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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES**

Coordination Proceeding) Judicial Council Coordination
Special Title (Rule 1550(b))) Proceeding No. 4408

ANTELOPE VALLEY GROUNDWATER CASES) [Assigned for all Purposes to the
Honorable Jack Komar]

Included actions:)
) FEDERAL DEFENDANTS'
) RESPONSE TO PEREMPTORY
) CHALLENGE TO ASSIGNED
) JUDGE (CCP § 170.6)

Los Angeles County Waterworks District No. 40 v.)
Diamond Farming Co., et al.)
Los Angeles County Superior Court, Case No. BC 325)
201)

Los Angeles County Waterworks District No. 40 v.)
Diamond Farming Co., et al.)
Kern County Superior Court, Case No. S-1500-CV-)
254-348)

Wm. Bolthouse Farms, Inc. v. City of Lancaster)
Diamond Farming Co. v. City of Lancaster)
Diamond Farming Co. v. Palmdale Water District)
Riverside County Superior Court, Consolidated Action,)
Case nos. RIC 353 840, RIC 344 436, RIC 344 668)

AND RELATED CROSS ACTIONS

**FEDERAL DEFENDANTS' RESPONSE TO PEREMPTORY
CHALLENGE TO ASSIGNED JUDGE (CCP § 170.6)**

1 The United States respectfully submits this response to the motion for peremptory
2 challenge to presiding Honorable Judge Jack Komar filed by certain landowner parties in the
3 above captioned cases. *See Peremptory Challenge to Assigned Judge (C.C.P. § 170.6)*
4 (hereinafter the “*Chall. Mtn.*”), filed October 13, 2009. The movants allege that Judge Komar’s
5 consolidation of these complex, coordinated actions provides the opportunity to exercise a
6 peremptory challenge under California Civil Procedure Code § 170.6.

7 The movants’ argument is not persuasive. A peremptory challenge must be timely; in a
8 coordinated case a § 170.6 challenge to the assigned judge must be made within 20 days after
9 service of the coordination order and, in any case, before the judge has determined contested fact
10 issues relating to the merits of the case. Here, the challenge comes over four years after the
11 cases were coordinated and well after the judge has heard and made substantive rulings on
12 factual issues related to the merits. Consolidation of the coordinated cases in this matter does
13 not reset the clock for peremptory challenge. While consolidation does allow the judge to issue
14 one final decree that will be binding on all parties, the relief sought - a declaration on the rights
15 to use groundwater in the Antelope Valley basin - has not changed. Accordingly, the
16 peremptory challenge must be stricken.

17 **1. Background.**

18 By Order dated July 11, 2005, the above captioned cases were ordered coordinated. By
19 Order dated August 31, 2005, the Chair of the Judicial Council, Chief Justice Ronald George of
20 the California Supreme Court confirmed the coordination of these actions pursuant to Cal. Civ.
21 Proc. Code § 404 *et seq.* Notice of Judge Komar’s assignment to the coordinated cases was
22 given on September 2, 2005. Cross-complaints were filed in the cases, and subsequently the two
23 class action complaints were added on to the coordinated action. In the instant case,
24 coordination was deemed appropriate because each case shares the need to define the relative
25 rights to ground water in the Antelope Valley Aquifer.

26 Following coordination, Judge Komar held three days of trial in October, 2006, taking
27 factual evidence from half a dozen witnesses and dozens of exhibits. This Phase I trial resulted
28

1 in Court findings and rulings that defined the jurisdictional boundaries of the aquifer to be
2 adjudicated, thus defining the geographical scope of the relative rights to be determined. *See*
3 Order After Hearing on Jurisdictional Boundaries, dated November 3, 2006. In October and
4 November, 2008, a second phase of trial was held before Judge Komar. Over a week of
5 testimony was taken, and extensive factual evidence developed. On November 6, 2008, the
6 Court entered its findings and Order regarding hydraulic connectivity. *See* Order After Phase
7 Two Trial on Hydrologic Nature of Antelope Valley, dated November 6, 2008. Both Phase I and
8 II of trial determined contested factual issues that relate to the merits of the ultimate issue
9 common to all of the parties - that of the relative rights to withdraw water from the Antelope
10 Valley Aquifer.

11 By Order entered on October 13, 2009, the Court has ordered that these coordinated
12 cases, including the two add-on class actions, be consolidated, at least to the extent of the
13 common issues related to the determination of the relative rights to withdraw ground water of all
14 of the parties. The extent or limitations on the consolidation are to be determined pursuant to the
15 parties obligation to meet and confer in order to propose a consolidation order, and at the hearing
16 currently scheduled for January 8, 2010.

17 **2. The Landowners' Peremptory Challenge Must Be Stricken Because It Is Untimely.**

18 **A. The Landowners' challenge is untimely because it was filed beyond the 20**
19 **day limit provided for in Rule 3.516.**

20 Pursuant to Cal. Civ. Proc. Code § 170.6, parties in civil and criminal actions may
21 disqualify an assigned judge without a showing of good cause on the basis of an affidavit
22 asserting that the party believes the judge is prejudiced or biased. *See Solberg v. Superior Court*,
23 19 Cal. 3d 182, 197-98, 561 P.2d 1148, 1157-58 (1977). Section 170.6 is to be liberally
24 construed, and if in proper form and timely filed, it must be accepted without further inquiry.
25 *Davcon, Inc. v. Roberts and Morgan*, 110 Cal. App. 4th 1355, 1359, 2 Cal. Rptr. 3d 782, 786
26 (2003). If the peremptory challenge motion is timely and in the proper form, a new judge must
27 be assigned "to try the cause or hear the matter." *Peracchi v. Superior Court*, 30 Cal.4th 1245,
28 1252, 135 Cal. Rptr.2d 639, 644 (2003).

1 However, a § 170.6 challenge to the assigned judge in a coordination proceeding is
2 limited. Cal. Rules of Court, Rule 3.516 provides that:

3 A party making a peremptory challenge by motion or affidavit of prejudice
4 regarding an assigned judge must submit it in writing to the assigned judge within
5 20 days after service of the order assigning the judge to the coordination
6 proceeding.

7 This case was coordinated and assigned to presiding Judge Komar by order of the
8 Judicial Counsel, on September 2, 2005. Thus, the movants' October 13, 2009 peremptory
9 challenge is 1502 days past due.

10 While not clear in their motion to disqualify Judge Komar, the movants appear to argue
11 that because the coordinated cases were subsequently consolidated by order of the Court on
12 October 13, 2009, they "unwillingly" became parties to cases in which they have not been
13 named. *Chall. Mtn.* at 1. Specifically, they claim that the class actions filed by non-pumping
14 overlying landowners (the Willis Class) and by small pumpers (the Wood Class) involve
15 separate causes of action. *Id.* As such, they apparently argue that the opportunity to assert a §
16 170.6 challenge is now available.^{1/}

17 The movants are mistaken. Rule 3.516 "exclude[s] add-on parties from the right to
18 peremptorily challenge the coordination trial judge." *Industrial Indemnity Co. v. Superior Court*,
19 214 Cal.App.3d 259, 263, 262 Cal.Rptr. 544, 546 (1989). In *Industrial Indemnity*, the presiding
20 judge to a coordinated action struck peremptory challenges as untimely. Section 170.6 motions
21 were filed immediately after eight separate actions were added on to the coordinated case, but
22 over two years after the case was assigned a coordination trial judge and after several of the
23 complaints had gone to judgment. The appellate court held that add-on parties who came into a
24 coordination proceeding long after the coordination judge was assigned could not exercise a

25 ^{1/} Even accounting for the addition of the class action complaints, the motion is untimely. The
26 Willis Class' Second Amended Class Action Complaint was posted on May 6, 2008. *See Order*
27 *Granting Plaintiff Rebecca Willis Leave to File Second Amended Class Action Complaint* [nunc pro
28 tunc], dated May 21, 2009. The Wood Class' First Amended Class Action Complaint was added
on June 20, 2008. Based on either the original coordination order or the class actions added to the
coordination proceeding, the movants have not brought their peremptory challenge within the 20
days deadline prescribed by law.

1 section 170.6 peremptory challenge. The court reasoned that when the Judicial Counsel adopted
2 Rule 3.516

3 [t]he council could well have concluded that add-on cases were peculiarly subject
4 to abuse of the peremptory challenge since the coordination trial judge may, as in
5 this case, have participated in the case for years and the nature and the extent of
6 his rulings could be well known. This presents an unusual opportunity to
7 challenge for reasons unrelated to bias or prejudice. It also presents the possibility
8 that by use of the challenge, the add-on party can effectively thwart the add-on
9 procedure and prevent the benefits the Legislature sought to achieve by the
10 add-on process.

11 214 Cal.App.3d at 264.^{2/}

12 The rationale for barring peremptory challenges to the coordination judge by add-on
13 parties applies equally to peremptory challenges by parties once a coordinated case has been
14 consolidated. Complex cases may be coordinated and additional cases added if common
15 questions of law or fact are predominating or significant to the litigation. Cal. Civ. Proc. Code §
16 404.1; Cal. Rules of Court, Rule 3.544. Similarly, cases may be consolidated if they involve a
17 common question of law or fact. Cal. Civ. Proc. Code § 1048(a) (2009). As a result, both
18 adding cases and consolidating actions allow one judge in a coordinated proceeding to hear all
19 the actions for all the purposes relating to common questions of fact or law.^{3/} Movants' attempt
20 to thwart the consolidation procedure, therefore, is no different than an attempt to thwart the add-
21 on procedure which was rejected in *Industrial Indemnity*. Both are inimical to an efficient
22 utilization of judicial resources in this coordinated proceeding.^{4/}

23 ^{2/} *Industrial Indemnity* addressed Rule 1515 which was subsequently renumbered Rule 3.516,
24 effective January 1, 2007.

25 ^{3/} Consolidation provides the additional benefit of a final, single decree binding on all parties
26 and potentially satisfying the McCarran Amendment's requirement of comprehensively adjudicating
27 all rights to water in the Antelope Valley basin.

28 ^{4/} Starting over with a new judge after five years of litigation would raise efficiency concerns
in any proceeding, but is a particular concern in a complex, coordinated action. A chief reason for
coordination is "the efficient utilization of judicial facilities and manpower." Cal. Civ. Proc. Code
§ 404.1. In a coordination proceeding such as this one, where the Court has a significant interest
in not losing a presiding judge who has almost five years of experience in the case, the movants
untimely motion would certainly contravene the coordination proceeding goals. *Compare Jane Doe*
8015 v. Superior Court, 148 Cal.App.4th 489, 498, 55 Cal.Rptr.3d 708, 714 (2007) (rejecting

Moreover, in the instant case we are not even dealing with what might be considered an “add-on” proceeding, or new parties, as was the case in *Industrial Indemnity*.^{5/} The nature and the extent of Judge Komar’s rulings on substantive issues of law and fact are well known. Indeed, the moving parties were parties to and active in the prior Phase I and II trials before this Court. With respect to the class actions, the moving parties were party to, and participated in hearings related to the notice to the class actions. They can hardly be considered strangers to the proceeding, even if not technically joined.^{6/}

B. A peremptory challenge is untimely because the Court has decided factual issues related to the merits of the issues common to the coordinated and consolidated Actions.

Even if movants had filed their § 170.6 motion within 20 days after service of the order assigning the Judge to the coordination proceeding (as required by Rule 3.516), their peremptory challenge must be denied because earlier hearings in these proceedings involved determinations of contested factual issues relating to the merits.

Where a judge has presided over hearings or trial that involved determinations of

arguments against a peremptory challenge and noting that Petitioner’s “complaints about ‘delay and disruption’ would be well taken if this were a complex case involving numerous coordinated actions with difficult or disparate issues; but that hypothetical situation is not presented here.”)

^{5/} Movants cite *Nissan Motor Corp. v. Superior Court* 6 Cal.App.4th 150 (1992), in support of their challenge. The *Nissan* court held that where separate cases are consolidated, the parties in the consolidated cases retain the right to timely challenge the assigned judge. The case is easily distinguishable from the present case because in *Nissan*

[t]he three cases arise out of different injuries and damages, occurring in automobile accidents involving different vehicles at different times and places, and under different fact patterns. They are thus three separate and distinct cases, entitled to separate challenges under Section 170.6.

Id. at p 155. In contrast, the Antelope Valley Groundwater Adjudication involves common questions of law and fact. Moreover, the defendant in *Nissan* successfully challenged the assigned judge only to the two new cases over which he had not presided. In the original action, in which the judge had rendered pretrial rulings on the merits, no peremptory challenge was brought.

^{6/} Judge Komar has ordered the parties to meet and confer as to the form of the consolidation order and instructed the parties that the form of order include the causes of action common to all parties. Thus, even assuming *arguendo* the motion was timely, it is entirely premature to argue, as plaintiffs do, that the consolidated action will involve separate causes of action unrelated to the predominating issues of fact and law.

1 contested facts related to the merits, a subsequent peremptory challenge motion is precluded as
2 untimely. *Stephens v. Superior Court*, 96 Cal. App. 4th 54, 59, 116 Cal. Rptr. 2d 616, 620-21
3 (2002). In *Stephens*, it was argued that a late-appearing party could exercise a peremptory
4 challenge within 10 days of appearing, regardless of whether the judge had previously
5 determined contested fact issues in the case. The Appellate Court rejected this position, holding
6 that a late appearing party is precluded from peremptory challenge under section 170.6 if the
7 judge had “determined a contested fact issue relating to the merits and the party appears *in the*
8 *proceeding in which the judge made the determination or a subsequent proceeding that is a*
9 *continuation of the proceeding in which the judge made the determination.*” *Stephens* at 61.
10 (emphasis in original).

11 This exception under which a peremptory challenge is precluded strikes a balance
12 between ensuring a fair and impartial court and discouraging “judge shopping.” *Id.* at 60. The
13 Court in *Stephens* reasoned that

14 Once a case has progressed to the point where an assigned judge has presided over trial
15 or any other proceedings involving the determination of contested fact issues relating to
16 the merits, the policy of avoiding possible judicial bias by allowing a party to remove a
17 judge without having to establish the judge’s prejudice to the satisfaction of a judicial
18 body must yield to the policy against judge shopping-i.e., removing an assigned judge
19 from a case for reasons other than a good faith belief the judge is prejudiced.

20 *Stephens* at 60. Thus, once a judge has tried a portion of the case, and is ordinarily in the best
21 position to pass on the questions involved, mere unsupported allegations of unfairness are
22 insufficient.

23 In the instant case, the proceedings have clearly progressed beyond the point where the
24 judge has presided over the determination of contested fact issues relating to the merits. This
25 Court has taken significant evidence, and determined contested issues of fact that relate to the
26 merits of the determination and adjudication of relative rights to withdraw ground water from the
27 Antelope Valley Aquifer. The two trial segments in the coordinated proceedings, and the
28 determination of facts material to the common issues that bind these proceedings stand as a bar
to the timeliness of any peremptory challenge to the presiding judge. *Id.* at 63.

The public policy grounds for barring such challenge in the instant case is neatly

1 summarized by the California Supreme Court:

2 It would mean that the judge who tried the case, and who is ordinarily in the best position
3 to pass upon the questions involved, could by a mere general allegation of prejudice, and
4 without any judicial determination of the facts, be disqualified. . . . Such procedure would
5 make it possible for litigants to gamble on obtaining a favorable decision from one judge,
and then, if confronted with an adverse judgment, allow them to disqualify him . . . in the
hope of securing a different ruling from another judge in supplementary proceedings
involving substantially the same issues.

6 *Jacobs v Superior Court*, 53 Cal.2d 187, 190, 1 Cal.Rptr. 9, 10 (1959). This public policy
7 against judge-shopping also prevents prejudice to the parties. In the instant case, parties who
8 have already spent numerous years and abundant resources advancing this case would be
9 prejudiced if they were forced to relitigate matters already determined. Accordingly, a
10 peremptory challenge to the presiding Judge in this matter at this point in the proceedings is
11 unavailable.

12 CONCLUSION

13 Wherefore, for the reasons set forth herein, the peremptory challenge to the assigned
14 Judge is untimely and should be stricken.

15 Respectfully submitted this 19th day of October, 2009.

16
17 JOHN C. CRUDEN
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Environment and Natural Resources Division

18
19 /s/
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PROOF OF SERVICE

I, Linda Shumard, declare:

I am a resident of the State of Colorado and over the age of 18 years, and not a party to the within action. My business address is U.S. Department of Justice, Environmental and Natural Resources Section, 1961 Stout Street, 8th Floor, Denver, Colorado 80294.

On October 19, 2009, I caused the foregoing documents described as; **FEDERAL DEFENDANTS' RESPONSE TO PEREMPTORY CHALLENGE TO ASSIGNED JUDGE (CCP § 170.6)** , to be served on the parties via the following service:

☒

BY ELECTRONIC SERVICE AS FOLLOWS by posting the documents(s) listed above to the Santa Clara website in regard to the Antelope Valley Groundwater matter.

☐

BY MAIL AS FOLLOWS (to parties so indicated on attached service list): By placing true copies thereof enclosed in sealed envelopes addressed as indicated on the attached service list.

☐

BY OVERNIGHT COURIER: I caused the above-referenced document(s) be delivered to FEDERAL EXPRESS for delivery to the above address(es).

Executed on October 19, 2009, at Denver, Colorado.

/s/ Linda Shumard
Linda Shumard
Legal Support Assistant