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Code Section 6103*

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THE METROPOLITAN WATER DISTRICT OF
SOUTHERN CALIFORNIA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

ANTELOPE VALLEY
GROUNDWATER LITIGATION

Judicial Council Coordination Proceeding
No. 4408

Santa Clara Case No. 1-050CV-049053
The Honorable Jack Komar, Dept. 1

**THE METROPOLITAN WATER
DISTRICT OF SOUTHERN
CALIFORNIA’S REPLY IN SUPPORT OF
MOTION TO QUASH SUBPOENA OR
ALTERNATIVELY MOTION FOR
PROTECTIVE ORDER**

Date: February 10, 2014
Time: 9:00 a.m.
Dept.: 1

Trial Date: February 10, 2014
Time: 9:00 am

Non-Party Witness The Metropolitan Water District of Southern California (“Metropolitan”) respectfully provides this reply in support of its motion to quash or alternatively impose a protective order regarding the Civil Subpoena (Duces Tecum), dated January 17, 2014 (“subpoena”), served on it by Antelope Valley-East Kern Water Agency (“AVEK”).

I. AVEK’s INTENDED USE OF THE EVIDENCE THAT METROPOLITAN HAD NO RECORDS OF THE LOS ANGELES CASE IS IMPROPER AND INADMISSIBLE

Metropolitan is not arguing that evidence of the absence of records is *per se* inadmissible. For certain purposes, it may be admissible, but not here and not for the purpose AVEK intends.

1 *Schweitzer v. Westminster Investments, Inc.*, 157 Cal. App. 4th 1195, 1214 (2007) (“When evidence
2 is not pertinent to the issues raised by the pleadings, the evidence is irrelevant and it is proper to
3 preclude the introduction of such evidence.”) Metropolitan objects to the subpoena for two reasons:
4 the proposed testimony does not tend to prove the legal conclusion for which AVEK purports to
5 offer it (i.e., that Metropolitan did not make a claim because it had no claim to return flows), and the
6 proposed testimony relating to potential claims that Metropolitan may have had 64 years ago in the
7 Los Angeles River basin is irrelevant to any legal issue in the present litigation involving a different
8 groundwater basin. Instead of limiting its argument to the fact that Metropolitan made no claim in
9 the *City of Los Angeles v. City of San Fernando* (1975) case or the “nonoccurrence of the act or
10 event” (Cal. Evid. Code § 1272), AVEK goes further, speculating that the lack of a claim is evidence
11 that Metropolitan had no claim and that this supports AVEK’s return flow claim in the current case.
12 For this purpose, Metropolitan believes the admission of this evidence is irrelevant and inadmissible.

13 Moreover, AVEK could rely on the public record regarding the *Los Angeles* case and the
14 ULARA adjudication to confirm Metropolitan was not a party and made no claim to return flows
15 there. Thus, requiring Metropolitan to be on-call to appear in this complex litigation is unnecessary
16 and burdensome on Metropolitan. At a minimum, the court should enter a limiting instruction that
17 the evidence is admissible only to prove that Metropolitan made no claim and no more. Speculating
18 as to Metropolitan’s motivation in failing to make a claim, or the legal effect of its failure to do so, is
19 irrelevant to the current dispute and improper.

20 The authority relied on by AVEK in its opposition, California Evidence Code section 1272
21 and *People v. Torres*, 201 Cal. App. 2d 290, 291 (1962), is distinguishable. Section 1272 allows for
22 the admission of business records to assert the: “nonoccurrence of an act or event, or the
23 nonexistence of the condition if:

24 (a) It was the regular course of that business to make records of all such acts,
25 conditions, or events at or near the time of the act, condition, or event and to
preserve them; and

26 (b) The sources of information and method and time of preparation of the
27 records of that business were such that the absence of a record of an act,
28 condition, or event is a trustworthy indication that the act or event did not occur or
the condition did not exist.

1 *Torres* applied the pre-Evidence Code version of this rule to allow the admission of a receipt book,
2 used in the regular course of a used car business to show the absence of a sales receipt for a vehicle
3 that was allegedly stolen and that the criminal defendant claimed to have paid for. *Id.* at 297-298.
4 The non-existence of a receipt for the allegedly stolen car was material evidence supporting
5 testimony that the defendant had not paid for the vehicle and its absence was relevant to the case. *Id.*
6 at 295-296 (“[I]n an action between the parties to a transaction, receipts are not only admissible, but
7 proof.... A similar view, that the absence of an entry in a regularly kept business record, is an
8 indication that the fact did not occur, had been adopted in many other jurisdictions”)

9 Here, AVEK is not simply asserting the absence of records to show that Metropolitan did not
10 claim rights to return flow from imported water in the Los Angeles River basin, but instead offers
11 the evidence of the absence of any Metropolitan records from 64 years ago to support the speculative
12 conclusions that Metropolitan made a conscious decision not to do so or that Metropolitan had no
13 legal right to do so. For example, in AVEK’s Motion for Summary Adjudication, it cites to the
14 declaration of Metropolitan’s witness to support the legal contention that:

15 During the period of time relevant to the decision in the *City of Los Angeles v.*
16 *City of San Fernando*, i.e., from 1955 through 1968, MWD did not intend to
17 recapture, or claim a right to recapture return flows resulting from imported water
18 MWD delivered to its member agencies, Burbank, Glendale, Los Angeles and San
Fernando, in the Upper Los Angeles River Area (“ULARA”).

19 AVEK’s Stmt. of Undisputed Facts (“SUF”) at ¶ 43, page 7, filed Nov. 11, 2013); *see also* SUF at
20 ¶¶ 44-46, pages 8-9 (relying on the “anticipated deposition testimony of MWD’s PMK”). In fact,
21 this assertion misstates Metropolitan’s statement in its declaration. Metropolitan stated that: “Based
22 on a diligent search of MWD’s records, MWD did not find any records evidencing that MWD
23 adopted or held a position on whether it had rights to recapture or use return flows” Kunysz
24 Decl. at ¶ 6. At most, Metropolitan’s declaration supports the fact that no records were found that
25 show Metropolitan took any official position on its right to recapture return flows in the ULARA
26 during the relevant time frame. *Id.* It is not appropriate for AVEK to assume that the absence of any
27 official position means Metropolitan took a position that it did not have such rights. Moreover, it is
28 not appropriate to compare what did not happen in the ULARA with a wholly separate geographic

1 basin, 64 years later. Unlike the circumstances in *Torres*, the absence of Metropolitan records
2 regarding its position on return flows in the Los Angeles River basin does not tend to prove that
3 Metropolitan made a decision not to claim such flows, as there is no basis to show that Metropolitan
4 regularly maintained records relating to return flows of its imported water in the Los Angeles River
5 basin at that time. *People v. Trombino*, 253 Cal. App. 2d 643, 646 (1967) (“The testimony that a
6 witness did not find a record is meaningless unless (a) there is evidence that such a record would
7 have existed”) Here, the absence of evidence cannot demonstrate a “trustworthy indication that
8 the act or event did not occur or the condition did not exist.” Cal. Evid. Code § 1272(b).

9 Additionally, AVEK has available other testimony regarding the *Los Angeles* case and the
10 public record regarding the adjudication of the ULARA. The testimony from Joseph Scalmanini
11 appears to do just that and was admissible. *See* AVEK Opp. at Exhibit 2. In fact, it is not clear why
12 AVEK cannot rely similarly on the public records to establish that Metropolitan was not a party to
13 the *Los Angeles* case or the subsequent adjudication. Nothing in the Scalmanini testimony provided
14 in AVEK’s opposition would require the testimony AVEK seeks to elicit from Metropolitan—
15 regarding its alleged intent not to pursue return flows.

16
17 **II. ALTERNATIVELY, IF A WITNESS IS REQUIRED TO APPEAR, A PROTECTIVE
ORDER LIMITING THE TESTIMONY IS WARRANTED**

18 Metropolitan appreciates AVEK’s offer to limit the testimony if the witness is required to
19 appear. Metropolitan believes a protective order limiting the testimony to the review of the records
20 is important, not just as to AVEK, but to the numerous other parties’ whose questions cannot be
21 anticipated. Metropolitan’s witness should not be subjected to open-ended questions regarding
22 Metropolitan’s water rights or groundwater issues generally. Metropolitan requests that the
23 protective order be issued limiting the scope of questioning should it be required to provide a
24 witness.

25 **III. CONCLUSION**

26 For the foregoing reasons, Metropolitan respectfully requests that this motion be granted and
27 the subpoena be quashed in its entirety or its use limited to show the absence of records regarding
28

1 the recovery of return flows from imported water in the Los Angeles River basin, or alternatively, a
2 protective order be granted limiting any elicited testimony to the scope of the record search.

3 Dated: February 4, 2014

4 THE METROPOLITAN WATER DISTRICT OF
5 SOUTHERN CALIFORNIA

6 By: 
7

8 Catherine M. Stites

9 Attorneys for Non-Party THE METROPOLITAN
10 WATER DISTRICT OF SOUTHERN CALIFORNIA
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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the City and County of Los Angeles, State of California. I am over the age of 18, and not a party to the within action. My business address is 700 North Alameda Street, Los Angeles, California 90012.

On **February 6, 2014**, I served the foregoing document(s) described as: **THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S REPLY IN SUPPORT OF MOTION TO QUASH SUBPOENA OR ALTERNATIVELY MOTION FOR PROTECTIVE ORDER** on the interested parties in this action in the following manner:

☒ (BY ELECTRONIC SERVICE AS FOLLOWS by POSTING) the document(s) listed above to the Santa Clara website in the action of the Antelope Valley Groundwater Litigation, Judicial Council Coordination Proceeding No. 4408, Santa Clara Case No. 1-05-CV-049053

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

Executed on **February 6, 2014**, at Los Angeles, California.

Maureen Boucher
Print Name


Signature