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By: C. Beutler, Deputy

**THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO**

LARRY GERACI, an individual,

Plaintiff,

v.

DARRYL COTTON, an individual; and
DOES 1 through 10, inclusive,

Defendants.

AND RELATED CROSS-ACTION

Case No: 2017-00010073-CU-BC-CTL

**ORDER STRIKING DEFENDANT'S
STATEMENT OF DISQUALIFICATION
OF JUDGE JOEL R. WOHLFEIL**

The Court has reviewed the paperwork that was filed by Defendant Darryl Cotton on September 12, 2018, entitled "Verified Statement of Disqualification" (hereafter "Statement of Disqualification"), which seeks to disqualify Judge Joel R. Wohlfeil from further presiding over the proceedings in the above-entitled case. However, the Statement of Disqualification was not properly served, is untimely, and overall fails to state any legal basis for disqualification on its face. Therefore, the Statement of Disqualification is ordered stricken for the reasons cited below.

I. Authority to Strike the Challenge.

Challenges filed pursuant to Civil Code of Procedure¹ section 170.1 are adjudicated under the procedures set forth in section 170.3. Pursuant to section 170.3, if a judge who should

¹ All further references are to the Code of Civil Procedure unless otherwise stated.

1 disqualify himself or herself fails to do so, any party may file with the clerk a verified written
2 statement setting forth facts constituting grounds for disqualification. The statement seeking to
3 disqualify the judge "shall be presented at the earliest practicable opportunity after discovery of
4 the facts constituting the ground for disqualification. Copies of the statement shall be served on
5 each party or his or her attorney who has appeared and shall be personally served on the judge
6 alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse
7 or in chambers." (§ 170.3 (c)(1).)

8 Once objection has been made, the judge may, within 10 days after service of the objection,
9 "file a consent to disqualification" (§ 170.3(c)(3)); or file "a written verified answer admitting or
10 denying any or all of the allegations...." (*Id.*) Failure to take any action is tantamount to consenting
11 to disqualification. (§ 170.3(c)(4); *Hollingsworth v. Superior Court* (1987) 191 Cal.App.3d 22,
12 26.) However, if the statement is untimely filed, has not been served, or on its face discloses no
13 legal grounds for disqualification, the judge against whom it is filed may strike it. (§ 170.4(b).) In
14 striking a challenge the court is not passing on its own disqualification, but instead is passing only
15 on the legal grounds set forth in the Verified Statement.

16 Should the 10-day period after service pass with the judge taking no action, the judge is
17 deemed disqualified and has no power to act in the case. (§ 170.4(b); *Lewis v. Superior Court*
18 (1988) 198 Cal.App.3d 1101, 1104.)

19 Here, the Statement of Disqualification was not properly served, is untimely, and overall
20 fails to state any legal basis for disqualification on its face.

21 II. Service.

22 Section 170.3(c)(1) requires that a copy of the challenge for cause be personally served on
23 the judge being challenged, or on his or her clerk provided that the judge is present in the
24 courthouse or in chambers. Further, the 10-day period in which to respond does not begin to run
25 until service is effected. Here, Judge Wohlfeil was not personally served, nor was his clerk served
26 while he was present in the courthouse or in chambers. Therefore, the Statement of
27 Disqualification is stricken for lack of service.

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1 III. Timeliness.

2 Section 170.3(c)(1) provides in part that the statement seeking to disqualify the judge “shall
3 be presented at the earliest practicable opportunity after discovery of the facts constituting the
4 ground for disqualification.” The failure to timely file a statement of disqualification promptly
5 upon discovery of the ground for disqualification constitutes a forfeiture or waiver of the right to
6 seek disqualification. (*Tri Counties Bank v. Sup.Ct. (Amaya-Guenon)* (2008) 167 Cal.App.4th
7 1332, 1337-38.) In addition, an untimely disqualification statement may be stricken by the judge
8 against whom it is filed. (§ 170.4(b). “Consequently, if a party is aware of grounds for
9 disqualification of a judge but waits until after a pending motion is decided to present the statement
10 of objection, the statement may be stricken as untimely.” (*Tri Counties Bank v. Sup.Ct. (Amaya-*
11 *Guenon)*, *supra*, 167 Cal.App.4th at 1338.)

12 According to the Statement of Disqualification, Defendant asserts that Judge Wohlfeil is
13 biased based on rulings made by the court at several hearings, the latest of which occurred on July
14 13, 2018. Yet, the present Statement of Disqualification was not filed until September 12, 2018,
15 almost two months after Defendant first became aware of the facts supporting the alleged bias.
16 While Defendant attributes the delay to defense counsel’s schedule and other time sensitive
17 obligations, it is clear that the Statement of Disqualification was not “presented at the earliest
18 practicable opportunity.” Therefore, the Statement of Disqualification is stricken as untimely
19 pursuant to section 170.4(b), in addition to the reasons set forth below.

20 IV. The Factual Allegations.

21 Defendant asserts that Judge Wohlfeil is biased and should be disqualified from the present
22 action because he made “various unsupported rulings and procedurally improper orders in this
23 matter.” Specifically, he alleges that Judge Wohlfeil improperly denied Defendant’s Motion for
24 Judgment on the Pleadings and Request for Judicial Notice, made statements indicating that the
25 Court had a “fixed opinion” regarding the credibility of Plaintiff and Plaintiff’s counsel,² failed to
26 rule on the crucial threshold inquiry concerning whether there was an integrated contract, failed to

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28 ² Although Defendant asserts that Judge Wohlfeil made a statement that he was personally acquainted with Plaintiff’s
counsel and “does not believe that they would act unethically by filing a meritless suit,” citing to Exhibit B, ln. 6-10;
p. 1051, 25-28; p. 1055, the documents cited do not contain any such statements by Judge Wohlfeil.

1 explain the bases for his decisions, took procedurally improper actions which favored Plaintiff,
2 and acted frustrated with Defendant's counsel. (See Statement of Disqualification pp. 14-16; 21;
3 26-29.)

4 Defendant is seeking to disqualify Judge Wohlfeil pursuant to section 170.1(a)(6)(A)(iii),
5 which provides a judge is disqualified if, "a person aware of the facts might reasonably entertain
6 a doubt that the judge would be able to be impartial." Defendant also cites to section
7 170.1(a)(6)(B), which provides that, "[B]ias or prejudice toward a lawyer in the proceeding may
8 be grounds for disqualification." (§170.1.) The standard is articulated in *United Farm Workers of*
9 *America v. Superior Court* (1985) 170 Cal.App.3d 97. However, there are well-established
10 limitations on what evidence may be used to establish bias or prejudice under section
11 170.1(a)(6)(A)(iii). Section 170.2 expressly provides that it shall not be grounds for
12 disqualification where the judge has "in any capacity expressed a view on a legal or factual issue
13 presented in the proceeding, except as provided in paragraph (2) of subdivision (a) of, or
14 subdivision (b) or (c) of, Section 170.1." In addition, a legal ruling is insufficient to establish bias
15 or prejudice, even if the legal ruling is later determined to be erroneous. (*Dietrich v. Litton*
16 *Industries, Inc.* (1970) 12 Cal.App.3d 704, 719.) Further, it is not evidence of prejudice or bias
17 when a judge expresses an opinion based upon actual observances and in what he or she considers
18 the discharge of his or her judicial duty. (*Jack Farenbaugh & Son v. Belmont Construction, Inc.*
19 (1987) 194 Cal. App. 3d 1023, 1031; *Shakin v. Board of Medical Examiners* (1967) 254 Cal. App.
20 2d 102, 116.) Moreover, the grounds for disqualification must be established by offering
21 admissible evidence, rather than information and belief, hearsay or other inadmissible evidence.
22 (See, *United Farm Workers, supra*, 170 Cal.App.3d at 106, fn.6.) Lastly, in *People v. Sweeney*
23 (1960) 55 Cal.2d 27, 35, the California Supreme Court held that a statement of disqualification
24 based upon the conclusions or speculation of a party "may be ignored or stricken from the files by
25 the trial judge."

26 As summarized above, Defendant's claims of bias are based solely on his disagreement
27 with the statements and legal rulings made by this Court, and therefore fall squarely within the
28 parameters of the authorities set forth above. Such allegations, without more, cannot establish a

1 legal basis for disqualification. Every ruling requires the court to resolve a conflict in favor of one
2 party and against another. The opinion formed does not amount to bias and prejudice. (*Moulton*
3 *Niguel Water Dist. v. Colombo* (2003) 111 Cal. App. 4th 1210, 1219-1220.) Thus, it is clearly not
4 legal evidence of bias that the Court made decisions regarding the evidence or issues presented, or
5 ruled in a particular way in this case even if those decisions were, as Defendant contends, in error.

6 Likewise, statements made in the performance of judicial duties cannot establish a legal
7 basis for disqualification. Judicial remarks that are critical or disapproving of, or even hostile to,
8 counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.
9 “[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course
10 of the current proceedings ... do not constitute a basis for a bias or partiality motion unless they
11 display a deep-seated favoritism or antagonism that would make fair judgment impossible.”
12 (*Liteky v. United States* (1994) 510 U.S. 540, 555.) Further, the facts and circumstances prompting
13 a challenge for cause must be evaluated in the context of the entire proceeding and not based solely
14 upon isolated conduct or remarks. (*Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 171-172.)

15 In the present case, all of the Court’s decisions and comments were made during court
16 proceedings, in the context of the factual and evidentiary issues presented, the court’s knowledge
17 of the case, and its overall handling of the matters pending before it. As the authorities above
18 clearly indicate, a judge must be able to issue rulings and make statements in connection with the
19 performance of his or her judicial duties, including those concerning the sufficiency of the
20 evidence, the credibility of parties, or any other issues before the court. Thus, any rulings or
21 statements made by Judge Wohlfeil that Defendant believes were intemperate, unfair, or somehow
22 favored the other party fall into the categories set forth in the legal authorities above; namely the
23 Court expressing its views about the legal and factual issues before it, and the expression of opinion
24 in the performance of the court’s judicial duties which cannot establish a legal basis for
25 disqualification.

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1 Further, the Statement of Disqualification is based solely on Defendant's conclusions and
2 interpretation of the Court's rulings and statements. Thus, it lacks sufficient factual or evidentiary
3 support and amounts to no more than mere speculation and conjecture, which likewise cannot form
4 a legal basis for disqualification.

5 In short, the allegations made by Defendant do not show any bias on the part of the judge,
6 nor do they support any reasonable and objective conclusion that Judge Wohlfeil is, or could
7 reasonably be believed to be, biased. Therefore, the Statement of Disqualification is properly
8 stricken, and this Court may hear any further matters that may come before it in this case.

9 V. Conclusion.

10 IT IS HEREBY ORDERED that the Statement of Disqualification of Judge Joel R.
11 Wohlfeil is stricken for the reasons stated above pursuant to section 170.4(b).

12 This order constitutes a determination of the question of disqualification of the trial judge
13 pursuant to section 170.3(d).

14
15 IT IS SO ORDERED.

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17 Dated this 17 day of September 2018.

By: 

Hon. Joel R. Wohlfeil
Judge of the Superior Court