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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; ALL PERSONS INTERESTED IN THE VALIDITY OF THE RATES ADOPTED BY THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA ON APRIL 13, 2010 TO BE EFFECTIVE JANUARY 2011; and DOES 1-10,

Respondents and Defendants.

Case No. CPF-10-510830
Case No. CPF-12-512466

SAN DIEGO'S PRETRIAL BRIEF FOR THE PHASE II TRIAL

Dept.: 304
Judge: Hon. Curtis E.A. Karnow

Date Filed: June 11, 2010
June 8, 2012

Trial Date: March 30, 2015

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I. INTRODUCTION

In Phase I of this case, the Court invalidated Met's System Access Rate, System Power Rate, Water Stewardship Rate and wheeling rate for calendar years 2011-2014. *See* Apr. 24, 2014 Statement of Decision ("SOD") at 65. The Court's Phase I decision also conclusively established Met's liability for breaching the parties' Exchange Agreement, which expressly limits the Price Met can charge under that agreement to "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." PTX-065** (Exchange Agr.) § 5.2.[1] Met breached that provision because the Price it charges San Diego consists of the System Access Rate, System Power Rate and Water Stewardship Rate—the very rates that, as this Court held, violate applicable law, and are not applicable to the conveyance of water, because they include State Water Project ("SWP") costs and Water Stewardship Rate ("WSR") charges that are not caused by Met's conveyance of water. *See* SOD at 65.

San Diego's contract damages are measured by the amount of the overcharge from 2011 to 2014—*i.e.*, the SWP and WSR charges that Met had no lawful basis for including in its Price. Those damages flow directly from Met's breach of the Exchange Agreement because Met's inclusion of those unlawful SWP and WSR charges in its Price ***was*** the breach. *See* Exchange Agr. § 5.2. "California law requires only that some reasonable basis of computation be used" in calculating damages. *SCI Cal. Funeral Servs., Inc. v. Five Bridges Found.*, 203 Cal. App. 4th 549, 570 (2012) (quotation marks and ellipses omitted). "This is ***especially true*** where, as here, it is the wrongful acts of the defendant that have created" any purported "difficulty in proving the amount" of damages. *GHK Assocs. v. Mayer Group, Inc.*, 224 Cal. App. 3d 856, 874 (1990) (emphasis added); *accord Meister v. Mensinger*, 230 Cal. App. 4th 381, 397 (2014). As this Court already recognized, "[e]ven if damages are difficult to determine, a trial court should do so if there is liability." Nov. 4, 2014 CMC Order at 2 n.2 (citing *Meister*). And, in fact, San Diego's damages are ***not*** "difficult to determine," *id.*, despite Met's attempts to make them so.

[1] As in the Court's Statement of Decision, "**" indicates that the document cited is not in either of Met's administrative records, and "*" indicates the document is only in the 2012 administrative record (all documents in the 2010 record are also in the 2012 record). *See* SOD at 5 n.2.

In Phase II, San Diego will prove the amount of the unlawful SWP and WSR charges from 2011 to 2014, the years covered by the Court's Statement of Decision and San Diego's contract claims. The SWP costs, which this Court already found Met had "***[n]o reasonable basis***" for including in its Price, undoubtedly provide a "reasonable basis of computation" for San Diego's damages. SOD at 53 (emphasis added); *SCI*, 203 Cal. App. 4th at 570. Met's own prior practice and every other relevant piece of evidence in this case prove that those SWP costs belong ***exclusively*** on Met's supply rates, and that it is not only reasonable, but conservative to award those damages to San Diego. Likewise, the WSR charges should never have been included in Met's transportation rates because, as this Court already found, the primary purpose of the WSR and the programs it funds is to increase supply, and even if doing so also might help Met avoid unspecified transportation costs, the avoided costs would relate to transporting ***Met water***, ***not wheeled water***. *See* SOD at 58-61. In any event, the Court has already concluded the WSR is an illegal tax, and the law is clear that the remedy for an illegal tax is a full refund. *See, e.g., Gen. Motors Corp. v. City & Cnty. of San Francisco*, 69 Cal. App. 4th 448, 454-55 (1999) ("*GM*").[2]

The law is also clear that the remedy for Met's breaches is certainly ***not*** the unprecedented procedure Met suggests, whereby ***San Diego*** must prove, and this Court must "decide" the "highest lawful rate" ***Met*** might have imposed if Met had not broken the law instead, over San Diego's continuous objections for nearly two decades. *See, e.g., id.*; *Oneida Motor Freight, Inc. v. I.C.C.*, 45 F.3d 503, 507-08 (D.C. Cir. 1995) (damages in a rate case are ***not*** based on "the maximum reasonable rate"). Indeed, Met knows that what it suggests is contrary to law, because Met itself has repeatedly told this Court, from the outset of this case, that the Court ***cannot*** set rates. *See, e.g.*, Met's July 28, 2010 Answer; Jan. 9, 2015 Mot. to Dismiss; *see also* Dec. 3, 2014

[2] To be clear, San Diego is ***not*** seeking as contract damages a full refund of the entire amount it paid under the Exchange Agreement, much less a complete refund of all of the transportation rates the Court invalidated. Although, as the Court found, those rates are illegal and invalid, in the context of contract damages, San Diego is not seeking a refund of the fixed and variable costs, including power costs, San Diego paid for ***Met's*** system (as opposed to the SWP, which is owned and operated by the Department of Water Resources ("DWR")). San Diego seeks to recover only the portions of the Exchange Agreement Price that improperly impose (1) the costs of the SWP, which, as the Court found, is not part of Met's system, is not used to transport water under the Exchange Agreement, and is not a proper component of the Price; and (2) the illegal WSR tax, which, as the Court also found, is not a valid charge for conveying non-Met water.

Order at 2; Nov. 4, 2014 Order at 1-2 (instructing Met not to propose a damages theory that Met contends is beyond the Court's power). Met's damages theory is unreasonable—as Met effectively concedes by arguing that its own theory will lead to reversible error, *see id.*—whereas San Diego's measure of damages follows from the Exchange Agreement and the law.

For these reasons and others San Diego explains below and will prove at trial, the Court should rule for San Diego in Phase II.

II. BACKGROUND

There is no better background for the Phase II trial than the Court's Statement of Decision from Phase I. As already mentioned, with regard to SWP costs, the Court found:

> Met's contract with the state makes clear that Met does not own or operate the SWP transportation facilities. Previously, Met allocated SWP costs to supply, and ***none to transportation*** (including the SWP costs that DWR bills as its own transportation costs). No reasonable basis appears in the record as to why this has changed.

Id. at 53 (emphasis added) (footnotes omitted). And, with regard to the WSR, the Court found:

> The record shows that at least a significant benefit of [Met's demand-management programs funded by the WSR] is the creation of new water "supply," reducing Met's need to purchase water from other sources.… **Met itself knows that the *primary* benefit is not for transportation, but for supply**.… Nevertheless Met argues that the demand management programs also reduce the demand for transportation.… But the record does not show correlation between those avoided costs and water stewardship rates.… [T]he costs and avoided costs attributable to the demand management programs relate to the transportation needs to provide purchased water. This too suggests that **the cost of wheeling**, while properly a function of system-wide costs associated with transportation as such, **should not be a function of system-wide avoided costs of transporting purchased water**.

Id. at 58-61 (italics in original; bold added) (footnotes omitted).

The Court concluded:

> [T]he record confirms that [Met's transportation] rates over-collect from wheelers, because at least a significant portion of these costs are attributable to supply, not transportation. These rates – the System Access Rate, System Power Rate, Water Stewardship Rate, and Met's wheeling rate – therefore violate Proposition 26 (2013-14 rates only), the Wheeling statute, Govt. Code § 54999.7(a), and the common law. The Court invalidates each rate for both the 2011-2012 and 2013-2014 rate cycles.

Id. at 65.

That conclusion establishes Met's contractual liability for breaching the Exchange Agreement, which is the primary subject of Phase II. The purpose of the Exchange Agreement is

to get water from the Colorado River to San Diego. San Diego owns Colorado River water that it has acquired from IID, as well as Colorado River water that San Diego conserved by lining the All-American and Coachella canals. But "[n]o facilities exist to deliver water directly from IID to SDCWA." AR2012-16509* (Met's Official Bond Statement). Accordingly, San Diego and Met entered into the Exchange Agreement, whereby San Diego delivers its Colorado River water to Met, and Met delivers a like quantity and quality of water to San Diego by whatever means are convenient to Met. *See* Exchange Agr. §§ 1.1(m), 3.2(e), 3.6. The Price for that service "shall be 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." *Id.* § 5.2. Met breached that Price term because the Price it charges San Diego consists of Met's System Access Rate, System Power Rate, and Water Stewardship Rate—the same rates this Court invalidated because they violate constitutional, statutory and common law and are not generally applicable to the conveyance of water. *See* SOD at 65.

III. ISSUES REMAINING TO BE TRIED

The issues remaining to be tried in Phase II of this case are (1) the amount of San Diego's damages for Met's breaches of the Exchange Agreement; (2) Met's affirmative defenses to the contract claim; and (3) San Diego's claim for declaratory relief regarding preferential rights.

A. Met's liability for breaching the Exchange Agreement was conclusively established in Phase I.

As an initial matter, Met's liability for breaching the Exchange Agreement has already been established conclusively and may not be relitigated in Phase II. The elements of a cause of action for breach of contract are "a contract, plaintiff's performance or excuse for failure to perform, defendant's breach and damage to plaintiff resulting therefrom." *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1489 (2006). San Diego established all of these elements in Phase I, and the Court ruled that San Diego had done so in its Statement of Decision. The issue of breach is off the table for Phase II.

First, it is undisputed that San Diego and Met executed the Exchange Agreement, which was authenticated and moved into evidence in Phase I. *See* PTX-065**.

Second, it is undisputed that San Diego performed its obligations under the Exchange Agreement by delivering its Colorado River water to Met and paying Met's Price in full.

Third, it is beyond dispute, given the Court's Statement of Decision, that Met breached the Exchange Agreement. Met agreed that it would only include lawful conveyance charges in its Price, but the Court found that all three components of Met's Price—the System Access Rate, System Power Rate, and Water Stewardship Rate—are unlawful. *See* Exchange Agr. § 5.2; SOD at 65. That ruling conclusively establishes that Met breached the Exchange Agreement. *See id.*; *see also*, *e.g.*, *McKell*, 142 Cal. App. 4th at 1489 (fees that violate the law are a breach of contract); *Bird, Marella, Boxer & Wolpert v. Superior Court*, 106 Cal. App. 4th 419, 427 (2003) (plaintiffs have "the right not to be subjected to … unlawful billing practices").

Fourth, the fact of damages is also established by the Court's Phase I ruling. The Court found that Met's transportation rates "over-collect" from those who pay those rates, as San Diego does under the Exchange Agreement, because Met's transportation rates unlawfully include costs that "are attributable to supply, not transportation." SOD at 65.

B. San Diego's measure of damages follows from the Exchange Agreement itself, the evidence, the Court's Statement of Decision, and the law.

The recent round of briefs on Met's motion to dismiss and San Diego's motions *in limine* set forth the parties' respective positions on the appropriate measure of damages in this case. Met contends that in order to award damages, the Court must "decide the highest lawful rate the Board could have set." Met's Jan. 26, 2015 Br. at 1. As San Diego explains in Section C, below, that purported measure of damages is contrary to law, including everything Met has ever said in this case about "ratemaking" being beyond this Court's jurisdiction, among many other fatal defects. San Diego, on the other hand, contends that damages consist of all SWP costs and all WSR charges that Met included in its Exchange Agreement Price from 2011 to 2014.

Unlike Met's theory of damages, San Diego's measure of damages does not require the Court to engage in anything that could be construed as "ratemaking." Instead, San Diego's measure of damages follows directly from the Exchange Agreement, which expressly limits the Price to "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." Exchange Agr. § 5.2. Met breached that provision by including in the Price charges that, as this Court has already found, violate applicable law and regulation, and are not generally applicable to the conveyance of water. *See* SOD at 65. The damages that flow directly from those breaches are the portions of the Price that Met had no lawful basis for charging as conveyance rates—SWP costs and WSR charges. San Diego is entitled to recover those damages, the amount of which San Diego will prove in the Phase II trial.

In its Order on Met's motion to dismiss and the parties' motions *in limine*, the Court declined to "resolve competing readings of what the contract may permit as damages," and left open the possibility that "a lawful spectrum of rates" might be capable of proof without speculation, and that such a spectrum might be relevant to determining damages. Feb. 6, 2015 Order at 2. As discussed in Section C below, it is clear that Met plans to offer speculation in an attempt to involve this Court in the kind of judicial "ratemaking" that Met itself has repeatedly castigated as reversible error. In any event, as discussed below and as San Diego will prove at trial, the only spectrum of rates with any evidentiary basis leaves no doubt that San Diego's measure of damages, unlike Met's, flows from the Exchange Agreement itself and is not only reasonable in amount but conservative by comparison with every other alternative in the record.

1. The damages award should include all SWP costs Met included in the Exchange Agreement Price from 2011 to 2014.

As the Court found in its Statement of Decision, "[p]reviously, Met allocated SWP costs to supply, and ***none to transportation*** (including the SWP costs that DWR bills as its own transportation costs). No reasonable basis appears in the record as to why this has changed." SOD at 53 (emphasis added) (footnote omitted). There is not, and cannot be, any dispute that it would have been reasonable for Met to continue to allocate all SWP costs to supply. There is, indeed, no reasonable basis in the record for Met to have done anything other than that. *See id.* San Diego's damages, therefore, should include all SWP costs it was charged under the Exchange Agreement because if Met had continued to allocate those costs to supply rather than transportation—consistent with Met's own past practice and its legal and contractual obligation to

follow the cost-of-service principles that led it to allocate all SWP costs to supply in the first place—San Diego would not have been charged ***any*** SWP costs under the Exchange Agreement.

The conclusion that San Diego's damages should include ***all*** SWP costs Met unlawfully charged under the Exchange Agreement follows not only from the Court's Statement of Decision, but from the admitted evidence, including:

- **The 1969 Study**, which establishes that it is entirely reasonable and consistent with cost-of-service principles, as well as Met's past practice, to allocate SWP costs—including the SWP costs that DWR bills as its own transportation costs—to supply, and ***none*** to transportation. *See* AR2012-16288_1723* at 1743-46; *see also* Trial Tr.** at 469:23-470:12; SOD at 53 & n.79.
- **The 1993 Raftelis Textbook**, which states that "supply" costs include "operating and capital costs associated with the source of water supply (reservoir construction and maintenance costs, water right purchases, supply development costs, conservation costs, etc.)." DTX-134* at AR2012-5291; *see also* SOD at 32.
- **The October 1995 RMI Report**, which states that "supply" costs include the costs of water "purchased from other sources such as the State Water Project." DTX-013 at AR2012-1104; *see also id.* at 1112; SOD at 32-33.
- **The December 1995 RMI Report**, which characterizes all SWP costs as supply costs, and presents a spectrum of potential rate designs. *See* DTX-136; SOD at 34-35. With the exception of RMI's Option I, which corresponds to what the Court found unlawful, ***all of the other points on the spectrum of possibilities RMI discussed would result in higher damages than what San Diego asks the Court to award***. Option II would return to San Diego not only the SWP costs, but also Colorado River Aqueduct costs, which San Diego has not included in the damages it seeks. And Options III and IV, which would charge only additional costs actually caused by wheeling, would correspond to a still greater damages award for San Diego, further demonstrating that the damages San Diego seeks are quite conservative. *See* DTX-136 at AR2012-1244-54.

- **Met's July 1996 Memorandum on "Alternative Wheeling Models" and "Evaluation Matrix,"** which likewise recognized the validity of an incremental wheeling rate that would correspond to a damages award far higher than the conservative damages San Diego seeks. *See* AR2012-17126_0106-11*.
- **Met's contract with DWR**, which actually includes such an incremental wheeling rate, whereby DWR charges Met only additional costs actually caused by wheeling. *See* DTX-055 at AR2012-000153 (Art. 55(b)-(c)); *see also* SOD at 6-7.
- **The Bartle Wells Associates Letters**, which explain that cost-causation principles, including those established in the guidelines of the National Association of Regulatory Utility Commissioners ("NARUC") and the American Water Works Association ("AWWA"), dictate that all SWP costs are water supply costs. *See* AR2010-11207-14; AR2010-11393-400; AR2012-16215-16; *see also* SOD at 41. Bartle Wells also stated that three other agencies with DWR contracts allocate SWP costs to supply, and that it was not aware of any agency, other than Met, which allocates SWP costs to transportation rates. AR2010-11209; *see also* SOD at 41.
- **The FCS Report**, which likewise concluded that all SWP costs should be allocated to supply, and none to transportation. *See* AR2012-16156-91*; *see also* SOD at 43-44.

Thus, San Diego should recover in damages all of the SWP charges that Met unlawfully included in the Exchange Agreement Price from 2011 to 2014.

2. The damages award should include all WSR charges Met included in the Exchange Agreement Price from 2011 to 2014.

San Diego also should recover in damages all of the WSR charges Met unlawfully included in its Exchange Agreement Price from 2011 to 2014. "The record shows that at least a significant benefit of" the demand-management programs Met funds with the WSR "is the creation of new water 'supply,' reducing Met's need to purchase water from other sources." SOD at 58-59. Indeed, "Met itself knows that the *primary* benefit is not for transportation, but for

supply," and says so in its Official Bond Statement, among many other places. *Id.* at 59 (emphasis in original) (citing AR2012-16429 at 16519*); *see also id.* at 58-59 & nn.84-87. Even if Met's demand-management programs could theoretically allow Met to avoid some transportation costs to some unspecified extent, "the record does not show correlation between those avoided costs and water stewardship rates," and "avoided costs attributable to the demand management programs relate to the transportation needs to provide ***purchased water***"—*i.e.*, "water that Met sells to its member agencies," ***not*** water that San Diego owns separately and never purchased from Met, which is what the Exchange Agreement is about. *Id.* at 60-61 (emphasis added). "This too suggests that the cost of wheeling, while properly a function of system-wide costs associated with transportation as such, ***should not be a function of system-wide avoided costs of transporting purchased water***." *Id.* (emphasis added). Because Met never had any legal basis for including any part of the WSR in its Price for transporting or exchanging Colorado River water that San Diego owns and does not purchase from Met, San Diego is entitled to recover all such amounts as contract damages. *See id.*; Exchange Agr. § 5.2.

Indeed, Met should never have charged the WSR at all. WSR charges are not like SWP costs, which Met actually incurs from DWR and must recover (but should only recover from supply rates, and certainly not from transportation rates, as discussed above). Rather, the WSR is a completely invented charge that does not reflect any service Met provides. Met should not have imposed the WSR on ***any*** volumetric rate without establishing a proper cost-of-service basis for doing so, and most definitely should not have charged the WSR as a transportation rate. To be sure, if the WSR must be reallocated to some volumetric rate for purposes of the damages analysis (which is neither necessary nor proper in San Diego's view), then that should be a supply rate, ***not*** a transportation rate. *See, e.g.*, AR2010-11209-10 (Bartle Wells) ("Because the Water Stewardship service function is intended to increase water supply through projects, such as recycling, desalination and groundwater recovery, and conservation, the costs of these projects should be recovered with Supply rates."); AR2012-16161 (FCS) (same); *see also* SOD at 58-61 & nn.84-87. But because the WSR is a wholly discretionary mechanism for generating a pool of money that Met spends as it pleases, without even attempting to ensure proportionality between

the benefits received and who is paying for them, let alone by how much, it is a tax, which is invalid under longstanding cost-of-service principles, and is unconstitutional under Proposition 26. *See* SOD at 58-61, 65; Cal. Const. art. 13C, § 1.

It makes no sense, therefore, to condition San Diego's damages on proof that this unlawful tax could have been lawfully allocated in its entirety to Met's supply rates, or to allow Met to retroactively manufacture some purported basis for re-reallocating some part of it back to the transportation rates after all. On the contrary, the remedy for such a fundamentally unlawful tax is a complete refund. *See, e.g.*, *GM*, 69 Cal. App. 4th at 454-55 (ordering full refund of unlawful taxes); *City of Modesto v. Nat'l Med, Inc.*, 128 Cal. App. 4th 518, 525-28 (2005) (unconstitutional tax could not be cured by remand to the taxing authority or by judicial reformation); *see also Cresta Bella, LP v. Poway Unified Sch. Dist.*, 218 Cal. App. 4th 438, 453 (2013) (ordering refund of fees and refusing to reduce the refund because there was no basis for reduction in the administrative record); *Warmington Old Town Associates, L.P. v. Tustin Unified Sch. Dist.*, 101 Cal. App. 4th 840, 867 (2002) (same); *Shapell Indus., Inc. v. Governing Bd.*, 1 Cal. App. 4th 218, 244 (1991) (rejecting argument that "separation of powers demands" that the agency that set invalid fees in the first place should decide the amount of the refund).

San Diego also should recover the WSR charges Met unlawfully included in its Exchange Agreement Price from 2011 to 2014 for the additional reason that, as of June 23, 2011, Met barred San Diego from receiving any new funding for local water supply projects from the WSR, while still requiring San Diego to pay that unlawful tax throughout the damages period (and still to this day). *See* PTX-202**. And, while ***all*** of Met's WSR taxes are illegal, including those charged for Met water supply, only the WSR charges Met included in its Price for transporting or exchanging non-Met water under the Exchange Agreement from 2011 to 2014 are included in San Diego's conservative contract-damages calculation. This, along with all of the other evidence already discussed, refutes Met's contention that San Diego would be unjustly enriched by the damages award it seeks here.

Indeed, San Diego's contract damages from 2011 to 2014 do not come close to holding Met fully accountable for its nearly two decades of unjust and unlawful conduct. Met's illegal

wheeling rates date back to 1997, when Met decided to include costs that are not caused by wheeling in its wheeling rate, solely and admittedly in order to "protect Metropolitan's [other] member agencies from financial injury." DTX-680 at AR2012-2449; *see also* SOD at 37-39, 55-58. Met postponed judgment on that original unlawful wheeling rate by abandoning an earlier validation action and "unbundling" its rates instead. This bought Met time but, as the Court recognized in its Statement of Decision, Met's "unbundled" rates are illegal for the same reasons its original 1997 wheeling rate was illegal. *See* SOD at 55-58. Met also negotiated a five-year litigation timeout with San Diego in the Exchange Agreement, by virtue of which Met avoided challenges to its unlawful rates for five years, and obtained tens of millions of dollars in illegal overcharges from 2003 to 2010, which are not included in San Diego's damages calculation. Having reaped the benefits of the bargained-for five-year delay, Met now seeks to renege on it, concocting the argument that San Diego waived its right to sue for damages, despite Met's own express agreement to the contrary. *See* Exchange Agr. §§ 5.2, 11.1, 12.5, 13.9; *see also* § III.D.1, *infra*. It is not San Diego, but Met and its other member agencies that have been unjustly enriched as a result of Met deliberately and systematically overcharging San Diego for decades.

For all of these reasons, the Court should award San Diego damages consisting of all SWP costs and all WSR charges that Met unlawfully collected from San Diego under the Exchange Agreement from 2011 to 2014.

C. Met's erroneous damages theory is an invitation to reversible error.

From the outset of this case, Met has been telling this Court—and will undoubtedly tell the Court of Appeal—that anything remotely resembling "ratemaking" by this Court is reversible error. In its very first pleading, back in 2010, Met asserted that ratemaking is a quasi-legislative task that is beyond the Court's jurisdiction. *See* July 28, 2010 Answer at 2. Met has said the same thing, in one way or another, in virtually every other pleading, brief and hearing since then. For example, after the Court issued its tentative Statement of Decision on February 25, 2014, Met objected that "this Court is prohibited from substituting its judgment for that of MWD's Board of Directors or reweighing the evidence before MWD's Board when it adopted the rates," because "[r]atemaking embodies the complexity of quasi-legislative decision making and involves

balancing many competing economic and policy objectives," and "[e]ven under the most stringent standard of review that the Court stated it would apply in this case, the Court is not permitted to choose the 'best' rate structure, or the structure that any one entity or person might prefer." Met's Mar. 27, 2014 Br. at 2-3. More recently, in moving to dismiss San Diego's contract claim, Met asserted that "**COURTS DO NOT HAVE JURISDICTION TO DETERMINE WHAT LAWFUL RATES SHOULD HAVE BEEN**." Met's Jan. 9, 2015 Mot. to Dismiss at 3 (bold capitals in original).

Now, however, Met asserts that, in order to determine damages, this Court must determine what lawful rates should have been after all, and, indeed, must "decide the ***highest*** lawful rate the Board could have set." Met's Jan. 26, 2015 Br. at 1 (emphasis added). Met even goes so far as to contend that ***San Diego*** "must prove the maximum MWD could have charged." *Id.* at 7. Met is wrong about everything other than its original premise that the Court cannot set rates, let alone the "highest lawful rate."

1. California law refutes Met's "highest lawful rate" theory.

Met bases its "highest lawful rate" theory on the court's statement in *A.A. Baxter Corp. v. Colt Indus., Inc.*, 10 Cal. App. 3d 144 (1970), that "if the facts show that either of two measures of damages will fully compensate plaintiff for his loss, that measure must be adopted which is less expensive to defendant." *Id.* at 160. But Met ignores everything that case says about the prerequisites for a measure of damages that "will fully compensate plaintiff for his loss," including that it must be the measure of damages that is "***most definite and certain***"; the measure that "***affords the better and more satisfactory means of reaching an accurate and certain result***"; and the measure that "***best achieves the fundamental purpose of compensation to the injured person for his loss***." *Id.* (emphases added).

The tax refund cases cited above explain what is, and is not, a "certain" remedy.[3] In *GM*, for example, the court held that a full refund is "a clear and certain remedy," and accordingly

[3] Tax refund cases are also relevant because, under the Court's Statement of Decision, and by definition under Proposition 26, Met's unlawful rates are illegal taxes. *See* SOD at 65; Cal. Const. art. 13C, § 1.

ordered a full refund despite the defendant's argument that the refund should be limited to some lesser "illegal" amount. *GM*, 69 Cal. App. 4th at 454 (citation and quotation marks omitted). There, as here, the substantive and procedural difficulties in determining such a lesser amount "condemn it as less than 'clear and certain relief.'" *Id.* at 455. Similarly, in *Modesto*, the court held that the defendant could not collect an unconstitutional tax, and refused to remand the tax for the defendant to recalculate, or to judicially reform it, because neither of those proposed remedies was clear and certain and, in any case, courts must "steer clear of judicial policymaking." *Modesto*, 128 Cal. App. 4th at 525, 528 (citations and quotation marks omitted); *see also*, *e.g.*, *Cresta Bella*, 218 Cal. App. 4th at 453; *Warmington*, 101 Cal. App. 4th at 867; *Shapell*, 1 Cal. App. 4th at 244.

Unlike the clear and certain remedy of a full refund of the unlawful charges, Met's "highest lawful rate" theory is uncertain by design. In its motion to dismiss, Met tried to put this Court into an impossible bind, arguing that in order to determine damages, the Court ***must***, yet ***cannot***, decide rates. *See* Met's Jan. 9, 2015 Mot. to Dismiss. As the Court recognized in denying Met's motion to dismiss, Met is wrong that this Court must set rates—let alone the highest possible rates—in order to award contract damages to San Diego. *See* Feb. 6, 2015 Order at 1-2. Nevertheless, Met continues to try to manufacture a fog of uncertainty around damages in the hope that this Court will throw up its hands and refuse to award damages at all. But "California law requires only that some reasonable basis of computation be used, and the damages may be computed even if the result reached is an approximation." *SCI*, 203 Cal. App. 4th at 570 (quotation marks and ellipses omitted). "This is especially true where, as here, it is the wrongful acts of the defendant that have created the [purported] difficulty in proving the amount" of damages. *GHK*, 224 Cal. App. 3d at 874; *accord Meister*, 230 Cal. App. 4th at 397.

Indeed, Met's effort to manufacture uncertainty can only serve to create a burden for Met that, by its own admissions, it cannot carry. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. That principle is an ancient one.'" *Allen v. Gardner*, 126 Cal. App. 2d 335, 340 (1954) (ellipses omitted) (quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265

(1946)). Met violated California constitutional, statutory and common law, breached the Exchange Agreement, and "caused damage, serious damage," to San Diego, which cannot "be denied recovery simply because precise proof of the amount of damage is not available." *Id.* Where, as here, the fact of damages is proven and the plaintiff offers a reasonable computation of the amount of damages, the "'burden rests upon the defendant'" to prove that those damages should be "'reduced.'" *Meister*, 230 Cal. App. 4th at 397 (quoting *Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists*, 227 Cal. App. 2d 675, 705 (1964)); *see also* Nov. 4, 2014 CMC Order at 2 n.2 (citing *Meister*). To hold otherwise would violate the fundamental principle that "[n]o one can take advantage of his own wrong." Civ. Code § 3517.[4]

Likewise, Met bears the burden of proving any offset to San Diego's damages. *See, e.g.*, *Conrad v. Ball Corp.*, 24 Cal. App. 4th 439, 444 (1994). As discussed above, and contrary to Met's contentions, San Diego's measure of damages does not award San Diego any more than it could have gained if Met had performed its contractual obligation to include only lawful conveyance charges in the Price. To the extent Met contends otherwise, it bears the burden of proof. *See id.*; *Benard v. Walkup*, 272 Cal. App. 2d 595, 605-06 (1969). In *Benard*, for example, the defendant—like Met—argued that the measure of damages the plaintiff sought would overcompensate him, citing Civil Code section 3358 for the rule that contract damages are limited to what the plaintiff could have gained by full performance on both sides. "The rule of Civil Code section 3358 cannot be invoked, however, where there is no showing as to what the performance on both sides would have been." *Benard*, 272 Cal. App. 2d at 605. On the contrary, the "applicable rule is that which states that one whose wrongful conduct has rendered difficult the ascertainment of damages cannot complain because the court must make an estimate of damages rather than an actual computation." *Id.* at 606. Thus, Met bears the burden of proving that San Diego would be overcompensated by its measure of damages because Met might have

[4] *See also, e.g.*, *Ward v. Taggart*, 51 Cal. 2d 736, 744 (1959); *Kashmiri v. Regents of Univ. of Calif.*, 156 Cal. App. 4th 809, 849 (2007); *Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, 226 Cal. App. 3d 442, 458-59 (1990); *DePalma v. Westland Software House*, 225 Cal. App. 3d 1534, 1544-46 (1990); *C. Norman Peterson Co. v. Container Corp. of America*, 172 Cal. App. 3d 628, 646-47 (1986); *A&M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 570-71 nn.11-12 (1977); *Milton v. Hudson Sales Corp.*, 152 Cal. App. 2d 418, 434-36 (1957).

charged some higher hypothetical lawful rate. But Met cannot carry that burden given its own failure to set a lawful rate in the first place, and its own contention that "**COURTS DO NOT HAVE JURISDICTION TO DETERMINE WHAT LAWFUL RATES SHOULD HAVE BEEN**." Met's Jan. 9, 2015 Mot. to Dismiss at 3 (bold capitals in original); *see also* Dec. 3, 2014 Order at 2 (Met should not ask the Court "to conduct a trial on a theory of damages which it contends [the Court has] no power or jurisdiction to do"); Nov. 4, 2014 Order at 1-2 (same).

In any event, far from requiring the Court to engage in the kind of ratemaking Met itself has always argued would be reversible error, California law simply requires the Court to choose the measure of damages that "best achieves the fundamental purpose of compensation to the injured person for his loss," *A.A. Baxter*, 10 Cal. App. 3d at 160, without allowing the wrongdoer to "take advantage of his own wrong." Civ. Code § 3517; *see also, e.g.*, *Benard*, 272 Cal. App. 2d at 605-06. San Diego's measure of damages satisfies those fundamental principles, as discussed above, whereas Met's damages theory violates them, and should therefore be rejected.

It is also worth noting that what Met is asking for amounts to a one-way advisory opinion, which Met would use against San Diego in future ratemaking cycles to the extent it favors Met, and ignore to the extent it does not. "The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court." *People ex rel. Lynch v. Superior Court*, 1 Cal. 3d 910, 912 (1970). When it came time last April for Met to set rates for 2015 and 2016, Met completely ignored the Court's Statement of Decision, and did not even consider making any changes to a rate allocation that had been adjudicated illegal. Accordingly, it is clear that, if this Court were to "decide the highest lawful rate," as Met is asking it to do, that rate instantly would become the floor for Met's future rates going forward, not the ceiling. It is equally clear that Met would defend against any subsequent challenge to its rates by claiming this Court's advisory opinion had already blessed Met's approach, even though this Court has never been presented with an administrative record supporting any hypothetical alternative rates Met may offer. The Court should decline Met's invitation to offer an advisory opinion that Met itself contends is beyond the Court's power to provide.

2. Met's highest-rate theory contravenes the Wheeling Statutes and other "applicable law and regulation."

Furthermore, even if this Court could "decide" a lawful rate—which, it cannot, as Met itself has long argued—Met's contention that the Court must decide and rely on the ***highest*** rate contravenes the Wheeling Statutes. It is "the established policy of this state to facilitate the voluntary transfer of water and water rights," and the legislature has accordingly directed "the Department of Water Resources, the State Water Resources Control Board, and all other appropriate state agencies to encourage voluntary transfers of water and water rights." Water Code § 109. The Wheeling Statutes further this policy by providing that any public agency setting a wheeling rate "shall act in a reasonable manner consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange of water." Water Code § 1813. Likewise, the "court shall give due consideration to the purposes and policies of this article." *Id.*

This Court already found that Met violated the Wheeling Statutes by adopting a wheeling rate with the goal that it "**not negatively impact the rates or charges to any other Member Agencies**." SOD at 57 (quoting AR2010-1222 at 1234) (emphasis in original). Now, Met is inviting this Court to make the same error: to adopt a wheeling rate that returns the maximum possible amount to Met, rather than giving "due consideration to the purposes and policies of" the Wheeling Statutes "to facilitate the voluntary sale, lease, or exchange of water." Water Code § 1813. For example, Met apparently intends to base the power component of its "highest lawful rate" on the expensive spot-market price for on-peak power. See Mar. 16, 2015 Decl. of Jon C. Lambeck. But that rate would not be "lawful" at all because Met has not shown and cannot show that wheeling in general, or the Exchange Agreement in particular, actually caused Met to pay those expensive power rates. In fact, the notion that Met would pay on-peak, spot-market power rates because of the Exchange Agreement is absurd because, under the Exchange Agreement, Met receives regularly-scheduled deliveries of water from San Diego, and makes regularly-scheduled deliveries of water to San Diego, and has absolutely no reason to, ***and does not***, buy power at the expensive "last minute" spot-market rate to make regularly-scheduled deliveries under the Exchange Agreement. For Met to charge San Diego, or wheeling parties in general, such

expensive power rates, absent proof that wheeling (or exchange) actually caused Met to incur those costs, violates the Wheeling Statutes' requirement that Met charge no more than "increased costs from any ***necessitated purchase*** of supplemental power, and including reasonable credit for any offsetting benefits for the use of the conveyance system." Water Code § 1811(c) (emphasis added).

More generally, Met's proposed rates violate the cost-causation principles that, as the Court already recognized in its Statement of Decision, are enshrined not only in the Wheeling Statutes, but also the California Constitution (through Proposition 26), Government Code § 54999.7(a), and California common law. See SOD at 47, 52, 65. Met's litigation-driven rates would also breach the Price term's requirement that charges must be set "pursuant to applicable law and regulation." Exchange Agr. § 5.2. This is true not only because Met's proposed rates violate substantive law for the reasons already discussed, but also because those rates cannot possibly comply with the procedural and administrative requirements of applicable law and regulation, including public notice and an opportunity to comment, a complete administrative record, and a vote by Met's Board of Directors.

3. Federal courts have explicitly rejected Met's highest-rate theory.

Federal cases, though not controlling, also have rejected ***exactly*** the argument Met presents here: that damages in a rate case must be based on the highest lawful rate. In *Oneida*, for example, the court expressly rejected the argument "that the only proper measure of damages" is the difference between the rate charged "and the maximum reasonable rate." *Oneida*, 45 F.3d at 507 (quotation marks omitted). As in California law, damages need only have a reasonable basis. *See id.* at 507-08; *see also, e.g.*, *Meister*, 230 Cal. App. 4th at 397. As long as damages are reasonable—as the damages San Diego seeks undoubtedly are—they need not and, for the sake of fairness, should not be based on the "maximum reasonable rate." *See Oneida*, 45 F.3d at 507-08.

Similarly, in *MCI Telecommunications Corp. v. F.C.C.*, 59 F.3d 1407 (D.C. Cir. 1995), the court held that to require the plaintiff to establish such a rate "would be to ask of it the very thing that the [defendant] was itself unable to do," which would be both "inequitable" and "absurd." *Id.* at 1415. Given that the defendant, "with its superior information, could not (or did

not) accurately establish such a rate, then it seems obvious that the [plaintiff] could not (or should not be expected to) establish such a rate from the outside looking in." *Id.*

Nor should the defendant be allowed an ***offset*** based on its contention that the plaintiff was undercharged for ***some other rate***. "By awarding an offset" based on another category of service, the Court "effectively allows the [plaintiff] alone to be charged for the offsetting category of service at a rate above what others paid for it," which "is inconsistent with the statutory and regulatory goal of preventing discrimination." *Id.* at 1419; *see also* Water Code § 109-134 (rates "shall be uniform for like classes of service throughout the district").

The exact same analysis applies here. Met has argued that if it had not included its unlawful SWP and WSR charges in the transportation rates on which the Exchange Agreement Price is based, then San Diego would have paid more in extra-contractual supply rates. But if the Court were to, in effect, adopt a higher supply rate for purposes of Met's purported offset, it would be a supply rate for San Diego alone, which would be "inconsistent with the statutory and regulatory goal of preventing [rate] discrimination." *MCI*, 59 F.3d at 1419; *see also* Water Code § 109-134. Met's other 25 member agencies paid Met's actual supply rates for the years at issue, and it is beyond the scope of the Exchange Agreement, which deals only with transportation rates charged to San Diego, to require those other member agencies to pay their share of a judicially-created higher supply rate, as they would have to under Met's supply-rate offset theory to prevent even more unfair and unlawful rate discrimination against San Diego. *See id.*

Further, as San Diego has explained before, if Met had conducted the analysis that is necessary in order to establish and prove a cost-causation basis for the WSR, for example, it might have abandoned that unlawful tax and program completely;[5] or collected more revenues from property taxes; or collected revenues and paid for local water supply projects on a per-

[5] It is important to bear in mind that, as Met admits, it is not required to subsidize demand-management programs. *See* Met's First Pretrial Br. at 75 (Met concedes that it could "discontinu[e] its investment in local conservation and resource development projects"). And Met certainly need not collect funds for such subsidies through the WSR or any other rate—particularly given its admitted failure to even consider the proportional or regional benefits of "water stewardship," which is not a "service" at all, but merely a euphemism for collecting money from all of its member agencies (including San Diego), which Met distributes however it sees fit (but not to San Diego).

project basis, with the costs assessed on the member agencies that actually benefit from those supply programs. Met certainly could not have collected the tax from San Diego while barring San Diego from receiving the benefits. San Diego also might have wheeled more non-Met water given a lower, lawful wheeling rate. And, again, any offset based on a higher supply rate must contend with the fact that all 26 Met member agencies must pay that same rate for the years at issue. Met's contention that San Diego would have paid more in extra-contractual supply rates would, therefore, mire the Court in "guesswork which has little probative value," if any, and drag the Court into Met ratemaking. *DePalma*, 225 Cal. App. 3d at 1544.

For all of these reasons, the Court should reject Met's erroneous damages theory and adopt, instead, the measure of damages proposed by San Diego, which follows from the Exchange Agreement, the evidence, the Court's Statement of Decision, and the law.

D. Met's affirmative defenses have no merit.

Met has indicated that it intends to try the following affirmative defenses: waiver, consent, estoppel, mistake of law, illegality of contract, offset and unjust enrichment. Nov. 25, 2014 CMC Statement at 13.[6] Met's offset and unjust enrichment defenses are subsumed within its erroneous damages theory, which San Diego refuted above. Met's other defenses are equally meritless.

1. Met's waiver, consent and estoppel defenses fail as a matter of law and fact, including the express terms of the Exchange Agreement.

Met's purported defenses of waiver, estoppel, and consent all turn on the notion that, despite entering into a contract specifically preserving its right to sue beginning in 2008, and despite repeatedly objecting to Met's illegal rates between 2003 and the filing of the first of these lawsuits in 2010, San Diego somehow waived its right to sue, consented to being charged Met's illegal rates, and is estopped from bringing this action. Met is wrong. Indeed, Met admitted as much in Phase I, when it asserted that "the threat of future litigation was made explicit by SDCWA in the context of negotiating" the Exchange Agreement, in which San Diego "reserved its right to challenge the validity of MWD's rates," and "openly threatened to litigate over

[6] Met also indicated that it might assert a "timeliness" defense, which "can be resolved by briefing." Nov. 25, 2014 CMC Statement at 13, 15-16. To date, Met has not filed any motion or brief asserting any timeliness defense, which Met has therefore waived.

MWD's existing rate structure and destabilize MWD's rates." Met's Oct. 18, 2013 First Pretrial Br. at 14. The testimony and evidence presented in the Phase I trial further confirms that San Diego has consistently and continuously complained about Met's illegal rates, in both correspondence and in meetings, for the same reasons asserted in this action, from "as far back as the 1990s." *See, e.g.*, Trial Tr. 219:25-221:6, 258:9-263:17 (Cushman); *see also* PTX-22, PTX-38**, PTX-44**, PTX-55**, DTX-49 at AR2012-7121-23, AR2010-11454-64.

Furthermore, the Exchange Agreement itself provides that "[n]o waiver of a breach, failure of condition, or any right or remedy contained in or granted by the provisions of this Agreement is effective unless it is in writing and signed by the Party waiving the breach, failure, right or remedy," and that if "the non-breaching party fails to exercise or delays in exercising such right or remedy, [it] does not thereby waive that right or remedy." Exchange Agr. §§ 12.5, 13.9. Consistent with these non-waiver provisions, San Diego specifically preserved its right to challenge Met's unlawful rates and the Price term in the Exchange Agreement following a five-year litigation timeout, during which San Diego agreed not to contest in any "administrative or judicial forum" whether Met's transportation rates and the Price term were set "in accordance with applicable law and regulation." *See id.* §§ 5.2, 11.1.

Indeed, as the Court found in connection with Met's failed motion for summary adjudication on the same issue, "the five-year cooling off period in the Exchange Agreement … supports the inference that San Diego intended to retain the ability to challenge [Met's] rates under applicable law after the end of that period." Dec. 4, 2013 Order at 4 n.9. The fact that "San Diego paid its bills under the contract and did not bring a legal challenge to the 2003-2007 rates … is not a concession that the rates complied with law, only that San Diego was complying with the five year hiatus agreement." *Id.* at 4. "The written [Exchange Agreement] must therefore be regarded as controlling, for written contracts cannot be set aside and implied agreements substituted therefor if the conduct of the parties was not clearly contrary to the terms of the written contract." *Garrison v. Edward Brown & Sons*, 25 Cal. 2d 473, 480 (1944).

Moreover, even if there was a waiver, which there was not, "no waiver will constitute a continuing waiver unless the writing so specifies," and there is no writing so specifying.

Exchange Agr. § 13.9.[7] Met has a continuing obligation under the Exchange Agreement to provide water to San Diego at a Price comprised of lawful transportation rates. *See* Exchange Agr. §§ 5.1, 5.2. Each Met rate-setting cycle constitutes an independent legal event, subject to new legal challenge. *See Barratt Am. Inc. v. City of Rancho Cucamonga*, 37 Cal. 4th 685, 703-04 (2005); *Arcadia Dev. Co. v. City of Morgan Hill*, 169 Cal. App. 4th 253, 262-64 (2008). Thus, even if Met could establish waiver, estoppel or consent with regard to water rates set prior to 2010 that are not challenged in this litigation—which it cannot—San Diego still would not be precluded from asserting subsequent breaches based on Met's unlawful 2011-2014 rates.

For all of these reasons, Met's defenses of waiver, estoppel and consent must fail.

2. Met's illegality and mistake defenses also fail as a matter of law.

The premise of Met's illegality defense is that the ***Exchange Agreement*** is illegal because Met's ***rates*** are illegal. Nonsense. "It is 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). Met does not dispute that it could have charged a lawful Price. Indeed, Met has never disputed—and cannot reasonably dispute now—that it could have lawfully charged a Price that simply omitted the SWP and WSR components that, under the Statement of Decision, Met had no lawful basis for including. As discussed above, all of the relevant evidence in the record proves that Met could and should have done exactly that. While Met argues that it might have charged some other, unspecified, "highest lawful rate" (which is wrong for all of the reasons discussed above), the underlying premise of even that argument is that there must have been some lawful Price Met could have charged. Because neither the Exchange Agreement nor its Price term are illegal, Met's illegality defense fails as a matter of

[7] This is true not only under the express terms of the Exchange Agreement, but also as a matter of law. *See, e.g., Romano v. Rockwell Int'l, Inc.*, 14 Cal. 4th 479, 489-90 (1996); *Woodward v. Glenwood Lumber Co.*, 171 Cal. 513, 523 (1915); *Citizens for Goleta Valley v. HT Santa Barbara*, 117 Cal. App. 4th 1073, 1077-78 (2004); *Call v. Alcan Pac. Co.*, 251 Cal. App. 2d 442, 447-48 (1967); *Budaef v. Huber*, 194 Cal. App. 2d 12, 20 (1961); *Bowman v. Santa Clara County*, 153 Cal. App. 2d 707, 713 (1957); *Extension Oil Co. v. Richfield Oil Corp.*, 52 Cal. App. 2d 105, 110 (1942); 1 WITKIN, SUMMARY OF CAL. LAW § 857(2).

law. *See id.*[8]

Similarly, Met contends that it made a "mistake of law" by charging illegal rates. But "mistake of law" is not a defense whenever a defendant's conduct is found to be illegal, or a breach of contract, or—as here—both. Mistake of law is a defense to a contract claim "only when it arises from" a "misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law," or a "misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify." Civ. Code § 1578; *see also*, *e.g.*, *Dowling v. Farmers Ins. Exch.*, 208 Cal. App. 4th 685, 699 (2012); *Hedging Concepts, Inc. v. First Alliance Mortg. Co.*, 41 Cal. App. 4th 1410, 1421 (1996). The mistake Met made by charging illegal rates does not fall into either of those categories. On the contrary, as already discussed, the parties here disagreed about the law all along, and San Diego repeatedly tried to rectify Met's illegal rates, but Met insisted on imposing them over San Diego's objections.

Met made a business decision to include its SWP and WSR charges in the Exchange Agreement Price, and took the risk that it would be ordered to refund those unlawful charges in damages after the first five years. San Diego, on the other hand, took the risk that Met's charges would be upheld and San Diego would be required to pay them for more than five years. The fact that this Court ultimately agreed with San Diego and found Met's underlying transportation rates to be unlawful is not a defense to San Diego's claims for breach of contract. *See* Civ. Code § 1578; *Dowling*, 208 Cal. App. 4th at 699; *Hedging Concepts*, 41 Cal. App. 4th at 1421; *Freeman*, 125 Cal. App. 2d at 546. After decades of ignoring San Diego's attempts to convince Met to rectify its mistakes and set lawful rates, Met must finally pay for the injuries it caused by refusing to do so—or, at least, pay the limited portion of those injuries that falls within San Diego's conservative measure of damages.

[8] Moreover, if the Exchange Agreement were illegal (which it is not), San Diego would be entitled to a full refund of all consideration, whereas Met would be barred as a matter of law from seeking any offset. *See, e.g., R. M. Sherman Co. v. W. R. Thomason, Inc.*, 191 Cal. App. 3d 559, 563 (1987); *Marshall v. La Boi*, 125 Cal. App. 2d 253, 268 (1954). Thus, Met's argument is not only nonsensical, but self-defeating.

E. The Court should rule for San Diego on preferential rights because San Diego does not "purchase water" when it purchases wheeling or exchange services for water it already owns.

Finally, the Court should rule for San Diego on preferential rights. The parties previously agreed that the preferential-rights issue "can be resolved as a matter of law." June 26, 2014 Joint CMC Statement at 15:15. But Met has reversed course, and now apparently intends to present live testimony on this legal issue. *See* Met's Feb. 24, 2015 Supp. Witness Statement. That testimony is unlikely to be helpful, or even admissible, because Met was right the first time: the preferential-rights issue is a matter of law for this Court to decide.

San Diego's claim for declaratory relief on preferential rights presents a straightforward legal question: does the phrase "purchase of water" in the Met Act apply to the Exchange Agreement and other wheeling contracts? *See* Water Code § 109-135. In determining each Met member agency's statutory right to water—*i.e.*, the amount of Met water to which that member agency is always entitled on demand—Met must calculate each member agency's percentage contribution to Met's historical revenue (dating back to the beginning of Met), "excepting purchase of water." *Id.* The meaning and interpretation of that phrase—"purchase of water"—is the main dispute between the parties, because Met arbitrarily excludes from its calculation of San Diego's preferential rights the money that San Diego has paid and continues to pay Met under the Exchange Agreement and other wheeling contracts for water transportation services. Wheeling contracts, however, are by definition ***not*** contracts for the "purchase of water," but for the transportation of water purchased from a third party. The same is true of the Exchange Agreement, as this Court has already recognized: "San Diego has already paid *someone else* (a third party such as Imperial) for the 'purchase of water.'" Dec. 4, 2013 Order at 7 (emphasis in original).

Thus, neither the Exchange Agreement in particular nor wheeling contracts in general are for the "purchase of water." Rather, San Diego is paying Met to transport (or exchange) water San Diego purchases elsewhere. Met's witnesses cannot reasonably dispute that fact. San Diego will further explain this, as necessary, after hearing what (if anything admissible) Met's witnesses have to say. But the bottom line is simple: this Court should declare that, pursuant to the terms of

the Met Act, the money San Diego has paid and will pay under the Exchange Agreement and other wheeling contracts counts toward San Diego's statutory preferential rights to water.

IV. CONCLUSION

For all of these reasons, and as San Diego will prove at trial, the Court should rule for San Diego in Phase II.

Dated: March 23, 2015

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PROOF OF SERVICE

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 March 23, 2015, I served the following document(s):

SAN DIEGO'S PRETRIAL BRIEF FOR THE PHASE II TRIAL

☑ By **ELECTRONICALLY SERVING** the document via File & ServeXpress as described above on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Executed on March 23, 2015, 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.

Maria S. Canales