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SAN DIEGO COUNTY WATER AUTHORITY

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF SAN FRANCISCO

12 SAN DIEGO COUNTY WATER
13 AUTHORITY,

14 Petitioner and Plaintiff,

15 v.

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

20 Respondents and Defendants.
21

Case No. CPF-10-510830

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF SDCWA'S MOTION FOR
SUMMARY ADJUDICATION (FIFTH
CAUSE OF ACTION)**

Date: December 3, 2013
Time: 9:00 a.m.
Dept.: 304
Judge: Hon. Curtis E.A. Karnow

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Trial Date: December 17, 2013

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 At least one piece of this case is simple. MWD’s so-called “Rate Structure Integrity” (or
4 “RSI”) Clause is illegal. The RSI Clause purports to give MWD unfettered discretion to
5 terminate subsidy funding to any member agency that challenges MWD’s rates, either by filing a
6 lawsuit, as SDCWA has done here, or by speaking its mind in support of legislation. In
7 punishment for SDCWA’s exercising its constitutional right to challenge MWD’s rates in court,
8 MWD enforced the RSI Clause against SDCWA in 2011 by terminating SDCWA’s existing
9 subsidy funding for local water-supply and conservation programs. At the same time, MWD also
10 blackballed SDCWA from eligibility for future benefits, expressly in retaliation for filing this
11 litigation. As a result, SDCWA must continue to fund MWD’s current and future subsidy
12 programs by paying millions of dollars annually through MWD’s “Water Stewardship Rate”
13 (WSR)—but, because of the RSI Clause, SDCWA is ineligible to benefit from its WSR
14 contributions, a penalty that will continue to compound until this Court declares that the RSI
15 clause is invalid and prohibits MWD from enforcing it.

16 Even by MWD’s standards, the RSI Clause is shocking. MWD is a public utility that
17 provides water supply and distribution services to 26 member agencies, public water suppliers
18 that collectively serve more than 18 million people who live and work in southern California.
19 Water is a public utility service and a literal essential of life. MWD is the primary source of
20 water to SDCWA and its ratepayers, and MWD holds a monopoly over distribution of imported
21 water in its Southern California service area. There is no dispute that the rates MWD charges for
22 its water supply and delivery services are a matter of public interest. Nor can there be any dispute
23 that MWD adopted the RSI Clause in order to deter public debate about, or challenges to, the
24 rates MWD charges—in particular challenges by SDCWA—by financially punishing any agency
25 that dared to seek relief for MWD’s violations of the law. This heavy-handed burden on MWD
26 member agencies’ core constitutional rights to petition and to free speech is void as a matter of
27 law, for two independent reasons:

- *First*, the RSI clause is an unconstitutional condition on MWD’s subsidy benefit programs because it does not further the purpose of the subsidy programs, is unjustified by any offsetting benefits to the public, and (by design) is not the least restrictive way of achieving MWD’s purported goals.
- *Second*, the RSI clause violates California Civil Code section 1668, because it serves to immunize MWD prospectively for its violations of rate-making laws.

MWD offers a typical defense for facial restrictions on bedrock constitutional rights, claiming that by suppressing dissent, the RSI clause encourages “consensus” decision-making within MWD itself, thus protecting the MWD revenues that pay for its subsidy programs. But rate challenges do not actually threaten MWD’s revenues, and the argument that suppressing dissent encourages consensus is tautological—and a classic (but deficient) rationalization for government oppression. MWD can’t achieve any legitimate goal by forcing its members to give up their constitutional rights to sue or lobby when MWD violates the law by setting predatory water rates.

On the undisputed facts, as a matter of law, SDCWA is entitled to relief on its Fifth Cause of Action. Specifically, SDCWA seeks a declaration that the RSI Clause is invalid and unenforceable, and an order prohibiting MWD from enforcing the RSI Clause.¹

II. BACKGROUND

MWD has made the policy choice, as part of its public mission, to promote conservation and the development of local water resources.² See MWD’s Answer (“Answer”) to Third Amended Petition and Complaint ¶¶ 13, 14; see also Declaration of Daniel Purcell (“Purcell Decl.”) Ex. A (Upadhyay Depo.) at 44:25-46:4. MWD does so by providing incentive payments (subsidies) to MWD member agencies, and to individual ratepayers and consumers. Answer ¶ 14. These payments subsidize local water supply development and water conservation programs, ranging from multi-million dollar seawater desalination and groundwater projects, to

¹ SDCWA will also be entitled to additional relief related to the Water Stewardship Rate, based on SDCWA’s other causes of action, in an amount to be determined at trial on those claims.

² The parties do not dispute any of the material facts about the RSI Clause, as set forth in the accompanying Separate Statement of Material Undisputed Facts. In seeking summary adjudication, SDCWA can rely on assertions of fact in MWD’s pleadings, which are binding on MWD (though not on SDCWA) as judicial admissions. See *24 Hour Fitness, Inc. v. Sup. Ct.*, 66 Cal. App. 4th 1199, 1211 (1998); *Valerio v. Andrew Youngquist Construction*, 103 Cal. App. 4th 1264, 1271 (2002) (“The admission of fact in a pleading is a ‘judicial admission.’”).

1 \$3 consumer subsidies for water-saving shower heads.³ MWD funds its local-supply subsidy
2 program by charging a so-called “Water Stewardship Rate.” Purcell Decl. Ex. A (Upadhyay
3 Depo.) at 85:6-8. Despite its name, the Water Stewardship Rate is not a “rate” for any service
4 MWD provides. Purcell Decl. Ex. E (April 5, 2013 Declaration of June M. Skillman i/s/o
5 MWD’s Opposition to SDCWA’s Mot. to Compel Responses to Discovery Requests) ¶ 7 (“MWD
6 does not provide separate water stewardship services”). Instead, that charge is a per-acre-foot tax
7 imposed on every acre-foot of water delivered through MWD’s distribution facilities.⁴

8 SDCWA’s Fifth Cause of Action seeks narrow declaratory relief invalidating MWD’s so-
9 called “Rate Structure Integrity” Clause, an Orwellian title for restrictions that MWD inserts into
10 its subsidy agreements to deter and punish dissent by its member agencies. Since 2004, MWD
11 has insisted that every contract by which it provides subsidy payments to its member agencies for
12 water conservation or local water-supply projects must include the RSI Clause. Purcell Decl. Ex.
13 A (Upadhyay Depo.) at 33:25-36:14. The RSI Clause is not negotiable. MWD imposes it as a
14 take-it-or-leave-it requirement for any member agency to receive MWD subsidies, even though
15 all member agencies are paying to fund the subsidies through MWD’s Water Stewardship Rate.

16
17 ³ SDCWA disputes whether there is any general regional benefit to MWD’s service area from
18 these subsidies, but those disputes are not material to this motion. MWD contends, but has never
19 even attempted to establish, that its subsidies provide not only specific benefits to the service area
20 where the projects are located, but also more generalized benefits to the entire member agency
21 receiving the subsidy and even the general public living elsewhere in MWD’s service area.
22 Purcell Decl. Ex. A (Upadhyay Depo.) at 45:13-46:13. SDCWA disagrees. MWD also contends
23 that the RSI clause allows it to terminate any benefit agreements that include the RSI language,
24 including those that provide benefits directly to the rate-paying public. *Id.* at 67:9-68:1.

25 ⁴ SDCWA pays MWD roughly \$15 million to \$20 million in Water Stewardship Rate charges
26 each year. Purcell Decl. Ex. D (Cushman Depo.) at 140:20-25. SDCWA does not challenge
27 MWD’s authority to spend money on conservation or local water-supply projects, provided
28 MWD allocates those costs properly—which it has not done. MWD’s improper allocation of
“water stewardship” costs, however, is not the subject of this motion. In its first three causes of
action, to be adjudicated at trial in December, SDCWA has challenged the inclusion of the Water
Stewardship Rate as part of MWD’s “wheeling rate” and the price charged to SDCWA under the
2003 Exchange Agreement, by which MWD conveys water SDCWA purchased from the
Imperial Irrigation District. As the Court will hear, while MWD has admitted that the projects
funded by the Water Stewardship Rate are geared primarily toward developing new water
supplies, or avoiding the cost of having to buy alternative water supplies, MWD arbitrarily treats
all the costs associated with these projects as transportation costs and assigns those costs to its
transportation rates. That violates the most basic cost-of-service principles applicable under
numerous provisions of California law.

1 *Id.* (Upadhyay Depo.) at 33:25-36:14.

2 The RSI Clause allows MWD to terminate financial benefits provided under any subsidy
3 agreement “if the recipient participates in litigation or supports legislation challenging
4 Metropolitan’s rate structure.” Answer ¶ 15. Section x.2(a) of the RSI Clause⁵ provides that if
5 SDCWA, or any member agency receiving subsidies, were to “**file or participate in litigation or**
6 **support legislation to challenge or modify Existing Rate Structure, including changes in**
7 **overall rates and charges that are consistent with the current cost-of-service methodology,”**
8 Metropolitan may terminate that subsidy agreement. *See, e.g.*, Purcell Decl. Ex. F (Sept. 5, 2007
9 Enhanced Conservation Agreement between MWD and SDCWA § 8.2(a) (emphasis added), at
10 MWD2010-00010656. Section x.4 of the RSI Clause spells out the termination procedure. If a
11 recipient member agency acts to “file or support litigation, or sponsor or support legislation, that
12 would challenge or be adverse to Existing Rate Structure,” MWD’s Chief Executive Officer “may
13 file a 90-day notice of intent to terminate” the benefit agreement, and the MWD Board must then
14 decide whether to terminate the agreement within 90 days of the termination notice or, if either
15 party requests mediation, within 90 days of the request for mediation. *See id.* § 8.4, at
16 MWD2010-00010657. The RSI Clause does not include any process for reinstating terminated
17 subsidy benefits, even if a court issues an express finding that MWD’s challenged rates were
18 illegal. *Id.*

19 While MWD claims the RSI Clause is necessary to protect the revenues that fund MWD’s
20 conservation and local water supply programs, *see* Purcell Decl. Ex. G (Dec. 14, 2004 MWD
21 Board Memo); *id.* Ex. A (Upadhyay Depo.) at 80:19-81:17, 88:23-89:12, the trigger for the RSI
22 Clause is not limited to challenges to the funding of MWD’s local supply programs, or even to
23 the Water Stewardship Rate. *Id.* Ex. B (Arakawa Depo.) at 93:5-18. Instead, **any** legislative or
24 legal challenge to **any** of MWD’s rates empowers MWD to begin the process for terminating a
25 member agency’s subsidy benefits. *Id.* Ex. A (Upadhyay Depo.) at 29:19-30:13. In fact, the RSI

26 _____
27 ⁵ The RSI Clause always includes six sub-paragraphs, in the same order, but its paragraph number
28 varies by contract. For example, while identified as x.2(a) here, the quoted provision of the RSI
Clause could appear as section 7.2(a) or 8.2(a) in the actual agreements at issue.

1 Clause termination provision is so broadly written that MWD itself could not identify what
2 actions would trigger MWD’s right to terminate benefits, or define what it actually means to
3 “support legislation.” *Id. Ex. A* (Upadhyay Depo.) at 18:18-24:20, 26:1-27:18; *id. Ex. B*
4 (Arakawa Depo.) at 50:18-51:9, 52:21-53:6.⁶

5 The discrepancy between the narrow claimed purpose of the RSI Clause and its broad
6 actual scope was no accident. As contemporaneous documents make plain, MWD adopted the
7 RSI Clause to discourage SDCWA from challenging MWD’s water rates, by forcing SDCWA to
8 forfeit subsidy benefits if it did so. Prior to 2004, MWD had never imposed an RSI Clause, or
9 anything like it, on its member agencies. Purcell Decl. Ex. B (Arakawa Depo. 82:21-23); *id. Ex.*
10 *A* (Upadhyay Depo.) at 44:25-45:12. In October 2003, however, MWD and SDCWA entered
11 into the 2003 Exchange Agreement, by which MWD agreed to deliver water that SDCWA
12 purchased from IID. The 2003 Exchange Agreement required SDCWA to pay the equivalent of
13 MWD’s “wheeling rate” during the life of the contract, but included an express reservation
14 allowing SDCWA to challenge MWD’s rates “in an administrative or judicial forum” after five
15 years. *Id. Ex. I* (Exchange Agreement 5.2); *id. Ex. C* (Thomas Depo.) at 122:6-19. Only a few
16 months after the Exchange Agreement was signed, MWD began work on the RSI Clause. *Id. Ex.*
17 *B* (Arakawa Depo. 84:25-85:8); *id. Ex. J* (June 18, 2004 Gastelum memo). In a memorandum
18 introducing the RSI Clause to MWD’s member agencies in June 2004, MWD’s then-CEO Ron
19 Gastelum explicitly called out SDCWA’s reservation of rights in the Exchange Agreement and
20 the risk that SDCWA might bring suit. *See id. Ex. J; id. Ex. B* (Arakawa Depo.) at 88:18-24.
21 MWD claimed that the RSI Clause would help to avoid “potentially significant *cost shifting onto*
22 *other member agencies*”—not loss of Water Stewardship Rate revenues—that could result from
23 SDCWA’s or another member agency’s challenge to MWD’s rates. *Id. Ex. K* (Sept. 23, 2004

24
25 ⁶ Notably, the RSI Clause includes a provision, separate and apart from those authorizing MWD
26 to terminate a member agency’s subsidies for filing suit or supporting legislation involving
27 MWD’s rates, that commits MWD to fulfilling its subsidy agreements even if litigation results in
28 changes to MWD’s rates. Section x.5 provides that “should litigation or legislation brought by
third parties result in changes to Existing Rate Structure, this Agreement will continue in effect
unless mutually agreed in writing by the parties.” *Id. Ex. F* (Conservation Agreement) § 8.5.

1 Gastelum memo FAQ) (emphasis added); *id.* Ex. B (Arakawa Depo.) at 68:11-69:6, 73:5-74:11
2 (“[C]hallenges to the rates could lead ... to cost shifting and create some equity problems, and so
3 that could be . . . a risk in Metropolitan carrying out its plans and meeting its objectives.”); *id.* Ex.
4 H (Dec. 13, 2004 presentation) at 3-4. Mr. Gastelum unapologetically justified the RSI’s attempt
5 to deter rate challenges by SDCWA because “[i]n commerce or charity” it is “usually bad
6 business and not healthy for long term relationships to ‘bite the hand that feeds you.’” *Id.* Ex. J
7 (June 18, 2004 Gastelum Memo) at 3.

8 Between 2007 and 2010, SDCWA entered into several subsidy agreements with MWD
9 that included the RSI Clause. Purcell Decl. Ex. N (Aug. 25, 2010 MWD termination notice to
10 SDCWA) (listing agreements). MWD refused to let SDCWA modify or eliminate the RSI Clause
11 in these agreements. Purcell Decl. Ex. L (April 20, 2005 email chain between MWD’s Lauren
12 Brainard and SDCWA’s Dan Hentschke); *id.* Ex. M (Aug. 2, 2005 letter from MWD to
13 SDCWA). Then, after SDCWA filed this action in June 2010, MWD enforced the RSI Clause to
14 terminate three contracts providing subsidy benefits that MWD had previously agreed to make
15 available to San Diego. *Id.* Ex. O (June 23, 2011 MWD termination letter to SDCWA, attaching
16 Board Action); *id.* Ex. N; *id.* Ex. P. On the same basis, MWD also deferred execution of three
17 pending agreements with SDCWA that would have provided additional subsidy benefits, because
18 “termination proceedings would begin immediately upon execution.” *Id.* Ex. N at 2 (Aug. 25,
19 2010 MWD Letter to SDCWA). MWD also barred SDCWA from entering into any new subsidy
20 agreements with MWD in the future. *Id.* Ex. O (June 23, 2011 letter) at 2; *id.* Ex. A (Upadhyay
21 Depo.) 63:8-17, 64:7-65:16 (by “making a choice to trigger [the RSI Clause] in the contract,”
22 SDCWA rendered itself unable to receive subsidy benefits from MWD, since SDCWA’s rate
23 challenge “would immediately trigger the termination proceedings for the [subsidy] contract.”).⁷

24
25 ⁷ Subsidy agreements between MWD and SDCWA that predate MWD’s adoption of the RSI
26 Clause remain in effect. SDCWA may still receive some subsidy benefits from MWD until those
27 agreements expire, even though MWD has cut off future benefits to SDCWA under the RSI
28 Clause. However, as those older agreements expire or otherwise run their course, subsidy
funding to SDCWA will decline. Eventually, SDCWA will receive no benefits at all from its
Water Stewardship Rate payments.

1 Nothing in the RSI Clause requires MWD to remove its bar on future subsidy benefits to
2 SDCWA if SDCWA prevails on its rate challenges, or even if SDCWA were to withdraw its
3 claims. *See* Purcell Decl. Ex. F § 8 (RSI Clause), at MWD2010-00010656-57.

4 **III. ARGUMENT**

5 The RSI Clause is intended to prevent MWD member agencies from bringing any court
6 challenge to MWD’s illegal rates, or even engaging in lobbying related to water rates—and to
7 punish any member agency that raises such a challenge. But for enforcement of the RSI Clause,
8 all MWD member agencies would be eligible to receive subsidy benefits. If any member agency
9 challenges MWD’s rates in any legal or legislative forum, however, the RSI Clause allows MWD
10 to terminate subsidy benefits to that member agency, and to declare that agency ineligible for
11 future benefits. The RSI Clause gives MWD free rein to penalize member agencies for the mere
12 act of challenging MWD’s rates, even if a court ultimately finds the challenged rates to be illegal.

13 The RSI Clause is both an unconstitutional condition on SDCWA’s right to petition and
14 right to free speech, and an unlawful attempt to immunize MWD for its own violations of law
15 under California Civil Code § 1668. Summary adjudication is proper because all material facts
16 about the RSI Clause are undisputed, and SDCWA is entitled to the relief it seeks in its Fifth
17 Cause of Action as a matter of law. Code Civ. Proc. § 437c(c).

18 **A. The RSI Clause is an unconstitutional condition burdening SDCWA’s right to**
19 **petition the courts and legislature.**

20 The RSI Clause conditions access to the benefit of MWD’s water supply development
21 subsidies upon a member agency’s waiver of its constitutional rights to petition the courts and
22 legislature and to speak about matters of public interest, by giving the MWD Board absolute
23 discretion to terminate benefits if a recipient challenges MWD’s rates. *See* Cal. Const. art. I, §§
24 2, 3; U.S. Const. Am. 1. This violates the longstanding judicial rule that public agencies like
25 MWD cannot condition the benefits they provide on a waiver of constitutional rights, even if they
26 could legitimately choose not to provide any such benefits at all. “When receipt of a public
27 benefit is conditioned upon the waiver of a constitutional right, the ‘government bears a heavy
28 burden of demonstrating the practical necessity for the limitation.’” *Robbins v. Superior Court*,

1 38 Cal. 3d 199, 213 (1985) (quoting *Bagley v. Wash. Township Hosp. Dist.*, 65 Cal. 2d 499, 505
2 (1966)). This rule applies even where the waiver is “well-informed and voluntary” on its face.
3 *Parrish v. Civil Serv. Comm’n of Alameda Cnty.*, 66 Cal. 2d 260, 271 (1967). As the California
4 Supreme Court explained almost 50 years ago, and both federal and state courts continue to hold,
5 it is “without question that the power of government, federal or state, to withhold benefits from its
6 citizens does not encompass a supposed ‘lesser’ power to grant such benefits upon an arbitrary
7 deprivation of constitutional right.” *Bagley*, 65 Cal. 2d at 504. This rule applies to all sorts of
8 benefits provided by government agencies, ranging from public housing and employment to
9 building permits and the subsidy benefits at issue here. *See Koontz v. St. Johns River Water*
10 *Mgmt. Dist.*, 133 S. Ct. 2586, 2596-97 (2013) (addressing unconstitutional permit conditions and
11 reviewing history of unconstitutional conditions doctrine).

12 To justify a forced waiver of constitutional rights, “[t]he governmental entity seeking to
13 impose such a condition”—here, MWD—“must establish that: (1) the condition reasonably
14 relates to the purposes of the legislation which confers the benefit; (2) the value accruing to the
15 public from imposition of the condition *manifestly outweighs* any resulting impairment of the
16 constitutional right; and (3) there are no available alternative means that could maintain the
17 integrity of the benefits program without severely restricting a constitutional right.” *Robbins*, 38
18 Cal. 3d at 213 (emphasis added). MWD cannot meet its burden on any of these three
19 requirements as to the RSI Clause, much less all three.

20 **1. The RSI Clause is not reasonably related to the purpose of MWD’s**
21 **subsidy benefits.**

22 The RSI Clause has no rational relationship to the purposes of MWD’s subsidy benefits.
23 The subsidy programs help pay for water conservation and local water supply development;
24 penalizing challenges to MWD’s rates does nothing to advance those causes. As explained
25 above, and as reflected in MWD’s contemporaneous documents, one of MWD’s goals in adopting
26 the RSI Clause was to avoid or penalize the very sort of rate challenges SDCWA has raised in
27 this litigation, and to preserve MWD’s current misallocation of costs. Consistent with that goal,
28 which has nothing to do with the purpose of MWD’s subsidy programs, the RSI Clause penalizes

1 a member agency for bringing *any* substantive challenge to MWD’s rates—whether or not the
2 challenge has anything to do with MWD’s conservation and water supply development programs.
3 *See* Purcell Decl. Ex. A (Upadhyay Depo.) at 29:19-30:13. Rather, MWD has complete
4 discretion to terminate the benefits of any subsidy agreement “if the recipient participates in
5 litigation or supports legislation challenging Metropolitan’s rate structure.” Answer ¶ 15; Purcell
6 Decl. Ex. P (Attachment 1 to June 14, 2011 Board Action) (allowing termination of contracts in
7 response to “fil[ing] or participat[ing] in litigation or support[ing] legislation to challenge or
8 modify Existing Rate Structure, including changes in overall rates and charges that are consistent
9 with the current cost-of-service methodology”).

10 MWD’s claim that the RSI Clause is necessary because it “supports a stable and
11 predictable revenue stream required for Metropolitan’s long-term water development and delivery
12 planning,” Answer ¶ 19, is demonstrably false. MWD has admitted, both under oath and in
13 documents submitted to investors in the bond market, that SDCWA’s challenge to its rates in this
14 litigation *will have no effect on MWD’s revenues*. Purcell Decl. Ex. Q (Operating Statement) at
15 A-48; *id.* Ex. A (Upadhyay Depo.) at 93-99. MWD’s June 19, 2013 Operating Statement,
16 submitted to its bondholders and investors in support of a recent bond issuance, stated as follows:

17 [T]o the extent that a court invalidates Metropolitan’s adopted rates
18 and charges, Metropolitan will be obligated to adopt rates and
19 charges that comply with any mandates imposed by the court.
20 Metropolitan expects that such rates and charges would still recover
21 Metropolitan’s cost of service. As such, revenues would not be
22 affected. If Metropolitan’s rates are revised in the manner proposed
23 by SDCWA in the complaint, other member agencies may pay
24 higher rates unless other actions are taken by the Board.

25 *Id.* Ex. Q (Operating Statement); *see also* Upadhyay Depo. 98:19-99:7 (agreeing with accuracy of
26 those statements). Likewise, the December 14, 2004 MWD Board Memo evaluating the
27 inclusion of the RSI Clause in future incentive agreements admits as much by stating, under the
28 heading “Fiscal Impact” that adoption of the provision would have *no fiscal impact* on MWD:

Fiscal Impact: No current impact. Modification in cost-of-service methodology
and rate structure elements could result in changes in cost responsibilities among
member agencies.

1 *Id. Ex. G* (December 2004 Board memo). If San Diego prevails in this case, it would have no
2 effect on MWD’s revenues and thus no impact on MWD’s ability to pay subsidies to its member
3 agencies and meet its other financial obligations.

4 MWD also claims the RSI Clause helps to promote “consensus” decision-making within
5 MWD itself. Answer ¶ 19. To the extent MWD may argue this is a benefit justifying the RSI
6 clause, it also fails. Of course retaliatory punishment of dissent effectively imposes “consensus,”
7 but this is the very wrong that the First Amendment and Article 1 protect against, and the
8 opposite of a public benefit. “We set up government by consent of the governed, and the Bill of
9 Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be
10 controlled by public opinion, not public opinion by authority.” *W. Virginia State Bd. of Educ. v.*
11 *Barnette*, 319 U.S. 624, 641 (1943) (holding unconstitutional compulsory flag salute by
12 schoolchildren).

13 Accordingly, MWD’s RSI Clause fails at the first hurdle, because it doesn’t advance the
14 purposes of the subsidy contracts it purports to support.

15 **2. Any public benefit of the RSI Clause does not “manifestly outweigh”**
16 **its burden on constitutional rights.**

17 MWD also cannot meet its burden on the second element of the test, because any benefits
18 to the public deriving from the RSI Clause (and there are none) do not “manifestly outweigh” its
19 burden on member agencies’ constitutional rights to petition the Courts, lobby legislative officials
20 or even speak freely in public in support of legislative or legal activities. *Robbins*, 38 Cal. 3d at
21 213. As discussed above, any benefits *from the RSI Clause* (as opposed to benefits from
22 conservation or local-supply subsidy programs) are non-existent, both because the RSI Clause
23 does nothing to protect MWD’s subsidy funding and because forcing member agencies to keep
24 their concerns out of the public sphere is not a valid or defensible benefit.

25 As in *Robbins*, where the California Supreme Court rejected arguments similar to
26 MWD’s, MWD can make no showing of financial necessity here that would justify the RSI
27 Clause’s burden on SDCWA’s constitutional rights. The *Robbins* Court explained that “financial
28 considerations cannot justify an infringement of a basic constitutional right” as a matter of law,

1 unless an agency proves that no less constitutionally onerous approaches are available. *Robbins*,
2 38 Cal. 3d at 217. Accordingly, the court rejected a county’s financial justifications for requiring
3 single, employable indigent residents to accept in-kind welfare benefits by living in a county-
4 provided shelter (thus burdening their constitutional right of privacy), instead of providing cash
5 welfare benefit payments that the county made available to other indigent citizens. *Id.* at 216-17.
6 Here, MWD claims that challenges to its rates threaten its revenues, and thus the stability of its
7 subsidy programs. This would be an attenuated connection even if it were true, and could not
8 save the RSI Clause. *See Robbins*, 38 Cal. 3d at 217. But in fact (as discussed above) MWD’s
9 financial premise is false, and rate challenges have no impact on MWD’s ability to fund its
10 subsidy benefits.

11 MWD cannot show that the RSI Clause provides a public benefit that even slightly, let
12 alone manifestly, outweighs its burden on constitutionally protected speech and the right to
13 petition the government. That burden falls not only on SDCWA, but on the general public: free
14 debate about matters of public concern like water policy and rates is a vital public good that our
15 federal and state Constitutions guarantee “not only to one who speaks but also to those who
16 listen.” *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 486 (2000) (explaining that “article I’s
17 right to freedom of speech, like the First Amendment’s, does not restrict itself depending upon the
18 identity or legal character of the speaker”); *id.* at 490. MWD is a public agency that supplies and
19 delivers water to more than 18 million people, with a literal and self-professed monopoly on
20 “water distribution facilities to service Southern California areas.” MWD Admin. Code
21 § 4202(b). Public debate and petitioning about MWD’s rates serves the public interest by
22 ensuring valid, legal rate-making and distribution of water—one of life’s few true necessities.
23 The courts have recognized that government representatives like SDCWA properly “intercede,
24 lobby, and generate publicity to advance their constituents’ goals” on such matters, and that these
25 activities are “nearly as vital to the functioning of a modern representative democracy as
26 petitioning that originates with private citizens.” *Manistee Town Ctr. v. City of Glendale*, 227
27 F.3d 1090, 1093 (9th Cir. 2000) (applying *Noerr-Pennington* immunity); *see also Mariana v.*

1 *Fisher*, 338 F.3d 189, 200 (3d Cir. 2003). In fact, MWD has previously claimed that individual
2 rate-payers lack standing to challenge its rates (because only SDCWA directly pays those rates),
3 making SDCWA’s ability to speak out freely against illegal MWD actions all the more essential
4 to protecting California consumers from unfair water rates and service. Purcell Decl. Ex R
5 (MWD brief opposing UCAN standing) at 4-5. The RSI Clause provides no legitimate public
6 benefits, much less any benefits related directly to the MWD subsidies that manifestly outweigh
7 the RSI Clause’s burden on core constitutional rights.

8 **3. MWD cannot show that it lacked alternative means to ensure funding**
9 **stability for its subsidy programs without burdening constitutional**
10 **rights.**

11 Even if the RSI Clause had a public benefit that manifestly outweighed its intrinsic burden
12 on constitutional rights (and it does not), the RSI Clause would still fail the *Robbins test* because
13 it does not advance MWD’s asserted interest—ensuring funding stability for MWD’s subsidy
14 programs—and is certainly not the narrowest possible restriction on benefit recipients’
15 constitutional rights that advances that interest. *See Robbins*, 38 Cal. 3d at 213.

16 As already established above, there can be no dispute that the RSI Clause is not narrowly
17 tailored to advance MWD’s purported objective, because, as MWD has repeatedly admitted to its
18 Board and bondholders, the RSI Clause does not actually protect MWD’s ability to fund its
19 subsidy benefit programs, or have any effect on MWD’s net revenues. Purcell Decl. Ex. G (Dec.
20 2004 Board memo); *id.* Ex. Q (MWD Operating Statement). The RSI Clause has no impact on
21 revenue and cannot be necessary to, or even supportive of, revenue reliability. Not one penny of
22 MWD’s revenues has ever been in jeopardy because of SDCWA’s legal challenge.

23 If MWD really wanted to protect its net revenues and funding for its subsidy programs, it
24 easily could have enhanced revenue stability without any impact on its member agencies’
25 constitutional rights, including through an increase to its fixed charge revenues. *See, e.g.,* Purcell
26 Decl. Ex. V (American Water Works Ass’n, *Principles of Water Rates, Fees and Charges*,
27 *Manual of Water Supply Practices – M1*, Sixth Edition (2012), at 137-140 (“In designing rates,
28 fixed charges are viewed as being desirable because they provide a measure of revenue stability

1 to the utility”). In particular, MWD could have imposed fixed charges on the individual member
2 agencies receiving the subsidy funding and the benefit of the subsidy programs. That approach
3 would have ensured MWD took in adequate revenues to fund the programs, even in wet years
4 when its water sales were depressed, while having no impact on its agencies’ ability to petition
5 the courts for lawful rates. But MWD did not adopt this or any other measure to actually protect
6 its revenues, because MWD was more interested in burdening (and if possible eliminating)
7 dissent by enacting the RSI Clause. *Id. Ex. J* (June 18, 2004 Gastelum memo).

8 Indeed, the present RSI Clause so broadly defines the constitutionally-protected activity it
9 burdens that not even MWD can identify what conduct by member agencies will trigger potential
10 termination of benefits. MWD claims instead that it has unfettered discretion to decide case-by-
11 case whether litigation, lobbying or speech activities constitute a sufficient “challenge” to warrant
12 termination of a member agency’s subsidy benefits. Purcell Decl. Ex. A (Upadhyay Depo.) at
13 18:18-24:20, 26:1-27:18; *id. Ex. B* (Arakawa Depo.) at 50:18-51:9, 52:21-53:6.

14 MWD’s deliberate failure to minimize the constitutional burden of the RSI Clause is fatal.
15 The California Supreme Court rejected a similarly overbroad forced waiver of rights based on its
16 sweeping scope and improper purpose alone, without even reaching questions about the
17 restriction’s purported benefits. *Parrish v. Civil Serv. Comm’n of Alameda Cnty.*, 66 Cal. 2d 260,
18 272 (1967). In *Parrish*, the court held that Alameda County could not condition its payment of
19 welfare benefits on citizens’ forced consent to random, intrusive “bed-checks” by county
20 personnel. *Id.* at 263. The Court found that the county had pursued the bed-check campaign in
21 part to boost its own image as tough on fraud. *Id.* at 273-74. Although the county pointed to
22 fraud prevention (and related financial benefits) to justify the campaign, the campaign was not
23 tailored in any way to suspected fraud cases. *Id.* at 272. Even without resolving factual questions
24 about the claimed purposes and purported benefits of the county’s bed-check campaign, the Court
25 rejected the program as unlawful because the means chosen were so ill-matched to the claimed
26 purpose. *Id.* at 272-74. Specifically, the Court found that the county could not lawfully fire a
27 county social worker who refused to help implement in the bed-check program, because it wasn’t

1 insubordination to refuse to participate in an illegal program. *Id.* at 262.

2 In addition to its other defects, the RSI Clause fails for the same reasons as the *Parrish*
3 bed-check program: it is overbroad and was adopted at least in part for an improper purpose.
4 Although MWD claims that the RSI Clause is financially necessary to protect its subsidy
5 programs, MWD also made clear from the time it first considered the RSI Clause that one goal of
6 the RSI Clause was to discourage challenges from SDCWA over MWD's rates. *See* Purcell Decl.
7 Exs. H, J, K, S; *id.* Ex. B (Arakawa Depo.) at 88:18-24. Accordingly, MWD imposed broad RSI
8 terms that allowed it to penalize SDCWA at MWD's discretion if it challenged MWD's rates as
9 illegal, in an effort to protect MWD's financial *status quo* by avoiding legally required
10 reallocation of MWD's costs among its member agencies—reallocation that would not result in
11 any net revenue loss to MWD. As the *Parrish* Court explained in that case, “so striking is the
12 disparity between the [program's] declared purpose and the means employed, so broad its
13 gratuitous reach, and so convincing the evidence that improper considerations dictated its ultimate
14 scope, that no valid link remains between that operation and its proffered justification.” *Id.* at
15 272. The RSI Clause is likewise invalid because it places untailed, gratuitous and
16 unconstitutional conditions on MWD's provision of public benefits.

17 **B. The RSI Clause is an unenforceable exculpatory term that violates Civil Code**
18 **Section 1668.**

19 Independently, the RSI Clause is also void as a matter of settled public policy under Civil
20 Code section 1668. Section 1668 prohibits contractual terms that “have for their object, directly
21 or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the
22 person or property of another, or violation of law, whether willful or negligent.” Civ. Code §
23 1668. As explained above, one reason MWD chose to adopt the RSI Clause was to deter
24 SDCWA's intended challenges to MWD's rates by imposing a financial penalty on challengers—
25 regardless of whether the challenged rates violated the law. By requiring SDCWA or other
26 member agencies to forfeit substantial subsidy benefits (at MWD's discretion) if they challenge
27 MWD's rates as illegal, the RSI Clause effectively exempts MWD from responsibility for
28 violations of any applicable laws or regulations.

1 By its plain language, section 1668 applies to contractual terms like the RSI Clause, which
2 attempts to immunize MWD from challenges alleging that its rates violate California law. When
3 it adopted the RSI Clause, MWD assumed that its Board would always set legal rates and
4 dismissed the “possibility that Met’s Board would take a future illegal action” as a barrier to
5 adopting the RSI Clause. Purcell Decl. Ex. S (July 15, 2004 email from Brenda Kelly, and
6 attachment). But that is precisely the scenario Section 1668 condemns: a party like MWD
7 inserting preemptive contractual language in an effort to avoid future liability for violating the
8 law. The RSI Clause penalizes *all* substantive challenges to MWD’s rates, even where those rates
9 are found to be illegal. Nor is it relevant that MWD may argue it believed its rates were legal and
10 did not *intend* to violate the law. Section 1668 explicitly prohibits contract provisions that would
11 excuse even *negligent* violations of statutory law. *See* Civ. Code § 1668; *Health Net of Cal., Inc.*
12 *v. Dep’t of Health Servs.*, 113 Cal. App. 4th 224, 227, 238 (2003) (voiding contractual waiver of
13 damages for violations of law not expressly identified in contracts by hospitals providing
14 MediCal managed care).

15 Section 1668 voids terms like the RSI Clause even where a party like SDCWA knows that
16 they appear in an agreement.⁸ No agreement can waive the protections of Section 1668 as to
17 statutory violations: “It is now settled ... that notwithstanding its different treatment of ordinary
18 negligence, under section 1668, ‘a party [cannot] contract away liability for his fraudulent or
19 intentional acts or for his negligent violations of *statutory* law.’” *Health Net*, 113 Cal. App. 4th at
20 234 (emphasis in original). Thus, it does not matter that SDCWA knew about the RSI Clause
21 when MWD imposed it or when it entered into subsidy contracts with MWD, because even where
22 a term that violates public policy is disclosed and ostensibly accepted by the other party, that term
23 is still unenforceable. “A public policy claim under Civil Code section 1668 ... does not depend
24 on the element of surprise.” *McCarn v. Pac. Bell Directory*, 3 Cal. App. 4th 173, 183 (1992).

25
26 ⁸ Of course, while SDCWA was well aware of the existence of the RSI Clause, SDCWA always
27 made clear that it objected to the RSI Clause as illegal and, reserved its rights to argue that. *See*
28 Purcell Decl. Ex. T (Apr. 18, 2007 SDCWA Board Action “Participation in MWD Water
Management Program Incentive Contracts”)

1 Any limitation of liability that violates Section 1668 is invalid “even if it was fully read and
2 understood by the buyer” because “public policy forbids compelling even a knowing buyer to
3 make such an agreement.” *Id.*

4 Neither may MWD escape Section 1668 by arguing that the RSI Clause does not directly
5 eliminate MWD’s liability for its illegal acts. In fact, the RSI Clause directly penalizes any
6 MWD member agency that pursues litigation asserting that MWD has violated applicable law in
7 setting its rates. But even if one were to characterize this as an “indirect” exemption for MWD’s
8 illegal activity rather than a “direct” one, it makes no difference under section 1668. By its plain
9 terms, the statute invalidates contracts that “directly *or indirectly*” excuse a party for its violations
10 of law. Civ. Code § 1668 (emphasis added). The RSI Clause’s punitive termination provision
11 serves to immunize MWD against SDCWA’s challenge to MWD’s illegal rates by imposing a
12 financial penalty on SDCWA for pursuing that challenge. As explained above, MWD made clear
13 that deterring SDCWA from suing MWD over its rates was one of MWD’s goals in adopting the
14 RSI Clause. At a minimum, the RSI Clause is designed to reduce the relief available to SDCWA
15 if it prevails on its rate claims: if the RSI Clause were to survive (and it should not), SDCWA’s
16 recovery would be reduced by the amount of the forfeited benefits from all contracts containing
17 the RSI Clause. Even this partial waiver of remedies runs afoul of Section 1668 and cannot be
18 enforced. *See Health Net*, 113 Cal. App. 4th at 227 (striking term that waived damages but not
19 equitable relief).

20 **IV. CONCLUSION**

21 The RSI Clause is void and unenforceable, both as an unconstitutional condition on public
22 benefits and as an illegal exculpatory provision under Civil Code Section 1668. For all these
23 reasons, and as argued above, the Court should grant SDCWA’s motion for summary
24 adjudication of its Fifth Cause of Action, invalidate the RSI Clause, and order MWD to cease
25 enforcing it against SDCWA or anyone else.

26 Respectfully submitted,

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