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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 12, 2016 TO BE EFFECTIVE JANUARY 1, 2017 AND JANUARY 1, 2018; AND DOES 1-10, Inclusive,

Respondents and Defendants.

Case No.: CPF-16-515282

RESPONDENT AND DEFENDANT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR PEREMPTORY DISQUALIFICATION PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 170.6

Department 304
Hon. Curtis E.A. Karnow

Complaint Filed: April 13, 2016
Trial Date: None Set Yet

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant/Respondent Metropolitan Water District of Southern California ("MWD") submits this Memorandum of Points and Authorities in support of its Motion for Peremptory Disqualification Pursuant to Code of Civil Procedure section 170.6 (the "Motion").

I. RELEVANT BACKGROUND

This action was filed by Plaintiff/Petitioner San Diego County Water Authority ("SDCWA") on April 13, 2016, in the Superior Court of the State of California, County of Los Angeles ("2016 Action"). The 2016 Action was transferred to the Superior Court of the State of California, City and County of San Francisco, on September 27, 2016. On October 6, 2016, SDCWA filed its Application for Complex Designation and Assignment for All Purposes to the Honorable Curtis E.A. Karnow in Department 304 ("Application"). MWD now moves pursuant to Code of Civil Procedure section 170.6 to disqualify Judge Karnow. Having been filed before a hearing on SDCWA's Application or any other substantive proceedings in the 2016 Action, the Motion is timely.

SDCWA's Application indicates it intends to assert that the 2016 Action is a "mere continuation" of the prior litigation between the parties and thus that MWD's section 170.6 rights are unavailable. (Declaration of Phillip R. Kaplan ["Kaplan Decl."], Ex. A [Application 1:13-15].) Indeed, the first sentence of the Background section of SDCWA's Application reads: "This case is a continuation of the 2010, 2012 and 2014 cases . . . ." Out of an abundance of caution, therefore, MWD addresses this anticipated argument here. SDCWA is wrong; the 2016 Action is not a "mere continuation" of the prior litigation, within the meaning of case law evaluating the timeliness of a section 170.6 challenge. (*Id.*) This case is separate and distinct from the prior cases previously litigated in Judge Karnow's Court and now on appeal (the "2010 and 2012 Actions"), or currently stayed in Judge Karnow's Court (the "2014 Action").

The 2016 Action advances a set of new challenges by SDCWA arising out of MWD's adoption of water rates and charges for 2017 and 2018, as well as new challenges to other MWD actions. Part of the 2016 Action asserts the same legal claims that are now on appeal with respect to the allocation of certain costs to MWD's Transportation Rates and wheeling rate, but as

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applied to MWD's Transportation Rates and wheeling rate for 2017 and 2018. The administrative record for these claims is separate and different than the records in prior cases. In addition, the 2016 Action asserts several entirely new claims that have never been litigated before, including with respect to a variety of MWD actions unrelated to rate-setting and involving facts never previously at issue. The administrative record as to this significant portion of the 2016 Action will be entirely new and different from the records in the prior cases. Moreover, SDCWA's pleading in the 2016 Action is not even set yet. Since April 2016, SDCWA has advised of its intention to amend the Petition/Complaint in the 2016 Action to add still other new and different claims, but it has not yet done so. Because the "mere continuation" exception does not apply here, MWD's challenge is timely and must be granted.

II. APPLICABLE LEGAL STANDARDS

A. Liberal Construction In Favor of the Right to Challenge

A party's statutory right to peremptorily challenge a judge exists in every case and is not extinguished merely because parties in an ongoing business relationship have a history of litigation. Nor is it waived when parties or the Court utilize statutory rules of convenience to relate or stay cases for case management purposes. The statute allowing a peremptory challenge should be liberally construed in favor of allowing a challenge, and a challenge should only be denied if the statute absolutely forbids it. *Stephens v. Super. Court (Stephens)*, 96 Cal. App. 4th 54, 61-62 (2002) ("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) (the right to peremptorily challenge a judicial assignment is an extraordinary right that should be liberally construed to promote justice).

B. Challenge Operates to Divest Jurisdiction

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) ("[T]he rule has developed that, 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."). A party may seek to disqualify a judge from hearing any matter involving a contested issue of law or fact. Code Civ. Proc. § 170.6(a)(1). Although a section 170.6 motion may be made prior to a particular hearing, a disqualification deprives the judge of jurisdiction in any further proceedings in the case that involve a contested issue of fact or law. *See Brown v. Super. Court (14011 Ventura Boulevard Corp.)*, 124 Cal. App. 3d 1059, 1060-61 (1981) (judge who had been disqualified prior to hearing on motion for leave to intervene could not hear later-filed demurrer). Because MWD's challenge is timely and properly made, the 2016 Action must be reassigned to another judge "without any further act or proof." *See* Code Civ. Proc. § 170.6(a)(3).

III. MWD'S MOTION IS TIMELY.

Under the general rule, a peremptory challenge is timely if it is made before trial commences. Code Civ. Proc. § 170.6(a)(2). A peremptory challenge to a judge assigned to preside over a hearing, but not trial, must be made no later than commencement of the hearing. *Id.* Conversely, a challenge is untimely if the challenged judge has made a determination of contested fact issues related to the merits. *Id.* This Motion is timely because MWD filed it prior to the hearing on SDCWA's Application and before Judge Karnow decided any issue of contested fact related to the merits in the case. Indeed, SDCWA's Application would be Department 304's first contact with the 2016 Action. MWD's Motion must be granted and the case must be assigned to a new department and judge.

As noted above, MWD anticipates from SDCWA's Application that SDCWA will characterize the Motion as untimely on the alleged ground that the instant lawsuit is a mere continuation of the 2010 and 2012 Actions in which Judge Karnow decided contested fact issues related to the merits, and the 2014 Action that was stayed at the outset.[1] It is not. The 2016

[1] Whether the 2016 Action is a continuation of the 2014 Action is immaterial to the timeliness of

Action involves a distinct set of facts and alleges different causes of action than SDCWA's prior lawsuits against MWD.

In *Jacobs v. Superior Court (Jacobs)*, 53 Cal. 2d 187 (1959), the Supreme Court of California carved out a ***narrow*** exception to a party's peremptory disqualification right for cases that are ***mere*** continuations of previous cases. *See id.* at 191. This continuation rule is necessarily narrow because each side is entitled by statute to one peremptory challenge in each and every action, and therefore, extinguishing a party's disqualification right in one action does not extinguish that right in any other action—even similar litigation between the same parties. *See generally Home Ins. Co. v. Super. Court (Montrose Chem. Corp. of Cal.)*, 34 Cal. 4th 1025, 1033 n.4 (2005). Accordingly, in order for the *Jacobs* rule to defeat MWD's section 170.6 motion, San Diego must establish that the 2016 Action is essentially part of the same case as its earlier litigation.

The *Jacobs* continuation rule does not apply here. This lawsuit is not a continuation of SDCWA's previous cases. The previous cases challenged the allocation of certain costs to MWD's Transportation Rates and wheeling rate, based on the administrative records in those cases. The decisions in the 2010 and 2012 Actions that there was not sufficient evidence in the administrative records to support the allocations does not, and cannot, inform the sufficiency of future administrative records. While part of the 2016 Action asserts the same legal claims as to allocation of costs to Transportation Rates and the wheeling rate, applied to MWD's 2017 and 2018 rates, the supporting administrative record is different and has never been adjudicated.

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the instant Motion because Judge Karnow made no determination of contested fact related to the merits in the 2014 Action. Instead, the 2014 Action was designated complex, assigned to Judge Karnow and stayed—all by stipulation of the parties. Judge Karnow's consideration and rejection of the SDCWA's later motion to partially lift the stay did not decide any contested fact related to the merits of the case. Therefore, MWD has not exhausted its rights under section 170.6 with respect to the 2014 Action. Nevertheless, in its pending Application in the 2016 Action, SDCWA portrays MWD's non-opposition to relation of the cases and agreement to stay the 2014 Action as concessions that the cases are all continuations of the original 2010 lawsuit. MWD has made no such concession. While the parties and the Court have utilized statutory rules of convenience such as relating the cases and staying the 2014 Action for case management purposes, MWD's rights under section 170.6 are not merely a function of case management. *Bravo v. Super. Court (Cty. of Los Angeles)*, 149 Cal. App. 4th 1489, 1494 (2007) ("The fact that the cases are related does not resolve the issue of whether the second case is a continuation of the first case for purposes of section 170.6.") To the contrary, they implicate an important statutory right that courts must protect and liberally construe in favor of allowing disqualification.

Therefore, not even that portion of the 2016 Action is a continuation. But the 2016 Action also contains several new claims that have never been previously litigated and constitute an entirely new case, involving an entirely new and extensive administrative record. The 2016 Action asserts different claims with respect to other rates and charges that were never previously challenged, on grounds wholly different than the allocation between supply versus transportation (*see* section II.B, *infra*); it newly challenges various financial matters spanning years, such as MWD's budgeting practices, the amount and nature of MWD's collection and expenditure of funds going back at least five years, and MWD's financial forecasting for the next ten years; and alleges that MWD has deprived SDCWA of various procedural rights. A significant part of the 2016 Action is wholly different than any of the prior cases.

A. No part of the 2016 Action, including the portion of the 2016 Action that challenges the allocation of certain costs to transportation, is a continuation of prior cases.

Under the *Jacobs* continuation rule, a party's statutory right to challenge a judicial assignment is not barred merely because parties have litigated similar claims against one another in prior lawsuits before the same judge. *See Pickett v. Super. Court (99¢ Only Stores)*, 203 Cal. App. 4th 887, 893 (2012) ("To conclude that one action is a continuation of another requires more than a simple determination that the two actions involve similar parties litigating similar claims."); *Nissan Motor Corp.*, 6 Cal. App. 4th at 155 ("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.") As explained above, *Jacobs* and its progeny require a much closer connection between cases for a party to lose its extraordinary right of disqualification—the cases must be one and the same in that the latter action is a subsequent hearing in the same proceedings as the first case.

The cases being compared here, notwithstanding the existence of common legal issues, are not the same. SDWCA's cases each (in part) involve MWD's allocation of certain costs to transportation based on the administrative record for a particular rate-setting year. The sufficiency of the administrative record to support MWD's allocation in one year cannot be imputed to the administrative record for a subsequent year. They are separate records that require

separate adjudication. More specifically, SDCWA's 2010, 2012 and 2014 Actions challenge the allocation of certain costs (State Water Project transportation costs and MWD's demand management program costs) to MWD's Transportation Rates and wheeling rate, based on the administrative records in those cases. The Court's decision in the 2010 and 2012 Actions was that there was not sufficient evidence in *those* administrative records to support the allocations. That decision does not, and cannot, inform the sufficiency of future administrative records. *Cf Hanford v. Super. Court (GWF Power Syss.)*, 208 Cal. App. 3d 580, 592-93 (1989) (even where issues raised by the second action turn on issues litigated in the first, the cases are not continuations for section 170.6 purposes where the second suit litigates a "separate phenomenon" from the first).

While part of the 2016 Action asserts the same legal claims as to allocation of costs to Transportation Rates and the wheeling rate, applied to MWD's 2017 and 2018 rates, the supporting administrative record is different. The administrative record supporting the MWD Board's April 12, 2016 adoption of rates for 2017 and 2018 has never been adjudicated. The 2016 record includes the documents comprising the 2010 and 2012 records, but also far more documents, which are additional and different. Therefore, not even the portion of the 2016 Action that asserts the same legal claims as the prior cases, applied to the 2016 setting of rates for 2017 and 2018, is a continuation.

SDCWA posits in its Application that, given the similarities that do exist between the cases, assigning all of them to Judge Karnow would promote judicial efficiency. (Kaplan Decl., Ex. A [3:20-26].) Judicial efficiency is not a factor that impacts any analysis under section 170.6. SDCWA's cases are consecutive lawsuits involving a series of complex actions between sophisticated parties with an ongoing business relationship. California court have been clear on this point: "judicial efficiency is not to be fostered at the expense of a litigant's rights under section 170.6 to peremptorily challenge a judge." *Id.* at 593. *City of Hanford* involved a dispute between the City of Hanford, which had approved a coal-fueled generation plant, and the power company commissioned to build the plant. *Id.* at 583-84. A number of public agencies filed lawsuits, which were later consolidated, to enjoin construction of the plant. *Id.* at 584. The City

then reconsidered its approval and issued a moratorium on emissions from coal burning industries in order to prevent the construction it had previously approved. *Id.* at 585. The power company filed a counterclaim and a separate "mirror" action, alleging the same causes of action as the counterclaim, and a motion to disqualify the judge who had heard the consolidated actions from hearing the counterclaim. *Id.* In issuing a writ to compel the trial court to enter an order accepting the disqualification challenge, the Court of Appeal highlighted the complex nature of consecutive actions between the same parties. *Id.* at 593. The Court opined that "[a]ssigning 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." *Id.* Like in *City of Hanford*, the SDWCA cases involve a series of complex disputes between the same parties in an ongoing business relationship. The complexity of the disputes and the appeal of having a single judge adjudicate them, however, does not impact the analysis. *Accord Solberg v. Super. Court*, 19 Cal. 3d 182, 190 n.6 (1977); *Nissan Motor Corp.*, 6 Cal. App. 4th at 155. MWD's right to peremptorily challenge a judge takes priority over judicial efficiency concerns as a matter of law.

In the same vein, the fact that this portion of the 2016 Action may be similar enough to the prior cases to consider the cases to be related for case administration purposes is a different analysis that is not controlling here. The Court of Appeal has unequivocally held that a case is not a continuation of an earlier-filed case merely because the cases have been related. *Bravo v. Super. Court (Cty. of Los Angeles)*, 149 Cal. App. 4th 1489, 1494 (2007) ("The fact that the cases are related does not resolve the issue of whether the second case is a continuation of the first case for purposes of section 170.6.")[2]

[2] Similarly, the fact that MWD believes the 2016 Action should be stayed pending resolution of the appeal of the 2010 and 2012 Actions, and has asked SDCWA to stipulate to a stay, is different than the continuation analysis. The Court of Appeal's decision on the transportation allocation issues may moot those claims in this case, because if the Court of Appeal decides the 2010 and 2012 records were sufficient to support the allocations, the larger 2016 record necessarily supports it. The converse is not true: if the Court of Appeal finds the 2010 and 2012 records lacking, whether the larger 2016 record is sufficient remains a completely new question. Moreover, MWD's contention that the transportation allocation was validated by operation of law in 2002 (also an issue on appeal) does not change the fact that the 2016 record supporting that

Several recent Court of Appeal cases have further clarified that relatedness between cases is insufficient to trigger the continuation rule and defeat a peremptory challenge as untimely. In *NutraGenetics, LLC v. Superior Court (Cavenah)*, 179 Cal. App. 4th 213 (2009), the plaintiff filed two separate lawsuits—one against a company and one against its members. The second suit was assigned to a new judge after a successful peremptory challenge. The defendant filed a writ petition challenging the reassignment. Both suits involved the same employment relationship and alleged misconduct. However, the suits named different defendants, and the second suit alleged an additional cause of action for breach of an employment agreement. *Id.* at 250. The court denied the writ petition, reasoning that the cases were related, but the second action was not a continuation of the first because it was not a post-trial matter—*i.e.* it did not "arise out of" the first. *See id.* at 253, 257-58. The court explained:

> There is no doubt at all that [the cases] are related to each other. Everyone agrees . . . that [the prior action] "arises from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact" as [the second action]. But that is the standard for determining whether the cases are related, not for determining whether one case constitutes a continuation of another. This point was made in *Bravo*, which expressly held that "[t]he fact that the cases are related does not resolve the issue of whether the second case is a continuation of the first case for purposes of section 170.6."

Id. at 258 (quoting *Bravo*, 149 Cal. App. 4th at 1494.)

Whether the 2016 Action arose "from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact" as the 2010, 2012 or 2014 Actions is not controlling here. A case is not a continuation of a prior action unless it is part of the same litigation—relation is not enough. *See NutraGenetics, LLC*, 179 Cal. App. 4th at 257 ("From *Jacobs* and the ensuing line of cases, we perceive one salient point. All the cases applying the continuation rule to preclude a peremptory challenge in the second proceeding ***involve the same parties at a later stage of their litigation with each other, or they arise out of conduct in or orders made during the earlier proceeding***."

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allocation is a larger and more detailed record.

(emphasis in original)). There is no dispute that the instant case is related to SDCWA's earlier lawsuits. But it is not part of the same case, and therefore, is not a continuation of the earlier cases.

B. <u>A significant portion of the 2016 Action is entirely new and is certainly not a continuation of prior cases where such claims were never asserted</u>.

As detailed above, two cases can involve the same parties, the same type of factual allegations and the same legal issues without the later-filed action being a continuation of the first. *See Bravo*, 149 Cal. App. 4th at 1491, 1494. Here, the case for finding that the 2016 Action is not a continuation of the 2010, 2012 or 2014 Actions is even stronger because, as SDCWA has acknowledged, the 2016 Action involves numerous claims that were never asserted in the 2010, 2012 or 2014 pleadings, much less litigated. (*See* Kaplan Decl., Ex. A [2:19-21 (citing Complaint ¶¶ 11, 37-54, 62-75, 88-100)].) Whereas the prior cases challenged three Transportation Rates and the wheeling rate on the ground certain costs should not be allocated to transportation, the 2016 Action challenges these four rates on new and different grounds too, plus challenges for the first time and on new and different grounds the Tier 1 Supply Rate, the Tier 2 Supply Rate, the Treatment Charge, the Readiness-to Serve Charge, and the Capacity Charge and various other MWD practices and decisions. (*See, e.g.*, Petition/Complaint ¶¶ 5, 90.) The allegations asserted for the first time include:

- All of MWD's 2017 and 2018 rates and charges "are unlawful because they are part of a deliberate scheme to over-collect and spend revenues without ever accounting for the cost of service" (*See, e.g., id.* ¶¶ 9, 62-63);
- MWD "does not follow generally accepted industry practices to projecting [sic] its sales and revenue requirements" (*id.* ¶ 9);
- MWD "chooses to set its revenue requirement and rates and charges in such a manner that revenues will substantially exceed Metropolitan's actual costs of providing services in seven years out of ten" (*id.* ¶¶ 9, 64);

- "This intentional over-collection creates a pool of money–in the hundreds of millions of dollars–that Metropolitan treats like a 'windfall' that it may use for any purpose" (*id.* ¶¶ 9, 65);
- "Over the past five years alone, Metropolitan has collected $847 million more than its actual costs, which Metropolitan has spent on unbudgeted projects approved by the Board outside of Metropolitan's budget and rate-setting processes" (*id.* ¶¶ 9, 66);
- Because of MWD's budget-setting and revenue collection practices, each of MWD's rates is an unlawful tax (*id.* ¶ 9);
- MWD "misallocates its supply (including storage) costs because it has failed to determine and allocate those costs by customer class–refusing to distinguish or account for the varying service characteristics and demand patterns of its 26 member agency customers–or, according to the proportional benefit each member agency receives from Metropolitan water supplies" (*id.* ¶¶ 10, 70);
- MWD's "Tier 2 Supply Rate is a sham because it is based on such a high demand threshold that Metropolitan has no expectation that the Tier 2 Rate will be charged on any water sales" and is an illusory "artifice designed to disguise the true cost of serving the respective and varying needs of Metropolitan's 26 customer member agencies" (*id.* ¶ 71);
- MWD "failed to demonstrate that its Treatment Charge properly recovers the costs Metropolitan incurs for providing treated water, or that those costs have been properly allocated among Metropolitan's member agency customers" (*id.* ¶¶ 10, 72);
- MWD arbitrarily reduced its fixed Readiness-to-Serve Charge and Capacity Charge for 2017 and 2018, and those Charges should have been higher (*id.* ¶¶ 10, 73-75);

- MWD "is planning to impose property taxes at a level only authorized under the Metropolitan Water District Act as an action necessary to ensure its 'fiscal integrity'" (*id.* ¶¶ 10, 73);
- MWD defines its standby costs and uses the word "standby" inconsistently with the industry standard definition of providing an emergency water supply (*id.* ¶ 74); and
- MWD violated various alleged procedural requirements that were not the subject of any prior litigation (*id.* ¶¶ 11, 37-54, 95-100, Exs. F-R).

These numerous new allegations, which are unique to the 2016 Action and will necessitate a completely new, multi-year administrative record, firmly establish the 2016 Action as a separate lawsuit from SDCWA's prior lawsuits against MWD.

This case is not a continuation of any prior case for an additional reason not present in *Bravo*—it involves new and different causes of action than the prior cases. SDCWA alleges five causes of action in the Complaint: (1) writ of mandate regarding misallocation of costs in MWD's 2017 and 2018 transportation rates; (2) writ of mandate regarding over-collection and misallocation of MWD's supply rates; (3) writ of mandate regarding procedural violations; (4) declaratory relief regarding over-collection and misallocation of costs in MWD's 2017 and 2018 rates and charges, and procedural violations; and (5) determination of invalidity of MWD's 2017 and 2018 rates. In the 2010 and 2012 Actions which were litigated, and the 2014 Action which is stayed, SDCWA challenged only the allocation of certain costs to transportation (in addition to other claims that are not repeated in the 2016 Action, including those dismissed in MWD's favor). In those prior cases, SDCWA also alleged breach of contract based on the theory that this allocation automatically constituted a breach. Now, SDCWA alleges in its five causes of action numerous different and additional claims, as demonstrated in the bullets listed above. It has also promised to amend the Petition/Complaint to add more, apparently including one or more different contract breaches not previously litigated. (*See id.* ¶¶ 5, 18.)[3] SDCWA has filed a

[3] SDCWA has not provided MWD with any proposed amended Petition/Complaint, so MWD has been unable to stipulate to an amendment. MWD has also informed SDCWA that it believes it can amend as a matter of right. (Kaplan Decl. ¶ 6.)

Government Claim with MWD that includes two types of contract breach which have never before been litigated. (Kaplan Decl. ¶ 7, Ex. B.) The 2016 Action arose from ***different facts*** than the prior cases ***and*** it alleges ***different causes of action***. On this basis alone, the continuation rule does not apply and the Motion is timely.

C. The continuation rule only precludes a peremptory challenge when a case challenges a prior order or seeks a new order based on the fact set of a prior case.

The 2016 Action is also distinct from the cases that have applied the continuation rule to preclude a peremptory challenge in that those cases all involved plaintiffs who either sought modification of a prior order or issuance of a new order based on the fact set of a prior adjudication—*i.e.* when the second case actually arises out of the first. For instance, *Jacobs* involved a custody battle between a father and his children's maternal grandparents. *Jacobs*, 53 Cal. 2d at 189. The challenged judge had previously awarded custody to the maternal grandparents and then to the father in prior proceedings. *Id.* When the grandparents sought modification of the second custody order, they concurrently moved to disqualify the same judge from hearing the modification petition. *Id.* at 190. Their 170.6 motion was denied as untimely because the modification proceedings sought to alter the outcome of the earlier litigation and thus, were a continuation of the prior custody proceedings.

Jacobs and other cases in which the continuation rule barred a peremptory challenge also involved disputes that (unlike this case) by their very nature require ongoing enforcement in later stages of the same litigation such as modification of custody orders, creditors' actions to enforce a judgment and contempt proceedings. *See, e.g.*, *Nat'l Financial Lending v. Super. Court (Brewer Corp.)*, 222 Cal. App. 4th 262, 278-79 (2013) (creditor's motion to hold third party liable for failure to honor a notice of levy is a continuation of the proceedings that resulted in the judgment/levy which the creditor seeks to enforce); *McClenny v. Super. Court (Farmers and Merchants Tr. Co. of Long Beach)*, 60 Cal. 2d 677 (1964) (contempt proceeding is a continuation of an original domestic violence action in which allegedly violated order was issued).

Unlike those cases, the 2016 Action is a separate lawsuit filed by SDCWA to challenge a unique set of agency actions: MWD's setting of its 2017 and 2018 rates and charges, and

numerous other actions taken by MWD. (Petition/Complaint ¶ 27.) The 2016 Action concerns new facts, new causes of action and ***new requested relief***. It does not challenge a prior order, but seeks a new one on new facts. Indeed, the full scope of the 2016 Action remains unknown because SDCWA has pleaded its intention to amend the complaint. (*Id.* ¶¶ 5, 18.) Accordingly, the 2016 Action is not a continuation of SDCWA's prior lawsuits.

In its Application, SDCWA argues otherwise on the grounds that Judge Karnow retained continuing jurisdiction to enforce the Court's writ as to MWD's future rates. (Kaplan Decl., Ex. A [1:19-21, 5:1-15].) This does not change the analysis. San Diego has not filed a case to enforce a writ already in place. It filed a new case for a new writ of mandate on a new record.[4]

In addition, a court's assertion of continuing jurisdiction does not make all later-filed actions between the same parties and their affiliates continuations of the first action even where there are common facts and issues in the two actions. The Court of Appeal recently addressed this question in *Rothstein v. Superior Court (Rothstein). Rothstein* involved a couple's action to dissolve their marriage. No. B275603, --- Cal. Rptr.3d ---, 2016 WL 4939297, *1 (Cal. Ct. App. Sept. 16, 2016). The judge entered judgment terminating the marriage, but "reserve[d] jurisdiction over all other issues of the marriage" including the division of property. *Id.* In her schedule of assets, the wife had included a loan made to her husband through her small business. *Id.* After dissolution of the marriage, the wife's company filed a second action against the husband to recover the balance due on the loan. The cases were deemed related and the company filed a section 170.6 challenge to the judge who had granted the divorce and had reserved jurisdiction. *Id.* at *1-2. The challenge was granted and both cases were transferred to a second judge. The husband thereafter filed a petition for mandamus relief urging that the second action was a mere continuation of the first because the prior judge had reserved jurisdiction to matters related to the divorce and these claims arose out of scheduled assets in the divorce. *Id.* at *2.

The Court of Appeal reasoned that even if the wife and company were the same party, the civil action would not be a continuation of the dissolution action because it was not a later stage

[4] MWD has challenged the writ on appeal on the ground that the Court may not direct MWD's Board how to exercise its discretion in the future, particularly as applied to a different record. The 2010 and 2012 Actions lack finality and cannot simply be applied to the 2016 Action.

of, and did not arise out of conduct in or orders made in, the family law matter. *Id.* at *3. In the dissolution action, the assigned judge had not yet determined the status of the specific debt in issue, and therefore the court's reservation of jurisdiction was not sufficient to render the second case a continuation of the first because it did not arise out of an order in the prior case. *Id.*

Like in *Rothstein*, the 2010 and 2012 Actions did not determine—or even purport to determine—MWD's adoption of water rates and charges for 2017 or 2018; and the 2014 Action does not involve this either. Nor could they have. The decision in the 2010 and 2012 Actions was that there was not sufficient evidence in *that* administrative record to support the allocation of certain costs to transportation. The decision did not and could not speak to whether future administrative records containing additional and different facts and information would be sufficient. Also, as explained above, a significant part of the 2016 Action is entirely new and is based on an entirely new fact set. The parties have never before litigated, for example, whether MWD acted properly in 2016 or at any other time in setting its budget, determining its overall revenue requirement, collecting and expending revenue, forecasting financial matters for the upcoming ten years, addressing a historic drought including responding to the Governor's emergency drought directives, determining supply costs including storage, or allocating costs to and setting the appropriate level of its Treatment Charge, Readiness-to-Serve Charge, and Capacity Charge. The fact set—the administrative record concerning these new claims—has never been reviewed by a court or litigated.

Moreover, the 2016 Action does not merely seek to enforce an order; nor does it seek a new order based on the fact set of any of SDCWA's prior lawsuits. It seeks a new judgment based on an entirely new fact set. Indeed, the 2016 Action includes significant factual allegations not present, much less resolved, in the earlier actions—for instance that the 2017 and 2018 rates and charges are invalid because the rate-setting process for those years specifically, violated procedural requirements. (*Id.* ¶¶ 11, 37-54, 95-100.) And there are more allegations to come. SDCWA has stated its intent to amend the Complaint ***after*** the occurrence of ***additional*** facts. (*Id.* ¶¶ 5, 18.) The 2016 Action is therefore not a continuation of SDCWA's prior lawsuits because (1) the lawsuits involve different sets of facts and claims, and (2) the full scope of the

case, and hence of its distinctions with the prior cases, remain unknown to the Court and to MWD.

IV. CONCLUSION

For the foregoing reasons, MWD's Motion for Peremptory Disqualification is timely and must be granted.

Dated: October 13, 2016

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By: _____
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TABLE OF CONTENTS

		Page
I.	RELEVANT BACKGROUND	1
II.	APPLICABLE LEGAL STANDARDS	2
	A. Liberal Construction In Favor of the Right to Challenge	2
	B. Challenge Operates to Divest Jurisdiction	2
III.	MWD'S MOTION IS TIMELY	3
	A. No part of the 2016 Action, including the portion of the 2016 Action that challenges the allocation of certain costs to transportation, is a continuation of prior cases	5
	B. A significant portion of the 2016 Action is entirely new and is certainly not a continuation of prior cases where such claims were never asserted	9
	C. The continuation rule only precludes a peremptory challenge when a case challenges a prior order or seeks a new order based on the fact set of a prior case	12
IV.	CONCLUSION	15

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TABLE OF AUTHORITIES

Page

CASES

Bravo v. Super. Court (Cty. of Los Angeles), 149 Cal. App. 4th 1489 (2007) ..... passim

Brown v. Super. Court (14011 Ventura Boulevard Corp.), 124 Cal. App. 3d 1059 (1981) 4

City of Hanford v. Super. Court (GWF Power Syss.), 208 Cal. App. 3d 580 (1989) 7, 8

Hemingway v. Super. Court (People), 122 Cal. App. 4th 1148 (2004) 3

Home Ins. Co. v. Super. Court (Montrose Chem. Corp. of Cal.), 34 Cal. 4th 1025 (2005) 5

Jacobs v. Superior Court (Jacobs), 53 Cal. 2d 187 (1959) 5, 6, 9, 13

McCartney v. Comm'n On Judicial Qualifications, 12 Cal. 3d 512 (1974) 4

McClenny v. Super. Court (Farmers and Merchants Tr. Co. of Long Beach), 60 Cal. 2d 677 (1964) 13

Nat'l Financial Lending v. Super. Court (Brewer Corp.), 222 Cal. App. 4th 262 (2013) 13

Nissan Motor Corp. v. Super. Court (Bower), 6 Cal. App. 4th 150 (1992) 3, 6, 8

NutraGenetics, LLC v. Super. Court (Cavenah), 179 Cal. App. 4th 213 (2009) 9

Pickett v. Super. Court (99¢ Only Stores), 203 Cal. App. 4th 887 (2012) 6

Rothstein v. Superior Court, No. B275603, ---Cal. Rptr.3d----, 2016 WL 4939297 (Cal. Ct. App. Sept. 16, 2016) 14, 15

Solberg v. Super. Court, 19 Cal. 3d 182 (1977) 8

Spruance v. Comm'n On Judicial Qualifications, 13 Cal. 3d 778 (1975) 4

Stephens v. Super. Court (Stephens), 96 Cal. App. 4th 54 (2002) 3

STATUTES

Code Civ. Proc. § 170.6 ..... passim

TABLE OF AUTHORITIES
(continued)

Page

Code Civ. Proc. § 170.6(a)(1) 4
Code Civ. Proc. § 170.6(a)(2) 4
Code Civ. Proc. § 170.6(a)(3) 4

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PROOF OF SERVICE

I, Heather Nowak, declare as follows:

I am employed in Orange County, Costa Mesa, California. I am over the age of eighteen years and not a party to this action. My business address is Manatt, Phelps & Phillips, LLP, 695 Town Center Drive, 14th Floor, Costa Mesa, California 92626-1924. On the date listed below, I served the within document(s):

- **RESPONDENT AND DEFENDANT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S NOTICE OF MOTION AND MOTION FOR PEREMPTORY DISQUALIFICATION PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 170.6**
- **RESPONDENT AND DEFENDANT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR PEREMPTORY DISQUALIFICATION PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 170.6**
- **DECLARATION OF PHILLIP R. KAPLAN IN SUPPORT OF RESPONDENT AND DEFENDANT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MOTION FOR PEREMPTORY DISQUALIFICATION PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 170.6**

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 13, 2016, at Costa Mesa, California.

Heather Nowak

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