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CASITAS MUNICIPAL WATER DISTRICT and
CASITAS MUNICIPAL WATER DISTRICT
COMMUNITY FACILITIES DISTRICT NO. 2013-1
(OJAI)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

GOLDEN STATE WATER COMPANY, a California corporation,

Petitioner/Plaintiff,

vs.

CASITAS MUNICIPAL WATER DISTRICT, a quasi-municipal corporation, CASITAS MUNICIPAL WATER DISTRICT COMMUNITY FACILITIES DISTRICT NO. 2013-1 (OJAI), a purported community facilities district, ALL PERSONS INTERESTED IN THE VALIDITY OF CASITAS MUNICIPAL WATER DISTRICT RESOLUTIONS NOS. 13-12, 13-13, AND 13-14 and DOES 1 through 50, inclusive,

Respondents/Defendants.

Case No. 56-2013-00433986-CU-WM-VTA

RESPONSE TO GOLDEN STATE WATER COMPANY'S EVIDENTIARY OBJECTIONS TO MATERIALS SUBMITTED BY CASITAS MUNICIPAL WATER DISTRICT WITH ITS OPPOSITION BRIEF

Date Action Filed: March 26, 2013

Trial:
Date: October 15, 2013
Time: 8:30 a.m.
Dept.: 43

Respondents/Defendants Casitas Municipal Water District and Casitas Municipal Water District Community Facilities District No. 2013-1 (Ojai) (collectively, "CMWD") hereby submit the following response to the evidentiary objections filed by Plaintiff/Petitioner Golden State Water Company ("GSW") in this matter on June 3, 2013 (the "GSW Evidentiary Objections").

I. **The Evidence to Which GSW Objects is Judicially Noticeable and Relevant to the Statutory Interpretation Issues At the Heart of this Lawsuit**.

The evidence submitted by CMWD and objected to by GSW satisfies both of the following criteria: (1) it is judicially noticeable under Evidence Code §§452 and 453; and (2) it is relevant to the statutory interpretation questions at the heart of GSW's lawsuit--*to wit*, whether CMWD is authorized to finance the acquisition of GSW's Ojai water utility with the proceeds of Mello-Roos Community Facilities District ("CFD") special taxes and bond proceeds. As such, CMWD's evidence clearly is admissible to the same extent that GSW's own Exhibit 1 (a report prepared by the California Debt and Investment Advisory Commission) and Exhibits 12-17 (excerpts from the legislative history of the Mello-Roos Community Facilities Act of 1982) are admissible. See GSW's Request for Judicial Notice filed in this action on May 10, 2013, at 3:2-4, 3:8-21, 5:1-8:26 and authorities cited therein. CMWD will respond to each of GSW's objections below.

A. **Oderman Declaration, Paragraphs 2-4 and Exhibits "A"-"I" thereto**.

1. General Description of Evidence. Exhibits "A"-"I" to the Oderman Declaration were submitted to the Court (1) to demonstrate there is a long-established administrative practice in California of using CFD financing to acquire property by eminent domain and (2) to rebut the unsubstantiated and false *verified* allegation in Paragraph 18 of GSW's Petition/Complaint and in GSW's Opening Brief that the "Felton takeover was the only time that the Mello-Roos Act has ever been used to fund a taking by eminent domain" and CMWD's use of the Mello-Roos Act is "unprecedented." Paragraphs 2-4 of the Oderman Declaration were intended merely to briefly summarize the evidence in Exhibits "A"-"I."

2. Relevancy. California courts routinely look to administrative practice in interpreting ambiguous provisions of the California Constitution or statutory law. See, *e.g., Ste. Marie v. Riverside County Regional Park & Open-Space District* (2009) 46 Cal.4th 282,

292-293, n. 7 and accompanying text, and cases cited therein (Supreme Court grants request for judicial notice consisting of various public agencies' master plans, board resolutions, and declarations of policy relating to their administration of statute as an aid to interpreting statute) ; *Marek v. Community Redevelopment Agency* (1988) 46 Cal.3d 1070, 1085 (same), and *Redevelopment Agency v. County of San Bernardino* (1978) 21 Cal.3d 255, 266 (same). If CMWD's counsel alone has been involved in no fewer than four (4) other instances in which public agencies in California financed eminent domain acquisitions with CFD bond proceeds, it is evident the practice is widespread and this is a relevant factor in determining whether the Mello-Roos Act should be interpreted consistent with established administrative practice.

The fact that CMWD summarized the evidence by way of the Oderman Declaration rather than in a separate Request for Judicial Notice should be of no consequence. The court records in the other cases are judicially noticeable under Evidence Code § 452(c) and (d) but undersigned counsel felt that it would be appropriate to authenticate and explain the records by means of a short explanation in a declaration.

Contrary to Golden State's implied assertion (GSW's Evidentiary Objections at 2:8-14), CMWD did *not* offer this evidence as proof that other courts have ruled on the issue.[1]

Moreover, GSW "opened the door" on the issue of whether there is a past history of public agencies in California using the Mello-Roos Act to finance acquisition of properties by eminent domain. Having raised the issue, GSW cannot now be heard to complain when CMWD proves the falsity of GSW's assertions! *Travis v. Southern Pac. Co.* (1962) 210 Cal.App.2d 410, 422 (discussing rule of "curative admissibility" to allow party to counter prejudicial and inadmissible evidence offered by opposing party) see, generally, 3 Witkin, *California Evidence,* "Presentation at Trial," §§ 363-365, pp. 509-513.

3. Lack of Foundation/Hearsay. The relevant paragraphs of the Oderman Declaration are simply intended to explain the relevancy and provide the foundation for

[1] To undersigned counsel's knowledge, this is the first time the authority of a public agency to use CFD financing in an eminent domain action has ever been challenged in California (although, unlike GSW's executive who verified its Petition/Complaint, undersigned counsel is not able to contradict GSW's false allegation with a similarly extreme and opposite allegation under penalty of perjury).

the admissibility of Exhibits "A"-"I." The declaration establishes that Mr. Oderman and/or other members of his law firm personally were involved in each of the four other identified eminent domain actions that were funded with CFD bond proceeds. GSW does not explain in what respect Mr. Oderman's statements lack foundation or constitute hearsay. CMWD concedes that the statement in the last sentence of Paragraph 4.b of the Oderman Declaration that was made on information and belief (as to the Poway Unified School District's condemnation of *other* school sites with the use of CFD bond funds) does not establish the fact and can be disregarded by the Court.

4. Argumentative. Apparently, GSW did not appreciate Mr. Oderman "calling out" GSW's executive for making a statement under penalty of perjury that is "demonstrably false." The fact is: the statement *is* demonstrably false and CMWD did nothing more than prove that.

5. Inadmissible Lay and Expert Opinion Testimony. CMWD does not understand this basis for GSW's objection. No expert opinion has been offered—merely facts. The facts are relevant to the legal issues in this case involving prior administrative practice in using CFD bonds to fund eminent domain actions and are therefore admissible.

B. **Oderman Declaration, Paragraph 6.**

1. General Description of Evidence. Paragraph 6 of the Oderman Declaration succinctly summarizes the 9,766 pages of legislative history and 13 separate bills enacted over the 30-year history since the Mello-Roos Act was first proposed in 1982 that relate to the legal issues raised by GSW in this action.

2. Relevancy. To the extent the Court determines there is any ambiguity in the language of the Mello-Roos Act itself, the legislative history is obviously relevant to the interpretation of the statute. GSW itself has submitted excerpts from the same legislative history and made the same arguments for its relevancy. (See GSW's Request for Judicial Notice filed May 10, 2013, at 3:8-21, 5:1-8:26 and authorities cited therein.) The fact that CMWD chose to briefly summarize the legislative history in a declaration rather than in a separate Request for Judicial Notice (as GSW did) should be of no consequence.

3. Hearsay, Improper Lay Opinion and Expert Opinion Testimony. Once again, Paragraph 6 of the Oderman Declaration is merely a summary of the *complete* (not excerpted and truncated) legislative history of the Mello-Roos Act. Notably, GSW does *not* argue any portion of Mr. Oderman's summary is *inaccurate.* The evidence is the legislative history itself. The declaration is offered simply to assist the Court in reviewing nearly 10,000 pages of documents.

4. Argumentative. Paragraph 6 of the Oderman Declaration *is* somewhat impassioned and emphatic. However, it is 100% factually accurate (and, again, GSW does not argue otherwise).

C. **Oderman Declaration, Paragraphs 7-12, Exhibits "J"-"Z," and Exhibit "B" to Wickstrum Declaration.**

1. General Description of Evidence. In Paragraph 7 of the Oderman Declaration the declarant summarizes his experience and qualifications as an eminent domain attorney and as a long-time participant in various aspects of the valuation of real property. In Paragraph 8, the declarant summarizes the process by which CMWD evaluated whether it is financially feasible for CMWD to utilize CFD financing to acquire GSW's Ojai water utility, as addressed in the March 20, 2011, Feasibility Analysis prepared by the local citizens' group Ojai Friends for Locally Owned Water ("Ojai FLOW"). (*Id.*, opening paragraph of Paragraph 8 and subparagraphs a-c.)[2] As noted in the opening paragraph of Paragraph 8 of the Oderman Declaration, Ojai FLOW estimated the fair market value of GSW's Ojai water system to be in the range of $16-21.4 million, assuming the system was acquired within the following five (5) years. In Paragraph 8.d, the declarant refers to excerpts from various California Public Utilities Commission ("CPUC") documents (Exhibits "J"-"M" to the Declaration) and notes that GSW's then-current CPUC-approved "weighted average rate base" was $14,643,249, which weighted average rate base figure was tentatively proposed to be increased to $18,305,100 in 2014 (*id.*, Paragraph 8.e and Exhibit "N" thereto. In Paragraph 8.f-h of the Oderman Declaration, the

[2] The March 20, 2011, Ojai FLOW Feasibility Analysis is identified and authenticated in Paragraph 4 of the Declaration of Steven E. Wickstrum ["Wickstrum Declaration"] and is attached as Exhibit "B" thereto.

declarant summarizes (1) his search of the CPUC web site for information regarding other recent sales of private water utilities in the State of California, (2) the fact that every voluntary sale by a private water company of its utility to a private purchaser in the State of California must be approved by the CPUC (Cal. Public Utilities Code §§ 851-854), (3) his identification of every single CPUC-approved sale of a privately owned California water utility since January 1, 2008 (the twelve (12) sales being set forth in Exhibits "O"-"Z" to the declaration), (4) the fact that the CPUC consistently applies a "ratepayer indifference test" in determining whether to approve the sale, which means that the ratepayers should not be subject to increased rates or reduced service as a result of the change of ownership, and (5) how all 12 of the sale prices approved by the CPUC in those transactions were closely correlated to the seller's then-existing CPUC-approved rate base figure. In Paragraphs 9-10 of the Oderman Declaration, the declarant summarizes the analytical path CMWD followed in carefully considering—and rejecting—the notion that GSW might have valuable "water rights" that would be separately compensable over and above the value of its Ojai water utility, thereby jeopardizing the financial feasibility of CMWD's use of CFD financing. In Paragraph 11 of the Oderman Declaration, the declarant summarizes the analytical path CMWD followed in considering—and also rejecting—the notion that GSW might have a valid claim for loss of business goodwill *in addition to* the compensation to which GSW would be entitled as determined based on the standard income and sales comparison approaches to determining fair market value. In Paragraph 12 of the Oderman Declaration, the declarant summarizes the facts and analysis set forth in Paragraphs 8-11 of the declaration (and the exhibits referred to therein) and sets forth CMWD's conclusions that (1) Ojai FLOW's $16-21.4 million fair market value estimate for GSW's Ojai water utility is in fact "in the ballpark," the conservatively estimated $40 million-plus in net bond proceeds that will be generated by the CFD is sufficient (with a large cushion above the estimated fair market value range) to acquire GSW's Ojai water utility, and the likelihood that CMWD will wind up with insufficient funds to complete the acquisition of GSW's Ojai water utility and will have to abandon an eminent domain action when the just compensation figure is determined (assuming the matter goes that far) is extremely remote.

2. Relevancy. First of all, it must be emphasized that the challenged

information closely tracks and merely supplements the information provided to CMWD's Board of Directors at the March 13, 2013, public hearing on formation of the CFD and authorization of the sale of CFD bonds that GSW has already (properly) included as part of the evidentiary record. (See GSW' Request for Judicial Notice, Exhibit 6, pp. 153-221, in particular pp. 181-186.) In particular, the CPUC decisions attached as Exhibits "J"-"Z" to the Oderman Declaration are the CPUC decisions referred to in that report. (*Id.* at 184.)

The CPUC decisions are judicially noticeable under Evidence Code §§ 451(f) and 452(c) and (d).

CMWD's evidence (including the Oderman Declaration's summary of the CPUC decisions set forth in the attached exhibits) is intended to rebut the completely unfounded/unsubstantiated arguments made throughout GSW's pleadings that GSW's Ojai water utility has a value "of $100 million or more," that CMWD's proposed acquisition is financially infeasible because CMWD's costs will "substantially exceed[] the $60 million bond limit" approved through the CFD, that CMWD will also end up having to pay GSW's attorney's fees and litigation costs (based on the speculative assumption CMWD will violate a statute requiring it to make a reasonable "final offer of compensation" to GSW 20 days prior to trial in a possible future eminent domain action), and that "this risk further illustrates why the Mello-Roos Act does not allow funding for eminent domain takings." (GSW's Opening Brief at 23:3:21. See also, *id.* at 3:9-4:7 [CMWD's "unprecedented scheme poses major financial risks that the Mello-Roos Act does not provide for or contemplate," "there is a probability that the end result of Casitas MWD's proposed Mello-Roos-funded eminent domain plan would be [financial disaster]," and "[t]he special property taxes and liens authorized by the Mello-Roos Act are not meant to finance an empty shell consisting only of lawyers' fees and litigation costs, nor to finance litigation that could saddle taxpayers with unfunded liability arising from a jury verdict." *Cf.* GSW Opening Brief at 10:1-16, referring to GSW's "prior statements that [its property] rights would be valued at $50 million," *id.* at 22:10-12 ["The open-ended and incalculable obligations to pay eminent domain-related expenses and damages. . . are not encompassed in the [applicable provisions of the Mello-Roos Act]," and *id.* at 25:15-16 ["The impediments for Casitas MWD are. . . that it lacks the funds to prosecute

expensive eminent domain litigation. . . ."].) GSW cannot be heard to (1) weave a speculative and factually unsupported tale as to how CMWD's acquisition plan is a looming financial train wreck the Legislature could not possibly have intended to authorize when it enacted the Mello-Roos Act and then (2) object when CMWD responds to GSW's nonsense by showing point-by-point the careful financial planning and analysis that underlie all of CMWD's actions! GSW "opened the door" with its own unfounded arguments. It has no right to close that door before CMWD has an opportunity to respond. *Travis v. Southern Pac. Co.*, *supra,* and 3 Witkin, *California Evidence,* "Presentation at Trial," §§ 363-365, pp. 509-513.

GSW's assertion that CMWD's evidence is irrelevant "because this is not an eminent domain proceeding" (GSW's Evidentiary Objections at 3:5-6) is a complete *non sequitur.* CMWD did not offer its evidence as a formal appraisal of property as it would be required to do if this dispute advances to a future eminent domain action. Rather, the more limited purposes of CMWD's evidence in *this* action are (1) to demonstrate that CMWD carefully considered and evaluated the feasibility of using the Mello-Roos Act to finance the acquisition of GSW's Ojai water utility, (2) to rebut the speculative and factually unsupported argument offered by GSW that CMWD's acquisition costs will far exceed the financing/bonding capacity of the CFD, and (3) to dispel the notion GSW is attempting to convey to the Court that since using a CFD to finance an acquisition by eminent domain is so inherently risky the California Legislature *must* have intended that the Mello-Roos Act cannot be used for this purpose.

GSW's somewhat contradictory assertion that evidence of the price paid for *other* water utilities (as reflected in the 12 CPUC decisions referred to in Paragraph 8.g-h of the Oderman Declaration and included as Exhibits "O"-"Z" thereto) is irrelevant to this proceeding because "none of the acquisitions of the assets of the other utilities were acquired by eminent domain" (GSW's Evidentiary Objections at 4:2-3) is similarly misplaced. Those other sales are, potentially, comparable sales for the CMWD/GSW acquisition. The general rule is that *only* sales in which the buyer *lacks* condemnation authority are admissible in evidence as comparable sales (Evidence Code § 822(a)(1)), the reason being that in the condemnation setting the transaction is not one "agreed to by a seller, being willing to sell but under no particular or urgent necessity for

so doing, nor obliged to sell," an essential component of the Eminent Domain Law's definition of "fair market value." (See Code of Civil Procedure § 1263.320(a); *South Bay Irrigation District v. California-American Water Company* (1976) 61 Cal.App.3d 944, 983.)[3] Accordingly, the fact that 11 of the 12 CPUC-approved sales referred to were sales to private purchasers lacking condemnation authority *bolsters* the relevancy of those sales instead of undermining it. Moreover, CMWD did not offer evidence of those other (potentially) comparable sales for any purpose beyond demonstrating the critical importance of the selling water utility's rate base as a primary factor the CPUC consistently relies upon in determining whether to approve such a sale, an approval process that is *highly* relevant since CPUC approval is *essential* to any such sale transaction being consummated. (See, in this regard, *South Bay Irrigation District*, *supra*, 61 Cal.App.3d at 957.)

To the extent that GSW's relevancy objection may be based on the assertion that CMWD committed errors in the methodology it used to evaluate the Ojai FLOW Financial Feasibility Analysis and estimate the range of value(s) for GSW's Ojai water utility, the objection is similarly off-base. First of all, GSW's assertion that "a regulatory rate base [as referred to in the various CPUC decisions mentioned above] has little or nothing to do with fair market value of a regulated utility" (GSW's Opening Brief at 9, fn. 9; see also, *id.* at 19:15-16) is flat wrong. The only California authority GSW cites for this proposition is an old CPUC decision—*Petition of City of Riverside*, 74 CPUC 563 (1974) ("*City of Riverside*"). GSW conveniently fails to mention that the CPUC's *City of Riverside* decision was distinguished and criticized in *South Bay Irrigation District, supra,* in which the court noted that "[w]hether the [CPUC] in the *City of Riverside* proceeding properly exercised or abused its discretion. . . has not been judicially determined." (61 Cal.App.3d at 977.) In *South Bay Irrigation District*, an eminent domain action brought by a public agency to acquire a water system owned by a private CPUC-regulated water company (the same fact situation that would be present if GSW refuses to sell and the CMWD Board authorizes a condemnation action to be filed), the court (1) *affirmed* the trial court's determination of fair

[3] Evidence Code § 822(a)(1) was amended subsequent to the *South Bay Irrigation District* decision to add an exception to this general rule if the proceeding relates to the valuation of a water system. *Id.*

market value which placed primary emphasis on the water company's CPUC-approved rate base (as part of the trial court's reliance upon the capitalization-of-income approach to determining value), (2) *rejected* numerous attacks on that appraisal methodology/approach, (3) rejected the water company's assertion that the CPUC's "legislatively imposed rate regulations" should be ignored in determining the fair market value of its utility (citing the time-honored rule that "[a] diminution in the value of property resulting from a valid exercise of the police power is not a compensable item of damage"), and (4) further rejected the water company appraisers' other approaches to determining value, at one point quoting the analogous case of *United States v. Benning Housing Corporation* (5th Cir. 1960) 276 F.2d 248, 250, for the proposition that the water company's sort of "'cost evidence almost invariably tends to inflate valuation' because it sets an absolute ceiling on market price 'which may not be, and most frequently is not, even approached by actual market negotiations.'" *Id.* at 976, 980; see generally pp. 973-983.

Similarly, there is no merit in GSW's attack on the relevancy of the statements in the Oderman Declaration (Paragraphs 9-11) describing the process CMWD followed in evaluating—and rejecting--the notion that GSW is likely to be compensated for alleged "water rights" or loss of business goodwill over and above the value for the balance of its GSW's property rights. Once again, these statements closely track information previously provided to the CMWD Board of Directors at its March 13, 2013, public hearing. (GSW Request for Judicial Notice, Exhibit 6, pp. 184-185. As noted in the challenged Declaration (and in the other evidence submitted at the March 13, 2013, hearing), CMWD's analysis is that whatever water "rights" and business goodwill GSW may have is part and parcel of the business it owns and operates and the value of such "rights" is already reflected in the capitalized income of the business (as would be whatever similar rights the selling water companies may have had in the 12 CPUC-approved transactions referred to above). The holding in *South Bay Irrigation District* completely supports CMWD's position. (61 Cal.App.3d at 987-990 [rejecting water company's claimed right to additional compensation for the "going concern" value of its business, the court finding that the "going concern" value was subsumed in the value determined by the trial court through the capitalization-of-income approach, was "indivisible" from that value and not a "separate thing," and the water

company's proposed approach would improperly result in "an inflated 'market value'."].)[4]

3. Improper Expert Witness Opinion. CMWD acknowledges Mr. Oderman is not an appraiser, but, once again, this is beside the point. The Oderman Declaration was not offered to *prove* the fair market value of GSW's Ojai water utility; rather, it was offered in order to demonstrate that (1) CMWD made a diligent, careful, and good faith effort prior to forming and "sizing" the CFD in question to assess the financial feasibility of the CFD as a financing vehicle and (2) the only evidence that *is* available with regard to the likely range of value(s) for GSW's Ojai water system (GSW offers absolutely none) is consistent with the March 20, 2011, Ojai FLOW Feasibility Analysis (that the value is in the $16-21.4 million range). One does not have to be a certified appraiser to perform a financial feasibility analysis and Mr. Oderman's qualifications suffice for that more limited function. The formal appraisal process will commence now that the voters in the CFD have overwhelmingly rejected GSW's unsubstantiated scare tactics and approved the CFD and sale of the CFD bonds (assuming, of course, the Court gives the "green light" for the CFD to proceed).

CMWD also acknowledges the Court determines the law; not Mr. Oderman (through testimony in a declaration). To the extent legal citations are contained in the Oderman Declaration they are provided only to provide the framework for explaining the analytical route CMWD took in conducting its financial feasibility analysis of the projected cost of acquiring GSW's Ojai water utility. Once again, the fact that CMWD included legal citations in a declaration, rather than in its request for judicial notice (as GSW did, at some length), should be of no consequence.

4. Lack of Foundation. GSW's objection on this ground appears to be duplicative of its objection that Mr. Oderman is attempting to improperly offer expert appraisal

[4] GSW also objects to the relevancy of a statement in Paragraph 9 of the Oderman Declaration that he "had heard that GSW or its supporters were floating the idea that GSW's supposed 'water rights' alone had a value of perhaps $50 million." The same statement is already in the record. (GSW's Request for Judicial Notice, Exhibit 6, p. 184.) CMWD acknowledges the statement is hearsay, but it is not objected to as such and the hearsay objection is therefore waived. Moreover, the statement is not offered for the proof of the statement, but rather only as background to show CMWD's "state of mind" and to provide an explanation as to why CMWD separately evaluated (and rejected) this claim. (*Id.*) In any event, GSW has made the same allegation directly in its own pleadings and papers in this action, so there is no longer any question about the source of the rumor.

opinion testimony, which he is not. (See Paragraph C.3 above.)

5. Hearsay. Contrary to GSW's assertion, the CPUC orders/decisions cited by CMWD are not hearsay. They are judicially noticeable and useable for the purpose for which they have been offered: (1) as proof of GSW's existing and future CPUC-approved "rate base" (which, again, is highly relevant as an indicator of the fair market value of GSW's Ojai water utility); and (2) the CPUC's heavy, arguably primary, reliance upon a selling water utility's rate base as a basis for determining whether the sale is at a fair market price and should be approved by the CPUC. (See the authorities cited in GSW's own Request for Judicial Notice at 3:16-4:19.)

D. **Wickstrum Declaration, Paragraphs 4 and 5 and Exhibit "B" Thereto**.

1. General Description of Evidence. In Paragraphs 4 and 5 of the Wickstrum Declaration, the declarant (1) states that the water rates charged by GSW to its Ojai customers are more than twice as high as the water rates charged by CMWD to its customers in the surrounding portions of CMWD's territory; and (2) identifies the March 20, 2011, report he personally received from Richard Hajas from Ojai FLOW analyzing the financial feasibility of an acquisition of GSW's Ojai water utility by CMWD. The Ojai FLOW Feasibility Analysis itself is set forth in Exhibit "B" to the Wickstrum Declaration.

2. Relevancy. Mr. Wickstrum's Declaration merely restates and supports the uncontradicted evidence in the record previously submitted by GSW itself on this same issue. See, *e.g.*, Exhibit 6 to GSW's Request for Judicial Notice filed May 10, 2013, at pp. 181-182, 189, and 190 (summary of Ojai FLOW Feasibility Analysis and CMWD's analysis/confirmation that (1) GSW's water rates have increased over 75% since 2008, (2) GSW customers annually pay $3.14 million more for water service than they would have paid for the same service at the CMWD water rates, (3) this $3.14 million disparity in the cost of water is proposed to be used to support the maximum amount of the CFD bond issue(s), and (4) GSW's water rates are more than double CMWD's water rates.

Contrary to GSW's assertion, the water rates charged by GSW and CMWD are *highly* relevant to the issues before the Court. GSW has chosen to make an issue of the financial

feasibility of CMWD's acquisition of GSW's Ojai water utility. (See, *e.g.*, Paragraph C.2 above.) Having so "opened the door," GSW cannot now seek to prohibit CMWD from responding with the evidence supporting its analysis and determination that use of CFD financing to acquire GSW's property, by eminent domain if necessary, *is* in fact feasible. The differential water rates charged by GSW and CMWD and the Ojai FLOW Feasibility Analysis are essential parts of that analysis. In this regard, it should be noted that

3. Hearsay. GSW argues that the Ojai FLOW Feasibility Analysis does not identify its author. Mr. Wickstrum's declaration authenticates who provided him with the report, however, as does the staff report Mr. Wickstrum and Mr. Oderman provided to the CMWD Board at the March 13, 2013, public hearing that is already part of the record submitted by GSW. (GSW's Request for Judicial Notice, Exhibit 6, p. 181.)

4. Inadmissible Expert Opinion. It is not necessary that CMWD prove Mr. Hajas's qualifications as a financial "expert" to justify reference to the Ojai FLOW Feasibility Analysis or its inclusion as part of the evidentiary record. Once again, the Ojai FLOW Feasibility Analysis is part of the historical record submitted to CMWD's Board and CMWD repeatedly referred to this report and explained how CMWD used and analyzed it in the public hearing process. The fact that GSW chose to exclude the Ojai FLOW Feasibility Analysis from the list of documents it included in its truncated "record" is of no consequence. It is noteworthy that even GSW does not point to a single statement in the Ojai FLOW Feasibility Analysis with which it takes issue.

E. **Wickstrum Declaration, Paragraphs 6 and 7.**

1. General Description of Evidence. In these 2 paragraphs of his Declaration, Mr. Wickstrum again repeats information already set forth in the record submitted to the Court by GSW (at pp. 181-182 of Exhibit 6 to its Request for Judicial Notice): that (1) Pat McPherson and Richard Hajas of Ojai FLOW presented FLOW's Feasibility Analysis for the proposed takeover of GSW's Ojai water utility to the CMWD Board on April 13, 2011, (2) GSW's water rates had increased sharply in the 3 prior years, (3) GSW's Ojai customers are extremely frustrated with GSW's escalating water rates and poor service and the CPUC's lack of

responsiveness, and (4) Ojai FLOW presented petitions to CMWD signed by 1,900 registered voters in GSW's Ojai service area asking CMWD to commence the acquisition process and give the people the opportunity to vote on paying for the acquisition.

2. Relevancy. As noted above, the differential rates charged by GSW and CMWD are highly relevant to explaining the financial feasibility of the CFD financing mechanism attacked by GSW in this lawsuit. The historical summary of the grassroots community effort that led to the CMWD Board's unanimous action to form the CFD and the voters' overwhelming 87% support for imposing a CFD tax upon themselves in order to help CMWD finance the takeover are also relevant to dispelling the inferences in GSW's papers that CMWD is involved in some sort of ill-thought-through aggressive empire-building scheme.

3. Hearsay. The evidence in question is already part of the record submitted by GSW (see above) and it assists in explaining the historical background that led CMWD to take the actions it took ("state of mind" exception to hearsay rule).

F. **Wickstrum Declaration, Paragraph 8**.

1. General Description of Evidence. In Paragraph 8 of his Declaration, Mr. Wickstrum describes the process CMWD went through, after receiving the Ojai FLOW Feasibility Analysis and petitions, to retain special legal counsel (Rutan & Tucker, LLP) and financial consultants (David Taussig & Associates) to advise it in evaluating its legal and financial options with respect to the formation of the CFD and issuance of CFD bonds to finance the acquisition of GSW's Ojai water utility.

2. Relevancy. Mr. Wickstrum's statements are relevant to demonstrating the careful analysis CMWD made with respect to whether it would be financially feasible for CMWD to form a CFD and sell CFD bonds to finance the acquisition of GSW's Ojai water utility. Once again, Mr. Wickstrum's statements essentially restate in summary form the same statements that are already set forth in the record submitted by GSW to the Court. (GSW's Request for Judicial Notice, Exhibit 6, pp. 182, 183-186, and 189-191.)

3. Lack of Foundation. Contrary to GSW's unexplained objection, CMWD respectfully submits that it *has* adequately explained what it "determined" and how it

made its "determinations" with respect to the feasibility of CFD financing. (In addition to the Declaration itself, see GSW's Request for Judicial Notice, Exhibit 6 at pp. 181-186 and 189-191 and Exhibits 8-11, pp. 267-298 [including the adopted "Rate and Method of Apportionment" for the CFD at pp. 273-283].)

4. Improper Expert Witness/Opinion Testimony. Once again, Mr. Wickstrum does nothing more than summarize the process that CMWD followed in assessing the financial feasibility of using CFD bond financing to acquire GSW's Ojai water utility, based on his own knowledge of CMWD's and GSW's water rates and the assistance of CMWD's retained legal and financial consultants. This is not a task that requires Mr. Wickstrum himself to be an expert—although he obviously *is* an expert in the delivery of water service and water rates charged for that service in his capacity as the long-term General Manager or top executive of CMWD.

G. **Wickstrum Declaration, Paragraph 9.**

1. General Description of Evidence. In Paragraph 9 of his Declaration, Mr. Wickstrum summarizes the "governance" benefits that will accrue to the residents and businesses currently served by GSW when they are instead served by a public agency such as CMWD.

2. Relevancy. Paragraph 9 of the Wickstrum Declaration tracks the uncontradicted evidence on this same issue that is already contained in the record offered by GSW itself. (GSW's Request for Judicial Notice, Exhibit 8, pp. 186-187.) Beyond that, while CMWD's position is that the Mello-Roos Act unambiguously authorizes it to use CFD financing to acquire GSW's Ojai water utility, to the extent this Court were to find the Mello-Roos Act ambiguous on the point CMWD relies in part upon the statutory policy that the Mello-Roos Act is supposed to be "liberally construed in order to effectuate its purposes" (Government Code § 53315; see also, § 53312.5) and CMWD submits that the "governance benefits" of having CMWD serve GSW's Ojai customers weighs in favor of the Court resolving the ambiguities in CMWD's favor and finding that the authority to use CFD financing for this purpose does in fact exist.

3. Lack of Foundation and Improper Expert Witness/Opinion

Testimony. GSW does not explain its "lack of foundation" or "improper expert witness" objections and none exist. All of Mr. Wickstrum's statements are factually and legally accurate.

II. **CMWD's Evidence Is Not Objectionable On the Ground That it "Goes Beyond the Record."**

GSW cites 2 cases in support of its argument that CMWD's evidence improperly "goes beyond the record." (GSW's Evidentiary Objections at 1:7-18.) Both cases are distinguishable. In *Meaney v. Sacramento Housing & Redevelopment Agency* (1993) 13 Cal. App. 4th 566, 582-583, the trial court had sustained without leave to amend a demurrer to a reverse validation complaint and the Court of Appeal reversed, finding that the trial court had improperly decided the case on the pleadings alone and thereby ignored the full record. There was no question presented in the case regarding the admissibility of "extra-record" evidence, however, and no indication an administrative record had even been prepared yet or that the parties differed as to what evidence should be included in it. *Western States Petroleum Ass'n. v. Superior Court* (1995) 9 Cal.4th 559, 576-578, was a writ of mandate action brought under Public Resources Code § 21168.5 and Code of Civil Procedure § 1085, not a validation or reverse validation action brought under Code of Civil Procedure § 860 *et seq.*, and there is nothing in that case indicating that its rules should be applied in validation or reverse validation proceedings. Moreover, *Western States Petroleum Ass'n.* recognized that there are a number of exceptions to the "general rule of inadmissibility," including without limitation consideration of "background information" (which is the nature of the evidence challenged by GSW here) and the Court applied its general rule of inadmissibility only to prevent a litigant from "contradict[ing] the evidence the administrative agency relied on in making a quasi-legislative decision or [] rais[ing] a question regarding the wisdom of that decision" (*id.* at 579), which CMWD most assuredly is *not* attempting to do here.

Even if the *Western States Petroleum Ass'n.* rule *does* apply in the present action, the supplemental evidence presented by CMWD through the Oderman and Wickstrum Declarations should be admitted for the following reasons:

(1) The Ojai FLOW Feasibility Analysis (Exhibit B to Wickstrum Declaration) Should Have Been Included In the Record. As noted above, CMWD received the Ojai FLOW Feasibility

Analysis at a public meeting and referred to and explicitly relied upon it on multiple occasions throughout the underlying administrative proceedings. GSW improperly excluded this document from the truncated "record" it submitted to the Court.

(2) The Administrative Practice of Other Public Agencies in Using CFD Financing to Pay Eminent Domain Acquisition Costs Is Judicially Noticeable and Relevant to Interpretation of the Mello-Roos Act (Exhibits "A"-"I" of Oderman Declaration and Paragraphs 2-4 Thereof). Once again, this issue was raised at the March 13, 2013, public hearing (GSW's Request for Judicial Notice, Exhibit 6, p. 183) and courts have the authority to take judicial notice of administrative practice as an aid to interpreting an ambiguous statute. The fact that this administrative practice is offered through a declaration rather than in a separate Request for Judicial Notice is of no consequence.

(3) The Full Legislative History of the Mello-Roos Act is Judicially Noticeable and Relevant to Interpretation of the Mello-Roos Act (Oderman Declaration, Paragraph 6). Courts have the authority to take judicial notice of legislative history as an aid to interpreting an ambiguous statute. This paragraph of the Oderman Declaration does nothing more than summarize that legislative history and, again, the fact the summary is in a declaration rather than (as GSW organized its papers) in the Request for Judicial Notice is of no consequence.

(4) CPUC Decisions Showing How CPUC-Regulated Water Companies Such as GSW Are Valued Are Relevant to Rebut GSW's Assertions That CMWD's Financial Feasibility Analysis is Flawed and the Legislature Could Not Possibly Have Intended to Allow CFDs to Pay for Eminent Domain Costs (Oderman Declaration, Paragraphs 7-12, Exhibits "J"-"N"). Courts also have the authority to take judicial notice of decisions of the CPUC as relevant to the statutory interpretation issues in this case. The relevant paragraphs of the Oderman Declaration do nothing more than summarize the information in the judicially noticeable exhibits and, again, the fact that this was done in a declaration rather than in a separate Request for Judicial Notice should not control whether the Court considers the information.

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III. **Alternatively, to the Extent the Court Declines to Consider CMWD's Additional Evidence, It Must Also Decline to Consider Unsubstantiated Arguments Made by GSW That Have No Evidentiary Foundation in the Record.**

CMWD's final point is that even *if* the Court refuses to consider CMWD's challenged evidence, the Court should also refuse to consider GSW's unsupported assertions that (1) the use of CFDs to pay eminent domain costs is "unprecedented" (or nearly so), (2) the Legislature expressed an intention in the Mello-Roos Act to prohibit public agencies from using CFD special taxes or bond proceeds to pay eminent domain costs, and (3) CMWD's analysis of the likely range of values that it will have to pay to acquire GSW's Ojai water utility is unreliably low (and that this lack of reliability explains *why* the Legislature refused to allow CFD funds to be used to pay eminent domain costs).

Dated: September ___, 2013

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By: _____
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