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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES)	Judicial Council Coordination
)	Proceeding No. 4408
)	[Santa Clara Superior Court Case No. 1-05- CV-049053]
Included Actions:)	
Los Angeles County Waterworks District No. 40)	
v. Diamond Farming Co. Superior Court of)	[Assigned for All Purposes to the
California, County of Los Angeles, Case No. BC)	Honorable Jack Komar]
325201; Los Angeles County Waterworks District)	
No. 40 v. Diamond Farming Co., Superior Court)	
of California, County of Kern, Case No. S-1500-)	OPPOSITION TO PEREMPTORY
CV-234348; Wm. Bolthouse Farms, Inc. v. City)	CHALLENGE TO ASSIGNED JUDGE
of Lancaster Diamond Farming Co. v. City of)	(CCP § 170.6)
Lancaster v. Palmdale Water District, Superior)	
Court of California, County of Riverside,)	
consolidated actions, Case Nos. RIC 353840,)	
RIC 344436, RIC 344668)	
)	
[Include class actions])	
)	
)	

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1 **I. INTRODUCTION**

2 The following opposition to the peremptory challenge to Judge Komar filed by certain landowner
3 parties. This peremptory challenge must be overruled because it is untimely.

4 Consolidation does not provide a new opportunity for a peremptory challenge because judicial
5 coordination rules do not allow for it, and all parties have already appeared before Judge Komar on all
6 matters subject to consolidation. Judge Komar has already conducted two phases of trial and made
7 significant determinations of key, factual issues. The time to peremptorily challenge this court passed
8 years ago. This challenge is untimely.

9 **II. PROCEDURAL HISTORY**

10 On July 11, 2005 the Chief Justice of the California Supreme Court coordinated the various cases
11 which compose this action pursuant to Code of Civil Procedure section 404.3 and Court Rule 1540. On
12 August 31, 2005 the Chief Justice of California assigned the Honorable Jack Komar as the coordination
13 trial judge to hear all the coordinated actions in this case. Notice of Judge Komar's assignment was given
14 on September 2, 2005.

15 On October 13, 2009, the court granted the motion of the public water suppliers to consolidate the
16 previously coordinated cases for all purposes. A number of landowner parties filed a peremptory
17 challenge the same day, 1,502 days after notice was given of Judge Komar's assignment.

18 All of the parties who have peremptorily challenged Judge Komar either participated in the phase
19 2 trial or could have participated in the phase 2 trial which started on October 6, 2008. The court is
20 requested to take judicial notice of the Docket, which demonstrates that all of the parties which have
21 issued the preemptory challenge appeared in the cases which were consolidated prior to the trial on
22 October 6, 2008.

23 **III. ARGUMENT**

24 **A. The challenge is untimely under Court Rule 3.516 because the challenge was not**
25 **issued within twenty days.**

26 Coordinated proceedings, such as the instant case, have specialized timing provisions for
27 disqualification motions. Rule 3.516 provides that:

1 “A party making a peremptory challenge by motion or affidavit of prejudice regarding an assigned
2 judge must submit it in writing to the assigned judge within twenty days after service of the order
3 assigning the judge to the coordination proceeding.”

4 The case was ordered coordinated June 17, 2005. The order assigning Judge Komar to hear all the
5 coordinated cases was made on August 31, 2005. Service of this order was made on September 2, 2005.
6 (See Exhibit “A” attached hereto.) Defendants failed to issue a preemptory challenge within twenty days
7 of this date. Therefore, this challenge is more than four years too late.

8 The application of this rule to “new parties” was considered in a case arising from a complex
9 litigation filed in Santa Clara County. In *Industrial Indemnity Co. v. Superior Court* (1989) 214
10 Cal.App.3d 259, 262 Cal.Rptr. 544, newly added parties to a court proceeding attempted to disqualify the
11 Honorable Conrad L. Rushing. Judge Rushing denied the motion on the grounds that it was untimely. In
12 upholding this decision, the court of appeal’s held:

13 “The effect of rules governing coordination cases is to exclude add-on parties from the right
14 to peremptorily challenge the coordination trial judge.” (*Industrial Indemnity Co. v. Superior
15 Court, supra*, 214 Cal.App.3d at 263, 262 Cal.Rptr.
16 at 546.)

17 The landowners suggest they should be considered “new parties” to two class actions upon
18 consolidation. However, *Industrial Indemnity* makes it clear that even if the landowners were “new” to
19 any aspect of this case, the special timing provisions of Rule 3.516 bar their challenge as untimely.
20 Accordingly, the motion must be overruled.

21 **B. The challenge is also untimely under Code of Civil Procedure section 170.6**

22 By arguing that even under the terms of 170.6, the preemptory challenge fails, the PWS are not
23 conceding that Court Rule 3.516 does not apply. Nevertheless, addressing the preemptory challenge as
24 argued by the Landowners, the challenge still fails.

25 Even if Rule 3.516 somehow did not apply to this case, the motion would still be untimely for
26 three separate reasons. First, a challenge under 170.6 must be filed within 10 days after a party has
27 appeared in the action (Code of Civ. Proc. § 170.6(a)(2)). Prior to consolidation, Judge Komar was the
28 assigned judge for each case and had been the assigned judge since August 31, 2005. Since notice was

1 given to all parties that Judge Komar was assigned on September 2, 2005, under this section, the
2 challenge must have been made on or before September 12, 2005.

3 Next, Code of Civil Procedure section 170.6 provides in part:

4 “In no event shall any judge, court commissioner, or referee entertain the motion if it be made
5 after the drawing of the name of the first juror, or if there be no jury, after the making of an
6 opening statement by counsel for plaintiff, or if there is no opening statement by counsel for
7 plaintiff, then after swearing in the first witness or the giving of any evidence or after trial of the
8 cause has otherwise commenced.”

9 Here, this court has presided over two phases of trial involving the landowners. The first phase of
10 trial was for purposes of determining the significant, factual issue of the scope of the court’s jurisdiction,
11 including the identity of landowners who needed to be included in the case. All of the moving parties
12 were represented at this trial. The second phase of trial included a factual determination of the
13 characteristics of the basin, including a determination that water in the basin commingled throughout the
14 basin. Therefore, pursuant to C.C.P. § 170.6, landowners were required to submit this challenge no later
15 than the first phase of trial.

16 Finally, the challenge must be made prior to any hearing of any contested issues of law and fact.
17 (*Pacific etc. Conference of United Methodist Church v. Superior Court* (1978) 82 Cal.App.3d 72, 79.)

18 The court has held:

19 “[A]n otherwise timely peremptory challenge must be denied if the judge has presided at an
20 earlier hearing which involved a determination of contested factual issues relating to the
21 merits.” (*Grant v. Superior Court* (2001) 90 Cal.App.4th 518, 525, 108 Cal.Rptr.2d 825.)

22 Even if the court hearings so far were not considered to be the trial of the case, they involved the
23 determination of contested factual issues relating to the merits. In particular, the determination in phase
24 two that there is but a single groundwater basin is essential to the comprehensive adjudication of water
25 rights which is at the heart of the case.

26 Therefore, even if the timing provisions of C.C.P. § 170.6 applied to this case, the landowners’
27 opportunity to challenge the judge would have expired approximately four years ago. The statute is
28 clearly designed to prevent precisely this situation: where a party is dissatisfied with the result and wishes

1 to “shop” for a new judge. Therefore, permitting this untimely challenge would be extremely unfair to the
2 remaining parties in this case, and would encourage sharp practices.

3 **C. *Nissan Motors v. Superior Court* affords Landowners no relief**

4 *Nissan Motors Corporation In USA v. Superior Court* (1992) 6 Cal.App.4th 150, the only case
5 cited by Defendants, has no application to this case. In *Nissan*, there were three separate lawsuits in three
6 courts before three separate judges. Judges Ross, Parslow, and Luesebrink. One of the judges, Judge
7 James R. Ross, ordered that all three actions be consolidated into his court. The litigants before Judge
8 Parslow and Judge Luesebrink therefore never had the opportunity to challenge Judge Ross. The
9 defendant in each of the three actions, Nissan Motor Corp., moved to disqualify Judge Ross pursuant to
10 CCP § 170.6 only *as to the actions that had not yet been before Judge Ross*. The appellate court ruled
11 that as to the actions that were new to Judge Ross, the challenge was timely because it was made within
12 ten days after the assignment of those cases to Judge Ross.

13 The important component of this decision was the fact that Judge Ross had never before presided
14 over the two new cases. The court made a special point to note that:

15 “The three cases arise out of different injuries and damages, occurring in different accidents
16 involving different vehicles at different times and places, and under different fact patterns.
17 They are thus three separate and distinct cases, entitled to separate challenges under Section
18 170.6.” (*Nissan, supra*, 6 Cal.App.4th at 155, 7 Cal.Rptr.2d at 303.)

19 The difference between *Nissan Motors* and the case at hand is that here, all parties were before
20 Judge Komar prior to consolidation. The act of consolidation did not result in a new judge being assigned
21 to the case, as it did in *Nissan Motors*. Since the act of consolidation did not impose a new judge on
22 anybody, there is no basis to revive the right to make a preemptory challenge.

23 The *Nissan Motors* court comments that “A party's acquiescence of a judge to hear one action
24 does not impair his or her right to exercise a challenge to prevent that judge from hearing another matter”
25 *Nissan Motor Corporation In USA v. Superior Court, supra*, 6 Cal.App.4th 150, 155. Defendants had the
26 right to challenge Judge Komar. Defendants failed to timely exercise that right over four years ago.

27 The landowners would argue that consolidation equals the right to a preemptory challenge.
28 Because all of the parties have appeared before Judge Komar more the ten days before the challenge was

1 issued, and because a contested hearing of law and fact has occurred, section 170.6 does not allow a
2 preemptory challenge.

3 4 **III. CONCLUSION**

5 Whether the timing of this motion is governed by Rule 3.516 or C.C.P. § 170.6, the motion has
6 been made several years too late. Since Judge Komar has already conducted two phases of trial, and
7 decided significant factual issues applicable to *all claims* in each case, disqualification of the judge at this
8 point would seriously prejudice the non-moving parties. Accordingly, the motion must be denied.

9
10 DATED: October 19, 2009.

LEMIEUX & O'NEILL

11 By: _____
12 W. Keith Lemieux
13 Attorneys for Littlerock Creek Irrigation
14 District, et al.

15 **LAGERLOF, SENEAL, GOSNEY & KRUSE, LLP**

16 /s/
17 By: _____
18 Thomas S. Bunn
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20 **RICHARD, WATSON & GERSHON**

21 /s/
22 By: _____
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24 Attorneys for City of Palmdale.
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28

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA,)
3) ss.
4 COUNTY OF VENTURA)

5 I am employed in the County of Ventura, State of California. I am over the age of 18 and not a
6 party to the within action. My business address is 2393 Townsgate Road, Suite 201, Westlake Village,
California 91361.

7 On **October 19, 2009** I posted the following document(s) to the website <http://www.scefiling.org>,
8 a dedicated link to the Antelope Valley Groundwater Cases:

9 **OPPOSITION TO PEREMPTORY CHALLENGE TO ASSIGNED JUDGE (CCP § 170.6)**

10
11 I declare under penalty of perjury under the laws of the United State of America that the above is
12 true and correct.

13 Executed on October 19, 2009, in Westlake Village, California.

14 /s/

15 _____
16 KATHI MIERS
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SERVICE LIST

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24	*Chair, Judicial Council of California Administrative Office of the Courts Attn: Appellate & Trial Court Judicial Services (Civil Case Coordination) 455 Golden Gate Avenue San Francisco, CA 94102-3688	CRC Rule 1511: *Serve only when required to be transmitted to Judicial Council.
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