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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

**ANTELOPE VALLEY GROUNDWATER
CASES**

Judicial Council Coordination
Proceeding No. 4408

**PUBLIC WATER SUPPLIERS'
OPPOSITION TO CODE OF CIVIL
PROCEDURE SECTION 170.6
PEREMPTORY CHALLENGE**

Date: March 8, 2010
Time: 9:00 a.m.
Dept.: 1

(Hon. Jack Komar)

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1 **I. INTRODUCTION**

2 On August 31, 2005, approximately four years and five months ago, Judge Komar
3 received a Judicial Council appointment to act as the coordination trial judge for these
4 coordinated cases, which now include two plaintiffs’ class actions and which comprise
5 the structure for the adjudication of all rights to produce water from the Antelope Valley
6 Groundwater Basin. On February 19, 2010, Judge Komar entered an order consolidating
7 the cases for all purposes. As expected, on the same day, a group of overlying landowner
8 parties filed a peremptory challenge of Judge Komar pursuant to Code of Civil Procedure
9 Section 170.6 (“Section 170.6”). Also as expected, the stated basis of the challenge is
10 that consolidation causes the water production rights of the challenging parties to be
11 prioritized against those of the members of the two classes, without those groups of
12 parties otherwise being adverse by virtue of specific pleadings. The challenging parties
13 erroneously claim a “new” adversity created a new opportunity to file a peremptory
14 challenge of Judge Komar pursuant to Section 170.6.

15 Moving parties have no authority for their motion but a misplaced reliance upon
16 *Nissan Motor Corp. v. Superior Court* (1992) 6 Cal.App.3d 150. However, *Nissan* does
17 not concern a coordination proceeding and, therefore, is neither useful nor controlling
18 precedent. Instead, *Industrial Indemnity Co. v. Superior Court* (1989) 214 Cal.App.3d
19 259, a case concerning coordinated cases and the relationship between Section 170.6
20 challenges and Rule of Court 3.516 (formerly 1515), is controlling precedent and, as
21 explained below, requires denial of the challenge.

22 **II. RULE OF COURT 3.516 PROVIDES THE ONLY PERIOD IN WHICH A**
23 **COORDINATION TRIAL JUDGE MAY BE CHALLENGED PEREMPTORILY,**
24 **NAMELY, A TWENTY-DAY PERIOD FOLLOWING THE APPOINTMENT OF**
25 **THAT JUDGE**

26 In *Nissan*, the court created a new ten-day period to make a Section 170.6
27 challenge for parties to three distinct automobile accident cases, commencing to run from
28 the date when those cases were ordered consolidated. That consolidation order caused

1 two of the three cases to be heard by a judge *not* previously assigned to those cases,
2 thereby providing a basis for a new ten-day challenge period pursuant to Section 170.6.
3 But, the challenged judge in *Nissan* was not a coordination judge appointed under the
4 rules governing coordination proceedings established by the Judicial Council. In fact, the
5 *Nissan* Court recognized that the holdings in that case do not apply to a coordinated
6 proceeding, making the following pertinent statements:

7 “Two cases which the respondent found to be analogous are inapposite...
8 In *Industrial Indemnity Co. v. Superior Court* [citation], the trial judge
9 denied peremptory challenges by add-on parties in a coordination action.
10 The Court of Appeal denied the add-on parties’ petition holding that the
11 Judicial Council rules governing coordination proceedings do not provide
12 for parties to an add-on petition to file a peremptory challenge to the
13 coordination judge, and that the Judicial Council has the authority to
14 exclude parties to an add-on petition from the exercise of peremptory
15 challenges. [Citation.]” 6 Cal.App.3d at 154, n.2.

16 The *Nissan* Court understood that the cases before it had no bearing on, and, in
17 turn, were not controlled by a published opinion involving coordinated cases and,
18 particularly, the special Judicial Council rules which control the handling of coordinated
19 cases.

20 *Industrial Indemnity* is the controlling authority on the issue before the Court here.
21 In *Industrial Indemnity*, a judge was assigned as coordination trial judge for multiple
22 actions by investors against Technical Equities Corporation. After several of the
23 coordinated complaints were reduced to judgments, individual plaintiffs in the
24 coordination proceedings filed eight new separate actions as judgment creditors seeking a
25 declaration that, as judgment creditors, they could directly sue Technical Equities’ insurer
26 and that the subject insurance policies covered their losses. Those plaintiffs petitioned to
27 coordinate those new lawsuits with the other cases. They also made a Section 170.6
28 peremptory challenge of the judge in question.

1 The Court of Appeal held that the challenges were not timely because they were
2 not filed within twenty days of the original appointment of that judge as the coordination
3 trial judge, citing Court Rule 1515 [now Rule 3.516]. In so doing, the Court concluded:

4 “... [T]he authority given to the Judicial Council over coordinated actions is broad
5 enough to empower the Judicial Council to exclude parties from the right to
6 exercise a Section 170.6 challenge. Section 404.7 [of the Code of Civil
7 Procedure] empowers the Council to provide ‘by rule the practice and procedure
8 for coordination of civil actions...’ ‘notwithstanding any other provision of
9 law....’ ‘The practical effect of such a grant of powers is to remove any restraints
10 of statutory consistency on the Judicial Council’s rules.’ [Citation.]” 214
11 Cal.App.3d at 263

12 The Court went on to state: “Nor does the exclusion of one category of parties
13 from the right to exercise a peremptory challenge necessarily violate federal and state
14 constitutional provisions.” *Id.* at 253. The Court then observed that the Judicial Council
15 was reasonable in not according an add-on party the right to a peremptory challenge,
16 stating that “[t]he Council could well have concluded that add-on cases were peculiarly
17 subject to abuse of the peremptory challenge since the coordination trial judge may, as in
18 this case, have participated in the case for years and the nature and the extent of his
19 rulings could be well known. This presents an unusual opportunity to challenge for
20 reasons unrelated to bias or prejudice...” *Id.* at 254.

21 This last observation by the *Industrial Indemnity* Court, that a later challenge
22 period could afford an opportunity to forum shop, is applicable here. In this matter, all of
23 the parties to the subject challenge have for years participated in these proceedings,
24 including trial phases and motions, and are aware of Judge Komar’s many decisions
25 made herein during those years. The type of forum shopping which is now occurring in
26 the form of the instant challenge, as well as the waste of judicial resources and delay in
27 the proceedings inherent in now bringing on a new coordination judge, are negative
28 impacts on the proceedings which the application of Rule of Court 3.516 precludes.

1 In summary, Rule of Court 3.516 established by the Judicial Council provides for
2 a single twenty-day period in which a party may make a peremptory challenge of the
3 assigned coordination judge. The peremptory challenge is untimely, and has been so for
4 more than four years.

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1 **III. CONCLUSION**

2 For the foregoing reasons, the Public Water Suppliers submit that the Peremptory
3 Challenge to the Assigned Judge under discussion must be denied.

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5 Dated: February 26, 2010

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