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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE 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 No. CPF-10-510830
Case No. CPF-12-512466

**SAN DIEGO COUNTY WATER AUTHORITY'S CONSOLIDATED OPPOSITION TO METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MOTION FOR LEAVE TO AMEND ANSWER AND MOTION TO REOPEN EXPERT DISCOVERY**

Date: August 6, 2014
Time: 3:00 p.m.
Dept.: 304
Judge: Hon. Curtis E.A. Karnow

Actions Filed: June 11, 2010; June 8, 2012
Trial Date: December 17, 2013

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## I. INTRODUCTION

It is a pulp film cliché that a desperate villain, out of bullets and backed into a corner, will make one final effort to escape by throwing his empty gun at his adversary. By bringing these motions in an obvious effort to delay trial and judgment, MWD has just thrown its gun.

MWD's motions are factually wrong, legally circular, and would turn these cases (which are finally nearing resolution) into an endless logistical nightmare. Factually, MWD's motions depend on the provably false premise that, back in 2003, San Diego conceded MWD's rates were legal. But, as this Court has already recognized, the undisputed evidence from both MWD's and San Diego's designee witnesses shows the opposite—San Diego always told MWD its rates violated the law and reserved its right to sue, as it has done here. Legally, MWD wants to delay trial of this case by months so it can hire multiple rate-setting experts to offer repetitive testimony on an issue MWD claims this Court has no power to decide anyway—what MWD's rates would have been had it obeyed the law.

***First,*** MWD's arguments for reopening expert discovery are self-contradictory and would send this case into a rabbit warren of irrelevancies. MWD wants to designate several experts on ***other*** lawful rate structures MWD might have adopted, each of which would need to be evaluated by the Court on the same cost-causation standards by which MWD's 2011-14 rates were invalidated. But there is no need for the Court to go there in order to resolve contract damages. San Diego has repeatedly told MWD and the Court it would be relying on the remedy provision in section 12.4(c) of the Exchange Agreement if it prevailed on its contract claim. The Court should simply apply and enforce section 12.4(c). Further, at the same time it pleads for experts, MWD claims the Court has no jurisdiction to decide what MWD's rates ought to have been, so it is unclear what admissible testimony such experts could possibly provide. Perhaps most fundamentally, it is simply too late for MWD to obtain a do-over after losing the Phase I trial. The parties agreed to, and the Court ordered, a single expert discovery period covering all claims in the case. San Diego designated a contract damages expert. MWD did too, but chose to have that expert opine that contract damages were incalculable, because giving San Diego a remedy would, MWD argued, require MWD or the Court to set new rates first. MWD must live with its

strategic decision now. It cannot ask San Diego and the Court to endure a year-long sideshow of irrelevant rate-setting hypotheticals and further delay the day of reckoning. Further, MWD entirely ignores the mandatory California rules governing late augmentation of expert reports, which bar MWD's motion as a matter of law.

***Second,*** halfway through trial, MWD for the first time seeks leave to amend its answer to add concocted affirmative defenses of mistake of law and illegality of contract. MWD is too late and has no excuse for waiting until now to seek amendment. Moreover, its new defenses—which depend on the factual premise that MWD and San Diego believed MWD's rates to be lawful when they signed the Exchange Agreement—would be futile if added. Last fall, MWD moved for summary adjudication on this same factual theory, but this Court rejected that argument as "rely[ing] on [an] artificially blinkered view of the evidence" and being "more than" refuted by San Diego's proof that it always disputed the legality of MWD's rates. Most obviously, the parties specifically incorporated a five-year standstill provision into the Exchange Agreement, which expressly permits San Diego to sue MWD for illegal rates.

The Court should deny both of MWD's motions, enforce section 12.4(c) of the Exchange Agreement, and award San Diego its bargained-for remedy for MWD's settled violations of law.

## II. BACKGROUND

### A. Contrary to MWD's claims today, the terms and negotiating history of the 2003 Exchange Agreement show that both parties always knew San Diego intended to challenge MWD's rates as unlawful and unfair.

Both of MWD's motions are attempts to wriggle free from this Court's Phase I Statement of Decision, which held that MWD violated California law in setting its transportation rates (and thus also breached section 5.2 of the parties' October 10, 2003 Exchange Agreement). Section 5.2 requires MWD to charge San Diego a transportation Price "equal to the charge or charges set by Metropolitan's Board of Directors pursuant to applicable law and regulation and generally applicable to the conveyance of water by Metropolitan on behalf of its member agencies." Declaration of Warren A. Braunig ("Braunig Decl.") Ex. A (Exchange Agreement) § 5.2, at 16-17. As a temporary truce, San Diego and MWD also agreed San Diego could not sue to enforce this price term for five years. Section 5.2 specifically provides that "after the conclusion of the

first five (5) Years [of the Agreement's term], nothing herein shall preclude SDCWA from contesting in an administrative or judicial forum whether such charge or charges have been set in accordance with applicable law and regulation." *Id.* The parties repeated the five-year standstill provision, belt and suspenders style, in section 11.1, making clear that "[i]n the event negotiation is unsuccessful, then the Parties reserve their respective rights to all legal and equitable remedies." *Id.* § 11.1, at 24. There is no dispute that San Diego obeyed the limitations of section 5.2. The only conceivable purpose for these redundant contractual provisions was to establish a process to allow San Diego to challenge MWD's rates.

Despite these contractual terms, MWD's motion for leave to amend rests on the frankly baffling contention that, when the parties signed the Exchange Agreement, they both believed MWD's rates were legal. To begin with, MWD has made this argument before, when it moved for summary adjudication of San Diego's contract claim last fall, claiming that San Diego agreed in 2003 that MWD's transportation rates were legal. The Court reviewed the contemporaneous documents and deposition testimony of both parties' negotiators, and based on that review decisively rejected MWD's position. Dec. 4, 2013 Order at 3-5. Specifically, the Court found that MWD's "arguments rely on [an] artificially blinkered view of the evidence," which ignored the testimony of San Diego's contract negotiator Scott Slater and the plain text of the contract itself. *Id.* at 3-4. The Court concluded that MWD hadn't even presented enough affirmative evidence to meet its initial burden, but went the extra step, concluding that San Diego had "more than adequately" refuted MWD's showing. *Id.* at 5.

Undeterred, MWD revives this argument in its motion to amend. But, as the undisputed facts show, the Court's prior ruling was correct. San Diego always made clear to MWD during negotiations, and MWD always actually understood, that San Diego believed MWD's rates were unlawful and planned to sue if those rates weren't changed. As Slater explained at deposition, "during the five-year period, there was a peace treaty," but "at the end of the five years, if you didn't like it, if you thought it was inappropriate, you had an opportunity to challenge it." Braunig Decl. Ex. B (Slater Depo.) at 97:3-22. San Diego told MWD that, after five years, "if the rate was not set in accordance with applicable law, they would avail themselves of their remedies,

whatever they may be"—including a lawsuit. *Id.* at 101. Indeed, Slater explained this "***was part of the rationale for why [San Diego] could accept the arrangement***, because they would not be discriminated against by Metropolitan if the law provided that conveyance should be provided at a certain price." *Id.* at 102 (emphasis added). In other words, without the right to sue, there would have been no agreement at all.

MWD's own negotiator's testimony and contemporaneous documents confirm that MWD knew San Diego disputed its rates and planned to sue unless the rates were changed within the five-year standstill period. MWD's designee witness Brian Thomas admitted both points at his deposition. *Id*. Ex. C (Thomas Depo.) at 122-23 (ability to sue after five years would give San Diego an "opportunity to address its concerns" with the rates); *id*. at 135:25-136:10 (contract precluded San Diego from suing for five years); *see also id.* at 143:13-144:5 (filing suit before 2008 "would have violated the Exchange Agreement"). Thomas also conceded San Diego insisted on the right to sue after five years as a material condition of signing the contract. *Id.* at 143:4-11; *id.* at 126:15-127:2. There is no factual dispute on this issue.

The contemporaneous documents make clear that, in addition to MWD negotiators, MWD staff generally also knew San Diego likely would sue after the five-year standstill if MWD did not alter its rates. *See* Braunig Decl. Ex. D (8/29/03 email among MWD staff outlining "QSA Settlement Proposal" and stating: "SDCWA would agree to not make any challenges (legislative, judicial or administrative challenges to MWD's wheeling rates for a period of time. SDCWA is at 5 years."). Neither was the basis of San Diego's challenge a secret; San Diego was complaining in 2003 about the same violations of the law the Court identified in its Statement of Decision. For example, a June 29, 2004 memo from Kevin Hunt of the Metropolitan Water District of Orange County to MWD Board members explains that San Diego's General Manager Maureen Stapleton told Hunt that, "absent any negotiated changes" to MWD's rates, San Diego "would be pursuing legal or legislative remedies at the end of the 5 years' QSA delay." *Id*. Ex. E. MWD's Brian Thomas testified that MWD knew about San Diego's objections to MWD's rates at the time the parties entered into the Exchange Agreement, including a concern "about the allocation of costs that would be included in the system access rate, including the State Water

Project costs." *Id*. Ex. C (Thomas Depo.) at 133:6-24. Thomas also admitted at deposition that the Exchange Agreement permitted San Diego to sue to enforce "all laws affecting MWD's rates and charges, whatever they might be." *Id.* at 131:15-21.[1]

Although the intent of the parties at the time of contracting is all that matters, the evidence of subsequent conduct presented in Phase I of the trial confirms everything the negotiators admitted. *See id.* Ex. F (Trial Tr.) at 219:25-220:20; *id.* 258:23-260:19 (Cushman) ("As far back as the 1990s," in both correspondence and in meetings and MWD committee processes, San Diego had "made clear its opposition to charging 100 percent of local water supply development and conservation costs on transportation and zero of those costs on the Water Supply Rate at Metropolitan"); *see also id*. at 287:5-293:16 & Braunig Exs. G-J (detailing San Diego's history of complaints to MWD about improper rate allocations dating back to 1990's). San Diego also presented testimony about San Diego's presentation of those same objections during MWD's 2010 rate-setting process. *Id*. Ex. F (Trial Tr.) at 246:5-247:4 (Cushman) (2010 submission of "San Diego's position about allocating state water project costs to transportation rates" and about "allocating the Water Stewardship Rate to the transportation rates"). Even MWD's June Skillman admitted that MWD expected San Diego to sue after the five-year standstill was up and that the standstill was the only reason San Diego hadn't sued over MWD's rates already. *Id*. at 718:21-719:3 (Skillman). When San Diego was finally free to sue in April 2010, its complaint asserted claims entirely consistent with the issues it had been presenting to MWD and its Board for nearly a decade without making any headway.[2]

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[1] *See also* Braunig Decl. Ex. B (Slater Depo.) at 180:3-15 (Slater informed MWD's Kightlinger that to comply with the agreement, regardless of compliance with MWD's Admin Code, MWD "can't be setting rates that are ***otherwise violating some provision of the law***") (emphasis added); *id*. at 36:25-37:11 (MWD's 2003 rates complied with MWD Admin Code); *id.* at 103:1-19, 178:19-180:2 (Slater made clear to MWD during negotiations that Section 5.2's "applicable law and regulation" provision was much broader than the Administrative Code).

[2] In its original 2010 complaint, San Diego alleged that MWD's "overcharge occurs in two ways. First, Metropolitan improperly allocates a large percentage of the costs it incurs to purchase water from the State Department of Water Resources ("DWR") as a water transportation cost, not a water supply cost. Second, Metropolitan improperly incorporates the costs of subsidizing conservation and the development of local water supplies in the charges it imposes for water transportation; however, these expenses, too, should be allocated as a water supply costs. The effect of these misallocations is to artificially increase the charge that the Water Authority pays Metropolitan to transport water through its facilities." 6/11/10 Pet. for Writ of Mandamus ¶¶ 1-2.

**B. In negotiating the Exchange Agreement, the parties bargained for and agreed to a specific remedy provision governing rate challenges.**

In its effort to overcomplicate the simple damages analysis here, MWD essentially ignores section 12.4(c) of the Exchange Agreement. But the parties were well aware that a dispute over the legality of MWD's rates would have damages implications, because if MWD's transportation rates were held to be illegal, that would mean MWD had been overcharging San Diego for transportation services. The parties discussed how to handle the monetary effect of rate disputes and resolved the issue by adding section 12.4(c). That section provided that,

> In the event of a dispute over the Price, SDCWA shall pay when due the full amount claimed by Metropolitan; provided, however, that, during the pendency of the dispute, Metropolitan shall deposit the difference between the Price asserted by SDCWA and the Price claimed by Metropolitan in a separate interest bearing account. ***If SDCWA prevails in the dispute, Metropolitan shall forthwith pay the disputed amount, plus all interest earned thereon, to SDCWA.*** If Metropolitan prevails in the dispute, Metropolitan may then transfer the disputed amount, plus all interest earned thereon, into any other fund or account of Metropolitan.

Braunig Decl. Ex. A ¶ 12.4(c) (emphasis added). The clear understanding of the parties, as explained by MWD's chief negotiator Brian Thomas, was that for any issues on which San Diego prevailed, MWD would simply pay the disputed amount:

> Q. And if the Water Authority prevails in the price dispute, then what happens?
>
> A. That amount that they prevail on would be given to the Water Authority along with all interest earned.
>
> Q. And that's what Metropolitan agreed to, that requirement?
>
> A. Yes.
>
> Q. And the term "Metropolitan shall forthwith pay the disputed amount," that's a – that's a mandatory obligation, right?
>
> A. Yeah, that's what we agreed to.

*Id*. Ex. C (Brian Thomas Depo. at 155:19-156:9).

As with San Diego's repeatedly expressed intention to sue and the five-year timeout under section 5.2, the parties' subsequent course of conduct shows they understood and followed the remedy provision in section 12.4(c). On February 10, 2011, San Diego's General Counsel wrote

to MWD's General Manager and General Counsel, specifically referencing section 12.4(c), providing a calculation of an overcharge of $236 per acre-foot of water transported under the Exchange Agreement, and demanding that Metropolitan place that amount into a separate interest-bearing account. Braunig Decl. Ex. K. San Diego informed MWD that the overcharge was the result of MWD's improper inclusion of State Water Project costs and the Water Stewardship Rate costs in the contractual Price for Exchange Water—the same grounds for relief San Diego had asserted in its then-pending 2010 complaint. *Id.* Two weeks later, on February 24, 2011, MWD's General Counsel wrote back, confirming that MWD was complying with section 12.4(c) by placing $236 per acre foot in an interest-bearing account. *Id*. Ex. L. MWD made modest adjustments to San Diego's request but never claimed San Diego's calculation was unreasonable or excessive. *Id.* In October 2012, San Diego's new Treasurer wrote to MWD's CFO requesting summary information about the interest-bearing account, *id.* Ex. M, and two weeks later MWD replied, giving an account balance of $57.4 million. *Id*. Ex. N. On February 5, 2013, a month after MWD's rates for 2013 and 2014 went into effect, San Diego's General Counsel again wrote to his counterparts at MWD, again expressly referencing section 12.4(c) and demanding MWD set aside money paid under the then-new transportation rates. *Id*. Ex. O. On February 25, 2013, just as it had done before, MWD promised it would comply. *Id*. Ex. P. Finally, outside the context of litigation, where MWD is speaking directly (and presumably honestly) to bondholders for purposes of soliciting money, MWD has conceded section 12.4(c) controls damages in this case. In its June 9, 2013 Bond Statement, MWD told its investors that it was holding $84.4 million pursuant to section 12.4(c), that such "[a]mounts held pursuant to the exchange agreement will continue to accumulate based on the quantities of exchange water that Metropolitan provides to SDCWA and the amount of charges disputed by SDCWA." *Id*. Ex. Q at A-48-49. Most importantly, MWD confessed to its bondholders that "***[t]hese amounts are transferable to SDCWA if it prevails in litigation***." *Id.* at A-49 (emphasis added).

## III. ARGUMENT

### A. The Court should deny MWD's improper motion to reopen expert discovery.

MWD's motion to reopen expert discovery rests on fiction, would create untold logistical complications and months of delay, and should be denied. MWD's motion asks the Court to pretend that it was impossible for MWD to imagine and prepare for the possibility that the Court would uphold San Diego's challenges to its rates and reach questions of contract damages until the Court actually did so in its April 2014 Statement of Decision. Mot. at 1, 4. To be kind, this argument is featherweight. The possibility always exists that a defendant might lose at trial. Unless expert discovery is bifurcated into a liability and a damages phase (and it was not here), the defendant can't simply postpone preparing its damages case until after it loses on liability, then get relief by claiming it was really sure it would defeat liability. MWD's failure to prepare for the possibility that San Diego's long-standing challenges to its rates might succeed is no basis for allowing MWD to augment its expert discovery now. This is especially true here, where the experts MWD seeks to present on rate-setting would have nothing relevant to say anyway, given MWD's position that doing so would involve "rate-setting" by the Court, something MWD argues this Court lacks the power to do. The fact that MWD neglected to prepare rate-setting experts to help calculate damages is more evidence that MWD knew all along that damages in this case would be governed not by a complicated hypothetical rate-setting exercise, but by the benefit of the parties' far simpler bargain under section 12.4(c). Moreover, MWD cannot meet the requirements set forth in the Code of Civil Procedure for reopening discovery in any respect, let alone the rules for justifying late submissions of additional expert opinion.

#### 1. The Court need not consider MWD's hypothetical expert rate-making to award damages in any event, because it can simply enforce the parties' bargain, as embodied in section 12.4(c) of the Exchange Agreement.

The parties agreed to simplify damages questions in any rate disputes under the Exchange Agreement by adopting section 12.4(c), and they have unstintingly followed the procedures of section 12.4(c) since the challenged transportation rates first went into effect in early 2011. MWD pretends to be unaware of the parties' bargain, claiming that the Court may only determine

damages by using the most convoluted and biased process imaginable. According to MWD, the Court first must evaluate multiple potentially lawful rate structures proposed by various experts, (Mot. at 2, 3) a process that itself would take many months and require examination of several forests' worth of spreadsheets. Then—presumably after deciding, in a factual vacuum, which of those hypothetical structures would be legal—the Court would identify the proposed transportation rates that impose the highest possible lawful charges on San Diego. *Id*. at 4. Undoubtedly, MWD's experts will claim that MWD lawfully could have charged San Diego even more than it did, and thus that San Diego didn't suffer any overcharge at all. *Id.* at 1, 3 ("MWD needs to be able to put forward considered evidence as to what fair and reasonable rates, lawful under the Decision, could have been charged in the absence of the [rates] struck down by the Court."). MWD's proposal makes no sense and is directly contrary to the parties' explicit bargain.

The proper quantum of damages here is laid out, explicitly and unambiguously, in section 12.4(c) of the Exchange Agreement, which states:

> In the event of a dispute over the Price, SDCWA shall pay when due the full amount claimed by Metropolitan; provided, however, that, during the pendency of the dispute, Metropolitan shall deposit the difference between the Price asserted by SDCWA and the Price claimed by Metropolitan in a separate interest bearing account. ***If SDCWA prevails in the dispute, Metropolitan shall forthwith pay the disputed amount, plus all interest earned thereon, to SDCWA.*** If Metropolitan prevails in the dispute, Metropolitan may then transfer the disputed amount, plus all interest earned thereon, into any other fund or account of Metropolitan.

Braunig Decl. Ex. A, ¶ 12.4(c) (emphasis added). MWD is making things up when it claims that, to obtain any relief on its breach of contract claim, San Diego "must show that the amount it paid under the 2003 Exchange Agreement was greater than the amount that MWD could have lawfully charged." Mot. at 1. That is not what the parties agreed to under section 12.4(c). That section plainly states that the amount in controversy in this Price dispute is the "difference between ***the Price asserted by SDCWA*** and the Price claimed by Metropolitan." Braunig Decl. Ex A at § 12.4(c) (emphasis added). Equally unambiguously, once San Diego prevails, MWD is bound by the terms of the Exchange Agreement to ***forthwith pay the entire disputed amount***. *Id.* These

Exchange Agreement terms are clear and unambiguous.[3] There is nothing in the Exchange Agreement to support MWD's argument that the Price amount in dispute is the difference between what MWD charged and what it lawfully "could have charged" in some alternative rate-setting universe.

Likewise, having understood and complied with section 12.4(c) for years now, MWD may not revisit (and undoubtedly reduce) its calculation of the disputed amount now, or argue for an alternative method of calculating damages. MWD established its Price under Section 12.4(c) by charging San Diego based on the transportation rates the Court has now found unlawful. San Diego asserted its Price based on its understanding that certain SWP and WSR costs included in those same transportation rates could not lawfully be included in those rates based on MWD's rate-setting—a view the Court has now upheld, effectively establishing that MWD breached section 5.2's promise to set lawful rates. Both parties complied with Section 12.4(c), thus defining the parameters of their Price Dispute, and MWD has set aside the disputed amount based on those parameters. San Diego doesn't need to do anything more to establish its entitlement to the money MWD has set aside in an interest-bearing account under section 12.4(c).

Indeed, part of the basis of the parties' bargain was the understanding that the rate-setting process is complex and challenging. Because of the difficulties inherent in setting rates, the parties agreed to a damages provision that did not require MWD (or the Court) to set new, lawful rates before San Diego could recover damages. As San Diego has explained before, section 12.4(c) is akin to a liquidated damages provision. Under current California law, liquidated damages provisions are presumed valid. Civ. Code § 1671(b); *Weber, Lipshie & Co. v. Christian*, 52 Cal. App. 4th 645, 656 (1997). The requirement that MWD pay the disputed amount if San

[3] At the recent case-management conference, MWD was unable to identify any contract term that was ambiguous, much less explain why that could be so. Absent ambiguity, the Court cannot look to parol evidence to second-guess the contract's clear statement that if San Diego wins a Price Dispute, it receives the full disputed amount set aside for any issues on which it prevailed. *See Alling v. Universal Mfg. Corp.*, 5 Cal. App. 4th 1412, 1433 (1992) ("The parol evidence rule generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument."); *Lonely Maiden Productions, LLC v. GoldenTree Asset Mgmt.*, 201 Cal. App. 4th 368, 376 (2011) (parol evidence may be considered only where the contract language is ambiguous).

Diego prevails reflects the parties' recognition that damages from a breach of the Price provision could be difficult to calculate, given the different possible approaches by which MWD might have set lawful rates had it chosen to do so. MWD has used the complexity of rate-setting as an excuse throughout this litigation. During the expert discovery that MWD did conduct timely, MWD's designated expert Christopher Woodcock prepared a report in which he opined that it was "impossible to determine" damages because of uncertainty about "what actions the Board may take in response" to an adverse ruling. Braunig Decl. Ex. R (Woodcock Report) at 25-26.

Fortunately, thanks to the parties' foresight in adopting section 12.4(c), there is no need to engage in these gymnastics. "[O]ne of the very purposes of liquidated damages is to allow '[t]he parties [to] avoid the cost, difficulty, and delay of proving damages.'" *Radisson Hotels Int'l, Inc. v. Majestic Towers, Inc.*, 488 F. Supp. 2d 953, 963 (C.D. Cal. 2007) (quoting Witkin, *Summary of California Law*, § 533 (10th ed. 2005)). The parties' agreement that MWD would pay the "disputed amount, plus all interest"—nothing more or less—reflects a reasonable, *ex ante* attempt to estimate and resolve the amount of damages should there ever be a Price Dispute. *See Utility Consumers' Action Network, Inc. v. AT&T Broadband of S. Cal., Inc. (UCAN)*, 135 Cal. App. 4th 1023, 1029 (2006).

The Court can and should enforce Section 12.4(c), as a matter of law. *See Harbor Island Holdings v. Kim*, 107 Cal. App. 4th 790, 794 (whether a provision is a valid liquidated damages provision or an unenforceable penalty is a question of law). If MWD claims that Section 12.4(c)'s plain terms create a penalty that should not be enforced, MWD bears the burden of establishing that "the provision was unreasonable under the circumstances existing ***at the time the contract was made***." Civ. Code § 1671(b) (emphasis added). MWD cannot do so. On its face, there is nothing punitive about section 12.4(c). Rather, the "entire agreement, its scope, purpose, and subject matter" reflect the parties' intention to streamline disputes and avoid ongoing ambiguity, and section 12.4(c) is part of that effort. *See UCAN*, 135 Cal. App. 4th at 1036. The amount MWD has set aside not only is a reasonable calculation of the amount of MWD's overcharge that is reasonably calculated to make San Diego whole, but it reflects the agreement of the parties at the time the money was set aside. MWD never suggested, in any of its

correspondence with San Diego or its matter-of-fact statements to its bondholders, that the amount in dispute was "punitive" or unfair.

MWD's proposed expert discovery here is designed to lead the Court and San Diego into a maze of discretionary rate-making decisions—exactly what MWD has always insisted this Court lacks the basic power to do. San Diego has never asked this Court to set rates—only to evaluate the legality of MWD's rates and enforce the terms of the Exchange Agreement. If MWD is right, and the Court may not tell MWD what MWD's rates should have been, the Court would lack the power to calculate damages under MWD's own theory. Thus, even were the Court to adopt the precise process Met suggests for calculating damages, Met would then tell the Court of Appeal that this Court had overstepped its boundaries. MWD's proposed frolic and detour into expert discovery serves only one purpose: delay. In addition to being part of the parties' bargain, and legally binding, section 12.4(c) also would allow the Court to avoid all of this. The Court should enforce section 12.4(c) and reject MWD's motion to reopen discovery.

**2. MWD cannot meet—and entirely ignores—the mandatory standards it must satisfy to justify augmenting its long-completed expert reports.**

MWD's Motion also completely ignores a fundamental defect: it cannot satisfy the express statutory requirements for augmenting its expert disclosures and discovery. MWD does not even mention these standards in its motion, much less try to meet them. California law permits courts to allow augmented expert discovery (even if requested timely, as opposed to seven months after trial started, as here) only if (1) MWD "would not in the exercise of reasonable diligence have determined to call that expert witness" in a timely manner, or (2) MWD failed to do so "as a result of mistake, inadvertence, surprise, or excusable neglect," and "promptly" took steps to rectify the error. Code Civ. Proc. § 2034.620(c). The Court must also take into account the extent of San Diego's reliance, and the prejudice to San Diego from MWD's augmentation of its expert list. *Id.* § 2034.620(a), (b). The Court may grant leave to augment "***only if all***" of these conditions are satisfied. *Id.* (emphasis added).

First and foremost, MWD cannot satisfy its burden of showing that it exercised reasonable diligence, or that its failure to identify these purportedly critical rate-making experts was the

result of "mistake, inadvertence, surprise or excusable neglect." MWD's motion to reopen fails for this reason alone. MWD knew that contract damages were an issue in this case and even offered an expert opinion on that issue—although, for tactical reasons, MWD argued that damages were impossible to determine instead of offering an actual calculation. There was no "surprise" here, and MWD's omission was plainly not the result of inadvertence, mistake, or excusable neglect. MWD claims that before the Statement of Decision, it "would not have been possible" for MWD to "produc[e] expert reports analyzing all possible ways in which MWD could have set its rates in compliance with the Decision." Mot. at 8. This lawyerly *ipse dixit* is just false. San Diego had identified specific flaws with MWD's rates, calculated the amount of MWD's overcharge, and the Court ultimately agreed with San Diego as to why MWD's rates violated California law. MWD was ably represented by counsel from two national law firms and certainly could have hired a rate-setting expert to develop an alternative rate model and calculate a purported overcharge. (Of course, such expert testimony would not be relevant to the Court's decision, which should simply enforce the parties' bargain under section 12.4(c) of the Exchange Agreement.)

Under the mandatory requirements of section 2034.620, augmented expert discovery isn't permitted where a party fails to conduct essential discovery based on a mistaken bet that its other litigation positions will make that discovery unnecessary, and turns out to be wrong. *See Cottini v. Enloe Med. Ctr.*, 226 Cal. App. 4th 401 (2014). This is "gamesmanship," not diligence or excusable delay. *See id.* at 421-22. In *Cottini*, for example, the superior court properly denied a motion to reopen discovery and allow late submission of expert witness information. *Id.* at 420-22 (applying section 2034.720, parallel provision to section 2034.620). There, counsel had "made a strategic decision to forgo expert witness discovery in favor of pursuing a meritless disqualification motion. Diligence would have required [the party] to disclose his expert witnesses while this motion was pending." *Id.* at 421. As *Cottini* explained, "[g]ambling on the outcome" of a litigation position "is not a good reason to fail to complete discovery during the statutory period" allowed. *Id.* But that is exactly what MWD did here, gambling the Court would

find its rates lawful and eliminate the need for contract damages evidence.[4] Having lost that gamble, MWD is barred as a matter of law from getting a do-over on expert discovery.

The other two factors—reliance and prejudice—further militate against allowing MWD to re-open expert discovery at this late stage of the case. As confirmed by the Court's Phase I Statement of Decision, San Diego has been paying illegal rates for three and a half years now; and Met has made clear, both in word and in deed, that it will not make any changes to its rates until the Court of Appeal has ruled. San Diego should not be required to endure another year of expert discovery and trial before these issues are sent along to the appellate court. And, make no mistake: MWD's additional discovery would be no minor endeavor. MWD's own description of the discovery suggests that experts would be wading into a "vastly complex process" of rate-setting in "myriad" ways, Mot. at 7, using "a number of fair and reasonable different cost structures or architectures [that] are possible in light of the Court's Decision." *Id.* at 3. These new expert disclosures would almost surely engender counter-designations of experts, complicated motion practice, and a factually and legally intensive trial; MWD suggested it would need 7-10 trial days just to put on its case. Even then, MWD hedges its bets about the critical issue—whether any of this hard work would eventually be of any use to the Court in making its Phase II decision. But it doesn't take much reading between the lines to know that MWD will ultimately argue that no damages may be awarded because "[s]etting new, compliant conveyance rates is a task that legally and contractually ***must*** be left to MWD's Board to undertake," Mot. at 7, which task MWD routinely claims its own Board will need years to complete.

**3. MWD also cannot justify reopening discovery under CCP section 2024.050.**

In addition, MWD's Motion would still fail even if it could meet the separate, mandatory test for justifying augmented expert discovery, because MWD cannot justify reopening discovery at all to permit such a request. *See* Code Civ. Proc. § 2034.610(b) (requiring motion to augment expert discovery to be filed before close of discovery, except in "exceptional circumstances").

[4] *See* Mot. at 1, claiming additional discovery is necessary "[i]f the Parties are required to proceed with litigating the breach of contract claims"—which they inevitably would need to do unless MWD prevailed in the rate challenge.

CCP 2024.050(a) provides that the Court, in its sound discretion, "may" reopen discovery "after a new trial date is set,"[5] after taking into consideration "any matter relevant to the leave requested." Relevant considerations expressly include the requesting party's "diligence or lack of diligence" and "the reasons the discovery was not completed earlier," the odds that allowing the discovery will "interfere with the trial calendar" or "result in prejudice to any other party," and the "necessity and reasons for the discovery." Code Civ. Proc. § 2024.050(b).

Every factor counsels against granting MWD's motion, and the Court should reject it for this independent reason as well. First, as explained above, MWD has not been diligent. Courts can and should grant motions to reopen discovery where there are legitimate reasons for delay, but no such reasons exist here. *Compare Hernandez v. Superior Court*, 115 Cal. App. 4th 1242, 1247-48 (2004) (abuse of discretion to deny motion to reopen discovery where plaintiff's counsel was ill with pancreatic cancer during the discovery period and died five days before trial). Second, it would be unfair and prejudicial to San Diego to allow MWD to delay the Phase II trial and decision by conducting a boundless and hypothetical inquiry into possible ways that MWD might theoretically choose to set its rates in the future. Third, as discussed above, delay is inevitable if MWD's Motion is granted. Last but not least, as explained above, MWD's proposed expert discovery is pointless given the express, enforceable, and controlling damages provision in section 12.4(c).

### B. The Court should deny MWD's belated motion to amend its answer to add defenses with no basis in fact or law.

MWD's motion to amend its answer should be denied because the proposed amendments depend on a distorted view of the law and a false factual premise: that when the parties entered into the Exchange Agreement, "SDCWA, as well as MWD, believed that the rate structure was lawful." Mot. at 2. This is nonsense. As the Court already recognized in denying MWD's

[5] It is not entirely clear that CCP 2024.050 applies here at all. The statute provides terms under which a court may, in its discretion, "reopen discovery after a new trial date has been set." Code Civ. Proc. § 2024.050(a). But no "new trial date" was ever set here: the Court held the first phase of trial as scheduled in December 2013 and the remaining claims should now be ready to proceed. MWD offers no authority to suggest that the fact the trial has been bifurcated means that a "new trial date" is in play for the Phase II claims.

motion for summary judgment on the contract claim, the agreement itself confirms that San Diego did not believe that MWD's rates were lawful, and the express "five-year cooling off period" that the parties negotiated in the agreement "supports the inference that San Diego intended to retain the ability to challenge the rates under applicable law after the end of the period." Dec. 4, 2013 Order on Summary Adjudication Motions at 4 n.9. As detailed above, other evidence already in the record further confirms that the Court's understanding of the parties' negotiations was correct. MWD also has no excuse for seeking leave to amend halfway through trial, when the factual basis of these new purported defenses has been known to MWD for years.

MWD contends that the Court has no meaningful discretion to deny leave to amend. But in fact, deciding this motion is within the Court's sound discretion, and courts can and should reject proposed amendments where, as here, a proposed amendment is inexcusably late or seeks to add new defenses that have fatal substantive flaws.

**1. The Court could reject MWD's motion based on MWD's inexcusable delay alone.**

MWD purports to seek this amendment "[b]ased on the Statement of Decision," Mot. at 2—which MWD claims somehow created the illegality or mistake its defenses depend upon. That theory is incoherent, because illegality and mistake depend on circumstances at the time the contract was signed, and nothing about the contract or its negotiation has changed since 2003, or since this litigation began in 2010. Put another way, nothing in the Statement of Decision changes anything about the underlying facts of the parties' understandings and negotiations in 2003, the Exchange Agreement itself, or the parties' course of conduct under that agreement from 2003 to today. If it took these arguments seriously, rather than using them as a last-ditch mechanism to create delay and confusion, MWD could have pled them years ago. Indeed, MWD used the same concocted factual basis—that San Diego agreed MWD's rates were legal—to support a meritless summary-adjudication motion last fall. It should have sought to amend then.

Unexcused delay alone can be an adequate reason to deny leave to amend, even where an amendment would otherwise be proper. Despite the general policy of allowing amendments liberally, "even if a good amendment is proposed in proper form, unwarranted delay in presenting

it may—of itself—be a valid reason for denial." *Melican v. Regents of Univ. of California*, 151 Cal. App. 4th 168, 175 (2007). The *Melican* court quoted *Huff v. Wilkins*, 138 Cal.App.4th 732, 746 (2006), which affirmed denial of leave to amend complaint three days before summary judgment hearing with no explanation for delay, where the proposed amendment failed to state a viable claim. Trial courts have "wide discretion" in considering proposed amendments to pleadings, and trial court rulings "will be upheld unless a manifest or gross abuse of discretion is shown." *Id.* And trial courts routinely exercise this discretion to deny amendment where a party delayed for years to assert a known claim or defense without any reasonable explanation. *See, e.g. Melican*, 151 Cal. App. 4th at 176 (affirming denial of leave to amend where plaintiff sought to add a new contract claim after five years of litigation, with no explanation of the delay); *Falcon v. Long Beach Genetics, Inc.*, 224 Cal. App. 4th 1263, 1280 (2014) (affirming denial of leave to amend to add purported claim that was sought untimely, failed to state a claim, and was inconsistent with previous allegations); *Hulsey v Koehler*, 218 Cal. App. 3d 1150, 1153-54 (1990) (affirming denial of leave to amend answer at trial to conform to proof, more than three years filing, based on defendants' lack of diligence and prejudice to plaintiffs). Here, the parties have been litigating these cases actively since June 2010. MWD has been vigorously represented by prominent counsel from national firms, and the cases have been hotly contested, with motion practice on nearly every significant issue in the case. MWD previously filed answers to the 2010 and 2012 complaints in October 2010, January 2012, July 2012, and November 2012. MWD answered San Diego's operative Third Amended Complaint in the 2010 case in April 2013, only eight months before trial. The first phase of that trial took place in December 2013, after the contract claims now at issue were bifurcated at MWD's insistence. The Court issued its final State of Decision in Phase I in April 2014. The only thing that has changed with respect to the Exchange Agreement over the past four years is that MWD lost the first phase of trial, and San Diego is now poised to win its breach of contract claims. That is no justification for late amendment.

Although no specific showing of prejudice to the other party is necessary to deny leave to amend, it would be grossly unfair to San Diego to allow MWD to introduce new defenses here,

and force yet more litigation and delay trial, based on new (and fictional) factual contentions. Time is of the essence for San Diego, which has paid illegal rates for three and a half years and continues to pay illegal rates today. MWD has made clear that it will do nothing to remedy its overcharges to San Diego until the Court of Appeal rules on this case. Most notably, in April 2014, when MWD was tasked with setting new rates for calendar years 2015 and 2106, MWD ignored the Court's then-tentative Statement of Decision and simply re-approved the same cost allocations and rate definitions this Court decided were illegal. MWD argues San Diego will suffer no prejudice if the proposed amendments are allowed, because (MWD claims) its new defenses present purely legal questions and no new discovery is required. But this is backwards. The factual background set forth above, which MWD ignores, shows that MWD's new defenses are wrong as a matter of undisputed facts. If MWD hopes to sustain those defenses at all (which it can't), it would have to offer some new (nonexistent) factual evidence. As is discussed below, the total lack of merit to MWD's proposed new defenses is another reason to deny this motion.

**2. The Court should reject MWD's proposed amendments because they are factually false and legally untenable.**

The Court can and should deny MWD leave to amend its answer because its putative new defenses are fatally flawed. "Leave to amend is properly denied when the facts are undisputed and as a substantive matter no liability exists under the plaintiff's new theory." *Huff v. Wilkins*, 138 Cal. App. 4th 732, 746 (2006); *see also Vogel v. Thrifty Drug Co.*, 43 Cal. 2d 184, 188-89 (1954) (affirming denial of leave to amend where the "proffered amendment was defective"); *Falcon v. Long Beach Genetics, Inc.*, 224 Cal. App. 4th 1263, 1280 (2014) ("[I]f the proposed amendment fails to state a cause of action, it is proper to deny leave to amend."); *accord Foxborough v. Van Atta*, 26 Cal. App. 4th 217, 230 (1994) (affirming denial of leave to amend); *Oakland Raiders v. Nat'l Football League*, 131 Cal. App. 4th 621, 652 (2005) (same); *Osborn v. Hertz Corp.*, 205 Cal. App. 3d 703, 714 (1988) (same); *Robertson v. City of Long Beach*, 19 Cal. App. 2d 676, 679 (1937) (same).

**a. MWD's "mistake" defense is fatally defective.**

MWD's proposed "mistake" defense depends on the demonstrably false notion that both

parties believed that MWD's rates were lawful when they signed the Exchange Agreement, but that MWD only recently discovered this assumption was a "mistake." This is all wrong.

However mistaken MWD may have been about how to design lawful rates, nobody made any "mistake" here in the legal sense. Both parties understood that San Diego believed that MWD's rates were unlawful, based on the same grounds asserted in San Diego's complaint: the misallocation of State Water Project costs and Water Stewardship Rate expenses to MWD's transportation rates. Both parties also knew that, if MWD did not alter its rates, San Diego could and would challenge them in court after the five-year litigation timeout expired. Despite these undisputed facts, MWD now invents the argument that the Exchange Agreement is unenforceable because the parties made a mutual mistake of law about the legality of the MWD rates linked to the Price term, or because San Diego knew that MWD had made a mistake and failed to correct it. Mot. at 4. That is nonsense.

A mistake of law can support rescission of a contract only where "1) all parties think they know and understand the law but all are mistaken in the same way, or 2) when one side misunderstands the law at the time of contract and the other side knows it, but does not rectify that misunderstanding." *See Hedging Concepts, Inc. v. First Alliance Mortg. Co.*, 41 Cal. App. 4th 1410, 1421 (1996); *see also Dowling v. Farmers Ins. Exch.*, 208 Cal. App. 4th 685, 699 (2012) (rejecting mistake defense where plaintiff claimed they could not have intended to agree to the terms of an agreement, as the court had interpreted it, and therefore should be excused from the agreement based on mistake).

No such mistake occurred here. As explained above, both parties were well aware of the other's position on the validity of MWD's rate allocations. MWD insisted its rates were legal; San Diego disagreed. Both conveyed their disagreement to each other. But the issue had never been litigated and resolved, and in the interests of seeking peace, both MWD and San Diego deliberately chose to adopt the Price term (requiring San Diego to pay lawful transportation rates set by MWD) despite that uncertainty—which the Court has since resolved in San Diego's favor.

In its recent CMC statement, MWD suggested that the Court's Statement of Decision this April could somehow qualify as a "mistake" by the parties during contract negotiations back in

2003. MWD states that "[t]here is evidence that both Parties believed that MWD's rate structure for the conveyance of water was lawful at the time the Exchange Agreement was made" and that San Diego "understood how MWD had set [its various] charges for the conveyance of water," but that "[w]hen the Court invalidated these rates, under this Court's Statement of Decision, a mistake of law had occurred because what the Parties once considered to be lawful rates actually constituted unlawful rates in this Court's determination." Braunig Decl. Ex. S (CMC Statement for July 2, 2014 Case Management Conference) at 17.

If this is MWD's theory, the law is clear that no "mistake" defense can exist. Where both parties are aware of uncertainty about the legal basis of a contract term and choose to contract in spite of that uncertainty, they assume the risk that they will later prove to be wrong. For example, in *Stermer v. Bd. of Dental Examiners,* 95 Cal. App. 4th 128 (2002), the Court of Appeal rejected a mistake defense to enforcement of a contractual agreement with the Dental Examiners board. Stermer had agreed to accept discipline based in part on a then-existing conviction for misdemeanor domestic violence, even though he had a pending habeas corpus petition seeking to undo that conviction. *See id.* at 133. After Stermer's conviction was vacated, he claimed that his contract with the Dental Examiners board was invalid because it was premised on a mistake of law: that he was subject to a legally valid conviction. *See id.* The court rejected the challenge, holding the agreement valid because the parties had been aware of the legal uncertainty about the conviction but entered into the contract anyway. *See id.* at 134. As the court explained, Stermer had assumed the risk the conviction might in fact prove invalid:

> At the time of the stipulation, the conviction existed. That it was later vacated … does not legally create a mistake as to its existence at the time of the settlement, especially as the parties stipulated with the knowledge that the petition for writ of habeas corpus was pending and might lead to the vacation of the conviction.

*Id.* at 133. Doubt or uncertainty about the legal significance of existing facts—like the legality of MWD's transportation rates here—does not vitiate a contract where the parties contract with full awareness of that uncertainty. Even if this sort of dispute "could be viewed as a type of mistake, it is reasonable and equitable to allocate the risk of that purported mistake to [a party that proves mistaken] because the parties contemplated the possibility that the conviction would be vacated."

*Id.* at 134. In other words, "[w]here parties are aware at the time the contract is entered into that a doubt exists in regard to a certain matter and contract on that assumption, the risk of the existence of the doubtful matter is assumed as an element of the bargain. . . . [T]he kind of mistake which renders a contract voidable does not include 'mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk.'"[6] *Id.* (quoting *Guthrie v. Times-Mirror Co.*, 51 Cal. App. 3d 879, 885 (1975)); *see also Larsen v. Johannes*, 7 Cal. App. 3d 491, 503-04 (1970) (rejecting mistake defense where parties "dealt openly with each other, with no advantage taken of each other," but appellants claimed they were mistaken about the legal effect of a compromise agreement). Likewise, if the parties simply "had differing subjective understandings of the contract from the inception," that difference "does not constitute a 'mistake' for rescission purposes." *Hedging Concepts*, 41 Cal. App. 4th at 1421.

**b. MWD's "illegality" defense is also fatally defective.**

MWD also seeks to add the defense of "illegality of contract," depending entirely on the fact that "the Court found in the Statement of Decision that the rates upon which MWD's consideration [under the Exchange Agreement] is based are unlawful." Motion to Amend at 4. But the Court found that MWD's rates are unlawful for reasons that San Diego has been raising since 2003 (as reflected in the record already before the Court, discussed above), and certainly since June 2010 when it first initiated these actions. *See* MWD Motion at 2 ("In 2010, however, SDCWA alleged in these actions that the System Access Rate, System Power Rate and Water Stewardship Rate were unlawful."). Contrary to MWD's arguments, the Court's Statement of Decision did not indicate that "performance of the Price term … is unlawful"—only that MWD had breached that term by charging unlawful rates. Mot. at 4.

[6] Essentially the same rule holds where a mistake is couched as one of fact instead of law (and there's often not much more than a semantic difference between the two). A mutual mistake about an "objective, existing fact" can defeat formation of a contract—but judgments that later prove to be erroneous, like MWD's belief in the legality of its rates, do not qualify. "Where a belief or assumption under which a contract is made is rendered mistaken by subsequent events, the mistake generally will not support rescission of the contract." *CRV Imperial-Worthington, LP v. Gemini Ins. Co.*, 770 F. Supp. 2d 1074, 1078 (S.D. Cal. 2010) (citing federal authority and *Mosher v. Mayacamas Corp.*, 215 Cal. App. 3d 1, 6 (1989)). According to *Mosher*, when such facts are rendered mistaken by future events, they constitute an "error in judgment" rather than a mistake of fact that can void the contract. *Id.*

In other words, nothing about the Price term, or the Exchange Agreement more generally, is unlawful. MWD does not argue that it is somehow illegal for MWD to agree in a contract to charge a Price equal to a lawful transportation rate. The only illegality here is MWD's ***failure to perform*** that Price obligation.[7] Essentially, what MWD is arguing is that, by breaching the Exchange Agreement, it turned an otherwise legal and enforceable contract into an illegal and unenforceable one. This is yet another MWD Catch-22, making the Exchange Agreement legal (and enforceable against San Diego) as long as MWD performs (and San Diego is entitled to no remedy anyway), but turning it into an illegal, nefarious compact the minute MWD breaches (and San Diego could be entitled to damages). This is a bad argument.

Accepting MWD's position would violate the basic California rule that contracts must be interpreted as lawful wherever possible: "A contract must receive such an interpretation as will make it lawful … and capable of being carried into effect, if it can be done without violating the intention of the parties." Cal. Civ. Code § 1643. Under this rule, courts "will not construe a contract in a manner that will render it unlawful if it reasonably can be construed in a manner which will uphold its validity." *In re Quantification Settlement Agreement Cases*, 201 Cal. App. 4th 758, 798 (2011) (quoting *People v. Parmar*, 86 Cal.App.4th 781, 802 (2001)). Thus, it has long been "well settled" that "if a contract can be performed legally, it will not be presumed that the parties intended for it to be performed in an illegal manner, and it will not be declared void merely because it was performed in an illegal manner." *Freeman v. Jergins*, 125 Cal. App. 2d 536, 546 (1954) (rejecting claim of illegality where "the contract did not call for the performance of any illegal act"); *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 954 (2008) (reading waiver of rights in employment contract to exclude rights that could not legally be waived, because "[i]t is one of the cardinal rules of interpreting an instrument to give it such construction as will make it effective rather than void."). The Price term of the Exchange Agreement could

[7] Allowing MWD to convert its own breach of the Exchange Agreement (namely its setting of unlawful rates) into a defense of illegality would also violate the long-standing California rule that "[n]o one can take advantage of his own wrong." Cal. Civ. Code § 3517. A party cannot obtain "rescission of [a] contract . . . when the only obstacle to its completion and fulfilment was caused by his own default, and when the other party is entirely without blame." *Salmon v. Hoffman*, 2 Cal. 138, 143 (1852).

have been performed legally, if MWD had reformed its rates to comply with the law. MWD's failure to do so does not make the contract illegal, it simply means that MWD has breached and San Diego is entitled to damages under section 12.4(c).[8]

MWD's further argues "illegality of contract arises where a central aspect of the contract, or performance of a term of a contract, is unlawful" or where "the central purpose of the contract is tainted with illegality." Mot. at 4. This has nothing to do with this case. MWD claims that "because the price consideration was a central purpose of the contract (i.e. water exchanged for a 'Price' based on MWD's existing rate structure), the Court's ruling has in effect determined the contract is illegal." June 26, 2014 CMC Statement at 18:1-3. But as the Civil Code explains, the purpose or "object" of a contract is "the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do." Civil Code § 1595; *see also* Civil Code § 1598 (illegality defense lies where an "object" of a contract "is unlawful, whether in whole or in part"). Here, the purpose of the Exchange Agreement was 100% lawful—namely, the payment by San Diego of lawful rates for MWD's agreement to transport water to San Diego through its facilities. Once the Court of Appeal upholds this court's rulings and Met finally sets lawful rates, the contract, including Section 5.2, will continue to operate and bind both parties. MWD's proposed illegality defense is legally meritless and adding it to this case would be futile.

## IV. CONCLUSION

For the reasons set forth above, MWD's motions for leave to amend and to reopen expert discovery should be denied. The Court should confirm the legality of the damages provision in section 12.4(c) of the Exchange Agreement, and proceed to trial of Phase II, where San Diego is entitled to the benefit of its bargain—payment *forthwith* of the "disputed amount" set aside by MWD.

[8] MWD's own cited authorities fully support this rule, explaining that an illegality defense lies "when the evidence shows that the plaintiff in substance seeks to ***enforce an illegal contract or recover compensation for an illegal act***." *Fellom v. Adams*, 274 Cal. App. 2d 855, 863 (1969) (emphasis added). Here, San Diego is seeking a contractual remedy for MWD's illegal acts of rate-setting, not trying to enforce illegal rates.

Respectfully submitted,

Dated: July 24, 2014

KEKER & VAN NEST LLP

*/s/ Daniel Purcell*
By: DANIEL PURCELL

Attorneys for Petitioner and Plaintiff
SAN DIEGO COUNTY WATER AUTHORITY

**PROOF OF SERVICE BY ELECTRONIC TRANSMISSION AND EMAIL VIA PDF FILE**

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker & Van Nest LLP, 633 Battery Street, San Francisco, CA 94111-1809.

On July 24, 2014, I served the following documents described as:

**SAN DIEGO COUNTY WATER AUTHORITY'S CONSOLIDATED OPPOSITION TO METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MOTION FOR LEAVE TO AMEND ANSWER AND MOTION TO REOPEN EXPERT DISCOVERY**

**DECLARATION OF WARREN BRAUNIG IN SUPPORT OF PETITIONER AND PLAINTIFF SDCWA'S CONSOLIDATED OPPOSITION TO RESPONDENT AND DEFENDANT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MOTION FOR LEAVE TO AMEND ANSWER AND MOTION TO REOPEN EXPERT DISCOVERY**

by serving a true copy of the above-described documents in the following manner:

**BY LEXIS NEXIS® FILE & SERVE**

On the date executed below, I electronically served the documents described above via Lexis Nexis® File & Serve on the recipients designated on the Transaction Receipt located on the via Lexis Nexis® File & Serve website.

Executed on July 24, 2014, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Joanne Winars