power rates, water stewardship, and systems access

[12] *See* 2010 TAC, ¶ 115.

rates), then (iii) conclude that the [not quite] identity of components means they are in effect the same, i.e. Price = rates for the purchase of water. The flaws in the reasoning include: (a) the components are not the same, for Price includes only some of the four items; (b) critically, the one item it does not include is the cost of water, and concomitantly (c) San Diego has already paid *someone else* (a third party such as Imperial) for the 'purchase of water'.

Metropolitan's argument assumes the legal proposition it wishes to establish.

Metropolitan' Reply looks at contractual language allowing Metropolitan to convey to San Diego 'Exchange Water' that may come from any source available to Metropolitan.[13] This argument, coming as it does in the Reply, is late, but even so it does not establish as matter of law that San Diego is 'purchasing' Exchange Water as opposed to making some other sort of payment.

3. RSI Clause

San Diego signed project contracts with Metropolitan that each contain a RSI provision.[14] In the fifth cause of action in the 2010 case, San Diego seeks a judicial declaration that the RSI provisions are unenforceable, based on two theories: (1) the RSI clauses constitute 'unconstitutional conditions' on San Diego's ability to receive any benefit from Metropolitan's subsidy programs; and (2) the RSI clauses are unlawful under California Civil Code § 1668.[15]

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[13] 2010 Reply, 10 (citing 2010 Reply Separate Statement of Undisputed Facts, 25-27 (referencing undisputed language of § 1.1(m) of the contract)).

[14] San Diego's Response to 2010 Separate Statement of Undisputed Facts, ¶ 16.

[15] 2010 TAC, ¶¶ 105-06, 108. Metropolitan argues that these legal theories invoke distinct primary rights, and should be treated as separate causes of action. 2010 Motion, 15. San Diego did not respond. A cause of action is comprised of a primary right of the plaintiff, a corresponding primary duty of the defendant, and a wrongful act by the defendant constituting a breach of that duty. *Hindin v. Rust*, 118 Cal.App.4th 1247, 1257 (2004). The violation of a single primary right gives rise to a single cause of action. *Villacres v. ABM Indus., Inc.*, 189 Cal.App.4th 562, 576 (2010) (res judicata issues). A primary right is "the plaintiff's right to be free from the injury suffered. It must be distinguished from the *legal theory* on which liability for that injury is premised." *Hindin*, 118 Cal.App.4th at 1257. One injury gives rise to only one claim for relief. *Slater v. Blackwood*, 15 Cal.3d 791, 795 (1975). Here, the primary right driving this cause of action is San Diego's asserted right to project contracts free of the limitations imposed by the RSI clause. The cause of action for a declaration that the RSI clause is invalid is one cause of action

The parties present cross-motions for summary adjudication on this cause of action.

A. Text

The RSI clause provides:

> 8.1 Agency agrees and understands that Metropolitan's rate structure as of January 1, 2004 ("Existing Rate Structure") provides the revenue necessary to support the development of new water supplies by local agencies through incentive payments in the Local Resources Program (LRP), Conservation Credits Program (CCP), and the Seawater Desalination Program (SDP). In particular, the Water Stewardship Rate is the component of the Existing Rate Structure that provides revenue for the LRP, CCP, and SDP. Further, Agency acknowledges that Existing Rate Structure and all components within that rate structure were developed with extensive public input and member agency participation, and that the elements of Existing Rate Structure have been properly adopted in accordance with Metropolitan's rules and regulations.
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> 8.2 (a) Agency agrees that Metropolitan's rates set under the Existing Rate Structure may be reset throughout the term of this Agreement to account for the cost of service, and that Agency will address any and all future issues, concerns, and disputes relating to Existing Rate Structure, through administrative opportunities available to them pursuant to Metropolitan's public board process. As such, Agency agrees if the file or participate in litigation or support legislation to challenge or modify Existing Rate Structure, including changes in overall rates and charges that are consistent with the cost-of-service methodology, Metropolitan may initiate termination of this agreement consistent with Paragraph 4 below. ...[16]

B. Unconstitutional Conditions

The unconstitutional conditions doctrine is explained in *Parrish v. Civil Service Commission of Alameda County*, 66 Cal.2d 260, 271 (1967):

> When ... the conditions annexed to the enjoyment of a publicly conferred benefit require a waiver of rights secured by the Constitution, however well-informed and voluntary that waiver, the governmental entity seeking to impose those conditions must establish: (1) that the conditions reasonably relate to the purposes sought by the legislation which

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supported by two legal theories, and so I cannot grant summary adjudication of the cause of action unless a party prevails on both theories. C.C.P. § 437c (f)(1)(last sentence). Metropolitan does so prevail.

[16] *See* Declaration of Daniel Purcell in Support of San Diego Motion, Ex. F at § 8; Declaration of Deven Upadhyay in Support of Metropolitan Opposition, Ex. D at § 7.

confers the benefit; (2) that the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and (3) that there are available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit.[17]

a. **Standing**

Summary

The 2010 TAC does not allege a violation of the First Amendment, but rather of Article I, section 3 of the California Constitution.[18] Metropolitan says San Diego has no constitutional right to petition the courts under the California Constitution, but instead has only the statutory right to sue and be sued.[19] San Diego counters with a citation to a different constitutional provision, that government agencies have *First Amendment* –type speech rights under Article I of the California Constitution, and that in any event it is acting to protect the First Amendment rights of its constituents.[20]

We should be careful regarding the use of analogy within the context of First Amendment cases. The Amendment is packed with varied rights, and we should be nervous when a party (such as San Diego here) pivots from the pleaded right of petition to (in its motion papers) that of free speech.[21] The strategy is understandable, because there is very good authority for sweeping entitlements to free speech, indeed perhaps to speech regardless of the identity of the speaker or "the identity of the interests that spokesmen may represent in public debate...."[22] But having

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[17] *Parrish*, 66 Cal.2d at 271. *See also Robbins v. Superior Court*, 38 Cal.3d 199, 212 (1985).
[18] 2010 TAC, ¶ 105.
[19] 2010 Motion, 7; *see also* Opposition to San Diego Motion, 9.
[20] Opposition to 2010 Motion, 4-9.
[21] E.g., Memorandum In Support of Motion for Summary Adjudication at 5
[22] *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978), quoted with approval by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 346-47 (2010). But even cities may not have free speech rights. *City of Alpine v. Abbot*, 730 F.Supp.2d 630, 633-34 (W.D. Tex. 2010).

one set of rights under the First Amendment does not necessarily mean one has others—such as the right to freedom of religion,[23] or perhaps, pertinently here, the right to petition.

The parties' briefs also swing from federal to state authority, even though the language of the state Constitution is not the same as that in the First Amendment; and given the allegations of the complaint, only the state Constitution matters. On free speech issues, the state Constitution may provide broader protection than the federal counterpart,[24] but alone that neither suggests the state *standing* regime is more generous nor that the right to petition—the right at issue now—is to be more broadly construed than its federal counterpart.[25] There is however one contrast which suggests Metropolitan is correct on the standing issue. "Every person" is protected by Art. 2 § 2(a) of the California Constitution (free speech), and more to the point the same language is used in the separate provision, Art. 1 § 3 (right to petition), wording not found in the federal Constitution. This at least suggests that the right to petition is an individual right, further discussed below.

In the absence of controlling state authority and following the parties I have reviewed both state and federal cases, particularly because it does not appear that the decisive issue—whether the right to petition is or is not an individual right—is treated differently.

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[23] *Conestoga Wood Specialities Corp. v. Sebelius*, 917 F.Supp.2d 394, 407-08 (E.D. Pa. 2013) (holding that the freedom of religion is an *individual* right, decided after *Citizens United*), *aff'd sub nom. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013) *cert. granted,* 13-356, 2013 WL 5297800 (U.S. Nov. 26, 2013). *See Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1214 (D.C. Cir. 2013) (corporation's First Amendment free speech rights do not extend to First Amendment religious freedoms); *Korte v. Sebelius*, 12-3841, 2013 WL 5960692 (7th Cir. Nov. 8, 2013) (noting varied decisions among the federal circuits).

[24] *San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified Sch. Dist.*, 46 Cal.4th 822, 842 (2009); *Snatchko v. Westfield LLC,* 187 Cal. App. 4th 469, 480 (2010).

[25] And indeed a court has found to the contrary. *Guessous v. Chrome Hearts, LLC,* 179 Cal.App.4th 1177, 1184 (2009) (no case construes the state petitioning guarantees more broadly than the federal guarantees).

In the end, "the First Amendment of the United States Constitution does not apply to government speech."[26] San Diego does not have standing to make its RSI claim. While is it theoretically possible that a government agency might invoke third party constituent rights, San Diego did not plead this and cannot succeed on its unconstitutional conditions claim.

Discussion

Our Supreme Court has written that it is "well-established … that subordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment or under the contract clause of the federal constitution."[27] The basis for this rule is that "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."[28] The *Star-Kist* Court, confronted with a commerce clause challenge by a public entity, noted that the application of the "no standing" rule beyond the Fourteenth Amendment and contract clause was unsettled.[29] Noting that courts had declined to apply the rule in the context of the supremacy clause, *Star-Kist* drew a distinction between (i) constitutional provisions that "confer fundamental rights on individual citizens" and (ii) challenges to legislation that interferes with the balance of power between the state and federal government that might otherwise be insulated from scrutiny.[30] Finding the case to be in the latter category, *Star-Kist* concluded that the counties and municipalities before it had standing to bring a commerce clause challenge.[31]

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[26] *USA Waste of California, Inc. v. City of Irwindale*, 184 Cal.App.4th 53, 62 (2010), citing *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009).
[27] *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal.3d 1, 6 (1986).
[28] *Id.*
[29] *Id.*
[30] *Id.* at 7-9.
[31] *Id.* at 9-10.

This case falls on the other side of the divide, for nothing here implicates the balance of power issues *Star-Kist* identifies.

The "no standing" rule discussed in *Star-Kist* has been applied in the due process context.[32] The Court of Appeal in *Native American Heritage* applied the "no standing" rule to a land-use dispute between public agencies in which an agency raised First Amendment theories under the establishment clause.[33] It referred to the "general rule…denying one governmental agency's constitutional challenge to another agency's acts,"[34] and upheld that general rule in that case.[35]

Under these cases San Diego does not have the requisite standing.

San Diego also relies on anti-SLAPP and *Noerr-Pennington* cases. If a governmental agency can invoke these doctrines San Diego reasons, it must have a First Amendment right to petition.

Some cases have held that "government agencies and their representatives have First Amendment rights, and are 'persons' entitled to protection under section 425.16 [anti-SLAPP statute]".[36] But our Supreme Court in *Vargas* only approved these cases as a matter of statutory interpretation while expressly refusing to decide whether the First Amendment or Article I, § 2 of the California Constitution directly protects government speech.[37] After *Vargas*, one court noted that the First Amendment does *not* apply to government speech, and that anti-SLAPP

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[32] *See Sanchez v. City of Modesto*, 145 Cal.App.4th 660, 673 (2006) (collecting cases).
[33] *Native American Heritage Comm'n v. Board of Trustees*, 51 Cal.App.4th 675, 683-86 (1996).
[34] *Id.*, 51 Cal.App.4th at 684.
[35] *Id.*, 51 Cal.App.4th at 686.
[36] *Santa Barbara County Coalition Against Auto. Subsidies v. Santa Barbara County Ass'n of Governments*, 167 Cal.App.4th 1229, 1237 (2008); *see also Bradbury v. Superior Court*, 49 Cal.App.4th 1108, 1113-16 (1996).
[37] *Vargas v. City of Salinas*, 46 Cal.4th 1, 17 (2009).

standing (for governmental entities) is justified on statutory grounds under *Vargas*.[38] Anti-SLAPP standing does not translate into general First Amendment standing.

Under the *Noerr-Pennington* doctrine, "there is no antitrust liability under the Sherman Act for efforts to influence government which are protected by the First Amendment right to petition for redress of grievances, even if the motive behind the efforts is anticompetitive."[39] San Diego cites several federal decisions holding that "the First Amendment right to petition and/or the correlative *Noerr-Pennington* doctrine protect government actors from liability for petitioning activity,"[40] but in truth the federal circuits are split.

The relationship between the Constitution generally (and the First Amendment specifically) and the *Noerr-Pennington* doctrine is a bit dicey. The doctrine is to be sure "founded in constitutional doctrine."[41] But, while as San Diego suggests it may be "correlative" of the First Amendment, there is some doubt that it is *mandated* by the Constitution: it may be a by-product of statutory interpretation.[42] Our Supreme Court said as much in *Blank*,[43] nevertheless noting the doctrine is "reinforced" by, among other things, First Amendment considerations.[44]

The parties and I have not found direct state law on the issue whether governmental actors have a First Amendment (or state equivalent) right to petition including the right to file in

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[38] *USA Waste of California, Inc. v. City of Irwindale*, 184 Cal.App.4th 53, 62 (2010).
[39] *Hi-Top Steel Corp. v. Lehrer*, 24 Cal.App.4th 570, 574 (1994).
[40] Opposition to 2010 Motion, 7; *Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills*, 701 F.Supp.2d 568, 599 (S.D.N.Y. 2010) (describing a split of authority, stating that the Third, Seventh, and Ninth Circuits have applied the doctrine to municipalities). See e.g., *Student Government Ass'n v. Bd. Of Trustees of University of Massachusetts*, 868 F.2d 473, 481 (1st Cir. 1989); *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1041 (5th Cir. 1982) (as state instrumentalities, publicly licensed stations were without First Amendment protection); *Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996) (expressly not deciding whether municipality protected by the First Amendment). *Cf., City of Alpine v. Abbot,* 730 F.Supp.2d 630, 633-34 (W.D. Tex. 2010) (city has no First Amendment right).
[41] *Ludwig v. Superior Court*, 37 Cal.App.4th 8, 21 (1995).
[42] Joseph Maher, "Survival of The Common Law Abuse Of Process Tort In The Face of A Noerr-Pennington Defense," 65 UNIV.CHI.L.REV. 627, 641 (1998).
[43] *Blank v. Kirwan*, 39 Cal.3d 311, 320-21 (1985).
[44] *Id.*, 39 Cal.3d at 321.

court. On balance, cases such as *Star-Kist Foods* and *USA Waste* appear accurately to target the constitutional interests at stake. The First Amendment, after all, expressly addresses governmental censorship in favor of speech and petitioning rights,[45] and it would take some surgery to invoke it, as well as the state provision expressly entitling *persons*,[46] to instead protect *governmental* agencies.

I conclude that San Diego does not have an independent constitutional right to petition the legislature or the courts to challenge Metropolitan's water rates because that is an inherently individual right. Indeed it is noteworthy that the Legislature has gone to the trouble of granting public entities the *statutory* right to petition through the courts—i.e. to sue and be sued.[47]

Some courts do recognize an exception to the "no standing" rule where the political subdivision is asserting the rights of its constituents,[48] to the extent their rights are inextricably bound up with the governmental agency's rights and there are genuine obstacles the assertion of those rights by the constituents.[49] However, San Diego did not plead this theory in its 2010 TAC, and it is newly raised in this motion for summary adjudication.[50] This will not do.[51] Nor does San Diego present or propose evidence of the "genuine obstacles" faced by its constituents[52] or establish that they actually have their own standing to complain about the things

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[45] *See generally,* Anthony Lewis, FREEDOM FOR THE THOUGHT WE HATE 8 *et seq.* (2007).
[46] See above at 10, discussion of California Constitution Art. 2 § 2(a) & Art. 1 § 3.
[47] Gov. Code § 945 ("A public entity may sue and be sued").
[48] *See Sanchez*, 145 Cal.App.4th at 675-77 (must show (1) enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue such that construction of the right is necessary and advocacy will be fully as effective as that of the individual; and (2) some genuine obstacle to the constituent's assertion of the constitutional right); *Cent. Delta Water Agency v. State Water Res. Control Bd.*, 17 Cal.App.4th 621, 630-31 (1993) (agencies had standing to assert equal protection rights of constituents because their rights were inextricably bound up; no discussion of any obstacles to constituent's assertion of their own rights).
[49] *Perez*, 145 Cal.App.4th at 676-77.
[50] This is noted in Metropolitan's 2010 Reply at 3-4 & note 5.
[51] *Bostrom v. County of San Bernardino*, 35 Cal.App.4th 1654 (1995)(the pleadings control motions for summary judgment).
[52] *Cent. Delta Water Agency v. State Water res. Control Bd.*, 17 Cal.App.4th 621 (1993); *Singleton v Wolff,* 428 U.S. 106, 113-118 (1976). To assert the sort of vicarious standing urged by San Diego, it is essential to show that the third parties (here, San Diego's constituents) are in fact hindered in the assertion of their own rights. *Native*

San Diego described in its complaint; for example, it does not appear those constituents are signatories to the contract at issue.

San Diego cannot establish that the RSI clause is invalid as an unconstitutional condition. While this disposes of the 'unconstitutional conditions' attack on the RSI clause, appellate review may be aided by a discussion of the other elements of that claim, in particular because if San Diego does have standing, it wins on the merits of the claim.

b. "Public Benefits"

Metropolitan argues that the payments under the project contracts are not "public benefits" such that the unconstitutional conditions doctrine does not apply.

Metropolitan says public benefits are those made available pursuant to a general public benefit program, such as welfare benefits, public housing, public employment, unemployment benefits, or the use of public property.[53] Metropolitan distinguishes this case, warning that treating the money paid to San Diego in these project contracts as a 'public benefit' will render the term 'public benefit' superfluous in the unconstitutional conditions analysis. But this is not so: the term as used in *Robbins* is not superfluous when read to mean a benefit conferred by the government, as opposed to a benefit conferred by a private actor.[54]

Indeed, Metropolitan has not identified any case in which a court rejected an unconstitutional conditions argument because no public benefit was at issue, and cases it does cite do not help. For example in *Evans*[55] the California Supreme Court held that the city of Berkeley did not violate a youth group's constitutional rights by requiring a written assurance of

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American Heritage, 51 Cal.App.4th at 685 (1996) (requirement to show substantial hurdles in litigating their own interests on the part of those with standing). *Cf., Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, 908 F.Supp.2d 597, 617 (M.D.Pa. 2012).

[53] 2010 Motion, 10, 10 n.2.

[54] *See Robbins*, 38 Cal.3d at 213.

[55] *Evans v. City of Berkeley*, 38 Cal.4th 1, 5-6 (2006).

non-discrimination as a condition for allowing the youth group to use free berths at the city's marina. The opinion treated the free berths as public benefits without considering that the free berths were available only to a discrete group of organizations, and were not generalized benefits paid to the general public.

And it is irrelevant that Metropolitan had discretion to deny project applications. "[T]he power of government, federal or state, to withhold benefits from its citizens does not encompass a supposed 'lesser' power to grant such benefits upon an arbitrary deprivation of a constitutional right."[56]

Nor does it matter that benefits are tied to a contract rather than disbursed in a more traditional public benefit context (such as for example welfare benefits). Courts have invalidated restrictions on public employment that force employees to choose between public employment and their First Amendment rights where the government has not justified the burden.[57] As San Diego points out, public employment involves an exchange of consideration and is often contractual,[58] just the case here.

Metropolitan has not identified, and there does not appear to be, a principled basis for distinguishing funding under government contracts from other forms of public benefits subject to the unconstitutional conditions doctrine.

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[56] *Id.* at 15-16, quoting *Bagley v. Washington Township Hospital Dist.*, 65 Cal.2d 499, 504 (1966).
[57] *Myers*, 29 Cal.3d at 264 n.8 (collecting cases); *Bagley*, 65 Cal.2d at 505-11; *Long Beach City Employees Ass'n v. City of Long Beach*, 41 Cal.3d 937, 958-59 (1986) (where city ordered its employees to submit to a polygraph examination as a condition of continued employment it was requiring employees to waive their constitutional right to privacy or risk termination, invoking the unconstitutional conditions test set forth in *Bagley* and *Robbins*).
[58] Opposition to 2010 Motion, 12. The United States Supreme Court has applied the doctrine of unconstitutional conditions in the context of a public employment contract. *See Koontz v. St. Johns River Wat. Management Dist.*, 133 S.Ct. 2586, 2594 (2013) (noting prior decision in which the Court held that a public college would violate a professor's freedom of speech if it declined to renew his contract because he was an outspoken critic of the college's administration). It has also applied the doctrine to independent contractors. *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718-22 (1996) (government termination of a public employee on account of his political affiliation brings unconstitutional conditions cases into play, finding no reason to distinguish independent contractors).

c. Waiver/Consent

Metropolitan argues that San Diego waived its rights by entering the project contracts and further consented to the contractual term by accepting payments under the project contracts.[59] But this proves too much: If Metropolitan were right, the unconstitutional conditions doctrine could never be raised by anyone who signed a contract with the government. In fact, the doctrine applies where a party waives a constitutional right to receive a public benefit;[60] the waiver is *assumed* in the very language of the unconstitutional conditions doctrine.[61] The issue is not obviated by Metropolitan's observation that constitutional rights can be waived;[62] of course they can. The unconstitutional conditions doctrine focusses rather on the sacrifice of public benefits threatened in order to *extract* that waiver.

d. *Robbins* Test

We recall that once a party shows that the receipt of a public benefit is conditioned on the waiver of a constitutional right, the government bears the heavy burden of showing that (1) the conditions on the constitutional right reasonably relate to the governmental purposes sought by the action which confers the benefit; (2) the public benefit from the imposition of the conditions manifestly outweighs their burden on constitutional rights; and (3) there are no alternative means to achieve the public benefit.[63]

San Diego has made a prima facie showing that Metropolitan could have used a fixed-rate charge to achieve the same public benefit provided by the RSI clause, i.e., revenue stability

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[59] 2010 Motion, 11-12; *see also* Opposition to San Diego Motion, 9-10.
[60] *See Robbins*, 38 Cal.3d at 212; *Parrish*, 66 Cal.2d at 26 (even if county had obtained consent for mass early morning searches of homes of welfare recipients, the county could not constitutionally condition the continued receipt of welfare benefits upon the giving of that consent). Metropolitan's other citations to cases involving waiver do not address the unconstitutional conditions doctrine. E.g., *Leonard v. J.D. Clark*, 12 F.3d 885 (9th Cir. 1993), *Glendale v. George*, 208 Cal.App.3d 1394, 1398 (1989), *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1311, 1314-15 (8th Cir. 1991).
[61] *Parrish v. Civil Service Commission of Alameda County*, 66 Cal.2d 260, 271 (1967).
[62] Metropolitan's Motion at 11 lines 24 *et seq.*
[63] *Robbins*, 38 Cal.3d at 212.

to support Metropolitan's funding for water conservation and local supply projects. To be more precise, the only substantial benefits (of the RSI clause) are those programs, but they are not in jeopardy by reason of the litigation targeted by the RSI clause. To the extent there is any substantial public benefit to rate stability—and none has been shown—there are alternatives to that as well.

Metropolitan has not rebutted this showing.

i. Reasonable Relation and Balancing Interests

San Diego identifies the purposes of the RSI clause as (1) protecting a stable revenue stream to fund Metropolitan's water conservation and local water supply programs and (2) to promote consensus decision making within Metropolitan.[64] The trigger for the RSI clause is not limited to challenges to the Water Stewardship Rate or funding for Metropolitan's local supply programs, but extends to any rate challenge.[65] Metropolitan will still be able to fund conservation and local supply programs even if San Diego prevails in this rate challenge, although Metropolitan may have to revise its rates and other agencies may have to pay more.[66] Metropolitan has addressed the potential impact of this litigation:

> to the extent that a court invalidates Metropolitan's adopted rates and charges, Metropolitan will be obligated to adopt rates and charges that comply with any mandates imposed by the court. Metropolitan expects that such rates and charges would still recover Metropolitan's cost of service. As such, revenues would not be affected. If Metropolitan's rates are revised in the manner proposed by SDCWA in the complaint, other member agencies may pay higher rates unless other actions are taken by the board.[67]

[64] San Diego Motion 4, 9-10 (citing Answer, ¶ 19; Purcell Declaration, Exs. A at 80:19-81:17 and 88:23-89:12, G).
[65] *Id.* at 4-5 (citing Purcell Declaration, Exs. A at 29:19-30:13, B at 93:5-18).
[66] *Id.* at 9 (citing Purcell Declaration, Exs. A at 93-99, Q).
[67] Purcell Declaration, Ex. Q at A-48.

San Diego argues that a second public benefit asserted by Metropolitan, promoting consensus, is no public benefit but merely the elimination of a first amendment right. This is true.

Metropolitan responds that the RSI clause reasonably relates to the first purpose identified by San Diego by protecting the rate structure that generates revenues for its conservation and local supply projects.[68] Agreeing that overall revenues would not be affected by a rates challenge because Metropolitan would be able to reset its rates, Metropolitan suggests that a rates challenge may affect the revenues allocated to particular programs or services.[69] Metropolitan's argument and its evidence however show no more than allowing suits discouraged by the RSI clause might require Metropolitan to adjust its rates.[70] Indeed, the fact that its various programs are beneficial is not to the point; the public benefit issue focuses on the impact of the litigation inhibited by the RSI clause, which impact is not the deletion nor reduction of these programs—if Metropolitan wants, those can be left unaffected—but rather of the impact of having to adjust rates. I do see that Metropolitan insists on its interests in trying to avoid the "resetting of MWD's rates,"[71] but there is no reason to see that as any sort of substantial benefit, and certainly not a *public* benefit. The interest in being able to properly plan and budget for the future[72] is one every entity and person surely has, but Metropolitan's opposition proves too much: as an eternal interest of any entity with a budget, it would act to justify any burden on the exercise of a constitutional right.

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[68] Opposition to San Diego Motion, 11.
[69] *Id.* at 12 (citing Upadhyay Declaration, ¶¶ 29-30, Declaration of June Skillman in Support of Metropolitan Opposition, ¶ 5); *see also* Declaration of Somnath Raj Chatterjee in Support of Metropolitan Opposition, Ex. 16 at 24 (expert opinion that Metropolitan's rates are interrelated).
[70] Opposition to San Diego Motion at 4.
[71] Opposition to San Diego Motion at 12.
[72] Metropolitan expands on this in its Opposition at 12, 16, 18.

Finally, Metropolitan argues that when it comes to balancing, I must find in its favor because the analysis inexorably involves a "*factual determination*"[73] as if that were enough to defeat any summary adjudication motion. But it is not: The issue on these motions is whether there is a material factual *dispute*, not whether there are issues of fact; for there are factual issues in every case. Here there are no such disputes.

The benefit being insubstantial, the balancing here favors San Diego.

ii. Alternative Means

San Diego argues that there were alternative means, and that Metropolitan's choice was not narrowly tailored, for four reasons. Metropolitan responds to each argument and argues that the means chosen here were narrowly tailored. However, Metropolitan does not introduce evidence showing the San Diego's proffered alternative, a fixed-rate charge to fund project contracts, was not viable and would not avoid any burden on constitutional rights. Thus this factor favors San Diego.

San Diego suggests Metropolitan would be able to protect revenue stability without impacting member agencies' constitutional rights by using fixed charges.[74] Metropolitan does not directly dispute this proposition.[75] Rather, it argues that the RSI clause is designed to protect the stability of the existing rate structure.[76] So it now says, but when it came to arguments on the factors discussed above, Metropolitan relied on the public benefits that arise from its conservation *programs* (as a result of rate stability). There is no showing that preserving the existing rate structure is a worthy end in and of itself.

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[73] Opposition to San Diego Motion at 11 (emphasis in original).
[74] San Diego Motion, 12-13 (citing Purcell Declaration, Ex. V at 137-40, for the proposition that fixed charges provide revenue stability).
[75] Metropolitan Opposition, 18-19.
[76] *Id.* (citing Upadhyay Declaration, ¶¶ 15, 26-29).

Metropolitan also argues that use of fixed rate charges ignores cost of service principles, and would upset Metropolitan's careful balancing of fixed and variable charges.[77] But this does not establish that Metropolitan is barred from using fixed rates; there is no substantial evidence that fixed rates would, for example, not have the same *public* benefits as the RSI clause.

C. Section 1668

The parties disagree on whether the RSI clause exempts Metropolitan from liability, or future liability, given that it penalizes legal challenges to Metropolitan's then-existing rate structure but does not have any effect on the underlying liability. Neither party offers direct authority on this question.

Civil Code § 1668 provides:

> All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

San Diego argues that the RSI clause is an invalid attempt to immunize Metropolitan from challenges that its rates violate California law.[78] Metropolitan retorts that § 1668 does not apply because (1) the RSI clause does not exempt it from liability; and (2) the RSI provision does not exempt it from *future* liability.[79] San Diego argues that the RSI clause amounts to an agreement whose object, directly or indirectly, is to exempt Metropolitan from responsibility for statutory violations. Metropolitan retorts that the purpose is simply to "encourage" board processes as opposed to litigation or legislative battles.[80]

Courts have observed that the application of § 1668 is not as broad as its language suggests, but have held that under the statute, "a party [cannot] contract away liability for his

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[77] *Id.* at 19 (citing Skillman Declaration, ¶ 6).
[78] San Diego Motion, 14-16; *see also* 2010 Opposition, 14-16.
[79] 2010 Motion, 14-15 (arguing only the first point); Opposition to San Diego Motion, 19-20 (arguing both points).
[80] *See* Purcell Declaration, Ex G at MWD2010-00018304.

fraudulent or intentional acts or for his negligent violations of *statutory* law.[81] Section 1668 has limits; for example, it is not applicable to violations of statutory law,[82] or when the public interest would be adversely affected.[83] Parties may validly limit liability without violating § 1668 when they do not seek or obtain a complete exemption from culpability.[84]

Neither party has cited cases addressing this issue. And no party actually argues that I should wield § 1668 to invalidate an entire contract, although that is the apparent target of the statute.

The parties might conceivably have presented the matter as one involving factual issues, that is, arguing that the burden imposed by the RSI clause in effect, or practically, so discourages suit that it immunizes the defaulting party.[85] But aside from a brief mention by San Diego during argument, they did not do this. The issue they have presented is whether the RSI clause "on its face"[86] is or is not enforceable under § 1668. And they have presented no case which evaluates a § 1668 attack on the basis of the practical impact of a burden on litigation.

The fact is that the RSI clause does not bar suit. It does not on its face exempt Metropolitan from any sort of liability at all. San Diego may still prove it liable. Indeed it expects to do just that. The clause *burdens* San Diego's ability to bring suit by increasing the costs of suit, and as it says, and the clause may "deter" suit in the sense of reducing the odds one

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[81] *Health Net of California, Inc. v. Dep't of Health Servs.*, 113 Cal.App.4th 224, 227 (2003) (brackets and emphasis in original), quoting *Gardner v. Downtown Porsche Audi*, 180 Cal.App.3d 713, 716 (1986).
[82] *Health Net of California, Inc. v. Dep't of Health Servs.*, 113 Cal.App.4th 224 (2003).
[83] 113 Cal. App. 4th at 239. See also, *CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.*, 142 Cal. App. 4th 453, 467 (2006) (contract's limitations on liability do not affect public interest and are not barred by § 1668).
[84] *CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.*, 142 Cal.App.4th 453, 475 (2006).
[85] E.g., *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005) (unconscionability analysis informed with citation to § 1668). Of course *Discover Bank* has since been reversed on preemption grounds, and our Supreme Court's refurbished analysis of unconscionability and its factual predicates may be found at *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013). I hasten to add that none of these cases actually holds that *section 1668* requires a factual analysis such that economic disincentives may as a practical matter and on a case-by-case basis establish vulnerability to § 1668.
[86] Opposition to 2010 Motion at 14 at line 11 ("plain language"); at 15 line 22 ("on its face"); San Diego Motion at 15 line 1 ("plain language").

will be filed.[87] But it is just not true that the imposition of a financial penalty "in effect exempts" Metropolitan,[88] for San Diego might win the suit with a substantial net benefit, or other non-financial benefit.

There are many examples of perfectly ordinary financial disincentives to litigation, not the least of which is the cost of lawyers, but those arrangements are not for that reason subject to a § 1668 attack. In a variety of situations parties must contend with the financial disincentives of, for example, paying the other side's costs and attorney's fees under cost statutes and C.C. § 1717, as well as the 'no contest' or *in terrorem* clauses found in perfectly valid wills and codicils.[89] These may all be powerful disincentives to litigation but no case suggests they are subject to a § 1668 attack.

Health Net is, not as San Diego argues, "on all fours… because it involves statutory violations".[90] Such violations are surely implicated here but, unlike the facts in *Health Net*, Metropolitan is not actually relieved of liability for damages.[91]

Because the RSI clause does not exempt Metropolitan from liability it is not void under § 1668.

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[87] Opposition to 2010 Motion at 15 at line 25; San Diego Motion at 14 line 22. I note that *Health Net* is indeed concerned with whether certain events are "deter[red]" by the provisions of the exculpatory clause, but that notion of deterrence is used in an entirely different analysis, that undertaken to determine whether there is a "public interest" which is inhibited by contested language. *Health Net of California, Inc. v. Dep't of Health Servs.*, 113 Cal.App.4th 224, 238 (2003).

[88] San Diego Motion at 14.

[89] See e.g., Probate Code § 21300, *Fazzi v. Klein*, 190 Cal.App.4th 1280 (2010); *Munn v. Briggs*, 185 Cal.App.4th 578 (2010).

[90] San Diego Reply at 10, line 21.

[91] *Compare, Health Net of California, Inc. v. Dep't of Health Servs.*, 113 Cal.App.4th 224, 235 (2003).

Conclusion

The motion for summary adjudication brought by Metropolitan: on San Diego's fifth cause of action in the 2010 case (regarding the RSI clause) is granted; on San Diego's sixth cause of action in the 2010 case (declaratory relief regarding preferential rights calculation) is denied; on San Diego's fourth cause of action in the 2010 and 2012 cases (breach of contract) is denied.

The motion for summary adjudication brought by San Diego on its fifth cause of action (regarding the RSI clause) is denied.

Dated: December 4, 2013

Curtis E.A. Karnow
Judge of The Superior Court