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6 ATTORNEYS FOR PROPOSED INTERVENOR-DEFENDANTS
7 THE CHEMICAL TOXIN WORKING GROUP INC.
8 DBA HEALTH LIVING FOUNDATION
9 AND PENNY NEWMAN

10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA

12 CALIFORNIA CHAMBER OF COMMERCE,

13 Plaintiff,

14 v.

15 ROB BONTA, IN HIS OFFICIAL CAPACITY
16 AS ATTORNEY GENERAL OF THE STATE
17 OF CALIFORNIA,

18 Defendant,

19 COUNCIL FOR EDUCATION AND
20 RESEARCH ON TOXICS,

21 Intervenor-Defendant,

22 THE CHEMICAL TOXIN WORKING GROUP
23 INC. DBA HEALTHY LIVING
24 FOUNDATION INC.

25 Proposed Intervenor-Defendant, and

26 PENNY NEWMAN

27 Proposed Intervenor-Defendant.

Civil No. 2:19-cv-02019-KJM-JDP

**OBJECTION TO FURTHER PROCEEDINGS
OF JUDGE MUELLER BY PROPOSED
INTERVENORS-DEFENDANTS THE
CHEMICAL TOXIN WORKING GROUP
INC. DBA HEALTHY LIVING
FOUNDATION INC. AND PENNY NEWMAN**

**REDACTS MATERIAL FROM SEALED
RECORDS**

28 OBJECTION BY HLF AND NEWMAN TO FURTHER PROCEEDINGS
Case No. 2:19-cv-02019-KJM-JDP

1 1. Healthy Living Foundation and Newman object to Judge Mueller proceeding further in the
2 case by making a court’s motion in the Minute Order dated August 24, 2021 Doc. 153 after CERT filed
3 its disqualification motion and a timely and legally sufficient affidavit.

4 2. Healthy Living Foundation and Newman object to Judge Mueller proceeding further in the
5 case by holding the Scheduling Conference presently set for August 27, 2021, after CERT filed its
6 disqualification motion and affidavit.

7 **Legal Sufficiency of Affidavit: Extra-Judicial Grounds for Disqualification**

8 The grounds for disqualification in this case come exclusively from sources outside of the judge’s
9 participation in the case at hand. *See Pesnell v. Arsenault*, 543 F.3d 1038, 1043 (9th Cir. 2008) (alleged
10 bias “must usually stem from an extrajudicial source”). The affidavit “must state facts as opposed to
11 conclusions, and while the information and belief of the affiant as to the truth of the allegations are
12 sufficient, mere rumors and gossip are not enough.” *United States v. Hanrahan*, 248 F. Supp. 471, 474
13 (D.D.C. 1965). “The identifying facts of time, place, persons, occasion and circumstances must be set
14 forth, with at least that degree of particularity one would expect to find in a bill of particulars.” *Id.*
15 (citations omitted).

16 All facts brought by CERT are strictly material, stated with particularity, and supported by publicly
17 available sources of information and public record; the facts are such that they would convince a
18 reasonable person that bias exists; and the facts show the bias is personal, as opposed to judicial in nature.
19 None of the facts asserted is conclusory or is a belief or an opinion. The motion and the affidavit contain
20 facts of times, places, persons, occasions and circumstances, stated with an extremely high degree of
21 particularity, more than the standard requires. *See id.*; Doc. 152, 155, 155-1, 155-2. The so-called
22 “extrajudicial source” rule is fully satisfied by CERT’s motion and affidavits.

23 **Timeliness**

24 A recusal motion must be made “in a timely fashion.” *E. & J. Gallo Winery v. Gallo Cattle Co.*,
25 967 F.2d 1280, 1295 (9th Cir. 1992). “While there is no per se rule that recusal motions must be made at
26 a fixed point in order to be timely, such motions should be filed with reasonable promptness after the
27 **OBJECTION BY HLF AND NEWMAN TO FURTHER PROCEEDINGS**

1 ground for such a motion is ascertained.” *Id.* (citation omitted) (quotation marks omitted). Here, the
2 request that Judge Mueller be recused is timely.

3 As established in CERT’s motion and affidavit, Judge Mueller’s appearance of bias in favor
4 of California Chamber of Commerce only recently transpired in this case, through the research by the
5 proposed intervenor-defendant Healthy Living Foundation, who accidentally learned one of the facts
6 suggesting bias while researching almond growers for its notices of violation of Proposition 65 for high
7 levels of acrylamide in almond products.

8 Healthy Living Foundation sues Justin’s¹ for high levels of acrylamide in their almond butters and
9 routinely researches almond growers, their supply and distribution chains, manufacturing processes, and
10 sourcing practices. *See* Declaration of Aida Poulsen, ¶6. Almond products rank among the highest for
11 acrylamide contamination. Judge Mueller’s husband, Robert (Bob) J. Slobe, appears to own a large
12 almond ranch, but because of his different last name, Healthy Living Foundation did not make a
13 connection between Mr. Slobe and Judge Mueller in the past. When Healthy Living Foundation
14 accidentally learned of the fact connecting a possible supplier of almonds in violation of Proposition 65,
15 the North Sacramento Land Company owned by Mr. Slobe,² to Judge Mueller, it alerted its counsel, which
16 triggered further inquiry that returned the voluminous and overwhelming evidence of possible bias and/or
17 appearance of such, which should have been disclosed by the Judge at the onset of this litigation. Those
18 facts include, among others, Judge sharing a publicly registered home address with the Plaintiff’s
19 organization at [REDACTED], which may involve questions about landlord-tenant
20 relationship, among others; Judge’s past work as an attorney at Orrick, Herrington & Sutcliffe LLP,³ a US
21 Chamber of Commerce’s litigation counsel;⁴ see *AT&T Mobility LLC v. Yeager* (E.D.Cal. July 21, 2015,
22 No. 2:13-cv-0007-KJM-DAD) 2015 U.S.Dist.LEXIS 94898, at 8-9; her husband’s long-term engagement
23

24 ¹ *Chemical Toxin Working Inc. v. Justin's LLC*, Superior Court of the State of California County of
25 Alameda, No. RG20082547

26 ² <https://www.yelp.com/biz/north-sacramento-land-company-sacramento>, last visited August 26, 2021.

27 ³ https://drive.google.com/file/d/1d-3uvkOBr1GAWyDj-8MUaDi_C3h50ULp/view, last visited August
28 26, 2021.

1 with the Plaintiff's organization and his apparent managerial and sponsoring roles in it over the years; and
2 awarding of what is called "Slobe Advocate Award" to the executive director and the President of the
3 North Sacramento Chamber of Commerce Franklin Burriss.⁵ See Doc. 152, 155-156.

4 Under *Liteky v. United States*, 510 U.S. 540, 548 (1994), the obligation to identify the grounds for
5 recusal is on the judge. The Court in *Fowler v. Butts*, 829 F.3d 788, 794 (7th Cir. 2016) further explains:
6 28 U.S.C. § 455(e) "does not permit an otherwise-disqualified judge to serve just because the litigant fails
7 to make the appropriate motion. Instead the judge must take the initiative and make a 'full disclosure on
8 the record.'"

9 Under 28 U.S.C. § 455(a), any judge shall disqualify himself in any proceeding in which his
10 impartiality might reasonably be questioned. *United States v. Simmons*, 1997 U.S. Dist. LEXIS 22658, at
11 *7 (E.D. Cal. July 22, 1997, CV-F-96-5948 OWW DLB). "Because the judge knows both the facts and the
12 law about disqualification better than any litigant, even a litigant with a lawyer, it is well to stick with the
13 statutory language: the judge must disqualify herself when the statute so provides whether or not the
14 litigant files a motion." *Fowler*, 829 F.3d at 794. The participation of a disqualified judge is a form of
15 structural error, which may be noticed at any time. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909
16 (2016).

17 CERT only learned of the first initial facts from the email of the undersigned counsel on August
18 1, 2021, within days of its motion.

19 **Recusal is Non-Waivable Under § 455(b)(4)**

20 Importantly, one basis for CERT's disqualification motion, § 455(b)(4), requires disqualification
21 no matter how insubstantial the financial interest and regardless of whether or not the interest actually
22 creates an appearance of impropriety. See § 455(d)(4); *Liljeberg v. Health Servs. Acquisition Corp.*, 486
23 U.S. 847, 859 n.8 (1988); *Glick v. Edwards*, 803 F.3d 505, 508 (9th Cir. 2015). In addition, § 455(e)
24 specifies that a judge may not accept a waiver of any ground for disqualification under § 455(b). *Liljeberg*,
25 486 U.S. at 859 n.8. Recusal is mandatory if the judge, his or her spouse, or minor child residing in his or
26

1 her household has “a financial interest in the subject matter in controversy or in a party to the proceeding,
2 or any other interest that could be substantially affected by the outcome of the proceeding.” 28 U.S.C. §
3 455(b)(4). “Financial Interest” is defined in 28 U.S.C. § 455(d)(4) as “ownership of a legal or equitable
4 interest . . . or a relationship as director, advisor or other active participant in the affairs of a party.” *See*
5 *also In re Specht*, 622 F.3d 697, 699–700 (7th Cir. 2010) (judge’s denial of motion to amend complaint
6 to add defendant creates appearance of partiality if judge or spouse has financial interest in, or is member
7 of board of directors of, potential new defendant); *In re Kensington Int’l Ltd.*, 353 F.3d 211, 220 (3d Cir.
8 2003) (actual bias is of no consequence because statute is concerned not only with fairness to litigants,
9 but equally with public’s confidence in judiciary); *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir.
10 1995) (avoiding appearance of impropriety is as important in developing public confidence in judicial
11 system as avoiding impropriety itself). The facts in the CERT’s motion and affidavits sufficiently plead
12
13 both—bias and an appearance of bias. *See* Doc. 152, 155-156.

14 § 144 Motion

15 28 USC § 144 provides, in relevant part:

16 Whenever a party to any proceeding in a district court makes and files a timely and sufficient
17 affidavit that the judge before whom the matter is pending has a personal bias or prejudice either
18 against him or in favor of any adverse party, such judge **shall proceed no further therein**, but
19 another judge shall be assigned to hear such proceeding. [emphasis added]

20 Where the affidavit is legally insufficient, the judge at whom the motion is directed may resolve
21 the matter. *United States v. Scholl*, 166 F.3d 964, 977 (9th Cir. 1999). The significance of section 144 is
22 that it bars any inquiry into the facts beyond the face of the affidavit. *Berger v. United States*, 255 U.S.
23 22, 32-34 (1922). The judge must assume the facts alleged in a section 144 affidavit are true, even if he
24 or she knows them to be false. *Id.* at 35-36; *see also Hanrahan*, 248 F. Supp. at 474.

25 Due Process

26 The right to a tribunal free from bias or prejudice is based not on section 144, but on the Due
27 Process Clause. *See In re Murchison*, 349 U.S. 133, 136-37 (1955). The Court asks not whether the judge
28 is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or

1 whether there is an unconstitutional ‘potential for bias.’” *Tumey v. Ohio*, 273 U.S. 510, 523, (1927)
2 (violation of due process to subject person’s liberty or property to judgment of judge that has direct,
3 personal, substantial, and pecuniary interest in resolving case); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813
4 (1986).

5 **Objection to Court’s Motion**

6 Once CERT filed its disqualification Motion and affidavit, Judge Mueller should only be assessing
7 the timeliness and sufficiency questions. Once those are determined as satisfying the formal requirements,
8 it is the judge’s duty to proceed no further. *United States v. Azhocar*, 581 F.2d 735, 738 (9th Cir. 1978).
9 However, Judge Mueller has proceeded and seemingly intends to proceed further in this matter on issues
10 unrelated to the timeliness and sufficiency of CERT’s affidavit.

11 Specifically, on August 24, 2021, Judge Mueller made her own motion to submit two substantive
12 motions to intervene, previously scheduled for a hearing, after CERT invoked section 144 by filing a
13 timely and sufficient affidavit Doc. 153. Judge Mueller vacated two hearings for two interventions three
14 days prior to the oral argument, ordering that two pending contested Motions to Intervene filed by two
15 distinct intervenors, Healthy Living Foundation and Penny Newman, with vastly different standing,
16 different interests and arguments, are both submitted without oral argument; and ordered that the highly
17 contested Scheduling Conference in the case would proceed.

18 It appears Judge Mueller assumes she can continue to “proceed further” on certain purportedly
19 procedural issues (Scheduling Conference), while deferring the purely substantive issues (such as the two
20 pending motions to intervene). However, there is no such division in the law, allowing the judge, where
21 the disqualification is pending, to rule on such important and highly contested issues as those raised by
22 parties in the Joint Status Report. Doc. 144. Every issue pertaining to discovery, disclosures, experts,
23 depositions, and especially timing, has been challenged by CERT who asserts Judge’s bias, and will be
24 necessarily decided in favor of one of the contestants.

1 Therefore, Healthy Living Foundation and Penny Newman object to Judge Mueller proceeding
2 further in the case on any matters not relating to first assessing the facial sufficiency and timeliness of the
3 affidavit supporting CERT's disqualification motion.

4
5 Dated: August 26, 2021

Respectfully submitted,

6 /s/ Aida Poulsen

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17 *Healthy Living Foundation Inc. and Penny Newman*

CERTIFICATE OF SERVICE

1
2 I hereby certify that on August 26, 2021, I caused the foregoing document, described as
3 **OBJECTION TO FURTHER PROCEEDINGS OF JUDGE MUELLER BY PROPOSED**
4 **INTERVENORS-DEFENDANTS THE CHEMICAL TOXIN WORKING GROUP INC. DBA**
5 **HEALTHY LIVING FOUNDATION INC. AND PENNY NEWMAN** to be electronically filed with
6 the Court's CM/ECF filing system, which will send a Notice of Electronic Filing to all parties of record
7 who are registered with CM/ECF:
8

9
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16 I declare that I am employed in the offices of a member of this court, at whose direction service
17 was made.

18 Executed on August 26, 2021.

19 /s/ Kelley Genne
20 Kelley Genne, Declarant