

**CERTIFIED FOR PARTIAL PUBLICATION\***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

TRI COUNTIES BANK,

Petitioner,

v.

SUPERIOR COURT OF FRESNO COUNTY,

Respondent;

LINDA L. AMAYA-GUENON et al.,

Real Parties in Interest.

F055084

(Super. Ct. No. 06CECG02369)

**OPINION**

ORIGINAL PROCEEDING; petition for writ of mandate. Adolfo M. Corona,  
Judge.

Jeffer, Mangels, Butler & Marmaro, Michael J. Hassen and Richard A. Rogan for  
Petitioner.

Edmund G. Brown, Jr., Attorney General, Christopher E. Krueger, Assistant  
Attorney General, Jonathan K. Renner and Peter A. Krause, Deputy Attorneys General,  
for Respondent.

William M. Krieg & Associates, William M. Krieg and Patrick C. McManaman  
for Real Parties in Interest.

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\* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is  
certified for publication with the exception of part II.

In the proceedings below, petitioner Tri Counties Bank sought to disqualify the trial judge, the Honorable Adolfo Corona, on the ground that he conducted an independent investigation of a factual issue material to a class certification motion in the case, thereby creating the appearance of partiality. The trial court struck petitioner's statement of objection as untimely under Code of Civil Procedure section 170.3, subdivision (c),<sup>1</sup> because petitioner delayed over seven months before asserting the alleged ground for disqualification. By the instant petition for writ of mandate, petitioner seeks a reversal of the trial court's determination. We deny the petition for writ of mandate because, as explained in the published portion of this opinion, the trial court properly struck the untimely disqualification claim. Alternatively, petitioner requests that we exercise our discretion under section 170.1, subdivision (c), to reassign the case to a different judge in the interests of justice. That request is also denied.

### **FACTS AND PROCEDURAL HISTORY**

The relevant facts and procedural history are not in dispute. On February 1, 2006, petitioner commenced this action by filing a complaint against real party in interest, Joaquin Vasquez, for recovery of a deficiency allegedly owed after repossession and sale of a motor vehicle.

On July 11, 2006, a class action cross-complaint was filed against petitioner by real parties in interest, Joaquin Vasquez and Linda Amaya-Guenon (hereafter real parties), alleging that petitioner committed unfair business practices by failing to give statutory notice to borrowers as required under the Rees-Levering Automobile Sales Finance Act (Civ. Code, § 2981 et seq.) prior to seeking a deficiency. The cross-complaint was brought on behalf of real parties and the class of all those from whom petitioner had sought to collect on a deficiency claim during a specified time period.

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<sup>1</sup> All further statutory references will be to the Code of Civil Procedure unless otherwise specified.

Real parties filed a motion for class certification that was set for hearing on August 22, 2007. On August 21, 2007, the trial court issued a lengthy tentative ruling to grant the motion. On the issue of whether the class was reasonably ascertainable, the tentative ruling referred to petitioner's "10-K" report<sup>2</sup> as evidence that it possessed substantial data processing capability. The tentative ruling indicated the trial court would judicially notice the 10-K report on its own motion, even though neither party had mentioned the 10-K report in their papers.

On August 22, 2007, in the midst of extensive oral argument regarding the class certification motion, the trial court recognized it would be too difficult to cover all the issues addressed in its tentative ruling at that time, so it invited the parties to provide supplemental briefing on any additional objections they had to the tentative ruling, and indicated the trial court would thereafter inform the parties if it thought further argument was necessary.

On September 5, 2007, petitioner filed a supplemental brief responding to the trial court's tentative ruling. The supplemental brief asserted, among other claims of error, that the trial court improperly relied on "extraneous evidence apparently gleaned through extensive independent investigation in order to 'fill in the facts' where [real parties] failed to present evidence." Petitioner argued the trial court should not have referred to petitioner's 10-K when none of the parties cited that report. Moreover, it argued the 10-K did not prove what the trial court said it did. Petitioner's counsel also submitted a lengthy declaration outlining 50 purported factual and legal errors in the tentative ruling. On September 13, 2007, real parties filed their response to petitioner's supplemental brief.

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<sup>2</sup> An apparent reference to a type of public financial report filed with the Securities and Exchange Commission.

On November 8, 2007, the trial court issued its 24-page order granting class certification. The trial court's order included the following discussion regarding the issue of "[a]scertainability" of class members:

"The required showing on this front is that it is possible to determine who class members are. [¶] ... [Petitioner] admits it possesses paper records from which the members of the class can be ascertained, but contends it would be difficult, although there is no substantive proof of this. Further, it appears from [petitioner's] 3/2006 10-K that it possesses substantial data processing capabilities. The Court judicially notices [petitioner's] representations in that regard. *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1573. [¶] [Petitioner] did not avail itself of the opportunity to provide evidence from its data processing department to refute such capabilities as part of its further briefing after the August 22, 2007 hearing. The evidence submitted in connection with this motion confirms that [petitioner] possesses such a system. See Ex. C to the Hassen Declaration filed 8/9/2007 at 6:4-23 and Exhibit A to the Krieg Declaration filed 9/13/2007. [¶] Even if a manual search of paper files were required, [petitioner] is properly charged with making such a search to ascertain class members...."

On November 30, 2007, petitioner sought appellate review of the trial court's order granting class certification by filing a petition for writ of mandate. One of the several grounds raised therein for seeking reversal of the class certification order was that the trial court improperly undertook an independent factual investigation as shown by its unsolicited citation to petitioner's 10-K report. The petition for writ of mandate challenging the class certification order did not argue that Judge Corona was disqualified. On December 6, 2007, we granted petitioner's request for a stay of the trial court proceedings pending our review of the petition. After considering the briefs filed by the parties, we denied the petition on February 7, 2008. On February 19, 2008, petitioner sought review by the Supreme Court of California of the order granting class certification. Review was denied by the Supreme Court on March 26, 2008.

On April 1, 2008, petitioner returned to the trial court and presented a written statement of objection pursuant to section 170.3, subdivision (c), seeking to have Judge

Corona disqualified from presiding at trial on the ground that he had conducted an independent investigation of the facts. We shall refer to petitioner's papers filed pursuant to section 170.3, subdivision (c), as its statement of objection.<sup>3</sup> On April 7, 2008, the trial court issued its order striking petitioner's statement of objection on the ground it was untimely under section 170.3, subdivision (c).

On April 17, 2008, petitioner filed the instant petition for writ of mandate asserting that the trial court erred in its determination of the disqualification issue. Petitioner contends that its statement of objection was timely under all the circumstances, including its need to seek appellate review of the class certification order. Petitioner also contends that if Judge Corona is not disqualified, petitioner will be deprived of its due process right to an impartial judge. Finally, petitioner argues that even if other relief is not granted, we should exercise our discretion to assign the case to a different judge.<sup>4</sup> We now address these issues.

## **DISCUSSION**

### **I. Failure to Timely Object Resulted in Forfeiture of Right to Pursue Disqualification of Trial Judge Under Section 170.3, Subdivision (c)**

A party may seek a judge's disqualification for cause under the procedure set forth at section 170.3, subdivision (c). However, the party must do so "at the earliest

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<sup>3</sup> Courts sometimes describe a party's filing under section 170.3, subdivision (c), as a "motion" to disqualify. Although it can be argued that it satisfies the definition of a motion under section 1003, we decline to use that terminology when discussing the unique procedure set out in section 170.3, subdivision (c). The procedure is different from traditional motion practice. No hearing date is required and there is no provision for opposition papers to be filed by the nonobjecting litigants. The statute does not use the term "motion" or any related phrasing, such as a party may "move the court." Instead, the statute provides that a party may file a written verified statement objecting to the hearing or trial before the judge.

<sup>4</sup> After the petition was filed, we issued our order to show cause and directed real parties and respondent to file responsive briefs.

practicable opportunity after discovery of the facts constituting the ground for disqualification.” (§ 170.3, subd. (c).) This strict promptness requirement is not to be taken lightly, as a failure to comply constitutes forfeiture or an implied waiver of the disqualification. (*In re Steven O.* (1991) 229 Cal.App.3d 46, 54-55.) Thus, when a statement of objection is untimely filed, it is appropriate for the trial court to order it stricken. (§ 170.4, subd. (b); *PBA, LLC v. KPOD Ltd.* (2003) 112 Cal.App.4th 965, 972.)

The purpose of the requirement that alleged grounds for disqualification be asserted at the earliest practicable opportunity is that ““[i]t would seem ... intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.”” (*People v. Scott* (1997) 15 Cal.4th 1188, 1207, quoting *Caminetti v. Pac. Mutual L. Ins. Co.* (1943) 22 Cal.2d 386, 392.) In other words, “[a] party should not be allowed to gamble on a favorable decision and then raise such an objection in the event he is disappointed in the result.” (*Rorh v. Johnson* (1944) 65 Cal.App.2d 208, 212.) Consequently, if a party is aware of grounds for disqualification of a judge but waits until after a pending motion is decided to present the statement of objection, the statement may be stricken as untimely. (*Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 394.)

Here, petitioner knew all the facts on which it relies on August 21, 2007, when the trial court issued its tentative ruling on the motion for class certification. However, it was not until *after* petitioner eventually lost that motion and appellate review thereof failed, a delay of over seven months, that petitioner finally presented its motion to disqualify Judge Corona. As succinctly put by another court in reaction to a similar delay, “[t]hat does not comport with the statutory requirement of acting at the earliest practicable opportunity.” (*Alhusainy v. Superior Court, supra*, 143 Cal.App.4th at p. 394.) We conclude the trial court did not err in striking the untimely motion.

In so holding, we reject petitioner's contention that it was not practicable to pursue disqualification at an earlier time. Petitioner could have filed its statement of objection at any time in the case after learning in August of 2007 of the trial judge's purported independent factual investigation. Whatever the reason for petitioner's failure to act in a timely fashion, the suggestion that there was a legal necessity for its failure is without merit. No true dilemma existed here between promptly objecting to the trial judge's qualifications and pursuing any other legal remedy in the case.

It is true that petitioner sought appellate review of the class certification order by a petition for writ of mandate and, in connection therewith, we issued a *stay* of trial court proceedings pending such review. Petitioner argues the stay excused it from filing the statement of objection until after appellate review was concluded. We disagree. The issuance of the stay does not support petitioner's position for at least two reasons. First, the stay was not issued until December 6, 2007. Petitioner therefore had ample opportunity to pursue disqualification long before the stay was imposed. Second, although unnecessary to our conclusion that the statement of objection was untimely, it is our view that petitioner could have filed a statement of objection even while the stay was in effect. Our general stay of proceedings was obviously directed to the *underlying proceedings between the parties to the action (i.e., to the litigation itself)*, not to questions of the judge's qualification to preside over those proceedings. A judge's qualification to preside as judge in a particular case is foundational to, and hence distinct from, the ordinary proceedings between the parties that would be tried or heard by the judge. (See § 170.5, subd. (f).) Because of this basic distinction between a judge's qualification and the underlying litigation, we do not believe that our stay could reasonably be understood as barring petitioner from promptly filing a statement of objection in the trial court. We note further that disqualification of the trial judge was not raised in the writ of mandate petition challenging the class certification order, thus the filing of a statement of objection to pursue disqualification would not have interfered

with or affected our appellate review of that order.<sup>5</sup> For all of these reasons, it is clear that the statement of objection was untimely filed and properly stricken by the trial court.

For the same reasons, petitioner also forfeited its related claim that the purported ground for disqualification amounted to a violation of its due process right to an unbiased judge. It is true that section 170.3, subdivision (d), does not bar appeal from a final judgment on constitutional grounds of judicial bias. (*People v. Brown* (1993) 6 Cal.4th 322, 335.) Nevertheless, a litigant should seek to resolve such issues by the required statutory means and “his negligent failure to do so may constitute a forfeiture of his constitutional claim.” (*Id.* at p. 336.) This is particularly true in civil cases where “a constitutional question must be raised at the earliest opportunity or it will be considered to be waived.” (*Roth v. Parker* (1997) 57 Cal.App.4th 542, 548; *In re Marriage of Christie* (1994) 28 Cal.App.4th 849, 865.) Here, as we have observed, petitioner was aware of the asserted ground for disqualification long before the trial court issued its order on the motion for class certification. Petitioner plainly took a “wait and see” approach when it delayed over the course of several months before filing its statement of objection seeking to disqualify Judge Corona. Petitioner only asserted the purported grounds for disqualification when the contested class certification motion and appellate review thereof were finally decided against it. We conclude petitioner’s due process claims were forfeited by this dilatory conduct.

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<sup>5</sup> This is analogous to the automatic stay issued under section 916, which does not impair the ability of the trial court to proceed on matters not affected by the judgment or order appealed from. That is, the issue of the judge’s qualification to preside as judge was collateral to the obvious purpose and scope of our general stay.



## **II. Request for Assignment to Another Judge in the Interests of Justice\***

Alternatively, petitioner requests that we assign the case to another judge in the interests of justice. Section 170.1, subdivision (c), provides as follows: “At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court.” An appellate court’s discretionary power under section 170.1, subdivision (c), should be exercised sparingly and only if the interests of justice require it. (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 303; *Livingston v. Marie Callenders, Inc.* (1999) 72 Cal.App.4th 830, 840.) For example, such relief is appropriate where a reasonable person might doubt whether the trial judge was impartial (*Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 575-576; *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 247), or where the trial judge’s rulings suggest an animus inconsistent with judicial objectivity (*People v. Gulbrandsen* (1989) 209 Cal.App.3d 1547, 1562).

In the present case, since neither party mentioned or attached a 10-K report in connection with the class certification motion, petitioner argues the trial judge conducted an improper investigation outside of the pleadings and evidence in the case, thereby creating at least an appearance that he is no longer impartial. On that basis, petitioner requests that we use our discretionary power to reassign the case to a different judge in the interests of justice. We disagree that reassignment is warranted and therefore deny the request.

Our evaluation of petitioner’s request requires that we consider two distinct judicial principles. The first is that when a judge sits as a trier of fact, whether in the context of a bench trial or an evidentiary motion, he may not conduct an independent or collateral investigation of the factual questions at issue by examining evidence outside of

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\* See footnote, *ante*, page 1.

that which is properly brought before him or her in the case. (*Guadalupe A. v. Superior Court* (1991) 234 Cal.App.3d 100, 108-109; *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 632.) The rationale for this rule is fairly self-evident. When a judge conducts a collateral investigation, it may create the appearance to a reasonable person that the judge is no longer a neutral arbiter or that his or her neutrality has been compromised by whatever information was gleaned from the investigation. Additionally, a judge's independent investigation may create the appearance that the judge has so extensively injected himself or herself into the proceedings as to become a player for one side or the other, rather than an impartial adjudicator of facts. (See *Wenger v. Commission on Judicial Performance*, *supra*, at pp. 631-632.) Of course, the integrity of the judicial process requires courts to guard against even the appearance of partiality. (See, e.g., § 170.1, subd. (a)(6)(iii).) “‘Judges should be umpires rather than players.’ Judges must strive to maintain the appearance of neutrality when their actions could be interpreted otherwise.” (*Rose v. Superior Court*, *supra*, 81 Cal.App.4th at p. 570.)

The second principle we consider is that a judge *is* entitled to judicially notice matters that are described in Evidence Code sections 451 and 452, even when not requested by the parties. For example, Evidence Code section 452, subdivision (h), expressly permits judicial notice to be taken of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” As noted by the 1965 Law Revision Commission Comments regarding Evidence Code section 452: “Section 452 includes matters both of law and of fact. The court may take judicial notice of these matters, *even when not requested to do so*.” (Cal. Law Revision Com. com., Deering’s Ann. Evid. Code (2004 ed.) foll. § 452, p. 221, italics added.) Moreover, it is now well-established that a court may take judicial notice of matters described in Evidence Code section 452 *on its own motion*. (See, e.g., *Hollywood v. Superior Court* (2008) 43

Cal.4th 721, 732, fn. 6 [release of film Alpha Dog judicially noticed on court's own motion]; *Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1579, fn. 19; *BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc.* (2004) 119 Cal.App.4th 848, 853; *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 37, fn. 2.)

Evidence Code section 454 indicates a court may consult informational resources for the purpose of deciding whether to exercise judicial notice. It states: "In determining the propriety of taking judicial notice of a matter, or the tenor thereof: (1) Any source of pertinent information ... may be consulted or used, whether or not furnished by a party." (Evid. Code, § 454, subd. (a).) In this regard, Evidence Code section 455 furnishes the parties with important procedural safeguards. Evidence Code section 455 provides that when a trial court has been requested to take judicial notice or proposes to do so (i.e., on its own motion), and the matter is of "substantial consequence to the determination of the action," the court *must* "afford each party reasonable opportunity" to present "information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed." (Evid. Code, § 455, subd. (a); see also 1 Witkin, Cal. Evidence (4th ed. 2000) Judicial Notice, § 41, p. 135.)

Qualitatively, judicial notice relates to matters that are assumed to be indisputably true. (1 Witkin, *supra*, Judicial Notice, § 1, p. 102.) When judicial notice is taken (or proposed to be taken) of a discrete factual matter, it concerns a proposition that is *not reasonably subject to dispute* and is either (1) universally known (Evid. Code, § 451, subd. (f)), (2) of common knowledge in the territorial jurisdiction of the court (Evid. Code, § 452, subd. (g)), or (3) capable of verification by resort to sources of reasonably indisputable accuracy (Evid. Code, § 452, subd. (h).) Although a judge's determination that a matter is not reasonably subject to dispute may necessitate resort to reliable sources of information bearing on that question, that process should not be equated with conducting an extra-judicial investigation of disputed and disputable questions of fact in

the case. (See, § 170.1, subd. (a)(1)(A) [it is grounds for disqualification if “[t]he judge has personal knowledge of disputed evidentiary facts concerning the proceeding”].)

In the present case, the question before us is not whether the trial court’s exercise of judicial notice was flawed, but whether the interests of justice require us to reassign the case to a different judge due to a purported appearance of partiality. On that precise question, we do not believe a reasonable observer would doubt the trial court’s impartiality as a result of the court’s reference to the 10-K report. We so conclude because the trial court’s conduct is more fairly and reasonably characterized as an exercise of judicial notice on the court’s own motion than an improper collateral investigation of facts. In its tentative ruling, the trial court announced its proposed exercise of judicial notice by referring to a Court of Appeal decision in which a party’s Securities and Exchange Commission filings that were posted on that party’s corporate website were judicially noticed. (See *Ampex Corp. v. Cargle*, *supra*, 128 Cal.App.4th at pp. 1573-1574, fn. 2.) In response to the tentative ruling, petitioner did not specifically object that the 10-K report was incapable of being judicially noticed. Nor did it argue the 10-K report was inaccurate or unauthentic. Rather, petitioner focused *solely* on the fact that the 10-K report was not furnished by one of the parties but was obtained on the court’s own initiative. As the above discussion regarding judicial notice indicates, that fact is insufficient by itself to establish that an improper investigation occurred. Nor are we persuaded that the trial judge’s reference to the 10-K report created an appearance that the judge was partial to real parties.

The trial court was not only candid in acknowledging its consideration of the 10-K report, it did so *in advance* of the hearing (in the tentative ruling) to ensure there would be a fair opportunity to respond. The trial court even allowed a further opportunity to address the matter when it permitted supplemental briefing concerning any objections to the tentative ruling. Additionally, while petitioner disagreed with the inferences that were drawn by the trial court therefrom regarding ascertainability of the class, it appears

the trial court's reference to the 10-K report was in support of a relatively innocuous and unremarkable point -- that a modern-day bank like petitioner has substantial data processing capability.

Finally, although we are not privy to the means by which the trial judge specifically ascertained the existence of petitioner's 10-K report filed publicly with the Securities and Exchange Commission, nothing in the record before us suggests that a more generalized search was undertaken by the trial judge. From all appearances, at least, the trial judge merely sought and found a specific 10-K filing.

Even so, we take this occasion to sound a warning that judges are not at liberty to probe the internet for the purpose of secretly conducting investigations of parties or factual issues that are pending before them. A judge's legitimate review of collateral sources (including at times internet sources) for the purpose of potentially exercising judicial notice must be exercised with great caution, with due concern for even the appearance of partiality, and should be limited to those instances where the matter under consideration is reasonably likely to be indisputable and readily verifiable in character.

Having stated our basic concerns, it does not appear that any principle of judicial integrity was dishonored here based on the record before us. In light of all the circumstances, we conclude a reasonable person would not have questioned whether the trial judge was fair and impartial. The appearance of impartiality was not compromised. Consequently, a reassignment to another judge is not required in the interests of justice.

**DISPOSITION**

The petition for writ of mandate is denied. The request for discretionary relief under section 170.1, subdivision (c) is denied. The order to show cause is discharged. Costs on appeal are awarded to real parties and respondent.

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Kane, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Cornell, J.