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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 REPLY 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Defendant/Respondent Metropolitan Water District of Southern California ("MWD") submits this Reply to Plaintiff/Petitioner San Diego County Water Authority's ("SDCWA") Opposition to MWD's Motion for Peremptory Disqualification Pursuant to Code of Civil Procedure Section 170.6.

I. INTRODUCTION

MWD's Section 170.6 motion is timely—it has been filed before Judge Karnow has presided over any proceedings in this new case. SDCWA raises new challenges in the instant lawsuit that involve a wholly new record concerning numerous MWD decisions other than rate-setting, which have never been litigated. While common issues may well exist between this new action and the prior SDCWA lawsuits (along with a myriad of new issues) the Court will resolve SDCWA's challenges to the 2017 and 2018 rates and charges by assessing whether the unique administrative record developed in connection with the 2017 and 2018 rate-setting process contains substantial evidence to support MWD's quasi-legislative decisions. Because the administrative record in this case is unquestionably different than the records created for prior years, this action cannot be a "continuation" of SDCWA's prior lawsuits, regardless of whether common issues, along with entirely new issues, may exist. This lawsuit stands alone.

SDCWA's Opposition brief incorrectly characterizes Section 170.6, the continuation rule and SDCWA's prior lawsuits, all in an effort to divert the Court's attention from the fact that it is well-settled law that in every case, each side has an unchallengeable, statutory right to peremptorily disqualify a judge on its own affidavit with no further proof—even in cases that raise issues similar to those in prior cases between the same parties. The only permissible inquiry by the Court after a party files a Section 170.6 challenge concerns timeliness. The right to contest timeliness, however, is not an invitation to wade into the merits as a condition of making a peremptory challenge—as SDCWA invites the Court to do here.

SDCWA's only basis to challenge the timeliness of MWD's Motion is the continuation exception. In order for a case to be a continuation of a prior action, the second proceeding must "***involve the same parties at a later stage of their litigation with each other***" or "***arise out of conduct in or orders made during the earlier proceeding***." *NutraGenetics, LLC v. Super. Court*

(Cavenah), 179 Cal. App. 4th 243, 257 (2009) (emphasis in original). This lawsuit is neither a subsequent hearing in the 2010, 2012 or 2014 lawsuits nor an action to enforce a prior judgment or order. It is a new lawsuit that alleges new facts, pursues new causes of action and requests new relief. These distinguishing features render inapposite the authorities on which SDCWA relies.[1]

SDCWA stretches the continuation rule to new depths by asking the Court to:

- ignore the vast differences between this new case and the earlier-filed lawsuits;
- assume the truth of its factual allegations regarding how MWD set its rates and charges for 2017 and 2018;
- take SDCWA at its word that MWD's new administrative record is the same record MWD used in the past, for both similar claims on a new record and entirely new claims on different topics, even where that record has not yet been compiled;
- impose an unprecedented burden on MWD to develop a full factual record and try its case for the sole purpose of exercising its statutory Section 170.6 rights; and
- expand the scope of Judge Karnow's continuing jurisdiction, if any, to include as many new allegations and causes of action as SDCWA would like to pursue.

SDCWA even asks the Court to consider the fact that MWD has not put forth additional evidence of bias—the very thing Section 170.6 was enacted to avoid. SDCWA's approach to evaluating a Section 170.6 motion is improper and without precedent. It would allow a party to

[1] All the cases SDCWA advances as exemplars of when a second case constitutes a continuation of a prior action are inapposite. *See Home Ins. Co. v. Super. Court (Montrose Chem. Co. of Cal.)*, 34 Cal. 4th 1025, 1029 (2005) (involves the limitation on challenges to one per side, not the continuation rule); *Solberg v. Super. Court (People)*, 19 Cal. 3d 182, 186, 198 (1977) (evaluates the constitutionality of Section 170.6 in criminal cases—not the continuation rule—rejecting statutory constructions that "would introduce procedural complications resulting in delay"); *McClenny v. Super. Court (Farmers and Merchants Tr. Co.)*, 60 Cal. 2d 677, 684 (1964) (second action was contempt proceeding for violation of order in first action); *Pappa v. Super. Court*, 54 Cal. 2d 350, 353-54 (1960) (applies the limitation on challenges to one per side, not the continuation rule); *Jacobs v. Super. Court (Jacobs)*, 53 Cal. 2d 187, 190 (1960) (second action seeks only modification of order issued in first action); *Nat'l Fin. Lending v. Super. Court (Brewer Corp.)*, 222 Cal. App. 4th 262 (2013) (second action is creditor's motion to hold third party liable for judgment/levy in first action); *Andrews v. Joint Clerks Port Labor Relations Comm.*, 239 Cal. App. 2d 285, 298 (1966) (second action is motion to modify prior order in which movant filed "identical" points and authorities in both actions); *Oak Grove Sch. Dist. v. City Title Ins. Co.*, 217 Cal. App. 2d 678, 699-700 (1963) (second action is a motion to tax costs submitted by prevailing party in first action, required to be heard by same judge pursuant to Code of Civil Procedure Section 1033).

file lawsuits against an adverse party into perpetuity with the guarantee that each successive case would be heard by the same judge so long as it pleaded some common allegations and causes of action. That is not the law.

Because the instant lawsuit is not a continuation of any prior litigation between the parties, MWD's Motion is timely and must be granted.

II. ARGUMENT

A. Section 170.6 and the Continuation Rule

The right to peremptorily challenge a judge is an extraordinary right created by statute that should only be denied if the statute absolutely forbids it. *Hemingway v. Super. Court (People)*, 122 Cal. App. 4th 1148, 1158 (2004). Accordingly, the continuation rule does not bar peremptory disqualification of judges in later cases that raise factual and legal issues previously decided by the same judge in a prior proceeding. *Nissan Motor Corp. v. Super. Court (Bower)*, 6 Cal. App. 4th 150, 155 (1992) ("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."). Instead, to be a continuation, a later-filed case must actually be a later stage in the same proceedings or arise out of the originating case. *NutraGenetics, LLC*, 179 Cal. App. 4th at 257.

Rather than a reasoned application of the continuation rule here, SDCWA's Opposition devotes substantial time attempting to draw comparisons between its various lawsuits and carefully selected, misleading snippets of case law. The Opposition intermittently describes the relationship between a "continuation" and an originating case as: having the same "gist" (5:13); sharing "core issues" (5:21); substantial similarity (5:22, 7:18-19); direct "concern" (7:12-13); and "necessarily relevant" (7-23-24). None of these *factors* describes the test for determining whether a case is a continuation of an earlier-filed case for purposes of denying a motion for peremptory disqualification as untimely.

As explained above, the true test is simply stated: "the second proceeding must involve 'the same parties at a later stage of their litigation with each other, or . . . arise out of conduct in or orders made during the earlier proceeding.'" *Picket v. Super. Court*, 203 Cal. App. 4th 887,

893 (2012) (quoting *NutraGenetics, LLC*, 179 Cal. App. 4th at 257). Because the instant lawsuit is not a later stage in the 2010, 2012 or 2014 proceedings, and raises claims beyond the scope of those proceedings, as a matter of law, it is not a continuation; the Motion must be granted.

Against that backdrop, SDCWA's contention that MWD's Motion constitutes the type of judge shopping the continuation rule was crafted to prevent misses the mark. This is not *Jacobs* where a party, after receiving an unfavorable judgment, seeks to disqualify a judge from hearing an action to modify that judgment. *See Jacobs v. Super. Court (Jacobs)*, 53 Cal. 2d 187, 190 (1959). The 2016 Action is a new case, significantly broader in scope than the 2010, 2012 and 2014 Actions. In addition, MWD did not waive its Section 170.6 rights by not challenging Judge Karnow in 2014. The Supreme Court holds that "[I]n two successive actions [involving the same charges] a party may move to disqualify in each, or may disqualify in the later action without waiving that right by failing to so move in the earlier." *Solberg v. Super. Court (People)*, 19 Cal. 3d 182, 190 n.6 (1977); *see also City of Hanford v. Super. Court (GWF Power Syss.)*, 208 Cal. App. 3d 580, 593 (1989) ("[T]he fact that a party can peremptorily challenge a judge after he has ruled in a case involving related factual or legal issues may result to some extent in forum shopping by parties filing later similar suits. However, collateral estoppel does not apply to disqualification motions."). MWD's right to exercise its Section 170.6 rights in this new and different case cannot be extinguished.

B. The 2016 Action is a new and separate lawsuit.

The 2016 Action does not merely raise a handful of ancillary issues that were not previously considered by Judge Karnow as SDCWA suggests. To the contrary, it globally attacks MWD's very way of doing business in the hope that the same judge who found that MWD's transportation allocations in 2010 and 2012 were unlawful, will now invalidate MWD's entire business model. MWD identified a lengthy sample of these attacks, to which SDCWA fails to respond, in its Memorandum of Points and Authorities. (MPA 9:19-11:8.) The parties have never before litigated, for example, whether MWD acted properly in setting its budget, determining its overall revenue requirement, collecting and expending revenue, forecasting

financial matters, or allocating costs to its Treatment Charge, Readiness-to-Serve Charge, and Capacity Charge.

SDCWA attempts to downplay these vast differences between the 2016 Action and the prior lawsuits by arguing that a "substantial degree of similarity" exists between the actions. (Opp. 13-25.) But substantial similarity is not the most recently articulated test to determine whether the continuation rule bars a party's otherwise timely 170.6 motion. Even if it were the test, SDCWA makes no attempt to quantify substantial similarity. SDCWA agrees, however, that a continuation exists when the "second proceeding ***involve[s] the same parties at a later stage of their litigation with each other, or [it] arise[s] out of conduct in or orders made during the earlier proceeding***." (Opp. 1018-20 [emphasis and brackets in original].) Applying that test here establishes that this lawsuit is not a continuation as it is not a later stage in the 2010, 2012 or 2014 proceedings, and raises significant new claims beyond the scope of those proceedings.

C. Similarities between the cases are not substantial and do not make the 2016 Action a continuation of the prior lawsuits.

The crux of SDCWA's position is that MWD set certain rates for 2017 and 2018 using the same methodology it used in the past, and therefore, this case is a continuation of prior cases that challenged that methodology.[2] But the argument of one party to a dispute that a new case should come out the same way as a prior action is not the test for whether a matter is a continuation of the prior action. A case is also not a continuation merely because a plaintiff alleges that a defendant committed the same type of misconduct in the past. *See, e.g.*, *Bravo v. Super. Court (Cty. of Los Angeles)*, 149 Cal. App. 4th 1489 (2007) (second case alleging new incidents of same torts in issue during first case was not a continuation of the first case). A Section 170.6 motion is not like a demurrer in which the Court assumes the truth of the non-moving party's factual allegations—*i.e.* that MWD set its rates for 2017 and 2018 in the same manner as it set its rates in prior years. SDCWA is not entitled to the benefit of the doubt or to preliminary discovery and a determination of contested fact issues in connection with a disqualification motion. Indeed, such

[2] Of course, whether SDCWA's allegations are correct will be determined later based on whether the administrative record for the 2017 and 2018 rate years contains substantial evidence to support those rates. A court, not SDCWA or its lawyers, will make that determination.

determinations would render the Section 170.6 statutory scheme unworkable because by the time each side had a due process opportunity to create the record, the 170.6 motion would be untimely. *See* Code Civ. Proc. § 170.6(a)(2) (a judge cannot be peremptorily disqualified after making "a determination of contested fact issues relating to the merits").

MWD's Motion articulates that its rates and charges for 2017 and 2018 were set on a new and different administrative record than in past years. The Petition/Complaint also acknowledges distinctions. (*See, e.g.*, Petition/Complaint ¶¶ 40 [alleging that for 2017 and 2018 "Metropolitan had failed to provide any cost-of-service analysis ***as it had done in past years***"], 55 ["Metropolitan's 2017 and 2018 Transportation Rates and wheeling rate are therefore invalid for the same reasons as Metropolitan's previously invalidated rates, ***and more***."], 10, 73-75 ["Metropolitan has now substantially reduced the RTS charge for 2017 and 2018 ***compared to prior years***."].) This case simply does not arise out of orders or conduct in the prior proceedings, but rather presents a new factual and legal dispute based on a new administrative record, requiring new trial adjudications. The Section 170.6 Motion should be granted.

1. The 2016 Action involves a new quasi-legislative enactment and a new supporting administrative record that require new adjudication.

MWD agrees that the 2016 Action involves ***some*** of the same legal issues as prior litigation between the parties. The previous cases, however, challenged certain MWD prior cost allocations based on the administrative records in those cases. The decisions in the 2010 and 2012 Actions that the administrative records there did not contain sufficient evidence to support the transportation allocations at issue in those cases does not, and cannot, inform the Court's determination as to the sufficiency of future administrative records. While part of the 2016 Action asserts the same legal claims concerning allocation of certain costs to MWD's Transportation rates and wheeling rate, the supporting administrative record as to both those claims and the entirely new claims is different and has never been adjudicated.

SDCWA's only response to this argument is, based on its participation in MWD's administrative processes, to "vouch" for the accuracy of its Petition/Complaint and ask the Court to assume that the administrative record is the same. (Opp. 9:6-8.) First, the Court cannot deny

MWD's Motion based on SDCWA's untested characterization of the records. Nor can the Court conduct a comparison of the records prior to trial to resolve the 170.6 Motion. Second, SDCWA's characterization is belied by its own allegations. SDCWA acknowledges in the 2016 Petition/Complaint that "each year's rate-setting decision is a unique agency action." (Petition/Complaint ¶ 27.) In its Application for Complex Designation and Assignment for All Purposes, SDCWA pointed out that although the 2016 administrative record may include prior records, it is significantly more voluminous, in part because SDCWA itself included "voluminous additional documents" in the 2016 record. (Kaplan Decl., Ex. A, 4:16-25.) MWD did as well.

Indeed, the point that sets this case apart from all of the precedents on which SDCWA relies is that the fundamental issue for the Court is whether substantial evidence exists in ***this*** administrative record to support the rates and charges that MWD's Board set—not whether there is substantial evidence in the 2010, 2012 or 2014 administrative records, and not whether these are rates and charges that the Court would have set in a *de novo* review of the rates and charges. Because of the very nature of the inquiries, these cases are not "continuations" of each other within the meaning of the timeliness analysis under Section 170.6. In a typical mandamus suit challenging an agency action such as MWD's rate allocations, courts may not consider evidence outside the administrative record in determining whether the challenged quasi-legislative action was supported by substantial evidence. *See W. States Petroleum Ass'n. v. Super. Court (Air Resources Bd.)*, 9 Cal. 4th 559, 565 (1995). Even though agencies include past administrative records or portions thereof in new records, every case asks a new question—whether a particular record supports a particular quasi-legislative enactment. ***None*** of the cases on which SDCWA relies involve administrative law or a challenge to an administrative record.

Moreover, here, the question is not as SDCWA frames it: *if* the claims are just the same as in the prior cases, applied to a new rate-setting cycle, does the continuation doctrine apply? As explained, the answer would be no, due to the different records. But here, the doctrine without any question does not apply due to the numerous new claims SDCWA has asserted in the 2016 Action for the first time, about which no administrative record has previously been presented to a court and that concern Board decisions which have never been litigated.

SDCWA's position here conflicts with its opposition to MWD's Demurrer to SDCWA's Second Amended Petition/Complaint in the 2010 Action. (Lee Decl., Ex. A.) There, SDCWA pointed out that MWD's power to allocate rates was legislatively conferred and is quasi-legislative in nature. (*Id.* 6:10-20.) SDCWA then differentiated between MWD's rate setting in 2002 and 2010 by arguing that each rate-setting year constituted a new quasi-legislative enactment triggering a new statute of limitations for a new right of action. (*Id.* 8:13-22.) SDCWA's response to this Motion—that each rate-setting year is a continuation of prior years—calls into question whether it now agrees it cannot bring the 2016 Action to challenge MWD's rate structure in the first instance. [3]

The 2016 Action posits a direct question: whether substantial evidence exists in the administrative record to support the quasi-legislative decisions that have been challenged? That record is new and different than past records, both as to the legal claims that have been re-asserted, but necessarily so as to the numerous new claims. Therefore, even though the 2016 Action includes similar legal claims between the same parties as the earlier lawsuits, along with entirely new claims, it is not a later stage of those actions; nor did it arise out of them.

2. The 2010/2012 writ does not render the 2016 Action a continuation of prior actions.

SDCWA makes much of Judge Karnow's assertion of continuing jurisdiction in the 2010 and 2012 judgment and issuance of a peremptory writ. SDCWA's reliance is misplaced for at least four reasons: (1) the writ is not binding when on appeal; (2) the scope of the writ, if eventually enforceable, would arguably be limited to only a portion of the 2016 Action; (3) the

[3] Whether a particular administrative record includes substantial evidence to support a particular legislative enactment is a separate question from whether that enactment has been validated by operation of law. In the 2010 and 2012 Actions (and on appeal) MWD has contended that the transportation allocation was validated by operation of law in 2002 after SDCWA failed to challenge the allocation. That contention does not change the fact that the 2016 record supporting the 2016 allocation is a larger and more detailed record than any of the prior records. If the Court decides that the 2016 record is sufficient to support the 2016 allocation, that decision does not bear on the sufficiency of the older records. Conversely, Judge Karnow's judgment in the 2010 and 2012 cases does not bear on the 2016 case. Finding that the smaller administrative records in 2010 and 2012 did not include sufficient evidence to support their corresponding allocations cannot be imputed to 2016, which, as SDCWA acknowledges, involves a much more voluminous and detailed record.

2016 Action is not an enforcement action; and (4) the Court of Appeal has already addressed this issue and found that a reservation of jurisdiction does not make a later-filed case a continuation for purposes of Section 170.6.

First, the judgment and writ are not binding on this or any other court while on appeal. (*See* Goldberg Decl., Ex. 1 [Petition/Complaint, Ex. B, 3:22-4:2 (citing Code of Civil Procedure Section 870(a) to clarify that the judgment is binding "if no appeal is taken")].)

Second, the writ purports only to require MWD "to set its future transportation and wheeling rates in a manner consistent with the Court's Statement of Decision." (*Id.* 4:2-5.) As detailed above and in MWD's Memorandum of Points and Authorities, the 2016 Action does much more than challenge the allocation of certain costs to MWD's Transportation Rates and wheeling rate for 2017 and 2018. Judge Karnow's reservation of jurisdiction cannot encompass SDCWA's new claims that are beyond the scope of the previous writ. In addition, the Statement of Decision is expressly limited to the sufficiency of the 2010 and 2012 administrative records to support the corresponding cost allocations by MWD to its rates. (*Id.* [Petition/Complaint, Ex. C, 64-65].) Because the 2016 Action implicates a new and different administrative record, the prior writ is not in issue, and this case is not a continuation of the prior lawsuits.

Third, the 2016 Action is not an enforcement action. SDCWA cites *Stoneham v. Rushen*, 156 Cal. App. 3d 302 (1984) for the proposition that Judge Karnow may invalidate MWD's 2017 and 2018 rates because they fail to comply with the writ, which Judge Karnow can directly enforce pursuant to Code of Civil Procedure Section 1097. (Opp. 8:9-13.) SDCWA misses the mark. *Stoneham* involves issuance of a writ, a later motion to discharge the writ, and ultimately, contempt proceedings. 156 Cal. App. 3d at 306. None of those formal procedures have been taken in connection with Judge Karnow's writ. SDCWA correctly points out that the *Stoneham* Court rejected the argument that it lacked jurisdiction to determine the adequacy of a regulation in "the same mandamus proceeding", but SDCWA never identifies those proceedings. (Opp. 8:11-13.) In *Stoneham*, the Director of Corrections filed a motion for an order discharging a writ. In denying the motion, the trial court instead further ordered the Director to comply with the original writ. 156 Cal. App. 3d at 306. In the same proceeding, the trial court assessed the adequacy of

the regulation that was the subject of the original writ—*i.e.* when the Director challenged the writ, the court also asked whether the Director had complied with it. *See id.* at 310. Here, SDCWA has not filed an action to enforce the writ; nor has MWD filed a motion to discharge it. The writ is not in issue and the 2016 Action is not a continuation of the lawsuit that resulted in its issuance.

Lastly, the Court of Appeal has already decided that a trial court's reservation of jurisdiction over a particular subject matter does not make a later-filed case concerning that subject matter a continuation for purposes of Section 170.6. *See Rothstein v. Super. Court (Rothstein)*, 3 Cal. App. 5th 424, 207 Cal. Rptr. 3d 616, 618, 620 (2016). SDCWA attempts to differentiate *Rothstein*, arguing that there the trial court in the first action had yet to determine the core issue in the second—the disposition of a particular debt—whereas Judge Karnow has already assessed MWD's 2010 and 2012 allocations and commanded that all future allocations comport with his assessment. (Opp. 8:15-19.) The key distinction, which SDCWA misses, is that Judge Karnow has not assessed the 2017 and 2018 rates and charges or the sufficiency of the new record to support those rates and charges; and he certainly has not assessed new and different challenges to those rates and charges, and other MWD decisions, that have never been litigated before. In *Rothstein*, the debt at issue had expressly been reserved by the first trial court as an issue within its jurisdiction, and was included in the schedule of assets subject to disposition in the first proceedings with the court reserving jurisdiction, pursuant to a *stipulated* judgment, over the disposition of the assets. *Rothstein*, Cal. Rptr. 3d at 617. Nevertheless, a later-filed case that put those assets in issue was not a continuation of the first case because there had been no order determining the status of the assets. *Id.* at 620. Similarly, without an order from Judge Karnow evaluating the sufficiency of the 2016 administrative record to support the 2017 and 2018 rates and charges, and to support the other MWD decisions and practices newly at issue, the 2016 case cannot be a continuation of the earlier cases. The Motion must be granted and the 2016 Action must be assigned to a new judge.

III. CONCLUSION

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

Dated: October 17, 2016

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