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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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 9244 and the execution of certain agreements and amendments related to financing, pre-construction and construction activities for California WaterFix,

Defendants.

Case No. BC720692

MEMORANDUM IN SUPPORT OF DEFENDANT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S DEMURRER TO PLAINTIFFS' FIRST AMENDED COMPLAINT IN VALIDATION

Date: March 15, 2019
Time: 8:30 a.m.

Judge: Hon. Randolph M. Hammock
Dept: 47

Action Filed: September 7, 2018
Trial: TBD

[Filed concurrently with Notice of Demurrer and Demurrer; Request for Judicial Notice; Declaration of Adam W. Hofmann Pursuant to CCP § 430.41; Defendant Metropolitan Water District of Southern California's Notice of Motion and Motion to Strike]

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I. INTRODUCTION

Plaintiffs Food & Water Watch and Center for Food Safety seek to invalidate two resolutions adopted by the Board of Directors of the Metropolitan Water District of Southern California ("Metropolitan") on the grounds that those resolutions allegedly authorize bond issuances that depend on *future* fees and taxes that *would* violate constitutional and contractual limits. Plaintiffs lack standing to assert these claims and, in any event, Plaintiffs' own allegations acknowledge that no fees or taxes were adopted by Metropolitan's resolutions. Moreover, the plain language of the resolutions show the Board did not authorize Metropolitan to issue any bonds. Thus, Plaintiffs' First Amended Complaint ("FAC") still fails as a matter of law and the new unsupported allegation of a bond issuance does nothing to cure the legal defects.

First, Plaintiffs lack standing to assert the first through third causes of action. Those causes all seek a determination that Metropolitan's wholesale water rates and property taxes are invalid on three different grounds. But under California law, only a person who is liable for and has actually paid a government fee, charge, or tax may challenge its validity. Plaintiffs do not allege that they or their members are subject to any Metropolitan fee or charge. Nor can they. Only Metropolitan's member agencies—the public agencies that comprise and govern Metropolitan—pay Metropolitan's wholesale service fees (referred to as "rates") and charges, and neither Plaintiffs nor their members are alleged to be Metropolitan member agencies. Nor do Plaintiffs allege that they or their members are subject to or have actually paid any property taxes that collect costs approved by the challenged resolutions.

Second, the first through third causes of action fail, because the constitutional and contractual tax challenges Plaintiffs raise have no application to Metropolitan's resolutions. Plaintiffs' own allegations acknowledge that those resolutions do not adopt any wholesale rates or property taxes. Both as described and on their face, those resolutions authorize Metropolitan to increase its participation in a new, water-conveyance facility in Northern California ("California WaterFix"), including the purchase of an increased share of project capacity and to enter into related transactions. Plaintiffs allege, in contradiction to the resolutions, that Metropolitan has authorized a bond obligation that depends on *future* wholesale water rate and property tax

increases and further claim those *future* rates and taxes *would* violate constitutional and contractual provisions. But the California Supreme Court has already specifically held that a cost obligation is not itself a rate or tax subject to challenge. Rates and taxes are subject to challenge only when they are actually adopted.

Third, Plaintiffs' nominal fourth cause of action fails to allege any violation of any legal authority, resulting in a failure to state a valid cause of action and uncertainty. Plaintiffs allege the resolutions exceed the authority granted by Metropolitan's enabling act and the Joint Exercise of Powers Act, without alleging any facts that support an actual violation.

Significantly, these same foundational defects were present in Plaintiffs' original Complaint in this case. The addition of an unsupported allegation that Metropolitan authorized the issuance of a debt obligation still fails to amount to the adoption of a rate or tax subject to legal challenge, and such future rate or taxes are still ones Plaintiffs cannot allege to pay. The Court should dismiss each of their causes of action and deny leave to amend.

II. FACTUAL BACKGROUND[1]

A. The Metropolitan Water District of Southern California is a unique public agency providing supplemental, wholesale water exclusively to the member agencies that comprise and govern it.

Metropolitan is not like most public water utilities. It is "a voluntary collective of '26 member agencies—14 cities, 11 municipal water districts, [and] one county water authority'" established under state law. (See *San Diego County Water Auth. v. Metropolitan Water Dist. of So. Cal.* (2017) 12 Cal.App.5th 1124, 1131 (*San Diego*); FAC, ¶ 10; Water Code Appen., ch. 109 [the "MWD District Act"],[2] §§ 12 [defining member public agencies], 26 [boundaries set by boundaries of member public agencies].) And it is governed by its member agencies through a

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[1] Consistent with the procedural posture of the case, Metropolitan assumes only for purposes of its demurrer and related motion to strike that the factual allegations of Plaintiffs' FAC are true. (See *Cansino v. Bank of Am.* (2014) 224 Cal.App.4th 1462, 1468 (*Cansino*).) As appropriate, Metropolitan may also refer to facts that are subject to judicial notice. (See *ibid.*) Contentions, deductions, and conclusions of fact or law are disregarded. (See *ibid.*)

[2] Copies of the Metropolitan District Act provisions cited herein are attached for the Court's convenience to Metropolitan's Request for Judicial Notice filed and served concurrently with this motion.

Board comprised entirely of member-agency representatives. (See *San Diego*, at p. 1132.)

In turn, Metropolitan's member agencies are also its *only* customers. (See *San Diego*, at p. 1131, citing *Metropolitan Water Dist. of So. Cal. v. Imperial Irrigation Dist.* (2000) 80 Cal.App.4th 1403 (*Imperial*).) Thus, while it serves a geographic region populated by 19 million people (FAC, ¶ 10), Metropolitan does not provide wholesale services to those inhabitants. (See *id.* at pp. 1131-1132; cf. FAC, ¶¶ 10, 24, 25 [alleging Metropolitan charges' "wholesale water rates"].) Rather, it imports water from the Colorado River, though the Colorado River Aqueduct, and from Northern California, conveyed through the Sacramento River Delta and the State Water Project, and delivers those supplies exclusively to its member agencies. (See *San Diego*, at pp. 1131-1132; FAC, ¶ 10.) Those member agencies then use the supplies Metropolitan delivers to supplement their other sources of water to serve their customers throughout Southern California. (See *ibid.*; *Imperial*, at p. 1416.) As its only customers, Metropolitan's member agencies are also the only ones who pay Metropolitan's service rates, the primary source of funding for Metropolitan's operations. (See *San Diego*, at p. 1137; *Imperial*, at p. 1416-1417.)

B. Plaintiffs are two non-profits advocating for clean water, healthy food, and sustainable agriculture.

As it describes itself, Food & Water Watch it is a non-profit organization advocating for clean water and healthy food. (FAC, ¶ 8.) Center for Food Safety alleges it is an environmental-advocacy organization promoting sustainable agriculture and equitable water distribution. (FAC, ¶ 9.) Both organizations claim to have members living in Metropolitan's service area, but neither alleges they count any of Metropolitan's member agencies as amongst their membership. (FAC, ¶¶ 8, 9.) Neither do they allege that their organizational purposes include taxpayer advocacy or other efforts to limit public-agency revenue generation or expenditures. (See *ibid.*)

C. The California Department of Water Resources proposes the California WaterFix, and Metropolitan pledges funding as a State Water Contractor.

The State's Department of Water Resources ("DWR") owns and operates the State Water Project, which conserves water in and transports water from Northern California and is conveyed through the Sacramento River Delta and the California Aqueduct. (FAC, ¶ 10; *San Diego*, at p.

1132-1133.) DWR has contracts with 31 local government entities (the State Water Contractors), requiring the Contractors to pay the costs of the State Water Project in return for participation rights in the System and an allocation of water. (FAC, ¶ 10 [alleging there are 29 State Water Project contractors]; *San Diego*, at p. 1133 [reflecting there are 31].) DWR has proposed to improve the State Water Project by constructing significant new infrastructure for transporting water from the Sacramento River to the existing State Water Project facilities. (See FAC, Ex. A, p. 1.) This project, the California WaterFix, would add three new intakes to the east bank of the Sacramento River, tunnels connecting the intakes to a new, 30-acre intermediate forebay, two 30-mile tunnels carrying water from the forebay to a new pumping plant, and an expanded Clifton Court Forebay (the intake for the California Aqueduct, which transports delta water to southern California and other locations). (See *ibid.*) Amongst other benefits, the project is expected to improve the reliability of the State Water Project and as a result the reliability of Metropolitan's Northern California water supply resources. (See FAC, ¶¶ 29, 31.)

Before July 10, 2018, approximately 67% of the WaterFix's costs and capacity were estimated to be subscribed by mostly State Water Project Contractors, including Metropolitan. (See FAC, Ex. A, p. 1.) But DWR had not secured funding for the remaining 33% of capacity and costs (the "Unsubscribed 33%"). (See *ibid.*)

D. On July 10, 2018, Metropolitan authorizes an increase in its participation in California WaterFix, which includes the purchase of the Unsubscribed 33%.

On July 10, 2018, Metropolitan's Board of Directors considered and ultimately adopted Resolutions 9243 and 9244. (See FAC, Exs. A, B.) Those resolutions authorized Metropolitan to enter into a series of transactions to provide additional funding for California WaterFix, including the direct purchase of the Unsubscribed 33%. The authorization brings its total potential contribution to WaterFix to no more than 64.4% of the project's estimate costs, which is estimated around $10.8 billion. (See FAC, ¶¶ 19, 20, 22, Ex. A.)

Metropolitan plans to provide the approved funding through its participation in the State Water Project, as a State Water Project Contractor, and through direct funding of the Unsubscribed 33%. (See FAC,¶¶ 23, 24.) Its total contributions are estimated to average $515 million per year

through 2033. (See FAC, ¶ 24.) Metropolitan plans to recover some portion of its costs by increasing future wholesale water rates paid by its member agencies. (See FAC, ¶¶ 5, 23, 50, 61, 71.) To date, however, Metropolitan has not increased any of its wholesale service rates or taken any other action to recover the anticipated costs expected to result from the July 10 Board action. (See FAC, ¶¶ 5, 50, 61, 71.) Metropolitan may also recoup much of its up-front contribution toward the Unsubscribed 33% either by selling or charging for the use of some of that additional capacity. (See FAC, ¶ 27.)

E. ''Plaintiffs allege the approval of a cost obligation gives rise to a challenge to any potential future wholesale water rate increases or tax increases.

Plaintiffs' acknowledge the challenged resolutions do not approve a wholesale rate increase or tax increase. In an attempt to circumvent that fact, Plaintiffs allege Metropolitan's funding of California WaterFix depends on potential future wholesale rate increases and property tax increases that may violate the law and suggest the approval of the cost obligation itself must be illegal today. (FAC, ¶¶ 1, 5, 23, 24.) In the allegations supporting the first cause of action, they acknowledge again that they claim the invalidity of "*future* water rate increases." (FAC, ¶ 50, italics added.) Similarly, in support of the second and third causes of action, they acknowledge they claim the invalidity of "*future* property tax increases." (FAC, ¶ 61, 71, italics added.)

F. Plaintiffs allege the challenged Resolutions Authorize Revenue Bonds; but the Resolutions, which are Attached to the FAC, and the Judicially Noticeable Board Letter, contradict Plaintiffs' allegations.

The primary addition to the FAC is Plaintiffs' allegation that Metropolitan authorized "the issuance of revenue bonds." (FAC, ¶¶ 1, 5.) As Metropolitan's Resolution Nos. 9243 and 9244 (the "Resolutions") themselves reflect, however, Metropolitan did not authorize any bonds to be issued. (FAC, Exs. A, B; see also Request for Judicial Notice ("RJN"), Ex. A.) Indeed, Plaintiffs' allegations are contradictory, as they also allege that "MWD *plans* to finance its financial commitment to the WaterFix project through the issuance of revenue bonds that *will* be secured with a lien or liens on future revenues." (FAC, ¶ 23, italics added.)

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III. ARGUMENT

A. Allegations unreasonably interpreting a written instrument are insufficient to survive demurrer.

"The function of a demurrer is to test the sufficiency of a plaintiff's pleading by raising questions of law." (*Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 127 (*Marina*).) Although the allegations in the complaint must be regarded as true for purposes of testing the sufficiency of a complaint on demurrer, allegations that contradict judicially noticeable facts or a document attached to the complaint must not be accepted as true. (*Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1145 (*Moran*) [sustaining demurrer on grounds that terms of contract attached to complaint contradicted plaintiff's allegations and undermined his legal arguments]; *Cansino v. Bank of Am.* (2014) 224 Cal.App.4th 1462, 1468 (*Cansino*) [holding courts assume the truth of facts pled, except those contradicted by judicially noticeable facts]; *Sarale v. Pacific Gas & Elec. Co.* (2010) 189 Cal.App.4th 225, 245 [holding facts appearing in exhibits attached to pleading take precedence over contrary allegations in the complaint].)

Metropolitan filed a demurrer challenging the original Complaint on the grounds that Plaintiffs lacked standing to challenge Metropolitan's wholesale rates and charges, and that no such rates or charges had been adopted in the resolutions. (See Decl. of Adam W. Hofmann Pursuant to Code Civ. Proc., § 430.41, ¶ 6.) In the FAC, Plaintiffs still do not allege the challenged resolutions adopted rates or taxes, nor can they in light of the plain terms of the Resolutions, which are attached to the FAC, and the judicially noticeable Board letter. (FAC, Exs. A, B; RJN Ex. Y.) This is fatal to their first three causes of action. However, in hopes of establishing some kind of legal basis to challenge future rates or taxes, Plaintiffs allege the Metropolitan Board authorized bonds that *depend* on future rate and tax increases. (FAC, ¶¶ 1, 50, 61.) This too, however, fails as a matter of law as explained herein and is contradicted by the Resolutions themselves and the supporting Board letter. (FAC, Exs. A, B; RJN Ex. Y.) The Resolutions authorize Metropolitan's participation in a yet-to-be formed joint-powers authority that *itself* is expected to issue bonds under its own authority. (See FAC, Ex. A; Gov. Code, §

6588, subd. (c) [granting joint-powers authorities power to issue bonds independent of any member's bond-issuance authority].) As a result, Plaintiffs' new allegations cannot support any claim for the first through third causes of action. (See *Moran*, at p. 1145 [sustaining demurrer on grounds that terms of contract attached to complaint contradicted plaintiff's allegations and undermined his legal arguments]; *Cansino*, at p. 1468.)

B. Plaintiffs lack standing for the First through Third Causes of Action.

Plaintiffs' admit their rate and tax challenges rest on their assumption that any future rates or taxes Metropolitan may adopt to recover the costs of its increased investment in California WaterFix will violate the California Constitution, and State Water Project contract. (FAC, ¶¶ 1, 5, 50, 61, 71.) Plaintiffs, however, do not allege they have paid or would pay any such rates or taxes. Therefore, Plaintiffs have no standing to challenge the validity rates or taxes they do not pay.

Only an "interested person" has standing to bring a reverse validation proceeding. (See *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1041 (*Torres*) [holding plaintiffs were not sufficiently "interested" in neighboring city's redevelopment plans, and fact that they paid sales tax in the city was insufficient to establish standing in a reverse validation case].) Here, Plaintiffs lack standing for two reasons. First, neither Plaintiffs nor their members pay Metropolitan's wholesale water service rates, nor have they alleged that they have paid any property tax collected to recover the costs approved by Metropolitan's Resolutions. Second, Plaintiffs cannot demonstrate associational standing because their claims in this case have no relation to their organizational purposes. Moreover, these defects were previously brought to Plaintiffs' attention in connection with its original Complaint in this case, both in meet-and-confer discussions and in Metropolitan's prior demurrer. Yet, Plaintiffs FAC still fail to allege that Metropolitan's Resolutions approved any wholesale water rate or property tax that Plaintiffs, or their members, pay or have paid, and their erroneous and contradicted allegation that the Resolutions authorized bond obligations does not cure their standing problem.

1. Plaintiffs' first through third causes of action fail because neither they nor their members have alleged they paid or ever will pay any Metropolitan wholesale water service rates nor have they paid any property tax collected to recover the costs approved by the challenged Resolutions.

"To challenge the validity of a tax or other government levy, a plaintiff must be directly obligated to pay it. (See *Chiatello v. City & County of San Francisco* (2010) 189 Cal.App.4th 472, 494 (*Chiatello*) [holding retail customer did not have standing to challenge sales tax imposed on the retail seller by the state]; see also *id.* at pp. 496-497 [noting the absurd results and "chaos" that would result if a tax challenge could be raised by individuals who were not required to pay it]; *Reynolds v. Calistoga* (2014) 223 Cal.App.4th 865, 872 (*Reynolds*) [holding retail customers lack taxpayer standing because, despite the fact that the cost of the sales tax is passed on to customers, sales tax is imposed on retailers, not the retail customers].) In addition, under the "pay first, litigate later" rule, plaintiffs must first pay a tax or fee *before* filing suit. (See Cal. Const., art. XIII, § 32*; Loeffler v. Target Corp*. (2014) 58 Cal.4th 1081, 1101-1102 (*Loeffler*)*; Delta Airlines, Inc. v. State Board of Equalization* (1989) 214 Cal.App.3d 518, 525-526; see also *Water Replenishment Dist. of So. Cal. v. City of Cerritos* (2013) 200 Cal.App.4th 1450, 1455, 1469-1470 (*Cerritos*) [applying the "pay first, litigate later" rule to government fees challenged under Proposition 218].) Plaintiffs cannot satisfy either standard.

Plaintiffs have not alleged that they paid or ever will pay any wholesale water service rate Metropolitan may ever adopt to recover its increased WaterFix costs. Nor have they alleged that they paid a property tax that recovers the costs approved in the challenged resolutions. As a result, they lack standing to assert any challenge in their own right. (*Chiatello*, at p. 494; *Loeffler*, at pp. 1101-1102; *Cerritos*, at pp. 1455, 1469-1470.)

Even if Plaintiffs rely on the associational standing based on their members, Plaintiffs have not alleged that their members are directly subject to or have actually paid any wholesale water service rate or any property tax that collects the costs approved in the Resolutions. (See *Chiatello*, at p. 494; *Loeffler*, at pp. 1101-1102; *Cerritos*, at pp. 1455, 1469-1470.) Nor can they.

As discussed above, Metropolitan has only 26 customers who pay its wholesale service rates: its member agencies. (*San Diego*, at p. 1131; *Imperial*, *supra*, at pp. 1416-1417; MWD Act, §§ 25, 26, 130; FAC, ¶ 10.) Plaintiffs have not alleged that any of Metropolitan's member agencies are also members of Plaintiffs' organizations. As a result, Plaintiffs' members cannot have ever paid Metropolitan's wholesale water service rates, nor will they ever, and Plaintiffs'

members have no more standing than Plaintiffs to maintain this action. (See *Chiatello*, at pp. 494, 496-497; *Reynolds*, at p. 872; *Cerritos*, at pp. 1455, 1469-1470.)

Plaintiffs allege somewhat obliquely that their members are "ratepayers" within Metropolitan's service area. (FAC, ¶¶ 8, 9.) It appears likely that Plaintiffs mean they pay retail water rates, presumably to Metropolitan's member agencies and/or to customers of those member agencies.[3] (See FAC, ¶¶ 25-26 [discussing estimated impacts on retail water rates arising from WaterFix].) This does not save Plaintiffs' claims. Plaintiffs' members are still not liable for Metropolitan's wholesale water rates, and the fact that some bills they pay may be indirectly impacted by Metropolitan's rates does not grant them standing to challenge the wholesale water rates. (See *Chiatello*, at pp. 494, 496-497 [holding retail customers lack standing to challenge sales taxes, which are imposed on retailers, not the retail customers, even though customers ultimately absorb their economic impact]; *Reynolds*, at p. 872 [same].)

Moreover, the validation procedures at Code of Civil Procedure section 860, *et seq.*, does not create independent standing to sue. (See *Torres*, at pp. 1046-1048 [holding indirect responsibility for the cost of a tax does not confer standing for purposes of a reverse validation action].) The term "interested person" in Code of Civil Procedure sections 862 and 863 is "narrowly construed" to mean "a person having a *direct, and not a merely consequential, interest* in the litigation." (*Id.* at p. 1042, quoting *Associated Boat Industries of N. Cal. v. Marshall* (1951) 104 Cal.App.2d 21, 22, italics added.) Because Plaintiffs are not customers of Metropolitan, they cannot state an interest in the validity of Metropolitan's wholesale rates sufficient to amount to standing in a reverse validation action.

Moreover, Plaintiffs' projections regarding the Resolutions' impact on retail water rates, that "wholesale rate increases lead to corresponding retail rate increases" (FAC, ¶ 25) is a mere conclusion of fact that should be disregarded for purposes of a demurrer. (See *Cansino*, at p. 1468.) Plaintiffs fail to allege, because they cannot, that Metropolitan is responsible for or has any

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[3] To the extent Plaintiffs mean their members pay Metropolitan's rates directly, such an allegation should be disregarded as a conclusory allegation contradicted by the judicially noticeable fact that only Metropolitan's member agencies pay its rates. (See *Cansino*, at p. 1468.)

control over the ways in which its 26 member agencies recover their costs. (See MWD Act, § 17.) Metropolitan's member agencies are wholesalers and retailers, and they may recover their costs in various ways, including grants, transfers from municipal general funds, service rates and charges recovered from their own customers, or through other manners determined by their own governing bodies. Under this structure, it is clear that whatever projections may exist regarding the impacts of California WaterFix on retail rates are beyond Metropolitan's legal authority to control and not a basis for retail customers to challenge the validity of Metropolitan's wholesale rates on its 26 member agencies. (See *Torres*, at pp. 1046-1048.)

Alternatively, Plaintiffs allege that their members are "taxpayers" in Metropolitan's service area. (FAC, ¶¶ 8, 9.) But Plaintiffs have not alleged that any property tax they pay has been imposed or increased by Metropolitan's Resolutions. To the contrary, Plaintiffs affirmatively allege that Metropolitan will recover the costs of the Unsubscribed 33% through the wholesale rates its 26 member agencies pay. (See FAC, ¶ 23.) Accordingly, Plaintiffs have not alleged and cannot allege that their members (or, in fact, any person) is subject to or has paid property taxes reflecting the costs that have been or may be incurred by Metropolitan as a consequence of the Resolutions. Plaintiffs and their members, thus, cannot maintain any claim that the Resolutions imposed a tax on them and lack standing as a result. (See *Chiatello*, at pp. 494, 496-497; *Reynolds*, at p. 872.) Plaintiffs cannot represent their members' interests because Plaintiffs' associational purposes do not relate to their claims in this case.

2. Plaintiffs also lack associational standing to litigate their first through third causes of action on behalf of their members because those claims bear no relationship to Plaintiffs' organizational purposes.

In addition to their members' lack of standing, Plaintiffs lack associational standing to represent their members as alleged "ratepayers" and "taxpayers" in this action. An association may only litigate in the interest of its members on claims that are germane to the organization's purpose. (See *Property Owners of Whispering Palms, Inc. v. Newport Pacific* (2005) 132 Cal.App.4th 666, 673 (*Property Owners*).) Challenging Metropolitan's hypothetical methods for financing WaterFix is not germane to Plaintiffs' organizational purposes.

In its own words, Plaintiff Food & Water Watch is a non-profit "that champions clean

water and healthy food for all." (FAC, ¶ 8.) Center for Food Safety is likewise concerned with promoting sustainable agriculture, and its members are characterized by their interest in "food production and equitable water distribution." (FAC, ¶ 9.) None of these organizing principles touches on the public-finance concerns raised by Plaintiffs' FAC. As a result, Plaintiffs' members do not have a unified interest in these claims, and Plaintiffs cannot establish associational standing to represent them here. (See *Property Owners,* at p. 673.)

C. Plaintiffs' First through Third Causes of Action fail because Plaintiffs have not alleged adoption or approval of any fee or tax to recover the costs approved by the challenged Resolutions.

Plaintiffs' First, Second, and Third Causes of Action challenge Metropolitan's Resolutions as allegedly authorizing bonds that depend on *future* wholesale rate and property tax increases. They allege that any Metropolitan *future* wholesale rate increase *would* violate Article XIII C of the California Constitution (Proposition 26) if the increase *would* pass on to Metropolitan's "customers, ratepayers, and member agencies"—a redundant phrase—in a way that *would* be disproportional to the benefits of the funded project. (FAC, ¶¶ 49-59.) Plaintiffs also allege that any Metropolitan *future* property tax increase *would* violate Article XIII A of the California Constitution (Proposition 13) because the increase *would* be in excess of the constitutional limit. (FAC, ¶¶ 60-70.) Finally, they allege that any such "future property tax increases" and future charges "may be prohibited" by paragraphs 17 and 34 of Metropolitan's long-term SWP contract. (FAC, ¶ 71.) But, Plaintiffs' allegations and the Resolutions themselves show that Metropolitan did not adopt any rate or tax on July 10, 2018. Plaintiffs' claims are misplaced as a result.

Proposition 26 defines a "tax" that is subject to voting requirements as a levy or charge "imposed"[4] by a government agency. (Cal. Const., art. XIII C, § 1, subd. (e).) Fees for services or benefits are exempt, among other fees, so long as they do not exceed the reasonable cost of providing the service or benefit. (Cal. Const., art. XIII C, § 1, subd. (e)(1), (2).) However, the

[4] As reflected in Metropolitan's original demurrer, Metropolitan contends that it does not "impose" its rates on its member agencies, either. (See *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1770.) As San Diego County Water Authority noted in its limited "response," however, this is a complex and contested question that is not presented and should not be resolved in the context of this demurrer.

California Supreme Court has recently confirmed that an agency's decision to incur an otherwise allegedly unsupported cost is not a tax subject to constitutional challenge. (*Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1, 17 (*Redding*), citing *Northern Cal. Water Assn. v. State Water Resources Control Bd.* (2018) 20 Cal.App.5th 1204, 1221.) Rather, a tax only exists when specified payors have been forced to cover those costs in a way that the Constitution prohibits, which occurs after the tax is imposed by the agency. (*Ibid*.; accord *Webb v. City of Riverside* (2018) 23 Cal.App.5th 244, 259-260 [holding that only increased *rates* are subject to Proposition 26, not changes to an agency's budgetary methods].)

In *Redding,* plaintiffs challenged the validity of the City of Redding's electric rates to the extent they covered the costs of transferring money from the electric utility to the city (a payment in lieu of taxes, or "PILOT"). (See *Redding*, at p. 7.) Admitting that the utility, rather than customers, paid the PILOT, the plaintiff nonetheless alleged that the cost of the PILOT was "embedded" in the city's utility's rates, which they alleged resulted in a violation of Proposition 26 by failing to reflect the actual costs of providing electricity service. (*Ibid.*) On demurrer, the city argued that the PILOT predated and was accordingly not limited by Proposition 26 and that the utility had sufficient reserves to cover the cost of the PILOT, such that there was no evidence that cost was actually passed on to ratepayers. (*Id.* at p. 8.) The trial court agreed and dismissed the case. (See *id.* at p. 8.) The Court of Appeal reversed, holding that the PILOT itself was a tax that was newly imposed each time the City approved a budget that included the PILOT, even in the absence of evidence that the cost had been actually allocated to any rate or charge. At the threshold of its reversal, the California Supreme Court emphasized the need "to distinguish between the PILOT transfer in the city's budget and the rates charged to REU's customers." (*Id.* at p. 6.) Looking carefully at Proposition 26's definition of a "tax," the Court concluded that the PILOT was a budgeted cost obligation; it was not a levy, charge, or exaction imposed on any individual and, accordingly, "is not the type of exaction that is subject to article XIII C." (*Id.* at pp. 4-5, 12.) The retail electricity *rate* was subject to Proposition 26's limitations, but the individual cost obligations are not. (*Id.* at pp. 4, 15-19.)

Here, Plaintiffs allege that Metropolitan only authorized a future increased contribution of

money to California WaterFix, including the costs to fund and purchase the Unsubscribed 33%. (See FAC, ¶¶ 19-21.) They have not alleged that the Resolutions require any person to pay any amount of money whatsoever, nor do the Resolutions adopt any wholesale water service rates or property taxes to pay for the increased costs. To the contrary, Plaintiffs admit that Metropolitan "plans" to raise wholesale rates in the future. (FAC, ¶ 23.) Consistently, the Resolutions themselves and the supporting Board Letter 'confirm that the Resolutions only authorized an increased contribution to California WaterFix, and neither any tax or service rate. (FAC, Exs. A, B; RJN, Ex. A.)

Plaintiffs have thus not alleged the adoption of a tax, either in the form of an excessive fee for service that may be challenged under Proposition 26 or in the form of an unauthorized property tax that may be challenged under Proposition 13. As in *Redding*, Metropolitan's approval of California WaterFix costs is not a tax, and any challenge to a future Metropolitan rate will depend on evidence that a cost was *actually* allocated to a rate in an impermissible manner. (*Redding*, at pp. 4-5, 12, 18-19; see also *id.* at p. 15.) Plaintiffs have not alleged facts showing such an unlawful allocation, nor can they when no rate has been adopted.

In amending their original Complaint, Plaintiffs have added allegations that the Resolutions authorized "the issuance of revenue bonds" that will be secured by a lien on future revenue. (FAC, ¶¶ 1, 4, 23, 71.) On their face, however, the Resolutions do not authorize the issuance of any bond. (FAC, Exs. A, B; see also RJN Ex. A.) To the contrary, they expressly anticipate that a new and not-yet-formed joint-powers authority will issue bonds at some time in the future. (FAC, Exs. A, pp. 1-2, B, p. 1.) Plaintiffs' contrary assertions are mere conclusions entitled to no weight on demurrer. (*Cansino*, at p. 1468.) Even if this were true, however, the assumption of bonded indebtedness would be a cost obligation and would not constitute a tax or rate that could support a cause of action, as discussed above. (*Redding*, at pp. 4-5, 15-19.)

Plaintiffs have also added allegations focusing on the Resolutions' language granting Metropolitan's general manager authority to "take any and all actions" to effectuate the WaterFix project, which Plaintiffs construe to mean the general manager may himself adopt new or increase wholesale rates and property taxes . (FAC, ¶ 4, 6, 23, 51, 62.) This is not a rational reading of the

Resolutions. (See MWD Act, § 134 [the Board sets rates and charges].) The kinds of actions the Resolutions authorize are the negotiation and execution of agreements. (FAC, Exs. A, p. 2, B, p. 2.) While the selected language Plaintiffs' highlight could be read out of context more broadly, in context that language cannot reasonably be construed as Metropolitan granting its general manager carte blanche to act inconsistent with the law, even for purposes of a demurrer. (See *Comm. on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 295 [holding that items in a list should be read in context and interpreted in a way that gives each item a similar nature and scope and not in a way that would be "markedly dissimilar" from other items in the list]; Evid. Code, § 664 [establishing an evidentiary presumption that public agencies and officials will fulfill their legal duties]; *Marina,* at pp. 128, 130-32 [rejecting unreasonable interpretation of contract on demurrer].) Even if Plaintiffs'' reading were plausible, however, no challenge could lie until Metropolitan's general manager actually increased a rate or fee in a manner that violated the law. (*Redding*, at pp. 4-5, 15-19.) The mere possibility that he will do so is not justiciable.

D. Nothing in Plaintiffs' Fourth Cause of Action reflects a cognizable claim, and it should be dismissed.

Plaintiffs' nominal Fourth Cause of Action combines what appear to be two distinct, but incomplete claims. Neither is supported by the factual allegations in the FAC. As a result, their Fourth Cause of Action fails either because it states no claim for relief or, at a minimum, because it is uncertain. (Code Civ. Proc., § 430.10, subds. (e), (f).)

Plaintiffs allege that the Resolutions "exceed the limitations on [Metropolitan's] authority under its own District Act, Water Code Appendix section 109, including but not limited to the requirements for voter approval in section 200 of the District Act." (See FAC ¶ 72, p. 17:5-8.) Although Plaintiffs have now—unlike their original Complaint—alleged a violation of a specific provision of the Metropolitan District Act, they still fail to allege facts showing the Resolutions actually violated that provision. Section 200 of the Metropolitan District Act permits Metropolitan's Board of Directors, following adoption of certain ordinances, to submit to local voters a proposition for Metropolitan to incur bonded indebtedness. Plaintiffs have not alleged the adoption of any ordinance, and as discussed above, the Resolutions do not authorize any bond.

Instead, Resolution 9243 expressly anticipates that Metropolitan will participate in a joint-powers authority that has not been formed, and that joint-powers authority will at some point itself issue bonds. (FAC, Ex. A.) That bond issuance as a matter of law will rest on the joint-powers authority's own statutory powers and will be neither supported nor constrained by the Metropolitan District Act. (Gov. Code, § 6588, subd. (c).) Plaintiffs' claim the Resolutions somehow violate section 200 is thus only argument untethered from any factual allegation and cannot support a cause of action as a result. (See *Cansino*, at p. 1468.)

Second, Plaintiffs also allege in Paragraph 73 that the Resolutions exceed some unidentified JPA authority. (FAC, ¶ 73, pp. 17:9-12.) This claim is conclusory, unsupported by any facts in the FAC, and cannot support a claim. (*Cansino*, at p. 1468.)

E. Plaintiffs should not be granted leave to amend.

As noted in Metropolitan's original demurrer, the defects in Plaintiffs' claims are not merely errors of pleading; Plaintiffs claims are fundamentally untenable. Between their lack of standing and the absence of any new or increased rate or tax, Plaintiffs cannot save their claims by amendment, as proven by the fact that Plaintiffs have not cured their claims in the FAC. Under these circumstances, the Court need not and should not grant leave to amend. (See *Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436 [holding leave to amend should be denied when the facts are not in dispute and the nature of the claims clearly shows no liability under the law]; *Schonfeldt v. California* (1998) 61 Cal.App.4th 1462, 1465 [same].)

CONCLUSION

The Court should grant Metropolitan's demurrer as to each of Plaintiffs' cause of action and should deny leave to amend.

DATED: February 15, 2019

HANSON BRIDGETT LLP

By: _____

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PROOF OF SERVICE

Food & Water Watch, et al. v. Metropolitan Water District of Southern California, et al.
Los Angeles County Superior Court Case No.: BC720692

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 425 Market Street, 26th Floor, San Francisco, CA 94105.

On February 15, 2019, I served true copies of the following document(s) described as:

MEMORANDUM IN SUPPORT OF DEFENDANT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S DEMURRER TO PLAINTIFFS' FIRST AMENDED COMPLAINT IN VALIDATION

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at www.onelegal.com.

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

Executed on February 15, 2019, at San Francisco, California.

Grace M. Mohr

SERVICE LIST

Food & Water Watch, et al. v. Metropolitan Water District of Southern California, et al.
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