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No Fee per Gov. Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

FOOD & WATER WATCH and CENTER FOR FOOD SAFETY,

Plaintiffs,

v.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA,

and

ALL PERSONS INTERESTED IN THE MATTER of the authorization, by the Metropolitan Water District of Southern California, of financial support of California WaterFix, including the adoption of Resolutions 9243 and 9444 and the execution of certain agreements and amendments related to financing, pre-construction and construction activities for California WaterFix,

Defendants.

Case No. BC720692

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DEMURRER OF DEFENDANT SAN DIEGO COUNTY WATER AUTHORITY TO THE FIRST CAUSE OF ACTION IN PLAINTIFFS' FIRST AMENDED COMPLAINT IN VALIDATION

Reservation ID: 430622262776

Date:	March 15, 2019
Time:	8:30 a.m.
Dept:	47
Judge:	Hon. Randolph M. Hammock
Action Filed:	September 7, 2018

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Defendant SAN DIEGO COUNTY WATER AUTHORITY (the "Water Authority") respectfully submits the following Memorandum of Points and Authorities in support of its Demurrer to the First Cause of Action in the First Amended Complaint in Validation (the "FAC") of Plaintiffs FOOD & WATER WATCH and CENTER FOR FOOD SAFETY (collectively, "Plaintiffs").

I. INTRODUCTION

Plaintiffs' reverse validation action arises from Metropolitan Water District ("MWD")'s final approval of two resolutions authorizing its general manager to negotiate and execute agreements relating to the California WaterFix project (the "WaterFix Authorization"). (*See* FAC, ¶¶15, 17-33, Exhibits A, B.) Plaintiffs allege the WaterFix Authorization provides only "general direction" for negotiating and executing the WaterFix agreements, with no specific limitation on actual costs. (FAC, ¶20.) Notably, no particular agreements are pled to have been authorized or to exist in connection with this WaterFix Authorization, and no rates or charges were imposed by the challenged MWD resolutions. Yet, the first cause of action asserts that the WaterFix Authorization violates Proposition 26 because it *authorizes* the issuance of revenue bonds that rely on water rate increases, which might or might not be approved by voters (the "Proposition 26 claim"). (FAC, ¶50.) Without knowing how water rates would increase, *if at all*, Plaintiffs claim *any* water rate increase will not bear a fair and reasonable relationship to the burdens on or benefits to MWD customers, ratepayers, and member agencies. (FAC, ¶52.)

Plaintiffs' Proposition 26 claim, predicated on future costs and future contracts with undefined terms, and without an imposition of any rates, fees, charges, or taxes in the challenged actions, is not a proper controversy because the MWD actions at issue here impose no "taxes" under Proposition 26. (*See* Cal. Const., art. XIII C, § 1; *Reid v. City of San Diego* (*Reid*) (2018) 24 Cal.App.5th 343, 368 ["'[I]mposed' in this context means enacted."].) Moreover, under a Proposition 26 analysis, the Court must balance concrete factors and make fact-specific findings regarding both aggregate cost and allocation inquiries, which is not possible until rates are set based on proportional cost allocation. (*City of San Buenaventura v. United Water Conservation Dist.* (*City of Buenaventura*) (2017) 3 Cal.5th 1191, 1200, 1214.) At this juncture, the costs MWD might

ultimately incur in WaterFix, and how such costs may be recovered in the future by MWD, *if any*, are speculative, as is whether MWD will pay for such costs from taxes, reserves, increases in water rates, or some combination thereof.

The new allegations and omissions in the FAC do not remedy this fatal pleading defect. In the original complaint, Plaintiffs qualified their Proposition 26 claim as follows: "MWD's WaterFix Authorization, *if deemed ripe for determination*, violates multiple provisions of California law . . . ." (Complaint, ¶37, emphasis added.) Plaintiffs challenge the same MWD resolutions in their FAC, but omit their prior observation regarding the glaring ripeness issue. (*Compare* Complaint, ¶37, *with* FAC, ¶¶50-51.) However, ripeness remains a threshold question properly addressed at the pleading stage, *before* the Court analyzes the requested relief. (*See Otay Land Co. v. Royal Indemnity Co.* (*Otay Land Co.*) (2008) 169 Cal.App.4th 556, 562-63.) Plaintiffs cannot put the cart before the horse by simply suppressing the ripeness issue in their amended pleadings. (*See Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1058 ["[A]n unexplained suppression of the original destructive allegation will not, in the words of Lady MacBeth, wash out the 'damned spot.'"]. The first cause of action in the FAC is premised on the same MWD resolutions—which do not impose any "taxes" under Proposition 26—and is therefore still premature.

II. LEGAL STANDARD ON DEMURRER

A demurrer challenges defects that appear on the face of a complaint. (Code Civ. Proc. § 430.30.) A demurrer must be sustained where a complaint fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc. § 430.10(e).) A cause of action is not sufficiently pleaded if the claim is not ripe and does not present a justiciable controversy. (*See Stonehouse Homes LLC v. City of Sierra Madre* (*Stonehouse Homes*) (2008) 167 Cal.App.4th 531, 540; *Otay Land Co.*, 169 Cal.App.4th at 562-63 [in the context of a demurrer, courts evaluate "whether the factual allegations of a complaint for declaratory relief reveal that an actual, ripe controversy exists between the parties"].)

III. ARGUMENT

"Like all other actions, validation actions must be justiciable." (*Wilson & Wilson v. City Council of Redwood City* (*Wilson & Wilson*) (2011) 191 Cal.App.4th 1559, 1579.) The concept of

justiciability includes the criterion of ripeness and "embodies '[t]he principle that courts will not entertain an action which is not founded on an actual controversy.' [Citations.]" (*Id*. at 1783.) Accordingly, before the Court can entertain Plaintiffs' claim for violation of Proposition 26, it must find the declaratory relief action presents an actual controversy ripe for the Court's determination. (*See Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117; *Pacific Legal Foundation v. California Coastal Com.* (*Pacific Legal Foundation*) (1982) 33 Cal.3d 158, 169 ["[A] basic prerequisite to judicial review of administrative acts is the existence of a ripe controversy."].) There is no such controversy here for the Court to adjudicate, because no Proposition 26 claim can be stated.

A. Key Portions of Proposition 26.

For purposes of this motion, the key portions of Proposition 26 amended Section 3 of Article XIII A of the California Constitution, which governs "taxes" by the State of California, and also Section 1 of Article XIII C of the California Constitution, which governs local agency "taxation." Only the latter is relevant to the Complaint. The key change was in Section 1 of Article XIII C which added the following (emphasis added):

> "(e) As used in this article, "tax" means any *levy, charge, or exaction of any kind imposed by a local government*, except the following:
>
> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
> (6) A charge imposed as a condition of property development.
> (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

Under these provisions, the local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

B. The Proposition 26 Claim is Improper Because no "Levy, Charge, or Exaction" of Any Kind Has Been Imposed

Plaintiffs cannot state a claim for violation of Proposition 26 unless the challenged resolutions impose a specific "levy, charge, or exaction." (*See* Cal. Const., art. XIII C, § 1.) Here, Plaintiffs contend the WaterFix Authorization violates Proposition 26 because it authorizes actions that *might* impose unreasonable and disproportionate taxes or fees. (FAC, ¶50-51.) Specifically, Plaintiffs allege it is unreasonable and disproportionate to impose 64 percent of the total WaterFix costs, and nearly all costs for a second tunnel, on MWD customers, ratepayers, and member agencies. (FAC, ¶¶53-59.) *However, in the challenged action MWD did not adopt any schedule of rates, charges, or taxes based on incurring costs for WaterFix, and no such action is alleged*. Plaintiffs may fear that MWD will impose disproportionate rates in violation of Proposition 26 in the future. However, the MWD WaterFix decision attacked here makes no imposition that is as yet challengeable under Proposition 26 as a "tax."

The Court should look carefully at the two MWD Resolutions on which the Complaint is based, attached as Exhibits "A" and "B" to the Complaint. The Court will see that in these Resolutions, which are the only operative actions challenged by the FAC, there is no setting of any rates, fees, charges, or taxes at all. There is simply no "levy, charge, or exaction of any kind imposed by a local government" in the actions at issue here, as is required for Proposition 26 to apply.

There is dispositive case law that mandates the granting of this demurrer. In *Reid*, the plaintiffs sought declaratory relief challenging a procedural ordinance because it "*imposed* an illegal tax" in violation of Proposition 26. (24 Cal.App.5th at 343, 368-69, emphasis added.) Among other things, the ordinance "create[d] a framework and procedure for the City to . . . levy assessments by

resolution of the City Council." (*Id.* at 368.) *However, just as here, nothing in the ordinance set the rate or term of any assessment or identified those who were assessed.* (*Ibid*.) Instead, the rates and terms were set by a City Council resolution the plaintiffs failed to timely challenge. (*Id.* at 368-69.) The Court of Appeal found the demurrer to the Proposition 26 claim was properly sustained because "creating a mechanism by which the charge *can be* imposed" is not an *imposition* for purposes of Proposition 26. (*Ibid.*) The *Reid* court held that Proposition 26 "*applies only to those taxes 'imposed by a local government*.'" (*Id.* at 368, emphasis added.)

As with the ordinance in *Reid*, the WaterFix Authorization in this case provides, at most, a basis on which charges *could be* imposed in the future. As pleaded in both the original complaint and FAC, the WaterFix Authorization provides only "general" guidance regarding future agreements MWD *could* enter into, and even the 64.6 percent commitment ceiling would not fix the "actual costs" MWD might impose upon ratepayers. (Complaint, ¶13; FAC, ¶20.) Because the FAC is not challenging an act of MWD that imposes a "tax" under Proposition 26, it cannot state a Proposition 26 claim, and the Water Authority's demurrer to Plaintiffs' first cause of action must be sustained. (*See Otay Land Co*., 169 Cal.App.4th at 562-63.)

C. The Proposition 26 Claim is not fit for Judicial Determination

"'A controversy is 'ripe' when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.' [Citation.]" (*Pacific Legal Foundation*, 33 Cal.3d at 169.) "Validation actions are not exempt from the requirement of ripeness." (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 66.) In evaluating ripeness, the California Supreme Court applied the following two-factor analysis:

> [I]t is fair to say that [the ripeness doctrine's] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

(*Pacific Legal Foundation*, 33 Cal.3d at 171, quoting *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 148-49.) Under the first prong of this analysis, "the courts will decline to adjudicate a

dispute if 'the abstract posture of [the] proceeding makes it difficult to evaluate . . . the issues' [citation], if the court is asked to speculate on the resolution of hypothetical situations [citation], or if the case presents a 'contrived inquiry' [citation]." (*Farm Sanctuary, Inc. v. Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 502.)

1. Plaintiffs' Proposition 26 Claim is Too Abstract to Adjudicate

The abstract posture of Plaintiffs' Proposition 26 claim renders it too uncertain for a justiciable controversy. (*See, Stonehouse Homes*, 167 Cal.App.4th at 542.) MWD is not pled to have yet developed, approved or executed any of the purportedly problematic agreements authorized by the WaterFix Authorization, let alone articulate the material terms of any agreements or proposed rates to pay the costs that may be incurred to pay for such commitments. Rather, the gravamen of Plaintiffs' first cause of action is that MWD *authorized* its general manager to negotiate and execute contracts that might lead to imposition of "taxes or fees that do not bear a fair and reasonable relationship to the burdens on or benefits to MWD ratepayers . . . ." (Complaint, ¶38, emphasis added.) As Plaintiffs concede, this authorization provides only "general direction" to enter into contracts in the future and fund "*up to* 64.6% of total project costs" and "*up to* $86 million for further contributions . . . ." (FAC, ¶¶19-20, emphasis added.) Moreover, even the 64.6 percent commitment ceiling does not fix the "actual costs" to MWD, nor determine the manner in which those costs might be allocated to MWD's member agency customers and ultimately passed on to their ratepayers. (FAC, ¶20.)

Presented with estimated charges in hypothetical future contracts with unknown terms, the Court is given the impossible task of determining whether Proposition 26's prescription that the charges "be fixed in an amount that is 'no more than necessary to cover the reasonable costs of the governmental activity,' and . . . that 'the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity'" is satisfied. (*City of Buenaventura*, 3 Cal.5th 1191, 1214, citing Cal. Const., art. XIII C, § 1, subd. (e).) Because the authorization provides only general—rather than specific—direction on contract negotiation and execution, any number of undetermined contractual terms could materially affect final costs, as well as how, when and whether unreasonable or disproportionate costs might be

imposed on MWD's customers through rates. (*See Consumer Cause, Inc. v. Johnson & Johnson* (2005) 132 Cal.App.4th 1175, 1187 [the court "may not enter a judgment which, rather than resolving a dispute between the parties, purports to act like legislation" by regulating acts which may be undertaken at some time in the future].)

2. Plaintiffs Fail to Allege a Rate "Increase" Under Proposition 26

Plaintiffs speculate that MWD will recover WaterFix Authorization agreement costs through its wholesale water rates, which will "lead to corresponding retail rate increases." (FAC, ¶¶24-26.) These allegations are insufficient to state a claim under Proposition 26, which requires an actual present tax imposition. (*Reid*, 24 Cal.App.5th at 368-69.) Plaintiffs fail to allege any decision by MWD which actually increases any of its particular charges to anyone. Without an actual decision on fees, rates or charges at issue, the first cause of action raises only an abstract dispute regarding a potential Proposition 26 violation. (*See Pacific Legal Foundation*, 33 Cal.3d 158, 172, 174 [speculative nature of possible projects and possible conditions on project permits pursuant to challenged guidelines made declaratory relief inappropriate]; *Sanctity of Human Life Network v. California Highway Patrol* (2003) 105 Cal.App.4th 858, 871-72.)

IV. THE DEMURRER SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND

A demurrer should be sustained without leave to amend if the nature of the claim is such that it cannot result in liability as a matter of substantive law; in such cases, amendment will not serve any useful purpose. (*See, e.g., Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 489; *Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436-37.) In determining whether the defect in the complaint can be cured by amendment, the burden is on the plaintiff to so demonstrate. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) To satisfy this burden, "a plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading" by clearly stating not only the legal basis for the amendment, but also the factual allegations to sufficiently state a cause of action. (*See Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 95, citation omitted.)

Plaintiffs have not alleged and cannot allege facts sufficient to constitute a claim for violation of Proposition 26, because the action challenged in this case is not an imposition of "taxes" under

Proposition 26. (*See Wilson v. Transit Authority* (1962) 199 Cal.App.2d 716, 721 [court may sustain a demurrer without leave to amend if it determines that a judicial declaration is not "necessary or proper at the time under all the circumstances"].) Merely omitting references to the potential lack of ripeness in the FAC does not obviate Plaintiffs' obligation to plead a justiciable claim. (*See Hendy v. Losse* (1991) 54 Cal.3d 723, 742 ["'Where a verified complaint contains allegations destructive of a cause of action, the defect cannot be cured in subsequently filed pleadings by simply omitting such allegations without explanation.' [Citation.]"].) Accordingly, the Water Authority's demurrer to the first cause of action should be sustained without leave to amend. (*See CAMSI IV v. Hunter Technology Corporation* (1991) 230 Cal.App.3d 1525, 1539, quoting 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 945, p. 379 ["But in any event no abuse of discretion should be found where there is no material dispute as to the facts, the applicable law is clear, and under the facts and the law the plaintiff cannot prevail: In such a case, '[o]bviously, no amendment would change the result.'"].)

V. CONCLUSION

For the reasons stated above, the Water Authority respectfully requests the Court sustain its demurrer to the first cause of action in Plaintiffs' FAC, without leave to amend.

DATED: February 14, 2019

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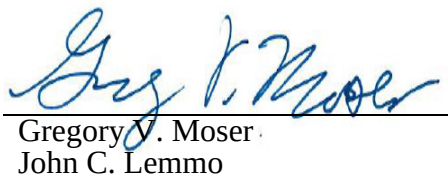
By: 

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