



FILED
San Francisco County Superior Court

AUG 28 2015

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Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER
AUTHORITY,

Plaintiff/Petitioner,

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

vs.

STATEMENT OF DECISION

METROPOLITAN WATER DIST. OF
SOUTHERN CALIFORNIA, et al.

Defendants/Respondents.

I. Introduction

San Diego County Water Authority (San Diego) claims that the Metropolitan Water District of Southern California (Met) breached the Exchange Agreement¹ and improperly computed preferential rights. Met disputes the merits and raised some affirmative defenses. I find for San Diego on both claims.

II. Factual Background²

San Diego is one of Met's member agencies. It purchases water from Met and may obtain wheeling services from Met. If San Diego purchases water from an entity other than Met, it is impossible for San Diego to receive the water without moving it through Met's facilities.

¹ The "Amended and Restated Agreement Between Metropolitan Water District of Southern California and the San Diego County Water Authority for the Exchange of Water." PTX-65.

² Most of this background is extracted from my April 24, 2014 Statement of Decision (April Statement of Decision).

1 This movement is termed ‘wheeling’ the water, i.e., the use of a water conveyance facility by
2 someone other than the owner or operator.

3 Met’s current rate structure dates to 2003. Met’s full-service water rate, charged when
4 Met sells a member agency water, includes supply rates, the System Access Rate, the System
5 Power Rate, and the Water Stewardship Rate. These are volumetric³ charges. Met’s Wheeling
6 Rate is different: it includes the System Access Rate, the Water Stewardship Rate, and the
7 incremental cost of power necessary to move the water.
8

9 San Diego acquired an annual supply of transfer water from the Imperial Irrigation
10 District (IID) in 1998. PTX-28. Later in 1998 San Diego and Met agreed to the 1998 Exchange
11 Agreement. PTX-31.⁴ There San Diego paid Met to take transfer water and have Met make
12 Exchange Water⁵ available to San Diego. *Id.* §§ 3.1-3.2, 5.2. The contract was to last 30 years.
13 *Id.* § 5.2. For the first 20 years, San Diego would pay \$90 per acre-foot plus an annual
14 percentage escalator. *Id.* For the final 10 years, San Diego would pay \$80 per acre-foot plus an
15 annual percentage escalator running from 1998. *Id.* The 1998 Exchange Agreement permitted
16 the parties to request a change in the price after 10 years. *Id.* § 5.3. The price term was close to
17 an \$80 per acre-foot wheeling rate proposed by Department of Water Resources Director David
18 Kennedy in January 1998 as a compromise between wheeling rates advocated by Met and San
19 Diego in a dispute over an appropriate wheeling rate. PTX-481 at MWD 2010-00264720.
20
21

22 There were no IID water transfers to San Diego between 1998 and 2003. Met Pre-Trial
23 Brief, 10; San Diego Post-Trial Brief for Phase II, 13. On October 10, 2003, the parties entered
24

25 ³ That is they are based on the volume of water at issue such as gallons, *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App.
26 4th 1342, 1385 (2012), or acre feet where one acre-foot is an acre of water one foot deep.

27 ⁴ The “Agreement Between Metropolitan Water District of Southern California and the San Diego County Water
Authority for the Exchange of Water.”

⁵ Exchange Water is a creature of contract. It is water delivered to San Diego by Met in the same quantity as that
made available to Met by San Diego. PTX-31 § 1.1(q); PTX-65 § 1.1(m).

1 the operative Exchange Agreement. PTX-65 at MWD2010-00190698. That day, the parties and
2 other agencies signed two other agreements: the Quantification Settlement Agreement and the
3 Allocation Agreement. *Id.* §§ F-G.

4
5 Most importantly for present purposes, the operative Exchange Agreement contained a
6 revised price provision.⁶ The new price was initially \$253 per acre-foot, and thereafter “equal to
7 the charge or charges set by [Met’s] Board of Directors pursuant to applicable law and regulation
8 and generally applicable to the conveyance of water by [Met] on behalf of its member agencies.”
9 *Id.* § 5.2.⁷ By this term, Met charged San Diego the volumetric transportation rates it charged
10 when it sold full-service water as of 2003 – the System Access Rate, System Power Rate, and
11 Water Stewardship Rate.⁸ Met’s rate *structure* has remained the same since 2003, but Met
12 periodically adjusts the dollar figures for the rates. San Diego has paid those charges under the
13 Exchange Agreement.
14

15 16 **III. Procedural History**

17 This action includes two complaints, responsive to Met’s 2010 and 2012 rate settings
18 respectively. April Statement of Decision, 2-3. The 2010 case included six causes of action:
19 three that directly challenged Met’s rate setting, one breach of contract claim, a declaratory relief
20 claim on Rate Structure Integrity, and one declaratory relief claim on preferential rights. *Id.* The
21 2012 case included four causes of action: three that directly challenged Met’s rate setting and
22 one breach of contract claim. *Id.* at 3. I phased proceedings. Phase I addressed the rate
23

24 ⁶ The revised price term was proposed by San Diego as Option 2. Option 1 was closer to the original terms of the
25 1998 Exchange Agreement whereas Option 2 involved a more significant shift in responsibilities. Trial Transcript,
1214:1-1217:22.

26 ⁷ The revised price provision also contained a sentence addressing the parties’ rights to seek to change those charges.
The meaning of that sentence is disputed by the parties.

27 ⁸ The rates differ from Met’s full-service water rate because San Diego does not pay the supply rates. The rates
differ from Met’s wheeling rate because San Diego pays the System Power Rate rather than the incremental cost of
power to move wheeled water.

1 challenges and the declaratory relief claim on Rate Structure Integrity. Phase II concerns the
2 breach of contract and preferential rights claims.

3 On April 24, 2014, I issued a Statement of Decision following Phase I of trial. There I
4 invalidated Met's System Access Rate, System Power Rate, Water Stewardship Rate, and
5 Wheeling Rate for calendar years 2011-2014 because Met improperly included "100% of (1) the
6 sums it pays to the California Department of Water Resources' SWP disaggregated by the SWP
7 as for transportation of that purchased water; and (2) the costs for conservation and local water
8 supply development programs recovered through the Water Stewardship Rate" in its
9 transportation rates. *Id.* at 65. I found that "at least a significant portion of these costs are
10 attributable to supply, not transportation." *Id.* I did not determine the proper allocation of the
11 disputed charges.
12

13
14 Met had earlier moved for summary adjudication of, among other things, San Diego's
15 preferential rights claim. Met's motion was predicated on the rule that payments for the
16 purchase of water do not give rise to preferential rights credit. December 4, 2013 Order, 6-7.
17 Met argued that San Diego pays several volumetric rates under the Exchange Agreement and as
18 a wheeler that Met also charges for the purchase of water, such that San Diego essentially paid
19 for the purchase of water. *Id.* I denied summary adjudication, finding that San Diego did not
20 pay any rate for the cost of water under the Exchange Agreement and that indeed San Diego had
21 already paid *someone else* for the purchase of water in the Exchange Agreement and wheeling
22 contexts. *Id.* at 7. I held that Met had not established as a matter of law that San Diego was
23 purchasing Exchange Water as opposed to making some other sort of payment. *Id.*
24

25 The parties have now completed a Phase II bench trial on San Diego's breach of contract
26 and preferential rights claims. Closing argument was held on June 5, 2015. The parties
27

1 submitted supplemental briefs on June 19, 2015. I issued a proposed statement of decision,
2 granted Met's request for an extension of time to file objections, and now file this statement of
3 decision resolving the Phase II issues including Met's motion for partial judgment interposed at
4 the conclusion of San Diego's case in the Phase II trial.
5

6
7 **IV. Discussion**

8 **A. Breach of Contract**

9 To prove a cause of action for breach of contract a plaintiff must establish the contractual
10 terms, the plaintiff's performance or excuse for failure to perform, the defendant's breach, and
11 damage to the plaintiff resulting from the defendant's breach. *McKell v. Washington Mut., Inc.*,
12 142 Cal.App.4th 1457, 1489 (2006); CACI No. 303.
13

14 **1. Terms**

15 In the Exchange Agreement San Diego agreed to both pay a price and make "Conserved
16 Water" and/or "Canal Lining Water" and "Early Transfer Water" available to Met each year at
17 the "SDCWA Point of Transfer," in exchange for which Met agreed to make "Exchange Water"
18 available to San Diego each year at the "Metropolitan Point(s) of Delivery." PTX-65 §§ 3.1-3.2,
19 5.1.⁹ The aggregate quantity of Exchange Water delivered by Met in a given year was to be
20 equal to the aggregate quantity of Conserved Water (including Early Transfer Water) and Canal
21 Lining Water San Diego made available to Met in the same year. *Id.* §§ 1.1(m), 3.2(c).
22

23 The Exchange Agreement provided for the Price, as follows:
24

25 ⁹ The Exchange Agreement was one of several agreements executed pursuant to the Quantification Settlement
26 Agreement. PTX-65 § F. San Diego entered the Allocation Agreement on the same day. *Id.* at § G. In the
27 Allocation Agreement, Met assigned certain water rights to San Diego and its right to receive substantial
reimbursements for certain canal lining projects from San Diego. DTX-884 § 4A.1. San Diego's obligations under
the Exchange Agreement were subject to the execution and delivery of the Allocation Agreement, among other
things. PTX-65 § 7.2.

1 The Price on the date of Execution of this Agreement shall be [\$253]. Thereafter, the
2 Price shall be equal to the charge or charges set by Metropolitan's Board of Directors
3 pursuant to applicable law and regulation and generally applicable to the conveyance of
4 water by Metropolitan on behalf of its member agencies. For the term of this Agreement,
5 neither SDCWA nor Metropolitan shall seek or support in any legislative, administrative
6 or judicial forum, any change in the form, substance, or interpretation of any applicable
7 law or regulation (including the Administrative Code) in effect on the date of this
8 Agreement or pertaining to the charge or charges set by Metropolitan's Board of
9 Directors and generally applicable to the conveyance of water by Metropolitan on behalf
10 of its member agencies; provided, however, that Metropolitan may at any time amend the
11 Administrative Code in accordance with Paragraph 13.12, and the Administrative Code
as thereby amended shall be included within the foregoing restriction; and, provided,
further, that (a) after the conclusion of five (5) Years, nothing herein shall preclude
SDCWA from contesting in an administrative or judicial forum whether such charge or
charges have been set in accordance with applicable law and regulation; and (b) SDCWA
and Metropolitan may agree in writing at any time to exempt any specified matter from
the foregoing limitation.

12 PTX-65 § 5.2.

13 The first sentence of § 5.2 sets the initial price. The second sentence of § 5.2 constrains
14 subsequent prices to charges Met sets pursuant to applicable law and regulation for the
15 conveyance of water by Met to its member agencies.

16 The parties dispute the import of the lengthy third sentence of § 5.2. Met contends that
17 San Diego there agreed to the rate structure Met had in place at the time of the Exchange
18 Agreement but reserved the ability to challenge only *amendments* to Met's rate structure (after
19 the five year period). Met Closing Brief, 20-22.¹⁰ San Diego contends that San Diego agreed
20 not to challenge Met's existing rate structure or any amendments to it for five years, but reserved
21 the ability to challenge Met's existing rate structure or any amendments to it after five years.
22

23 San Diego's position is consistent with the plain language of the provision and Met's
24 position is not.

25 The third sentence begins with a limitation on the parties' ability to seek changes to the
26 form, substance, or interpretation of any applicable law or regulation, including the
27

¹⁰ Citations to "Met Closing Brief" refer to Met's corrected closing brief.

1 Administrative Code, that pertains to the charge or charges set by Met and generally applicable
2 to Met's conveyance of water on behalf of its member agencies. This limitation is followed by a
3 proviso that permits Met to amend its Administrative Code and extends the scope of the
4 limitation to any of Met's amendments to the Administrative Code. The first proviso is followed
5 by a second proviso that constrains the scope of the general limitation in two ways – one that
6 sunsets restrictions on challenges brought by San Diego, and one that permits the parties to make
7 mutually agreeable changes.
8

9 This plain language shows the parties agreed to preclude certain challenges with the
10 exception of those challenges expressly permitted, including the specified challenges identified
11 in the final proviso. Among the permitted challenges are those brought by San Diego after the
12 passage of five years contesting Met's charges for the conveyance of water on the basis they
13 were not set pursuant to applicable law. Whether or not Met amended the underlying rate
14 structure is irrelevant to whether San Diego may challenge Met's rate structure.
15

16 Met's argument turns on the assertion that the second proviso modifies the first proviso,
17 not the general limitation. Met Closing Brief, 20-22. The key to Met's argument is the premise
18 that the language "such charge or charges" in the second proviso refers to the charge or charges
19 contained in any amendments made pursuant to the first proviso. *Id.* at 22. This reading is
20 irreconcilable with the plain language. The general limitation, not the first proviso, contains a
21 reference to "charge or charges." In using the "charge or charges" language, the general
22 limitation echoed the price term itself. The general limitation precludes San Diego from
23 attacking any law or regulation pertaining to Met's "charge or charges" "generally applicable to
24 the conveyance of water." The general limitation precludes San Diego from bringing a challenge
25 that could impact the contract price. The reference to "such charge or charges" in the second
26
27

1 proviso refers to those charges.¹¹ It does not refer to the first proviso, which contains no
2 reference to any “charge or charges.”

3 The structure of this section makes this conclusion inescapable. The first proviso begins
4 with the language “provided, however.” The second proviso begins with the language “and,
5 provided, further.” This makes it plain that the second proviso was a further proviso to the
6 general limitation.
7

8 Met hopes to inject ambiguity into the contract with extrinsic evidence such as the
9 testimony of Jeffrey Kightlinger, who negotiated the deal for Met. Met Closing Brief, 22; Trial
10 Transcript, 1327:21-1328:8. He said the purpose of the second proviso was to protect San Diego
11 from adverse changes in Met’s rate structure, *id.* at 1300:13-1307:2, 1328:9-14, noting that San
12 Diego’s negotiators told him that San Diego would not challenge Met’s existing rate structure
13 and that this concession was material to Met. *Id.* at 1300:13-1301:6, 1304:19-1305:7. One of
14 San Diego’s negotiators, Maureen Stapleton, disputed Kightlinger’s testimony. She said San
15 Diego always had concerns with the rates themselves and raised them repeatedly with Met. *Id.* at
16 1554:22-1555:14.¹²
17

18 Met also notes San Diego’s analysis of the future costs under the pricing agreement that
19 the parties ultimately adopted. San Diego analyzed the cost of that price plan over 20, 35, 45,
20 and 75 years, but not over five years. Met Closing Brief, 23; Trial Transcript, 1218:6-1221:6.
21 Met also seeks to corroborate its interpretation by looking to a San Diego memo to its Imported
22 Water Committee from 2007, in which San Diego stated that it did not intend to litigate Met’s
23

24
25 ¹¹ Met contends that if the second proviso refers to the general limitation then San Diego could challenge every
26 charge. Met Closing Brief, 22. Not so. The general limitation referred to a limited subset of Met’s charges, to which
27 the second proviso refers.

¹² Met disputes Stapleton’s credibility. Met Closing Brief, 22-23 n.10. But a Met person ‘most knowledgeable’ also
testified, in his deposition, that pursuant to these provisions San Diego could contest whether Met’s rates and
charges are consistent with applicable law after five years. PTX-392 at 121:10-124:25. I credit Stapleton’s
testimony, and not contrary Kightlinger testimony.

1 current rate structure but could not know what future actions Met may take. Met Closing Brief,
2 23; DTX-355 at 2.

3 None of this extrinsic evidence creates ambiguity in the contract.¹³ That San Diego
4 projected its exposure over periods exceeding five years is unsurprising, because even if San
5 Diego could succeed in a rate challenge San Diego would still pay Met's full, if reconfigured,
6 conveyance rates over the life of the Exchange Agreement. Stapleton testified that San Diego
7 was only interested in projecting a worst case scenario under the pricing plan. Trial Transcript,
8 1465:22-1466:1. A worst case scenario projection would not include savings from rate
9 restructuring as a result of litigation, even in the dubious event that one could estimate such
10 savings.
11

12 That in 2007 San Diego did not intend to challenge Met's existing rate structure does not
13 clarify the parties' intent when they signed the agreement in 2003. If anything, San Diego's
14 statement in 2007 is consistent with San Diego's interpretation of the contract, not Met's. By
15 stating that it did not intend to challenge Met's existing rate structure, San Diego implied that it
16 thought it had, or would soon have, a right to challenge Met's existing rate structure. (If San
17 Diego had no right to challenge Met's rate structure, there would be no reason for San Diego to
18 discuss whether it intended to do so.) This implication is inconsistent with Met's interpretation
19 of the contract, pursuant to which San Diego would never have any right to challenge Met's
20 existing, unamended, rate structure.
21

22 While Kightlinger's testimony supports Met's position, it is contradicted, and I reject it.
23 PTX-392 at 122:21-123:1; Trial Transcript, 1194:16-1196:6. His reading is in any event
24
25

26
27 ¹³ Only if the contract is reasonably susceptible to an interpretation urged does a court admit extrinsic evidence to aid in the interpretation of the contract. *Wolf v. Superior Court*, 114 Cal.App.4th 1343, 1350-51 (2004). The determination of whether an ambiguity exists is a question of law. *Id.* at 1351.

1 irreconcilable with the plain language of the contract. It does not create an ambiguity and the
2 unambiguous plain language controls.

3 The third sentence of § 5.2 permits San Diego to challenge Met's charges applicable to
4 the conveyance of water by Met to member agencies.¹⁴

6 2. Breach

7 In the rate years at issue, Met charged San Diego its transportation rates – the System
8 Access Rate, System Power Rate, and Water Stewardship Rate – pursuant to the price term.¹⁵
9 San Diego contends that Met breached the price term because Met's transportation rates were not
10 set pursuant to applicable law and regulation. San Diego Pre-Trial Brief, 1. In Phase I, I held
11 that Met's System Access Rate, System Power Rate, and Water Stewardship Rate were unlawful.
12 April Statement of Decision, 65. There is no dispute that those rates are the rates generally
13 applicable to Met's member agencies for the conveyance of water. Because Met's charges were
14 not consistent with law and regulation, Met breached § 5.2 of the Exchange Agreement. PTX-65
15 § 5.2.

17 To escape this result, Met argues that San Diego did in fact agree to Met's existing rate
18 structure by (1) agreeing to an initial price of \$253, based in turn on Met's existing rate structure;
19 (2) entering the Exchange Agreement knowing Met's existing rate structure; (3) voting in favor
20 of the challenged rate structure before and after the Exchange Agreement was entered into; and
21 (4) accepting Met's performance under the contract. Amended Motion for Partial Judgment, 2-3;
22 Met Pre-Trial Brief, 12.

24 ¹⁴ In passing, San Diego refers to this state of affairs as an “agree[ment] to disagree” about the law pertaining to
25 Met's rates. San Diego Post-Trial Brief for Phase II, 14. Met contends that San Diego agreed to a contract price
26 including the Water Stewardship Rate, the System Power Rate, and the System Access Rate, the latter two
27 components including State Water Project costs that the Department of Water Resources allocated to infrastructure.
Met Pre-Trial Brief, 12. Through this litigation Met has never contended the price term is uncertain or indefinite.
Compare, e.g., California Lettuce Growers v. Union Sugar Co., 45 Cal.2d 474, 481 (1955).

¹⁵ This is undisputed. *E.g.*, Met Pre-Trial Brief, 11; Met Closing Brief, 15; San Diego Post-Trial Brief for Phase II,
4, 21-22.

1 The first two points are not persuasive. Regardless of the parties' thinking which led to
2 the initial price, the parties just agreed to that number. San Diego's agreement to pay rates Met
3 set pursuant to applicable law and regulation does not amount to a tacit adoption of the then-
4 existing rate structure where the very same paragraph sets out provisions governing how and
5 when San Diego will be precluded from, and permitted to, a challenge whether those same
6 charges, whether or not amended, were in fact properly set pursuant to applicable law and
7 regulation. PTX-65 § 5.2.

9 Met contends there can be no breach when it uses the rate structure that has been in
10 existence since 2003, because San Diego entered the contract knowing Met's future performance
11 would be a continuation of that very structure. Amended Motion for Partial Judgment, 6. San
12 Diego may well have known that it was in substance agreeing to pay the Water Stewardship Rate
13 and for all State Water Project costs in Met's rate elements for five years. But San Diego also
14 bargained for the right to attack Met's conveyance rates after five years. If the charges were
15 removed from Met's generally applicable rates as the result of a change obtained by San Diego,
16 the charges would also be removed from the contract price. So San Diego did not agree to pay
17 any specific rate or abide by any specific rate structure for the life of the contract – it expressly
18 only agreed to pay rates set in accordance with applicable law and regulation, reserving the right
19 to challenge whether Met set its rates in accordance with applicable law and regulation (after five
20 years).

23 Accepting Met's performance for some period of time, even exceeding the five year
24 period, does not show San Diego agreed in the contract¹⁶ to a rate structure when at the same
25 time San Diego expressly retained the right to challenge Met's charges in court after the five year
26 period.

27 _____
¹⁶ I separately address Met's waiver defense.

1 Below, I discuss the impact of San Diego's representatives' votes on Met's Board of
2 Directors on waiver. Here, I find that the voting history does not suggest that the plain language
3 of the contract is ambiguous or that San Diego agreed to pay under Met's existing rate structure
4 for the life of the contract. The unambiguous plain language again controls.
5

6 3. Damages

7 There are two issues under the rubric of damages. First, San Diego must prove the fact
8 that it suffered some damage as an element of its breach of contract claim. Second, if liability
9 for breach of contract is established, I must determine the appropriate measure of damages.
10

11 a. Background Law

12 Damages are of course an essential element of a breach of contract claim. *Behnke v.*
13 *State Farm General Ins. Co.*, 196 Cal.App.4th 1443, 1468 (2011); C.C. § 3300. "The damages
14 awarded should, insofar as possible, place the injured party in the same position it would have
15 held had the contract properly been performed, but such damages may not exceed the benefit
16 which it would have received had the promisor performed." *Brandon & Tibbs v. George*
17 *Kevorkian Accountancy Corp.*, 226 Cal.App.3d 442, 468 (1990); *Lewis Jorge Const.*
18 *Management, Inc. v. Pomona Unified School Dist.*, 34 Cal.4th 960, 967-68 (2004). "Where the
19 fact of damages is certain, the amount of damages need not be calculated with absolute certainty.
20 [Citations.] The law requires only that some reasonable basis of computation of damages be
21 used, and the damages may be computed even if the result reached is an approximation." *GHK*
22 *Associates v. Mayer Group, Inc.*, 224 Cal.App.3d 856, 873 (1990).
23

24 Importantly, a defendant cannot escape liability for its breach because damages cannot be
25 measured exactly. *SCI Cal. Funeral Servs., Inc. v. Five Bridges Foundation*, 203 Cal.App.4th
26 519, 571 (2012).
27

1 **b. Fact of Damages**

2 To establish the fact of damages San Diego relies on the April Statement of Decision as
3 well as testimony to the effect that Met's rates resulted in inflated conveyance rates. San Diego
4 Post-Trial Brief for Phase II, 21.¹⁷ In Phase I, I held that Met's conveyance rates over-collect
5 from wheelers because Met allocated all of the State Water Project costs for the transportation of
6 purchased water to its conveyance rates and all of the costs for conservation and local water
7 supply development programs to its conveyance rates. April Statement of Decision, 65. The
8 same logic applies to the Exchange Agreement. San Diego paid more than it agreed to under the
9 Exchange Agreement because Met improperly included all of the State Water Project costs for
10 the transportation of purchased water to its conveyance rates and all of the costs for conservation
11 and local water supply development programs to its conveyance rates.
12

13
14 Met responds that contract damages may only be the difference between the price Met
15 charged San Diego and the highest price Met could have charged San Diego had it performed its
16 obligation to set a lawful rate. Met Closing Brief, 3. So, Met says San Diego bore a burden of
17 proving at least that its damages theory is based on some lawful rate structure, and (possibly) that
18 under every imaginable lawful alternative rate structure San Diego would have paid less than it
19 did in the real world.¹⁸
20

21 There are two points to be made here. First, Met's present argument flies in the face of
22 the positions it has repeatedly taken in the past; and secondly, Met's argument does not in any
23 event obviate the obvious point that San Diego has established the fact of damages.

24 ¹⁷ See also, Trial Transcript, 991:16-992:6 (Dennis Cushman's testimony that San Diego has overpaid State Water
25 Project and Water Stewardship Rate charges as a result of Met's rates), 1911:24-1912:9 (testimony from Met's
26 expert to the effect that if the State Water Project costs should not have been included then San Diego overpaid
those charges).

27 ¹⁸ Met Closing Brief, 3 (arguing that San Diego did not prove that it paid more under the Exchange Agreement than
it could have under an alternative lawful rate structure, and therefore did not prove damages, because it did not
prove what alternative rate structures may exist); Amended Memorandum in Support of Partial Judgment, 8-9
(arguing that San Diego must prove its allocation is based on a lawful rate structure).

1 On the matter of stating or fixing damages through some sort of analysis of
2 counterfactual arguably legal rates, Met has repeatedly tried to have its cake and eat it too, as it
3 were. It has told me both that (i) only a new rate setting procedure may be used in this case to
4 fix lawful rates which in turn must be done before damages can be ascertained,¹⁹ and (ii) superior
5 courts may not do this. Met's January 9, 2015 Motion to Dismiss, 1-5; Trial Transcript, 2013:6-
6 2018:16; *see also* Met's March 27, 2014 Objections to Tentative Statement of Decision, 2-3
7 (court is not a rate-fixing body).²⁰ Met has had no useful response when I have enquired whether
8 its vision of damages requires me to defer a calculation of damages until after Met resets rates
9 (which would come after, and be a function of, appellate proceedings in this very case) which
10 new rates themselves might very well be subject to further independent litigation, pushing out
11 the decision on both the fact and calculation of damage in this case to many, many years hence.
12 Met's January 9, 2015 Motion to Dismiss, 5-6. These parties were keenly, almost painfully,
13 aware that contract litigation (after five years) was likely; but the notion that they also intended
14 to have the anticipated contract dispute resolved in this way is inconceivable.²¹

17 On the second point, Phase I established Met unlawfully included supply costs in
18 transportation rate elements. Met charged the same transportation rate elements to San Diego
19 under the Exchange Agreement as charges generally applicable to the conveyance of water by
20 Met on behalf of its member agencies. It is thus patently obvious that San Diego has established
21 that some costs should have been removed from the rates it paid under the Exchange Agreement
22

23 ¹⁹ E.g., Met's Amended Motion for Partial Judgment at 7:20 ("rates must be recalculated").

24 ²⁰ This logical twist got to the point where I had to instruct Met not to press a damages theory which Met at the same
25 time maintained I had no jurisdiction to entertain. Nov. 4, 2014 Order Setting Case Management Conference, 1-2;
26 Dec. 4, 2014 Order Denying Met's Motion to Reopen Expert Discovery. The effect of Met's fabricated conundrum
27 would be, of course, that damages could *never* be fixed if Met ever breached the Exchange Agreement. Despite this,
I allowed the parties, and Met specifically, to introduce evidence of a "lawful spectrum of rates" to estimate
damages. Order Re: Metropolitan's Motion To Dismiss For Lack Of Subject Matter Jurisdiction And [On] The
Parties' Motions In Limine, dated February 6, 2015. In the event, Met did not do so.

²¹ Dennis Cushman's testimony at e.g. DTX-710 at 443:10-444:2 is not to the contrary: he does not there endorse
this mode of calculating damages.

1 – the rates were obviously overinclusive. The precise amount of overinclusion is not established,
2 nor is any resulting impact on other Met rates.

3 I turn to Met’s argument that San Diego failed to account for (or set off) benefits it
4 secured by Met’s illegal rates, and as a consequence failed to establish damages.

5
6 Met argues the same conduct that breached the contract also must have resulted in
7 decreased supply rates, saving San Diego some money when it purchased full-service water from
8 Met. Met Closing Brief, 6. These savings must be treated as an offset against San Diego’s
9 damages, Met says, for it must have under-collected its supply costs in such a way that
10 necessarily resulted in under-collection from full-service water purchases.²² But Met as
11 defendant has the burden on matters of offset and unjust enrichment. *Textron Fin. Corp. v. Nat’l*
12 *Union Fire Ins. Co. of Pittsburgh*, 118 Cal.App.4th 1061, 1077 (2004), *disapproved of on other*
13 *grounds by Yanting Zhang v. Superior Court*, 57 Cal.4th 364 (2013). Met bore the burden of
14 demonstrating that San Diego’s damages were offset by incidental extra-contractual benefits San
15 Diego obtained as a result of the same conduct amounting to breach. *Space Properties, Inc. v.*
16 *Tool Research Co.*, 203 Cal.App.2d 819, 827 (1962) (defendant has burden of proof on defenses
17 such as unjust enrichment and or setoff). No evidence shows San Diego would have received a
18 consequential benefit from paying reduced supply charges that equaled or outweighed its
19 damages under the contract during the rate years in question if Met had reallocated the unlawful
20 transportation charges to its supply rates. Accordingly, Met’s argument for an offset does not
21 defeat liability. It has not met that burden.

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26 ²² *Hicks v. Drew*, 117 Cal. 305, 314-15 (1897) (approving the jury instruction “If the jury find from the evidence that
27 the plaintiff has sustained any damage by the act of defendant, as she has complained against him, and that by the
same act she has received benefit, then, in estimating such damage, such benefit should be deducted”). See Trial
Transcript, 1136:25-1138:14.

1 Finally as I have suggested above a recalculation of Met's supply rates conflicts with
2 Met's view that such an approach is impermissible in superior court.

3 San Diego has proven by a preponderance of the evidence that it was in fact damaged by
4 paying conveyance rates that were higher than Met could have set pursuant to applicable law and
5 regulation. PTX-65 § 5.2. San Diego should not be required to prove the fact of damages
6 beyond any shadow of doubt by proving the entire universe of possible alternative legal rate
7 structures Met might have implemented.
8

9 **c. Amount of Damages**

10 San Diego seeks an award of \$188,295,602 plus interest. San Diego Post-Trial Brief for
11 Phase II, 29. San Diego computed its damages by removing the SWP costs and the Water
12 Stewardship Rate from the Price. *Id.* at 30. Met correctly notes the Phase I ruling did not go so
13 far as to hold that Met is not permitted to include any of its SWP costs or Water Stewardship
14 Rate in its conveyance rates. Met argues that San Diego bore a Phase II burden of demonstrating
15 the appropriate percentage that Met could have included; and failed to carry that burden. Met
16 Closing Brief, 5-6; Trial Transcript, 2033:15-22, 2035:20-2037:19. Met also argues that any
17 damage award should be offset by whatever increases San Diego would have paid in its supply
18 rates. Met Closing Brief, 6; Trial Transcript, 2021:4-10.
19
20

21 San Diego's approach may overcompensate San Diego, because San Diego (1) removed
22 all State Water Project costs from Met's conveyance rates although I have only ruled that Met
23 could not include 100% of those costs through its conveyance rates;²³ and (2) removed the entire
24

25 ²³ Met argues that Exchange Water included State Water Project water, so San Diego should be charged with some
26 costs from the State Water Project system under the Exchange Agreement. Met Closing Brief, 8-12. But the
27 question is not whether Met should recover State Water Project costs under the Exchange Agreement, the question is
whether State Water Project costs can properly be recovered through the lawfully set conveyance rates that San
Diego agreed to pay under the Exchange agreement. Met's argument that San Diego should have accounted for the
power costs to move water pursuant to the Exchange Agreement appears to suffer from the same defect. *Id.* at 13.
In a similar vein, Met challenges the methodology by which San Diego's expert recalculated the rates. Met Closing

1 Water Stewardship Rate from Met's conveyance rates although I only ruled that Met could not
2 recover 100% of those costs through its conveyance rates. Nor does San Diego account for
3 possible set-offs, although as suggested above it is not San Diego's burden to do so.²⁴
4

5 There is no viable alternate methodology available. Neither party has computed alternate
6 conveyance rates assuming that less than 100% of the charges are shifted from conveyance to
7 supply. Neither party has explained the basis for an appropriate offset as a result of reduced
8 supply rates.

9 Met seeks dismissal because of this uncertainty. Trial Transcript, 2033:12-19. But
10 where, as here, the fact of damage flowing from the breach is proven the amount of damages
11 may be fixed using an approximation if there is a reasonable basis for the approximation. *GHK*,
12 224 Cal.App.3d at 873-74.²⁵ The rationale for San Diego's calculation is (1) San Diego has
13 removed from Met's transportation rates only certain charges that this Court ruled cannot be
14 wholly included in transportation rates; (2) attempting to allocate the charges at issue between
15 transportation and supply would embroil the Court in an inappropriate ratemaking exercise (a
16 proposition with which Met has repeatedly agreed) (Trial Transcript, 2017:23-2018:7; Met's
17 January 9, 2015 Motion to Dismiss, 3-5; Met's March 27, 2014 Objections to Tentative
18

19
20 Brief, 7-8; Trial Transcript, 1140:5-17. San Diego's expert removed the challenged costs from the cost pool and
21 divided the cost pool by the sales assumption. Trial Transcript, 1140:5-17. Met's expert opined that San Diego
22 should have instead divided only Colorado River costs by Colorado River sales. Trial Transcript, 1899:8-1900:14.
23 But, once again, the proper approach was to determine what Met's rate would have been if certain charges in Met's
24 generally applicable conveyance rates were moved from conveyance to supply. To do this, it was appropriate to
25 look at Met's total conveyance costs and its total sales assumption.

26 ²⁴ San Diego provided some evidence in support of a 15% figure. Trial Transcript, 1258:7-1260:8. While Met
27 contends quantifying an offset is not its problem, Trial Transcript, 2022:11-14, defendants usually *do* have this sort
of burden. *Textron Fin. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 118 Cal.App.4th 1061, 1077 (2004),
disapproved of on other grounds by Yanting Zhang v. Superior Court, 57 Cal.4th 364 (2013). At closing argument
Met expressed no confidence in or support for this 15% figure. E.g., Trial Transcript (closing argument) June 5,
2015 at 2020. See also, Met Closing Brief, 7.

²⁵ The *GHK* Court noted that an approximation for which there is a reasonable basis is particularly permissible when
the wrongful acts of the defendant created difficulty in proving the amount of lost profits or where the wrongful acts
of the defendant caused the other party not to realize a profit to which it was entitled. *GHK*, 224 Cal.App.3d at 873-
74.

1 Statement of Decision, 2-3). San Diego Post-Trial Brief for Phase II, 31; San Diego Pre-Trial
2 Brief, 11-12.

3 San Diego has offered a reasonable computation. It is not possible to know how Met may
4 in the future allocate its State Water Project conveyance costs or Water Stewardship Rate
5 between transportation and supply rates. One reasonable assumption is that the entirety of the
6 rate would have been moved. San Diego computed its damages under the contract for the 2011-
7 2014 rate years using that assumption.

8 Met did not offer a competing computation.

9 It asks too much of San Diego to require it to recalculate Met's rates with any useful
10 degree of precision. *MCI Telecommunications Corp. v. F.C.C.*, 59 F.3d 1407, 1415 (D.C. Cir.
11 1995) (inequitable to permit defendants who were in the best position to set their rates at lawful
12 levels in the first place and who later had opportunities to correct those rates to avoid
13 responsibility for those unlawful rates because the complainant to establish an appropriate rate
14 without making simplifying assumptions); *SCI*, 203 Cal.App.4th at 571 (defendant cannot escape
15 liability for breach simply because damages cannot be measured exactly).

16 For these reasons, San Diego has proven that it is entitled to damages in the amount of
17 \$188,295,602 plus interest.

18
19
20
21 **4. Affirmative Defenses**

22 **a. Waiver**

23 Met contends that San Diego waived²⁶ any claim for damages arising from Met's use of
24 the rate structure to set the Price by the following conduct inconsistent with an intent to claim
25 damages: (1) proposing the Price with knowledge of the rate structure and its components; (2)
26 voting, through its delegates to Met's Board of Directors, in favor of the rate structure and rates;

27

²⁶ *Carmel Valley Fire Prot. Dist. v. California*, 190 Cal.App.3d 521, 534 (1987) (elements of waiver).

1 (3) failing to object to the structure of the rates until 2010; (4) stating in 2007 that San Diego did
2 not intend to litigate Met's existing rate structure; and (5) accepting Met's performance with
3 knowledge of the breach. Met Closing Brief, 14-20.

4 Met's waiver theories are precluded by the anti-waiver provision²⁷ in the Exchange
5 Agreement. Met has not identified any conduct that could have waived the protections of the
6 anti-waiver provision. *Id.* at 24-25. Nor has Met identified any written and signed waiver.
7
8 PTX-65 § 13.9.²⁸

9 **b. Consent**

10 Met asserts that San Diego consented²⁹ to using Met's then-existing rate structure to set
11 the Price by entering the Exchange Agreement with knowledge of the unlawfulness of the rate
12 structure, voting in favor of the rate structure, and accepting the benefits of the agreement. Met
13 Closing Brief, 25-28.

14
15 First, San Diego's agreement to the price term in the Exchange Agreement does not
16 amount to San Diego's approval of Met's rate structure. As discussed above,³⁰ contrary to Met's
17 reading of the Exchange Agreement San Diego retained the right to challenge Met's existing rate
18 structure after five years. San Diego agreed to pay only (1) a fixed initial rate; and (2) a rate set
19

20
21 ²⁷ "No waiver of a breach, failure of condition, or any right or remedy contained in or granted by the provisions of
22 this Agreement is effective unless it is in writing and signed by the Party waiving the breach, failure, right, or
23 remedy. No waiver of a breach, failure of condition, or right or remedy is or may be deemed a waiver of any other
24 breach, failure, right, or remedy, whether similar or not. In addition, no waiver will constitute a continuing waiver
25 unless the writing so specifies." PTX-65 § 13.9.

26 ²⁸ Met looks to San Diego's written statement in 2007 that it did not intend to litigate Met's existing rate structure as
27 a written waiver. Met Closing Brief, 19-20; DTX-355 at 2; DTX-1114 at 11-12; Trial Transcript, 1070:17-22. But
none of these documents shows San Diego's intention to give up any right to challenge the existing rates. Rather,
the documents reflect whether San Diego had the intent to challenge the existing rates in 2007. San Diego may not
have *then* intended to challenge the existing rates, but still not have intended to give up the right to do so in the
future.

²⁹ Consent is a free and mutual agreement to an act. C.C. § 1567. "A voluntary acceptance of the benefit of a
transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to
be known, to the person accepting it." C.C. § 1589.

³⁰ Section IV(A)(1).

1 pursuant to applicable law. San Diego did not agree to Met's existing rate structure, but
2 bargained away the ability to challenge that rate structure for five years.

3
4 Second, the voting records do not support the assertion that San Diego consented to the
5 use of Met's rate structure in the years at issue. San Diego's representatives on Met's board
6 voted in favor of Met's rates in 2002, 2005, 2006, 2007, 2008, and 2009. Trial Transcript,
7 1506:14-17; DTX-129. San Diego's representatives voted against the rates in the years at issue
8 in this case. DTX-129. In voting, San Diego's representatives acted as Met's fiduciaries in the
9 scope of their duties as members of the board. Trial Transcript, 1506:12-13. Each time Met set
10 an unlawful rate, Met breached its obligations under the Exchange Agreement. *Arcadia*
11 *Development Co. v. City of Morgan Hill*, 169 Cal.App.4th 253, 262 (2008). Even if San Diego
12 can be said to have consented to Met's breaches in prior years because its delegates voted in
13 favor of the rates, a proposition with which I do not agree,³¹ San Diego's delegates did not vote
14 in favor of the rates at issue now.

15
16 Third, San Diego did not accept the benefits of the contract without protest in the rate
17 years at issue here. Again, each time Met sets unlawful conveyance rates, it breached its
18 obligations. Perhaps San Diego accepted Met's performance in prior years, even after the
19 expiration of the five year period; but San Diego did not accept Met's performance without
20 protest in the rate years at issue. Rather, it sued to challenge these breaches.

21
22 **c. Estoppel**

23 Met argues that San Diego is estopped³² from asserting that setting the Price based on the
24 existing rate structure is a breach of contract because San Diego's delegates to Met's Board of
25

26 ³¹ As the text suggests these delegates wore at least two hats, and in voting for Met rates may well have acted in the
27 best interests of Met.

³² In general, there are four elements of equitable estoppel: (1) the party to be estopped must be apprised of the facts;
(2) the party to be estopped must intend that his conduct shall be acted upon or have acted in such a way that the

1 Directors failed to disclose that Met's rate structure was unlawful and instead in effect
2 represented that the Price could be based on the existing rate structure. Met Closing Brief, 28-
3 31. Met asserts that San Diego agreed to a price term based on the rate structure and the 2003
4 rates; did not communicate that any of Met's rates might be unlawful; did not object to the price;
5 and represented that it did not intend to sue over the existing structure. *Id.* at 30.

7 In short Met contends that San Diego, knowing Met's rate structure was unlawful,
8 engaged in conduct that created the impression Met's existing rate structure was lawful, and that
9 Met, not knowing that its rate structure was unlawful, relied on San Diego's conduct.

10 But as Met recognized in its First Phase I Pre-trial Brief, the plain language of the
11 Exchange Agreement is itself an "open[] threat[] to litigate over [Met's] existing rate structure"
12 because San Diego agreed not to challenge Met's rates for five years after execution but reserved
13 the right sue to challenge the validity of Met's rates thereafter. Met Oct. 18, 2013 Brief, 14
14 (providing background concerning Met's use of Rate Structure Integrity provisions); PTX-65 §
15 5.2. San Diego's right to challenge Met's existing rate structure is itself part of the price term
16 section. Met could not have relied on San Diego's proposal of or agreement to this price term to
17 conclude that its rate structure is lawful. Moreover, the contract itself demonstrates that neither
18 party knew that Met's rate structure was unlawful;³³ both parties were bargaining in the context

23 party asserting estoppel had the right to believe the conduct was so intended; (3) the party asserting estoppel must be
24 ignorant of the true facts; and (4) the party asserting estoppel must rely on the conduct. *Ashou v. Liberty Mut. Fire*
25 *Ins. Co.*, 138 Cal.App.4th 748, 766-67 (2006). Met's arguments conceivably satisfy the first two elements, but not
26 the rest, so setting aside my discussions in the text the estoppel defense fails in any event. Met does not show it was
27 ignorant of facts to which San Diego was privy nor does it show reliance, that is, that it would have acted otherwise.
33 Indeed, my determination on the lawfulness of Met's rate structure is itself exceedingly likely to be appealed. The
notion that Met relied on representations from San Diego to act on the belief that its rate structure is lawful is
particularly unpersuasive where Met continues to set its rates based on the belief that its rate structure is lawful even
after San Diego voted against the rates, sued Met over the rate structure, and obtained my trial court ruling that the
rate structure is unlawful. Met, as experienced in state water law as any entity, and served by some of the best
lawyers in the country, has never been misled by San Diego; it just disagrees with San Diego.

1 of uncertainty. The negotiations and terms of the Agreement make it plain—in way that is not
2 often found in contracts—that a lawsuit was contemplated.

3 Nor, in this context, could Met have reasonably relied on San Diego’s other conduct to
4 conclude that its rate structure was legal. For example, in 2007 San Diego stated in internal
5 documents that it did not intend to litigate Met’s existing rate structure.³⁴ But San Diego could
6 have determined not to litigate Met’s existing rate structure for a number of reasons, only one of
7 which is San Diego’s likelihood of success; and an internal document surely could not create an
8 estoppel as to Met. Met also notes San Diego’s delegates voted to approve Met’s rates in 2002
9 and 2005-2009 but did not tell Met that its rate structure might be illegal. But again the plain
10 language of the Exchange Agreement eviscerates this argument. Even as San Diego acquiesced
11 to Met’s rates on a year-to-year basis after the expiration of the five year period, the possibility
12 of a legal challenge to the rates was written into the Exchange Agreement.

13
14
15 San Diego did not represent to Met, by omission or by conduct on which Met could
16 reasonably rely, that Met’s rates were lawful knowing Met’s rates were in fact illegal. Rather,
17 San Diego bargained for the right to challenge Met’s rates in court in the future, and Met
18 bargained to constrain San Diego’s ability to do so. San Diego’s suit is not barred by the
19 doctrine of equitable estoppel.

20
21 **d. Illegality**

22 Met argues that the Exchange Agreement is void as illegal if Met’s rate structure or rates
23 in existence at the time the parties entered into the Exchange Agreement were illegal. Met
24 Closing Brief, 31-33. This is so because if San Diego is right, Met’s performance of the price

25
26
27 ³⁴ Met Closing Brief, 19-20; DTX-355 at 2 (San Diego memo weighing whether to enter contracts with a Rate Structure Integrity provision); DTX-1114 at 11-12; Trial Transcript, 1070:17-22.

1 term was unlawful, Met says, because the rate structure includes unlawful rates. Met Pre-Trial
2 Brief, 12.

3 Although San Diego agreed not to challenge the manner in which Met set its charge or
4 charges for the following five years, the parties did not agree the setting of charges was legal or
5 illegal. Fixing a \$253 price is not illegal. Nor is it illegal to require Met to set its charges for the
6 conveyance of water pursuant to applicable law and regulation; precisely the opposite is true.³⁵
7 The parties obviously bargained for—by definition—a *legal* price term.
8

9 **e. Mistake of Law**

10 Met argues that there was a mistake of law with respect to whether its existing rates at the
11 time the parties entered the Exchange Agreement were lawful. To the extent that neither party
12 was aware the rate structure was unlawful, Met contends that it is entitled to rescission based on
13 mutual mistake. Met Closing Brief, 34-35; C.C. § 1578(1).³⁶ To the extent that San Diego but
14 not Met was aware that Met's rate structure was unlawful, Met is entitled to rescission because
15 San Diego failed to rectify Met's mistake. Met Closing Brief, 35-36; C.C. § 1578(2). San Diego
16 says there was no mistake of law – the parties disagreed about the lawfulness of Met's rate
17 structure and bargained around that disagreement. San Diego Post-Trial Brief for Phase II, 28-
18 29.
19
20

21 Where parties are aware that a doubt exists in regard to a certain matter and contract on
22 that assumption, the risk of the existence of the doubtful matter is an element of the bargain.
23 *Guthrie v. Times-Mirror Co.*, 51 Cal.App.3d 879, 885 (1975). The kind of mistake that renders a
24

25 _____
26 ³⁵ "It is well settled that if a contract can be performed legally, it will not be presumed that the parties intended for it
27 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).

³⁶ Met never tells us how this rescission, based on mistake or other grounds, would be carried out. Presumably San
Diego would not have to return the transported water.

1 contract voidable does not include mistakes as to matters which the contracting parties had in
2 mind as possibilities and as to the existence of which they took the risk. *Id.*

3 It is not clear when San Diego reached the conclusion that Met's rates were unlawful.
4 San Diego notes evidence that San Diego suggested to Met that Met's wheeling rate was
5 unlawful and that Met understood the suggestion. PTX-398; PTX-392 at 121:10-124:25
6 (purpose of five year standstill was to permit San Diego to bring a challenge to the rates). Met
7 asserts that San Diego's own negotiator vacillated as to whether San Diego had identified
8 anything unlawful about Met's rates at the time the parties entered the Exchange Agreement.³⁷
9 The parties were unclear on exactly what the law was.³⁸

10
11 Neither party knew how a court would rule on Met's rate structure. But they contracted
12 around this uncertainty. For five years, the parties precluded San Diego from challenging Met's
13 interpretation of the law, whether or not that interpretation changed during that period.
14 Thereafter, if San Diego disagreed it was free to bring a judicial challenge. The structure of the
15 contract itself, against this backdrop of uncertainty, demonstrates that the parties knew San
16 Diego might challenge Met's rate structure, were unsure which party would prevail in such a
17 lawsuit, and contracted in a way that accounted for Met's interests if its rates were unlawful.³⁹
18 There was no mistake of law.
19
20
21
22

23 ³⁷ Compare Trial Transcript, 1590:7-1591:17 (Stapleton confronted with Slater's deposition testimony that San
24 Diego did not a violation although it knew there were laws that could be pertinent); with Trial Transcript, 1452:16-
25 1454:2 (Stapleton confronted with Slater's testimony that certain rates were unlawfully included in Met's
26 conveyance rates).

27 ³⁸ Trial Transcript, 1237:8-1243:17, 1248:13-1253:20, 1255:25-1256:8.

³⁹ San Diego forfeited its ability to challenge Met's rates in court for five years; to the extent Met's rates were
unlawfully inflated, Met received a benefit at San Diego's expense at least for the first five years of the contract.
Kightlinger testified that he did not have any doubt as to the lawfulness of Met's rates and that Met would not have
entered the Exchange Agreement if San Diego had said that Met's rates were unlawful during negotiations. Trial
Transcript, 1316:3-18. In section IV(A)(1), I rejected Kightlinger's testimony that San Diego told him that San
Diego would not challenge Met's existing rate structure and that the concession was material to Met.

1 **f. Offset and Unjust Enrichment**

2 These defenses are subsumed within the damages questions and are addressed there.⁴⁰

3 **B. Preferential Rights**

4 San Diego seeks a declaration that Met’s methodology of computing preferential rights
5 violates § 135 of the Metropolitan Water District Act⁴¹ because it excludes San Diego’s
6 payments relating to the conveyance of water San Diego purchases from other sources. Third
7 Amended 2010 Complaint ¶¶ 113-15. Specifically, the parties dispute whether (1) San Diego’s
8 payments pursuant to the Exchange Agreement should be included in the preferential rights
9 calculation; and (2) payments under wheeling agreements should be included in the preferential
10 rights calculation.⁴²

11 Section 135 includes the following:

12 Each member public agency shall have a preferential right to purchase from the district
13 ... a portion of the water served by the district which shall, from time to time, bear the
14 same ratio to all of the water supply of the district as the total accumulation of amounts
15 paid by such agency to the district on tax assessments and otherwise, excepting purchase
16 of water, toward the capital cost and operating expense of the district’s works shall bear
17 to the total payments received by the district on account of tax assessments and
18 otherwise, excepting purchase of water, toward such capital cost and operating expense.

19
20
21 ⁴⁰ Met’s briefing does not separately address these defenses.

22 ⁴¹ Water Code Appendix § 109-135.

23 ⁴² San Diego Post-Trial Brief for Phase II, 39-40 (referring to the Exchange Agreement and other wheeling
24 agreements); Met Closing Brief, 36-40 (addressing only the Exchange Agreement); Trial Transcript, 2037:20-
25 2038:1; Third Amended 2010 Complaint ¶¶ 113-15 (“113. ... The Water Authority formally requested a
26 determination that its preferential rights should include the amount paid as ‘transportation’ costs for Metropolitan’s
27 conveyance of Non-Metropolitan Water through its pipelines and facilities. Metropolitan has formally denied that
request, taking the position that money paid by the Water Authority for the transportation of its IID and Canal
Lining water are for the ‘purchase of water’ (i.e., supply)... [¶] 114. In the absence of declaratory relief,
Metropolitan will continue its wrongful calculation of the Water Authority’s preferential rights... [¶] 115.
Therefore, the Water Authority prays for a judicial declaration (a) that the current methodology used by
Metropolitan to calculate the Water Authority’s preferential rights violates section 135 of the MWD Act; and (b)
directing Metropolitan to follow the requirements of the MWD Act by including the Water Authority’s payments to
Metropolitan for transportation of IID Water and Canal Lining Water (which payments are not for ‘purchase of
water’) in the calculation of the Water Authority’s preferential rights to water”) (footnote omitted).

1 As explained by our Court of Appeal:

2 Under section 135, in the event of a water supply shortage, each Metropolitan member
3 public agency, including San Diego, has a preferential right to a percentage of
4 Metropolitan's available water supplies based on a legislatively established formula.
5 That formula affords each member an aliquot preference equal to the ratio of that
6 member's total accumulated payments toward Metropolitan's capital costs and operating
7 expenses when compared to the total of all member agencies' payments toward those
8 costs, excluding amounts paid by the member for "purchase of water."

7 *San Diego County Water Authority v. Metropolitan Water Dist.*, 117 Cal.App.4th 13, 17 (2004).

8 Met moved for summary adjudication of San Diego's preferential rights claim in 2013. I
9 denied Met's motion by order issued December 4, 2013. From *SDCWA*, I derived the rule that
10 the preferential rights calculation includes all payments for capital costs and operating expenses,
11 excluding those payments that were tied to the "purchase of water." Dec. 4, 2014 Order, 6. Met
12 attempted to draw a parallel to *SDCWA* based on the rate components charged for the purchase
13 of water in *SDCWA* and the similar rate components charged under, for example, the Exchange
14 Agreement. *Id.* at 6-7. I held that Met had not established that San Diego was purchasing water
15 from Met through the Exchange Agreement. *Id.* at 7.

17 At the Phase II closing argument, Met again pressed the argument that no payment of a
18 volumetric rate is properly credited to preferential rights. Trial Transcript, 2038:18-2039:11,
19 2040:21-2041:10. This reading contradicts the plain language of the statute and *SDCWA*. The
20 Court of Appeal agreed with Met's longstanding interpretation that "amounts paid for water
21 purchases are not to be taken into account in determining preferential rights, whatever those
22 amounts are used for." *SDCWA*, 117 Cal.App.4th at 24-25. The Court independently analyzed
23 the language of the statute, the structure of the statutory scheme, and the legislative history to
24 interpret the Legislature's intent. *Id.* at 25-28. *SDCWA* found the statute reflected the
25 Legislature's intent to create a general rule that all revenue used to pay capital costs and
26
27

1 operating expenses would count toward the calculation of preferential rights, except payments
2 for the purchase of water. *Id.* at 27. In the pure wheeling context, the wheeler does not purchase
3 water from Met but pays a volumetric rate for Met to move water that belongs to the wheeler. I
4 discern no basis for Met’s decision to treat volumetric wheeling payments as payments for the
5 purchase of water. Volumetric payments to Met to cover Met’s operating expenses that are not
6 connected to a purchase of water from Met are entitled to preferential rights credit under § 135 of
7 the Met Act and *SDCWA*.⁴³ Wheeling payments must be included in the preferential rights
8 calculation.

10 Whether payments specifically under the Exchange Agreement give rise to preferential
11 rights credit is a more difficult question. As in the wheeling context, San Diego pays volumetric
12 rates to cover Met’s operating expenses in exchange for the conveyance of water. Unlike in the
13 wheeling context, the Exchange Agreement does not literally call for the conveyance of water
14 but instead for the *exchange* of water. PTX-65 §§ 3.1-3.2. The question here is whether the
15 exchange of water facilitated by the Exchange Agreement brings San Diego’s payments into the
16 statutory “purchase of water” exception.

18 Met says that the Exchange Agreement facilitates a purchase of water because, under the
19 agreement, San Diego gives Met water and money and obtains different water⁴⁴ from Met. Met

21
22 ⁴³ Met argues that its interpretation of the statute to treat all volumetric payments as payments for the purchase of
23 water is entitled to deference. Met Closing Brief, 39; Trial Transcript, 1847:5-1848:13, 2040:21-2041:10. I do
24 defer, but this sort of deference is not tantamount to giving the agency a veto on the interpretation of the statute.
25 Courts must ultimately construe statutes. *Compare, SDCWA*, 117 Cal.App.4th at 22. The fact that Met uses
26 volumetric rates to collect its payments for the purchase of water as well as to collect payments under wheeling
27 contracts does not show payments under wheeling contracts are for the purchase of water. It is the purpose of the
28 payment, not the manner in which the amount of the required payment is computed, that controls under the statute.
29 Nothing in the statute or *SDCWA* supports Met’s interpretation. *Compare, Met Supplemental Brief*, 5 (asserting that
30 *SDCWA* compels the conclusion that all volumetric payments are excluded from the preferential rights calculation,
31 presumably because all volumetric rates are payments for the purchase of water). Accordingly, I reject Met’s
32 interpretation as contrary to the legislative intent of the statute, as interpreted in *SDCWA*.

⁴⁴ San Diego correctly argues that the Exchange Agreement defines Exchange Water as Local Water, not Met Water,
except for the purposes of the price provision and the Interim Agricultural Water Program, which are not relevant

1 Pre-Trial Brief, 15-16; Met Closing Brief, 39. San Diego contends that the Exchange Agreement
2 is, in practical terms, no different from any other conveyance agreement because in any wheeling
3 agreement the party receiving the service obtains molecules of water different from those
4 initially put into the conveyance system. San Diego's Post-Trial Brief for Phase II, 39-40.
5

6 The parties have not pointed me to legislative history or other sources which would
7 explain why the Legislature excluded payments for the purchase of water from the preferential
8 rights calculation. *SDCWA*, 117 Cal.App.4th at 24 (Legislature has not defined the "excepting
9 purchase of water" terminology). The fact remains that the Legislature included all contributions
10 toward capital costs or operating expenses in the preferential rights calculation with a single
11 exception: payments for the purchase of water.
12

13 San Diego is not purchasing water from Met. San Diego is exchanging water with Met to
14 make use of its own independent supplies. PTX-65 §§ 1.1(m), 3.1-3.2, 3.6.⁴⁵ The parties agreed
15 to exchange an equal amount of water; the only water quality requirement was for Met to provide
16 San Diego with water of at least the same quality as the water Met received from San Diego.
17 These facts underscore that the Exchange Agreement was not an agreement pursuant to which
18 San Diego obtained water from Met, but instead an agreement pursuant to which Met in effect
19 conveyed water on behalf of San Diego. That the Exchange Agreement differs in some respects
20 from a wheeling contract⁴⁶ does not mean that the Exchange Agreement was not in substance an
21

22 here. San Diego Supplemental Brief, 1; PTX-65 at §§ 4.1-4.2. Exchange Water is Met water for the purposes of the
23 price provision and the Interim Agricultural Program. PTX-65 at §§ 4.1-4.2.

24 ⁴⁵ The parties' characterization of the Exchange Water does not control whether the agreement is a purchase
25 agreement for the purposes of the preferential rights statute. PTX-65 §§ 4.1-4.2.

26 ⁴⁶ Met says there are five differences. Met Closing Brief, 38-39. But it remains unclear why these differences
27 matter. The differences Met asserts are: (1) wheelers can only move water when there is available capacity, but Met
makes deliveries every month regardless of capacity on the Colorado River Aqueduct; (2) water is wheeled only
when it is available, but Met wheels water every month regardless of the amount San Diego has made available; (3)
wheelers bear carriage losses as a result of loss in transit, but Met bears the carriage loss under the Exchange
Agreement; (4) San Diego was not billed for wheeling water, but instead for purchasing water with a monetary
credit for the supply it made available; and (5) to wheel Colorado River water, San Diego would have needed a


1 agreement to convey, rather than purchase, water. San Diego's payments under the Exchange
2 Agreement must be included in the preferential rights calculation.

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5 **V. Conclusion**

6 On the breach of contract claim, San Diego is entitled to \$188,295,602 plus interest.
7 Met's motion for partial judgment is denied.

8 On the preferential rights claim, San Diego is entitled to a judicial declaration (a) that
9 Met's current methodology for calculating San Diego's preferential rights violates § 135 of the
10 Metropolitan Water District Act; and (b) directing Met to include San Diego's payments for the
11 transportation of water under the Exchange Agreement in Met's calculation of San Diego's
12 preferential rights.
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16 Dated: August 28, 2015



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18 _____
Curtis E.A. Karnow
Judge of The Superior Court
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24 federal contract, but San Diego did not need a federal contract under the Exchange Agreement because the water
25 would be Met water. *Id.* at 38-39. Met says this demonstrates that San Diego is in effect "paying" for the water
26 with—water; making Exchange Water a water "purchase." *Id.* at 8. There can be nice distinctions between barter,
27 currency and investment, and conceivably water might have any of these roles—and in circumstances of increasing
drought, water may be a currency of the future (see *Mad Max Beyond Thunderdome* (1985),
<http://www.imdb.com/title/tt0089530/>), but there is no good reason to treat it so in this case. And as noted above,
the parties' characterization of a transaction does not control whether the transaction is a purchase for the purposes
of the preferential rights statute.

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 : **AUG 28 2015**, I electronically served THE ATTACHED ORDER via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: **AUG 28 2015**

T. Michael Yuen, Clerk

By:



DANIAL LEMIRE, Deputy Clerk