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[See Next Page For Additional Counsel]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

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: October 27, 2009** **Time: 9:00 AM** **Dept.: 17C**

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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

The only question presented for this hearing is whether the Cross-Defendants' motion for disqualification is timely – it is. Section 170.6 *guarantees* a litigant an extraordinary right to disqualify a judge. This right has been held to be a "substantial right" and is 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 that have been filed wish to deprive the moving parties of their guaranteed right. Given the oppositions' inability to point to any applicable law, however, their extraordinary request – where fundamental due process concerns are implicated – must be denied.

Simply stated, 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 in one of the consolidated cases.

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[1] At the October 13, 2009 hearing, Judge Komar set a hearing on the 170.6 Challenge for October 27, 2009. (October 13, 2009 Minute Order, at 4.) He ordered any oppositions to be filed by October 19, 2009 and any replies to such oppositions to be filed by October 22, 2009. On October 19, 2009, counsel for Littlerock Creek Irrigation District, Palm Ranch Irrigation District, North Edwards Water District, Desert Lakes Community Services District, Llano Del-Rio Water Co., Llano Mutual Water Co., Big Rock Mutual Water Co., Little Baldy Water Co., Palmdale Water District, and the City of Palmdale jointly filed their *Opposition to Peremptory Challenge to Assigned Judge*, claiming that Cross-Defendants' Peremptory Challenge is untimely. On October 19, 2009, the City of Los Angeles filed its *Joinder in Opposition to Peremptory Challenge to Assigned Judge*. Cross-Complainant Phelan Piñon Hills Community Services District filed its *Opposition to Preliminary Challenge (170.6)*, and the United States filed its *Federal Defendants' Response to Peremptory Challenge to Assigned Judge (170.6)*, on October 19, 2009, claiming Cross-Defendants' 170.6 Challenge to be untimely. The oppositions of the Public Water Suppliers, City of Los Angeles, Phelan Piñon Hills Community Services District and the United States are hereafter collectively referred to as the "Oppositions."

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Prior to the Court's ruling granting the *Motion by the Public Water Suppliers to Transfer and to Consolidate Cases for All Purposes All Matters Presently Pending under Judicial Council Proceeding No. 4408 from the Superior Courts of Riverside County, Los Angeles County and Kern County, Specifically Assigned to the Honorable Jack Komar* (the "*Order to Transfer and Consolidate*"),[2] 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"). When the Court issued its *Order to Transfer and Consolidate*, Cross-Defendants' peremptory challenge was timely filed.

As discussed below, the law that applies in such circumstances is unanimous—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 granted the Purveyors' *Motion to Transfer and Consolidate for All Purposes*, a right to exercise a 170.6 peremptory challenge arose for Cross-Defendants. Because Cross-Defendants filed their 170.6 Challenge, pursuant to *Code of Civil Procedure* section 170.6 (the "170.6 Challenge") **immediately** upon the Court's issuance of its *Order to Transfer and Consolidate* and in conformity with the form set forth in section 170.6(a)(5), Cross-Defendants' peremptory challenge was timely and proper.

II. THE 170.6 CHALLENGE

Despite significant opposition from many parties including Cross-Defendants, on October 13, 2009, the Court issued its Order to Transfer and Consolidate; 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. The Court also set a further hearing for January 8, 2010 to consider the form of the Order to Transfer and Consolidate (October 13, 2009 Minute Order, p. 2) and the specific conditions under which the consolidation is to occur (Reporter's Transcript of Proceedings, October 13, 2009, p. 42:21-23.) The hearing date was chosen specifically in order to allow both classes to finalize a settlement with the Purveyors and the United States so that the

[2] See, October 13, 2009 Minute Order, p. 2.

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conditions of consolidation could be considered in tandem with the class settlement. (Reporter's Transcript of Proceedings, October 13, 2009, 15:14-16:20, 30:27-31:1.) The settlement with the classes is inexorably tied[3] to the consolidation, and it is the clear intention of the Purveyors and the Classes that when consolidation of the class actions with the adjudication is completed, the Classes will come in to the action with a finalized settlement. The Court facilitated this intention by specifically scheduling the settlement approval hearings on the same day as the hearing to consider the terms of consolidation. (Reporter's Transcript of Proceedings, October 13, 2009, pp. 34:15-21, 42:21-23.)

Immediately after the Court's issuance of the Order to Transfer and Consolidate, Cross-Defendants filed the 170.6 Challenge, which contained 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.

III. THE COURT MAY EVALUATE ONLY THE TIMELINESS AND TECHNICAL SUFFICIENCY OF THE 170.6 CHALLENGE

Review of Cross-Defendants' 170.6 Challenge is limited to its timeliness and technical sufficiency. If a section 170.6 challenge is timely and in proper form, immediate disqualification is mandatory. (*Grant v. Superior Court* (6th Dist. 2001) 90 Cal. App. 4th 518; *Barrett v. Superior Court* (3d Dist. 1999) 77 Cal. App. 4th 1.) "Accordingly, if a party or attorney makes a proper, timely challenge under this statute, disqualification is instantaneous and irrevocable; the judge has no discretion to reject it, inquire about the party's motives, or require a showing of prejudice." (*Id.*; see also *Davcon, Inc. v. Roberts & Morgan* (2003) 110 Cal.App.4th 1355, 1359-1360; *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1249, 1251.)

Once it is properly exercised, a party's section 170.6 peremptory challenge terminates the

[3] The settlement process was prompted by the Court and the Court facilitated the use of a settlement judge (Justice Robie). (Reporter's Transcript of Proceedings, April 24, 2009, pp. 19:14-20:4, 69:7-28; see also Reporter's Transcript of Proceedings, July 24, 2009 pp. 36:15-39:25.) Cross-Defendants were excluded from the settlement process at the direction of the Court. (See Reporter's Transcript of Proceedings, July 24, 2009, pp. 36:18-23-37:15.) At this date Cross-Defendants still have been provided no information about the nature of the "finalized" settlement.

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judge's authority to act in any manner in the case, other than to transfer the case to another judge. (*In re Jenkins* (2d Dist. 1999) 70 Cal. App. 4th 1162). The challenged trial court judge has jurisdiction solely to "inquire into the timeliness of the affidavit or its technical sufficiency under the statute." (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 531-32 (citing to *Andrews v. Joint Clerks, etc., Committee* (1966) 239 Cal.App.2d 285, 293-299 (upholding court's power to inquire as to timeliness), and *Lewis v. Linn* (1962) 209 Cal.App.2d 394, 399-400 (upholding court's power to inquire into technical sufficiency of the affidavit).)[4] If either another party or the court itself objects to the timeliness or propriety of the motion, the challenged judge must conduct a hearing. (*Andrews*, 239 Cal.App.2d at 294; see also *Shipp v. Superior Court* (1992) 5 Cal.App.4th 147.) Therefore, the review and hearing on Cross-Defendants' 170.6 Challenge is limited to a determination as to its timeliness and technical sufficiency.

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

A. The 170.6 Challenge is Timely and Technically Sufficient

A peremptory challenge is timely if made "... 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). In this case, immediately after the Court's issuance of the Order to Transfer and Consolidate, Cross-Defendants filed their 170.6 Challenge, which contained 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. "Immediate" is certainly within such period 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 (10) days after the issuance of the *Order to Transfer and Consolidate*. Rather, the Oppositions

[4] Following the filing of the 170.6 challenge the Court issued two Minute Orders on issues unrelated to the 170.6 challenge. (See Minute Orders dated October 15, 2009 and October 16, 2009.) Depending on the determination regarding the 170.6 challenge, the validity of these Minute Orders is subject to challenge.

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only challenge the ability of the Cross-Defendants to exercise their rights to peremptorily challenge Judge Komar because they had previously acquiesced to him in the coordinated cases.

B. Consolidation Provides a New Right to a Peremptory Challenge

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 following the Court's *Order to Transfer and Consolidate*. (Reporter's Transcript of Proceedings, October 13, 2009, pp. 39:25-40:28.) The substantial form of the peremptory challenge is set forth at *Code of Civil Procedure*, section 170.6(a)(5), which was followed by the Cross-Defendants.

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., *Littlerock Creek, et al. Opposition to Peremptory Challenge to Assigned Judge (CCP 170.6)*, filed October 19, 2009, p. 6:13-14 ["The important component of this decision was the fact that Judge Ross had never before presided over the two new cases."] and *Phelan Piñon Hills Community Services District's Opposition to Preliminary Challenge* (170.6), filed October 19, 2009, p. 5:9-13

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["*Nissan* is distinguishable because in this case, all parties were before Judge Komar prior to consolidation, and the act of consolidation did not impose a new judge upon any of the defendants who now challenge Judge Komar."].)

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 characterization framed by the oppositions, 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 170.6 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 170.6 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 170.6 Challenge rights that the appellate court afforded to Nissan are more duplicative than those 170.7 Challenge rights exercised by Cross-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 waiving 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 section 170.6 challenge. This challenge was properly and timely filed under the rule set forth in *Nissan*.

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 newly consolidated cases. Consolidation provides a second chance at exercising the statutory right to challenge a judge by

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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.) Cross-Defendants should not be deprived of their guaranteed right to exercise a peremptory challenge in the consolidated cases. "Assigning the same judge to hear a series of complex actions, such as these where there exists subject matter overlap, may promote judicial efficiency. However, 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.)

C. The Consolidated Case and the Previous Cases Are Not Continuous

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

An example of the way in which consolidation changes the nature of the case can be seen in the sequence of class certification and the Phase I and II trials. As a matter of due process, neither the Willis Class members nor the Wood Class members can be bound by the Court's rulings in Phases I and II, as notices of the class proceedings had not yet been disseminated. (*Plaintiff Rebecca Willis's Response to Ex Parte Application for Order Continuing Trial Date and to AGWA's Request for Order Protecting Phase 2 Findings*, filed October 1, 2008, pp. 2:1-3, 2:26-3:7.) Further, the law is clear that prior to class notice, class members cannot be bound by a determination on the 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

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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.

Another example of the alteration of the nature of the actions is to be found in the very process of consolidation itself. The Court has set a hearing to consider the conditions of consolidation for January 8, 2010 and has set a hearing to consider a settlement between the Classes and the Purveyors on the same day. (Reporter's Transcript of Proceedings, October 13, 2009, p. 42:21-23.) As described above, these two matters were specifically calendared in this way so that the manner of consolidation of the cases would be considered in tandem with approval of the class settlements. Thus, in the newly consolidated case, the Cross-Defendants will be faced with a vast number of landowners who have settled with the Purveyors at the prompting of the Court.[5] This will place these other landowners in a procedural and substantively different position than all the other landowners currently on the "landowner side" of the case. It may even result in an adverse relationship between these landowners and the landowner side of the case. This circumstance did not exist prior to consolidation.

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.[6]

Similarly here, the two class actions to be consolidated 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,

[5] In fact, the Court went so far as to prompt the Purveyors to drop their claim of prescription against at least the Wood Class. (Reporter's Transcript of Proceedings, April 24, 2009, p. 15:13-24.)

[6] 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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both substantively and procedurally. Following completion of the 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 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 to Transfer and Consolidate*. 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 a 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.

As set forth above, the differences between coordination and consolidation are fundamental. Prior filings by the Federal Defendants make clear the manner in which consolidation fundamentally alters cases, 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.)

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In fact, the Federal Defendants have argued that the cases could not proceed merely in a coordinated fashion and that consolidation was imperative to resolution of this case, as without consolidation, the "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.) 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.

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 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

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> 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' reliance upon *Industrial Indemnity Co. v. Superior Court* (1989) 214 Cal.App.3d 259 to claim that the 170.6 Challenge is untimely is entirely misplaced. (See *Littlerock Creek et al. Opposition to Peremptory Challenge to Assigned Judge (CCP 170.6)*, p.4:7-18; *Phelan Piñon Hills Community Services District's Opposition to Preliminary Challenge (170.6)*, p. 3:19-24; *Federal Defendants' Response to Peremptory Challenge to Assigned Judge (CCP 170.6)*, pp. 3:16-5:2.) 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 section 170.6 challenge *upon consolidation* was an issue of first impression. (*Nissan*, 6 Cal.App.4th at 154, n. 2.)

Industrial Indemnity dealt with "add-on" parties coming into a coordinated proceeding, where several of the coordinated cases had already gone to judgment. Federal Defendants attempt to analogize the current situation to that in *Industrial Indemnity* through their argument that "both adding cases and consolidating actions allow one judge in a coordinated proceeding to hear all the actions for all the purposes relating to common questions of fact or law" and that Cross-Defendants' 170.6 Challenge is merely an "attempt to thwart the consolidation procedure." (*Federal Defendants' Response to Peremptory Challenge to Assigned Judge (CCP § 170.6)*, p. 4:14-19.) In this regard, Federal Defendants claim Cross-Defendants' 170.6 Challenge is no different than an attempt to thwart the add-on procedure in *Industrial Indemnity*, which they claim threatens efficient utilization of judicial resources in this case. (*Id.*) However, as stated above, and stated plainly in more recent case law, "judicial efficiency is not to be fostered at the expense of a litigant's rights under section

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170.6 to peremptorily challenge a judge." (*Nissan*, 6 Cal.App.4th at 155.)

Further, while the Federal Defendants claim that Cross-Defendants were party to and participated in the hearings related to the notice of class actions and "can hardly be considered strangers to the proceeding, even if not technically joined," (*Federal Defendants' Response to Peremptory Challenge to Assigned Judge (CCP § 170.6)*, p. 5:1-7) Cross-Defendants were not parties to the class actions themselves and did not have the ability at that point to exercise a section 170.6 challenge. Fundamentally, the policy of not allowing a section 170.6 challenge when a petitioner could use it to thwart the add-on procedure simply does not apply here; the Rules of Court add-on procedure is not involved, and the consolidation of the parties was strongly protested by the Cross-Defendants in the first place.

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

The Oppositions further contend that the Section 170.6 Challenge cannot be exercised because the Court has made determinations as to contested facts relating to the merits of this case – specifically in regard to the phases of trial that have previously occurred. (See *Federal Defendants' Response to Peremptory Challenge to Assigned Judge (170.6)*, pp. 5:10-6:26; *Public Water Suppliers' Opposition to Peremptory Challenge to Assigned Judge (170.6)*, p. 5:15-23; *Phelan Piñon Hills Community Services District's Opposition to Peremptory Challenge*, p. 4:9-18.) However, the determinations made by the Court in those "trial" phases were strictly jurisdictional, necessary to determine which rights would be at issue in these proceedings. As described Phelan Piñon Hills Community Services District, the determination of the Basin boundaries in the first phase was a jurisdictional issue, not substantive. (*Phelan Piñon Hills Community Services District's Opposition to Peremptory Challenge*, p. 4:10-12.) 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. (See *Federal Defendants' Response to Peremptory Challenge to Assigned Judge (170.6)*, p. 6:21-26.) 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

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both of these phases were conducted prior to the case being at issue.[7]

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. Indeed, 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.)

Similarly, Cross-Defendants are not asking for a redetermination of the jurisdictional issues previously determined by Judge Komar (as suggested by the *Federal Defendants' Response to Peremptory Challenge to Assigned Judge (170.6)*, p. 7:7-11.) In fact, the right to exercise the 170.6 peremptory challenge is predicated upon the Granting of the Motion to Consolidate.

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[7] 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." (emphasis added) (Federal Defendants' Response to Peremptory Challenge to Assigned Judge (170.6), p. 7:23-24.)

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V. 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 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 the right of the Cross-Defendants to file the 170.6 Challenge upon the Court's issuance of the *Order to Transfer and Consolidate*.

The only questions before this Court are the timeliness and the form of the peremptory challenge. Cross-Defendants' immediate filing of the 170.6 Challenge was certainly timely, and the statutory requirements for the peremptory challenge have clearly been met.

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

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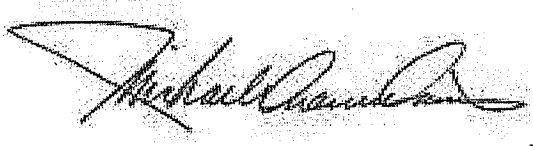

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PROOF OF SERVICE

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 October 22, 2009, 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 4:00 p.m. on October 22, 2009.
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 October 22, 2009.

APRIL A. ROBITAILLE
TYPE OR PRINT NAME

SIGNATURE