



FILED
San Francisco County Superior Court

DEC 10 2013

CLERK OF THE COURT

BY: [Signature]
Deputy Clerk

SUPERIOR COURT OF THE STATE 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 IN LIMINE MOTIONS

Introduction

On December 10, 2013 I heard argument on *in limine* motions, and provide rulings here.

The central cases on *in limine* motions are *Amtower v. Photon Dynamics, Inc.*, 158 Cal.App.4th 1582 (2008); *Kelly v. New West Federal Savings*, 49 Cal.App.4th 659 (1996); and *R & B Auto Center, Inc. v. Farmers Group, Inc.*, 140 Cal.App.4th 327 (2006) (Rylaarsdam, Acting P.J., concurring). The key function of these motions is to ensure juries do not hear inadmissible evidence, and in particular inadmissible evidence which may prejudice the jury. "The advantage of such motions is to avoid the obviously futile attempt to unring the bell in the event a motion to

1 strike is granted in the proceedings before the jury.” *Amtower*, 158 Cal.App.4th at 1593, quoting
2 *Hyatt v. Sierra Boat Co.*, 79 Cal.App.3d 325, 337 (1978). Secondly, *in limine* motions can
3 help speed the trial and allow for a more considered decision on difficult evidentiary issues.
4 *Kelly*, 49 Cal.App.4th at 669-70. They are not a good device for resolving what are in effect
5 dispositive motions such as motions for judgment on the pleadings or for summary adjudication.
6 *Id.*; David N. Finley, CIVIL PRACTICE GUIDE: CALIFORNIA MOTIONS IN LIMINE § 1:4.

8 Some judges believe *in limine* motions are not useful in bench trials at all.¹ But at least to
9 the extent pretrial rulings can assist counsel in determining whether to call a witness or not, it is
10 worth the candle.

11 As a general matter, past ruling have in summary noted that (i) only on the Wheeling
12 claim will evidence outside the record be accepted; and (ii) it is a legal issue (and so not subject
13 to testimony) as to what the lawful *components* are for wheeling services. But other issues under
14 the Wheeling claim may be matters of fact, such as how components are measured, or whether a
15 given proposed component does or does not as a matter of fact account for certain types of costs
16 or expenses. The default ruling then is that extra-record evidence will be accepted with respect to
17 the Wheeling claim but not if it purports to state what the components of those wheeling charges
18 ought to be.
19

20
21 The rulings are, as they must be, preliminary, and are subject to revision as the testimony
22 comes in.
23
24
25

26 ¹ E.g., <http://judgebonniesudderth.wordpress.com/tag/motion-in-limine/>; John N. Sharifi, “Techniques for Defense
27 Counsel in Criminal Bench Trials,” 28 AM. J. TRIAL ADVOC. 687, t.a.n. 12,
<http://www.scribd.com/doc/31439427/Bench-Trial-How-To>; Randy Wilson, “The Bench Trial: It Really Is
Different,” ADVOCATE (2009), <http://www.justex.net/JustexDocuments/12/Articles/Bench%20Trial.pdf>.

1 **Metropolitan's Motions**

2 1. *Exclude Economidies*

3 The parties agree that I will not be treated to historical matters (and Erie will be
4 precluded for the same reason), and that Economidies will not testify on legal issues. I will not
5 now preclude other testimony as to dry year peaking costs if they relate to the Wheeling claims.
6

7 2. *Exclude Denham*

8 Denham will not testify in the upcoming hearing on breach of contract damages, as those
9 are not now relevant. This does not preclude testimony that the sums at stake in the Wheeling
10 case are substantial and not *de minimis*. If he has opinions that relate dry peaking costs to the
11 Wheeling claims, I will hear them. Finally, I cannot now determine with any assurance that
12 Denham's opinions are unsupported by the record, and so must deny the motion to the extent it is
13 brought on that ground.
14

15 3. *Exclude Rothstein*

16 San Diego apparently does not oppose this *in limine* motion. Compare San Diego's
17 Opposition to MWD's Motions in Limine re Expert Testimony, dated December 8, 2013 (no
18 mention of Rothstein).
19

20 **San Diego's Motions**

21 1. *Preclude Steven Erie*

22 Given the rulings above and following the discussions at today's argument, Metropolitan
23 has agreed that it does not plan to call Mr. Erie.

24 2. *Preclude Witness on Topics MWD Refused to Present Deposition Testimony*

25 The thrust of this motion is that Metropolitan made representations to the Court that
26 resulted in a ruling that blocked deposition testimony on MDW's accounting for costs associated
27

1 with dry peaking years. The representation from Metropolitan was that it did not make a
2 separate allocation for dry peaking years. This arguably is subject to judicial estoppel. See
3 generally, *Jackson v. Cnty. of Los Angeles*, 60 Cal. App. 4th 171, 181 (1997); *Blix St. Records,*
4 *Inc. v. Cassidy*, 191 Cal. App. 4th 39, 46 (2010); *Minish v. Hanuman Fellowship*, 214 Cal. App.
5 4th 437, 449 (2013), reh'g denied (Feb. 25, 2013), review filed (Mar. 28, 2013).
6

7 The fairest approach here is to hold Metropolitan to its representation, but not bar all the
8 testimony the subject of this motion *in limine*. As Metropolitan notes, the scope of the motion is
9 broader than that which would be arguably precluded by the position Metropolitan earlier took,
10 and broader than the topics of the withdrawn PMK deposition notices putatively done on the
11 basis of the Court's actions. The motion is denied.
12

13
14 Dated: December 10, 2013



Curtis E.A. Karnow
Judge of The Superior Court