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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

REPLY 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

Defendant SAN DIEGO COUNTY WATER AUTHORITY (the "Water Authority") respectfully submits this reply 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

The factual allegations in Plaintiffs' FAC frame the issues in this action, and Plaintiff's first cause of action alleges that the WaterFix Authorizations violate Proposition 26. The WaterFix Authorization in this case provides, at most, a basis on which charges *could be* imposed in the future. As the Water Authority explains in its moving papers, there is dispositive case law regarding the justiciability of Plaintiffs' first cause of action. In *Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 368 (*Reid*), the Court 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. The *Reid* court held that Proposition 26 "applies only to those taxes 'imposed by a local government.'" (*Id.* at 368.) Here, the WaterFix Authorization provides, at most, a basis on which charges *could be* imposed in the future. Because the FAC is not challenging an act of MWD that imposes a "tax" under Proposition 26, it cannot state a Proposition 26 claim.

Plaintiffs do not dispute this point. In fact, Plaintiffs' Opposition does not even address *Reid* or substantively respond to the law and reasoning set forth in the Demurrer. Rather, Plaintiffs concede "[p]erhaps SDCWA is correct that a challenge under Proposition 26 would not be ripe." (Opposition at p. 15:2-4.) In a last ditch effort, Plaintiffs now argue the first cause of action—which repeatedly alleges violations of Proposition 26 and is even titled "Authorization . . . that Would Violate Proposition 26"—is no longer a claim for violation of Proposition 26. (FAC at p. 13:4-6; Opposition at p. 14:8-9 ["SDCWA's demurrer to Plaintiffs' First Cause of Action is entirely predicated on the false premise that Plaintiffs have filed a challenge under Proposition 26."].) This argument does not hold water, and is squarely contradicted by the factual allegations in FAC, as well as Plaintiffs' own opposition papers. (*E.g.*, Opposition at pp. 5:5-7 ["Because Propositions 13 and 26 prohibit MWD from raising property taxes or water rates . . . without first securing voter approval, MWD's authorization . . . is invalid."], 11:2-4 ["Pursuant to section 870, there is a very

real possibility that future challenges . . . under Propositions 13 or 26, could be permanently foreclosed if the bonds are validated now."].) Accordingly, for the reasons discussed herein and in the moving papers Plaintiffs failed to refute, the demurrer to Plaintiffs' first cause of action must be sustained.

II. PLAINTIFFS FAIL TO ADDRESS THE DISPOSITIVE LAW THAT MANDATES DEMURRER

The Demurrer cites dispositive legal authority that plainly shows Plaintiffs' first cause of action is not ripe controversy. In particular, the Court's holding in *Reid* mandates the granting of this demurrer. (*See* Demurrer at pp. 8:25-9:15.) The Opposition does not dispute the application of *Reid*, let alone address the substantive law analyzed in the Demurrer. Instead, Plaintiffs consciously filed a combined opposition brief that only superficially addresses the Water Authority's Demurrer. Accordingly, the Water Authority will not belabor the undisputed points from its Demurrer.

III. THE CASES CITED IN PLAINTIFFS' OPPOSITION DO NOT DEMONSTRATE A RIPE CONTROVERSY

While Plaintiffs do not address *Reid* and the other salient authorities in the Demurrer, the case law Plaintiffs do cite actually underscore their failure to state their first cause of action. Plaintiffs cite *McLeod v. Vista Unified School Dist.* (2008) 158 Cal.App.4th 1156, 1160 (*McLeod*) for the proposition that the Court has "clear authority" to adjudicate a challenge to Plaintiffs' hypothetical "future tax and/or rate increases." (Opposition at p. 12:16-19.) However, in *McLeod*, the district had already issued two series of general obligation bonds based on voter-approved authorization and let a construction contract for the final contemplated project. The court, nonetheless found that a 60-day statute of limitations applied *after* a "clear" decision by District's Board of Trustees (Board) to utilize the remaining bond authorization amount. (*McLeod*, 158 Cal.App.4th at 1170.) In 2002, the district in *McLeod* successfully passed a $140 million Proposition 39 general obligation bond with the express purpose of funding construction for new schools and renovating aging schools. (*Id.* at 1160.) Much later, in an April 2005 meeting the plaintiff attended, the Board "voted against a proposal to return to taxpayers $24,278,118, the amount budgeted" for schools deleted from the district's plan, "**thereby making clear its decision**

to use [the] funds." (*Id.* at 1163, 1170, emphasis added.) It was not until May 2006, "more than 13 months after the Board voted not to refund [funds] to voters," that the plaintiff taxpayer "brought suit challenging the decision to delete the two elementary schools and alleged improper use of funds on other building projects." (*Ibid*.) The Court found the plaintiff's action accrued no later than April 2005, and was therefore untimely under the validation statutes. (*Id.* at 1170.)

In stark contrast to *McLeod*, here, Plaintiffs are challenging the authorization of the "future issuance of revenue bonds." (Opposition at p. 1:2-4; FAC, ¶50.) Unlike *McLeod*, no bonds were voter-approved, issued or even structured. Furthermore, MWD did not adopt any schedule of rates, charges, or taxes based on incurring costs for WaterFix, and no such action is alleged. This is supported by the resolutions attached as Exhibits "A" and "B" to the FAC, which demonstrate there is no setting of any rates, fees, charges, or taxes at all. Plaintiffs merely fear that MWD may impose disproportionate rates in violation of Proposition 26 in the future. However, MWD is not pled to have yet developed, approved or executed any specific agreements, let alone articulate proposed rates to pay the costs that may be incurred to pay for such commitments. The concrete action in *McLeod* illustrate an issue actually fit for determination, as opposed to an abstract disagreement regarding inestimable funds.[1]

Going a step further, Plaintiffs contend that because this is a "validation action, the fact that the exact terms of the future contracts are uncertain is inapposite." (Opposition at p. 15:2-4.) Plaintiffs provide no authority for this claim, but discuss *McLeod* as well as *California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406 (*California Commerce Casino*) for the more general proposition that the first cause of action is not premature. (*See* Opposition at p. 12:4-18 ["The time to challenge MWD's authorization is now."].) Plaintiffs fail to grasp that the Court's reasoning in *California Commerce Casino*, when applied to this case, demonstrate that Plaintiffs' first cause of action is *not* ripe. For instance, Plaintiffs provide the following quote from *California*

[1] The speculative nature of these future contracts is even more evident today. In the first cause of action, Plaintiffs allege the WaterFix projects second tunnel is estimated to cost $5.6 and imposes an unreasonable, unfair, and disproportionate cost on MWD customers, ratepayers, and member agencies. (FAC, ¶¶54, 56, emphasis added.) However, last month, Gavin Newsom stated during the State of the State address that he supported a single tunnel rather than twin tunnels. In response, the Department of Water Resources and the U.S. Bureau of Reclamation already requested and received a 60-day stay of hearings with the State Water Resources Control Board. Plaintiffs are, no doubt, well aware of these developments, and do not even mention the second tunnel, or any tunnel, in their Opposition.

Commerce Casino, 146 Cal.App.4th at 1431:

> The applicability of the validation statutes is determined at the beginning of the financing process **when the contracts**—in this case the amended compacts—**required to implement that process are approved.**

(Opposition at pp. 3:28-4:2, 10:12-14.) In *California Commerce Casino*, there were actual, approved contracts with material terms, which were subject to validation under the Government Code. (*Id.* at 630, 645-46 [discussing the terms of the amended compacts].) It was those *required*, *defined*, and *approved* contracts that demarcated the "beginning of the financing process." (*California Commerce Casino*, 146 Cal.App.4th at 1431.) By comparison, here, there are no contracts, and the purported future contracts alleged in the FAC have no certain terms. The financing process—as framed in *California Commerce Casino*—would not even begin until applicable contracts are executed.

Moreover, *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335 (*City of Ontario*) and its progeny preclude the validation of indeterminate contracts, such as the purported *future* contracts pleaded in the FAC. In *City of Ontario*, 2 Cal.3d at 342, the California Supreme Court cautioned that the validation statutes do not apply to every contract and are to be narrowly construed to apply to actual financing arrangements. The Court also noted a "broad reading of the term 'contracts' would unduly burden taxpayers challenging government actions, because virtually all government actions would fall within the definition." (*Holloway v. Showcase Realty Agents, Inc.* (2018) 22 Cal.App.5th 758, 766, citing *City of Ontario*, 2 Cal.3d at 342.) After *City of Ontario*, Courts have construed the word "contracts" in Government Code 53511 as having "a restricted meaning," encompassing "only those [contracts] that are in the nature of, or directly relate to a public agency's bonds, warrants or other evidences of indebtedness." (*Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 42; *see Walters v. County of Plumas* (1976) 61 Cal.App.3d 460, 132 Cal.Rptr. 174 [action challenging award of franchises for collection and disposal of solid waste not subject to validation statutes].) In each case cited by Plaintiffs where a validation action was allowed, actual agreements and specific debt obligations were "in existence" within the meaning of Code of Civil Procedure section 864. No such obligation is in existence here. As pleaded, the future contracts

with unknown terms are not sufficiently defined such that a Court could analyze whether the agreements meet the narrow construction of "contracts." Plaintiffs' reading of the validation statutes would dramatically expand their application to preliminary actions in which no specific bonds or evidences of indebtedness on which any third party might rely were at stake, undermining the purpose of the validation statutes. (*See City of Ontario*, 2 Cal.3d at 342-44.)

IV. THE FIRST CAUSE OF ACTION ALLEGES A VIOLATION OF PROPOSITION 26

On its face, Plaintiffs first cause of action states a claim for violation of Proposition 26. (*E.g.*, FAC at p. 13:5-6.)[2] Plaintiffs ask this Court to reach a different conclusion by simply ignoring references to "Proposition 26" throughout the first cause of action. However, selective reading of the FAC does not alter the substance of Plaintiffs' claim. The allegations in Plaintiffs' first cause of action unequivocally state violations of Proposition 26.

Plaintiffs' allegations in Paragraphs 50 through 52 of the FAC actually mirror the Proposition 26 framework, and Plaintiffs admit these allegations are the *gravamen* of Plaintiffs' first cause of action (Opposition at p. 15:18-21). Article XIII C of the California Constitution, as amended by Proposition 26, "provides that local government charges are taxes that generally must be approved by voters, but exempts from this category those charges that are limited to the reasonable costs of providing a special benefit or service and that bear a 'fair or reasonable' relationship to the benefit to the payor of, or the payor's burden on, the government activity." (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1198.) Applying this very framework, the FAC alleges future water rate increases might not be approved by voters (FAC, ¶50), the WaterFix Authorization authorizes its General Manager to raise water rates (FAC, ¶51), and 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).

Even the Opposition summarizes these allegations as a violation of Proposition 26. According to Plaintiffs, "the problem" with the WaterFix Authorization is that any water rate

[2] The Opposition states the Water Authority "repeatedly mischaracterizes Plaintiffs' First Amended Complaint ("FAC") as being an action under Proposition 26." (Opposition at 14:17-21.) However, the moving papers make clear that the Water Authority demurs to Plaintiffs' first *cause of action* (*see* Notice at 2:13-20.), which it refers to as the "Proposition 26 claim." (Demurrer at 5:14-16 ["[T]he first cause of action asserts that the WaterFix Authorization violates Proposition 26 . . . (the "Proposition 26 claim")."].)

increase "(a) requires voter approval which was not obtained (FAC, ¶¶50-51)" and "(b) will necessarily not bear a fair and reasonable relationship to the burdens/benefits obtained by MWD (FAC, ¶52) . . . ." (Opposition at p. 15:9-14.) In other words, Plaintiffs' "problem" is that the WaterFix Authorization does not satisfy Proposition 26's tightened restrictions on local revenue-generating measures.

Plaintiffs do not address, or even mention, article XIII C of the California Constitution in their opposition. Instead, without providing any analysis of Proposition 26, Plaintiffs "distinguish" their claim as follows:

> In actuality, the TAC [sic] contends that "MWD's WaterFix Authorization is ***invalid*** because it authorizes the issuance of revenue bonds, secured with liens on future revenues, that are dependent on and rely on future water rate increases which have not been approved . . . by voters . . . ." (FAC at ¶ 50 (emphasis added).)

(Opposition at p. 14:21-24.) However, Plaintiffs' quote conspicuously excludes the remainder of this allegation in the FAC, which states: "by voters **as required by the California Constitution provisions enacted by Proposition 26.**" (FAC, ¶50, emphasis added.)

Plaintiffs also quote Paragraph 51 of the FAC for the same proposition that the first cause of action is not a Proposition 26 claim. (Opposition at p. 14:24-26.) Once again, Plaintiffs exclude the explicit reference to Proposition 26 in this Paragraph of the FAC:

> MWD's WaterFix Authorization is invalid because it authorizes its General Manager to take any and all actions . . . , **in violation of provisions in the California Constitution that were enacted by Proposition 26.**

(*Compare* Opposition at p. 14:24-26 *with* FAC, ¶51, emphasis added.) Plaintiffs make no effort to explain these salient—if not misleading—omissions.

Even assuming arguendo the allegations in Paragraphs 50 and 51 have nothing to do with Proposition 26, Plaintiffs' Opposition only begs the question: If the first cause of action does not assert a claim for violation of article XIII C, what other Constitutional provision or statute invalidates the act alleged in Plaintiffs' first claim? The Opposition provides no answer.

Regardless, no additional legal theory is sufficiently pleaded in Plaintiffs' first cause of action. To withstand demurrer, a "plaintiff must set forth the essential facts of his or her case with

reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent of the plaintiff's claim. Legal conclusions are insufficient. [Citation.]" (*See Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1120, internal quotation marks omitted.) While Plaintiffs effectively concede a Proposition 26 claim is unripe, the first cause of action does not set forth any alternative legal theory with the requisite precision and particularity.

Accordingly, irrespective of whether the first cause of action expressly mentions Proposition 26, the allegations in Plaintiffs' first cause of action state an insufficiently pleaded claim for violation of Proposition 26. The nature of a claim is determined by its factual allegations, not its label. (*Black v. Department of Mental Health* (2000) 83 Cal.App.4th 739, 745.) Plaintiffs' attempt to label the first cause of action as something other than a Proposition 26 claim is therefore irrelevant. In the original complaint, Plaintiffs alleged the WaterFix Authorization violated Proposition 26 "if deemed ripe for determination." (Complaint, ¶37.) Although Plaintiffs omit this allegation in their amended pleading, the ripeness issue did not disappear. (*See* Demurrer at p. 6:4-16.) Similarly, Plaintiffs' efforts to relabel the Proposition 26 claim in the Opposition does not sidestep the threshold issue of ripeness. Even if Plaintiffs were to remove all references to Proposition 26 from the FAC, the first cause of action would still fail to state a controversy ripe for judicial review. As succinctly stated in the Water Authority's demurrer to both the original and operative complaints, "the challenged acts of MWD are what they are and no amendment will change them." (Notice at 2:19-20.)

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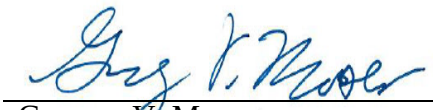
V. CONCLUSION

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

DATED: March 8, 2019

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: 

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