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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION

HOUSING IS A HUMAN RIGHT, et al.,

Plaintiffs,

v.

THE COUNTY OF ORANGE, et al.,

Defendants.

Case No: 8:19-00388 DOC JDE

OPPOSITION TO RECUSAL

Date: June 24, 2019
Time: 1:30 p.m.
Ctrm: 10C (Hon. James V. Selna)

I. INTRODUCTION

Defendants City of San Clemente, City of San Juan Capistrano and City of Dana Point move to recuse the Honorable David O. Carter from presiding over this case based on how the Court conducted proceedings in a different case, *Orange County Catholic Worker, et al. v. County of Orange, et al.,* Case No. 18-cv-00155 DOC (CD Cal. 2018) ("OCCW"). During the 18 months of litigation in *OCCW*, the Court has engaged in broad discussions with the parties, their counsel, and other officials and entities only with permission to facilitate a resolution of a complex case.

Defendants cannot establish mandatory disqualification pursuant to 28 U.S.C. § 144 or § 455(b), both of which require a supporting affidavit with specific facts proving unlawful bias and grounds for removal of the assigned judge. Since no affidavit was filed with this motion, § 455(a) is the only possible grounds for recusal.

Even under § 455(a), Defendants bear a heavy burden to establish bias. The Code of Conduct for United States Judges expressly provides in Canon 3, Sec. 4A(d) that the Court, "with the consent of the parties, [may] confer separately with the parties and their counsel in an effort to mediate or settle pending matters." Similarly, Federal Rules of Civil Procedure 16(a)(5) and 16(c)(I) expressly allow the Court to preside over settlement conferences, whether separately or as part of a pre-trial conference process. That is what the Court did, all with the express and repeated consent of the parties. Defendants at bar do not have to agree to the process followed in the related cases, but their disagreement does not support recusal.

II. FACTUAL BACKGROUND

Defendants complain that Judge Carter engaged in ex parte communications that somehow require recusal. From the outset in *Orange County Catholic Worker v. County of Orange*, 8:18-cv-0155 DOC (C.D. Cal.), the Court requested the parties' permission to speak to them separately – and sometimes together – to facilitate a non-judicial resolution of the case. The Court made clear that this process was optional

and that the alternative was that the Court would hear any motions filed by the parties and act in accord with Ninth Circuit authority, including *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacatur on settlement by* 505 F.3d 1006 (9th Cir. 2007), and the subsequent decision in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). Plaintiffs understood the Court's goal was to balance the parties' interests and reach a resolution that would allow Defendants to enforce local ordinances without violating the constitutional rights of unsheltered persons in Defendants' jurisdictions.

Repeatedly, the Court sought and received permission of all parties for this informal settlement process, including ex parte communications. The County suggested settlement discussions with the Court after the TRO was initially granted and the Court stated it would issue further rulings on Plaintiffs' TRO.[1] [Doc 91, 94]. The Court disclosed visits to potential shelter sites in open court, as well as other communications in furtherance of a resolution. *See e.g.,* Tr. 3/22/18, p. 35 [Doc 143]. At the March 22, 2018 status conference, former Supervisor Spitzer urged the Court to expand outreach to elected officials. Tr. 3/22/18, pp. 35- 45 [Doc 143]. In *OCCW*, Defendant County recently filed a "Notice of County's Continuing Consent to the Court's Involvement in Settlement Negotiations," setting out the directive of the Board of Supervisors. [Doc 304]. The parties also agreed to an expedited dispute resolution process before the Court and the appointed Special Master, retired Superior Court Judge James Smith. [Doc. 134] That process is expressly incorporated into the settlement agreements already executed with the City of Orange, the City of Costa Mesa, the City of Tustin, and the North SPA cities not named as defendants in the *OCCW* case by Plaintiffs, but named by Intervenor Santa Ana.

Setting aside the *OCCW* parties' express consent, there are no facts alleged

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[1] Initially, the Court denied the TRO in *OCCW* but set a hearing for Feb. 13, 2018, then four days away. Only when the County then announced it would immediately begin enforcement did the Court grant the TRO. [Doc. 50, 52, 53]

based on ex parte communications to support recusal. To bolster their motion, Defendants provide a series of newspaper articles. Anyone in a public place in Orange County would observe most of these same facts Defendants imply impermissibly taint Judge Carter: until recently, parks filled with unsheltered individuals living in tents; in 2018 a Civic Center housing 500 people on a concrete plaza with no shade, water or toilets; a drop-in shelter (The Courtyard) across from the federal courthouse with nearly 500 unsheltered people a night sleeping in it and on the sidewalks around it.

Anyone who rode a bicycle, jogged or walked in the Santa Ana Riverbed would have seen the same things Judge Carter did. Asking questions about how often the trash was picked up or how many needles were found does not establish "ex parte" information or other information evincing even the appearance of a lack of impartiality, bias or personal antagonism to any of the parties in this action. Moreover, when Judge Carter went to the Riverbed, he generally provided advance notice to all counsel and both Plaintiffs' and Defendants' counsel were present at 5:30 in the morning and sometimes late into the night. Again, Judge Carter saw what everyone else saw and gained no special information that would require recusal now.

The newspaper stories submitted by Defendants report events and statements by the Court where Plaintiffs' counsel were often present, as well as Defense Counsel,[2] or where counsel on both sides consented to the Court engaging in discussions outside of their presence. While it is true that Judge Carter visited many of the shelters and encampments early in the morning, there was no effort to hide these visits. On some occasions, Plaintiffs' counsel was present. For example, Plaintiffs' counsel Brooke Weitzman met Judge Carter at SafePlace to address pressing problems there. Other times, counsel for the Plaintiffs and the County, along

[2] Sobel Declaration and Exhibits thereto.

with County employees, met Judge Carter at Bridges at Kraemer Place in Anaheim to resolve urgent issues short of litigation. All parties consented on the record to the Court's involvement, with broad leeway, but were free to withdraw their consent.

The suggestion that Judge Carter issued "veiled threats" to anyone is baseless. The Court noted it could rule on any motions filed, in accord with controlling precedents, or the parties could continue to work toward a resolution of the issues. As the Court often noted, Ninth Circuit law might require the Court to enjoin enforcement of local ordinances. That is not a threat: that is a statement of obvious choices available to the Court based on the evidence that the parties might submit.

Similarly, Judge Carter's remarks at the April 2, 2019 hearing do not establish a basis for recusal. The information referenced by the Court is largely public. Again, that Judge Carter stated that he would be required to follow Ninth Circuit law and might bar enforcement of municipal laws criminalizing homeless individuals camping in public is hardly secret. As noted below, Courts opine frequently on what they might do, but until they do it and a ruling evinces compelling evidence of personal "bias or deep-seated antagonism," there is no grounds for recusal. That the Court noted that homeless individuals tend to migrate to non-settling cities because those jurisdictions that met *Martin* could enforce their local ordinances was also not a secret. In fact, several "settling cities," as well as Santa Ana, raised this concern and it was discussed in Court on several occasions. *See e.g.*, Tr. 3/22/18, p.37 [Doc 143]. As the Court noted, Santa Ana officials are especially concerned, *id.*, because the City is home to the courts, the County jail, government services and the Courtyard, then the only year-round drop-in shelter in the County. In sum, the Court's involvement in facilitating resolution of the *OCCW* case does not demonstrate a basis for recusal.

III. THE STANDARD ON A MOTION TO DISQUALIFY A JUDGE

The standard to grant a motion to disqualify a judge is established by 28 U.S.C. §§ 144 and 455. The applicable standard for recusal under both statutes is the same

– "Whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Hernandez*, 109 F.3d 1450, 1453-54 (9th Cir. 1997). *See also United States v.McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012) (same).

Recusal under 28 U.S.C. § 455(a) is warranted only when the Court's alleged bias or prejudice can be traced to "a source outside the judicial proceeding at hand." *Liteky v. United States*, 510 U.S. 540, 545, 554-56 (1994); see also *In re United States*, 441 F.3d 44, 66-68 (1st Cir. 2006). Just because a judge has prior knowledge of facts concerning a party does not require disqualification. *United States v. Patrick,* 542 F.2d 381, 390 (7th Cir. 1976)). Here, nearly all facts are in the public record.

Federal judges are presumed to be impartial. *First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler* (9th Cir. 2000) 210 F.3d 983, 988. A judge has "as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require." *Clemens v. U.S. Dist. Court for the Cent. Dist. of California*, 428 F.3d 1175, 1178–79 (9th Cir. 2005) (citation omitted). The moving party bears a "heavy burden" to counter this strong presumption. *See Baldwin Hardware Corp. v. Franksu Enter. Corp*., 78 F.3d 550, 557 (Fed. Cir. 1996).

To meet its burden, the moving party must establish that the alleged bias "result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnel Corp.*, 384 U.S. 563, 583 (1966) (edit supplied). The standard is an objective one. *See United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986); *see also, United States v. Conforte*, 624 F.2d 869, 881 (9th Cir. 1980) (citing H. Rep. No. 1453, 93rd Cong., 2d Sess., reprinted in (1974) U.S. Code Cong. & Admin. News 6355). Ultimately, the issue is whether the facts presented by the moving party "give fair support to the charge of a bend of mind that may prevent or impeded impartiality of judgment." *Berger v. United States*, 255 U.S. 22, 33-34 (1921) (construing the predecessor to section 144).

In weighing the evidence for recusal, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion . . . and can only *in the rarest circumstances* evidence the degree of favoritism or antagonism required [for recusal] when no extrajudicial source is involved." *Liteky*, 510 U.S. at 555 (emphasis supplied); *see also, Pesnell v. Arsenault*, 543 F.3d 1038, 1044 (9th Cir. 2008) (emphasis supplied). The Supreme Court set a high bar to prove the requisite "deep-seated and unequivocal antagonism" toward a party so that fair judgment would become "impossible" and necessitate recusal. "[E]xpressions of impatience, dissatisfaction, annoyance, and even anger" are not grounds for recusal based on bias or impartiality." *Liteky,* 510 U.S. at 555-56. Absent independent evidence of significant bias and hostility by the Court, "a judge's rulings and statements in the course of proceedings before him or her rarely provide a basis for recusal under § 455(a)." *Liteky,* 510 U.S. at 556. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course . . . of prior proceedings[] do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky,* 510 U.S. at 555 (emphasis added).

Similarly, "neither prior adverse rulings nor 'participation in a related or priori proceeding' is sufficient to constitute the requisite bias or prejudice." *In re Deatley Litig.*, 2008 U.S. Dist. LEXIS 12606, *9, cv-06-0278 JLQ (ED WA 2008), citing *United States v. Nelson*, 718 F.2d 315, 321 (9th Cir. 1983), and *Davis v. Fendler*, 650 F.2d 1154, 1163 (9th Cir. 1981). Nor do talks with parties not in the lawsuit recusal support recusal, even when newspapers report hearsay statements of these talks. *Simona Tanasescu et al v. Matthew Kremer et al. Additional Party Names: Danut Tanasescu, Dorin Coroian, Mirela Mosoiu*, No. SACV1701513 DOC JDE, 2018 WL 6010334, at *3 (C.D. Cal. June 13, 2018), recons. den. sub nom. *Tanasescu v. Kremer*, No. SACV1701513 DOC JDE, 2018 WL 4693883 (C.D. Cal. July 3, 2018).

III. DEFENDANTS CANNOT ESTABLISH A BASIS FOR RECUSAL

Section 455(a) prohibits only such partiality or favoritism "as is, for some reason, *wrongful or inappropriate*." *Liteky*, 510 U.S. at 552 (emphasis supplied). "'Impartiality' is not gullibility. Disinterestedness does not mean child-like innocence." *Liteky*, 510 U.S. 540 at 551 (1994). "Section 455(a) asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits." *In re Mason,* 916 F.2d 384, 385 (7th Cir.1990). In this context, that means a "well-informed, thoughtful observer," as opposed to a "hypersensitive or unduly suspicious person." *Id.* at 386. The Court applies an objective test: "'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" *Herrington v. County of Sonoma,* 834 F.2d 1488, 1502 (9th Cir.1987) (quoting [*Nelson,* 718 F.2d at 321]); *see also, Milgard Tempering, Inc. v. Selas Corp. of America* (9th Cir. 1990) 902 F2d 703, 714; *United States v. Holland* (9th Cir. 2008) 519 F3d 909, 914]."We are also mindful "that section 455(a) claims are fact driven, and as a result, the analysis of a particular section 455(a) claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue." *United States v. Bremers,* 195 F.3d 221, 226 (5th Cir.1999) (edits supplied).

The Court's assessment must apply the general rule that questions about a judge's impartiality *necessarily* stems from "extrajudicial" factors, *Liteky,* 510 U.S. at 554, that is, from sources other than the judicial proceeding at hand. *Pau v. Yosemite Park and Curry Co.,* 928 F.2d 880, 885 (9th Cir.1991) (citing *Toth v. Trans World Airlines,* 862 F.2d 1381, 1388 (9th Cir.1988)); *see also Clemens*, 428 F.3d at 1178.

Clemens cited with approval a nonexhaustive list of assertions not ordinarily sufficient to require a § 455(a) recusal. These include several applicable here:

> (1) Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters; (2) the mere fact that a judge has previously expressed an opinion on a point of law or has expressed a dedication to upholding the law or a determination to impose severe punishment within the limits of the law upon those found guilty of a particular offense; (3) prior rulings in the proceeding, or another proceeding, solely because they were adverse; (4) mere familiarity with the defendant(s), or the type of charge, or kind of defense presented. … *Nichols v. Alley,* 71 F.3d 347, 351 (10th Cir.1995) (citing *United States v. Cooley,* 1 F.3d 985, 996 (10th Cir.1993)). a judge has "as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require." *Id.* at 351.", 428 F.3d 1175, 1178–79 (9th Cir. 2005)[.]

Id. at 1178 (edit supplied).

A judge's ruling and remarks on the evidence generally do not evince personal bias or prejudice. *United States v. Grinnell Corp.*(1966) 384 US 563, 583; *Liteky* 510 US at 555. Even if the Court's comments could somehow be construed as directing Plaintiffs to file for injunctive relief, this is not evidence of impermissible bias. "[D]irecting a party to move for summary judgment is not proof of bias; it may be intended to preserve scarce judicial resources and avoid unnecessary trials. Complainant's allegation that the judge said he 'could grant' such a motion does not mean that the judge promised to grant it; in fact, the judge ultimately did not grant the motion." *In re Complaint of Judicial Misconduct*, 599 F.3d 1087, 1088 (9th Cir. 2010) (citation omitted) (edit supplied).

Similarly, any objection based on the Court's prior rulings in *OCCW* may not form the basis of disqualification. "Almost invariably, they are proper grounds for appeal, not for recusal. Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky,* at 555

(citations omitted), citing *Grinnell Corp*., 384 U.S. at 583.

The reality is that "[j]udges constantly form personal opinions during proceedings. It may be wiser not to express such views, … but disqualification is almost never required where the judge's opinions are based on the proceedings. Inaccurate findings based on those opinions may lead to reversal on appeal but not to recusal." *In re Martinez-Catala*, 129 F.3d 213, 219 (1st Cir. 1997) (emphasis added). In *Martinez-Catala,* recusal was sought based on ex parte communications alleged to communicate how the judge would rule on a particular motion. Notwithstanding these assertions, the Circuit found no basis for recusal, holding that "the problem is not one of ex parte contacts as such; absent objection, separate discussions in the context of settlement agreements are common occurrences. And, in pressing each side to take a reasonable view of its situation, judges often give the parties the court's impression of apparent strengths and weaknesses. There are dangers in this practice, of course, but clients are often well served by settlements, and settlements often result from realistic appraisals of strengths and weaknesses." 129 F.3d at 219.

The Court emphasized that "the claim of bias or prejudice here rests primarily on the inference, drawn by plaintiffs' counsel, that the judge told defense counsel more or less definitively how the judge planned to rule on the summary judgment motions and on the implication that the judge gave no similar information to plaintiffs' counsel." *Id.* The Circuit "assume[d] arguendo that such an indiscretion could at least arguably be grounds for a reasonable inference of bias or prejudice toward someone (whether toward a party or counsel might require further information)." *Id.*

An exception exists "when a judge's remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party. *King v. United States District Court,* 16 F.3d 992, 993 (9th Cir. 1994), citing *United States v. Monaco,* 852 F.2d 1143, 1147 (9th Cir. 1988). There is no such showing here.

By this motion, Defendants demand something to which they are not entitled.

Indeed, "[p]roof that a [judge's] mind was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Laird v. Tatum,* 409 U.S. 824, 835, (1972) (mem. op. by Rehnquist, J.) *See also Southern Pacific Communication v. AT & T,* 740 F.2d 980 (D.C.Cir.1984) ("As long as a judge is capable of refining his views ... and maintaining a completely open mind to decide the facts and apply the applicable law to the facts, personal views on law and policy do not disqualify him from hearing the case. The test may be stated in terms of whether the judge's mind is 'irrevocably closed' on the issues as they arise in the context of the specific case") (citations omitted); *Association of National Advertisers, Inc. v. FTC,* 627 F.2d 1151, 1174 (D.C.Cir.1979) ("Administrators, and even judges, may hold policy views on questions of law prior to participating in a proceeding."); *see also Conforte,* 624 F.2d at 882 (a judge's views on legal issues may not serve as a basis for motions to disqualify)." *United States v. Payne*, 944 F.2d 1458, 1476–77 (9th Cir. 1991).

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Motion to Recuse be denied. Defendants failed to establish any basis for granting the motion.

Dated: May 26, 2019

Respectfully submitted,

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