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Attorneys for Intervenor-Defendant,
COUNCIL FOR EDUCATION AND
RESEARCH ON TOXICS ("CERT")

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA CHAMBER OF
COMMERCE,

Plaintiff,

vs.

XAVIER BECERRA, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA.

Defendant.

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

*Assigned to the Hon. Kimberly A. Mueller,
Ctm. 3*

**FURTHER SUPPLEMENTAL
MEMORANDUM AND DECLARATION
OF RAPHAEL METZGER IN SUPPORT
OF CERT'S MOTION TO DISQUALIFY
THE HONORABLE KIMBERLY
MUELLER**

[Matter deemed submitted by the Court on
September 13, 2021 per ECF Doc. No. 168]

**REDACTS MATERIAL FROM SEALED
RECORDS**

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OBJECTION TO JUDGE MUELLER TAKING THIS MATTER UNDER SUBMISSION

Intervenor-Defendant Council for Education and Research on Toxics (CERT) objects to Judge Mueller hearing and taking under submission CERT’s motion to disqualify Judge Mueller.

On August 16, 2021, CERT filed a motion to disqualify Judge Mueller and to stay the proceedings. [ECF No. 152] CERT’s motion contends that Judge Mueller is disqualified from serving as the judge and the trier of fact in this case and should recuse herself pursuant to 28 USC § 455(b)(1)(2)(4)(5)(i)(iii)(c)(e), or that the case be assigned to another judge for ruling on the disqualification motion pursuant to 28 USC § 144, and the proceedings be stayed until such ruling can be made. 28 U.S.C. § 144 states in relevant part as follows:

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

Given CERT’s recent discovery of the facts warranting disqualification set forth in support of the motion, CERT’s motion is plainly timely. Based on the conflict of interest stated in CERT’s motion and the facts set forth in the supporting affidavits of Raphael Metzger [ECF No. 152] and Nancy Quam-Wickham [ECF No. ***], and CERT’s Supplemental Memorandum [ECF No. 170], the Honorable Kimberly J. Mueller may not rule on CERT’s motion to disqualify her as the trier of fact and the judge in this case, as such motion must be heard by a different judge of the court - a judge who is not alleged to be disqualified.

CERT expected that Judge Mueller would abide by 28 U.S.C. § 144 and have CERT’s motion randomly assigned to a different judge of the court for decision, rather than ruling on the motion herself as she stated she would do at the hearing that took place on August 27, 2021. However, on September 13, 2021, Judge Mueller submitted CERT’s motion to disqualify her on her own motion, without assigning it to another judge in violation of 28 U.S.C. § 144. [ECF No. ***]

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MEMORANDUM OF POINTS AND AUTHORITIES

1. THE FACTS REGARDING JUDGE MUELLER’S FINANCIAL INTEREST IN SACRAMENTO NATURAL FOODS COOP

On September 22, 2021 Intervenor-Defendant CERT learned that in the Questionnaire for judicial nominees dated September 3, 2010, Judge Mueller disclosed her membership in Sacramento Natural Foods Coop (“SNFC”) (approx. 1982-Present), in which she had also served as Director (approx. 1984-1985). Exhibit “D.” SNFC “began as a food buying club in 1972 and opened a storefront of primarily bulk foods.” The Bylaws last amended in September 2016, in Section 1.02. describe its “Function and Objectives” as “production, purchase, sale, rental, storage, and distribution of merchandise and services for the mutual benefit of the Members.”

SNFC’s “About” webpage, titled “Our Story,” states:

Our Co-op began as a food buying club in 1972 and opened a storefront of primarily bulk foods at 16th and P Streets in downtown Sacramento. In 1973, this buying club was incorporated as the Sacramento Natural Foods Cooperative, a Board of Directors was elected and the first paid employee was hired. We’ve come a long way from our buying club days, but we stay true to our cooperative roots with the multitude of discussions on product selection, member services, retail practices and ethical issues that take place every day in our business. (Exhibit “A”)

SNFC’s page “Coop Policies and Bylaws state: “The Sacramento Natural Foods Cooperative ... is a financially sustainable operation that supports and yields economic, social and environmental returns to its members and the community at large.” Exhibit “B”. The same webpage makes available the Bylaws of the Sacramento Natural Foods Cooperative, which state:

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Section 1.02 Function and Objectives. a) The business to be carried on by the Cooperative shall be production, purchase, sale, rental, storage, and distribution of merchandise and services for the mutual benefit of the Members. b) Other objectives of the Cooperative shall be: 1) cooperative service for the benefit of the Members as consumers and of the consuming public. 2) promotion of the cooperative ideal and the use of natural food, and 3) conducting such other activities as will serve the economic, educational, recreational and cultural welfare of the Members.

Section 2.02. Active/Inactive Member. An active Member is a Member who is paid up to date on his or her fair share. An inactive Member is a Member who is not paid up to date on his or her fair share. An inactive Member has no voting privileges and does not receive a discount on purchases.

Section 2.03 “Fully-vested Member “ shall mean a Member who is fully paid up on a Member's Fair Share as defined in Section 4.05”

Section 2.04. Membership Fee. A one-time nonrefundable Membership Fee, in an amount set, from time to time, by the Board of Directors, may be charged and collected from each prospective Member upon joining the Cooperative.

Section 2.05 “Membership Share” shall mean that share which confers the right to vote on a member and is initially purchased by a prospective member as a prerequisite for membership in the cooperative and any subsequent shares required by the board to be purchased for membership.

Section 2.06 ”Shareholder” shall mean a Member who has also purchased Preferred Non-voting shares.

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Section 2.07 “Preferred Non-voting share” shall mean those shares authorized and issued by the board of directors for purchase by Members.

...

Section 4.01. Issuance of Shares. To evidence capital funds provided by Members, the Cooperative shall issue Membership Shares and Preferred Non-voting shares.

Section 4.02. Membership. Shares Ownership Membership Share ownership entitles a Member to one (1) vote only in the affairs of the Cooperative, regardless of the number of membership and Preferred Non-voting shares a Member owns, and to all the rights of Membership as described by statute, the Articles of Incorporation, and these Bylaws

Section 4.03. Preferred Non-voting Shares Ownership, Preferred Non-voting shares are not transferable but are subject to the redemption provisions set forth in the Articles of Incorporation. Any attempted transfer of these shares is void and confers no rights on the attempted transferee.

Section 4.05. Fair Share Investment. a) From time to time, the Board shall set a monetary amount of investment in Membership Shares which each Member must purchase. Such minimum investment shall be called the Member's "fair share." The Board shall also, from time to time, set the minimum amount in dollars that each Member must invest toward his or her fair share in each fiscal year of the Cooperative. b) Membership Shares shall be subject to assessment for the reasonable capital needs of the Cooperative, provided that the original purchase price plus all assessments does not exceed the fair share amount required of new Members. The Board shall, from time

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to time, specify the mechanisms by which the annual investments are to be made. c) Once a Member reaches his or her fair share amount, he or she may make further purchases of, or receive distributions in, membership shares at his or her option, provided the Board and statute allows this action. Under no circumstances, however, may the Board require a Member to invest in Membership Shares above the current "fair share" requirement.

...

Section 6.01. Control. The control of the Cooperative shall be vested in the Membership.

Section 6.02. Administration. The administration of each enterprise of the Cooperative is vested in a Board of Directors responsible to the Membership.

Section 6.03. Management. The management of each enterprise of the Cooperative shall be vested in a Consultant/Manager selected by and responsible to the Board of Directors.

...

Section 21.01. Allocations to Members. The Cooperative shall allocate and distribute to its Members its adjusted net savings from business done with them.

Section 12.02. Adjusted Net Savings. Net savings as so adjusted shall be allocated in proportion to the patronage of Members and distributed among Members in such Page 8 manner and at such time as to constitute patronage dividends within the meaning of federal income tax law.

Section 12.03. Distribution. A percentage of each allocation as determined by the Board, which shall not be less than 20 percent, shall be distributed in cash to all recipient Members.

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Section 12.04. Consent of Members. Each person who becomes a Member of this Cooperative consents to include in his or her gross income for federal income tax the amount of any patronage refund paid him or her by the Cooperative in money or by written notice of allocation (as defined in the Internal Revenue Code), except to the extent that such a patronage refund is not income to the Member because: a) it is attributable to the purchases of personal, living or family items, or b) it should properly be treated as an adjustment to the tax basis of property previously purchased.

2. APPLICABLE LAW REGARDING JUDICIAL DISQUALIFICATION

A party may petition the district court to recuse the assigned judge pursuant to 28 U.S.C. § 144 and seek to have a neutral district court judge determine whether such bias exists, and/or pursuant to 28 U.S.C. § 455, by establishing that the judge’s impartiality might reasonably be questioned. Under 28 U.S.C.S. § 455(a), any judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. *United States v. Simmons* E.D.Cal. July 22, 1997, CV-F-96-5948 OWW DLB) 1997 U.S.Dist.LEXIS 22658, at 1.

Sections 144 and 455 are construed *in pari materia* and the test for disqualification is the same under both statutes. In almost all cases, recusal under either § 144 or § 455(b)(1) is required only if the judge's bias is (1) directed against a party; (b) stems from an extrajudicial source; and (3) casts doubt on his or her impartiality. *Simmons* at 1.

Under 28 U.S.C. § 144 “if [an] affidavit of bias is filed, [the] originally assigned “judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.” Where the affidavit is legally insufficient, the judge at whom the motion is directed may resolve the matter. *United States v. Scholl*, 166 F.3d 964, 977 (9th Cir. 1999).

The judge must assume the facts alleged in a 28 U.S.C.S. § 144 affidavit are true, even if he or she knows them to be false. The trial judge may only review the affidavit to determine

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1 if it is legally sufficient: whether it is timely and whether it states facts and reasons establishing bias.
2 Affidavits under § 144 are strictly construed as to form, timeliness and sufficiency.

3 A legally sufficient affidavit must meet the following requirements: (1) the facts must
4 be material and stated with particularity; (2) the facts must be such that if true they would convince
5 a reasonable man that bias exists; and (3) the facts must show the bias is personal, as opposed to
6 judicial in nature. Conclusory allegations, rumors, beliefs and opinions will not support
7 disqualification. The affidavit should contain facts of times, places, persons, occasions and
8 circumstances with the particularity that would be reasonably expected in a bill of particulars. An
9 affidavit filed under § 144 must be accompanied by a certificate by counsel of record stating that it
10 is made in good faith. *Simmons, supra*.

11 The Court in *Fowler v. Butts*, 829 F.3d 788, 794 (7th Cir. 2016) further explains that
12 28 U.S.C. § 455(e) “does not permit an otherwise-disqualified judge to serve just because the litigant
13 fails to make the appropriate motion. Instead the judge must take the initiative and make a ‘full
14 disclosure on the record.’”

15 The same standard for recusal, which applies to both statutes, is “whether a
16 reasonable person with knowledge of all the facts would conclude that the judge's impartiality might
17 reasonably be questioned.” *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986) (quoting
18 *Mayer v. Leipziger*, 729 F.2d 605, 607 (9th Cir. 1984)).

19 The Supreme Court applies an objective standard that, in the usual case, avoids
20 having to determine whether actual bias is present: “The Court asks not whether a judge harbors an
21 actual, subjective bias, but instead whether, as an objective matter, the average judge in his position
22 is likely to be neutral, or whether there is an unconstitutional potential for bias.” (internal quotation
23 marks omitted), *Williams v. Pennsylvania*, 579 U.S. —, 136 S. Ct. 1899, 195 L. Ed. 2d 132, 140–144
24 (2016).

25 The alleged prejudice must result from an extrajudicial source; a judge's prior adverse
26 ruling is not sufficient cause for recusal. *Mayer*, 729 F.2d at 607; *United States v. Sibla*, 624 F.2d
27 864, 868 (9th Cir. 1980).

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3. JUDGE MUELLER MUST RECUSE DUE TO HER FINANCIAL INTEREST IN SACRAMENTO NATURAL FOOD COOP (SNFC)

Recusal is mandatory if the judge, his or her spouse, or minor child residing in his or her household has “a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.” 28 U.S.C. § 455(b)(4).

“Financial Interest” is defined in 28 U.S.C. § 455(d)(4) as “ownership of a legal or equitable interest . . . or a relationship as director, advisor or other active participant in the affairs of a party.” See also *Liteky v. United States*, 510 U.S. 540, 548, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) (“what matters is not the reality of bias or prejudice but its appearance”); accord *In re Specht*, 622 F.3d 697, 699–700 (7th Cir. 2010) (judge’s denial of motion to amend complaint to add defendant creates appearance of partiality if judge or spouse has financial interest in, or is member of board of directors of, potential new defendant); *In re Kensington Int’l Ltd.*, 353 F.3d 211, 220 (3d Cir. 2003) (actual bias is of no consequence because statute is concerned not only with fairness to litigants, but equally with public’s confidence in judiciary); *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995) (avoiding appearance of impropriety is as important in developing public confidence in judicial system as avoiding impropriety itself).

In addition to her financial interest in the North Sacramento Land Company (which owns land that it leases for exclusive use as an almond ranch) and her interest in Spring Valley Ranch Partnership (which receives a percentage of the income from the almond business), Judge Mueller also has a financial interest in the Sacramento Natural Food Coop (SNFC), which sells various acrylamide-containing foods (Exhibit “E”). The almonds and the acrylamide-containing foods that SNFC sells are the subject of this litigation, such that Judge Mueller has a direct financial interest in the subject of this litigation. As previously noted, she also has a financial interest in the North Sacramento Chamber of Commerce, whose office is located at 400 Slobe Avenue, the address of the North Sacramento Land Company and Judge Mueller herself, and which is a real party in interest in this case. For all these reasons, Judge Mueller must recuse herself from this case.

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4. CONCLUSION

Judge Mueller has a direct financial interest in the subject matter of this case as well as in Real Parties in Interest. Judge Mueller’s ownership interest in the Sacramento Natural Food Coop, which sells acrylamide-containing foods that are the subject of this litigation, is just one more financial interest which requires Judge Mueller’s disqualification in this case.

All the grounds for disqualifying Judge Mueller in this case that CERT asserts derive exclusively from sources outside of the judge's participation in this case. The so-called “extrajudicial source” rule is thus fully satisfied here. All facts are strictly material, stated with particularity, and supported by sources of information and public record. The facts are such that they would convince a reasonable person that bias exists; and the facts show the bias is personal, as opposed to judicial in nature. None of the facts below is conclusory or is a belief or an opinion. The motion and the affidavit, as well as the supplemental declarations, contain facts of times, places, persons, occasions and circumstances with the particularity that would be reasonably expected in a bill of particulars. Judge Mueller should, indeed must, therefore, recuse herself under § 455(b)(1)(2)(4)(5)(i)(iii)(c)(e), or the case to be assigned to another judge to rule on CERT’s motion for disqualification.

DATED: September 24, 2021

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A Professional Law Corporation

/s/ Raphael Metzger

RAPHAEL METZGER, ESQ.
Attorneys for Intervenor-Defendant, CERT

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DECLARATION OF RAPHAEL METZGER

I, Raphael Metzger, declare as follows:

1. I am an attorney at law, duly licensed and authorized to practice law in the State of California. I am a member of the bar of all federal district courts in the State of California, the Ninth Circuit Court of Appeals, and the United States Supreme Court.

2. I have personal knowledge of the matters set forth hereinafter and, if called as a witness, I would competently testify thereto.

3. My firm represents the Council for Education and Research on Toxics (CERT), which is the Intervenor-Defendant in this action.

4. This declaration is submitted in further support of CERT’s pending motion to disqualify the Honorable Kimberly J. Mueller as the trier of fact and judge in this case.

5. On September 22, 2021, my client, Intervenor-Defendant, Council for Education and Research on Toxics, learned that in the Questionnaire for judicial nominees dated September 3, 2010, Judge Mueller disclosed her membership in Sacramento Natural Foods Coop (“SNFC”) (approx. 1982-Present), in which she had also served as Director (approx. 1984-1985).

6. Attached hereto as Exhibit “A” is a true and correct copy of the “About” webpage titled “Our Story” of the Sacramento Natural Foods Coop (SNFC), which I downloaded from the internet.

7. Attached hereto as Exhibit “B” is a true and correct copy of SNFC’s webpage titled “Coop Policies and Bylaws” which I downloaded from the SFNC website.

8. Attached hereto as Exhibit “C” is a true and correct copy of SNFC’s Bylaws which I downloaded from the SFNC website.

9. Attached hereto as Exhibit “D” is a true and correct copy of Judge Mueller’s disclosure in her responses to the questionnaire for judicial nominees that she submitted on September 3, 2010.

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10. Attached hereto as Exhibit “E” is a true and correct copy of a SNFC webpage advertising for sale various roasted almond products.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed September 24, 2021, at Long Beach, California.

/s/ Raphael Metzger

Raphael Metzger

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2021, I caused the foregoing document, described as FURTHER SUPPLEMENTAL MEMORANDUM AND DECLARATION OF RAPHAEL METZGER IN SUPPORT OF CERT'S MOTION TO DISQUALIFY THE HONORABLE KIMBERLY MUELLER, to be electronically filed with the Court's CM/ECF filing system, which will send a Notice of Electronic Filing to all parties of record who are registered with CM/ECF:

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email: ap@poulsenlaw.org

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

Executed on September 24, 2021, at Long Beach, California.

/s/ Nina S. Vidal

Nina S. Vidal, Declarant

updated 09/17/21 nsv

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