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Michael G. Slater SBN 247302
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E-FILED
11/27/2018 3:27 PM
FRESNO COUNTY SUPERIOR COURT
By: J. Nelson, Deputy

6 Attorneys for Pinedale County Water District

7 NO FILING FEE REQUIRED GOVERNMENT CODE §6103

8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF FRESNO**

10 PINEDALE COUNTY WATER)
DISTRICT, a County Water District,)

Case No. 18CECG02957

11 Plaintiff,)

**DECLARATION OF NEAL E.
COSTANZO IN SUPPORT OF THE
MOTION TO TRANSFER ACTION**

12 v.)

13 CITY OF FRESNO, a Municipal)
14 Corporation, and DOES 1 through 5)
inclusive,)

DATE: December 5, 2018

TIME: 3:30 p.m.

DEPT: 502

15 Defendants.)
16

17 I Neal E. Costanzo declare:

18 1. I am the attorney of record for Pinedale County Water District in this case and
19 in the case that was transferred from this court, Case No. 17CECG02055, and which is
20 now Kings County Superior Court Case No. 18C-0051 and the attorney for Pinedale in this
21 case as well.

22 2. Attached and incorporated by reference as Ex. A is a true and correct copy
23 of the February 20, 2018 Notice of Transfer issued by the Kings County Superior Court.

24 3. Attached and incorporated by reference as Ex. B is a true and correct copy
25 of Respondent's Memorandum of Points and Authorities in Reply to the Memorandum of
26 Points and Authorities filed by Petitioner City of Fresno in Case No. 17CECG02055 relating
27 to the prior motion to transfer that case to the Kings County Superior Court.

28 4. Attached and incorporated by reference as Ex. C is a true and correct copy
DECLARATION OF NEAL E. COSTANZO IN SUPPORT OF THE MOTION TO TRANSFER ACTION

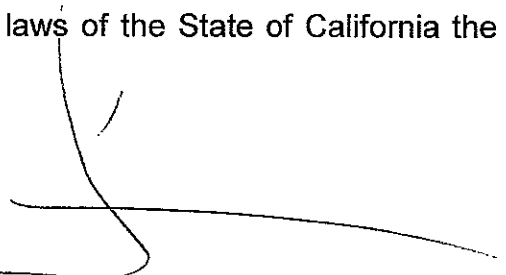
1 of the ex parte application and for order shortening time; Memorandum of Points and
2 Authorities in Support thereof and Declaration of Neal E. Costanzo filed after the entry of
3 the order sustaining Fresno's demurrer to the cross-complaint in that case and after the
4 court's denial of Pinedale's Motion to Transfer and Consolidate this case with the case
5 pending in Kings County which shows that the court has, notwithstanding its denial of that
6 motion, acknowledged that the case now pending in this court in this action is one that is
7 necessarily dispositive of the case now pending in Kings County and is one that should be
8 tried first in order to avoid a multiplicity of actions and the potential for inconsistent
9 judgments because it is dispositive of Fresno's Petition for Mandate in Kings County Case
10 18C-0051.

11 5. Attached and incorporated by reference as Ex. D is a true and correct copy
12 of the Declaration of Neal E. Costanzo filed in Case No. 18C-0051, in Kings County
13 Superior Court, in support of the prior motion to transfer and consolidate this action with
14 that case.

15 I declare under penalty of perjury under the laws of the State of California the
16 foregoing is true and correct.

17 //

18 Dated: November 27, 2018

19 By: 

20 Neal E. Costanzo,
21 Attorney for Plaintiff, Pinedale
22 County Water District
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EXHIBIT A

CONFORMED COPY
ORIGINAL FILED ON

FEB 20 2018

MICHELLE S. MARTINEZ, CLERK OF COURT
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF KINGS

DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KINGS

CITY OF FRESNO,

Plaintiff,

vs.

PINEDALE COUNTY WATER DISTRICT,

Defendants,

Case No: 18C0051

☒ NOTICE OF TRANSFER

☐ NOTICE OF ORDER FOR TRANSFER

Deputy

TO ALL PARTIES:

☒ YOU ARE HEREBY NOTIFIED the above-entitled action was transferred from Fresno County Superior Court (case #17CECG02055) and accepted in this Superior Court on **February 13, 2017**.

☐ YOU ARE HEREBY NOTIFIED the above-entitled action is being transferred to Superior Court, pursuant to the court order of this Superior Court filed on .

Dated: 2/20/2018

MICHELLE S. MARTINEZ
CLERK OF THE COURT

KARIN NOBLE

By: Karin Noble, Deputy Clerk

*1690
Karin Noble
DMM*

PROOF OF SERVICE BY MAIL

* * *

STATE OF CALIFORNIA)
COUNTY OF KINGS)

Case No: 18C0051

I hereby declare under penalty of perjury that I am a citizen of the United States, over the age of eighteen (18) years, and not a party to the within action.

That on February 20, 2018, I served the attached by placing a true copy thereof, enclosed in a sealed envelope and deposited at my place of business for same-day collection and mailing with the United States mail at Hanford, California, following our ordinary business practices with which I am readily familiar, addressed as follows:

<u>Receiving Jurisdiction:</u>	<u>Attorney for Plaintiff</u>
Fresno County Superior Court Civil Unlimited Department, Central Division 1130 "O" Street Fresno, CA 93724-00002	James B. Betts, Esq. Betts & Rubin 907 Santa Fe Ave., Ste. 201 Fresno, CA 93729
	<u>Attorney for Defendant</u>
	Neal E. Costanzo, Esq. Costanzo & Associates 575 East Locust Ave., Ste. 115 Fresno, CA 93720

Executed on February 20, 2018, at Hanford, California.

JEFFREY E. LEWIS
MICHELLE S. MARTINEZ
CLERK OF THE COURT
KARIN NOBLE

By: Karin Noble, Deputy Clerk

EXHIBIT B

1 Neal E. Costanzo SBN 122352
Michael G. Slater SBN 247302
2 Costanzo & Associates
A Professional Corporation
3 575 E. Locust Avenue, Suite 115
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6 Attorneys for Pinedale County Water District

7 NO FILING FEE REQUIRED GOVERNMENT CODE §6103

8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF FRESNO**

10 CITY OF FRESNO,	)	CASE NO. 17 CECG 02055
	)	
11 Plaintiff,	)	RESPONDENT'S MEMORANDUM OF
	)	POINTS AND AUTHORITIES IN REPLY
12 v.	)	TO THE MEMORANDUM OF POINTS
	)	AND AUTHORITIES FILED BY
13 PINEDALE COUNTY WATER	)	PETITIONER, CITY OF FRESNO
DISTRICT,	)	
	)	
14 Defendant.	)	Date: November 08, 2017
	)	Time: 8:30 a.m.
15 _____	)	Dept.: 404
	)	Judge : Honorable Mark Cullers

16
17 **INTRODUCTION**

18 The City of Fresno (Petitioner) concedes that the case required by virtue of CCP
19 §394 either to be assigned to a disinterested judge from a neutral county or to be
20 transferred to a neutral county. (City's Brief at p. 2:10-20). City suggests and Respondent,
21 Pinedale County Water District (Pinedale) agrees that it is most appropriate for the court
22 to exercise the option of requesting the assignment of a disinterested judge from a neutral
23 county to hear this case in the Fresno County Superior Court, simply by virtue of the fact
24 of the proximity of the attorneys and the parties to this court.

25 **ARGUMENT**

26 A. IF TRANSFERRED THE CASE MUST BE TRANSFERRED TO A COUNTY
27 OTHER THAN MADERA.

28 City suggests, and Pinedale disagrees that if the preferred option of assigning a
RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO THE MOPA FILED BY PETITIONER

1 disinterested judge from a neutral county is not pursued by the court, that the court can
2 transfer the case to Madera County which the City characterizes as the "closest neutral
3 county". Transfer to the Madera Court is not an option. The Madera Court is of course,
4 the court that entered the judgment the City of Fresno is attempting to enforce and is
5 obviously not neutral. "Section 394 does not provide that a plaintiff", in this case Petitioner
6 - the City of Fresno, "may commence the action in a neutral county or that Plaintiff may
7 select its own forum". (*Skidmore v. Solano County* (1954) 128 Cal.App.2d 391, 394). The
8 statute exists for the sole benefit of a defendant, or in this case, a respondent. It is the
9 defendant that is entitled to have venue changed. Fresno could have filed this action in
10 Madera County, if it wished, and Pinedale would not be able to rely on CCP §394.
11 Allowing Fresno to select which county is neutral is simply contrary to the statute which
12 vests that right in a defendant which has been sued in the public entity's county of
13 residence. (*Fitzpatrick v. Sonoma County* (1929) 97 Cal.App.588, 596).

14 CONCLUSION

15 It is the neutrality of the disinterested judge or county that is the important factor
16 in determining where the case should be assigned or transferred to. If the court declines
17 to request assignment of a disinterested judge according to the preferences of both parties,
18 Madera County is not neutral. Madera County is were the order that is sought to be
19 enforced emanated and the mandate of §394 cannot be so easily avoided by the City of
20 Fresno which clearly knew Pinedale would file this motion requiring the mandatory transfer
21 under when it filed in Fresno County.

22 //

23 Dated: October 24, 2017

COSTANZO & ASSOCIATES

24
25 By: _____

Neal E. Costanzo, Attorneys for
Petitioner/Defendant

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PROOF OF SERVICE

The undersigned declares:

I, Julia Sellers, the undersigned, declare that:

I am employed in the County of Fresno, State of California. I am over the age of eighteen years, and am not a party to the within action. My business address is 575 E. Locust Avenue, Suite 115, Fresno California 93720.

I am familiar with the regular mail collection and processing practice of said business, and in the ordinary course of business the mail is deposited with the United States Postal Service that same day.

On October 24, 2017, I served the foregoing document described as:

RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO THE MEMORANDUM OF POINTS AND AUTHORITIES FILED BY PETITIONER, CITY OF FRESNO

on all parties to this action by causing a true copy thereof to be:

- (X) Telecopied Via Facsimile
- (X) Placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail
- () Delivered by Hand
- () Sent Via Overnight Delivery (see below)

as addressed below:

James B. Betts
Joseph D. Rubin
Betts & Rubin
907 Santa Fe Avenue, Suite 201
Fresno, CA 93721
Fax: (559) 438-6959

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

Date: October 24, 2017


Julia Sellers

EXHIBIT C

1 Neal E. Costanzo SBN 122352
Michael G. Slater SBN 247302
2 Costanzo & Associates
A Professional Corporation
3 575 E. Locust Avenue, Suite 115
Fresno CA 93720
4 Telephone: (559) 261-0163
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5

6 Attorneys for Pinedale County Water District

7 NO FILING FEE REQUIRED GOVERNMENT CODE §6103

8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF KINGS**

10 CITY OF FRESNO,	)	CASE NO. 18C-0051
	)	
11 Petitioner,	)	EX PARTE APPLICATION FOR ORDER
	)	SHORTENING TIME; MEMORANDUM
12 v.	)	OF POINTS AND AUTHORITIES IN
	)	SUPPORT THEREOF, AND
13 PINEDALE COUNTY WATER	)	DECLARATION OF NEAL E.
DISTRICT, and DOES 1 through 15,	)	COSTANZO
14 inclusive,	)	
	)	
15 Respondent	)	DATE: November 7, 2018
	)	TIME: 8:15 a.m.
	)	DEPT: 8

17 Respondent, Pinedale County Water District (Pinedale), through its attorney hereby
18 applies ex parte for an order shortening notice of hearing on Plaintiff's motion to (1) stay
19 or vacate the hearing or trial date of December 13, 2018; and (2) for leave to file an
20 amended answer to Petition for Writ of Mandate. Good cause exists for the requested
21 order shortening time for service and hearing of the aforementioned motions in that staying
22 or vacating the hearing or trial date of December 13, 2018, will allow either for the
23 consolidation in this case of a complaint for rescission of the underlying contract on which
24 the judgment sought to be enforced by the Petition for Mandate on file herein is based, and
25 which would be dispositive of the Petition for Mandate, or resolution of that claim prior to
26 determination of the Petition for Writ of Mandate, and avoid a multiplicity of actions,
27 unnecessary litigation between the same parties on the same subject matter
28 simultaneously and the possibility conflicting judgments and the prevention of harassment

EX PARTE APPLICATION; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF NEAL E. COSTANZO

1 and vexation of Respondent. The amended answer will allow Respondent to raise the
2 illegality of the contract as an affirmative defense and basis for determining the judgment
3 is void or voidable. There is an insufficient amount of time between now and December
4 13, 2018, for these motions to be heard on notice, and it is necessary that as they be heard
5 as far in advance of this date as possible because without knowing the outcome of those
6 motions it is impossible to even prepare for the December 13, 2018 hearing.

7 **DECLARATION OF NEAL E. COSTANZO IN SUPPORT OF**
8 **APPLICATION FOR ORDER SHORTENING TIME**

9 I Neal E. Costanzo declare:

10 1. Attached to this application is a copy of the proposed notice of motion and
11 supporting brief and declaration to (1) stay or vacate the hearing or trial date on the
12 Petition for Writ of Mandate set for December 13, 2018, and (2) for leave to file an
13 amended answer to the Petition for Writ of Mandate which I intend to file and serve on
14 behalf of Respondent.

15 2. A delay in hearing this matter after the normal time for service would
16 cause substantial hardship to Respondent because the motion would not be heard
17 sufficiently in advance of the December 13, 2018, hearing or trial date to allow
18 Respondent to determine the issues that will actually be tried on December 13, 2018,
19 and would preclude the joinder or consolidation in this case, or prior determination in a
20 separate action, of a claim for rescission of the underlying contract which lead to the
21 entry of the judgment sought to be enforced by the Petition for Writ of Mandate, which
22 is a matter that should be heard and determined prior to the determination on the
23 Petition for Writ of Mandate since the outcome of the recession claim is dispositive of
24 the outcome on the Petition for Writ of Mandate.

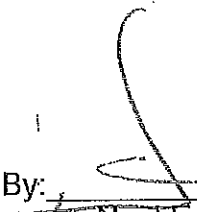
25 3. On October 29, 2018, I notified Petitioner's attorney by telephone that I
26 would be applying for this Order Shortening Time for Service of each of the referenced
27 motions, asked whether he would stipulate to an order shortening time and he refused.
28 I notified Petitioner's attorney by telephone on November 1, 2018, that the hearing on

1 this application for an order shortening time for service of the aforementioned motions
2 would occur at the date, time and department noted on the title of this document.

3 I declare under penalty of perjury under the laws of the State of California the
4 foregoing is true and correct.

5 //

6 Dated: November 5, 2018

By: 
Neal E. Costanzo,
Attorney for Defendant, Pinedale
County Water District

8 //

9 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OR**
10 **APPLICATION FOR ORDER SHORTENING TIME FOR FILING AND SERVICE OF**
11 **MOTION (1) TO STAY OR VACATE DATE SET FOR HEARING ON PETITION FOR**
12 **WRIT OF MANDATE; AND (2) FOR LEAVE TO FILE AMENDED ANSWER**

12 Under Code of Civil Procedure §1005 the court may prescribe a shorter period
13 of time for the service and hearing of a motion than otherwise prescribed by that
14 section. (See also CRC Rule 3.1300(b)). Good cause exists for the shortening of the
15 time for hearing on the accompanying motions to (1) stay or vacate the hearing date on
16 the Petition for Writ of Mandate on file in this action and (2) for Leave to File an
17 Amended Answer so that the hearing on both motions occurs no more than ten days
18 after the date of this application, or November 17, 2018. The trial or hearing date on
19 the Petition for Writ of Mandate, which is the sole pleading other than Respondent's
20 Answer, is currently set for December 13, 2018. It was set in the expectation that
21 Respondent would file its claim for recession of the underlying contract on which the
22 judgment which the Petition for Writ of Mandate seeks to enforced is based in the
23 Fresno Superior Court and would seek consolidation of the newly filed case in this court
24 as shown by the transcript of the hearing before court on July 23, 2018.

25 A subsequent motion for consolidation was made and denied in this court, but
26 expressly without prejudice to the motion to stay trial on December 13, 2018. Without
27 knowing what issues the court will allow evidence on, Respondent cannot prepare for
28 that trial or hearing. Further, a claim which Respondent wishes to have consolidated for

1 trial in this matter would be dispositive, if successful, of the pending Petition for Writ of
2 Mandate and would eliminate any need for any hearing on that matter at all. The
3 motions as to which an order shortening time is sought are designed ultimately to allow
4 for either the transfer to this court and consolidation in this court of the rescission claim
5 with the Petition for Writ of Mandate; or, alternatively, a separate, prior resolution of the
6 rescission claim which, because it would be dispositive of the Petition for Mandate,
7 should in the interest of justice be determined at the same time or prior to a
8 determination of a Petition for Writ of Mandate to prevent a multiplicity of actions and
9 unnecessary simultaneous litigation between the same parties on the same subject
10 matter and the accompanying increased expense, delay, confusion and potential for
11 conflicting judgments. The motion to amend the answer is made in the event the court
12 ultimately declines to stay the trial so that the illegality of the contract can be raised in
13 defense to the Petition for Mandate.

14 //

15 Dated: November 5, 2018

By: _____

Neal E. Costanzo,
Attorney for Defendant, Pinedale
County Water District

1. _____

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Michael G. Slater SBN 247302
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6 Attorneys for Pinedale County Water District

7 NO FILING FEE REQUIRED GOVERNMENT CODE §6103

8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF KINGS**

10 CITY OF FRESNO,	)	CASE NO. 18C-0051
	)	
11 Petitioner,	)	DECLARATION OF NEAL E.
	)	COSTANZO IN SUPPORT OF MOTION
12 v.	)	TO STAY OR VACATE HEARING ON
	)	PETITION FOR WRIT OF MANDATE
13 PINEDALE COUNTY WATER	)	AND TO AMEND ANSWER
14 DISTRICT, and DOES 1 through 15,	)	
inclusive,	)	
	)	DATE:
15 Respondent	)	TIME:
	)	DEPT:

16
17
18 I Neal E. Costanzo declare:

19 1. I am the attorney of record for Pinedale County Water District as Respondent
20 in this action and as Plaintiff in Fresno County Superior Court Case No. 18CECG02957,
21 which was filed on August 9, 2018 (the "Fresno Action").

22 2. The response in the Fresno Action which was a demurrer, was filed on
23 September 21, 2018 and our Motion to Transfer this case in Fresno County to Kings
24 County was filed in the Fresno Action on October 15, 2018. The Motion to Transfer filed
25 in the Fresno Court was filed only after this court denied a motion to consolidate, transfer
26 and stay the Fresno County Action on October 4, 2018. That motion was filed three days
27 after September 7, 2018, on September 10, 2018, following Counsel's receipt of a Meet
28 and Confer Letter relative to the demurrer that Fresno's attorney in this action stated he

DECLARATION OF NEAL E. COSTANZO IN SUPPORT OF MOTION TO STAY OR VACATE HEARING

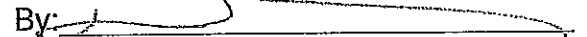
1 would be filing a demurrer in the Fresno Action and noting that he would be representing
2 Fresno in the Fresno Action, despite the prior refusal to accept service. The filing of the
3 transfer motion in this case could not be made under CCP §403 until the City of Fresno
4 responded to the Fresno Action.

5 3. All other facts relevant to the current Motion to Stay or Vacate the Hearing
6 on December 13, 2018 in this action are set forth in the Declaration of Neal E. Costanzo
7 in Support of the prior motion to transfer and consolidate the Fresno Action with this case
8 filed September 10, 2018. The court is requested to consider the matter contained in that
9 declaration in addition to the request for judicial notice filed in connection with that motion,
10 specifically, Exhibit E to that document which is a transcript of the proceedings on Fresno's
11 demurrer to the Cross-Complaint that was filed by Pinedale in this case.

12 I declare under penalty of perjury under the laws of the State of California the
13 foregoing is true and correct.

14 //

15 Dated: November 5, 2018

By: 
Neal E. Costanzo,
Attorney for Defendant, Pinedale
County Water District

1 Neal E. Costanzo SBN 122352
Michael G. Slater SBN 247302
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6 Attorneys for Pinedale County Water District

7 NO FILING FEE REQUIRED GOVERNMENT CODE §6103

8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF KINGS**

10 CITY OF FRESNO,	)	CASE NO. 18C-0051
	)	
11 Petitioner,	)	NOTICE OF MOTION AND MOTION TO
	)	STAY OR VACATE DECEMBER 13,
12 v.	)	2018, HEARING ON PETITION FOR
	)	WRIT OF MANDATE AND FOR LEAVE
13 PINEDALE COUNTY WATER	)	TO FILE AMENDED ANSWER [CCP
DISTRICT, and DOES 1 through 15,	)	§128; 473]
14 inclusive,	)	
	)	DATE:
15 Respondent	)	TIME:
	)	DEPT:

16
17 TO EACH PARTY AND TO EACH ATTORNEY OF RECORD IN THIS ACTION:
18 NOTICE IS HEREBY GIVEN that on November ___, 2018 in Department 8 of the
19 above entitled court Respondent, Pinedale County Water District (Pinedale) will and hereby
20 does move for an order staying or vacating the hearing or trial date on the Petition for Writ
21 of Mandate on file herein of December 13, 2018 and granting leave to amend
22 Respondent's Answer to the Petition for Writ of Mandate.

23 The motion for stay or vacating the hearing or trial date of December 13, 2018, on
24 the Petition for Writ of Mandate on file herein is made on the ground that a stay is
25 necessary in the interest of justice to allow for resolution of the claim and cause of action
26 for rescission now alleged in a complaint on file in the Fresno County Superior Court,
27 Pinedale County Water District v. City of Fresno, Fresno County Superior Court Case No.
28 18CECG02957, which claim is potentially dispositive of the Petition for Writ of Mandate

NOTICE OF MOTION AND MOTION TO STAY OR VACATE HEARING

00017188.WPD;1

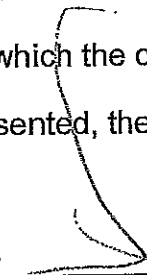
1 and avoid a multiplicity of suits by preventing two actions between the same parties
2 involving the same subject matter from proceeding independently of each other,
3 unnecessarily, and to prevent vexation and oppression and harassment of Respondent,
4 the potential for conflicting judgments, confusion and unseemly controversy between the
5 court and litigants.

6 The motion for an order granting leave to file an amendment to the answer to the
7 petition for writ of mandate on file herein is made on the ground that the illegality of the
8 contract on which the judgment which is sought to be enforced by the Petition for Mandate
9 is based, in addition to supplying grounds for rescission of the contract and extinction of
10 the contract and the resulting judgment, gives rise to the additional defense that the
11 judgment is void or voidable so that allowing the amendment is in the furtherance of the
12 interest of justice as provided for by CCP §473.

13 Both motions will be based on this Notice of Motion, the accompanying Memorandum
14 of Points and Authorities and the Declaration of Neal E. Costanzo in Support thereof and
15 on the records and files in this action, matters as to which the court is requested to take
16 judicial notice and such other matters as may be presented, the hearing of the motions.

17 //

18 Dated: November 5, 2018

By: 

Neal E. Costanzo,
Attorney for Defendant, Pinedale
County Water District

1 judgment Fresno sought specific performance of an "audit" provision in the contract for
2 disposal and treatment of sewage collected from Pinedale and transported to the City's
3 sewage collection and wastewater treatment facilities. Although the underlying judgment
4 became final in December 2013 (Petitions Ex.'s 2 and 3), Fresno has never sought to
5 conduct the audit which the judgment grants specific performance to conduct or to
6 otherwise enforce that aspect of the judgment. Aside from illegally recording abstracts of
7 judgment on the monetary portion of the underlying judgment (the contract provides for an
8 attorney's fee award to a successful party in litigation) Fresno has not sought until now to
9 enforce that aspect of the judgment. As detailed in the Declaration of Neal E. Costanzo
10 filed September 10, 2018, in support of the motion for transfer and consolidation and
11 request for stay of proceedings, the reason for the inaction by Fresno is their knowledge
12 that the underlying contract is illegal and agreements made on behalf of the City by elected
13 officials and officers of the City to not attempt to enforce this judgment and to instead enter
14 into negotiations for a substitute agreement to replace the clearly illegal agreement on
15 which these judgments are based. (See Declaration of Neal E. Costanzo in Support of
16 Motion to Transfer and Consolidation at ¶4 p. 2-3).

17 After the matter was transferred, Pinedale filed both an Answer and a Cross-
18 Complaint seeking, among other things, to rescind the illegal agreement. (Cross-
19 Complaint filed April 3, 2018). Fresno demurred to the Cross-Complaint on June 5, 2018,
20 and the demurrer was heard in this court on July 23, 2018. The demurrer, insofar as the
21 claim for rescission is concerned, was premised on the ground, among others, that a cross-
22 complaint cannot be filed in response to a Petition for Writ of Mandate (see Memorandum
23 of Points and Authorities in Support of Demurrer filed June 5, 2018, at p. 2-4).

24 The court entered a tentative ruling the day before the hearing sustaining the
25 demurrer without leave to amend on the ground, for which there is no statutory or case
26 authority, that a cross-complaint can be filed in a "special proceeding", that is, a proceeding
27 initiated by a Petition for Writ of Mandate. The court adopted its tentative ruling finding no
28 cross-complaint can be filed in a "special proceeding". As recognized by this court's local

1 rules, CCP §1109 makes the provisions of the Code of Civil Procedure relating to "actions"
2 applicable to and constituting the rules of practice in "special proceedings". (Local Rule
3 308(F) ("the rules of practice governing civil actions are generally applicable [to a mandate
4 petition]). The tentative ruling discloses absolutely no legal basis for this determination and
5 none exists. The grounds for the order is the incorporated tentative ruling. No order
6 dismissing the cross-complaint has been issued, or requested.

7 On August 9, 2018, Pinedale filed a separate action in the Fresno Superior Court.
8 The complaint replicates the former cross-complaint. It is filed in Fresno County because
9 that is where Fresno is located, where the contract was made and where the contract is
10 performed and the claim is one for rescission of that contract. (See *Skidmore v. Solano*
11 *County* (1954) 128 Cal.App.2d 391, 393-394; CCP §395). That Pinedale would file the
12 action in Fresno and move to transfer it and consolidate with this case was expressly
13 discussed in the course of the hearing on the demurrer:

14 "THE COURT: . . . in any event, the court's going to adopt the tentative . . .
15 We do have a case management now.
16 How do you want to deal with that issue? . . .

17 Mr. Costanzo: I have to go and look at filing a separate lawsuit now, your
18 Honor.

19 THE COURT: Of course.

20 Mr. Costanzo: And as he properly points out, I'll have to file that in Fresno
21 County, at least originally.

22 THE COURT: Right.

23 Mr. Costanzo: And I'll move to have it transferred, but I think the filing of that
24 would be a basis for holding this in abeyance.

25 THE COURT: Okay.

26 Mr. Costanzo: And that's a motion that I would make.

27 (Transcript of Hearing on Demurrer, Exhibit E to Request for Judicial Notice filed
28 September 10, 2018).

29 The court then proceeded to select a date for the hearing of the Petition for Writ of
30 Mandate based on the representation that he was not the assigned Judge and that counsel
31 would "have a new set of eyes and ears so you won't have to worry about it, but we can

1 set the matter for like November or December if that would give you enough time to do
2 what you have to do . . .". (Id. at p. 25:9-15). The following exchange occurred:

3 THE COURT: Alright, because that will give you enough time to do whatever
4 you have to do in terms of filing. Is October too soon?

5 Mr. Costanzo: October is too soon. . . .

6 The Clerk thereupon suggested December 13 and counsel indicated "that will work".
7 (Id p. 26). The separate action was filed in the Fresno Court on August 9, 2018. Fresno
8 refused to accept service. The complaint had to be served and counsel had to await a
9 response in that court (which came in the form of a demurrer) before filing the motion to
10 transfer in this court. Before Fresno responded to the Fresno action on September 21,
11 2018, on September 10, 2018 three days after issuance of a letter stating Fresno's
12 attorney in this action would be representing Fresno in the Fresno Court Action, Pinedale
13 filed on September 10, 2018 a motion in this case to transfer and consolidate the Fresno
14 Court Action. The motion to consolidate, transfer and stay was denied on October 4, 2018.
15 The court issued a tentative ruling prior thereto indicating that the motion was an improper
16 motion to reconsider the ruling on the demurrer. During the course of the hearing, the
17 court still decided to deny the motion, but allowed for the making of this motion to stay the
18 hearing date, although the order submitted by Fresno does not reflect that. In any event,
19 following the denial of that motion, Pinedale filed a motion for transfer of the Fresno County
20 action to a neutral court under CCP §394 noting that the neutral court and the appropriate
21 court for transfer would be this court. That motion was filed on October 15, 2018, prior to
22 the hearing on Defendant's demurrer and the court has continued that hearing to
23 December 5, 2018, the date set for the hearing of the transfer motion.

24 The filing of the transfer motion under CCP §394 operates as a supersedious or
25 stay of the proceedings in Fresno Superior Court which must disposed of before any other
26 steps can be taken by the court including a ruling on the demurrer because any such ruling
27 given the pendency of the transfer motion would be a nullity. (*South Center LLC v. LJ*
28 *Center Partners LP* (2011) 193 Cal.App.4th 634; *Pickwick Stages System v. Superior Court*

1 (1934) 138 Cal.App.448, 449; *City of Oakland v. Darbee* (1951) 102 Cal.App.2d 493, 503-
2 504 (applying the rule that a motion for transfer under CCP §394 which, like a motion to
3 change venue under CCP §395, suspends the court's jurisdiction to take substantive action
4 (as opposed to incidental or ancillary matters) until passing on the motion for transfer)).

5 At the hearing on the motion to consolidate this court invited a motion for a stay, and
6 a motion to amend the answer. ¹ As noted in the declaration supporting the motion to
7 consolidate, there is certain discovery that needs to occur, which has not yet occurred, but
8 will occur as soon as the action is transferred, presumably to this court and, since the
9 rescission claim is, as shown below, and as shown in the motion to consolidate, dispositive
10 of this entire proceeding it simply makes no sense, and results in a multiplicity of actions,
11 and creates a danger of inconsistent judgments, to allow this hearing on the Petition for
12 Mandate to go forward without consideration of the rescission claim. Respondent requests
13 the stay of that hearing, as invited by the court. A stay of the hearing will allow the action
14 to be transferred to this court, or to a different neutral court, and will allow the court to
15 which it is assigned to make a determination as to whether or not Pinedale is entitled to
16 rescission of the contract which would render the Petition for Writ of Mandate moot.

17 II. ARGUMENT

18 A. THE COURT SHOULD STAY THE DECEMBER 13, 2018 HEARING,
19 WHICH WAS SET IN CONTEMPLATION OF THE FILING OF THE SEPARATE
20 ACTION FOR RESCISSION AND SUBSEQUENT MOTION TO CONSOLIDATE, TO
21 PUT AN END TO THE MULTIPLICITY OF ACTIONS CREATED BY THE COURT'S
22 GRANTING OF THE DEMURRER TO THE CROSS-COMPLAINT AND THE
23 CONSEQUENT INCREASED EXPENSE AND POTENTIAL FOR CONFLICTING
24 JUDGMENTS SO THAT THE RESCISSION CLAIM WHICH IS DISPOSITIVE OF THE
25 PETITION FOR MANDATE MAY BE DECIDED PRIOR TO OR AT THE SAME TIME
26 THE PETITION FOR MANDATE PETITION IS DECIDED.

27 The court has inherent power to control and manage the proceedings before it.
28 (CCP §128). The power is to be exercised in order to achieve the orderly
administration of justice. (*Hayes v. Superior Court* (1940) 16 Cal.2d 260, 264; *People*
Ex Rel Kottmeier v. Municipal Court (1990) 220 Cal.App.3d 602, 611). In exercising

¹ Because the order submitted by Fresno does not reflect that and misstates the order, Pinedale has
requested a transcript of that hearing.

1 those powers, courts have routinely granted a stay of proceedings in actions before
2 them to allow either for the joinder or consolidation of a different pending action
3 between the same parties on the same subject matter, or to allow a proceeding which
4 may be dispositive of a different proceeding to be decided first. Of paramount
5 consideration to the orderly administration of justice, is the policy of avoiding a
6 multiplicity of actions and the attendant added expense, inconvenience, confusion and
7 possibility of inconsistent judgments that is created, unnecessarily, when there is
8 simultaneous litigation between the same parties concerning the same subject matter in
9 different forums. (See *Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1456). The courts
10 regularly issue injunctions where that restraint is necessary to prevent a multiplicity of
11 judicial proceedings. (*Simmons v. Superior Court* (1950) 96 Cal.App.2d 119, 131-133).
12 In *Simmons, supra*, an Appellate Court concluded that a trial court had erred in failing to
13 stay an action between the same parties and involving the same subject matter but
14 separately filed explaining:

15 "The rule which forbids a later action in the same state between the same
16 parties involving the same subject matter rests upon principles of wisdom
17 and justice to prevent vexation, oppression, and harassment, to prevent
18 unnecessary litigation to prevent a multiplicity of suits - in short to prevent
19 two actions between the same parties involving the same subject matter
20 from proceeding independently of each other."

21 Indeed, prevention of a multiplicity of actions between the same parties and
22 involving the same subject matter is a recognized ground for the granting of declaratory
23 and injunctive relief (*Californians for Native Salmon Etc Association v. Department of*
24 *Forestry* (1990) 221 Cal.App.3d 1419, 1430). Or, to toll a statute of limitations or to
25 allow conclusion of preliminary or underlying proceedings that may be dispositive of a
26 different proceeding between the same parties. (*Olsen v. County of Sacramento* (1974)
27 38 Cal.3d 958, 964 (judicial policy underlying decisions which toll statutes of limitations
28 during the pendency of interrelated administrative proceedings in cases where the latter
may be dispositive of an essential element of a legal cause of action is founded on the
need for harmony and avoidance of chaos in the administration of justice).

1 The contract on which the Judgment Fresno seeks to enforce is based provides
2 the "District shall bill and collect from the customer's sewer charges for each premise
3 served by the District's sewage collection system at the rate set forth in the ordinances
4 and regulations . . .". (Petition Ex. 1, p. 2, ¶4). The ordinances and regulations are
5 those of the City setting its rates for sewer charges and Pinedale is required to set its
6 rates at the rate set by the City and cannot under any circumstances have rates lower
7 than the City. (Ex. 4 to Petition at p. 3-4). The agreement is "perpetual" and may not
8 be cancelled or terminated except by mutual written consent of the parties. (Petition
9 Ex. 1, p. 6, ¶15).

10 The District is specifically given the power to operate a sewage system and to
11 prescribe, revise and collect rates and other charges for those services. (Water Code
12 §§31100, 31101). Proposition 218, California Constitution Article XIID, Section 6
13 requires the District to notify property owners of any proposed change in fees, conduct
14 a public hearing on not less than 45 day's notice and if a majority of the property
15 owners protest the proposed fee it cannot be imposed. (Article XIID, Section 6(a);
16 Government Code §53755; 9 Witkin, Summary of California Law, 11th Ed. 2018) Tax,
17 Section 148; *Plantier v. Romona Municipal Water District* (2017) 12 Cal.App.4th 856,
18 862-863).

19 The requirement of this contract that Pinedale set its rates at the level set by the
20 City, which is the sole consideration for the contract, a sharing of fees at the specified
21 level, is an illegal provision because it amounts to the surrender, abnegation,
22 divestment abridging or bargaining away of Pinedale's control of a police power in
23 perpetuity. The provision renders the contract void as a matter of law. (*County of*
24 *Ventura v. City of Moore Park* (2018) 24 Cal.App.5th 377, 390-392; *County Mobile*
25 *Home Positive Action Commission Inc v. County of San Diego* (1998) 62 Cal.App.4th
26 727, 738-741; *Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4th 1550,
27 1557-1559; *AVCO Community Developers v. South Coast Regional Commission* (1975)
28 17 Cal.3d 785, 800; *San Diego County v. California Water and Telegraph Company*

1 (1947) 30 Cal.2d 817, 824; *Summit Media LLC v. Los Angeles* (2012) 211 Cal.App.4th
2 921, 934; *Trancas Property Owner's Association v. Malibu* (2006) 138 Cal.App.4th 172,
3 181). The contract amounts to an invalid and void abdication of police power in
4 perpetuity and, in addition, requires the District to disregard the effect of a majority
5 protest in violation of Proposition 218 and is illegal for that reason as well (*Plantier v.*
6 *Ramona Municipal Water District* (2017) 12 Cal.App.5th 856, 862-863):

7 A contract is extinguished by its rescission. (Civil Code §1688). The rescission
8 not only terminates further liability but also restores the parties to their former position
9 by requiring each to return whatever he or she has received as consideration under the
10 contract. (1 Witkin Summary of California Law 11th Ed. Contract Section 956 (2018).
11 The effect of the rescission is to reinstate the parties to the status quo that existed
12 before the contract was made. (*Wong v. Stoller* (2015) 237 Cal.App.4th 1375, 1387).

13 Thus, the rescission claim is dispositive of the Petition for Mandate and, as such,
14 is a matter required, on request, whether raised in an answer or in a complaint, to be
15 tried and determined before the Petition for Mandate. (See CCP §589 (setting
16 precedence of issues to be tried and providing for trial of dispositive issues first); 587
17 (requiring trial of affirmative defenses that are dispositive first)). The rescission claim is
18 now subject to a transfer motion which is mandatory and which the Fresno Court has no
19 discretion to deny. Because the rescission claim is dispositive of the entire case it
20 simply makes no sense to conduct the proceeding backwards by making a
21 determination on the Petition for Writ of Mandate first, and deciding whether the
22 Judgment is even enforceable later. The mandate petition must await determination of
23 the rescission claim, otherwise Pinedale is effectively precluded from having the issues
24 between these parties determined in the order in which they should be determined. By
25 refusing to stay this proceeding until the rescission claim is consolidated with this
26 proceeding or tried in a neutral court, (most likely Kings County Superior Court), before
27 the trial on the Petition for Writ of Mandate, the court will simply be creating a
28 multiplicity of suits and creating confusion and a very real prospect of conflicting

1 judgments which can only lead to further litigation. The interest of justice command that
2 actions between the same parties on the same subject matter be tried together. The
3 December 13th hearing date was only set in the expectation that the complaint in the
4 Fresno Court could be transferred to this court prior to that date. Because Fresno has
5 successfully delayed proceedings in the Fresno Court the expectation that the matter
6 would be transferred by now has not been achieved. Taking any course other than
7 vacating and staying the proceedings in this pending action until the outcome of the
8 rescission claim is known, runs counter to the interest of justice and the efficient and
9 orderly disposition of all issues pending between two parties on the same subject
10 matter.

11 B. THE COURT MUST ALLOW THE FILING OF THE FIRST AMENDED
12 ANSWER ALLEGING THE ILLEGALITY OF THE AGREEMENT AND THE
13 CONSEQUENT UNENFORCEABILITY OF THE JUDGMENT

14 The existing answer incorporates the allegations of the former cross-complaint
15 which included the rescission claim. In order to place the parties in the position they
16 were in prior to execution of this agreement, it is necessary for the rescission claim to
17 be determined. If the court refuses to stay this case pending the outcome of the
18 rescission claim, Pinedale is clearly entitled to raise the illegality of the contract
19 underlying the judgments and the consequent unenforceability of the judgment. (See
20 *Signal Oil and Gas Company v. Ashland Oil and Refining Company* (1958) 49 Cal 2d.
21 764, 776; *People v. Gonzales* (1996) 12 Cal.4th 804, 823; *Brady v. Superior Court*
22 (1962) 200 Cal.App.2d 69, 73) (all dealing with and allowing attacks on enforceability
23 of a judgment that is based on an illegal contract holding that granting relief on an
24 illegal contract may, depending on the circumstances, be in excess of jurisdiction and
subject to collateral attack).

25 The amended answer simply raises the illegality of the contract and the likely
26 void nature of the ensuing judgment which is based on that illegal agreement. This is
27 obviously a proper amendment in the interest of justice since the original answer
28 alleged, as an affirmative defense, the matter that appeared in the cross-complaint

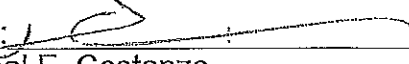
1 alleging rescission. There is no basis for refusing the amendment, but the City of
2 Fresno will not stipulate to anything that allows for the interjection of the illegality issue.

3 **III. CONCLUSION**

4 For the foregoing reasons, these proceedings must be stayed. If they are not,
5 the court is simply creating a multiplicity of actions and defeating what is the established
6 interest of justice and the efficient resolution of all issues between parties.

7 //

8 Dated: November 5, 2018

By: 
9 Neal E. Costanzo,
Attorney for Defendant, Pinedale
County Water District

1 PROOF OF SERVICE

2 The undersigned declares:

3 I, Julia Sellers, the undersigned, declare that:

4 I am employed in the County of Fresno, State of California. I am over the age of
5 eighteen years, and am not a party to the within action. My business address is 575 E.
6 Locust Avenue, Suite 115, Fresno California 93720.

7 I am familiar with the regular mail collection and processing practice of said
8 business, and in the ordinary course of business the mail is deposited with the United
9 States Postal Service that same day.

10 On November 5, 2018, I served the foregoing document described as:

11 **EX PARTE APPLICATION FOR ORDER SHORTENING TIME; MEMORANDUM**
12 **OF POINTS AND AUTHORITIES IN SUPPORT THEREOF, AND DECLARATION**
13 **OF NEAL E. COSTANZO**

14 on all parties to this action by causing a true copy thereof to be:

- 15 (☐) Telecopied Via Facsimile
16 (☒) Placed in a sealed envelope with postage thereon fully prepaid in the
17 designated area for outgoing mail
18 (☒) Electronic Mail
19 (☐) Sent Via Overnight Delivery (see below)

20 as addressed below:

21 James B. Betts
22 Joseph D. Rubin
23 Betts & Rubin
24 907 Santa Fe Avenue, Suite 201
25 Fresno, CA 93721
26 Email: br@bettsrubinlaw.com

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

29 Date: November 5, 2018

30 
31 Julia Sellers

EXHIBIT D

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1 Acknowledgment of Service on August 10, 2018. The complaint was filed August 9, 2018,
2 as Fresno Superior Court Case No. 18CECG02957.

3 3. Betts did not respond until August 15, stating that he was arranging a
4 meeting with his client, presumably the City Council, although neither the Fresno County
5 case or this case shows on any closed session agenda of the City Council occurring on or
6 after August 9, 2018. Ultimately Betts refused to either accept service of the Summons
7 and Complaint or stipulate to the transfer and consolidation of this action with the newly
8 filed Complaint. Copies of Betts' letters in response dated August 15, and August 23,
9 2018, are attached and incorporated by reference as Exhibit C.

10 4. I represented the Pinedale County Water District in the underlying actions
11 which lead to the filing of the Petition for Mandate in this case. The Judgment(s) and Court
12 of Appeal opinions from that case are exhibits to the Petition for Mandate in this case.
13 From the day that the underlying action was first filed in 2007, I, along with either an
14 elected official of the Pinedale County Water District or its General Manager have met
15 repeatedly with individuals at the Fresno City Attorney's Office, the Council person who's
16 District includes Pinedale County Water District (either Andreas Borgas, first, or Steve
17 Brandau, second) and a series of city managers and public works directors who have
18 occupied that position from 2007 to and including June 16, 2017, when this petition for writ
19 of mandate was filed. At first, those discussions centered around Pinedale's demand that
20 Fresno dismiss that action which is one brought ostensibly to enforce the "Agreement for
21 Transportation and Treatment of Pinedale County Water District Sewage" that is Exhibit
22 1 to the Petition for Mandate (The Contract). The City nevertheless continued to prosecute
23 the action it filed against Pinedale County Water District and seeking specific performance
24 of a provision in the Contract that allows for the City (or Pinedale) to conduct an "audit".
25 At no time since the issuance of the remittitur from the two appeals that were taken in the
26 underlying action (one from the original judgment ordering Pinedale to submit to a specified
27 type of audit and the other from the award of attorney's fees), has the City sought to
28 conduct the audit which the judgment allows. The Court of Appeal opinions are both filed

1 September 17, 2013 and the remittitur in both cases issued 60 days after that date.
2 Discussions between representations of the City and Pinedale all of which I was involved
3 in at that time centered on the fact that the judgments the City obtained arise from an
4 illegal contract and the City representatives involved in those discussions have always
5 indicated they were willing to change the contract so as to make it conform to law and did
6 not seek to recover anything from Pinedale, given the clear illegality of the agreement. The
7 City of Fresno's persistent practice of withholding money from Pinedale that Pinedale is
8 clearly entitled to recover consisting of a share of monies received from the federal
9 government as community development block grants was also discussed and the City
10 representatives have always advised Pinedale they would not attempt to collect any part
11 of the monetary judgment, partly for that reason. Pinedale's per capita share of those
12 block grants, which are obtained by use of the demographics of Pinedale County Water
13 District exceeds one million dollars a year. The filing of the Petition for Mandate in this
14 case comes immediately following Steve Brandau's representation to the Board of
15 Directors of Pinedale County Water District that the City would not make any attempts to
16 enforce it's purported judgment and would issue a new proposed agreement for the
17 transportation and treatment of Pinedale County Water District's sewage that did not
18 violate the provisions of law identified for the City of Fresno that this Contract violates.

19 5. The District intends to present at trial testimony from a City Council member,
20 from the City's former Public Works Director, its former City Managers and from
21 representatives of the District, all to the effect that Fresno concedes the underlying
22 agreement is illegal and that their judgment is unenforceable as a result. Those persons
23 will also provide testimony to the effect that numerous representations were made directly
24 to the Pinedale County Water District's Board of Directors by, among others, Steve
25 Brandau, the former Public Works Director, the former City Manager, and others, that the
26 City had absolutely no intention of ever attempting to collect on its judgement, would
27 stipulate to the rescission of the judgment and was in the process of preparing and would
28 propose a new contract that conformed to the requirements of law identified for the City.

1 Indeed, although the judgment for specific performance, was entered January 23, 2012
2 (see Exhibit 5 to Petition for Writ of Mandate) Fresno has never even attempted to conduct
3 the audit the judgment in the underlying case allows it to conduct.

4 6. The action sought to be transferred and consolidated is Pinedale v. City of
5 Fresno, Fresno County Superior Court Case No. 18CECG02957 filed August 9, 2018.
6 Fresno was served with the Summons and Complaint on August 24, 2018. The parties in
7 these actions are, of course, the same. The facts which establish that neither case is
8 complex as defined by the Judicial Council Rule, consists of the only matter that is
9 currently before this court and the Fresno Court in the referenced action, which consists
10 entirely of pleadings and briefs on pleading motions.

11 I declare under penalty of perjury under the laws of the State of California the
12 foregoing is true and correct.

13 //

14 //

15 Dated: September ___, 2018

By: _____
Neal E. Costanzo,
Attorney for Defendant, Pinedale
County Water District

1 PROOF OF SERVICE

2 The undersigned declares:

3 I, Julia Sellers, the undersigned, declare that:

4 I am employed in the County of Fresno, State of California. I am over the age of
5 eighteen years, and am not a party to the within action. My business address is 575 E.
6 Locust Avenue, Suite 115, Fresno California 93720.

7 I am familiar with the regular mail collection and processing practice of said
8 business, and in the ordinary course of business the mail is deposited with the United
9 States Postal Service that same day.

10 On November 27, 2018, I served the foregoing document described as:

11 **DECLARATION OF NEAL E. COSTANZO IN SUPPORT OF THE MOTION TO**
12 **TRANSFER ACTION**

13 on all parties to this action by causing a true copy thereof to be:

- 14 (☐) Telecopied Via Facsimile
15 (☒) Placed in a sealed envelope with postage thereon fully prepaid in the
16 designated area for outgoing mail
17 (☒) Electronic Mail
18 (☐) Sent Via Overnight Delivery (see below)

19 as addressed below:

20 James B. Betts
21 Joseph D. Rubin
22 Betts & Rubin
23 907 Santa Fe Avenue, Suite 201
24 Fresno, CA 93721
25 Email: br@bettsrubinlaw.com

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

28 Date: November 27, 2018


Julia Sellers