SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY, Plaintiff/Petitioner, vs. METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA, et al. Defendants/Respondents.	Case No. CFP-10-510830 Case No. CFP-12-512466 ORDER DENYING DEFENDANTS'/RESPONDENTS' MOTION FOR A NEW TRIAL

I heard argument on December 17 on Metropolitan's Motion for New Trial.[1] The motion is denied.

Requests for Judicial Notice

Met requests judicial notice of three documents: (1) excerpts from the official November 2010 General Election Ballot Pamphlet, relevant to Proposition 26; (2) a San Francisco Superior Court Order Denying Petition for Writ in *Cal. Bldg. Indus. Association,* Case No. CGC 11-516510, from September 20, 2012; and (3) a printout of the California Supreme Court Case

[1] There are joinders: Las Virgenes Municipal Water District, West Basin Municipal Water District, Foothill Municipal Water District, Eastern Municipal Water District, Western Municipal Water District, Three Valleys Municipal Water District, and the City of Los Angeles join Met as to the request for a new Phase I trial, and Sections II and III of its MPA in support of its Motion. Municipal Water District of Orange County joins the Motion as to the issues concerning San Diego's first through third causes of action. Las Virgenes Municipal Water District, West Basin Municipal Water District, Foothill Municipal Water District, Eastern Municipal Water District, and Western Municipal Water District (the Member Agencies) also move separately for a new trial. Their motion is joined by Three Valleys Municipal Water District and Municipal Water District of Orange County.

Information website for the Case Summary of *Cal. Bldg. Indus. Ass'n v. State Water Res. Control Bd.*, Supreme Court Case No. S226753. The requests are unopposed and are granted. Evid. Code § 452(c), (d), and (h).

The Member Agencies request judicial notice of two documents: (1) excerpts from the official November 1996 General Election Ballot Pamphlet, relevant to Proposition 218; and (2) excerpts from the official November 2010 General Election Ballot Pamphlet, relevant to Proposition 26. The requests are unopposed and are granted. Evid. Code § 452(c) and (h).

Discussion

A. Phase I Ruling

Met complains that the Court's Phase I Statement of decision (SOD) is "against the law" because it is inconsistent with *Goodman v. Cnty. of Riverside*, 140 Cal.App.3d 900 (1983), and with Proposition 26.

Met noted at the hearing that it raised *Goodman* in its trial brief. This is true. *See* Oct. 18, 2013 Pretrial Brief, 31-32, n. 13. However, Met did not cite *Goodman* for the reasons now offered. It also discussed *Goodman* in its March 23, 2015 Trial Brief – long after I issued my Phase I Statement of Decision. Similarly, Met did not previously raise § (e)(1) of Proposition 26, and its only mention of § (e)(2), as San Diego notes, was a comment disagreeing with my "finding that Proposition 26's (e)(2) exception does not apply." Opp., 2.

1. *Waiver*

San Diego suggests Met waived arguments by failing to include them in its objections to the tentative Phase I SOD. But § 634 explicitly permits raising omissions or ambiguities in a motion for new trial, even if they might have been raised as objections. Anyway, Met does not

really raise such an objection now; it raises new legal theories. *Hoffman-Haag v. Transamerica Insurance Co.*, 1 Cal.App.4th 10, 15 (1991).

San Diego next argues that I have discretion, and need not entertain these late arguments and new legal theories. *Stevens v. Owens-Corning Fiberglas Corp.*, 49 Cal.App.4th 1645, 1654 (1996); *Richmond v. Dart Indus., Inc.*, 196 Cal.App.3d 869, 879 (1987). I agree that these arguments have been waived: both Met's current approach to *Goodman* and the Proposition 26 exceptions could have been raised earlier. The cost causation argument Met makes now is not what it has previously argued. *Miller v. Nat'l Am. Life Ins. Co.,* 54 Cal. App. 3d 331, 346 (1976) (waiver of new trial grounds when counsel makes strategy decision). Granting a new trial now on these bases would create exactly the wrong incentives: parties would be encouraged to try out one theory and then after it fails ask for a do-over based on a different theory.

As an alternative basis for my decision, below I reject Met's arguments on the merits.

2. *Goodman*

Met asserts that my finding that there was "no reasonable basis" to include State Water project (SWP) costs is inconsistent with *Goodman.* MPA, 4. San Diego is right that *Goodman* stands for the basic proposition that Met may levy property taxes to pay its SWP costs, and has nothing to do with Met's transportation rates. Opp., 6. *Goodman* says that voters "intended that the [SWP] costs were to be met by payments from local agencies with water contracts" and that they "approved the use of local property taxes whenever the boards of directors of the agencies determined such use to be necessary to fund their water contract obligations," including the tax under consideration in that case. 140 Cal.App.3d at 910. That is not inconsistent with any of my rulings.

Met insists that because it "is billed separately by DWR for [] 'transportation charges,'" it can "specifically identify the portion of its SWP costs that relate to transportation and then

reasonably and accurately allocate[] those transportation costs to the SAR and SPR components of its rates." MPA, 5. It adds that because *Goodman* established that "the SWP costs *are* [Met's] costs," Met "could reasonably allocate SWP transportation costs to transportation." *Id.* But even if *Goodman* suggests, to put it colloquially as Met does, that Met "owns the costs" of the SWP, MPA, 5, it does not necessarily follow that Met may cover those costs in any way it desires, or that there was a "reasonable basis" to impose them on San Diego.

3. *Prop 26*

Met next contends I should have applied Proposition 26 §§ (e)(1) and (e)(2), which obligated it to analyze the reasonableness of Met's transportation and wheeling rates under the collective reasonableness test rather than the "strict proportionality" standard. In Met's view, "[w]hether a charge is exempt from Proposition 26 pursuant to the payor-specific charges exception depends on the reasonableness of the collective costs to an agency." MPA, 8, citing *California Farm Bureau Federation v. State Water Resources Control Board*, 51 Cal. 4th 421, 438-39 (2011).

The Phase I SOD did discuss collective reasonableness, noting several cases holding that "proportionality is not measured on an individual basis, but instead is measured collectively." *See, e.g.*, Phase I SOD at 28, 30, citing *Griffith v. City of Santa Cruz*, 207 Cal.App.4th 982, 997 (2012); *Griffith v. Pajaro Valley Water Mgmt. Agency*, 220 Cal.App.4th 586, 601 (2013). Both of these cases cited *Cal. Farm Bureau* for this principle. Indeed, I directly addressed the issue, explaining that the collective reasonableness standard "is not a license to impose any system-wide charge on any user." Phase I SOD at 58.

And as Met agrees, *Cal. Farm Bureau* dealt with *regulatory fees*, which fall under section (e)(3); a Proposition 26 exception not at issue here. This case, by contrast, involves *user* fees. They are treated differently. While "[r]egulatory fees are valid despite the absence of any

perceived 'benefit' accruing to the fee payers," *Cal. Farm Bureau*, 51 Cal. 4th at 438, the user fee exceptions contemplate a "specific benefit conferred or privilege granted" or "service or product provided." Cal. Const. Art. XIII C §§ 1(e)(1)-(2); see also *Bay Area Cellular Tel. Co. v. Union City*, 162 Cal.App.4th 686, 695, 698 (2008) (holding that charges for 911 access were taxes, not fees, and explaining that "a user fee is charged to the person using the service and its amount is related to the goods and services actually provided."). No such service or benefit is provided here.

Next Met argues that recent Proposition 218 cases such as *Capistrano Taxpayers Ass'n, Inc. v. City of San Juan Capistrano*, 235 Cal.App.4th 1493 (2015) "confirm that a public agency's holistic costs should be considered in making a cost of service determination." MPA, 11. There the Court of Appeal reversed, explaining that the trial court wrongly assumed that providing "recycled water" and "traditional potable water" were two separate services, *id.* at 1502, remanding to determine whether the charges violated Prop 218's prohibition of fees for services that are not actually used by, or immediately available to, the owner of the property in question. In short, neither *Cal. Farm Bureau* nor *Capistrano* demonstrates the SOD was mistaken.

4. *Member Agency Arguments*

Several Member Agencies argue that the Court should not have applied Prop 26 because the rates in question were agreed upon rather than "imposed," and are therefore not taxes. MPA, 4-5. I reject this argument for the third time. *See* Phase I SOD at 48; Sept. 19, 2013 Order Denying Met's Motion for Judgment on the Pleadings. As I explained previously, the record states that Met will "impose rates and charges," and acknowledges that San Diego had no choice but to use Met's facilities to wheel water.

The agencies contend that even if they are taxes, they were approved by two-thirds of the electorate, as required by Article XIII C of the California Constitution. *Id.* at 6. They reach this conclusion by way of certain dictionary definitions of the word "electorate," which purportedly require the Court to construe that word to mean "the member agencies through their representatives on MWD's board." *Id.* Any other interpretation, they assert, "would effectively mean that Article XIII C repealed MWD Act § 57 [which requires Met to submit its rates for Board member vote] by implication." *Id.* at 7. Contrary to the agencies' claim, the word "electorate" was interpreted in *City of San Diego v. Shapiro*, 228 Cal.App.4th 756, 780 (2014), which concluded that "article XIII C, section 2, subdivision (d) requires the approval of two-thirds of the *registered voters* when a local government seeks to impose special taxes." Interpreting the word "electorate" to mean "voters" does not repeal § 57; it simply reaffirms that Met's board can only approve otherwise lawful rates.

B. *Phase II Expert & Discovery*

1. *Alternate measure of damages*

Met argues I improperly refused to reopen expert discovery for the limited purpose of determining what rates Met could have lawfully set, improperly prohibited Met's expert from testifying on alternative rates during Phase II, and erroneously sustained objections to a substantial portion of June Skillman's fact testimony, on the ground that it was undisclosed expert testimony. Met claims that these evidentiary errors prevented it from presenting various alternative measures of contract damages.

There is little to add to the record. As explained in the December 4 Order, Met asked to reopen expert discovery for the specific purpose of permitting an expert to testify as to contract damages that Met claimed the Court lacked jurisdiction to award. This would have been a futile

exercise. As I stated, "[n]o one, including Metropolitan, actually contends Metropolitan's proposed expert has anything relevant to contribute." In this state, evidence is irrelevant if it does not go to a *disputed* fact. M. Simons, CALIFORNIA EVIDENCE MANUAL § 1:4 (2015 ed.). There was no dispute: all parties agreed that the expert's damages were improper (or that I had no jurisdiction to award them).

Met claims my decision prevented it from pursuing expert discovery necessary to rebut San Diego's claimed damages, and was therefore inconsistent with well-recognized principles that a party can argue in the alternative. MPA, 14-15, citing *Lynch & Freytag v. Copper,* 218 Cal.App.3d 603, 613 (1990). But this isn't true. Met *was* allowed to make inconsistent allegations and arguments, but it failed to offer proof to support them. See Phase II SOD at 14 n.20 (the Court "allowed the parties, and Met specifically, to introduce evidence of a 'lawful spectrum of rates' to estimate damages," but "Met did not do so."). Where "a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error." *Mesecher v. Cty. of San Diego*, 9 Cal.App.4th 1677, 1686 (1992). There is no prejudice here.

2. *Excessive Damages*

For the first time Met now presents damages calculations, suggesting the maximum San Diego could have actually recovered was $127,304,698, or perhaps $114,460,159. MPA, 18, 21. And Met contends my finding of a breach was unsupported by the evidence, that alternative damages calculations were less, and that prejudgment interest was excessive.

Met's arguments about breach have already been addressed and there is no reason to repeat the analysis.

Met's argument on damages is plainly waived. C.C.P. § 657 states that "[a] new trial shall not be granted upon the ground of insufficiency of the evidence ... [or] excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court [] clearly should have reached a different verdict or decision." Met's claims now are based on brand-new damages calculations. They should not be considered in assessing whether damages were excessive. *Lundquist v. Marine Engineers Beneficial Ass'n No. 97, Inc.*, 208 Cal.App.2d 390, 396 (1962). Based on the evidence I had as of the trial, the damages awarded were appropriate. At that time, there were no alternate methods presented, and San Diego's calculations were reasonable. Met refused to present a damages calculation or methodology because it hoped that its reasoning would actually lead to a dismissal. Phase II SOD, 17. Having seen that I did not dismiss, Met now reverses its position and wants to retry the case. As I note above, adopting Met's position now would create exactly the wrong incentives, profoundly threating the finality of trials and judgments. That Met belatedly presents several alternatives now does not mean that the court should "clearly [] have reached a different result." C.C.P. § 657(5).

Met again attacks the calculation of prejudgment interest. As before, Met cannot say what that rate should have been. I will not repeat my earlier analysis. See October 9 Order.

And Met has a new case; well, not new, but mentioned now for the first time. *Lilli Ann Corp. v. City and County of San Francisco*, 70 Cal.App.3d 162, 198 (1977). As Met concedes, this involved "interest language in Revenue and Tax Code, Section 5141," not the Civil Code. MPA, 23. The language of the two statutes is different. There the rate there was set by statute. But not in our case.

Met also argues for the first time that it is not reasonable to interpret § 12.4(c) as providing benefits *only* to San Diego. MPA, 24. Met waived this argument too, and in any event Met is wrong. It contends that because that because Gov. Code § 970.5 provides statutory security to public agencies, it would have been unreasonable for Met to obtain additional security. But there is nothing unreasonable in obtaining additional security. The fact of § 970's existence is not sufficient to show that the Court's decision was legally erroneous or against the law, or that damages were excessive.

Finally, Met renews its suggestion that the damages were not "certain" because the Court suggested that they "may overcompensate San Diego." MPA, 24. For a very, very long time courts have allowed approximation of damages. See e.g., *Allen v. Gardner*, 126 Cal. App. 2d 335, 340 (1954), relied on for this proposition by recent cases such as e.g., *Scheenstra v. California Dairies, Inc.*, 213 Cal. App. 4th 370, 402 (2013). An approximation might be high; it might be low. The key inquiry is whether the approximation is reasonable, and here it is.

I have previously discussed the related argument that damages were uncertain because Met challenged them. October 9 Order at 5.

Conclusion

The motion is denied.

Dated: December 23, 2015

Curtis E.A. Karnow
Judge Of The Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On , I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated:

T. Michael Yuen, Clerk

By: _____
DANIAL LEMIRE, Deputy Clerk