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Exempt from filing fee pursuant to Government Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY,

Petitioner and Plaintiff,

vs.

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, ALL PERSONS INTERESTED IN THE VALIDITY OF THE RATES ADOPTED BY THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA ON APRIL 13, 2010 TO BE EFFECTIVE JANUARY 1, 2011; AND DOES 1-10,

Respondents and Defendants.

Case No.: CPF-10-510830
Related Case No.: CPF-12-512466

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MWD'S EX PARTE APPLICATION FOR ORDER REVOKING ORDER STRIKING C.C.P. § 170.6 MOTION, AND GRANTING DISQUALIFICATION; OR IN THE ALTERNATIVE, FOR ORDER GRANTING RECONSIDERATION, REVOKING PRIOR ORDER, AND GRANTING DISQUALIFICATION

Hearing
Department 304, Hon. Curtis E.A. Karnow
Date: March 23, 2018
Time: 11:30 a.m.

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I. INTRODUCTION

The California Court of Appeal has held unequivocally that when it remands a case to a superior court, and if the trial judge in the prior proceeding is assigned to the remand proceedings, the time period to file a Section 170.6 peremptory challenge of that judge "begins on the date of the notice of assignment and that the issuance of the remittitur does not provide notification." *Ghaffarpour v. Super. Court (Commerce Plaza Hotel)*, 202 Cal. App. 4th 1463, 1466 (2012); *see also* Cal. Code Civ. Proc. § 170.6(a)(2) ("A motion under this paragraph may be made following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, ***if the trial judge in the prior proceeding is assigned*** to conduct a new trial on the matter. . . . The motion shall be made within 60 days ***after*** the party or the party's attorney has been ***notified of the assignment***." (emphasis added)).

This case (the "2010 Action") and the related Case No. CPF-12-512466 (the "2012 Action") have been remanded to the Superior Court for the City and County of San Francisco following a successful appeal by Respondent and Defendant Metropolitan Water District of Southern California ("MWD"). (Declaration of Barry W. Lee ["Lee Decl.], ¶¶ 7-8.) Remittitur issued in these cases on October 24, 2017 and was filed in the 2012 Action on October 25, 2017. (*Id.*, ¶¶ 8, 12, Ex. F.) Remittitur has not been filed in the 2010 Action; nor does it appear on the Court's docket for the 2010 Action. (*Id.*, ¶ 13, Ex. G.) There has been no notice of judicial assignment of the remand in either case. (*Id.*, Exs. G-H.) Nonetheless, on March 12, 2018, Petitioner and Plaintiff San Diego County Water Authority ("SDCWA") filed a letter asking the Honorable Curtis E.A. Karnow to set a case management conference in the remanded 2010 and 2012 Actions. (*Id.*, ¶ 9.) Although Judge Karnow had not been assigned to the remanded 2010 and 2012 Actions, MWD promptly, on March 15, 2018, filed its Motion for Peremptory Disqualification Pursuant to Code of Civil Procedure Section 170.6 (the "Motion") out of an abundance of caution. (*Id.*, ¶ 15.) Because there still has been no notice of judicial assignment in the remand of the 2010 and 2012 Actions, the Motion could not have been late as a matter of law.

Nevertheless, on March 16, 2018, in both the 2010 Action and the 2012 Action, this Court

issued its "Order Striking C.C.P. § 170.6 Motion" (the "Order"). (*Id.*, ¶ 15.) The Court reasoned that the Motion was untimely on the grounds that it was "obvious" and "plain"—even in the absence of "formal" assignment—that the remand proceedings would be handled by Judge Karnow. (*See* Order at 1-2.) MWD respectfully disagrees and requests, on an *ex parte* basis, that in both the 2010 Action and the 2012 Action, the Court revoke its Order striking the Motion, and instead enter an order granting the Motion for Peremptory Disqualification for three reasons.

First, ex parte relief is appropriate because neither a motion brought on regular notice to reconsider under Code of Civil Procedure section 1008 nor a case management conference—the options presented to MWD in the Order—would protect MWD's important due process right to seek disqualification. (*See* Order at 2.) Code of Civil Procedure Section 170.3 provides that the only appellate review available for a disqualification determination is by a writ of mandate from the Court of Appeal and that "[t]he petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court's order determining the question of disqualification." Cal. Code Civ. Proc. § 170.3(d). Seeking reconsideration on a regularly noticed motion or waiting for a case management conference to informally discuss reconsideration would cause the time to file a writ petition to expire, irreparably harming MWD by extinguishing its Section 170.6 rights. *See id.* (party has only 10 days after written notice of disqualification order to file petition for writ of mandate); Cal. Rules of Court, rule 3.1202(c) (ex parte relief warranted to avoid irreparable harm); *see also Fry v. Super. Court*, 222 Cal. App. 4th 475, 481 (2013) ("'Courts must refrain from any tactic or maneuver that has the practical effect of diminishing' the important right to exercise the [Section 170.6] challenge." (quoting *Hemingway v. Superior Court (People)*, 122 Cal. App. 4th 1148, 1158 (2004))). Ex parte relief is warranted and MWD's Application should be granted.

Second, MWD's Motion was timely as a matter of law. The plain language of Section 170.6(a)(2) states that the triggering event that causes the statutory period to begin to run is when "the party or the party's attorney has been ***notified of the assignment***" (emphasis added). *See also MacIsaac v. Waste Mgmt. Collection & Recycling, Inc.*, 134 Cal. App. 4th 1076, 1082 (2005) ("In the first step of the interpretive process we look to the words of the statute themselves."). The

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statute does not include a provision for constructive notice (*e.g.*, "should have known," "obvious" or "apparent"), and the Court cannot read such a requirement into the statute. *See Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc.*, 26 Cal. 4th 1, 14 (2001) (When the language of statutes "is clear and unambiguous, judicial construction of the statutes is not permitted unless they cannot be applied according to their terms or doing so would lead to absurd results, thereby violating the presumed intent of the Legislature."); *Hudson v. Super. Court (People)*, 7 Cal. App. 5th 1165, 1172 (2017), *review denied* (Apr. 26, 2017) ("Courts may not insert words or add provisions to an unambiguous statute."). Indeed, the Court of Appeal has held that Section 170.6 does not include a constructive notice trigger and remittitur does not constitute notice of judicial assignment. *Ghaffarpour*, 202 Cal. App. 4th at 1470-71; *see also cf. Jones v. Super. Court*, 246 Cal. App. 4th 390, 403 (2016) (deadline of "10 days after notice of the all-purpose assignment," for a peremptory challenge of a judge, runs from the time actual notice is given that a judge is assigned to the case for all purposes, and not from the time constructive notice is given.) For this reason, the issue framed by the Court in its March 16 Order[1] is not legally relevant to the outcome here; the question of timeliness is controlled by whether there was actual notice to MWD that the case was reassigned to Judge Karnow. It is undisputed that MWD did not receive notice of judicial assignment and the Motion was timely as a matter of law.

Third, even if there were a constructive notice standard in Section 170.6(a)(2)—which is not the case—it was not apparent that the remand proceedings would be assigned to Judge Karnow. While the order states "It appears plain I [Judge Karnow] would handle this case on remand," Section 170.6(a)(2) shows that assignment to the same judge is not a given: ". . . ***if*** *the trial judge in the prior proceeding is assigned . . .*" (emphasis added). It is the prerogative and responsibility of the presiding judge to determine the reassignment of cases after reversal and remand. *See* Cal. Rules of Court, rules 10.603(b)(1), (c)(1) (presiding judge has authority and duty to reassign cases to different judges in appropriate circumstances); *Ghaffarpour,* 202 Cal. App. 4th at 549 (same). The 2010 Action and 2012 Action are part of a series of *five* related cases

[1] "Thus the issue appears to be this: whether it was obvious that the case would be handled by me on remand, or whether it was apparent only after e.g., I was (or will be) in some fashion formally assigned (or reassigned) to it." (Order at 1.)

filed by SDCWA that challenge various MWD rates and charges for the water and water services that MWD provides to its Member Agencies.[2] Here, there are "appropriate circumstances" that would support a decision by the presiding judge to assign the 2010 Action and 2012 Action to another judge, the Honorable Mary E. Wiss. Judge Wiss has already been assigned to hear the related 2016 Action and the parties have stipulated that another related case ("2017 Action") should also be assigned to Judge Wiss. (Lee Decl., ¶¶ 28, 39, Exs. T, V.) Judge Wiss has scheduled a case management conference in the 2016 Action for April 27, 2018. (*Id.*, ¶ 29, Ex. U.) The presiding judge has scheduled a case management conference in the 2017 Action for May 30, 2018. (*Id.*, ¶ 31, Ex. W.) In all events, these determinations were for the presiding judge in the first instance, who has not yet addressed the reassignment of the remanded 2010 Action and 2012 Action. Accordingly, it was far from obvious that the 2010 Action and 2012 Action would necessarily be reassigned to Department 304 of this Court.

At bottom, the filing of a Section 170.6 challenge divests the challenged judge of jurisdiction to hold further proceedings in the case, other than to inquire into the timeliness of the motion. *See McCartney v. Comm'n On Judicial Qualifications*, 12 Cal. 3d 512, 531-32 (1974), *overruled on other grounds by Spruance v. Comm'n On Judicial Qualifications*, 13 Cal. 3d 778 (1975). When making that inquiry, the Court must broadly construe Section 170.6 in favor of allowing the challenge, and a challenge should be denied only if the statute absolutely forbids it. *Stephens v. Super. Court (Stephens)*, 96 Cal. App. 4th 54, 61-62 (2002). MWD's Motion was timely based on the plain language of Section 170.6(a)(2) *and* published Court of Appeal precedent.

The Court may revoke its order and enter a new order granting the Motion under either (a) its inherent power to make its orders conform to law and justice pursuant to Code of Civil Procedure Section 128(a)(8) or (b) its authority to reconsider and change an order under Code of Civil Procedure Section 1008. On either basis, the Court should grant this Ex Parte Application,

[2] In addition to the 2010 and 2012 Actions, SDCWA challenged MWD rates and charges in cases filed in 2014, 2016 and 2017. *See San Diego County Water Authority v. Metropolitan Water District of Southern California, et al.*, Superior Court of the City and County of San Francisco Case Nos. CPF-14-514004 (the "2014 Action"), CPF-16-515282 (the "2016 Action"); CGC-17-563350 (the "2017 Action").

revoke its Order of March 16, 2018, and enter a new order granting MWD's timely Motion for Peremptory Disqualification.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In June 2010, SDCWA filed litigation to challenge rates adopted by MWD's Board of Directors in April 2010 (the "2010 Action"). (Lee Decl., ¶ 10.) Since then, SDCWA has filed a new case each time MWD's Board has adopted rates and/or charges—in 2012, 2014, 2016 and 2017 (the "2012, 2014, 2016 and 2017 Actions," respectively). (*Id.*, ¶¶ 10, 17-31.) In 2016 and 2017, SDCWA also challenged charges that they did not challenge in the prior cases. These cases involve certain common questions of fact and law, and the parties have agreed that the outcome of the 2010 and 2012 Actions will necessarily impact the subsequent litigation. The 2016 and 2017 Actions also have many differences. SDCWA has filed notices of related cases in all five actions, (*id.*, ¶¶ 18-23, Exs. K-P), and the parties have entered a series of stipulations staying the 2014, 2016 and 2017 Actions pending the outcome of the 2010 and 2012 Actions (*id.*, ¶¶ 24, 28, 30, Exs. Q, T, V). Those stipulations and the Court's treatment of each case strongly suggest that all five cases should ultimately be assigned to Judge Wiss. Indeed, a sixth case involving a Public Records Act dispute brought by SDCWA against MWD, initially assigned to Department 302, was transferred to Judge Wiss on the Court's own motion. (*Id.*, ¶ 17.)

A. The 2010 and 2012 Actions

SDCWA filed the 2010 Action in June 2010, challenging the rates MWD adopted in April 2010 for the years 2011 and 2012. SDCWA later amended the 2010 Petition/Complaint to add a cause of action for breach of an Exchange Agreement between the parties that contains a price term based on the transportation components of MWD's full service rate, as well as other causes of action separate and distinct from the rate challenge. In April 2012, MWD, consistent with its biennial practice, adopted its rates for 2013 and 2014. SDCWA then filed the 2012 Action, asserting the same allegations regarding the rates MWD adopted in April 2012, along with a "dry year peaking" rate challenge. The 2012 Petition/Complaint also alleged another claim for breach of the Exchange Agreement. The 2010 and 2012 Actions were litigated together before Judge Karnow. (*Id.*, ¶ 10.)

On April 24, 2014, the Court issued a Statement of Decision in the 2010 and 2012 Actions, ruling that there was not substantial evidence in the 2010 and 2012 administrative records to support MWD's allocation of 100% of its State Water Project transportation costs and 100% of its water stewardship costs to transportation, and rejecting the "dry year peaking" claim. The 2010 and 2012 Actions continued to a Phase II trial, addressing SDCWA's breach of contract claims and a "preferential rights" claim. A final judgment was entered on November 18, 2015. The Court also issued a peremptory writ of mandate, granted in the judgment, which commanded MWD to enact transportation and wheeling rates "in the future" without doing "the things th[e] Court held were illegal and/or unconstitutional in the Court's April 24, 2014 Statement of Decision." Lastly, the Court partially granted SDCWA's motion for attorneys' fees and issued an order awarding fees on March 24, 2016. (*Id.*, ¶ 11.)

On December 4, 2015, MWD filed a notice of appeal as to the final judgment (No. A146901). On April 12, 2016, MWD filed a separate notice of appeal as to the attorneys' fee award (No. A148266). (*Id.*, ¶ 5.) On June 21, 2017, the First District Court of Appeal reversed the judgment and the attorneys' fees award, holding that "it is necessary to remand the matter to the trial court for further proceedings consistent with [its] opinion." (*Id.*, ¶¶ 6-7, Appellate Opinion at 2.) The Court of Appeal remanded the action to the trial court for "redetermination of damages based solely on overcharges from inclusion of the water stewardship rate" (*id.* at 33), "entry of declaratory relief on the Rate Structure Integrity clause, redetermination of the prevailing party, and other proceedings consistent with the views expressed in [its] opinion" (*id.* at 47-48).

On September 27, 2017, the California Supreme Court denied SDCWA's Petition for Review.[3] The Court of Appeal issued a remittitur to the Superior Court on October 24, 2017. (Lee Decl., ¶ 8.) On October 25, 2017, the remittitur was filed in the 2012 Action. (*Id.*, ¶ 13, Ex. H.) It does not appear on the 2010 Action docket. (*Id.*, ¶ 13, Ex. G.) To date, neither MWD nor its counsel has received any notice that the 2010 and 2012 remand Actions were assigned to Judge Karnow or any other judge; no record of notice of assignment appears in the docket of either case.

[3] *See San Diego County Water Authority v. Metropolitan Water District of Southern California, et al., 12 Cal. App. 5th 1124 (2017); modified and reh'g denied (July 18, 2017); and review denied (Sept. 27, 2017).* (Lee Decl., ¶ 8.)

(*Id.*, ¶ 13.)

On March 12, 2018, without prior consultation with MWD, counsel for SDCWA filed a letter to Judge Karnow requesting that a case management conference be set in the 2010 and 2012 remand Actions. (*Id.*, ¶¶ 9, 12.) MWD then filed the Motion out of an abundance of caution prior to any notice of judicial assignment. (*Id.*, ¶ 15.) The Court entered its order striking the Motion on March 16, 2018. (*Id.*) This Ex Parte Application followed.

B. The 2014 Action

In April 2014, MWD adopted its rates for 2015 and 2016. In May 2014, SDCWA challenged those rates by filing the 2014 Action, asserting the same allegations as in the earlier cases, but based on the 2014 administrative record. SDCWA also asserted the same breach of Exchange Agreement claim as in the 2010 and 2012 Actions. The parties agreed that the 2014 Action was related to the 2010 and 2012 Actions and should be stayed, and the Court ordered the stay. (*Id.*, ¶ 24, Ex. Q.)

Following entry of the judgment and writ of mandate in the 2010 and 2012 Actions, in Dedcember 2015, the Court denied SDCWA's attempt to partially lift the stipulated stay in the 2014 Action to require MWD to prepare and lodge the administrative record for that case, concluding that "the result of the pending appeal may moot at [sic] some issues, affecting the scope of the administrative record which [MWD] would assemble for the new case." (*Id.*, ¶ 25, Ex. R at 2.) The parties and this Court approached the 2014 Action as closely related to the earlier-filed cases such that their outcomes are interdependent. All of the cases (2010 through 2017) should be litigated in the same court.

C. The 2016 Action

Consistent with its biennial process, MWD adopted its rates and charges in April 2016 for 2017 and 2018. SDCWA challenged those rates and charges by filing the 2016 Action later that same month. The 2016 Petition/Complaint alleges that the 2017 and 2018 rates are unlawful for the same reasons that SDCWA has challenged the rates in the 2010, 2012 and 2014 Actions. The 2016 Petition/Complaint also adds different challenges to MWD's rates, and new challenges to MWD's charges, budget, financial forecasting and various practices, which were not asserted in

prior cases. The 2016 Petition/Complaint also included the same breach of Exchange Agreement claim made in the 2010-2014 Actions, and a new breach of Exchange Agreement claim. (*Id.*, ¶ 26.)

On October 6, 2016, SDCWA filed an Application for Complex Designation and Assignment for all Purposes to Department 304 (Judge Karnow). MWD then exercised its statutory right to peremptorily challenge Judge Karnow from presiding over the 2016 Action, which the Court granted. The Honorable Mary E. Wiss then designated the 2016 Action complex and singly assigned it for all purposes to herself in Department 305. (*Id.*, ¶ 27, Ex. S.)

On November 10, 2016, the parties stipulated to stay the 2016 Action, and the Court entered an order staying the case. (*Id.*, ¶ 28, Ex. T.) The 2016 Action is currently set for a case management conference before Judge Wiss on April 27, 2018. (*Id.*, ¶ 29, Ex. U.)

D. The 2017 Action

On June 9, 2017, SDCWA filed a Petition/Complaint challenging the legality of charges adopted by MWD in April and July 2017. The parties agreed that the 2017 Action should be transferred to San Francisco Superior Court and entered a stipulation to that effect in October 2017, which was entered as an order on October 27, 2017. (*Id.*, ¶ 30, Ex. V.) The 2017 Action was later transferred and filed in San Francisco Superior Court. A case management conference in the 2017 Action is set for May 30, 2018, before the Presiding Judge in Department 610. Just as the 2017 Action has been scheduled for a conference before the Presiding Judge, MWD anticipated that the remanded 2010 and 2012 Actions also would be scheduled for a case management conference in Department 610. (*Id.*, ¶ 31, Ex. W.)

III. EX PARTE RELIEF IS NECESSARY.

Ex parte relief is warranted upon an affirmative showing of "irreparable harm, immediate danger, or any other statutory basis for granting ex parte relief." Cal. Rules of Court, rule 3.1202(c). Ex parte relief is warranted here for at least three reasons.

First, MWD's deadline to file a petition for writ of mandate with the Court of Appeal is March 26, 2018. *See* Cal. Code Civ. Proc. § 170.3(d) ("The petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court's order determining the

question of disqualification."). The Court issued its Order at 4:29 pm on Friday, March 16, 2018. MWD attempted to reach the Court telephonically on Monday, March 19, 2018, and Tuesday, March 20, 2018, to schedule an ex parte hearing. (Lee Decl., ¶ 16.) On March 20, 2018, the Court informed MWD counsel that the first available time for an ex parte hearing before Judge Karnow would be Friday, March 23, 2018, at 11:30 a.m. MWD reserved the hearing date, which will be MWD's first and only opportunity to be heard prior to its deadline to file a writ petition. (*Id.*)

Second, as the Court acknowledged in its Order, "the parties have not had the opportunity to make a legal argument on these issues." (Order at 2.) Therefore, the ex parte hearing will be the first and only opportunity for the parties to present legal argument to this Court prior to MWD seeking a writ. It is in the parties' and the Court's interest to resolve the instant dispute efficiently by revoking the Order and issuing an Order granting the Motion at the ex parte hearing.

Third, the relief proposed by the Court in the Order—a case management conference and/or a motion to reconsider—would not sufficiently protect MWD's important Section 170.6 rights. (*See* Order at 2.) The dates proposed for that conference—April 2, 6, 9, 10 or 11, 2018—are after MWD's deadline to seek relief from the Court of Appeal. (Lee Decl., ¶ 14.) A regularly noticed motion to reconsider could also only be heard well after MWD's deadline.

Requiring MWD to resolve the instant dispute through either the case management process or a noticed motion for reconsideration would have the practical effect of permanently extinguishing MWD's right to seek writ review to protect its rights under Section 170.6(a)(2). *See* Cal. Rules of Court, rule 3.1202(c) (ex parte relief warranted to avoid irreparable harm); *Fry v. Super. Court*, 222 Cal. App. 4th 475, 481 (2013) ("'Courts must refrain from any tactic or maneuver that has the practical effect of diminishing' the important right to exercise the [Section 170.6] challenge." (quoting *Hemingway v. Superior Court (People)*, 122 Cal. App. 4th 1148, 1158 (2004))). Ex parte relief is therefore warranted and MWD's Application should be granted.

IV. MWD'S MOTION FOR PEREMPTORY DISQUALIFICATION WAS TIMELY.

The filing of a Section 170.6 challenge divests the challenged judge of jurisdiction to hold further proceedings in the case, other than to inquire into the timeliness of the motion. *See McCartney*, 12 Cal. 3d at 531-32 ("once an affidavit of prejudice has been filed under section

170.6, the court has no jurisdiction to hold further proceedings in the matter except to inquire into the timeliness of the affidavit or its technical sufficiency under the statute."). When making that inquiry, the Court should broadly construe Section 170.6 in favor of allowing the challenge, and a challenge should be denied only if the statute absolutely forbids it. *Stephens*, 96 Cal. App. 4th at 61-62 ("The right to exercise a peremptory challenge under Code of Civil Procedure section 170.6 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."); *see also Hemingway v. Super. Court (People)*, 122 Cal. App. 4th 1148, 1158 (2004) (courts must refrain from any tactic or maneuver that has the practical effect of diminishing this important right); *Nissan Motor Corp. v. Super. Court (Bower)*, 6 Cal. App. 4th 150, 154 (1992) (peremptory challenge is an extraordinary right that should be liberally construed to promote justice).

The rule in favor of Section 170.6's broad application is particularly important when a litigant exercises its Section 170.6 rights on remand. In 1985, the Legislature amended Section 170.6 to address the very situation at issue in this case: reassignment of a case to the same judge whose decision has just been reversed on appeal. "The 1985 amendment was enacted at a time when it was common to reassign the trial judge to the remanded case" in order to address potential bias against successful appellants when the former trial judge is "reassigned to the case." *Paterno v. Super. Court (California)*, 123 Cal. App. 4th 548, 556 (2004). Cases following the 1985 amendment establish that a trial court abuses its discretion when it contravenes the purpose of the Legislature's amendments or extinguishes a party's disqualification right through an impermissibly narrow reading of the statute. *See, e.g., Stubblefield Constr. Co. v. Super. Court (San Bernardino)*, 81 Cal. App. 4th 762, 765 (2000) ("Given the policy reasons for the 1985 amendments to Code of Civil Procedure section 170.6, it is plain that Stubblefield had the right to disqualify Judge Warner.").

In sum, it is well settled that the Court's jurisdiction is limited to a timeliness determination, which must be made with an eye towards preserving MWD's Section 170.6 rights unless the statute clearly provides that the Motion was untimely. Here, the converse is true—under the plain language of the statute, the Motion was timely.

A. The Motion was timely based on the plain language of Section 170.6.

Any reasonable reading of Section 170.6(a)(2) compels the conclusion that MWD's Motion was timely and should be granted:

> A motion under this paragraph may be made following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, **if the trial judge in the prior proceeding is assigned** to conduct a new trial on the matter. Notwithstanding paragraph (4), the party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a motion under this section regardless of whether that party or side has previously done so. **The motion shall be made within 60 days after the party or the party's attorney has been notified of the assignment**.

Cal. Code Civ. Proc. § 170.6 (emphasis added).

Section 170.6 plainly permits a disqualification motion to be filed after remand, (1) "***if***" the original trial judge is also assigned to the remand proceedings, and (2) within sixty days "***after***" notice of assignment. *Id.* When a statute is clear on its face—as is the case here—the analysis stops, and rules of construction cannot be applied. *See Foxgate Homeowners' Ass'n, Inc.*, 26 Cal. 4th at 14 (When language "is clear and unambiguous, judicial construction of the statutes is not permitted unless they cannot be applied according to their terms or doing so would lead to absurd results, thereby violating the presumed intent of the Legislature."); *MacIsaac*, 134 Cal. App. 4th at 1082 ("In the first step of the interpretive process we look to the words of the statute themselves."). Here, Section 170.6 is clear and unambiguous: the motion shall be made "within 60 days after the party or the party's attorney has been notified of the assignment,"—not when the party *could have* known or *should have* known or even when it was "obvious" what the assignment might be. MWD's Motion was timely as a matter of law.

The Court of Appeal has decided this issue. In *Ghaffarpour v. Superior Court (Commerce Plaza Hotel)*, 202 Cal. App. 4th 1463 (2012) remittitur issued on August 26, 2010, and on June 3, 2011—almost a year later—plaintiffs' counsel contacted the clerk of the presiding judge to inquire about case status and was informed, for the first time, that the matter would be reassigned to the initial trial judge. *Id* at 1467. One week later, plaintiffs filed a Section 170.6 motion,

which—like the instant case—the court denied as untimely based on the date remittitur issued. *Id.* The Court of Appeal issued a writ directing the trial court to vacate its denial order, concluding:

> the time to file a peremptory challenge pursuant to section 170.6, subdivision (a)(2) begins when the party who filed the appeal has been notified of the assignment, and does *not* begin from the date of issuance of the remittitur by the Court of Appeal.

Id. at 1471 (emphasis added); *accord Hendershot v. Super. Court (Pac. Sw. Investments, Inc.)*, 20 Cal. App. 4th 860, 863, 865 (1993) (writ directed court to vacate order rejecting 170.6 challenge, and to enter a new order accepting the challenge because timeliness is measured from notification of assignment). Similarly, this Court should revoke or vacate its prior Order and issue a new Order granting MWD's Motion.

The Court of Appeal's reasoning in *Ghaffarpour* applies even more clearly here. In *Ghaffarpour*, the lower court denied the disqualification motion based on a former local rule of Los Angeles County Superior Court providing that cases, after reversal on appeal and remand, "shall be reassigned" to the last assigned judge and that "[t]he time for filing any motion under Code of Civil Procedure section 170.6, after reversal and remand, shall begin to run from the date of issuance of the remittitur by the court of appeal." *Ghaffarpour*, 202 Cal. App. 4th at 1469-70. The Court of Appeal correctly reasoned that any superior court rule in conflict with the Legislature's statutory scheme regarding motions to disqualify judges is void. *Id.* at 1468 (citing *Elkins v. Super. Court*, 41 Cal. 4th 1337, 1352 (2007)). The Court of Appeal then rejected a codified policy of measuring the deadline to disqualify a judge based on the date of remittitur. Here, there is not even a codified rule. It follows that even if the San Francisco Superior Court had an unwritten policy of assigning remanded cases to the same judge—of which MWD has no knowledge—it would be void and could not extinguish MWD's Section 170.6 rights.

The respondents in *Ghaffarpour* also argued that the former local rule should be enforced because Section 170.6 does not specify the "mode" of notification and that remittitur constructively notifies parties that the previous judge would be reassigned. *Id.* at 1470. The Court of Appeal flatly rejected that position, reasoning that "[t]he parties and their counsel cannot

assume a case will be returned to the last assigned judge . . . because the presiding judge of the superior court has the discretion to override the local rule" and the "duty to reassign cases to different judges in appropriate circumstances." *Id.* at 1470-71 (citing Cal. Rules of Court, rules 10.603(b)(1) and 10.603(c)(1)). "California Rules of Court, rule 10.603(b)(2) provides that '[n]o local rule or policy may limit the authority of the presiding judge . . .' to reassign cases." *Id.* at 1471 (quoting Cal. Rules of Court, rule 10.603(b)(2)). In light of the presiding judge's discretion to reassign cases regardless of local rules, the former Los Angeles local rule had to be interpreted as only a general policy to return cases to the last assigned judge: "The parties and their counsel cannot be sure if this general policy will be followed in any particular case. Former Local Rule 7.5(f) therefore does not notify the parties of the assignment of the judge within the meaning of section 170.6, subdivision (a)(2)." *Id.*

Similarly, even if San Francisco Superior Court had such a general policy, it would not constitute notice within the meaning of Section 170.6. If the parties in *Ghaffarpour* could not "assume that a case will be returned to the last assigned judge"—even despite a local rule stating that it would be—MWD has an even stronger basis to *not assume* that this case would be returned to Judge Karnow, as this court has no similar local rule.[4]

Ghaffapour makes irrelevant any inquiry here into whether it should have been "obvious" to MWD that the case would be assigned to Judge Karnow after remand, and reduces the issue of timeliness to whether MWD received actual notice of such a reassignment. Because MWD did not receive such notice, the Court should grant MWD's Application and Motion.

B. <u>The Court applied an incorrect legal standard.</u>

The Order relied on an incorrect standard that is not supported by either statutory text or Court of Appeal precedent: "The 170.6 challenge must be provided within 60 days of ***knowing*** of the assignment." (Order at 1 [emphasis added].) The Court then phrased the issue as "whether it

[4] Further, here the two related cases that SDCWA filed during the appellate proceedings in the 2010 and 2012 Actions were not assigned to Judge Karnow. The 2016 Action is assigned to Judge Wiss and the 2017 Action is pending in the Presiding Judge's courtroom, with the parties having agreed the 2017 Action should be assigned to Judge Wiss and with upcoming case management conferences in these cases. MWD had a strong basis to assume that when the Presiding Judge did assign the remand of the 2010 and 2012 Actions, it would be to Judge Wiss.

was ***obvious*** that the case would be handled by [Judge Karnow] on remand, or whether it was ***apparent*** only after e.g., [Judge Karnow] was (or will be) in some fashion formally assigned (or re-assigned to it." (*Id.* [emphasis added].) But neither inquiry is correct, as Section 170.6 does not include a provision for constructive notice, and the Court cannot read such a requirement into the statute. *See Hudson v. Super. Court (People)*, 7 Cal. App. 5th 1165, 1172 (2017), *review denied* (Apr. 26, 2017) ("Courts may not insert words or add provisions to an unambiguous statute."). The Court should therefore revoke its prior Order.

To the extent the Court applied a "knowing" or knowledge of assignment standard, that too was legal error. As detailed above, the plain language of Section 170.6 sets "notice" as the triggering event that causes the statutory period to begin to run. [5] The Court should also revoke its prior Order for this reason.

V. THE COURT HAS JURISDICTION TO REVOKE ITS PRIOR ORDER

The Court has jurisdiction to correct its order *sua sponte* to conform to law and justice. Code of Civil Procedure Section 128(a)(8) provides that "Every court shall have the power to do all of the following: . . . To amend and control its process and orders so as to make them conform to law and justice." *See Schachter v. Citigroup, Inc.*, 126 Cal. App. 4th 726, 739 (2005) (By enacting reconsideration statutes, the "Legislature did not, however, attempt to limit the court's sua sponte authority."); *see also Le Francois v. Goel*, 35 Cal. 4th 1094, 1108 (2005) (the trial court may on its own motion reconsider one of its rulings). The Court should exercise that power here to correct its error and revoke its prior ruling and grant the Motion.

As a separate basis for relief, MWD may seek correction of the error under Code of Civil Procedure Section 1008, which permits a party who has made application for an order that has

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[5] The Legislature understands how to set knowledge as a standard, and it did so when drafting the 10-day/5-day rule for peremptory disqualification in the same statute. See Cal. Code Civ. Proc. § 170.6 ("If the judge, other than a judge assigned to the case for all purposes, court commissioner, or referee assigned to, or who is scheduled to try, the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least 5 days before that date." (emphasis added)). The Legislature's decision to impose distinct standards specific to each type of disqualification must be given effect. See id. § 1858 ("In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."); Parris v. Zolin, 12 Cal. 4th 839, 845 (1996) ("[A] construction must be adopted which will give effect to all provisions of the statute.").

been refused in whole or part to make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order based upon "new or different facts, circumstances, or law." *Id.* In *Monarch Healthcare v. Superior Court*, 78 Cal. App. 4th 1282 (2000), the trial court's *sua sponte* injection of a new issue that was not briefed by the parties before the court's ruling constitutes "different circumstances" under Section 1008. *Monarch Healthcare*, 8 Cal. App. 4th at 1286-87 ("[F]undamental principles of due process also call for those with an interest in the matter to have notice and the opportunity to be heard, so that the ensuing order does not issue like a 'bolt from the blue out of the trial judge's chambers.'" (quoting *Campisi v. Super. Court*, 17 Cal. App. 4th 1833, 1839 (1993))).[6] As the Court noted in its Order, "the parties have not had the opportunity to make a legal argument on these issues, and I am happy to entertain a motion for reconsideration." Based upon the Court's reliance on an incorrect issue and legal standard, MWD meets the "special or different circumstances" prong of Section 1008, reconsideration should be granted, the Order revoked and a new order entered granting the Motion.

VI. CONCLUSION

MWD filed its Motion for Peremptory Disqualification on March 15, 2018, which divested the Court of jurisdiction to hold further proceedings in the case, other than to inquire into the timeliness of the Motion. For all of the reasons discussed above, MWD's Motion was timely. MWD respectfully requests that this Court (1) grant this Ex Parte Application; (2) revoke its prior Order; and (3) enter a new order granting the Motion for Disqualification.

Dated: March 22, 2018

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[6] In *Monarch Healthcare*, Monarch's role in the litigation changed Monarch was initially subpoenaed as a nonparty and produced documents in response to the subpoena without filing a motion to quash. 78 Cal. App. 4th at 1285. Monarch was later added as a defendant and plaintiff moved to compel further production. The Court, on its own accord, ordered the production because Monarch was a nonparty when the subpoena issued and therefore, could only object by a motion to quash. *Id.* Monarch never had an opportunity to brief that legal issue.