MORGAN LEWIS & BOCKIUS LLP
Colin C. West (Bar No. 184095)
Thomas S. Hixson (Bar No. 193033)
Three Embarcadero Center
San Francisco, California 94111-4067
Telephone: (415) 393-2000
Facsimile: (415) 393-2286

QUINN EMANUEL URQUHART & SULLIVAN, LLP
John B. Quinn (Bar No. 090378)
Eric J. Emanuel (Bar No. 102187)
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
Telephone: (213) 443-3000
Facsimile: (213) 443-3100

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
Marcia Scully (Bar No. 80648)
Heather C. Beatty (Bar No. 161907)
Joseph Vanderhorst (Bar No. 106441)
John D. Schlotterbeck (Bar No. 169263)
700 North Alameda Street
Los Angeles, California 90012-2944
Telephone: (213) 217-6000
Facsimile: (213) 217-6980

Attorneys for Respondent and Defendant
Metropolitan Water District of Southern
California

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY,

Petitioner and Plaintiff,

vs.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; ALL PERSONS INTERESTED IN THE VALIDITY OF THE RATES ADOPTED BY THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA ON APRIL 10, 2012 TO BE EFFECTIVE JANUARY 1, 2013 AND JANUARY 1, 2014; and DOES 1-10,

Respondents and Defendants.

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

DEFENDANT AND RESPONDENT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON FOURTH CAUSE OF ACTION FOR BREACH OF CONTRACT

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

Actions Filed: June 11, 2010; June 8, 2012

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT

SDCWA assumes breach of contract without ever addressing the question as to what SDCWA agreed to pay. The ruling in Phase I does not mean a breach occurred here because SDCWA, knowing the facts and law, had agreed to pay what Met charged. As the testimony of Dennis Cushman confirmed, SDCWA proposed a price term that both parties knew consisted of certain components, including the Water Stewardship Rate and State Water Project costs. SDCWA had voted for those rates, proposed them as the price term of the Exchange Agreement, approved the Exchange Agreement, and accepted the benefits of its agreement for years. SDCWA simply has no claim for breach based on its paying what it agreed to pay.

A second flaw in SDCWA's case is that it has not even attempted to show what it should have been charged. It merely assumes that all challenged costs move to supply. SDCWA's assumptions are at odds with the findings of this Court in Phase I. The Court's determination that "not all" State Water Project costs should be allocated to conveyance does not mean that all costs should instead be allocated to supply. The Court needs evidence.

Under SDCWA's logic, the plaintiff would get a windfall. Even if the price was miscalculated, SDCWA is not entitled to exchange water for less than it agreed to pay. The measure of damages is what plaintiff would have paid if the promise had been fulfilled. That issue does not require speculation as to what a board of directors *might* do. It requires evidence of what it *could* lawfully do. SDCWA needed to present evidence not only of the challenged costs but also expert opinion as to alternative rate structures and, after applying cost allocation principles, as to which amounts would have been supply and which conveyance. SDCWA presented no such evidence whatsoever.

Therefore, pursuant to California Code of Civil Procedure section 631.8, Met respectfully moves for judgment on SDCWA's breach of contract cause of action.

ARGUMENT

I. SDCWA PAID WHAT IT AGREED TO PAY AND THUS FAILED AS A MATTER OF LAW TO PROVE BREACH

A. SDCWA Proposed and Agreed to a Price that Included the Water Stewardship Rate and State Water Project Costs

The testimony of SDCWA's own witnesses has established that SDCWA knew the precise meaning of "conveyance charges" at the time it proposed that term and at the time the SDCWA Board of Directors subsequently approved the 2003 Exchange Agreement. Mr. Cushman – SDCWA's person most knowledgeable on breach – testified that SDCWA knew all the components of the conveyance charges, and knew State Water Project costs were included in these components. Cushman Phase II Trial Tr. at 63:3-24. Mr. Cushman also testified that SDCWA knew the Water Stewardship Rate was one of the conveyance charges. *Id.* Mr. Cushman conceded that SDCWA's representatives to Met's Board of Directors had voted for those rates. Cushman Phase II Trial Tr. at 69:3-8. And these representatives had the right, he admitted, to move the Board to restructure the rates, but never did. Cushman Phase II Trial Tr. at 136:3-19. Further, he testified that SDCWA's delegates to Met's Board had fiduciary duties to Met's Board. Cushman Phase II Trial Tr. at 93:23-94:6. Yet no representative from SDCWA disclosed to the Met Board that SDCWA believed Met's rates were illegal. Cushman Phase II Trial Tr. at 75:1-13.

The evidence also showed that originally SDCWA and Met had a deal for $90 per acre-foot that "reset" to $80 per acre-foot, with a modest escalator for inflation. Cushman Phase II Trial Tr. at 122:23-24. SDCWA, however, volunteered to pay $253 per acre-foot – the total of three conveyance charges (which included State Water Project costs), and to pay future conveyance charges. Cushman Phase II Trial Tr. at 64:22-66:20; *see also* DTX-843. Not only did SDCWA's Board approve those terms, but long after the Exchange Agreement was executed the General Manager of SDCWA affirmed SDCWA had no intent to sue to challenge the rates it had proposed and endorsed on multiple occasions. Cushman Phase II Trial Tr. at 105:16-106:20; *see also* DTX-355. Moreover, SDCWA's representatives themselves more than five years after the execution of the Exchange Agreement voted to continue the rate structure. Cushman Phase II Trial Tr. at 69:3-8.

In other words, SDCWA has paid exactly what it proposed and agreed to pay: State Water Project costs and the Water Stewardship Rate.

SDCWA will no doubt rejoin that it only agreed to pay conveyance charges set pursuant to "applicable law and regulation." SDCWA implies that no agreement existed as to the meaning of charges set pursuant to applicable law and regulation. But the evidence shows the parties did agree on that. They had to. They would not logically and could not legally agree to any rates other than lawful ones. SDCWA's actions conclusively proves its agreement to the lawfulness of the charges by its proposing and approving rates that it knew included State Water Project costs and the Water Stewardship Rate as part of the conveyance charges it would pay. SDCWA necessarily agreed those charges were proper; otherwise, it would not have had any agreement at all because an illegal agreement is a void contract. *See, e.g.*, *Tiedji v. Aluminum Taper Milling Co.*, 46 Cal. 2d 450, 453-54 (1956).

Besides, as the Court knows from Phase I, the issue of lawful rates is a factual one; such as for example, whether a rate is fair and reasonable. Even accepting that third party rate payers could argue that the rates were invalid, nothing prohibits contracting parties from agreeing that as between them, these charges are fair and reasonable and will be the price of the contract. In a bargained for exchange of benefits, SDCWA agreed to pay the conveyance charges and accepted them as proper for purposes of the agreement.

B. There Was No Agreement that the Conveyance Charges Were Only Agreed to for Five Years

Alternatively, SDCWA suggests there was some sort of "cooling off" period, after which SDCWA was free to challenge the legality of the very rates it not only proposed and agreed to but subsequently voted in favor of multiple times. *See, e.g.*, Cushman Phase II Trial Tr. at 38:21-24. Once again, that assertion would make nonsense of the agreement. The same rates and cost components that were used the first year of the agreement were used every year thereafter. If the rates were illegal at the end of five years, they were illegal from the start. But the parties wanted a binding agreement. Not one that would, after five years, be proved to be void *ab initio.* That

would be of no benefit to anyone. A clause should not be interpreted so as to render the contract meaningless.

Furthermore, the testimony has disproved that SDCWA had in fact complained about *illegality* of the rate structure at issue. To be sure, SDCWA has had any number of complaints. *See, e.g.*, Cushman Phase II Trial Tr. at 25:9-17, 28:1-4; *see also* SDCWA Trial Br. at 20. But as to the issue of illegality of the unbundled rate structure first effective January 1, 2003, Mr. Cushman's testimony proved that SDCWA had no complaints about illegality. He conceded no written complaints of illegality were made. Cushman Phase II Trial Tr. at 75:1-13. As to the possibility of oral complaints, he testified that SDCWA would *not* have communicated those concerns orally. Cushman Phase II Trial Tr. at 76:14-22.

Moreover, the consideration for the Exchange Agreement included the Allocation Agreement. *See* PTX-65 at 3. As Mr. Cushman testified, these two contracts were among a number of contracts that are collectively referred to as the Quantification Settlement Agreement (QSA), resolving disputed rights to Colorado River water, including the right of the Imperial Irrigation District (IID) to transfer water to SDCWA. Cushman Phase II Trial Tr. at 100:21-102:2. The Allocation Agreement included a provision assigning to SDCWA the Canal Lining Water for up to 110 years. Cushman Phase II Trial Tr. at 98:20-99:4. Mr. Cushman testified that it was crucial to this deal that there be some means of conveying IID water to SDCWA, and the only way to do it was a contract with Met. Cushman Phase II Trial Tr. at 23:6-18.

Thus SDCWA proposed an exchange agreement that would be effective for up to forty-five years. Yet now it asserts that the agreement on price was only for five years. Not only is that contention illogical, but if, as SDCWA now contends, it always believed the rates were illegal, SDCWA, a public agency, could not agree to the illegal price for any length of time, even for some sort of "cooling off" period. *See, e.g.*, Cal. Const., art. XVI, § 6. Mr. Cushman explained that what SDCWA agrees to pay is a component of the cost paid by its own member agencies and eventually the rate-paying residents of San Diego County. Cushman Phase II Trial Tr. at 132:21-133:7. Indeed, Mr. Cushman testified that increases in Met's rates can have "a profound impact on the rates that the Water Authority subsequently adopts and charges our 24 member agencies."

Cushman Phase II Trial Tr. at 133:4-7. If SDCWA truly believed that the conveyance rate included unlawful components and unlawful costs, then it could not agree to impose those illegal costs on its members, period. Not for five years. Not ever.

Paragraph 5.2 of the 2003 Exchange Agreement must be read as a whole and individual phrases must not be taken out of context. The provision at issue states a general rule that for the life of the agreement neither party will seek a "*change* in the *form, substance or interpretation of any applicable law* or *regulation*" in effect in 2003 pertaining to the charges or charges set by Met's Board. PTX-65, ¶ 5.2 (emphasis added). That clause is qualified by two provisos: First, a proviso that permitted Met to amend its Administrative Code (which as pertinent to the price term meant that Met it could change the conveyance charges at issue). The second proviso provided the following additional exception: "provided, further, that after the conclusion of the first 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." *Id*. (emphasis added.) That last exception must be read together with the preceding exception and with the general rule they qualify. Neither party could seek to change the form or interpretation of any applicable law or regulation, except that Met could change its regulations, which could change what the conveyance charges and if so, "*such charge or charges*" could be contested. Any other interpretation would have to assume that the original price term was illegal, voiding the contract. The only interpretation that preserves the contract and renders the clause meaningful is to interpret it as meaning that SDCWA could sue if the law had changed or if Met had changed its charges *to no longer* be in compliance with the law.

Importantly, SDCWA's conduct for many years was entirely consistent with the understanding that it had a permanent deal on the price. Since the 2003 Exchange Agreement, SDCWA's representatives voted repeatedly to approve Met's conveyance rate that still had the same components and still included State Water Project costs. Cushman Phase II Trial Tr. at 69:3-21. And of course during all these years, SDCWA took the benefits of the contract. (Met expects it will be able to add here that Mr. Slater's testimony will show that SDCWA staff produced

financial projections that assumed SDCWA paid the conveyance charges, as inflated, for 45 years.)

It has long been the rule in California that a contract is not breached when a party executes a contract knowing that the other party's future performance will be a continuation of the performance it agreed to. The rule was explained by the California Supreme Court more than a half century ago. In *Coughlin v. Blair*, 41 Cal. 2d 587 (1953), the Supreme Court stated, "If the injured party accepts or urges performance by the promisor, he will not be allowed to obtain damages on the theory that performance has not been made." *Id.* at 602.

In *California Lettuce Growers, Inc. v. Union Sugar Co.*, 45 Cal. 2d 474 (1955), the price for sugar beets was based on a certain formula. *Id.* at 479. One party later claimed that the agreed upon formula was illusory and lacked mutuality. *Id.* at 481. The California Supreme Court held: "Since the parties contracted with reference to an existing accounting system, California Lettuce may not now claim that the accounting procedures are unilateral and unfair." *Id.* at 484.

II. SDCWA FAILED TO PRESENT EVIDENCE OF A PROPER MEASURE OF DAMAGES

A. SDCWA Conceded That It Had to Show What It Should Have Been Charged, Yet SDCWA Has Not Presented Evidence of Any Alternate Rate Structures

Dennis Cushman conceded on cross-examination that "Met can adopt a variety of different rate structures that are lawful . . . [i]ncluding a variety of different rate structures for conveying water . . . ." Cushman Phase II Trial Tr. at 82:17-24; *see also id.* at 85:23-86:2. Having admitted other lawful rate structures existed, Mr. Cushman went further to concede that he did not know whether SDCWA would have been better off using other, lawful alternatives rate structures:

> Q. . . . you don't know whether San Diego would necessarily be better off under some of those alternative rate structures that Metropolitan could lawfully adopt; correct?
>
> A. Correct.

Cushman Phase II Trial Tr. at 82:25 – 83:5.

SDCWA had the burden of proof and thus had to show by admissible evidence that it would, in fact, have paid less under lawful rate structures. Yet, SDCWA did not present evidence of any alternative at all. As the Court found in its Order re Measure of Damages dated November

4, 2014, damages must be related "to a price that Met could have set in compliance with the contract . . . ." *Id.* at 8. Without evidence of a price that could have been set, SDCWA has not proved damages.

Notably, Mr. Cushman conceded that SDCWA would "have to calculate what San Diego should have been charged":

> Q. To figure out what San Diego was overcharged, what its damages are, you have to begin with an understanding of what San Diego was actually charged; correct?
>
> A. Yes.
>
> Q. And you have to calculate what San Diego should have been charged; correct?
>
> A. Yes.
>
> Q. And the difference between those two would be San Diego's damages; correct?
>
> A. The removal of the improper charges from what we were charged would be the damages.
>
> *Q. Well, the difference between what you were charged and what you should have been charged, that's the damages; correct?*
>
> *A. Yes.*

Cushman Phase II Trial Tr. at 85:7-22 (emphasis added).

SDCWA's evidence of damage is devoid of any facts showing what SDCWA should have been charged. Assuming rates were miscalculated, SDCWA is not entitled to free or steeply discounted power or any other windfall. The rates must be recalculated in accordance with the parties' agreement. That is the only way to ensure that SDCWA pays what it agreed to pay and not an artificially low price that eliminates components without consideration of the proper components

B. Denham's Assumptions Are Not Based on Evidence and Are Contradicted By the Ruling in Phase I

Of course SDCWA has the burden of proving damages in order to establish breach of contract. *See, e.g.*, *CDF Firefighters v. Maldonado,* 158 Cal. App. 4th 1226, 1239 (2008). California Civil Code § 3358 provides that, other than "as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have

gained by the full performance thereof on both sides." An award of contract damages should "place the injured party in the same position it would have held had the contract properly been performed, *but such damages may not exceed the benefit which it would have received had the promisor performed*." *Brandon & Tibbs v. George Kevorkian Accountancy Corp.,* 226 Cal. App. 3d 442, 468 (1990) (emphasis added); *see also Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.,* 34 Cal. 4th 960, 968 (2004) (damages cannot exceed what the injured party would have received if the contract had been fully performed).

Here, Mr. Denham simply assumed that all State Water Project costs, as well as the entire Water Stewardship Rate, were supply costs. Denham Phase II Trial Tr. at 164:8-25, 166:8-12, 169:14-170:6, 173:2-14. SDCWA presented no evidence to support that assumption. To the contrary, although SDCWA purports to rely on the Court's ruling in Phase I, in fact the assumptions are inconsistent with that ruling. Parenthetically, Mr. Denham could not have relied upon those findings because he rendered his opinion *prior* to the findings in Phase I. Despite Met's motion to reopen expert discovery for the limited purpose of addressing the Statement of Decision (which SDCWA opposed), SDCWA claimed it would not – and indeed did not – update its expert's opinion. It made an informed tactical decision not to.

In its Statement of Decision in Phase I, the Court applied the principle that evidence must be presented to support an allocation of costs. That principle applies equally to allocations to conveyance as well as allocations to supply. A misallocation would mean some parties are paying more than their fair share while others are paying less. In Phase I, the Court determined that, based on the evidence before it, not all State Water Project costs that the state allocates to conveyance, nor all the Water Stewardship Rate costs, could be allocated to Met's conveyance. *See* Statement of Decision at 65. It did *not* determine that none of those costs could be allocated to conveyance; just that not all of them could be. A determination that 100% cannot be allocated to *conveyance* is not proof that 100% must be allocated to *supply*. SDCWA must present evidence, and not merely assumptions, that *all* State Water Project and *all* Water Stewardship Rate costs are supply. Otherwise SDCWA's measure of damages would violate the very same Propositions, Constitutional provisions, statutes and common law it cited in Phase I, to the extent

these are applicable to water agencies like Met and SDCWA. Now the shoe is on the other foot, and they must prove their allocation.

Finally, as to the Water Stewardship Rate, SDCWA expert opined that "it's all or nothing." Denham Phase II Trial Tr. at 170:7-14. SDCWA presented no evidence that water conservation or development downstream – meaning water conserved or developed locally, after leaving Met's system – in any way added to the amount of Met's water supply upstream. Fully recognizing that it faced an "all or nothing" issue of proof – on which it carried the burden of proof -- SDCWA chose to present nothing.

CONCLUSION

For the foregoing reasons, Met's motion for partial judgment should be granted.

DATED: April 1, 2015

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By _____
Eric J. Emanuel
Attorneys for Respondent and Defendant Metropolitan Water District of Southern California

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017-2543.

On April 1, 2015, I served true copies of the following document(s) described as

DEFENDANT AND RESPONDENT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON FOURTH CAUSE OF ACTION FOR BREACH OF CONTRACT

on the interested parties in this action as follows:

SEE ATTACHED LIST

BY FILE & SERVEXPRESS: by causing a true and correct copy of the documents(s) listed above to be sent via electronic transmission through File & ServeXpress to the person(s) at the address(es) set forth below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 1, 2015, at Los Angeles, California.

Pamela S. Davis

SERVICE LIST

VIA E-SERVICE

John W. Keker, Esq.
Daniel Purcell, Esq.
Dan Jackson, Esq.
Warren A. Braunig, Esq.
Keker & Van Nest LLP
633 Battery Street
San Francisco, CA 94111-1809
Telephone: (415) 391-5400
Facsimile: (415) 397-7188
Email: jkeker@kvn.com
dpurcell@kvn.com
djackson@kvn.com
wbraunig@kvn.com

Counsel for Petitioner and Plaintiff San Diego County Water Authority

VIA E-SERVICE

Daniel S. Hentschke, Esq.
San Diego County Water Authority
4677 Overland Avenue
San Diego, CA 92123-1233
Telephone: (858) 522-6790
Facsimile: (858) 522-6566
Email: dhentschke@sdcwa.org

Counsel for Petitioner and Plaintiff San Diego County Water Authority

VIA E-SERVICE

Dorine Martirosian, Deputy City Attorney
Glendale City Attorney's Office
613 E. Broadway, Suite 220
Glendale, CA 91206
Telephone: (818) 548-2080
Facsimile: (818) 547-3402
Email: DMartirosian@ci.glendale.ca.us

Counsel for City of Glendale

VIA E-SERVICE

John L. Fellows III, City Attorney
Patrick Q. Sullivan, Assistant City Attorney
Office of the City Attorney
3031 Torrance Blvd.
Torrance, CA 90503
Telephone: (310) 618-5817
Facsimile: (310) 618-5813
Email: PSullivan@TorranceCA.Gov
JFellows@TorranceCA.Gov

Counsel for the City of Torrance

VIA E-SERVICE

Steven M. Kennedy, Esq.
Brunick, McElhaney Beckett, Dolen & Kennedy, PLC
1839 Commercenter West
San Bernardino, CA 92408-3303
Telephone: (909) 889-8301
Facsimile: (909) 388-1889
Email: skennedy@bmblawoffice.com

Counsel for Three Valleys Municipal Water District

VIA E-SERVICE

Patricia J. Quilizapa, Esq.
Aleshire & Wynder, LLP
18881 Von Karman Avenue, Suite 1700
Irvine, CA 92612
Telephone: (949) 223-1170
Facsimile: (949) 223-1180
Email: pquilizapa@awattorneys.com

Counsel for Municipal Water District of Orange County

SERVICE LIST (Continued)

VIA E-SERVICE

Michael N. Feuer, City Attorney
Richard M. Brown, General Counsel
Julie Conboy Riley, Deputy City Attorney
Tina P. Shim, Deputy City Attorney
Melanie A. Tory, Deputy City Attorney
City of Los Angeles
111 North Hope Street, Room 340
Los Angeles, CA 90012
Telephone: (213) 367-4500
Facsimile: (213) 367-1430
Email: tina.shim@ladwp.com
julie.riley@lawp.com
melanie.tory@ladwp.com

Counsel for The City of Los Angeles, Acting by and Through The Los Angeles Department of Water and Power

VIA E-SERVICE

Steven P. O'Neill, Esq.
Michael Silander, Esq.
Christine M. Carson, Esq.
Lemieux and O'Neill
4165 E. Thousand Oaks Blvd., Suite 350
Westlake Village, CA 91362
Telephone: (805) 495-4770
Facsimile: (805) 495-2787
Email: steve@lemieux-oneill.com
michael@lemieux-oneill.com
christine@lemieux-oneill.com
kathi@lemieux-oneill.com

Counsel for Eastern Municipal Water District, Foothill Municipal Water District, Las Virgenes Municipal Water District, West Basin Municipal Water District, and Western Municipal Water District

VIA E-SERVICE

Amrit S. Kulkarni, Esq.
Julia L. Bond, Esq.
Dawn A. McIntosh, Esq.
Edward Grutzmacher, Esq.
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108
Email: akulkarni@meyersnave.com
jbond@meyersnave,com
dmcintosh@meyersnave.com
egrutzmacher@meyersnave.com

Counsel for The City of Los Angeles, Acting by and Through The Los Angeles Department of Water and Power

VIA E-SERVICE (Case No. 10-510830 only)

Donald Kelly, Esq.
Utility Consumers' Action Network
3405 Kenyon Street, Suite 401
San Diego, CA 92110
Telephone: (619) 696-6966
Facsimile: (619) 696-7477
Email: dkelly@ucan.org

Counsel for Utility Consumers' Action Network

MORGAN LEWIS & BOCKIUS LLP
Colin C. West (Bar No. 184095)
Thomas S. Hixson (Bar No. 193033)
Three Embarcadero Center
San Francisco, California 94111-4067
Telephone: (415) 393-2000
Facsimile: (415) 393-2286

QUINN EMANUEL URQUHART & SULLIVAN, LLP
John B. Quinn (Bar No. 090378)
Eric J. Emanuel (Bar No. 102187)
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
Telephone: (213) 443-3000
Facsimile: (213) 443-3100

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
Marcia Scully (Bar No. 80648)
Heather C. Beatty (Bar No. 161907)
Joseph Vanderhorst (Bar No. 106441)
John D. Schlotterbeck (Bar No. 169263)
700 North Alameda Street
Los Angeles, California 90012-2944
Telephone: (213) 217-6000
Facsimile: (213) 217-6980

Attorneys for Respondent and Defendant
Metropolitan Water District of Southern
California

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY,

Petitioner and Plaintiff,

vs.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; ALL PERSONS INTERESTED IN THE VALIDITY OF THE RATES ADOPTED BY THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA ON APRIL 10, 2012 TO BE EFFECTIVE JANUARY 1, 2013 AND JANUARY 1, 2014; and DOES 1-10,

Respondents and Defendants.

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

AMENDED DEFENDANT AND RESPONDENT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON FOURTH CAUSE OF ACTION FOR BREACH OF CONTRACT

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

Actions Filed: June 11, 2010; June 8, 2012

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT

This Amended Memorandum of Points and Authorities in Support of Motion for Partial Judgment on Fourth Cause of Action for Breach of Contract is filed solely for the purpose of correcting the citations to the trial transcript to reflect the court reporter's re-pagination of the Phase II trial volumes to continue the pagination from the Phase I transcripts. No other changes have been made.

SDCWA assumes breach of contract without ever addressing the question as to what SDCWA agreed to pay. The ruling in Phase I does not mean a breach occurred here because SDCWA, knowing the facts and law, had agreed to pay what Met charged. As the testimony of Dennis Cushman confirmed, SDCWA proposed a price term that both parties knew consisted of certain components, including the Water Stewardship Rate and State Water Project costs. SDCWA had voted for those rates, proposed them as the price term of the Exchange Agreement, approved the Exchange Agreement, and accepted the benefits of its agreement for years. SDCWA simply has no claim for breach based on its paying what it agreed to pay.

A second flaw in SDCWA's case is that it has not even attempted to show what it should have been charged. It merely assumes that all challenged costs move to supply. SDCWA's assumptions are at odds with the findings of this Court in Phase I. The Court's determination that "not all" State Water Project costs should be allocated to conveyance does not mean that all costs should instead be allocated to supply. The Court needs evidence.

Under SDCWA's logic, the plaintiff would get a windfall. Even if the price was miscalculated, SDCWA is not entitled to exchange water for less than it agreed to pay. The measure of damages is what plaintiff would have paid if the promise had been fulfilled. That issue does not require speculation as to what a board of directors *might* do. It requires evidence of what it *could* lawfully do. SDCWA needed to present evidence not only of the challenged costs but also expert opinion as to alternative rate structures and, after applying cost allocation principles, as to which amounts would have been supply and which conveyance. SDCWA presented no such evidence whatsoever.

Therefore, pursuant to California Code of Civil Procedure section 631.8, Met respectfully moves for judgment on SDCWA's breach of contract cause of action.

ARGUMENT

I. SDCWA PAID WHAT IT AGREED TO PAY AND THUS FAILED AS A MATTER OF LAW TO PROVE BREACH

A. SDCWA Proposed and Agreed to a Price that Included the Water Stewardship Rate and State Water Project Costs

The testimony of SDCWA's own witnesses has established that SDCWA knew the precise meaning of "conveyance charges" at the time it proposed that term and at the time the SDCWA Board of Directors subsequently approved the 2003 Exchange Agreement. Mr. Cushman – SDCWA's person most knowledgeable on breach – testified that SDCWA knew all the components of the conveyance charges, and knew State Water Project costs were included in these components. Cushman Phase II Trial Tr. at 1028:3-24. Mr. Cushman also testified that SDCWA knew the Water Stewardship Rate was one of the conveyance charges. *Id.* Mr. Cushman conceded that SDCWA's representatives to Met's Board of Directors had voted for those rates. Cushman Phase II Trial Tr. at 1034:3-8. And these representatives had the right, he admitted, to move the Board to restructure the rates, but never did. Cushman Phase II Trial Tr. at 1101:3-19. Further, he testified that SDCWA's delegates to Met's Board had fiduciary duties to Met's Board. Cushman Phase II Trial Tr. at 1058:23-1059:6. Yet no representative from SDCWA disclosed to the Met Board that SDCWA believed Met's rates were illegal. Cushman Phase II Trial Tr. at 1040:1-13.

The evidence also showed that originally SDCWA and Met had a deal for $90 per acre-foot that "reset" to $80 per acre-foot, with a modest escalator for inflation. Cushman Phase II Trial Tr. at 1087:23-24. SDCWA, however, volunteered to pay $253 per acre-foot – the total of three conveyance charges (which included State Water Project costs), and to pay future conveyance charges. Cushman Phase II Trial Tr. at 1029:22-1031:20; *see also* DTX-843. Not only did SDCWA's Board approve those terms, but long after the Exchange Agreement was executed the General Manager of SDCWA affirmed SDCWA had no intent to sue to challenge the rates it had proposed and endorsed on multiple occasions. Cushman Phase II Trial Tr. at 1070:16-

1071:20; *see also* DTX-355. Moreover, SDCWA's representatives themselves more than five years after the execution of the Exchange Agreement voted to continue the rate structure. Cushman Phase II Trial Tr. at 1034:3-8.

In other words, SDCWA has paid exactly what it proposed and agreed to pay: State Water Project costs and the Water Stewardship Rate.

SDCWA will no doubt rejoin that it only agreed to pay conveyance charges set pursuant to "applicable law and regulation." SDCWA implies that no agreement existed as to the meaning of charges set pursuant to applicable law and regulation. But the evidence shows the parties did agree on that. They had to. They would not logically and could not legally agree to any rates other than lawful ones. SDCWA's actions conclusively proves its agreement to the lawfulness of the charges by its proposing and approving rates that it knew included State Water Project costs and the Water Stewardship Rate as part of the conveyance charges it would pay. SDCWA necessarily agreed those charges were proper; otherwise, it would not have had any agreement at all because an illegal agreement is a void contract. *See, e.g., Tiedji v. Aluminum Taper Milling Co.*, 46 Cal. 2d 450, 453-54 (1956).

Besides, as the Court knows from Phase I, the issue of lawful rates is a factual one; such as for example, whether a rate is fair and reasonable. Even accepting that third party rate payers could argue that the rates were invalid, nothing prohibits contracting parties from agreeing that as between them, these charges are fair and reasonable and will be the price of the contract. In a bargained for exchange of benefits, SDCWA agreed to pay the conveyance charges and accepted them as proper for purposes of the agreement.

B. There Was No Agreement that the Conveyance Charges Were Only Agreed to for Five Years

Alternatively, SDCWA suggests there was some sort of "cooling off" period, after which SDCWA was free to challenge the legality of the very rates it not only proposed and agreed to but subsequently voted in favor of multiple times. *See, e.g.*, Cushman Phase II Trial Tr. at 1003:21-24. Once again, that assertion would make nonsense of the agreement. The same rates and cost components that were used the first year of the agreement were used every year thereafter. If the

rates were illegal at the end of five years, they were illegal from the start. But the parties wanted a binding agreement. Not one that would, after five years, be proved to be void *ab initio.* That would be of no benefit to anyone. A clause should not be interpreted so as to render the contract meaningless.

Furthermore, the testimony has disproved that SDCWA had in fact complained about *illegality* of the rate structure at issue. To be sure, SDCWA has had any number of complaints. *See, e.g.*, Cushman Phase II Trial Tr. at 990:9-17, 993:1-4; *see also* SDCWA Trial Br. at 20. But as to the issue of illegality of the unbundled rate structure first effective January 1, 2003, Mr. Cushman's testimony proved that SDCWA had no complaints about illegality. He conceded no written complaints of illegality were made. Cushman Phase II Trial Tr. at 1040:1-13. As to the possibility of oral complaints, he testified that SDCWA would *not* have communicated those concerns orally. Cushman Phase II Trial Tr. at 1041:14-22.

Moreover, the consideration for the Exchange Agreement included the Allocation Agreement. *See* PTX-65 at 3. As Mr. Cushman testified, these two contracts were among a number of contracts that are collectively referred to as the Quantification Settlement Agreement (QSA), resolving disputed rights to Colorado River water, including the right of the Imperial Irrigation District (IID) to transfer water to SDCWA. Cushman Phase II Trial Tr. at 1065:21-1067:2. The Allocation Agreement included a provision assigning to SDCWA the Canal Lining Water for up to 110 years. Cushman Phase II Trial Tr. at 1063:20-1064:4. Mr. Cushman testified that it was crucial to this deal that there be some means of conveying IID water to SDCWA, and the only way to do it was a contract with Met. Cushman Phase II Trial Tr. at 988:6-18.

Thus SDCWA proposed an exchange agreement that would be effective for up to forty-five years. Yet now it asserts that the agreement on price was only for five years. Not only is that contention illogical, but if, as SDCWA now contends, it always believed the rates were illegal, SDCWA, a public agency, could not agree to the illegal price for any length of time, even for some sort of "cooling off" period. *See, e.g.*, Cal. Const., art. XVI, § 6. Mr. Cushman explained that what SDCWA agrees to pay is a component of the cost paid by its own member agencies and eventually the rate-paying residents of San Diego County. Cushman Phase II Trial Tr. at 1097:21-

1098:7. Indeed, Mr. Cushman testified that increases in Met's rates can have "a profound impact on the rates that the Water Authority subsequently adopts and charges our 24 member agencies." Cushman Phase II Trial Tr. at 1098:4-7. If SDCWA truly believed that the conveyance rate included unlawful components and unlawful costs, then it could not agree to impose those illegal costs on its members, period. Not for five years. Not ever.

Paragraph 5.2 of the 2003 Exchange Agreement must be read as a whole and individual phrases must not be taken out of context. The provision at issue states a general rule that for the life of the agreement neither party will seek a "*change* in the *form, substance or interpretation of any applicable law* or *regulation*" in effect in 2003 pertaining to the charges or charges set by Met's Board. PTX-65, ¶ 5.2 (emphasis added). That clause is qualified by two provisos: First, a proviso that permitted Met to amend its Administrative Code (which as pertinent to the price term meant that Met it could change the conveyance charges at issue). The second proviso provided the following additional exception: "provided, further, that after the conclusion of the first 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." *Id*. (emphasis added.) That last exception must be read together with the preceding exception and with the general rule they qualify. Neither party could seek to change the form or interpretation of any applicable law or regulation, except that Met could change its regulations, which could change what the conveyance charges and if so, "*such charge or charges*" could be contested. Any other interpretation would have to assume that the original price term was illegal, voiding the contract. The only interpretation that preserves the contract and renders the clause meaningful is to interpret it as meaning that SDCWA could sue if the law had changed or if Met had changed its charges *to no longer* be in compliance with the law.

Importantly, SDCWA's conduct for many years was entirely consistent with the understanding that it had a permanent deal on the price. Since the 2003 Exchange Agreement, SDCWA's representatives voted repeatedly to approve Met's conveyance rate that still had the same components and still included State Water Project costs. Cushman Phase II Trial Tr. at 1034:3-21. And of course during all these years, SDCWA took the benefits of the contract. (Met

expects it will be able to add here that Mr. Slater's testimony will show that SDCWA staff produced financial projections that assumed SDCWA paid the conveyance charges, as inflated, for 45 years.)

It has long been the rule in California that a contract is not breached when a party executes a contract knowing that the other party's future performance will be a continuation of the performance it agreed to. The rule was explained by the California Supreme Court more than a half century ago. In *Coughlin v. Blair*, 41 Cal. 2d 587 (1953), the Supreme Court stated, "If the injured party accepts or urges performance by the promisor, he will not be allowed to obtain damages on the theory that performance has not been made." *Id.* at 602.

In *California Lettuce Growers, Inc. v. Union Sugar Co.*, 45 Cal. 2d 474 (1955), the price for sugar beets was based on a certain formula. *Id.* at 479. One party later claimed that the agreed upon formula was illusory and lacked mutuality. *Id.* at 481. The California Supreme Court held: "Since the parties contracted with reference to an existing accounting system, California Lettuce may not now claim that the accounting procedures are unilateral and unfair." *Id.* at 484.

II. SDCWA FAILED TO PRESENT EVIDENCE OF A PROPER MEASURE OF DAMAGES

A. SDCWA Conceded That It Had to Show What It Should Have Been Charged, Yet SDCWA Has Not Presented Evidence of Any Alternate Rate Structures

Dennis Cushman conceded on cross-examination that "Met can adopt a variety of different rate structures that are lawful . . . [i]ncluding a variety of different rate structures for conveying water . . . ." Cushman Phase II Trial Tr. at 1047:17-24; *see also id.* at 1050:23-1051:2. Having admitted other lawful rate structures existed, Mr. Cushman went further to concede that he did not know whether SDCWA would have been better off using other, lawful alternatives rate structures:

> Q. . . . you don't know whether San Diego would necessarily be better off under some of those alternative rate structures that Metropolitan could lawfully adopt; correct?
>
> A. Correct.

Cushman Phase II Trial Tr. at 1047:25-1048:5.

SDCWA had the burden of proof and thus had to show by admissible evidence that it would, in fact, have paid less under lawful rate structures. Yet, SDCWA did not present evidence

of any alternative at all. As the Court found in its Order re Measure of Damages dated November 4, 2014, damages must be related "to a price that Met could have set in compliance with the contract . . . ." *Id.* at 8. Without evidence of a price that could have been set, SDCWA has not proved damages.

Notably, Mr. Cushman conceded that SDCWA would "have to calculate what San Diego should have been charged":

> Q. To figure out what San Diego was overcharged, what its damages are, you have to begin with an understanding of what San Diego was actually charged; correct?
>
> A. Yes.
>
> Q. And you have to calculate what San Diego should have been charged; correct?
>
> A. Yes.
>
> Q. And the difference between those two would be San Diego's damages; correct?
>
> A. The removal of the improper charges from what we were charged would be the damages.
>
> *Q. Well, the difference between what you were charged and what you should have been charged, that's the damages; correct?*
>
> *A. Yes.*

Cushman Phase II Trial Tr. at 1050:7-22 (emphasis added).

SDCWA's evidence of damage is devoid of any facts showing what SDCWA should have been charged. Assuming rates were miscalculated, SDCWA is not entitled to free or steeply discounted power or any other windfall. The rates must be recalculated in accordance with the parties' agreement. That is the only way to ensure that SDCWA pays what it agreed to pay and not an artificially low price that eliminates components without consideration of the proper components.

B. Denham's Assumptions Are Not Based on Evidence and Are Contradicted By the Ruling in Phase I

Of course SDCWA has the burden of proving damages in order to establish breach of contract. *See, e.g.*, *CDF Firefighters v. Maldonado*, 158 Cal. App. 4th 1226, 1239 (2008). California Civil Code § 3358 provides that, other than "as expressly provided by statute, no person

can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides." An award of contract damages should "place the injured party in the same position it would have held had the contract properly been performed, *but such damages may not exceed the benefit which it would have received had the promisor performed*." *Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, 226 Cal. App. 3d 442, 468 (1990) (emphasis added); *see also Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 34 Cal. 4th 960, 968 (2004) (damages cannot exceed what the injured party would have received if the contract had been fully performed).

Here, Mr. Denham simply assumed that all State Water Project costs, as well as the entire Water Stewardship Rate, were supply costs. Denham Phase II Trial Tr. at 1129:8-25, 1131:8-12, 1134:14-1135:6, 1138:2-14. SDCWA presented no evidence to support that assumption. To the contrary, although SDCWA purports to rely on the Court's ruling in Phase I, in fact the assumptions are inconsistent with that ruling. Parenthetically, Mr. Denham could not have relied upon those findings because he rendered his opinion *prior* to the findings in Phase I. Despite Met's motion to reopen expert discovery for the limited purpose of addressing the Statement of Decision (which SDCWA opposed), SDCWA claimed it would not – and indeed did not – update its expert's opinion. It made an informed tactical decision not to.

In its Statement of Decision in Phase I, the Court applied the principle that evidence must be presented to support an allocation of costs. That principle applies equally to allocations to conveyance as well as allocations to supply. A misallocation would mean some parties are paying more than their fair share while others are paying less. In Phase I, the Court determined that, based on the evidence before it, not all State Water Project costs that the state allocates to conveyance, nor all the Water Stewardship Rate costs, could be allocated to Met's conveyance. *See* Statement of Decision at 65. It did *not* determine that none of those costs could be allocated to conveyance; just that not all of them could be. A determination that 100% cannot be allocated to *conveyance* is not proof that 100% must be allocated to *supply*. SDCWA must present evidence, and not merely assumptions, that *all* State Water Project and *all* Water Stewardship Rate costs are supply. Otherwise SDCWA's measure of damages would violate the very same

Propositions, Constitutional provisions, statutes and common law it cited in Phase I, to the extent these are applicable to water agencies like Met and SDCWA. Now the shoe is on the other foot, and they must prove their allocation.

Finally, as to the Water Stewardship Rate, SDCWA expert opined that "it's all or nothing." Denham Phase II Trial Tr. at 1135:7-14. SDCWA presented no evidence that water conservation or development downstream – meaning water conserved or developed locally, after leaving Met's system – in any way added to the amount of Met's water supply upstream. Fully recognizing that it faced an "all or nothing" issue of proof – on which it carried the burden of proof -- SDCWA chose to present nothing.

CONCLUSION

For the foregoing reasons, Met's motion for partial judgment should be granted.

DATED: April 24, 2015

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By _____
Eric J. Emanuel
Attorneys for Respondent and Defendant Metropolitan Water District of Southern California

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017-2543.

On April 24, 2015, I served true copies of the following document(s) described as

AMENDED DEFENDANT AND RESPONDENT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON FOURTH CAUSE OF ACTION FOR BREACH OF CONTRACT

on the interested parties in this action as follows:

SEE ATTACHED LIST

BY FILE & SERVEXPRESS: by causing a true and correct copy of the documents(s) listed above to be sent via electronic transmission through File & ServeXpress to the person(s) at the address(es) set forth below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 24, 2015, at Los Angeles, California.

Pamela S. Davis

SERVICE LIST

VIA E-SERVICE

John W. Keker, Esq.
Daniel Purcell, Esq.
Dan Jackson, Esq.
Warren A. Braunig, Esq.
Keker & Van Nest LLP
633 Battery Street
San Francisco, CA 94111-1809
Telephone: (415) 391-5400
Facsimile: (415) 397-7188
Email: jkeker@kvn.com
dpurcell@kvn.com
djackson@kvn.com
wbraunig@kvn.com

Counsel for Petitioner and Plaintiff San Diego County Water Authority

VIA E-SERVICE

Daniel S. Hentschke, Esq.
San Diego County Water Authority
4677 Overland Avenue
San Diego, CA 92123-1233
Telephone: (858) 522-6790
Facsimile: (858) 522-6566
Email: dhentschke@sdcwa.org

Counsel for Petitioner and Plaintiff San Diego County Water Authority

VIA E-SERVICE

Dorine Martirosian, Deputy City Attorney
Glendale City Attorney's Office
613 E. Broadway, Suite 220
Glendale, CA 91206
Telephone: (818) 548-2080
Facsimile: (818) 547-3402
Email: DMartirosian@ci.glendale.ca.us

Counsel for City of Glendale

VIA E-SERVICE

John L. Fellows III, City Attorney
Patrick Q. Sullivan, Assistant City Attorney
Office of the City Attorney
3031 Torrance Blvd.
Torrance, CA 90503
Telephone: (310) 618-5817
Facsimile: (310) 618-5813
Email: PSullivan@TorranceCA.Gov
JFellows@TorranceCA.Gov

Counsel for the City of Torrance

VIA E-SERVICE

Steven M. Kennedy, Esq.
Brunick, McElhaney Beckett, Dolen & Kennedy,PLC
1839 Commercenter West
San Bernardino, CA 92408-3303
Telephone: (909) 889-8301
Facsimile: (909) 388-1889
Email: skennedy@bmblawoffice.com

Counsel for Three Valleys Municipal Water District

VIA E-SERVICE

Patricia J. Quilizapa, Esq.
Aleshire & Wynder, LLP
18881 Von Karman Avenue, Suite 1700
Irvine, CA 92612
Telephone: (949) 223-1170
Facsimile: (949) 223-1180
Email: pquilizapa@awattorneys.com

Counsel for Municipal Water District of Orange County

SERVICE LIST (Continued)

VIA E-SERVICE

Michael N. Feuer, City Attorney
Richard M. Brown, General Counsel
Julie Conboy Riley, Deputy City Attorney
Tina P. Shim, Deputy City Attorney
Melanie A. Tory, Deputy City Attorney
City of Los Angeles
111 North Hope Street, Room 340
Los Angeles, CA 90012
Telephone: (213) 367-4500
Facsimile: (213) 367-1430
Email: tina.shim@ladwp.com
julie.riley@lawp.com
melanie.tory@ladwp.com

Counsel for The City of Los Angeles, Acting by and Through The Los Angeles Department of Water and Power

VIA E-SERVICE

Amrit S. Kulkarni, Esq.
Julia L. Bond, Esq.
Dawn A. McIntosh, Esq.
Edward Grutzmacher, Esq.
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108
Email: akulkarni@meyersnave.com
jbond@meyersnave,com
dmcintosh@meyersnave.com
egrutzmacher@meyersnave.com

Counsel for The City of Los Angeles, Acting by and Through The Los Angeles Department of Water and Power

VIA E-SERVICE

Steven P. O'Neill, Esq.
Michael Silander, Esq.
Christine M. Carson, Esq.
Lemieux and O'Neill
4165 E. Thousand Oaks Blvd., Suite 350
Westlake Village, CA 91362
Telephone: (805) 495-4770
Facsimile: (805) 495-2787
Email: steve@lemieux-oneill.com
michael@lemieux-oneill.com
christine@lemieux-oneill.com
kathi@lemieux-oneill.com

Counsel for Eastern Municipal Water District, Foothill Municipal Water District, Las Virgenes Municipal Water District, West Basin Municipal Water District, and Western Municipal Water District

VIA E-SERVICE (Case No. 10-510830 only)

Donald Kelly, Esq.
Utility Consumers' Action Network
3405 Kenyon Street, Suite 401
San Diego, CA 92110
Telephone: (619) 696-6966
Facsimile: (619) 696-7477
Email: dkelly@ucan.org

Counsel for Utility Consumers' Action Network

MORGAN LEWIS & BOCKIUS LLP
Colin C. West (Bar No. 184095)
Thomas S. Hixson (Bar No. 193033)
Three Embarcadero Center
San Francisco, California 94111-4067
Telephone: (415) 393-2000
Facsimile: (415) 393-2286

QUINN EMANUEL URQUHART & SULLIVAN, LLP
John B. Quinn (Bar No. 090378)
Eric J. Emanuel (Bar No. 102187)
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
Telephone: (213) 443-3000
Facsimile: (213) 443-3100

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
Marcia Scully (Bar No. 80648)
Heather C. Beatty (Bar No. 161907)
Joseph Vanderhorst (Bar No. 106441)
John D. Schlotterbeck (Bar No. 169263)
700 North Alameda Street
Los Angeles, California 90012-2944
Telephone: (213) 217-6000
Facsimile: (213) 217-6980

Attorneys for Respondent and Defendant
Metropolitan Water District of Southern
California

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY,

Petitioner and Plaintiff,

vs.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; ALL PERSONS INTERESTED IN THE VALIDITY OF THE RATES ADOPTED BY THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA ON APRIL 10, 2012 TO BE EFFECTIVE JANUARY 1, 2013 AND JANUARY 1, 2014; and DOES 1-10,

Respondents and Defendants.

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

ADDITIONAL EVIDENTIARY CITATIONS IN SUPPORT OF DEFENDANT AND RESPONDENT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON FOURTH CAUSE OF ACTION FOR BREACH OF CONTRACT

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

Actions Filed: June 11, 2010; June 8, 2012

FURTHER EVIDENTIARY CITATIONS IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT

This memorandum is supplemental to the memorandum of points and authorities in support of motion for partial judgment filed on April 1, 2015, at the close of petitioner/plaintiff SDCWA's case. At the time the motion was made, the transcript of the April 1, 2015 testimony given by SDCWA's last witness, Scott Slater, was not available. Respondent/defendant Metropolitan files this supplement to its moving memorandum to provide citations to the Slater testimony in support of the argument in Section I of Met's motion.

I. SDCWA PAID WHAT IT AGREED TO PAY AND THUS FAILED AS A MATTER OF LAW TO PROVE BREACH

The testimony of Scott Slater, SDCWA's outside counsel and "lead negotiator" for both the 1998 Exchange Agreement and 2003 Exchange Agreement, Slater Phase II Trial Tr. April 1, 2015 at 1162:16-24, 1163:18-1164:2, further supports the arguments in Met's motion that SDCWA has failed to prove breach of contract.

A. SDCWA Proposed and Agreed to a Price that Included the Water Stewardship Rate and State Water Project Costs

Mr. Slater testified that SDCWA "underst[oo]d" and "knew" the cost elements that were included in the conveyance rates that were proposed to replace the fixed rates in the 1998 Exchange Agreement – "the system access rate, the power rate, and the water stewardship rate." Slater Phase II Trial Tr. Vol. VIII, April 1, 2015 at 1189:4-13, 1208:15-1209:1. With that knowledge, SDCWA "agreed" to pay the conveyance rates and was "satisfied" with those rates. Slater Phase II Trial Tr. Vol. VIII, April 1, 2015 at 1212:17-1213:10.

Furthermore, as counsel to SDCWA, Mr. Slater "didn't have any doubt at the time" about the legality of the rates proposed for the price term and "did not do a forensic exercise to break down the components and whether it was in compliance with the law" before he "recommended to the client . . . that the client enter into [the 2003] agreement." Slater Phase II Trial Tr. Vol. VIII, April 1, 2015 at 1210:17-1211:2, 1211:21-1212:11. Mr. Slater never advised his negotiating counterpart, Jeffrey Kightlinger, that he considered the Met "rate or any other rate or the

components of it [to be] illegal" or "unlawful." Slater Phase II Trial Tr. Vol. VIII, April 1, 2015 at 1225:12-23, 1232:19-22. He affirmed that SDCWA "voted to approve these rates repeatedly" after the execution of the 2003 Exchange Agreement, and that there were "no written communications from San Diego, prior to the filing of this lawsuit, . . . saying the rates [we]re unlawful." Slater Phase II Trial Tr. Vol. VIII, April 1, 2015 at 1247:5-12.

B. There Was No Agreement that the Conveyance Charges Were Only Agreed to for Five Years

Mr. Slater's testimony further disproves SDCWA's assertion that the five years was intended to be a "timeout" period after which it would sue over rates that it knew were illegal. *See* Slater Phase II Trial Tr. Vol. VIII, April 1, 2015 at 1195:3-12. Mr. Slater's testimony confirmed that the rate SDCWA proposed to pay in Option 2 (starting at $253/acre-foot) was significantly higher than the fixed rate provided by the new existing 1998 Exchange Agreement ($90/acre-foot). Slater Phase II Trial Tr. Vol. VIII, April 1, 2015 at 1216:25-1217:10. In the financial analysis prepared by Robert Campbell, executive assistant to SDCWA's general manager, and presented to the SDCWA board, the cost of Mr. Slater's Option 2 was calculated using Met's same rate structure for the "life of the contract," which was forty-five years, and "didn't just look at the next five years." Slater Phase II Trial Tr. Vol. VIII, April 1, 2015 at 1220:13-1221:16; *see also* DTX-50. SDCWA's board agreed to the Option 2 price term knowing the cost it would be paying over the full forty-five years.

As noted in Met's motion, *see* Motion at 4:11-19, SDCWA's ability to obtain the state funds and canal lining water were contingent on agreements related to the Exchange Agreement, including the Allocation Agreement and the Quantification Settlement Agreement, Slater Phase II Trial Tr. Vol. VIII, April 1, 2015 at 1222:2-1223:5. These interrelated agreements have terms that run from forty-five to 110 years, not the five years that SDCWA now asserts was the length of the price term in the Exchange Agreement. The evidence clearly shows that SDCWA expected to pay the rates set under Met's rate structure in effect in 2003 for the full forty-five-year term of the Exchange Agreement, not just for five years.

CONCLUSION

For the foregoing reasons, Met's motion for partial judgment should be granted.

DATED: April 20, 2015

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By _____

Eric J. Emanuel
Attorneys for Respondent and Defendant
Metropolitan Water District of Southern California

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017-2543.

On April 20, 2015, I served true copies of the following document(s) described as

ADDITIONAL EVIDENTIARY CITATIONS IN SUPPORT OF DEFENDANT AND RESPONDENT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON FOURTH CAUSE OF ACTION FOR BREACH OF CONTRACT

on the interested parties in this action as follows:

SEE ATTACHED LIST

BY FILE & SERVEXPRESS: by causing a true and correct copy of the documents(s) listed above to be sent via electronic transmission through File & ServeXpress to the person(s) at the address(es) set forth below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 20, 2015, at Los Angeles, California.

Pamela S. Davis

SERVICE LIST

VIA E-SERVICE

John W. Keker, Esq.
Daniel Purcell, Esq.
Dan Jackson, Esq.
Warren A. Braunig, Esq.
Keker & Van Nest LLP
633 Battery Street
San Francisco, CA 94111-1809
Telephone: (415) 391-5400
Facsimile: (415) 397-7188
Email: jkeker@kvn.com
dpurcell@kvn.com
djackson@kvn.com
wbraunig@kvn.com

Counsel for Petitioner and Plaintiff San Diego County Water Authority

VIA E-SERVICE

Daniel S. Hentschke, Esq.
San Diego County Water Authority
4677 Overland Avenue
San Diego, CA 92123-1233
Telephone: (858) 522-6790
Facsimile: (858) 522-6566
Email: dhentschke@sdcwa.org

Counsel for Petitioner and Plaintiff San Diego County Water Authority

VIA E-SERVICE

Dorine Martirosian, Deputy City Attorney
Glendale City Attorney's Office
613 E. Broadway, Suite 220
Glendale, CA 91206
Telephone: (818) 548-2080
Facsimile: (818) 547-3402
Email: DMartirosian@ci.glendale.ca.us

Counsel for City of Glendale

VIA E-SERVICE

John L. Fellows III, City Attorney
Patrick Q. Sullivan, Assistant City Attorney
Office of the City Attorney
3031 Torrance Blvd.
Torrance, CA 90503
Telephone: (310) 618-5817
Facsimile: (310) 618-5813
Email: PSullivan@TorranceCA.Gov
JFellows@TorranceCA.Gov

Counsel for the City of Torrance

VIA E-SERVICE

Steven M. Kennedy, Esq.
Brunick, McElhaney Beckett, Dolen & Kennedy,PLC
1839 Commercenter West
San Bernardino, CA 92408-3303
Telephone: (909) 889-8301
Facsimile: (909) 388-1889
Email: skennedy@bmblawoffice.com

Counsel for Three Valleys Municipal Water District

VIA E-SERVICE

Patricia J. Quilizapa, Esq.
Aleshire & Wynder, LLP
18881 Von Karman Avenue, Suite 1700
Irvine, CA 92612
Telephone: (949) 223-1170
Facsimile: (949) 223-1180
Email: pquilizapa@awattorneys.com

Counsel for Municipal Water District of Orange County

SERVICE LIST (Continued)

VIA E-SERVICE

Michael N. Feuer, City Attorney
Richard M. Brown, General Counsel
Julie Conboy Riley, Deputy City Attorney
Tina P. Shim, Deputy City Attorney
Melanie A. Tory, Deputy City Attorney
City of Los Angeles
111 North Hope Street, Room 340
Los Angeles, CA 90012
Telephone: (213) 367-4500
Facsimile: (213) 367-1430
Email: tina.shim@ladwp.com
julie.riley@lawp.com
melanie.tory@ladwp.com

Counsel for The City of Los Angeles, Acting by and Through The Los Angeles Department of Water and Power

VIA E-SERVICE

Amrit S. Kulkarni, Esq.
Julia L. Bond, Esq.
Dawn A. McIntosh, Esq.
Edward Grutzmacher, Esq.
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108
Email: akulkarni@meyersnave.com
jbond@meyersnave,com
dmcintosh@meyersnave.com
egrutzmacher@meyersnave.com

Counsel for The City of Los Angeles, Acting by and Through The Los Angeles Department of Water and Power

VIA E-SERVICE

Steven P. O'Neill, Esq.
Michael Silander, Esq.
Christine M. Carson, Esq.
Lemieux and O'Neill
4165 E. Thousand Oaks Blvd., Suite 350
Westlake Village, CA 91362
Telephone: (805) 495-4770
Facsimile: (805) 495-2787
Email: steve@lemieux-oneill.com
michael@lemieux-oneill.com
christine@lemieux-oneill.com
kathi@lemieux-oneill.com

Counsel for Eastern Municipal Water District, Foothill Municipal Water District, Las Virgenes Municipal Water District, West Basin Municipal Water District, and Western Municipal Water District

VIA E-SERVICE (Case No. 10-510830 only)

Donald Kelly, Esq.
Utility Consumers' Action Network
3405 Kenyon Street, Suite 401
San Diego, CA 92110
Telephone: (619) 696-6966
Facsimile: (619) 696-7477
Email: dkelly@ucan.org

Counsel for Utility Consumers' Action Network