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[See Next Page For Additional Counsel]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co. Superior Court of California County of Los Angeles, Case No. BC 325 201 Los Angeles County Waterworks District No. 40 v. Diamond Farming Co. Superior Court of California, County of Kern, Case No. S-1500-CV-254-348Wm. Bolthouse Farms, Inc. v. City of Lancaster Diamond Farming Co. v. City of Lancaster Diamond Farming Co. v. Palmdale Water Dist. Superior Court of California, County of Riverside, consolidated actions, Case No. RIC 353 840, RIC 344 436, RIC 344 668

Judicial Council Coordination Proceeding No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to The Honorable Jack Komar

CROSS-DEFENDANTS' REPLY TO OPPOSITIONS TO PEREMPTORY CHALLENGE TO ASSIGNED JUDGE (C.C.P. § 170.6)

Date: March 08, 2010
Time: 9:00 AM
Dept.: 1

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Cross-Defendants Antelope Valley Groundwater Agreement Association ("AGWA"), Service Rock Products Corporation, Sheep Creek Water Company, the Antelope Valley United Mutual Group, U.S. Borax, Inc., Bolthouse Properties, Inc., Wm. Bolthouse Farms, Inc., Diamond Farming Company, Crystal Organic Farms, Grimmway Enterprises, Inc., and Lapis Land Company, LLC (collectively, "Cross-Defendants") submit this *Reply to Oppositions to Peremptory Challenge to Assigned Judge.*[1]

I. INTRODUCTION

Cross-Defendants' motion for disqualification is timely in response to the Court's February 19, 2010 *Order Transferring and Consolidating Actions for All Purposes* (the "Order"). Upon such consolidation, Code of Civil Procedure section 170.6 guarantees a litigant the extraordinary right to disqualify a judge. Cross-Defendants previously attempted to exercise their 170.6 challenge right upon Judge Komar's announcement of his inclination to transfer and consolidate actions in these proceedings, only to be told by both Judge Komar and the Court of Appeals that such exercise was "premature" absent a signed order. (See *Order Striking Peremptory Challenge*, filed October 27, 2009, pp. 1:27-3:2; Court of Appeal, Fourth District's *Order*, filed November 19, 2009, in *Antelope Valley Groundwater Agreement Association et al. v. Superior Court of Los Angeles County*, E049581.) The Court has issued the signed Order effecting consolidation, meaning that Cross-Defendants' 170.6 Challenge is no longer premature, but is appropriately filed at this time. Any argument that Cross-Defendants previously missed their opportunity to exercise such a challenge and waived this right is not well taken, as it contradicts the prior findings of both Judge Komar and

[1] On February 19, 2010, Judge Komar set a hearing on the 170.6 Challenge for March 8, 2010. (February 19, 2010 Minute Order, at 2.) He ordered any oppositions to be filed by February 26, 2010 and any replies to such oppositions to be filed by March 4, 2010. On February 26, 2010, the Public Water Suppliers jointly filed their *Opposition to Code of Civil Procedure Section 170.6 Peremptory Challenge*, claiming that Cross-Defendants' Peremptory Challenge is untimely. The same day, the City of Los Angeles and Phelan Piñon Hills Community Services District separately filed a *Joinder in Opposition to Peremptory Challenge to Assigned Judge*. The United States also filed its *Federal Defendants' Response to Peremptory Challenge to Assigned Judge*, on February 26, 2010, claiming Cross-Defendants' 170.6 Challenge is untimely. The State of California subsequently joined in the oppositions of the Public Water Suppliers and the United States after the 12:00 pm filing deadline. The oppositions of the Public Water Suppliers, City of Los Angeles, Phelan Piñon Hills Community Services District, the United States and the State of California are hereafter collectively referred to as the "Oppositions."

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the Court of Appeals. As the Court has issued the signed Order, the 170.6 Challenge is timely and the consolidated cases must be transferred to another judge.

The right to disqualify a judge is a "substantial right" and an "important part of California's system of due process that promotes fair and impartial trials and confidence in the judiciary." (*Stephens v. Superior Court* (2002) 96 Cal. App. 4th 54, 61-62 (citations omitted).) The Oppositions' arguments do not address the effect of the Court's Order. As Cross-Defendants have previously explained,[2] a party to any consolidated case may exercise its right to peremptorily challenge a judge under *Code of Civil Procedure* section 170.6 when actions are consolidated, notwithstanding that the party had previously acquiesced to that judge presiding in one of the consolidated cases.

Prior to the Court's February 19, 2010, *Order Transferring and Consolidating Actions for All Purposes*, Cross-Defendants were not parties to either *Willis v. Los Angeles County Waterworks District No. 40*, LASC Case No. BC 364 553 (the "Willis Class Action") or *Wood v. Los Angeles County Waterworks District No. 40*, LASC Case No. BC 391 869 (the "Wood Class Action"). The act of consolidation fundamentally altered the nature of the case, such that parties and pleadings are realigned. After the Court issued its Order, Cross-Defendants' peremptory challenge was timely filed.

As discussed below, the law that applies in such circumstances is clear —in two successive actions, a party does not waive its right to disqualify a judge in the later action by failing to so move in the earlier action. When the Court issued its Order, a right to exercise a peremptory challenge pursuant to Code of Civil Procedure section 170.6 ("170.6 Challenge") arose for Cross-Defendants. Because Cross-Defendants filed their 170.6 Challenge immediately upon the Court's issuance of its Order and in conformity with the form set forth in section 170.6(a)(5), Cross-Defendants' peremptory challenge was timely and proper, the Court must now transfer the case for reassignment.

II. CROSS-DEFENDANTS' 170.6 CHALLENGE IS TIMELY AND IN PROPER FORM

A. The 170.6 Challenge is Timely and Technically Sufficient

[2] (*Cross-Defendants' Peremptory Challenge to Assigned Judge*, filed October 13, 2009, p. 1:14-25.)

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A peremptory challenge is timely if exercised "… within 10 days after notice of the all purpose assignment," and applies upon consolidation. (*Code of Civil Procedure*, section 170.6(a)(2); *Nissan Motor Corp. v. Superior Court* (1992) 6 Cal. App. 4th 150, 154-55.) The substantial form of the peremptory challenge is set forth at *Code of Civil Procedure*, section 170.6(a)(5). Despite significant opposition from many parties including Cross-Defendants, on February 19, 2010, the Court issued its Order, which, among other things, had the effect of making Cross-Defendants unwilling parties to the Willis Class Action and the Wood Class Action in which they had not been named.

As soon as reasonably possible after the Court's issuance of the Order, Cross-Defendants filed their 170.6 Challenge, which included their good-faith assertion that Judge Komar is prejudiced against the Cross-Defendants, or the interests of the Cross-Defendants, such that in the newly consolidated action Cross-Defendants cannot have a fair or impartial trial or hearing before him. Cross-Defendants' filing of the 170.6 Challenge the same day as the Order is within the timeframe required under the statute, and the 170.6 Challenge is fully in compliance with the substantial form set forth in subsection (a)(5) of the peremptory challenge statute.

None of the Oppositions challenge the form of the 170.6 Challenge or that it was filed within ten days after the issuance of the Order. Rather, the Oppositions *solely* challenge Cross-Defendants' ability to exercise their rights to peremptorily challenge Judge Komar because they had previously acquiesced to him presiding in the coordinated cases.

B. <u>Consolidation Provides a New Right to a Peremptory Challenge</u>

A party to any consolidated case may exercise its right to challenge the assigned judge under Code of Civil Procedure section 170.6, notwithstanding that the party previously acquiesced to the judge's assignment in one of the consolidated cases. (CAL. CIV. CTRM. HBOOK. & DESKTOP REF. § 14:50 (2009 ed.), citing *Nissan Motor Corp. v. Superior Court* (1992) 6 Cal. App. 4th 150, 155; *Philip Morris Inc. v. Superior Court* (1999) 71 Cal. App. 4th 116, 123.) Here, just as the defendant did in *Nissan*, Cross-Defendants properly moved to disqualify Judge Komar pursuant to section 170.6, by timely filing their 170.6 Challenge immediately after the Court's Order.

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Nevertheless, the oppositions state that consolidation of coordinated cases does not provide Cross-Defendants a renewed right to a peremptory challenge. (See *Federal Defendants' Response to Peremptory Challenge to Assigned Judge*, filed February 26, 2010, p. 1:12-16.)

The Oppositions misinterpret *Nissan* and its application to this case. The *Nissan* court held where separate cases are consolidated, the parties in each of the consolidated cases retain their rights to timely challenge the assigned judge upon consolidation.

> A party's acquiescence of a judge to hear one action does not impair his or her right to exercise a challenge to prevent that judge from hearing another matter, even if that matter raises issues closely related to those in the first action." (*Id.* at 155 [*citations omitted*].)

In arguing its inapplicability, the Oppositions incorrectly frame the Court's decision in *Nissan*, positing that it turned on the fact that the uncommon parties to three consolidated cases had not previously had the ability to challenge the judge assigned to the consolidated action. (See, e.g., *Public Water Suppliers' Opposition to Peremptory Challenge to Assigned Judge*, p. 1:28-2:4.) However, in *Nissan*, the peremptory challenge was exercised by Nissan – *the common defendant in the three consolidated cases.* Nissan was a party to the case overseen by the judge assigned to the consolidated action. (6 Cal.App.4th at 154-55.) Contrary to the Oppositions' characterization of the case, the appellate court's decision was not based on the imposition of a new judge because no new judge was being imposed on the party exercising the peremptory challenge. The appellate court's decision was instead based on the consolidation's creation of a newly configured case – precisely the situation here.

It should be noted that in *Nissan*, the party exercising the peremptory challenge was a party to all three consolidated cases and had therefore previously been afforded an opportunity to exercise a 170.6 challenge to any of the judges in any of the three cases. In the Antelope Valley cases, Cross-Defendants were never parties to the two class action cases and thus never had the opportunity to exercise a 170.6 Challenge in those cases. Thus, the peremptory rights that the appellate court afforded to Nissan are even broader than those 170.6 Challenge rights exercised by Cross-

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Defendants.

The *Nissan* court explained that section 170.6 must be construed to mean that in two successive actions a party may move to disqualify in each, or may disqualify in the later action, without having waived that right by failing to so move in the earlier action. (6 Cal.App.4th at 154-155.) Similarly here, Cross-Defendants were party to separate actions before Judge Komar, when consolidation created a later action, as to which Cross-Defendants immediately exercised their rights to a peremptory challenge. This challenge was properly and timely filed under the rule set forth in *Nissan*.

Contrary to the assertions of the Oppositions, the fact that Cross-Defendants had not challenged Judge Komar's assignment in any prior action does not render the 170.6 Challenge untimely for purposes of the new consolidated cases. Consolidation provides a second chance at exercising the statutory right to challenge a judge by alleging bias. (WEIL & BROWN, CIVIL PROCEDURE BEFORE TRIAL, § 12:369 (2009) (citing to *Nissan*).) Furthermore, as stated in *Nissan*, section 170.6 "'should be liberally construed with a view to effect its objects and to promote justice.'" (6 Cal.App.4th at 154.) Since the Oppositions never take the issue of a peremptory challenge after consolidation head on, they attempt to distract by framing the issue as if Cross-Defendants seek to exercise a late challenge in a merely coordinated proceeding. This is not the case—the newly consolidated case is not a continuation of the previously coordinated cases. As the court stated in *Nissan*, "...judicial efficiency is not to be fostered at the expense of a litigant's rights under section 170.6 to peremptorily challenge a judge." (*Nissan*, 6 Cal.App.4th at 155).

Moreover, it is clear that the prior coordination of cases in these proceedings did not and was not intended to have the same effect as the Court's Order of consolidation. At the time of coordination, Judge Vasquez of the Orange County Superior Court both knew and acknowledged the difference between coordination and consolidation. Judge Vasquez' comments at the time that coordination was ordered:

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> Let me start by saying what I am not going to be ordering today. The issue that was in the mind of many of the parties was whether or not the case should proceed on an individual basis or a basin-wide adjudication. That would not be what the court is going to be addressing today.
>
> Whether or not the matter should proceed as individual quiet title actions or basin wide would be up to the judge who gets the case to decide, but I am still inclined to order coordination to have all those issues resolved, except with the tiny carve out for Diamond Farming on the trial that was aborted to make its motion for fees and costs in the Riverside Superior Court, so that trial judge has the best handle on addressing that issue. But for all other purposes the matters will be coordinated.

10 (See Reporter's Transcript, June 17, 2005, Superior Court of the State of California for the County
11 of Orange, the Honorable David C. Velasquez, presiding, pp. 2 & 3, attached hereto.) Thus, Judge
12 Vasquez' prior coordination of certain cases that were consolidated through the recent Order did not
13 have the effect of consolidation, and did not give rise to the right to exercise a 170.6 challenge, as
14 described in *Nissan.*

15 **C. <u>The Consolidated Case and the Previous Cases Are Not Continuous</u>**

16 The ability of a party to exercise a 170.6 Peremptory Challenge upon the consolidation of
17 cases is based on the recognition that consolidation alters the nature of the consolidated actions,
18 essentially creating a new case. Consolidation of the diverse actions involved in Judicial Council
19 Coordination Proceeding 4408, especially with reference to the two class actions, changes the
20 alignment of the parties so fundamentally that the cases cannot be considered continuous.

21 An example of the way in which consolidation changes the nature of the case can be seen in
22 the sequence of class certification and the Phase I and II trials. As a matter of due process, neither
23 the Willis Class members nor the Wood Class members can be bound by the Court's rulings in
24 Phases I and II, as notices of the class proceedings had not yet been disseminated. (See *Plaintiff*
25 *Rebecca Willis's Response to Ex Parte Application for Order Continuing Trial Date and to AGWA's*
26 *Request for Order Protecting Phase 2 Findings*, filed October 1, 2008, pp. 2:1-3, 2:26-3:7.) Further,
27 the law is clear that prior to class notice, class members cannot be bound by a determination on the
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merits; the defendants only gain the res judicata benefits of class certification after notice has been disseminated. (*Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 372-74.) In effect, the Classes have a right of "automatic reversal" as to any of the Court's future rulings that are predicated on the Court's findings in Phases I and II. This gives the classes a procedural leverage point that is not enjoyed by anyone who is a party to the other actions consolidated with the class actions. This will make Cross-Defendants, as well as the rest of the parties and the Court, beholden to the classes unless the parties are willing to take the risk that the many years of litigation will be rendered moot and returned to the beginning.[3]

The *Nissan* Court touched briefly on the differences in the cases to be consolidated for the purpose of dismissing the characterization of the two cases to be consolidated as "continuations" of the third case. The Court briefly listed some of the distinguishing factors in the cases, but only as a contrast to the fact that all the cases involved the same defendant (Nissan), the same model of car (300ZX) and the same underlying defect (sudden acceleration). (*Nissan*, 6 Cal.App.4th at 153, 155.) The *Nissan* Court felt compelled to identify differences in the cases because the cases to be consolidated were otherwise nearly identical.[4]

Similarly here, the consolidation of the two class actions into the main action cannot be considered "continuations" of the main action. By virtue of the structure of the cases as class actions and the timing of creation of the classes, the relationship between plaintiffs and defendants is significantly different than the relationship between plaintiffs and defendants in the main action, both substantively and procedurally. Following completion of any settlement in the class actions, these differences will be even more significant.

Nissan cited *City of Hanford v. Superior Court* (1989) 208 Cal.App.3d 580 with respect to whether the cases at issue were continuations of previous cases. The discussion in *Hanford* is

[3] Even if the classes—who caused the need for consolidation in the first place—are somehow settled out of the proceedings, Cross-Defendants' 170.6 Challenge remains valid upon its filing. (Louisiana-Pacific Corp. v. Phil Lumber Co. (1985) 163 Cal.App.3d 1212, 1219-1221 (Once properly exercised, a peremptory challenge cannot be rescinded, and the dismissal of a party who asserted the challenge does not cause rescission of the challenge).)

[4] Of course, the similarities in the cases are the reason they were consolidated in the first place. Without sufficient commonality, they could not be consolidated.

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lengthy and no one factor is identified as determinative. However, *Hanford* identifies a subsequent proceeding which results in new parties and results in a realignment of the original parties, as factors weighing in favor of finding that the cases are not continuous.

D. Rule 3.516 Does Not Control for Consolidation Purposes

California Rule of Court, Rule 3.516, as cited by the Oppositions, is not applicable to this case, as the Cross-Defendants have exercised their right to file the 170.6 Challenge upon the Court's issuance of the Order. Rule 3.516 expressly deals with the ability of a party to exercise such a right upon the *coordination* of actions, and is not applicable where the issue is one of *consolidation* rather than coordination.

Upon consolidation, a party may find itself to be made a party to an entirely different action vis-à-vis new parties, which fundamentally changes the nature of the litigation in which it is involved. Under *Nissan,* the simple fact of consolidation gives rise to another opportunity for Cross-Defendants to exercise a 170.6 challenge, despite the fact that cases may have been previously coordinated. Nowhere in the oppositions' moving papers do they mention the effect of consolidation—they only discuss coordination in the previously unconsolidated cases.

The differences between coordination and consolidation are fundamental. Prior filings by the Federal Defendants have made clear the manner in which consolidation fundamentally alters cases, even though they may have been previously coordinated. (*Federal Defendants' Reply to Landowner Defendants' Motion to Dismiss Public Water Suppliers' Cross-Complaint and Reponses Thereto*, filed June 18, 2009, 2:19-3:18; *Federal Defendants' Response to Motion to Transfer and Consolidate*, filed August 3, 2009, p. 1:12-14.) With coordination, "...beyond the limited overlapping issues, the cases remain separate actions and the claims raised by plaintiffs in the various actions are, and remain, piecemeal." (*Id.*, p. 2:21-23.) Further, "The limitation of coordination as a means to achieve a mutually binding adjudication of all of the correlative rights is illustrated by the problems inherent in enforcement of the separate decrees." (*Id.,* p. 3:1-3.)

In fact, the Federal Defendants argued that the cases could not proceed merely in a coordinated fashion and that consolidation was imperative to resolution of this case, because the

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"coordination of complex cases may lead to separate and non-mutually binding determinations of rights and interests entered in separate decrees." (*Federal Defendants' Response to Motion to Transfer and Consolidate*, p. 1:12-14.) The Federal Defendants have further described how consolidation creates a different sort of unification with different postures amongst the parties, such that the consolidated case is not a continuation of the "separate actions and claims raised in the various actions…." (*Federal Defendants' Reply to Landowner Defendants' Motion to Dismiss Public Water Suppliers' Cross-Complaint and Responses Thereto*, filed October 19, 2009, p.2:21-23.) Now that the cases have been consolidated, the Federal Defendants argue that "[t]he consolidation…does not change the reason this case was coordinated in the first place—to declare all parties' rights to water….But, there is nothing new in terms of actions or claims that would or should re-set the clock for purposes of peremptory challenge." (*Federal Defendants' Response to Peremptory Challenge to Assigned Judge*, pp. 3:25-4:3.) If the consolidation did not alter the nature of the case and realign the parties, then the purpose of the consolidation is unclear. Obviously this is not the case, and the Federal Defendants' argument is simply a change of tune to achieve their latest goal—depriving the Cross-Defendants' of their guaranteed right to assure a fair and impartial trial. The Federal Defendants are correct that the consolidation "does not change the reason the case was coordinated in the first place – to declare all parties' rights to water." (*Federal Defendants' Response to Peremptory Challenge to Assigned Judge*, p. 3:26-27.) But that does not mean that the consolidation was simply for the sake of convenience and did not fundamentally reconfigure the coordinated actions. The Federal Defendants quote the decision in *Jane Doe 8015* (2007) 148 Cal.App.4th 489, 497, where the court stated "The 20-day time limit and the collective denomination of a 'side' in rule 3.516 preclude a succession of challenges that would delay the efficient resolution of coordinated actions." Rather than show Cross-Defendants' peremptory challenge as untimely, this statement solidifies the point: there was no collective denomination of the current "sides" Cross-Defendants now find themselves on until the order of consolidation.

Even if Rule 3.516 were applicable in this case, case law still allows a party to exercise a 170.6 challenge as to the assignment to consolidated cases of a judge that had previously been

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assigned to one of the cases consolidated. In *Farmers Insurance Exchange v. Superior Court of Contra Costa County* (1992) 10 Cal.App.4th 1509, three civil actions were consolidated and then another action pending in another county was coordinated with them. The defendant filed a timely section 170.6 challenge to the coordination judge, who had already ruled on contested matters in the three consolidated cases. The court held that the challenge was not untimely, even though the judge had previously ruled on contested matters in the consolidated cases, based on Rule 1515 (now Rule 3.516). Similar to the case in *Nissan* and the case at bar, the party filing the 170.6 challenge was the common party to all the cases that were consolidated, including the one over which the judge assigned to the consolidated cases had already been presiding.

The *Farmers* Court noted that the opposing parties

> argue that Farmers' challenge was untimely because of Judge O'Malley's prior rulings on contested motions, including a motion for summary adjudication (section 437c) and a motion for class certification. They accuse Farmers of judge shopping because it challenged the very judge who previously made rulings adverse to its interests on issues common to others of the coordinated cases. They emphasize that even though the coordinated actions involve different plaintiffs, all of them are members of the same class and the relief sought is identical.

(*Farmers* 10 Cal.App.4th at 1511.) The *Farmers* Court rejected all of these arguments and found the 170.6 challenge to be timely and proper. The Oppositions' similar arguments should likewise be rejected.

The Oppositions heavily rely upon *Industrial Indemnity Co. v. Superior Court* (1989) 214 Cal.App.3d 259 to claim that the 170.6 Challenge is untimely, claiming it is controlling authority. (See *Public Water Suppliers' Opposition to Code of Civil Procedure Section 170.6 Peremptory Challenge*, p.2:20-3:21; *Federal Defendants' Response to Peremptory Challenge to Assigned Judge*, p. 5:10-21.) *Industrial Indemnity* is not controlling here, however, for a very simple reason - it did not involve a consolidation. The Oppositions overlook that the *Nissan* Court considered *Industrial Indemnity*, and held the case to be irrelevant, finding that the issue of a party's ability to exercise a

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1 section 170.6 challenge *upon consolidation* was an issue of first impression. (*Nissan*, 6 Cal.App.4th
2 at 154, n. 2.) The *Industrial Indemnity* case and other cases cited by the Federal Defendants such as
3 *Jane Doe 8015 v. Superior Court* (2007) 148 Cal.App.4th 489, did not concern what is at issue here:
4 the effect of a consolidation with regards to the right to a peremptory challenge.

5 *Industrial Indemnity* dealt with "add-on" parties coming into a coordinated proceeding,
6 where several of the coordinated cases had already gone to judgment. The Oppositions analogize
7 Cross-Defendants' 170.6 Challenge after consolidation with the attempt to thwart the add-on
8 procedure in *Industrial Indemnity*, and claim that Cross-Defendants' 170.6 Challenge threatens
9 efficient utilization of judicial resources in this case. (See *Public Water Suppliers' Opposition to*
10 *Code of Civil Procedure Section 170.6 Peremptory Challenge*, p.3:12-20; *Federal Defendants'*
11 *Response to Peremptory Challenge to Assigned Judge*, pp. 7:21-8:1-3.) However, as stated above,
12 and stated plainly in more recent case law, "judicial efficiency is not to be fostered at the expense of
13 a litigant's rights under section 170.6 to peremptorily challenge a judge." (*Nissan*, 6 Cal.App.4th at
14 155.) Here, Cross-Defendants were not parties to the class actions themselves and did not have the
15 ability at that point to exercise a section 170.6 challenge. Fundamentally, the policy of not allowing
16 a section 170.6 challenge when a petitioner could use it to thwart the add-on procedure simply does
17 not apply here; the Rules of Court add-on procedure is not involved, and the consolidation of the
18 parties was strongly protested by the Cross-Defendants in the first place.

19 **E. <u>The Court's Determinations in this Case have been Jurisdictional</u>**

20 The Federal Defendants claim that even if Cross-Defendants may file a peremptory challenge
21 after consolidation, the challenge must be denied because earlier hearing involved determinations of
22 contested factual issues relating to the merits. (*Federal Defendants' Response to Peremptory*
23 *Challenge to Assigned Judge*, pp. 6:12-14, 7:12-16.) The Federal Defendants cite to *Stephens v.*
24 *Superior Court* (2002) 96 Cal.App.4th 54, where the Appellate Court held that a late appearing party
25 is precluded from peremptory challenge if the judge had determined a contested issue of fact and the
26 party had previously appeared in the proceeding or a subsequent proceeding that is a continuation of
27 the proceeding where the judge made the determination. (*Stephens*, *supra*, 96 Cal.App.4th at 61.) As
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stated above, the two class actions consolidated into the main action are not "continuations" of the main action. The relationship between plaintiffs and defendants with the classes is significantly different than the relationship between plaintiffs and defendants in the main action, both substantively and procedurally.

Furthermore, the determinations made by the Court in earlier "trial" phases were strictly jurisdictional, necessary to determine which rights would be at issue in these proceedings. The determination of the Basin boundaries in the first phase was a jurisdictional issue, not a substantive ruling on the merits of any cause of action. The Court's determination regarding the existence of sub-basins was similarly predicated on certain parties wishing to be outside the adjudication, and was a question of which water rights were at issue in the case. (*Federal Defendants' Response to Peremptory Challenge to Assigned Judge*, p. 7:13-20.) If the Phase I and II trials are to be considered anything other than jurisdictional, then the parties face a different set of problems since both of these phases were conducted prior to the case being at issue.[5]

However, even if this were a case where rulings on the merits did occur, such circumstances would not be controlling regarding whether a 170.6 challenge could be properly asserted. The ruling in the *Nissan* case applies even where the judge to be disqualified has made legal or factual rulings. ". . . [T]he fact that a party can peremptorily challenge a judge after he has ruled in a case involving related factual or legal issues may result to some extent in forum shopping by parties filing later similar suits. However, collateral estoppel does not apply to disqualification motions." (*Nissan*, 6 Cal.App.4th at 155.)

III. CONCLUSION

The issuance of the *Order to Transfer and Consolidate* gave the Cross-Defendants the right to file the 170.6 Challenge. That guaranteed right, sounding in principles of due process, existed regardless of whether any of the Cross-Defendants had previously acquiesced to Judge Komar in any

[5] The Federal Defendants suggest that the Court has already "determined contested issues of fact that relate to the *merits* of the determination and adjudication of relative rights to withdraw ground water from the Antelope Valley Aquifer." (*Federal Defendants' Response to Peremptory Challenge to Assigned Judge*, p. 7:14-16 (emphasis added).)

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of the previously coordinated cases. The controlling case law and related authorities-*Nissan, Philip Morris, Farmers* and other authority, such as the California Civil Courtroom Handbook and Desktop Reference at § 14:50 (2009 ed.) – clearly establish Cross-Defendants' right to exercise their 170.6 Challenge upon the Court's issuance of the *Order to Transfer and Consolidate*.

Based upon the foregoing, the 170.6 Challenge was timely and proper; and the consolidated case must be assigned to another judge.

Dated: March 4, 2010

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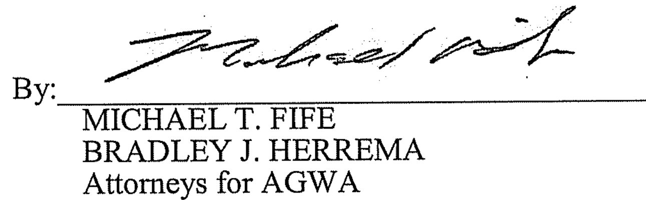

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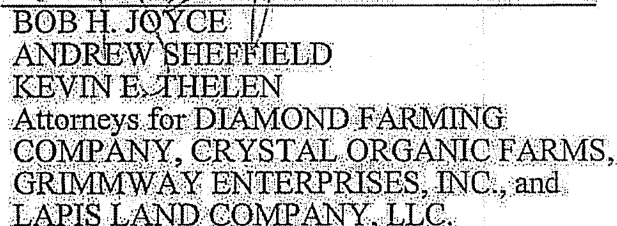

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PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF SANTA BARBARA

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 E. Carrillo Street, Santa Barbara, California 93101.

On March 4, 2010, I served the foregoing document described as:

CROSS-DEFENDANTS' REPLY TO OPPOSITIONS TO PEREMPTORY CHALLENGE TO ASSIGNED JUDGE (C.C.P. § 170.6)

on the interested parties in this action.

By posting it on the website at 10:00 a.m. on March 4, 2010. This posting was reported as complete and without error.

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

Executed in Santa Barbara, California, on March 4, 2009.

MARIA KLACHKO-BLAIR
TYPE OR PRINT NAME

SIGNATURE

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