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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY, Plaintiff/Petitioner, vs. METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA, et al. Defendants/Respondents.	Case No. CFP-10-510830 Case No. CFP-12-512466 PHASE II TENTATIVE STATEMENT AND PROPOSED STATEMENT OF DECISION

This is my proposed statement of decision and tentative ruling. CRC 3.1590(c)(1). Parties objecting under CRC 3.1590(g) should be familiar with the authorities that describe the limited purposes of objections.[1]

I. Introduction

San Diego County Water Authority (San Diego) claims that the Metropolitan Water District of Southern California (Met) breached the Exchange Agreement[2] and improperly

[1] *E.g., Golden Eagle Ins. Co. v. Foremost Ins. Co.*, 20 Cal.App.4th 1372, 1380 (1993); *Yield Dynamics, Inc. v. TEA Sys. Corp.*, 154 Cal.App.4th 547, 560 (2007); *Heaps v. Heaps*, 124 Cal.App.4th 286, 292 (2004) ("The main purpose of an objection to a proposed statement of decision is not to reargue the merits, but to bring to the court's attention inconsistencies between the court's ruling and the document that is supposed to embody and explain that ruling").

[2] 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.

computed preferential rights. Met disputes the merits and raised some affirmative defenses. I find for San Diego on both claims.

II. Factual Background[3]

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

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

San Diego acquired an annual supply of transfer water from the Imperial Irrigation District (IID) in 1998. PTX-28. Later in 1998 San Diego and Met agreed to the 1998 Exchange Agreement. PTX-31.[5] There San Diego paid Met to take transfer water and have Met make Exchange Water[6] available to San Diego. *Id.* §§ 3.1-3.2, 5.2. The contract was to last 30 years. *Id.* § 5.2. For the first 20 years, San Diego would pay $90 per acre-foot plus an annual percentage escalator. *Id.* For the final 10 years, San Diego would pay $80 per acre-foot plus an

[3] Most of this background is extracted from my April 24, 2014 Statement of Decision (April Statement of Decision).
[4] 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. 4th 1342, 1385 (2012), or acre feet where one acre-foot is an acre of water one foot deep.
[5] The "Agreement Between Metropolitan Water District of Southern California and the San Diego County Water Authority for the Exchange of Water."
[6] 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).

annual percentage escalator running from 1998. *Id.* The 1998 Exchange Agreement permitted the parties to request a change in the price after 10 years. *Id.* § 5.3. The price term was close to an $80 per acre-foot wheeling rate proposed by Department of Water Resources Director David Kennedy in January 1998 as a compromise between wheeling rates advocated by Met and San Diego in a dispute over an appropriate wheeling rate. PTX-481 at MWD 2010-00264720.

There were no IID water transfers to San Diego between 1998 and 2003. Met Pre-Trial Brief, 10; San Diego Post-Trial Brief for Phase II, 13. On October 10, 2003, the parties entered the operative Exchange Agreement. PTX-65 at MWD2010-00190698. That day, the parties and other agencies signed two other agreements: the Quantification Settlement Agreement and the Allocation Agreement. *Id.* §§ F-G.

Most importantly for present purposes, the operative Exchange Agreement contained a revised price provision.[7] The new price was initially $253 per acre-foot, and thereafter "equal to the charge or charges set by [Met's] Board of Directors pursuant to applicable law and regulation and generally applicable to the conveyance of water by [Met] on behalf of its member agencies." *Id.* § 5.2.[8] By this term, Met charged San Diego the volumetric transportation rates it charged when it sold full-service water as of 2003 – the System Access Rate, System Power Rate, and Water Stewardship Rate.[9] Met's rate *structure* has remained the same since 2003, but Met periodically adjusts the dollar figures for the rates. San Diego has paid those charges under the Exchange Agreement.

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

[8] 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.

[9] 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.

III. Procedural History

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

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

Met had earlier moved for summary adjudication of, among other things, San Diego's preferential rights claim. Met's motion was predicated on the rule that payments for the purchase of water do not give rise to preferential rights credit. December 4, 2013 Order, 6-7. Met argued that San Diego pays several volumetric rates under the Exchange Agreement and as a wheeler that Met also charges for the purchase of water, such that San Diego essentially paid

for the purchase of water. *Id.* I denied summary adjudication, finding that San Diego did not pay any rate for the cost of water under the Exchange Agreement and that indeed San Diego had already paid *someone else* for the purchase of water in the Exchange Agreement and wheeling contexts. *Id.* at 7. I held that Met had not established as a matter of law that San Diego was purchasing Exchange Water as opposed to making some other sort of payment. *Id.*

The parties have now completed a Phase II bench trial on San Diego's breach of contract and preferential rights claims. Closing argument was held on June 5, 2015. The parties submitted supplemental briefs on June 19, 2015, on which date I took the matter under submission. This statement of decision resolves the Phase II issues including Met's motion for partial judgment interposed at the conclusion of San Diego's case in the Phase II trial.

IV. Discussion

A. Breach of Contract

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

1. Terms

In the Exchange Agreement San Diego agreed to both pay a price and make "Conserved Water" and/or "Canal Lining Water" and "Early Transfer Water" available to Met each year at the "SDCWA Point of Transfer," in exchange for which Met agreed to make "Exchange Water" available to San Diego each year at the "Metropolitan Point(s) of Delivery." PTX-65 §§ 3.1-3.2,

5.1.[10] The aggregate quantity of Exchange Water delivered by Met in a given year was to be equal to the aggregate quantity of Conserved Water (including Early Transfer Water) and Canal Lining Water San Diego made available to Met in the same year. *Id.* §§ 1.1(m), 3.2(c).

The Exchange Agreement provided for the Price, as follows:

> The Price on the date of Execution of this Agreement shall be [$253]. Thereafter, the Price shall be equal to the charge or charges set by Metropolitan's Board of Directors pursuant to applicable law and regulation and generally applicable to the conveyance of water by Metropolitan on behalf of its member agencies. For the term of this Agreement, neither SDCWA nor Metropolitan shall seek or support in any legislative, administrative or judicial forum, any change in the form, substance, or interpretation of any applicable law or regulation (including the Administrative Code) in effect on the date of this Agreement or pertaining to the charge or charges set by Metropolitan's Board of Directors and generally applicable to the conveyance of water by Metropolitan on behalf of its member agencies; provided, however, that Metropolitan may at any time amend the 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.

PTX-65 § 5.2.

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

The parties dispute the import of the lengthy third sentence of § 5.2. Met contends that San Diego there agreed to the rate structure Met had in place at the time of the Exchange Agreement but reserved the ability to challenge only *amendments* to Met's rate structure (after the five year period). Met Closing Brief, 20-22.[11] San Diego contends that San Diego agreed

[10] The Exchange Agreement was one of several agreements executed pursuant to the Quantification Settlement Agreement. PTX-65 § F. San Diego entered the Allocation Agreement on the same day. *Id.* at § G.

[11] Citations to "Met Closing Brief" refer to Met's corrected closing brief.

not to challenge Met's existing rate structure or any amendments to it for five years, but reserved the ability to challenge Met's existing rate structure or any amendments to it after five years.

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

The third sentence begins with a limitation on the parties' ability to make changes to the form, substance, or interpretation of any applicable law or regulation, including the Administrative Code, that pertains to the charge or charges set by Met and generally applicable to Met's conveyance of water on behalf of its member agencies. This limitation is followed by a proviso that permits Met to amend its Administrative Code and extends the scope of the limitation to any of Met's amendments to the Administrative Code. The first proviso is followed by a second proviso that constrains the scope of the general limitation in two ways – one that sunsets restrictions on challenges brought by San Diego, and one that permits the parties to make mutually agreeable changes.

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

Met's argument turns on the assertion that the second proviso modifies the first proviso, not the general limitation. Met Closing Brief, 20-22. The key to Met's argument is the premise that the language "such charge or charges" in the second proviso refers to the charge or charges contained in any amendments made pursuant to the first proviso. *Id.* at 22. This reading is

irreconcilable with the plain language. The general limitation, not the first proviso, contains a reference to "charge or charges." In using the "charge or charges" language, the general limitation echoed the price term itself. The general limitation precludes San Diego from attacking any law or regulation pertaining to Met's "charge or charges" "generally applicable to the conveyance of water." The general limitation precludes San Diego from bringing a challenge that could impact the contract price. The reference to "such charge or charges" in the second proviso refers to those charges.[12] It does not refer to the first proviso, which contains no reference to any "charge or charges."

The structure of this section makes this conclusion inescapable. The first proviso begins with the language "provided, however." The second proviso begins with the language "and, provided, further." This makes it plain that the second proviso was a further proviso to the general limitation.

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

[12] Met contends that if the second proviso refers to the general limitation then San Diego could challenge every charge. Met Closing Brief, 22. Not so. The general limitation referred to a limited subset of Met's charges, to which the second proviso refers.

Diego always had concerns with the rates themselves and raised them repeatedly with Met. *Id.* at 1554:22-1555:14.[13]

Met also notes San Diego's analysis of the future costs under the pricing agreement that the parties ultimately adopted. San Diego analyzed the cost of that price plan over 20, 35, 45, and 75 years, but not over five years. Met Closing Brief, 23; Trial Transcript, 1218:6-1221:6. Met also seeks to corroborate its interpretation by looking to a San Diego memo to its Internal Water Committee from 2007, in which San Diego stated that it did not intend to litigate Met's current rate structure but could not know what future actions Met may take. Met Closing Brief, 23; DTX-355 at 2.

None of this extrinsic evidence creates ambiguity in the contract.[14] That San Diego projected its exposure over periods exceeding five years is unsurprising, because even if San Diego could succeed in a rate challenge San Diego would still pay Met's full, if reconfigured, conveyance rates over the life of the Exchange Agreement. Stapleton testified that San Diego was only interested in projecting a worst case scenario under the pricing plan. Trial Transcript, 1465:22-1466:1. A worst case scenario projection would not include savings from rate restructuring as a result of litigation, even in the dubious event that one could estimate such savings.

That in 2007 San Diego did not intend to challenge Met's existing rate structure does not clarify the parties' intent when they signed the agreement in 2003. If anything, San Diego's statement in 2007 is consistent with San Diego's interpretation of the contract, not Met's. By

[13] 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.

[14] 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.

stating that it did not intend to challenge Met's existing rate structure, San Diego implied that it thought it had, or would soon have, a right to challenge Met's existing rate structure. (If San Diego had no right to challenge Met's rate structure, there would be no reason for San Diego to discuss whether it intended to do so.) This implication is inconsistent with Met's interpretation of the contract, pursuant to which San Diego would never have any right to challenge Met's existing, unamended, rate structure.

While Kightlinger's testimony supports Met's position, it is contradicted, and I reject it. PTX-392 at 122:21-123:1; Trial Transcript, 1194:16-1196:6. His reading is in any event irreconcilable with the plain language of the contract. It does not create an ambiguity and the unambiguous plain language controls.

The third sentence of § 5.2 permits San Diego to challenge Met's charges applicable to the conveyance of water by Met to member agencies.[15]

2. Breach

In the rate years at issue, Met charged San Diego its transportation rates – the System Access Rate, System Power Rate, and Water Stewardship Rate – pursuant to the price term.[16] San Diego contends that Met breached the price term because Met's transportation rates were not set pursuant to applicable law and regulation. San Diego Pre-Trial Brief, 1. In Phase I, I held that Met's System Access Rate, System Power Rate, and Water Stewardship Rate were unlawful. April Statement of Decision, 65. There is no dispute that those rates are the rates generally applicable to Met's member agencies for the conveyance of water. Because Met's charges were

[15] In passing, San Diego refers to this state of affairs as an "agree[ment] to disagree" about the law pertaining to Met's rates. San Diego Post-Trial Brief for Phase II, 14. Met contends that San Diego agreed to a contract price including the Water Stewardship Rate, the System Power Rate, and the System Access Rate, the latter two 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).

[16] 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.

not consistent with law and regulation, Met breached § 5.2 of the Exchange Agreement. PTX-65 § 5.2.

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

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

Met contends there can be no breach when it uses the rate structure that has been in existence since 2003, because San Diego entered the contract knowing Met's future performance would be a continuation of that very structure. Amended Motion for Partial Judgment, 6. San Diego may well have known that it was in substance agreeing to pay the Water Stewardship Rate and for all State Water Project costs in Met's rate elements for five years. But San Diego also bargained for the right to attack Met's conveyance rates after five years. If the charges were removed from Met's generally applicable rates as the result of a change obtained by San Diego, the charges would also be removed from the contract price. So San Diego did not agree to pay

any specific rate or abide by any specific rate structure for the life of the contract – it expressly only agreed to pay rates set in accordance with applicable law and regulation, reserving the right to challenge whether Met set its rates in accordance with applicable law and regulation (after five years).

Accepting Met's performance for some period of time, even exceeding the five year period, does not show San Diego agreed in the contract[17] to a rate structure when at the same time San Diego expressly retained the right to challenge Met's charges in court after the five year period.

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

3. Damages

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

a. Background Law

Damages are of course an essential element of a breach of contract claim. *Behnke v. State Farm General Ins. Co.,* 196 Cal.App.4th 1443, 1468 (2011); C.C. § 3300. "The damages awarded should, insofar as possible, 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); *Lewis Jorge Const.*

[17] I separately address Met's waiver defense.

Management, Inc. v. Pomona Unified School Dist., 34 Cal.4th 960, 967-68 (2004). "Where the fact of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.] The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." *GHK Associates v. Mayer Group, Inc.*, 224 Cal.App.3d 856, 873 (1990).

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

b. Fact of Damages

To establish the fact of damages San Diego relies on the April Statement of Decision as well as testimony to the effect that Met's rates resulted in inflated conveyance rates. San Diego Post-Trial Brief for Phase II, 21.[18] In Phase I, I held that Met's conveyance rates over-collect from wheelers because Met allocated all of the State Water Project costs for the transportation of purchased water to its conveyance rates and all of the costs for conservation and local water supply development programs to its conveyance rates. April Statement of Decision, 65. The same logic applies to the Exchange Agreement.

Met responds that contract damages may only be the difference between the price Met charged San Diego and the highest price Met could have charged San Diego had it performed its obligation to set a lawful rate. Met Closing Brief, 3. So, Met says San Diego bore a burden of proving at least that its damages theory is based on some lawful rate structure, and (possibly) that

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

under every imaginable lawful alternative rate structure San Diego would have paid less than it did in the real world.[19]

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

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

[19] 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).

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

[21] This logical twist got to the point where I had to instruct Met not to press a damages theory which Met at the same time maintained I had no jurisdiction to entertain. Nov. 4, 2014 Order Setting Case Management Conference, 1-2; Dec. 4, 2014 Order Denying Met's Motion to Reopen Expert Discovery. The effect of Met's fabricated conundrum 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.

aware that contract litigation (after five years) was likely; but the notion that they also intended to have the anticipated contract dispute resolved in this way is inconceivable.

On the second point, Phase I established Met unlawfully included supply costs in transportation rate elements. Met charged the same transportation rate elements to San Diego under the Exchange Agreement as charges generally applicable to the conveyance of water by Met on behalf of its member agencies. It is thus patently obvious that San Diego has established that some costs should have been removed from the rates it paid under the Exchange Agreement – the rates were obviously overinclusive. The precise amount of overinclusion is not established, nor is any resulting impact on other Met rates.

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

Met argues the same conduct that breached the contract also must have resulted in decreased supply rates, saving San Diego some money when it purchased full-service water from Met. Met Closing Brief, 6. These savings must be treated as an offset against San Diego's damages, Met says, for it must have under-collected its supply costs in such a way that necessarily resulted in under-collection from full-service water purchases.[22] But Met as defendant has the burden on matters of offset and unjust enrichment. *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). Met bore the burden of demonstrating that San Diego's damages were offset by incidental extra-contractual benefits San Diego obtained as a result of the same conduct amounting to breach. *Space Properties, Inc. v.*

[22] *Hicks v. Drew*, 117 Cal. 305, 314-15 (1897) (approving the jury instruction "If the jury find from the evidence that 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.

Tool Research Co., 203 Cal.App.2d 819, 827 (1962) (defendant has burden of proof on defenses such as unjust enrichment and or setoff). No evidence shows San Diego would have received a consequential benefit from paying reduced supply charges that equaled or outweighed its damages under the contract during the rate years in question if Met had reallocated the unlawful transportation charges to its supply rates. Accordingly, Met's argument for an offset does not defeat liability. It has not met that burden.

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

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

c. Amount of Damages

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

San Diego's approach may overcompensate San Diego, because San Diego (1) removed all State Water Project costs from Met's conveyance rates although I have only ruled that Met could not include 100% of those costs through its conveyance rates;[23] and (2) removed the entire Water Stewardship Rate from Met's conveyance rates although I only ruled that Met could not recover 100% of those costs through its conveyance rates. Nor does San Diego account for possible set-offs, although as suggested above it is not San Diego's burden to do so.[24]

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

Met seeks dismissal because of this uncertainty. Trial Transcript, 2033:12-19. But where, as here, the fact of damage flowing from the breach is proven the amount of damages may be fixed using an approximation if there is a reasonable basis for the approximation. *GHK*,

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[23] Met argues that Exchange Water included State Water Project water, so San Diego should be charged with some costs from the State Water Project system under the Exchange Agreement. Met Closing Brief, 8-12. But the 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 Brief, 7-8; Trial Transcript, 1140:5-17. San Diego's expert removed the challenged costs from the cost pool and divided the cost pool by the sales assumption. Trial Transcript, 1140:5-17. Met's expert opined that San Diego should have instead divided only Colorado River costs by Colorado River sales. Trial Transcript, 1899:8-1900:14. But, once again, the proper approach was to determine what Met's rate would have been if certain charges in Met's generally applicable conveyance rates were moved from conveyance to supply. To do this, it was appropriate to look at Met's total conveyance costs and its total sales assumption.

[24] San Diego provided some evidence in support of a 15% figure. Trial Transcript, 1258:7-1260:8. While Met 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.

224 Cal.App.3d at 873-74.[25] The rationale for San Diego's calculation is (1) San Diego has removed from Met's transportation rates only certain charges that this Court ruled cannot be wholly included in transportation rates; (2) attempting to allocate the charges at issue between transportation and supply would embroil the Court in an inappropriate ratemaking exercise (a proposition with which Met has repeatedly agreed) (Trial Transcript, 2017:23-2018:7; Met's January 9, 2015 Motion to Dismiss, 3-5; Met's March 27, 2014 Objections to Tentative Statement of Decision, 2-3). San Diego Post-Trial Brief for Phase II, 31; San Diego Pre-Trial Brief, 11-12.

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

Met did not offer a competing computation.

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

[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.

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

4. Affirmative Defenses

a. Waiver

Met contends that San Diego waived[26] any claim for damages arising from Met's use of the rate structure to set the Price by the following conduct inconsistent with an intent to claim damages: (1) proposing the Price with knowledge of the rate structure and its components; (2) voting, through its delegates to Met's Board of Directors, in favor of the rate structure and rates; (3) failing to object to the structure of the rates until 2010; (4) stating in 2007 that San Diego did not intend to litigate Met's existing rate structure; and (5) accepting Met's performance with knowledge of the breach. Met Closing Brief, 14-20.

Met's waiver theories are precluded by the anti-waiver provision[27] in the Exchange Agreement. Met has not identified any conduct that could have waived the protections of the anti-waiver provision. *Id.* at 24-25. Nor has Met identified any written and signed waiver. PTX-65 § 13.9.[28]

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

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

[28] Met looks to San Diego's written statement in 2007 that it did not intend to litigate Met's existing rate structure as 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.

b. Consent

Met asserts that San Diego consented[29] to using Met's then-existing rate structure to set the Price by entering the Exchange Agreement with knowledge of the unlawfulness of the rate structure, voting in favor of the rate structure, and accepting the benefits of the agreement. Met Closing Brief, 25-28.

First, San Diego's agreement to the price term in the Exchange Agreement does not amount to San Diego's approval of Met's rate structure. As discussed above,[30] contrary to Met's reading of the Exchange Agreement San Diego retained the right to challenge Met's existing rate structure after five years. San Diego agreed to pay only (1) a fixed initial rate; and (2) a rate set pursuant to applicable law. San Diego did not agree to Met's existing rate structure, but bargained away the ability to challenge that rate structure for five years.

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

[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).

favor of the rates, a proposition with which I do not agree,[31] San Diego's delegates did not vote in favor of the rates at issue now.

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

c. Estoppel

Met argues that San Diego is estopped[32] from asserting that setting the Price based on the existing rate structure is a breach of contract because San Diego's delegates to Met's Board of Directors failed to disclose that Met's rate structure was unlawful and instead in effect represented that the Price could be based on the existing rate structure. Met Closing Brief, 28-31. Met asserts that San Diego agreed to a price term based on the rate structure and the 2003 rates; did not communicate that any of Met's rates might be unlawful; did not object to the price; and represented that it did not intend to sue over the existing structure. *Id.* at 30.

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

[31] As the text suggests these delegates wore at least two hats, and in voting for Met rates may well have acted in the 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 party asserting estoppel had the right to believe the conduct was so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must rely on the conduct. *Ashou v. Liberty Mut. Fire Ins. Co.*, 138 Cal.App.4th 748, 766-67 (2006). Met's arguments conceivably address the first two elements, but not the rest, so setting aside my discussions in the text the estoppel defense fails in any event. Met does not show it was ignorant of facts to which San Diego was privy nor does it show reliance, that is, that it would have acted otherwise.

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

Nor, in this context, could Met have reasonably relied on San Diego's other conduct to conclude that its rate structure was legal. For example, in 2007 San Diego stated in internal documents that it did not intend to litigate Met's existing rate structure.[34] But San Diego could have determined not to litigate Met's existing rate structure for a number of reasons, only one of which is San Diego's likelihood of success; and an internal document surely could not create as estoppel as to Met. Met also notes San Diego's delegates voted to approve Met's rates in 2002 and 2005-2009 but did not tell Met that its rate structure might be illegal. But again the plain language of the Exchange Agreement eviscerates this argument. Even as San Diego acquiesced

[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.

[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.

to Met's rates on a year-to-year basis after the expiration of the five year period, the possibility of a legal challenge to the rates was written into the Exchange Agreement.

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

d. Illegality

Met argues that the Exchange Agreement is void as illegal if Met's rate structure or rates in existence at the time the parties entered into the Exchange Agreement were illegal. Met Closing Brief, 31-33. This is so because if San Diego is right, Met's performance of the price term was unlawful, Met says, because the rate structure includes unlawful rates. Met Pre-Trial Brief, 12.

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

e. Mistake of Law

Met argues that there was a mistake of law with respect to whether its existing rates at the time the parties entered the Exchange Agreement were lawful. To the extent that neither party was aware the rate structure was unlawful, Met contends that it is entitled to rescission based on

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

mutual mistake. Met Closing Brief, 34-35; C.C. § 1578(1).[36] To the extent that San Diego but not Met was aware that Met's rate structure was unlawful, Met is entitled to rescission because San Diego failed to rectify Met's mistake. Met Closing Brief, 35-36; C.C. § 1578(2). San Diego says there was no mistake of law – the parties disagreed about the lawfulness of Met's rate structure and bargained around that disagreement. San Diego Post-Trial Brief for Phase II, 28-29.

Where parties are aware that a doubt exists in regard to a certain matter and contract on that assumption, the risk of the existence of the doubtful matter is an element of the bargain. *Guthrie v. Times-Mirror Co.*, 51 Cal.App.3d 879, 885 (1975). The kind of mistake that renders a contract voidable does not include mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk. *Id.*

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

Neither party knew how a court would rule on Met's rate structure. But they contracted around this uncertainty. For five years, the parties precluded San Diego from challenging Met's

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[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.

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

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

interpretation of the law, whether or not that interpretation changed during that period. Thereafter, if San Diego disagreed it was free to bring a judicial challenge. The structure of the contract itself, against this backdrop of uncertainty, demonstrates that the parties knew San Diego might challenge Met's rate structure, were unsure which party would prevail in such a lawsuit, and contracted in a way that accounted for Met's interests if its rates were unlawful.[39] There was no mistake of law.

f. Offset and Unjust Enrichment

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

B. Preferential Rights

San Diego seeks a declaration that Met's methodology of computing preferential rights violates § 135 of the Metropolitan Water District Act[41] because it excludes San Diego's payments relating to the conveyance of water San Diego purchases from other sources. 2010 Complaint ¶ 115. Specifically, the parties dispute whether (1) San Diego's payments pursuant to the Exchange Agreement should be included in the preferential rights calculation; and (2) payments under wheeling agreements should be included in the preferential rights calculation.[42]

Section 135 includes the following:

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

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[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.
[40] Met's briefing does not separately address these defenses.
[41] Water Code Appendix § 109-135.
[42] San Diego Post-Trial Brief for Phase II, 39-40 (referring to the Exchange Agreement and other wheeling agreements); Met Closing Brief, 36-40 (addressing only the Exchange Agreement); Trial Transcript, 2037:20-2038:1.

As explained by our Court of Appeal:

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

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

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

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

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

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

Met says that the Exchange Agreement facilitates a purchase of water because, under the agreement, San Diego gives Met water and money and obtains different water[44] from Met. Met

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

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

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

San Diego is not purchasing water from Met. San Diego is exchanging water with Met to make use of its own independent supplies. PTX-65 §§ 1.1(m), 3.1-3.2, 3.6.[45] The parties agreed to exchange an equal amount of water; the only water quality requirement was for Met to provide San Diego with water of at least the same quality as the water Met received from San Diego. These facts underscore that the Exchange Agreement was not an agreement pursuant to which San Diego obtained water from Met, but instead an agreement pursuant to which Met in effect conveyed water on behalf of San Diego. That the Exchange Agreement differs in some respects from a wheeling contract[46] does not mean that the Exchange Agreement was not in substance an

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

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

[46] Met says there are two differences. Exchange Water has to be delivered regardless of capacity whereas wheeled water is made available when capacity is available; secondly, Met makes Exchange Water available in monthly installments even if the same amount of water is not, on a monthly basis, provided to Met (the sums equalize out over a year period). Met Trial Brief at 7 *et seq.* Met says this demonstrates that San Diego is in effect "paying" for the water with—water; making Exchange Water a water "purchase." *Id.* at 8. There can be nice distinctions between barter, currency and investment, and conceivably water might have any of these roles—and in circumstances of

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

V. Conclusion

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

On the preferential rights claim, San Diego is entitled to a judicial declaration that its wheeling and Exchange Agreement payments must be included in the preferential rights calculation.

Dated: July 15, 2015

Curtis E.A. Karnow
Judge of The Superior Court

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.

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 JUL 15 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: JUL 15 2015

T. Michael Yuen, Clerk

By: _____
DANIAL LEMIRE, Deputy Clerk