



FILE
San Francisco County Superior Court

OCT 18 2016

CLERK OF THE COURT
BY: Shirley Green
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER
AUTHORITY,

Plaintiff/Petitioner,

vs.

METROPOLITAN WATER DIST. OF
SOUTHERN CALIFORNIA, et al.

Defendants/Respondents.

Case No. CFP-16-515282

ORDER GRANTING MOTION FOR
PEREMPTORY DISQUALIFICATION
PURSUANT TO C.C.P. § 170.6

By notice dated October 13, 2016, respondent and defendant Metropolitan Water District of Southern California (Met) challenged me under C.C.P. § 170.6. Plaintiff and petitioner San Diego Water Authority (San Diego) filed an opposition dated October 14, and Met filed a reply dated October 17, 2016.

The request for complex treatment was filed October 6, 2016. LRSF 3.6 (C). Given my work on prior related lawsuits with which the parties are quite familiar, the captioned case might well be assigned to me. Accordingly, the § 170.6 challenge is ripe for determination.

Previously, I handled the so-called 2010 and 2012 cases, which addressed Met's rates for the period 2011-2014. These cases are on appeal. The so-called 2014 case addresses Met's rates for 2015 and 2016, and by agreement of the parties, the case was transferred to me and stayed pending determination of the Court of Appeal in the earlier cases, because among other things the legal issues are similar, if not the same.

1 The current case challenges Met's rates for 2017 and 2018. The rates allegedly were set
2 using the same cost allocation which I previously determined to be improper or illegal.

3 Some of the issues raised by San Diego are not to the point. It does not matter if Met is
4 displeased by prior rulings, Opposition at 1, or whether judicial economy might be furthered if I
5 hear the new case, *id.* at 4 (compare *City of Hanford v. Superior Court*, 208 Cal. App. 3d 580,
6 593 (1989)), or whether I am actually biased (at least for § 170.6 purposes), *id.* at 5.

7 The issue now is just whether the current case is a "continuation" of the earlier cases. If it
8 is, I must refuse and deny the § 170.6 challenge; if it is not, I must accept it. No judicial
9 discretion is involved. My duty to hear the case, set forth in C.C.P. § 170, is precisely as
10 important as my duty to withdraw if I am disqualified. David Rothman, CALIFORNIA JUDICIAL
11 HANDBOOK § 7.01 (3d ed. 2007). It is this "continuation" issue which the parties have briefed.
12 See generally, Weil & Brown, et al., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE
13 TRIAL ¶ 9:131 (Rutter: 2016).

14 One circumstance in which a court may be called to determine whether a section 170.6
15 challenge was duly presented and in proper form is when confronted with the question of
16 whether the challenge is filed in a case that is a mere continuation of an earlier action.
17 That was the issue before this court in *Pickett v. Superior Court* (2012) 203 Cal.App.4th
18 887, 138 Cal.Rptr.3d 36 (*Pickett*). Quoting *NutraGenetics, LLC v. Superior Court*
19 (2009) 179 Cal.App.4th 243, 101 Cal.Rptr.3d 657 (*NutraGenetics*), we explained an
20 action is a continuation of an earlier action for section 170.6 purposes where the
21 subsequent proceeding involves " 'the same parties at a later stage of their litigation with
22 each other, or ... arise out of conduct in or orders made during the earlier proceeding.' "
23 (*Pickett, supra*, 203 Cal.App.4th at p. 893, 138 Cal.Rptr.3d 36.)

24 *Rothstein v. Superior Court*, ___ Cal.App.4th ___, 207 Cal. Rptr. 3d 616, 619-20 (2016).

25 The now venerable *Jacobs v. Superior Court In & For Los Angeles Cty.*, 53 Cal. 2d 187,
26 191 (1959) introduced the continuation rule, but is not of much direct use. It did equate the
27 continuation of one case with "supplementary proceedings involving substantially the same

1 issues” as the first, but later authority explored the elements of a continued action in more detail;
2 and similar claims are not enough.

3 The elements of a continuing case include the same parties and a “subsequent proceeding,
4 the gravamen of which is rooted in, or supplementary to, the initial proceeding.” *Pickett v.*
5 *Superior Court*, 203 Cal. App. 4th 887, 893 (2012), citing *NutraGenetics, supra*, 179
6 Cal.App.4th at pp. 252–257; or at least the continued action must at least “arise out of conduct in
7 or orders made during the earlier proceeding” *Id.* So for example, *Pickett* distinguishes thusly:
8 “In contrast, a plaintiff whose first complaint for employment discrimination was dismissed, and
9 who immediately thereafter filed a second complaint against the same defendant for similar
10 claims, was not continuing the first action because the second complaint addressed
11 discrimination on dates subsequent to those described in the first complaint. (*Bravo, supra*, 149
12 Cal.App.4th at p. 1494, 57 Cal.Rptr.3d 910.)” Indeed, under *Pickett* a differences in the relief
13 demanded suggests one case is not a continuation of another. *Pickett*, 203 Cal. App. 4th at 893–
14 95.

15
16
17 Two administrative or quasi-administrative actions *could* be “separate phenomenon,”
18 *City of Hanford v. Superior Court*, 208 Cal. App. 3d 580, 593 (1989), as Met argues in its
19 papers, Memorandum at 6-7. But *Hanford* involved “quite distinct” legal issues, “different relief,
20 ... new parties [and the] paramount questions presented by the two cases are different....” 208
21 Cal. App. 3d at 593.

22
23 Here, we have the same parties, the same legal issues, and at least highly similar fact
24 issues.¹ While this may not be enough to treat the current case as a continuation, there is an
25

26
27 ¹ I say similar because all I have on the current case is complaint. That some new facts may be in play in the new case is not dispositive. *Stephens v. Superior Court*, 96 Cal. App. 4th 54, 63 (2002) (some new facts but still continuation of former case). It is also true that an overlap of facts will not show a later case is a continuation of an older one. *Nutragenetics, LLC v. Superior Court*, 179 Cal. App. 4th 243, 254 (2009).

1 added twist: the relief I granted in the former cases was to require Met to adhere to legal rates in
2 the future, that is, to bind Met in its future rate-making, including the rates at issue in this current
3 case.
4

5 It appears that precisely the same methods of calculating costs and rates are the subject of
6 the older cases and the new one.² Compare *Stephens v. Superior Court*, 96 Cal. App. 4th 54, 63
7 (2002) (same “broad issue in both proceedings”). My order granting relief in the former cases,
8 which extends to the actions challenged in the current case, suggests the current case is a
9 continuation. *Stephens v. Superior Court*, 96 Cal. App. 4th 54, 63 (2002) (“*Andrews v. Joint*
10 *Clerks etc. Committee* (1966) 239 Cal.App.2d 285, 295-299 [48 Cal.Rptr. 646], upheld the denial
11 of a peremptory challenge in an action that essentially sought to modify an order still in effect in
12 an earlier action, and thus was “demonstrably a *continuation* of, and *ancillary* to, [the previous
13 action].”)
14

15 Thus were the current case to be assigned to a different judge, there might be a risk of
16 inconsistent rulings. This suggests that the policies invoked by *Stephens* counsel denial of the
17 peremptory challenge now:
18

19 The rationale for the rule is that if a peremptory challenge is allowed in a proceeding that
20 is a continuation of a prior proceeding in which trial occurred, ‘it would mean that the
21 judge who tried the case, and who is ordinarily in the best position to pass upon the
22 questions involved, could by a mere general allegation of prejudice, and without any
23 judicial determination of the facts, be disqualified... . Such procedure would make it
24 possible for litigants to gamble on obtaining a favorable decision from one judge, and
25 then, if confronted with an adverse judgment, allow them to disqualify him ... in the hope
26 of *securing a different ruling* from another judge in supplementary proceedings involving
27 substantially the same issues.’

26 ² Here Met has allegedly used the identical methods to calculate new rates were found impermissible in the former
27 cases. Compare Petition for Writ, No.BS 161729 ¶ 3 with its appended judgment in the former cases at 4 (Met’s
methodology violates Metropolitan Water Act § 135; *id.* at ¶ 5 (court retains continuing jurisdiction); *see* appended
Writ of Mandate at 1 (Met required to use cost causation in rate setting).

1 *Nat'l Fin. Lending, LLC v. Superior Court*, 222 Cal. App. 4th 262, 277 (2013 as modified Jan. 7,
2 2014) quoting *Stephens*, 96 Cal.App.4th at 59–60 (emphasis supplied and quote marks removed).

3 But the risk of inconsistent ruling is speculative. All the cases are likely to be similarly
4 affected, and will follow, the Court of Appeal ruling in the 2010 and 2012 matters, regardless of
5 which trial judges are assigned. More importantly, that risk is not the heart of the continuation
6 rule:
7

8 [W]e perceive one salient point. All the cases applying the continuation rule to preclude a
9 peremptory challenge in the second proceeding ***involve the same parties at a later stage***
10 ***of their litigation with each other, or they arise out of conduct in or orders made***
11 ***during the earlier proceeding***. In other words, the continuation rule applies in cases in
12 which the second action arises out of, or is a later stage of, the original action involving
13 the same parties.

14 *Nutragenetics, LLC v. Superior Court*, 179 Cal. App. 4th 243, 257 (2009) (emphasis in original).

15 This ‘arising out of’ language strongly suggests that the older case be at least a predicate, or
16 causal factor, of the later one. If the second suit does not depend in any way on the first one, it is
17 independent of the first one and so not a continuation of it. That is the case here. The current
18 case could have been filed and challenged Met’s actions regardless of whether or not (i) San
19 Diego had previously filed any cases regarding earlier rate settings, or (ii) I had made any prior
20 orders.³

21 It follows that I am obliged to grant the § 170.6 challenge. Further orders will issue in
22 due course respecting the judge assigned to the captioned case.

23
24 Dated: October 18, 2016



25 _____
Curtis E.A. Karnow
26 Judge Of The Superior Court

27 ³ Certainly, rulings in the cases already assigned to me may have an impact on the current case, both because the Court of Appeal may provide binding precedent and through doctrines of e.g. collateral estoppel. But that happens all time even as among cases that are not even related; it has no bearing on the continuation issue.

Superior Court of California
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SAN DIEGO COUNTY WATER
AUTHORITY,

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vs.

METROPOLITAN WATER DISTRICT
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Defendant(s)

Case No. CPF-16-515282

**CERTIFICATE OF ELECTRONIC
SERVICE**

(CCP 1010.6(6) & CRC 2.260(g))

I, Felicia Green, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On October 18, 2016, I electronically served **ORDER GRANTING MOTION FOR PEREMPTORY DISQUALIFICATION PURSUANT TO CCP 170.6**, via LexisNexis File & Serve on the recipients designated on the Transaction Receipt located on the LexisNexis File & Serve website.

Dated: **OCT 18 2016**

T. Michael Yuen, Clerk

By:



Felicia Green, Deputy Clerk