LAW OFFICES
KEKER & VAN NEST
LLP
633 BATTERY STREET
SAN FRANCISCO, CA 94111-1809
TELEPHONE (415) 391-5400
FAX (415) 397-7188

JOHN W. KEKER
jkeker@kvn.com

April 10, 2014

VIA HAND DELIVERY

Honorable Curtis E. A. Karnow
San Francisco County Superior Court
Complex Litigation
400 McAllister Street
Department 304
San Francisco, CA 94102

Re: *San Diego County Water Authority v. Metropolitan Water District of Southern California*
Case Nos. CPF-10-510830 & CPF-12-512466

Your Honor:

San Diego writes in brief response to Met's request for a hearing on Met's Objections to the Court's Tentative Determination. *See* Met's Obj. at 1. San Diego does not think that a further hearing is necessary if the Court is not inclined to make significant changes to its Tentative. San Diego is content to have the Court decide San Diego's own objections and suggested clarifications on the papers. If, however, the Court is considering adopting any of the changes Met proposes — particularly in response to the novel arguments Met has presented for the first time in its objections — San Diego also requests a hearing.

Much of Met's lengthy Objections brief is devoted to rearguing positions it argued at trial and fully briefed both before and after trial. San Diego doubts that the Court needs or wants any further briefing or argument about those positions — indeed, Met's reiteration of them is contrary to the limited purpose of objections as referenced in the Tentative Determination itself. *See* Tentative at 4 & n.2.

But Met also argues, for the first time, that this Court's ruling should only apply to Met's wheeling rate rather than its System Access Rate, System Power Rate and Water Stewardship Rate that also were the subject of the trial. *See id.* at 9-14. If the Court is inclined to consider that novel contention of Met's, San Diego respectfully requests an opportunity to be heard because, unlike most of Met's other arguments, this was ***not*** Met's position at trial. On the contrary, before and during trial, Met repeatedly recognized that "the rate components at issue in these actions are the System Access Rate, the System Power Rate, and the Water Stewardship

Rate," and that "SDCWA's wheeling challenge overlaps with its other rate challenge," because Met's wheeling rate includes rates that San Diego alleges exceed the cost of the services provided. Met's 1st Pretrial Br. at 4, 6-7; Met's 2nd Pretrial Br. at 27-28. As Met has acknowledged, "since 2003, MWD has unbundled its rates, meaning that the rates now expressly state which rate components are allocated for conveyance costs and supply costs." Met's 1st Pretrial Br. at 86 n.34. For years before trial, all the way through trial and even in the post-trial briefing, Met urged the Court to validate and uphold its Transportation Rates—the System Access Rate, System Power Rate, and Water Stewardship Rate—against San Diego's challenge that they violate various constitutional, statutory and common law standards by which it is bound. *See, e.g.,* Trial Tr. at 82:9-16; 89:6-19; Post-Trial Br. at 1, 3-5; *see also* May 27, 2011 MWD Initial Disclosures at 1-2. Now that the Court has tentatively invalidated those rates, Met suggests that the Court's doing so must have been "inadvertent." MWD Objections at 5.

Met's about-face on this point is a transparent effort to insulate the second phase of the trial, on the parties' Exchange Agreement, from the ruling in the first phase. Met wants to be able to argue that only its wheeling rate was invalidated and that the Price in the Exchange Agreement is unaffected because, according to Met, it is not a wheeling rate, even though — like the wheeling rate set out in Met's Administrative Code — the Exchange Agreement Price includes the System Access Rate and the Water Stewardship Rate. Met's effort is not only contrary to the facts and Met's own pretrial and trial presentations, it also contravenes Met's reason for bifurcating the contract claims in the first place. As the Court held in bifurcating the case at Met's request, the reason for doing so was Met's contention that "the breach of contract depends on the illegality of the rates." July 22, 2013 CMC Order at 2. The first phase of the trial would determine liability, leaving damages issues to be decided in the second phase. *See id.* Having made that bed, Met is judicially estopped from sleeping elsewhere, and if the Court is at all otherwise inclined, San Diego respectfully requests an opportunity to be heard.

Very truly yours,

JOHN W. KEKER

JWK:mls
cc: All Counsel