Bingham McCutchen LLP
JAMES J. DRAGNA (SBN 91492)
COLIN C. WEST (SBN 184095)
THOMAS S. HIXSON (SBN 193033)
Three Embarcadero Center
San Francisco, California 94111-4067
Telephone: 415.393.2000
Facsimile: 415.393.2286

Morrison & Foerster LLP
JAMES J. BROSNAHAN (SBN 34555)
SOMNATH RAJ CHATTERJEE (SBN 177019)
425 Market Street
San Francisco, CA 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

MARCIA SCULLY (SBN 80648)
SYDNEY B. BENNION (SBN 106749)
HEATHER C. BEATTY (SBN 161907)
The Metropolitan Water District Of Southern California
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

EXEMPT FROM FILING FEES
[GOVERNMENT CODE § 6103]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY,

Petitioner and Plaintiff,

v.

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 13, 2010 TO BE EFFECTIVE JANUARY 2011; and DOES 1-10,

Respondents and Defendants.

No. CPF-10-510830

NOTICE OF DEMURRERS AND DEMURRERS TO, AND NOTICE OF MOTIONS AND MOTIONS TO STRIKE PORTIONS OF, SDCWA'S FIRST AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF BY METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Date: January 4, 2012
Time: 1:30 p.m.
Dept.: 304
Judge: Hon. Richard A. Kramer

NOTICE OF DEMURRERS AND MOTIONS TO STRIKE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 4, 2012 at 1:30 p.m. or as soon thereafter as the matter may be heard in Department 304 of the Superior Court of California, County of San Francisco, located at 400 McAllister Street, San Francisco, CA 94102, Respondent and Defendant Metropolitan Water District of Southern California ("MWD") will and hereby does demur to, and will and hereby does move to strike portions of, the San Diego County Water Authority's ("SDCWA's") First Amended Petition for Writ of Mandate and Complaint for Damages and Declaratory Relief ("FAC") pursuant to California Code of Civil Procedure §§ 425.16, 430.10(e), 435, and 436. The hearing on the demurrers and motions to strike will be held on January 4, 2012 in accordance with this Court's October 27, 2011 Order. *See* October 27, 2011 Tr. at p. 13:5-17, 15:19-21.

The demurrers are made on the grounds that the fourth, fifth, sixth, and eighth causes of action in the FAC fail to state facts sufficient to constitute causes of action for breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, or declaratory relief regarding the preferential rights calculation as a matter of law.

A motion to strike is made on the grounds that, as a matter of law, portions of the FAC contained in the fifth cause of action are not drawn or filed in conformity with the laws of this state, and therefore should be stricken pursuant to California Code of Civil Procedure §§ 435 and 436.

A special motion to strike is made on the grounds that portions of the FAC – the sixth cause of action in its entirety and the related prayer – constitute a Strategic Lawsuit Against Public Participation ("SLAPP") pursuant to California Code of Civil Procedure § 425.16, and are therefore subject to a special motion to strike. It is further based on the grounds that SDCWA cannot establish a reasonable probability of prevailing on the merits of the sixth cause of action.

These demurrers and motions to strike will be and hereby are based on this Notice, the attached Demurrers and Motions to Strike, the Memorandum of Points and Authorities in support thereof filed concurrently herewith, the Request for Judicial Notice filed concurrently herewith,

the Appendix of Non-California Authorities filed concurrently herewith, all pleadings and papers on file in this action, and such argument as may be presented at the hearing.

DATED: December 2, 2011 BINGHAM MCCUTCHEN LLP

By: _____
James J. Dragna
Attorneys for Respondent and Defendant
Metropolitan Water District of Southern California

DEMURRERS AND MOTIONS TO STRIKE

MWD hereby demurs to, and moves to strike portions of, SDCWA's FAC on each of the following grounds:

Demurrer By MWD To Fourth Cause Of Action

Breach Of Contract

1. The fourth cause of action in the FAC (asserting breach of the Exchange Agreement between SDCWA and MWD) fails to state facts sufficient to constitute a cause of action. Cal. Code Civ. Proc. § 430.10(e). The cause of action is barred based on SDCWA's failure to comply with the Government Claims Act, set forth in California Government Code §§ 945.4 and 935(a)-(b). The cause of action is also barred by the applicable one year statute of limitations set forth in California Government Code § 911.2 and MWD Administrative Code § 9306(a).

Demurrer By MWD To Fifth Cause Of Action

Breach Of The Covenant Of Good Faith And Fair Dealing

2. The fifth cause of action in the FAC (asserting breach of the covenant of good faith and fair dealing) fails to state facts sufficient to constitute a cause of action. Cal. Code Civ. Proc. § 430.10(e). The cause of action is barred based on SDCWA's failure to comply with the Government Claims Act, set forth in California Government Code §§ 945.4 and 935(a)-(b).

Demurrer By MWD To Sixth Cause Of Action

Breach Of Fiduciary Duty

3. The sixth cause of action in the FAC (asserting breach of an alleged fiduciary duty) fails to state facts sufficient to constitute a cause of action. Cal. Code Civ. Proc. § 430.10(e). The cause of action is barred by the Government Claims Act, set forth in California Government Code § 815.

Demurrer By MWD To Eighth Cause Of Action

Declaratory Relief Re: Preferential Rights Calculation

4. The eighth cause of action in the FAC (asserting declaratory relief re: preferential rights calculation) fails to state facts sufficient to constitute a cause of action. Cal. Code Civ.

Proc. § 430.10(e).

Motion To Strike Portions Of Fifth Cause Of Action

5. MWD moves to strike SDCWA's allegations contained in paragraph 93, page 27, lines 9-12 of the FAC's fifth cause of action, the words beginning "By passing the resolution" and ending "unlawful rate setting, and" pursuant to California Code of Civil Procedure §§ 435 and 436. These allegations are not drawn or filed in conformity with the laws of this state because they are time-barred by the applicable one year statute of limitations, set forth in California Government Code § 911.2 and MWD Administrative Code § 9306(a).

Special Motion To Strike Sixth Cause Of Action And Related Prayer

6. The sixth cause of action in the FAC (asserting breach of an alleged fiduciary duty) contained in paragraphs 94-107, page 27, line 22-page 33, line 22 should be stricken in its entirety, and the related prayer contained in paragraph 5 of the FAC's Prayer for Relief, page 38, line 10-page 39, line 11 should be stricken, under California Code of Civil Procedure § 425.16. These portions of the FAC should be stricken because the sixth cause of action arises from an act of a person or government entity in furtherance of the person's or government entity's rights of petition and free speech, specifically: "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" and "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or issue of public interest." Further, SDCWA cannot establish a reasonable probability of prevailing on the merits of the sixth cause of action.

MWD respectfully requests that the Court issue an order sustaining its demurrers and granting its motions to strike without leave to amend.

DATED: December 2, 2011 BINGHAM MCCUTCHEN LLP

By: _____
James J. Dragna
Attorneys for Respondent and Defendant
Metropolitan Water District of Southern California

Bingham McCutchen LLP
JAMES J. DRAGNA (SBN 91492)
COLIN C. WEST (SBN 184095)
THOMAS S. HIXSON (SBN 193033)
Three Embarcadero Center
San Francisco, California 94111-4067
Telephone: 415.393.2000
Facsimile: 415.393.2286

Morrison & Foerster LLP
JAMES J. BROSNAHAN (SBN 34555)
SOMNATH RAJ CHATTERJEE (SBN 177019)
425 Market Street
San Francisco, CA 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

MARCIA SCULLY (SBN 80648)
SYDNEY B. BENNION (SBN 106749)
HEATHER C. BEATTY (SBN 161907)
The Metropolitan Water District Of Southern California
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

EXEMPT FROM FILING FEES
[GOVERNMENT CODE § 6103]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY,

Petitioner and Plaintiff,

v.

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 13, 2010 TO BE EFFECTIVE JANUARY 2011; and DOES 1-10,

Respondents and Defendants.

No. CPF-10-510830

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S DEMURRERS TO, AND MOTIONS TO STRIKE PORTIONS OF, SDCWA'S FIRST AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF

Date: January 4, 2012
Time: 1:30 p.m.
Dept.: 304
Judge: Hon. Richard A. Kramer

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

STATUTES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

The Metropolitan Water District of Southern California ("MWD") respectfully submits this memorandum of points and authorities in support of its demurrers to, and motions to strike portions of, the San Diego County Water Authority's ("SDCWA") First Amended Petition for Writ of Mandate and Complaint for Damages and Declaratory Relief ("FAC").

I. INTRODUCTION

SDCWA's initial petition/complaint in this action stated a single, straightforward suit for reverse validation of water rates, adopted by MWD in April of 2010, and which followed a rate structure that MWD put in place in 2003.[1] That petition/complaint was based on California Code of Civil Procedure § 863 and is entitled to statutory preference by Code of Civil Procedure § 867. SDCWA's FAC – filed more than a year later – seeks to dramatically expand the scope of this case by adding claims that are unrelated to the rate challenge and are invalid as a matter of law, apparently in a misguided attempt to bring evidence into the validation action which is both outside the administrative record and irrelevant to the rate challenge. The most far-reaching of SDCWA's new claims is its sixth cause of action, for purported breach of fiduciary duty. That claim contends that by "allowing" managers and staff of MWD's member agencies ("MAs"), which are separate legal entities not within the control of MWD, to discuss ratemaking and policymaking decisions and to make recommendations to MWD's Board of Directors, and by adopting by a majority vote of MWD's Board water rates and contract provisions not to SDCWA's liking, MWD violated an alleged fiduciary duty to SDCWA.

This claim is invalid and spurious for many reasons. *First*, it seeks to chill constitutional rights of freedom of speech and petition for redress of grievances, and thus this claim should be stricken under the anti-SLAPP statute. *Second*, it purports to name MWD as a defendant for the alleged acts of third parties not within its dominion or control. *Third*, the Legislature has abolished common law tort liability against public entities, and SDCWA's non-statutory "fiduciary duty" claim simply does not exist. *Fourth*, the imposition of a common law fiduciary

---

[1] FAC ¶¶ 25, 26; FAC, Ex. E at 7.

duty in favor of a particular member agency would violate the statutory provision that MWD is governed by majority rule, and would violate the separation of powers.

SDCWA's other new claims fail as a matter of law also. The fourth cause of action for breach of contract, and the fifth cause of action for breach of the covenant of good faith and fair dealing, each fail for multiple reasons. *First*, both claims are barred because SDCWA did not present the claims as required under the Government Code. *Second*, SDCWA's allegations show that the breach of contract claim is entirely time-barred, and most of the implied covenant claim is as well. *Third*, none of the conduct alleged in the fifth cause of action even arguably breaches the implied covenant.

In addition, the eighth cause of action – which challenges MWD's calculation of SDCWA's "preferential rights" – ignores the language of the statute governing that calculation, and the clear direction of a California Court of Appeal decision that rejected SDCWA's claim the last time it challenged MWD's preferential rights calculation. *See San Diego County Water Auth. v. Metropolitan Water Dist. of Southern California*, 117 Cal. App. 4th 13 (2004) ("*SDCWA*").

The Court should sustain MWD's demurrers and grant its motions to strike without leave to amend.

II. ARGUMENT

A. SDCWA's Breach Of Fiduciary Duty Claim And Related Prayer Are Barred By The Anti-SLAPP Statute And Fail To State A Cause of Action.

The Court should grant MWD's anti-SLAPP motion to strike SDCWA's sixth cause of action for breach of fiduciary duty, and should also sustain MWD's demurrer to it without leave to amend. The Court should also strike the related prayer contained in paragraph 5 of the FAC's Prayer for Relief (pg. 38, line 10-pg. 39, line 11). This claim alleges that managers and staff of MWD's MAs "have engaged in regular, private meetings . . . to align positions and 'recommend' to Metropolitan's Board how it should vote on key ratemaking and policymaking decisions." FAC ¶ 100. SDCWA alleges that the MAs write "letters addressed to the Metropolitan Board"

setting forth their positions, which they sometimes also "announce[] as 'recommended' Board policy at Metropolitan Board meetings." *Id.* SDCWA claims that "this so-called 'working group' . . . meets with Metropolitan staff members in advance of regularly scheduled MWD Board meetings," and "sometimes publishes detailed recommendations to Board members, which [t]he Board has followed." *Id.* SDCWA alleges that because these MAs constitute the majority of MWD's voting constituency, and by law the MWD Board must make decisions according to majority vote, the Board has adopted water rates and contract provisions that operate to SDCWA's disadvantage. *Id.* ¶¶ 96, 98, 100-01. SDCWA claims that MWD and its Board have breached their supposed fiduciary duties to SDCWA's "minority voting interest" and to its "constituency." *Id.* ¶ 95.

The Court should grant MWD's anti-SLAPP motion because this claim and related prayer are brought "to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances." Code Civ. Proc. § 425.16(a). A government entity cannot be sued for listening to citizens petitioning it, nor for the actions of staff of another public entity advocating a position. *Cf. Holbrook v. City of Santa Monica,* 144 Cal. App. 4th 1242, 1248-49 (2006) (holding the anti-SLAPP statute applies to a "legislative body's conduct" while "engaging in the business of governing," including meetings to discuss potential resolutions, because "[u]nder the First Amendment, legislators are given the widest latitude to express their views") (citations omitted). SDCWA's attempt to stifle free speech and petitioning should be stricken.

In addition, MWD's demurrer to this claim should be sustained for failure to state facts sufficient to constitute a cause of action, for several reasons. Code Civ. Proc. § 430.10(e). SDCWA has improperly sued MWD for alleged acts of others. The Legislature has abolished common law tort liability against public entities. SDCWA's non-statutory "fiduciary duty" claim does not exist. Further, to impose a common law fiduciary duty in favor of a particular

member agency would violate the Metropolitan Water District Act's majority rule provision[2] and the separation of powers.

1. The Court Should Grant MWD's Anti-SLAPP Motion To Strike.

The anti-Strategic Lawsuit Against Public Participation ("SLAPP") statute provides that "cause[s] of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Code Civ. Proc. § 425.16(b)(1). Anti-SLAPP protections apply regardless of the cause of action asserted by the plaintiff. *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 60 (2002); *Navellier v. Sletten*, 29 Cal. 4th 82, 92 (2002). "[A]nti-SLAPP protections are to be construed broadly." *Beach v. Harco Nat'l Ins. Co.*, 110 Cal. App. 4th 82, 90 (2003) (citing Code Civ. Proc. § 425.16(a)).

When a court finds an anti-SLAPP motion meritorious, it must grant the motion without leave to amend. *Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th 1068, 1073-74 (2001).

a. Burden-Shifting Under The Anti-SLAPP Statute.

A defendant pursuing an anti-SLAPP motion must make a "prima facie showing that [the] plaintiff's suit arises from an act in furtherance of [the] defendant's rights of petition or free speech." *Braun v. Chronicle Publ'g Co.*, 52 Cal. App. 4th 1036, 1042-43 (1997). That burden is minimal. Protected activities include, among other things, "(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" and "(4) any other conduct in furtherance of the exercise of the constitutional right of petition or the

---

[2] The MWD Act is MWD's enabling statute, and is set forth in the West's California Water Code at Appendix 109-142. *See* Request for Judicial Notice ("RJN"), Ex. 1.

constitutional right of free speech in connection with a public issue or issue of public interest." Code Civ. Proc. § 425.16(e).

"It is not the defendant's burden in bringing a SLAPP motion to establish that the challenged cause of action is constitutionally protected as a matter of law." *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 165 (2003). A defendant need only demonstrate that some of the speech or conduct by which the plaintiff claims to have been injured falls within *one* of these four categories. *Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1130 (2003) (emphasis added); *see Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 308 (2001) ("the only thing the defendant needs to establish to invoke the protection of the SLAPP statute is that the challenged lawsuit *arose from an act* on the part of the defendant in furtherance of her right of petition or free speech") (emphasis added).

Once a defendant meets its initial burden, the motion to strike must be granted unless the plaintiff proves a reasonable probability of prevailing on the merits. Code Civ. Proc. § 425.16(b)(1); *Summerfield v. Randolph*, No. B227322, __ Cal. App. 4th __, 2011 WL 5903950 at *5 (Cal. App. 2d Dist. Nov. 28, 2011); *Du Charme v. Int'l Bhd. of Elec. Workers, Local 45*, 110 Cal. App. 4th 107, 112 (2003). To satisfy this burden, the plaintiff must "demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Salma v. Capon*, 161 Cal. App. 4th 1275, 1288 (2008); *Wilcox v. Super. Ct.*, 27 Cal. App. 4th 809, 819, 823-24 (1994) (shifting burden to plaintiff in case where the alleged activity was only "arguably" protected and holding that plaintiff's standard is "much like that used in determining a motion for nonsuit or directed verdict") (overruled on other grounds in *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 68 n. 5 (2002)).

b. SDCWA's Breach Of Fiduciary Duty Claim And Related Prayer Fall Within The Scope Of The Anti-SLAPP Statute.

SDCWA's cause of action for breach of fiduciary duty and related prayer fall within the scope of the anti-SLAPP statute.

The allegations in the FAC show that the alleged communications within the MAs, and

between the MAs and MWD, are "in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other official proceeding authorized by law." Code Civ. Proc. § 425.16(e)(2). The anti-SLAPP statute does not require that protected conduct be made during an official proceeding if it is sufficiently related to matters under consideration by an official body. *Maranatha Corr., LLC v. Dep't of Corr. & Rehab.*, 158 Cal. App. 4th 1075, 1085 (2008). "[A] matter is 'under consideration' if it is one kept 'before the mind,' given 'attentive thought, reflection, meditation.'" *Id.* (citing *Braun v. Chronicle Publ'g Co.*, 52 Cal. App. 4th 1036, 1049 (1997)).

Here, all of the alleged communications within the MAs, and between the MAs and MWD, are in connection with *both* issues under consideration by a governmental entity[3] (namely, MWD's water rates and contracting practices), *and* are in connection with an official proceeding authorized by law (i.e., they were allegedly intended to affect the Board votes at public meetings concerning water rates and contracting practices). FAC ¶ 36. As such, they fall under the protection of the anti-SLAPP statute. Code Civ. Proc. § 425.16(e)(2).

Also, all of the alleged conduct falls under the statute because it is in furtherance of the exercise of the constitutional right of free speech regarding an issue of public interest. Code Civ. Proc. § 425.16(e)(4); U.S. Const., amend. I; Cal. Const., art. I, § 2(a) ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right); 7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 312 (California's free speech provisions are "more protective, definitive and inclusive of rights of expression of speech" than their federal counterparts). Meetings to discuss official decision-making constitute conduct in furtherance of the constitutional right of free speech in connection with issues of public interest. *Holbrook v. City of Santa Monica,* 144 Cal. App. 4th 1242, 1247-49 (2006) (city council's meetings during which "[c]ouncil members' . . . . oral statements before

---

[3] A metropolitan water district incorporated under the MWD Act is "a separate and independent political corporate entity." *City of Pasadena v. Chamberlain*, 204 Cal. 653, 656 (1928). Each of MWD's MAs is a separate public agency, too. *San Diego County Water Auth. v. Metropolitan Water Dist. of Southern California*, 117 Cal. App. 4th 13, 19 (2004).

the other members of their legislative body and in connection with issues under review by the city council" fall under the anti-SLAPP statute).

Here, the alleged communications within the MAs, and between MWD and the MAs, are protected speech. SDCWA's allegations that some of these communications have occurred in private, even if true, are of no consequence; the anti-SLAPP statute does not require a public forum or an official setting. *Terry v. Davis Comty. Church*, 131 Cal. App. 4th 1534, 1539, 1545-46 (2005) (statute applied to defamation action in which church distributed report investigating allegations of child abuse to parents of youth group members). Furthermore, MWD's ratemaking and policymaking decisions are matters of public interest. *See, e.g., Du Charme v. Int'l Brotherhood of Electrical Workers, Local 45*, 110 Cal. App. 4th 107, 115 (2003) ("matters of public interest include legislative and governmental activities").

In addition, the alleged communications between MWD and the MAs are also protected speech under both California Civil Code § 47 and the *Noerr-Pennington* doctrine. Under Civil Code § 47(b), communications made during certain official proceedings cannot form a basis for civil liability. Specifically, the statute shields communications made in any legislative, judicial, or other official proceeding authorized by law. Civ. Code § 47(b). *See also Silberg v. Anderson*, 50 Cal. 3d 205, 213 (1990) ("[C]ourts have applied the privilege to eliminate the threat of liability for communications made during . . . judicial, quasi-judicial, legislative and other official proceedings."). The privilege afforded by § 47 is absolute. *Id.* at 215. Similarly, the *Noerr-Pennington* doctrine, grounded in the First Amendment right to petition the government, holds that "[t]hose who petition the government are generally immune from . . . liability." *Ludwig v. Super. Ct.*, 37 Cal. App. 4th 8, 21 (1995) (internal quotation marks and citation omitted); *Blank v. Kirwan*, 39 Cal. 3d 311, 320-21 (1985). "[T]he *Noerr-Pennington* doctrine sweeps broadly . . . in the form of lobbying or advocacy before any branch of either federal or state government." *Kottle v. N.W. Kidney Ctrs.*, 146 F.3d 1056, 1059 (9th Cir. 1998). The doctrine applies to any effort to influence the legislative or executive branches of government, including communications directed at administrative agencies. *Blank*, 39 Cal. 3d at 320.

Finally, government entities such as MWD and the MAs possess free speech rights under

the anti-SLAPP statute. *See Vargas v. City of Salinas*, 46 Cal. 4th 1, 17 (2009) ("the statutory remedy afforded by § 425.16 extends to statements and writings of governmental entities and public officials [acting in their official capacity]"). The crux of a court's inquiry in an anti-SLAPP motion is whether the activity giving rise to the defendant's asserted liability constitutes protected speech. *Navellier v. Sletten*, 29 Cal. 4th 82, 92 (2002).

Since SDCWA's breach of fiduciary duty claim and related prayer arise out of allegations that fall within the scope of the anti-SLAPP statute, the burden thus shifts to SDCWA to establish a probability of prevailing on its claim. As discussed below, it cannot do so.

2. The Breach Of Fiduciary Duty Claim Is Meritless.

SDCWA's breach of fiduciary duty claim has no merit as a matter of law. MWD cannot be sued for the alleged acts of others. There is no such thing as a common law tort claim against a public entity under California law; such claims have all been abolished by statute. Also, creating a common law fiduciary duty to one member agency would violate the majority vote provisions in the MWD Act (§ 57) and the representative system of government specified in the MWD Act (§§ 51-54), as well as contradict the judicial deference required when courts review quasi-legislative agency decisions. Accordingly, MWD's anti-SLAPP motion should be granted because SDCWA cannot establish a probability of prevailing on its fiduciary duty claim, and the demurrer should be sustained without leave to amend because SDCWA has not and cannot state a claim.

a. MWD Cannot Be Sued For The Acts Of Third Parties.

Bizarrely, SDCWA has purported to sue MWD for the alleged acts of others. SDCWA alleges that the "managers and staff" of the MAs met to "align positions" and make recommendations to the MWD Board designed to further an alleged anti-San Diego "cabal." FAC ¶ 100. SDCWA also alleges that MWD "improperly allow[ed]" the managers and staff of the MAs to "exert undue influence" over its decisions. FAC ¶ 100.

As noted, MWD's MAs are legal entities separate and apart from MWD. *SDCWA*, 117 Cal. App. 4th at 18. MWD cannot be sued for the alleged acts of other legal entities' employees,

over whom it has no dominion or control. Basic agency law dictates that MWD cannot be liable for these third parties' alleged conduct. *See, e.g.*, *Villanazul v. City of Los Angeles*, 37 Cal. 2d 718, 721, 726 (1951) (applying the vicarious liability test of whether the party has "the right to control and direct the activities of the person [who caused the injury] . . . or the manner and method in which the work is performed" and upholding judgment sustaining demurrers to claims against City of Los Angeles and State of California on ground that they did not meet test with respect to a deputy marshal of a municipal court).

b. The Government Code Precludes This Claim.

SDCWA's breach of fiduciary duty claim is barred by the California Government Claims Act. Government Code § 815 abolished all forms of common law liability against public entities. The statute provides that "[e]xcept as otherwise provided by statute . . . A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." Gov't Code § 815(a). The Legislative Committee Comments confirm that it "abolishes all common law or judicially declared forms of liability for public entities . . . . In the absence of a constitutional requirement, public entities may be held liable only if a statute (not including a charter provision, ordinance, or regulation) is found declaring them to be liable." Gov't Code § 815, Legislative Committee Comments. Courts apply the California Government Claims Act broadly. "Of course there is no common law tort liability for public entities in California; such liability is wholly statutory." *In re Groundwater Cases*, 154 Cal. App. 4th 659, 688 (2007).

Breach of fiduciary duty is a common law tort claim. *See City of Hope v. Genentech*, 43 Cal. 4th 375, 380 (2008). For this very same reason, the U.S. District Court for the Northern District of California, dismissed with prejudice under § 815(a) a common law breach of fiduciary duty claim asserted against a public entity. *Fidge v. Lake Cnty. Bd. of Supervisors*, No. C 10-03953 CRB, 2011 WL 1364187 at *2 (N.D. Cal. Apr. 11, 2011). The court held: "As each of the Defendants is a public entity, each is immune from a common law breach of fiduciary duty claim." *Id.* The same result should apply here. Section 815 forecloses any common law fiduciary duty claim that SDCWA purports to assert.

Government Code § 815.6 sets forth an exception for common law sovereign immunity in tort, when the public agency's alleged wrongful act violated "a mandatory duty imposed by an enactment." In the complaint, "[a] plaintiff seeking to hold a public entity liable under Government Code § 815.6 must specifically identify the statute or regulation alleged to create a mandatory duty." *In re Groundwater Cases*, 154 Cal. App. 4th at 689. Determining whether the cited enactment creates a mandatory duty is a question of law and appropriate for resolution on demurrer. *Id.* at 688-89.

"Enactment" is defined as "a constitutional provision, statute, charter provision, ordinance, or regulation." Gov't Code § 810.6. Section 815.6 requires that the enactment at issue be *obligatory*, rather than merely discretionary or permissive; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken. To satisfy this standard, "the mandatory nature of the duty must be phrased in explicit and forceful language." *Quackenbush v. Super. Ct.*, 57 Cal. App. 4th 660, 663 (1997). When a statute confers only discretionary or permissive authority to take action or determine what action to take, no mandatory duty is involved, and no liability arises under § 815.6. *Haggis v. City of Los Angeles*, 22 Cal. 4th 490, 498 (2000).

SDCWA's sole statutory references for a purported fiduciary duty in the FAC are §§ 126.7 and 50 of the MWD Act. FAC ¶ 96. Those statutes, however, create no fiduciary duty. Section 126.7 merely states that MWD shall establish an Office of Ethics and adopt rules relating to internal disclosure, lobbying, conflicts of interest, and other matters. MWD Act § 126.7(a)-(g). It sets forth no fiduciary duty, no obligation by MWD towards any MA, and no basis for liability. And, SDCWA does not even allege that MWD violated that statute.

Likewise, § 50 of the MWD Act sets forth no mandatory duties that SDCWA has alleged MWD or its Board violated or could have violated. Section 50 simply states: "All powers, privileges and duties vested in or imposed upon any district shall be exercised and performed by and through a board of directors." This provision is a simple delegation of authority in a public agency's enabling legislation. It states nothing more than the self-evident conclusion that the Board of Directors possesses the discretion the Legislature granted it in the MWD Act.

In short, there is no basis under California law for a common law tort claim against MWD for breach of fiduciary duty.

c. The Fiduciary Duty SDCWA Alleges Does Not Exist As A Matter of Law.

As a matter of law, MWD, a public agency, does not have a fiduciary duty to any single one of its 26 MAs. A fiduciary duty is "a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client." *Richelle L. v. Roman Catholic Archbishop*, 106 Cal. App. 4th 257, 271 (2003). When such a relationship exists, the "fiduciary must give 'priority to the best interest of the beneficiary.'" *Oakland Raiders v. National Football League*, 131 Cal. App. 4th 621, 631 (2005) (quoting *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 222 (1983)). A fiduciary duty can only exist if "imposed by law" or "undertaken by agreement". *Maglica v. Maglica*, 66 Cal. App. 4th 442, 447 (1998).

SDCWA claims that MWD and its Board owe it fiduciary duties "as a member agency with a minority voting interest on the [MWD] Board" and that they also owe a fiduciary duty to SDCWA's constituency. FAC ¶ 95.[4] But there is no basis for either duty. SDCWA does not allege that MWD or its Board has entered into an agreement creating a fiduciary duty, and the law does not create one.

---

[4] To the extent SDCWA contends that MWD is vicariously liable for alleged common law breaches of fiduciary duty committed by the members of its Board of Directors, that fails too. "[M]embers of governing boards of . . . local public entities" do not have liability for any "act or omission of the public entity." Gov't Code § 820.9. Here, all of the complained-of acts concern MWD's rate-setting and contracting practices, FAC ¶¶ 98-106, i.e., they are acts "of the public entity." The directors are not themselves liable in the first instance, so cannot be the basis for imputing any vicarious liability to MWD.

Further, discretionary immunity bars any liability by Board members. *See* Gov't Code § 820.2 ("[A] public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."). Both rate-setting and contracting decisions are legislative activities protected by discretionary immunity. *See Kahn v. East Bay Municipal Utility District,* 41 Cal. App. 3d 397, 409 (1974) ("[i]n exercising its rate-making power . . . the board was acting in a legislative capacity . . . 'The fixing or refixing of rates for a public service is legislative, or at least quasi legislative.'") (citations omitted).

(1) MWD's Relationship To Its MAs Precludes A Fiduciary Duty.

Fiduciary duties are only imposed in "certain technical, legal relationships" and, as a general rule, do not exist when the law clearly defines a relationship between the parties that is inconsistent with the claimed fiduciary duty. *Oakland Raiders v. Nat'l Football League*, 131 Cal. App. 4th, 621, 632-33 (2005). In *Oakland Raiders*, for example, the court found the bylaws governing the relationship between the commission and the football team to be inconsistent with the existence of a fiduciary relationship because the bylaws established a voting system as a prerequisite for commission action, *id.* at 638-39, and because they allowed the commission to make determinations that could adversely affect any one team (but would serve the best interests of the league). *Id.* at 641-42.

Similarly, here, the relationship between MWD, its Board, and the MAs is covered by the MWD Act. The MWD Act is inconsistent with a fiduciary duty to a particular MA's voting interest. The Legislature set forth specific allocations of voting power among the MAs through the MWD Act, which requires a majority vote to carry out Board action. MWD Act § 57 ("the affirmative votes of members representing more than 50 percent of the total number of votes of all the members shall be necessary *and*, except as otherwise expressly provided, *shall be sufficient* to carry any order, resolution or ordinance coming before the board.") (emphasis added).[5] The MWD Act establishes a representative system of government (§§ 51-54) and the Board as a body that represents MWD as a whole through the majority vote provision (§ 57). It does not require, nor permit, that the Board act in the interest of the MAs voting with the *minority*. *See generally In re Valley Health Sys.*, 429 B.R. 692, 711-12, 715-16 (C.D. Cal. 2010) (refusing to find that the Board of Directors of California health care district owed a fiduciary

---

[5] MWD's majority vote mandate is like SDCWA's own mandate. SDCWA's enabling statute provides for its Board to decide matters by majority vote. *See* Water Code App'x § 45-6(e) ("The affirmative votes of members representing more than 50 percent of the number of votes of all the members shall be necessary. . . to carry any action coming before the board of directors.") (RJN, Ex. 2).

duty where statute creating the district and authorizing and governing its operations contained no mention of fiduciary duty). Not only is action by majority vote inconsistent with the existence of a fiduciary duty to those MAs voting with the minority, but invalidating a Board action based on an alleged duty to those disputing the majority would conflict with the Legislature's determination in § 57 of the MWD Act that a majority vote is both necessary and *sufficient* to carry out Board action. Indeed, the whole point of the majority vote requirement is to ensure that the Board acts in the interest of its full constituency, rather than in the parochial interest of a particular MA or MAs in the minority.[6]

Failing to find the required statutory mandatory duty, SDCWA attempts to base its claim solely on an ethics guide prepared by the MWD Ethics Office. This guide cannot impose liability because it is not an "enactment." Gov't Code, § 810.6. In addition, SDCWA's allegation that the ethics guide "expressly provides" that the directors of MWD's Board "have a duty of loyalty" to their respective MAs and the "full constituency of the Metropolitan service area," FAC ¶ 96, patently misstates the nature of the directors' responsibility. The guide "expressly provides":

> All Directors have a responsibility both to their respective member agencies and to the full constituency of the MWD service area. Sometimes fulfilling one's role as a Director for MWD fits neatly with member agency responsibilities. Sometimes it does not. But, as one Director points out, "We are representing our agencies, but always doing the work of MWD." Directors demonstrate leadership by carefully balancing the needs of their local citizens with the needs of MWD as a whole.

MWD Board of Directors Ethics Guide at 11 (RJN, Ex. 4). This broad statement of responsibility is a far cry from an express fiduciary duty of loyalty imposed by statute or contract. *See, e.g., I. E. Assoc. v. Safeco Title Ins. Co.*, 39 Cal. 3d 281, 288 (1985) (general

---

[6] Under SDCWA's unsupported concept of fiduciary duty, any time any representative body voted in a manner that benefited some of its constituents but not others, the disadvantaged constituent could assert breach of fiduciary duty. And any time a constituent lost a vote, it could sue for breach. Indeed, SDCWA's unworkable concept would only permit a representative body to act by unanimous vote, even where – as here – a statute expressly provides otherwise. SDCWA's attempt to fashion a new body of law is clearly unsound and specious.

statement that a trustee under a deed of trust is the "common agent" of both parties and is "required to act impartially" does not add a common law duty to the trustee's obligations). On the contrary, this provision *militates against* any fiduciary duty by MWD (or any Board member) to a specific MA. It states that directors represent their own agencies and that they need only balance their own agency's needs with the needs of MWD as a whole. That is hardly the sort of language that could establish a duty for MWD to give "priority to the best interest" of SDCWA. A director's responsibility to his *own* MA and to MWD's *full* constituency is incompatible with an alleged fiduciary duty *to SDCWA* and *its* constituency.

(2) The MWD Act Leaves No Room For A Fiduciary Obligation.

The MWD Act completely governs the subject of the voting requirements for Board action, leaving no room for a judicially created common law fiduciary duty of the type SDCWA alleges. "When the legislature has committed to a municipal body the power to legislate on given subjects . . . courts of equity have no power to interfere with such a body in the exercise of its legislative . . . functions." *City & County of San Francisco v. Cooper*, 13 Cal. 3d 898, 915 n.7 (1975) (ellipses in original). The Court cannot look past that and inquire into the Board's motives, which is the entirety of SDCWA's breach of fiduciary duty claim. Because of "separation of powers considerations," courts acknowledge that "[i]t is not possible to establish an objective standard for a party to prove or for a court to review whether legislators followed a certain thought process or acted according to certain motives." *Mike Moore's 24-Hour Towing v. City of San Diego*, 45 Cal. App. 4th 1294, 1304 (1996) (citations omitted); *see also San Joaquin Local Agency Formation Com'n v. Super. Ct.*, 162 Cal. App. 4th 159, 171 (2008) ("In an ordinary mandamus review of a legislative or quasi-legislative decision, courts decline to inquire into thought processes or motives, but evaluate the decision on its face because legislative discretion is not subject to judicial control and supervision.").

MWD's Board's adoption of rates and contract provisions are legislative acts because they necessarily require the balancing of policy objectives and the exercise of discretion. *See Carlton Santee Corp. v. Padre Dam Mun. Water Dist.*, 120 Cal. App. 3d 14, 26 (1981) (defining

legislative acts as those where "the Legislature has committed to a municipal body. . . judgment or discretion as to matters upon which it is authorized to act" (quoting *Nickerson v. San Bernardino County*, 179 Cal. 518, 522-23 (1918)). A judicially-created common law fiduciary duty that could overturn Board actions that complied with applicable voting procedures would contravene the separation of powers. *See Brydon v. East Bay Mun. Utility Dist.,* 24 Cal. App. 4th 178, 196 (1994) (citations omitted) (A court's limited review of a water rate structure approved by a municipal utility district's governing body "is grounded on the doctrine of the separation of powers which (1) sanctions the delegation of authority to the agency and (2) acknowledges the presumed expertise of the agency.") (citation omitted); *San Joaquin Local Agency Formation Comm'n v. Super. Ct.*, 162 Cal. App. 4th 159, 167 (2008) ("Excessive judicial interference with [local agency formation commission's] quasi-legislative actions would conflict with the well-settled principle that the legislative branch is entitled to deference from the courts because of the constitutional separation of powers.").

The statutory requirement governing MWD Board action is clear, it is inconsistent with the existence of a fiduciary relationship, and the Court should reject SDCWA's attempts to create judicial reversal of a quasi-legislative body's actions, taken by majority vote, under the guise of a non-existent common-law duty. If SDCWA disagrees with MWD Board decisions or the law requiring the Board to be governed by majority rule, making an end run around the Board through litigation is an inappropriate recourse. SDCWA should instead work within the system by approaching the Legislature or working to convince other agencies to vote the way SDCWA prefers.

d. SDCWA Has Not And Cannot Allege A Violation Of Law.

Finally, SDCWA cannot show a reasonably probability of prevailing, nor state a legally cognizable claim, because the alleged conduct is lawful. There is nothing improper – let alone unlawful – about MAs' staff discussing MWD items, providing information to and communicating with its representatives on MWD's Board on items to be considered by the Board, advocating or recommending representatives take a particular position, or urging a

particular outcome, even where SDCWA disagrees with that outcome. *See* U.S. Const., amend. I; Cal. Const., art. I, § 2(a) ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right."); 7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 312 (California's free speech provisions are "more protective, definitive and inclusive of rights of expression of speech" than their federal counterparts); Civ. Code § 47(b) (shielding communications made in any legislative, judicial, or other official proceeding authorized by law); *Ludwig*, 37 Cal. App. 4th at 21 ("[t]hose who petition the government are generally immune from . . . liability") (internal quotation marks and citation omitted).

And of course, there is nothing unlawful about MWD following the prescribed majority rule; indeed, not doing so would violate the law.

The sixth cause of action should be stricken and the demurrer sustained without leave to amend.

B. SDCWA's Breach Of Contract And Breach Of The Covenant Of Good Faith And Fair Dealing Claims Fail To State Causes Of Action, And Portions Of The Breach Of Covenant Claim Should Be Stricken.

1. The Government Code's Claims Presentation Requirements Bar Both Claims.

SDCWA's fourth cause of action, for breach of contract, alleges that MWD breached the 2003 Amended and Restated Agreement for the Exchange of Water ("Exchange Agreement"). FAC ¶¶ 82-86. Its fifth cause of action alleges that MWD breached the covenant of good faith and fair dealing in that Agreement. *Id.* ¶¶ 87-93 Both claims fail as a matter of law because SDCWA failed to present it in compliance with the Government Claims Act.

That Act requires a "party with a claim for money or damages against a public entity [to] first file a claim directly with that entity; only if that claim is denied or rejected may the claimant file a lawsuit." *City of Ontario v. Super. Ct.*, 12 Cal. App. 4th 894, 898 (1993); *see also* Gov't Code § 945.4. Where a local public entity establishes its own claims presentation requirements, as MWD has here, any other entity seeking to sue that entity must comply with them. *See* Gov't

Code § 935(a)-(b); MWD Admin. Code §§ 9300-9310 (RJN, Ex. 3).

MWD's claims presentation procedures require potential claimants in suits for money damages to first present written claims. MWD Admin. Code § 9301. Failure to allege facts demonstrating or excusing compliance with the claim presentation requirement subjects a complaint to a general demurrer. *State of California v. Super. Ct.*, 32 Cal. 4th 1234, 1237, 1239-45 (2004) (The Act's claim presentation requirement "is a condition precedent to plaintiff's maintaining an action against [a] defendant.").

Claims presented against MWD must include, among other things (1) the date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted; (2) a general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of the presentation of the claim; and (3) the amount claimed as of the date of presentation of the claim, together with the basis of computation thereof. MWD Admin. Code § 9302.

SDCWA alleges neither compliance nor excuse from compliance with MWD's claim procedures, and SDCWA presented no claim concerning its fourth or fifth causes of action.

The only document SDCWA has submitted which it even labeled a government claim was presented on August 26, 2011. That claim makes no reference to monetary relief for a supposed breach of the Exchange Agreement or a covenant of good faith and fair dealing in that Agreement. That claim instead refers exclusively to claims involving the Water Stewardship Rates, the Rate Structure Integrity ("RSI") contract provisions, and claims regarding the San Vicente Recycling Project. Aug. 26, 2011 letter (RJN, Ex. 5). It thus does not satisfy MWD's claim requirements. That the August 26, 2011 document vaguely refers to *other* claims does not change this. "If a plaintiff relies on more than one theory of recovery against the State, each cause of action must have been reflected in a timely claim." *Nelson v. California*, 139 Cal. App. 3d 72, 79 (1982); *see also Doe 1 v. City of Murrieta*, 102 Cal. App. 4th 899, 921 (2002) (where plaintiffs' Government Code claim reflected only personal injury claims, plaintiffs were barred from alleging breach of contract).

Moreover, when a claim is based on contract, a claim that fails to identify the contract

containing the alleged obligation is insufficient. *City of Murrieta*, 102 Cal. App. 4th at 920-21("[a] contract-based cause of action is barred if it exceeds the scope of a governmental claim because the claim does not allow the public entity to determine if a duty based on contract exists.").[7] Here, SDCWA's August 26, 2011 letter fails to mention the Exchange Agreement, or any breach of any covenant or obligation in it. RJN, Ex. 5. Accordingly, the fourth and fifth causes of action are barred, and the demurrer should be sustained. *Stockett v. Ass'n of California Water Agencies Joint Powers Ins. Auth.*, 34 Cal. 4th 441, 447 (2004) ("[T]he complaint is vulnerable to a demurrer if it alleges a factual basis for recovery which is not fairly reflected in the written claim.").

2. The Breach Of Contract Claim Is Time-Barred.

SDCWA's fourth cause of action for breach of contract fails for the additional reason that it is time-barred. A claim based on contract must be submitted to the local public agency within one year of its accrual. Gov't Code § 911.2; MWD Admin. Code § 9306(a). Thus, any contract claim accruing more than one year before being presented to MWD is time-barred. *Border Bus. Park, Inc. v. City of San Diego*, 142 Cal. App. 4th 1538, 1560-66 (2006) (contract claims not presented to public entity within one year of accrual are time-barred).

A breach of contract claim accrues when the breach occurs. *Krieger v. Nick Alexander Imports, Inc.*, 234 Cal. App. 3d 205, 221 (1991). SDCWA alleges that the breach occurred when MWD set the rates its lawsuit challenges, *see* FAC ¶¶ 36, 85, which rates, SDCWA alleges, were adopted on April 13, 2010. *Id.* ¶ 3. Thus, SDCWA was required to submit the required claim to MWD by April 13, 2011. It did not. SDCWA instead submitted a Government Code claim on August 26, 2011, which claim, as noted, did not even encompass a breach of contract claim.

---

[7] *See also Crow v. State of California*, 222 Cal. App. 3d 192, 201 (1990) (Plaintiff's contract-based claim was barred when the administrative claim omitted to mention the contract); *Harm v. Frasher*, 181 Cal. App. 2d 405, 417 (1960) (breach of covenant claims rest on contract).

This claim is time-barred. Accordingly, MWD's demurrer to the breach of contract cause of action should be sustained, without leave to amend. *Spellis v. Lawn*, 200 Cal. App. 3d 1075, 1081 (1988) (sustaining demurrer where a statute of limitations bar was apparent from the face of the complaint).

3. SDCWA Pleads No Claim For Breach Of The Covenant.

SDCWA's fifth cause of action fails to plead a cognizable claim for breach of the implied covenant of good faith and fair dealing. A narrow doctrine not applicable here, the implied covenant "exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*." *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 349–50 (2000) (emphasis in original). The covenant is limited to assuring good faith compliance with the *express* terms of the contract, and does not create additional unstated or implied obligations that are not expressly in the contract. *Pasadena Live v. City of Pasadena*, 114 Cal. App. 4th 1089, 1094 (2004). To state a claim, the plaintiff must show that the defendant undertook a unilateral action that rendered "performance of the contract impossible." *Harm*, 181 Cal. App. 2d at 417.

SDCWA does not allege that MWD breached or made impossible any express term of the Exchange Agreement. MWD and SDCWA both complied with the express "five-year standstill period," FAC ¶ 90, stated in the Exchange Agreement to refrain from litigation over MWD's charges for conveying water. None of MWD's actions that SDCWA alleges breached the implied covenant – sending the 2004 Gastelum memorandum, requiring RSI clauses in future contracts, and subsequently invoking the RSI clauses – are subject to any express term of the Exchange Agreement, nor do they constitute unilateral conduct that rendered the performance of the Exchange Agreement impossible. FAC ¶¶ 88, 93.

Inclusion of the RSI clauses in subsequent contracts was not a breach of the covenant, and SDCWA willingly entered into those contracts (FAC ¶ 35). *See Racine & Laramie v. Dep't.*

of Parks & Recreations, 11 Cal. App. 4th 1026, 1034-35 (1992) (covenant of good faith does not apply to contract negotiations).[8] Nor did invoking the RSI clauses in other contracts breach the implied covenant. Exercising an express contractual right does not breach the covenant. *See, e.g.*, *Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc.*, 2 Cal. 4th 342, 374 (1992).

4. SDCWA's Allegations Of Conduct In The Breach of Covenant Claim That Are Time-Barred Should Be Stricken.

If the Court does not dismiss the fifth cause of action for the breach of the implied covenant as a whole, it should strike SDCWA's allegations contained in paragraph 93 (pg. 27, lines 9-12) of the FAC because they are defective as a matter of law. Code Civ. Proc. §§ 435, 436(b) (a court may "[s]trike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court"); *PH II, Inc. v. Super. Ct.*, 33 Cal. App. 4th 1680, 1681 (1995) ("a substantive defect which appears on the face of a complaint, but involves only a portion of a cause of action, may be the subject of a motion to strike").

The allegations in FAC paragraph 93 are defective as a matter of law because they are time-barred. As noted above, a claim resting on contract must be submitted to the local public agency within one year of its accrual. Gov't Code § 911.2; MWD Admin. Code §9306(a). A claim for breach of the covenant accrues when the breach occurs. *Krieger v. Nick Alexander Imports, Inc.*, 234 Cal. App. 3d 205, 221 (1991). SDCWA contends that MWD breached the covenant on four distinct occasions, three of which fall outside the statute of limitations. FAC ¶ 93.

SDCWA alleges, first, that MWD breached the covenant by "passing the resolution" authorizing use of the RSI clauses in its future contracts (FAC ¶ 93) on December 14, 2004.

---

[8] Even *fraudulent* negotiation of a contract does not give rise to a claim for breach of the covenant. *McClain v. Octagon Plaza, LLC*, 159 Cal. App. 4th 784, 799 (2008) ("the implied covenant is a supplement to an existing contract, and thus it does not require parties to negotiate in good faith prior to any agreement").

FAC ¶ 33; *id.*, Ex. C. As for this alleged breach, SDCWA was required to submit the required claim to MWD by December 14, 2005. It did not.

SDCWA also alleges that MWD breached the covenant by including a RSI clause in contracts in 2007 (*id.* ¶¶ 93, 35), and on August 9, 2009. *Id.*, Ex. G. Thus, for these alleged breaches, SDCWA was required to submit the required claim to MWD at some point in 2008, or by August 10, 2010 for the Ramona Agreement. It did not.

SDCWA also alleges that MWD breached the covenant by "invoking the RSI Clauses" (FAC ¶ 93) on August 25, 2010. *Id.* ¶¶ 40, 41; *id.* Ex. F and G. For these alleged breaches, SDCWA was required to submit the required claim to MWD by August 25, 2011. It did not.

Instead, as discussed in the previous section, SDCWA submitted one letter which it labeled a government code claim on August 26, 2011, which did not even encompass a breach of contract or breach of the covenant claim. Thus, these allegations in paragraph 93 (pg. 27, lines 9-12) in support of SDCWA's fifth cause of action are time-barred as a matter of law, and should be stricken. *See* Code Civ. Proc. §§ 435, 436.

C. SDCWA's Claim Regarding Preferential Rights Fails To State A Cause of Action.

By the eighth cause of action, SDCWA seeks declaratory relief regarding preferential rights. A preferential right guarantees its holder the right to purchase a certain percentage of MWD's available water supply in the event of a shortage. *See SDCWA*, 117 Cal. App. 4th at 17. Under § 135 of the MWD Act, MWD is required to allocate preferential rights to each MA in proportion to that agency's payments, "excepting purchase of water, toward [Met's] capital cost and operating expense."

Here, SDCWA claims that MWD wrongly excludes SDCWA's payments under the Exchange Agreement when calculating SDCWA's preferential rights because MWD improperly designates those payments as for the "purchase of water" under § 135, rather than as transportation rate payments. FAC ¶ 118. According to SDCWA, Exchange Agreement payments cannot be for the "purchase of water" because they are not allocated to MWD's water "supply" costs. *Id.* SDCWA's argument turns on the interpretation of "purchase of water" under

§ 135 and what rates may be exclude thereunder.

SDCWA, however, already litigated this same issue against MWD – and lost. In *SDCWA*, SDCWA claimed that § 135 entitled it to preferential rights credit for those components of its water rate payments allocated to MWD's capital and operating costs. *Id.* at 20. After an extensive review of § 135's text and legislative history, the court "reject[ed] San Diego's interpretation of the phrase 'purchase of water' as being intended to mean only 'the cost of the water resource,' and not the 'bundled' charge for water inclusive of capital costs and operating expenses." *Id.* at 26. "Purchase of water," the court held, was synonymous with "water rates" *in general* – including those components of water rates not related to costs of supply. *Id.* at 26 n.6 (rejecting "San Diego's attempt to draw any meaningful distinction between the Water Code's use of the alternative phrases "water rates" . . . and the "purchase of water"). Here, SDCWA concedes that "transportation rate" constitutes a "water rate." FAC ¶ 25 (noting that MWD's "water rates" are "unbundled" into a "supply rate" and "various component rates that Metropolitan sums up and treats as a 'transportation rate'"). As such, it is entirely proper under *SDCWA* for MWD to include transportation rate payments, along with payments related to supply, as payments for the "purchase of water" under § 135 and exclude them from preferential rights calculations. SDCWA's claim is fundamentally flawed because it wrongfully attempts to equate "purchase of water" under § 135 with "Supply Rate" under MWD's rate structure. Those, however, are two different concepts. *See SDCWA*, 117 Cal. App. 4th at 17 ("We conclude that Metropolitan has properly interpreted section 135.").

SDCWA's eighth cause of action states no claim.

III. CONCLUSION

SDCWA's fourth, fifth, sixth, and eighth causes of action are invalid as a matter of law.

SDCWA's claim for breach of fiduciary duty has no legal basis. The California Government Claims Act abolished common law claims against public entities. Further, MWD plainly cannot have a fiduciary duty to any one of its MAs, since the MAs have competing interests. The MWD Act provides that a majority vote is both necessary *and sufficient* to determine Board action, leaving no room for a judicially created fiduciary duty to a single MA or

to a minority voting interest that would be incompatible with the principle and requirement of majority rule.

Moreover, the alleged "breaches" of this supposed fiduciary duty consist entirely of free speech and petitioning the government. If the MAs want to meet and talk with each other, and jointly advocate to MWD on policy positions, they are free to do so, and SDCWA's improper attempt to stifle public participation should be stricken.

SDCWA's breach of contract and breach of the implied covenant claims are fatally defective because SDCWA did not present those claims as required by the California Government Code. The breach of contract claim and portions of the implied covenant claim are also time-barred, and the implied covenant claim has no merit at all.

Finally, SDCWA's preferential rights claim is a rehash of a case SDCWA lost seven years ago in a published opinion. That opinion forecloses SDCWA's claim here.

The Court should sustain MWD's demurrers and grant its motions to strike without leave to amend.

DATED: December 2, 2011 BINGHAM MCCUTCHEN LLP

By: _____
James J. Dragna
Attorneys for Respondent and Defendant
Metropolitan Water District of Southern California