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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

REPLY BRIEF RE: SAN DIEGO'S MOTION TO STRIKE

Date: June 5, 2015
Time: 2:00 p.m.
Dept.: 304

Judge: Hon. Curtis E.A. Karnow

Date Filed: June 11, 2010
June 8, 2012

Trial Date: March 30, 2015

I. INTRODUCTION

San Diego's motion to strike urged this Court to exclude from the trial record testimony and evidence that this Court has already determined is "irrelevant," "completely incoherent," and wholly lacking in foundation, or constitutes legal conclusions that are the province of this Court to decide. Met's response is a combination of "You're too late" and "Who cares?" But it's not too late, San Diego cares, and this Court should, too. San Diego has spent much of the last year opposing Met's attempts to re-open and expand the scope of expert testimony in this case, both with witnesses formally designated as experts and through percipient witnesses acting as undisclosed experts. San Diego successfully opposed Met's motion to re-open expert discovery; moved in advance of trial to exclude Met's proposed testimony on previously-undisclosed hypothetical power costs and what an "alternative rate structure" might be; repeatedly objected to such testimony during trial, and then orally moved to strike it. Rather than rule on San Diego's motions mid-trial, the Court instead utilized an approach by which it would hear Met's testimony, subject to San Diego filing a motion to strike at the end of trial. That is precisely what San Diego has done, and Met's claims of untimeliness ignore the Court's explicit instructions. This Court should exercise its authority to keep the incoherent, baseless, and inadmissible passages identified in the Lambeck Declaration out of the record that will be certified to the Court of Appeal.

Likewise, Met's attempt to insert into the Phase II record the entire Woodcock report—which is both inadmissible hearsay and the very sort of opinion testimony Met successfully moved to keep out of Phase I—should be rejected. The bulk of Mr. Woodcock's expert report had nothing to do with Phase II. Instead, it addressed whether Met's 2011-2014 transportation rates were "reasonable" and consistent with cost-of-service requirements. Met presumably wants it in the trial record so that, in the appellate briefing, Met can point to Mr. Woodcock's opinions as purported support for Met's arguments to reverse this Court's Phase I decision. But the Phase I trial is over, and Mr. Woodcock's opinions were not part of that trial record—at Met's own request. The Court should, at a minimum, excise from Mr. Woodcock's report and testimony his opinions about whether Met's existing rates and cost allocations are "reasonable" or "proper."

II. ARGUMENT

A. San Diego's Motion to Strike Portions of the Lambeck Declaration is Timely and Should be Granted.

The fundamental problem with the portions of the Lambeck Declaration San Diego moves to strike is that they lack foundation and are not based on percipient knowledge, as Mr. Lambeck's live testimony demonstrated. For example, at trial, Mr. Lambeck attempted to explain the factual basis for the numbers in paragraph 12 of his declaration, through a document marked as DTX-1103.[1] *See* Trial Tr. at 1720:25-1723:23. The Court, in sustaining San Diego's objection to the admission of that document, stated:

> The reason I am sustaining it, in particular, the description of what went into this is completely incoherent. The bases that were described that generate all these numbers, it is completely incoherent. I couldn't even understand what goes into 2.349 or why it is this witness has this information or what the bases are. I think it is irrelevant.

Trial Tr. at 1724:11-18. Mr. Lambeck's calculation of the supposed kilowatt-hours of energy required to convey an acre-foot of Met water through the Colorado River Aqueduct is undisclosed and unsubstantiated expert testimony, the Court was right to exclude it during live testimony, and it should be stricken from paragraph 12 of the Lambeck Declaration as well. The same is true for Mr. Lambeck's calculation of "administrative costs," which was the subject of paragraph 15 of the Lambeck Declaration. Met's attempt, during trial, to lay a foundation for the administrative cost calculation in paragraph 15 only confirmed that this was undisclosed expert testimony, and the Court sustained an objection on that ground. Trial Tr. at 1749:11-1752:13. Likewise, during trial, Mr. Lambeck repeatedly acknowledged that he lacked foundation to extrapolate an "actual power cost" from the Platt's Reports, which is the same extrapolation he attempts in paragraph 14 of the declaration. *See* Trial Tr. at 1715:7-1718:24, 1769:4-23, 1782:8-1783:5. And, finally, Mr. Lambeck admitted, in response to the Court's questioning, that he did not possess sufficient percipient knowledge of the Department of Water Resources' power costs and sources to testify about them (paragraph 17 of his declaration). Trial Tr. 1752:14-1756:8. On this issue, the Court not only sustained San Diego's objection but immediately struck Mr. Lambeck's prior testimony

[1] The Lambeck Declaration, with objectionable sections highlighted, was Exhibit D to the Motion to Strike.

on the subject. *Id.* Indeed, for each of the four paragraphs (or portions of paragraphs) that San Diego moves to strike, the Court has already found that Mr. Lambeck lacked foundation to testify to those facts, and/or that they constituted undisclosed expert testimony.

Met attempts to resuscitate Mr. Lambeck in its Opposition by positing that he has personal knowledge "regarding the purchase, sale, and operations of MWD's power portfolio" (Opp. at 2:18-19) and that his "declaration covers materials within his knowledge" (Opp. at 3:7-8). Those assertions may be true in some general sense, but they do not establish that he had a foundation to testify to the specific statements in paragraphs 12, 14, 15, and 17. On the contrary, the Court already found that he did not. *See supra.* Given the Court's rulings that these very statements by Mr. Lambeck were inadmissible when offered in his live testimony, they are equally inadmissible when presented in written form.

Met's related attempt to evade the fact that it failed to produce in discovery the purported cost information in the Lambeck Declaration also fails. Met argues that San Diego merely asked for what "MWD had *actually charged* SDCWA," not the "entirely different question of what MWD *could have charged* SDCWA." Opp. at 3:17-19 (emphases in original). For starters, Met misstates the discovery. San Diego sought all "documents, data, analyses, calculations, studies or other information that detail or evidence ***MWD's specific costs of delivering, to SDCWA, SDCWA's conserved water from IID and canal-lining water supplies***," and its "***costs of transporting non-MWD water***." *See* PTX-235A, Interrogatory No. 20, Interrogatory No. 8 (emphases added). If, as Mr. Lambeck effectively conceded at trial, his testimony had nothing to do with Met's actual power costs, his testimony is irrelevant, and therefore inadmissible, because Met cannot charge San Diego for costs San Diego did not actually cause Met to incur. *See generally* Phase I Statement of Decision. But if Met contends that Mr. Lambeck's testimony does relate to actual costs, and Met possessed information about those purported costs during discovery, Met was required by the Court to provide such information, or be precluded from doing so at trial. *See* Mot. to Exclude, Ex. M (Apr. 23, 2013 Tr.), at 11:26-12:7, 21:17-27, 24:12-25:2, 34:20-35:2. And if Met did not possess that information back in 2013 but generated it solely for trial (as Met now apparently contends), the cost analyses proffered by Mr. Lambeck are

undisclosed expert testimony. Under any analysis, Met is barred from presenting this evidence.

Unable to provide any substantive reason why this testimony should ***not*** be stricken, Met argues that San Diego's motion is untimely. Opp. at 1-2. But San Diego's post-trial motion is exactly what the Court proposed, during trial, for dealing with San Diego's motion to exclude the foundational-less undisclosed expert testimony of Mr. Lambeck and Ms. Skillman:

> I think we will have a much better record if instead of trying to project what the witness is going to say or do or what the bases are or where the information surely must have come from, the best thing is just to have the record. We have this great benefit where we can do this and we have this stuff coming in subject to a motion to strike. . . . I think, really, the fastest way, the most efficient way to do it is find out where the witness got this stuff.

Trial Tr. at 1658:14-25; *see also id.* at 1759:19-1760:6 (Court suggesting that San Diego's motion to strike "Mr. Lambeck's testimony in its entirety"—which included his written testimony—would be "better to do after the fact," *i.e.*, in a post-trial motion). This "procedure of admitting evidence conditionally by either reserving its ruling on the objection or by admitting the evidence subject to a motion to strike is proper where the trial court is not in a position to determine, whether in the light of all the offered evidence, the item objected to will turn out to be admissible." *Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.*, 3 Cal. 3d 434, 443 n.6 (1970). Such was the case here. And, unlike the motions to strike in the two criminal cases Met cites in its Opposition, San Diego did not wait until days after trial to move to strike Mr. Lambeck's declaration,[2] or wait to see whether the answer was unfavorable before objecting.[3] San Diego objected to Mr. Lambeck's testimony—repeatedly—before, during and after Mr. Lambeck testified, and specifically moved at trial to strike these same portions of Mr. Lambeck's declaration once it became clear that he had no foundation for them. *See* Trial Tr. at

[2] *See People v. Demetrulias*, 39 Cal. 4th 1, 21-22 (2006) (defendant's motion to strike was made "days afterward" and on different grounds than any contemporaneous objections).

[3] *See People v. Perry*, 7 Cal.3d 756, 781 (1972) (denying motion to strike where "the question asked by the prosecutor was such that the answer from defendant would necessarily contain inadmissible evidence, but defense counsel did not object until defendant gave an unfavorable response").

1811:13-1812:17.[4] San Diego's motion to strike was not just timely—it was filed exactly when the Court asked for it, and in the form the Court asked for.

B. The Woodcock Report, and Three Portions of His Testimony, Should be Stricken.

Met does not dispute that the Woodcock report (DTX-123) is hearsay, and does not proffer any hearsay exception that would overcome the long-standing rule that expert reports are inadmissible. *See, e.g., Eddins v. Redstone*, 134 Cal. App. 4th 290, 317 n.24 (2005); *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1262 (9th Cir. 1984). The only basis that Met advanced at trial for why the Woodcock report should come in over San Diego's hearsay objection—because Mr. Denham's expert report had been admitted—was factually inaccurate, as San Diego pointed out during trial (Trial Tr. at 1895:7-23) and in its motion papers, and Met does not dispute in its Opposition. Met now argues, however, that the hearsay problem is nothing to worry about because the Court permitted the parties to present direct testimony by declaration. Opp. at 4:20-25. But Met did not actually present Mr. Woodcock by declaration,[5] Mr. Woodcock's expert report was not sworn under penalty of perjury, and if Met had tried to submit his expert report as "written testimony," San Diego would have objected for the same reasons it objects now.

Met also misstates the facts when it claims that this portion of San Diego's motion is untimely because, during trial, San Diego "made objections to only specific portions" of the Woodcock expert report. Opp. at 4:26-28. Quite the contrary. *See* Trial Tr. at 1866:12-15 (MR. KEKER: We don't have any objection to the resume coming in with the list ***but the report itself is hearsay and shouldn't be in evidence.*** He should testify." (emphasis added)). Later, San Diego again moved to strike the entire report as hearsay, and noted that the Court should "***at least*** . . . exclude that part of the report" about what is or is not a lawful rate. Trial Tr. at 1895:7-18

[4] Met's statement that San Diego, in its pretrial motion, had only moved to exclude certain DTX exhibits but not the substance of Mr. Lambeck's testimony, Opp. at 1:23-25, is simply false. San Diego, in its Motion to Exclude, specifically identified, and asked the Court to exclude, the proposed testimony of Mr. Lambeck about Met's "market power costs that MWD would charge to transport" Exchange Water. *See* Mot. to Exclude at 5:6-7, 7:8-16.

[5] The Court's February 27, 2015 Case Management Order allowed either party to submit direct testimony by written declaration. Met submitted trial declarations for Mr. Lambeck and for Deven Upadhyay, but not for Mr. Woodcock.

(emphasis added). That is the same position San Diego takes now. Expert reports are inadmissible hearsay, but should the Court choose to allow some portion of the Woodcock expert report into evidence, the Court should strike the large portions of the report dedicated to the question of whether Met's 2011-2014 rates are reasonable and proper. *See* Mot. to Strike at 8-9.

Met's argument that the Woodcock report nonetheless should be allowed into evidence because it merely addresses whether Met's rates "comport with proper cost accounting principles" (Opp. at 5:14-17), and not with whether the rates are lawful, is both wrong as a factual matter and would drive a truck through the Court's December 2013 *in limine* order. In Met's successful motion to exclude expert testimony from Phase I, Met argued that the sort of testimony that should be excluded from trial included: whether "State Water Project costs are 'source of supply costs for MWD'," and whether Met should be able to charge the Water Stewardship Rate as a transportation rate. Mot. to Exclude Ex. F (Dec. 3, 2013 Met Mot. in Limine) at 7. Those are the same topics on which Mr. Woodcock opines in his report, which is why the Court, to create a "level playing field," excluded Mr. Woodcock from testifying on those same topics in Phase I. Tr. at 4:23-5:11. While Met points out that the Court left open the possibility that an expert could testify about factual matters, Opp. at 5, Mr. Woodcock's views about the propriety of Met's categorization of State Water Project costs or demand management programs in its current rates are not questions of fact—they are questions of law reserved for the Court. *See* Mot. to Exclude Ex. F at 6-8; Nov. 5, 2013 Pretrial Rulings at 17.

The same *in limine* ruling should exclude Mr. Woodcock's oral testimony about whether Met's 2011-2014 rates, and the cost of service reports created for them, allocated costs in an "appropriate" manner, or whether certain facts about the State Water Project "make any difference . . . from a rate-making perspective." Trial Tr. at 1869:16-21, 1882:6-1883:4, 1903:4-25. Mr. Woodcock was not offering opinions to assist the Court in evaluating damages in light of the Phase I decision. On the contrary, Met's counsel asked him to "put aside" the Court's Phase I decision before offering these opinions. Trial Tr. at 1869:16-21. As such, Mr. Woodcock's answers to these three questions cannot be relevant in Phase II, and should be stricken.

III. CONCLUSION

For the foregoing reasons, San Diego's motion should be granted; the Woodcock report should be stricken in its entirety, or at least as indicated in the [Proposed] Order; and the identified portions of the Lambeck Declaration and the Woodcock testimony should be stricken as well.

Respectfully Submitted,

Dated: May 29, 2015

KEKER & VAN NEST LLP

By: */s/ Warren A. Braunig*
WARREN A. BRAUNIG

Attorneys for Plaintiff
SAN DIEGO COUNTY WATER AUTHORITY

PROOF OF SERVICE BY ELECTRONIC TRANSMISSION

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 May 29, 2015, I served the following documents described as:

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

BY FILE & SERVEXPRESS

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

Executed on May 29, 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.

Lauren Hartz-Lewis

Lauren Hartz-Lewis