

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

CARL L. JIMENA,)	No. CV-F-07-367 OWW/SKO
)	
)	MEMORANDUM DECISION AND
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	MOTION TO DISQUALIFY (Doc.
vs.)	219)
)	
UBS AG BANK, et al.,)	
)	
Defendants.)	
)	

On June 15, 2010, Plaintiff Carl L. Jimena, proceeding in *pro per*, filed a "Motion and Memorandum to Disqualify Judge Oliver W. Wanger," (Doc. 219), pursuant to 28 U.S.C. §§ 144 and 455(a) and (b) (1).¹

Section 144 provides:

Whenever a party to any proceeding in a

¹Plaintiff noticed this motion for hearing before Chief Judge Ishii. By Order filed on June 17, 2010, (Doc. 220), Judge Ishii denied the motion without prejudice on the ground that the motion should have been filed directly with Judge Wanger. Thereafter, Plaintiff filed a request that Judge Wanger rule on the merits of the motion. (Doc. 230).

1 district court makes and files a timely and
2 sufficient affidavit that the judge before
3 whom the matter is pending has a personal
4 bias or prejudice 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.

5 The affidavit shall state the facts and the
6 reasons for the belief that bias or prejudice
7 exists, and shall be filed not less than ten
8 days before the beginning of the term at
9 which the proceeding is to be heard, or good
10 cause shall be shown for the failure to file
it within such time. A party may file only
one such affidavit in any case. It shall be
accompanied by a certificate of counsel of
record stating that it is made in good faith.

11 Section 455(a) provides in pertinent part:

12 28 U.S.C. § 455 provides in pertinent part:

13 (a) Any ... judge ... of the United States
14 shall disqualify himself in any proceeding in
which his impartiality might reasonably be
questioned.

15 (b) He shall also disqualify himself in the
16 following circumstances:

17 (1) Where he has a personal bias or
18 prejudice concerning a party

19 Plaintiff asserts thirteen grounds in support of his motion
20 to recuse:

21 1. Rejecting the decision of the California
22 Supreme Court in *Johnson & Johnson v.*
23 *Superior Court*, (1985 38 Cal.3d 243, 250,
interpreting § 425.40 California Code of
Civil Procedure that service of summons and
complaint is complete on the date of mailing:

24 [a] Service of the amended
25 complaint by certified airmail on
26 Jan. 31, 2007 to UBS FS, Weehauken,
New Jersey Branch (proof of
service, Doc. 8, Exh. C, Annex 3,) was complete on the date of

1 mailing, not on the 10th day after
2 mailing as held by the California
3 Supreme Court in the case of
4 *Johnson & Johnson v. Superior Court*
5 (1985) 38 Cal.3d 243, 250 which is
6 binding on the District Court as
7 held in the case of ((*Doe v. Otte,*
8 *248 F.3d 832, 839 (9th Cir. -*
9 *2001); West v. American Tel. & Tel.*
10 *Co. 311 U.S. 233, 237 [1940]; Meier*
11 *ex rel. Meier v. Sun Intern.*
12 *Hotels, Ltd. 288 F.3d 1264, 1271*
13 *[11th Cir 2002]* see Doc. 18, p.7,
14 line 10-13;

15 2. Rejecting the decision of the Superior
16 Court of California that service on the P.O.
17 Box of the summons and complaint on the
18 alleged agent Corporation Service Company
19 (CVS) was invalid. [Doc. 18, p.6, line 12-14,
20 p. 7, line 1-3];

21 3. Rejecting the application of the decision
22 in *U.S. v. Toyota Motor Corp.*, *infra*, that
23 the alter ego doctrine is satisfied by the
24 'marketing conduit' doctrine

25 'Plaintiff cites *United States v.*
26 *Toyota Motor Corp.*, 561 F.Supp.
354, 359 (C.D.Cal.1983) as
authority for imposition of alter
ego liability on UBS FS for actions
of UBS AG based on this assertion.
Toyota Motor Corp. does not involve
the issue of alter ego liability
but, rather, in personum
jurisdiction.' (Doc. 124, p. 11,
line 15-20). The District Court
was absolutely in error here. (See
Doe v. Unocal 248 F.3d 915, 926
(9th Cir.2001);

27 4. Ignoring the case of *FMC Financing Corp.*
28 *v. Murphee*, *infra*, setting the elements to
29 make a subsidiary liable for the fraud of the
30 parent even assuming without admitting that
31 UBS FS is a subsidiary advocated by
32 defendanats [sic]. Plaintiff's position is
33 UBS FS is an alter ego or agent. The
34 District Court failed to rule on the
35 liability of UBS FS on the basis of fraud of

1 the parent alone, disregarding alter ego and
2 agency theory. This issue was raised in
3 plaintiffs [sic] motion Doc. 68, as the first
4 ground for liability of UBS FS amplified
5 further in plaintiff's reply. Doc. 93. The
6 point to be noticed is when plaintiff cites
7 an authority applicable to his favor, Judge
8 Wanger either ignores them, fails or refuse
9 [sic] to apply them. Examples are the three
10 cases cited above ... and more recently the
11 case of *General Mills, Inc. v. Kraft Foods*
12 *Global, Inc.*, 495F.3d [sic] 1378
13 (Fed.Cir.2007), the District Court failed to
14 apply on the default of defendants in Doc.
15 214. Allegations of agency and alter ego are
16 based on Exhibit 3. Striking out agency and
17 alter ego allegations in the third amended
18 complaint which Judge Wanger did over the
19 objection of plaintiff is null and void
20 because they are rooted in Exhibit 3. Unless
21 defendants confirm that UBS FS Inc. is a
22 branch of UBS AG, then the liability of UBS
23 FS would be that of a branch or part of UBS
24 AG. (Exhibit 3);

5. Denying all motions of the plaintiff from
the beginning up to the present time, without
any exception, demonstrating bias, prejudice,
partiality against the plaintiff and in favor
of the defendants;

6. Ignoring the fact that UBS FS is an agent
defeating UBS AG motion to dismiss. (Exh. 3);

7. Advancing reasons in behalf of defendants
that were never raised or advocated by
defendants themselves, thereby acting as
counsel for defendants. Example: (This falls
under Sec. 455(a) ...)The [sic]
mischaracterization of the Joint Scheduling
Report was a mere inadvertence. (Doc. 125,
p.12, line 9-11). Defendants never advanced
this argument;

8. Ignoring the procedural safeguards of due
process of law by refusing to grant a hearing
of plaintiff's Doc. 49 together with Doc. 80,
77, 79, (Doc. 49, was denied without setting
it for hearing, none could be shown on the
record.);

1 9. Ordering the appearance of the plaintiff
2 on a show cause order when there is no cause
3 the fault being on the District Court in not
4 reviewing the Joint Scheduling Report (Doc.
5 33) before ordering the plaintiff to appear
6 from his experience that amendment of the
7 complaint is a subject of the meet and confer
8 between the parties;

9 10. Ignoring the agreement of plaintiff and
10 defendants that California law applies to the
11 substantive claims of plaintiff. (Doc. 49,
12 denied by Doc. 101, p.10, line 18-20);

13 11. Insulting plaintiff by calling him
14 'ignorant of the law' (Doc. 18, p.12, line
15 19-20) which is an unnecessary comment in
16 resolving issues in this case and an
17 inappropriate conduct of a Judge when he
18 already knew at the time of removal that
19 plaintiff is a senior citizen on social
20 security income. This is personal bias,
21 prejudice against the plaintiff that calls
22 for the automatic disqualification of Judge
23 Wanger under the ruling ... of United States
24 v. Alabama, 828 F.3d at 1540. This is a
25 matter on record.

26 12. In Doc. 18, page 1, line 19 to 22, the
Court said: 'Plaintiff claims to have been
defrauded by individuals who sent him forged
emails that falsely purported to come from an
officer of Defendant UBS AG.' There is no
evidence on record to support this statement
but it suggest it came from 'extrajudicial
source' *Liteky v. U.S. 510 U.S. 540, 551*
[1994] and Judge Wanger prejudged the case
already

13 13. The Court continued its partiality in
14 Doc. 214 in refusing to apply Rule 15(a)(3),
15 FRCP and the case of *General Mills, Inc. v.*
16 *Kraft Foods Global, Inc., 495 F.3d 1378*
17 (Fed.Cir.2007).

18 A threshold issue is whether Plaintiff can proceed with this
19 motion pursuant to Section 144. Plaintiff's motion is not
20 accompanied by "a certificate of counsel of record stating that
21
22
23
24
25
26

1 it is made in good faith" as required by Section 144. Some
2 courts have concluded that an individual proceeding *in pro per*
3 cannot proceed under Section 144. See *United States v. Bennett*,
4 2008 WL 2025074 at *2 (C.D.Cal., May 5, 2008); *Williams v. New*
5 *York City Housing Authority*, 287 F.Supp.2d 247, 249
6 (S.D.N.Y.2003); *Mills v. City of New Orleans*, 2002 WL 31478223 at
7 *2-3 (E.D.La., Nov. 2, 2002); *Robinson v. Gregory*, 929 F.Supp.
8 334, 337-338 (S.D.Ind.1996);. Other courts have ruled that the
9 affidavit of any counsel who is a member of the bar may sign the
10 certificate of good faith. See *United States v. Pungitore*, 2003
11 WL 22657087 at *2 (E.D.Pa., Oct. 24, 2003); *Thompson v.*
12 *Mottleman, Greenberg, Schmerelson, Weinroth & Miller*, 1995 WL
13 318793 at *1 (E.D.Pa., May 25, 1995). Here, because Plaintiff is
14 *in pro per* and because his motion is not accompanied by a
15 certificate of good faith executed by an attorney a member of the
16 bar of this Court, Plaintiff cannot proceed pursuant to Section
17 144.

18 Section 455(a) covers circumstances that appear to create a
19 conflict of interest, whether or not there is actual bias.
20 *Herrington v. Sonoma County*, 834 F.2d 1488, 1502 (9th Cir. 1987).
21 The standard for judging the appearance of partiality requiring
22 recusal under Section 455(a) is an objective one and involves
23 ascertaining "whether a reasonable person with knowledge of all
24 the facts would conclude that the judge's impartiality might
25 reasonably be questioned." *Clemens v. U.S. Dist. Court for*
26 *Central Dist. of Cal.*, 428 F.3d 1175, 1178 (9th Cir.2005); *United*

1 *States v. Nelson*, 718 F.2d 315, 321 (9th Cir. 1983). ``Section
2 455(a) asks whether a reasonable person perceives a significant
3 risk that the judge will resolve the case on a basis other than
4 the merits.' ... The 'reasonable person' in this context means a
5 'well-informed, thoughtful observer,' as opposed to a
6 'hypersensitive or unduly suspicious person.'" *Clemens, id.* In
7 *Liteky v. United States*, 510 U.S. 540 (1994), the Supreme Court
8 held that recusal under Section 455(a) is subject to the
9 limitation of "extrajudicial source" applicable to Section 144.

10 The Supreme Court further held:

11 First, judicial rulings alone almost never
12 constitute a valid basis for a bias or
13 partiality motion ... In and of themselves
14 (i.e., apart from surrounding comments or
15 accompanying opinion), they cannot possibly
16 show reliance upon an extrajudicial source;
17 and can only in the rarest circumstances
18 evidence the degree of favoritism or
19 antagonism required ... when no extrajudicial
20 source is involved. Almost invariably, they
21 are proper grounds for appeal, not for
22 recusal. Second, opinions formed by the
23 judge on the basis of facts introduced or
24 events occurring in the course of current
25 proceedings, or of prior proceedings, do not
26 constitute a basis for bias or partiality
motion unless they display a deep-seated
favoritism or antagonism that would make fair
judgment impossible.

21 510 U.S. at 555. The Supreme Court further explained:

22 [J]udicial remarks during the course of a
23 trial that are critical or disapproving of,
24 or even hostile to, counsel, the parties, or
25 their cases, ordinarily do not support a bias
26 or partiality challenge. They may do so if
they reveal an opinion that derives from an
extrajudicial source; and they will do so if
they reveal such a high degree of favoritism
or antagonism as to make fair judgments

1 impossible. As example of the latter (and
2 perhaps the former as well) is the statement
3 that was alleged to have been made by the
4 District Judge in *Berger v. United States*,
5 255 U.S. 22 (1921), a World War I espionage
6 case against German-American defendants: 'One
7 must have a very judicial mind, indeed, not
8 [to be] prejudiced against the German-
9 Americans' because their 'hearts are reeking
10 with disloyalty.' ... Not establishing bias
11 or partiality, however, are expressions of
12 impatience, dissatisfaction, annoyance, and
13 even anger, that are within the bounds of
14 what imperfect men and women, even after
15 having been confirmed as federal judges,
16 sometimes display. A judge's ordinary
17 efforts at courtroom administration - even a
18 stern and short-tempered judge's ordinary
19 efforts at courtroom administration - remain
20 immune.

21 *Id.* at 555-556. In *United States v. Conforte*, 624 F.2d 869 (9th
22 Cir.), *cert. denied*, 449 U.S. 1012 (1980), the Ninth Circuit held
23 that a judge's views on legal issues may not serve as the basis
24 for motions to disqualify. *Id.* at 882. In explaining the type
25 of bias or animus that is required to compel the recusal of a
26 judge, the Ninth Circuit held:

It is an animus more active and deep-rooted
than an attitude of disapproval toward
certain persons because of their known
conduct, unless the attitude is somehow
related to a suspect or invidious motive such
as racial bias or a dangerous link such as a
financial interest, and only the slightest
indication of the appearance or fact of bias
or prejudice arising from those sources would
be sufficient to disqualify.

Id. at 881. In *Clemens*, the Ninth Circuit adopted a
nonexhaustive list of various matters not ordinarily sufficient
to require a § 455(a) recusal:

(1) Rumor, speculation, beliefs, conclusions,

1 innuendo, suspicion, opinion, and similar
2 non-factual matters; (2) the mere fact that a
3 judge has previously expressed an opinion on
4 a point of law or has expressed a dedication
5 to upholding the law or a determination to
6 impose severe punishment within the limits of
7 the law upon those found guilty of a
8 particular offense; (3) prior rulings in the
9 proceeding, or another proceeding, solely
10 because they were adverse; (4) mere
11 familiarity with the defendant(s), or the
12 type of charge, or kind of defense presented;
13 (5) baseless personal attacks on or suits
14 against the judge by a party; (6) reporters'
15 personal opinions or characterizations
16 appearing in the media, media notoriety, and
17 reports in the media purporting to be
18 factual, such as quotes attributed to the
19 judge or others, but which are in fact false
20 or materially inaccurate or misleading; and
21 (7) threats or other attempts to intimidate
22 the judge.

23 *Clemens, id.* at 1178-1179. The Ninth Circuit has ruled that
24 Section 455(b) (1) simply provides a specific example of a
25 situation in which a judge's impartiality might reasonably be
26 questioned pursuant to Section 455(a). *United States v. Sibla*,
27 624 F.2d 864, 867 (9th Cir.1980). Because Plaintiff has not
28 alleged grounds for recusal other than those relating to bias or
29 prejudice, the standards applicable to recusal pursuant to
30 Section 455(a) apply to Section 455(b) (1). *Id.*

31 Here, to the extent Plaintiff's motion is based on his
32 disagreement with various rulings made in this case, rulings in
33 the action are not a basis for recusal but rather, for appeal at
34 the appropriate time.

35 Plaintiff's motion is based on the statement in the
36 "Memorandum Decision and Order Denying Plaintiff's Motion for

1 Remand and Motion to Strike; Granting Defendants' Motion to
2 Dismiss with Leave to Amend" filed on June 8, 2007, (Doc. 18;
3 "June 8, 2007 Memorandum"):

4 Plaintiff is a resident of Bakersfield,
5 California. UBS AG is incorporated and has
6 its principal place of business in
7 Switzerland. UBS FS is incorporated in
8 Delaware and has its principal place of
9 business in Weehawken, New Jersey. (Doc. 11,
10 King Declaration.) UBS FS Bakersfield is not
11 a separate corporation. There is no such
12 entity. UBS FS Bakersfield is one of many
13 satellite locations at which the Delaware/New
14 Jersey corporation UBS FS does business.
15 Plaintiff's ignorance of the law does not
16 make it otherwise. Removal in this action
17 did not destroy diversity among the parties
18 and was properly filed by Defendants.

19 (Doc. 18, 12:12-22). However, as the authorities cited above
20 establish, this statement does not compel recusal.

21 Plaintiff's assertion that the statement in the June 8, 2007
22 Memorandum of background facts that "Plaintiff has apparently
23 been defrauded in a variant on the 'Nigerian advance fee scam' by
24 individuals who sent him forged emails that falsely purported to
25 come from an officer of UBS AG in Zurich, Switzerland," is
26 unsupported by any evidence in the record and therefore came from
an extrajudicial source is without merit. This statement was
made in then Defendant UBS FS's memorandum of points and
authorities in support of its motion to dismiss. See Doc. 6,
3:4-6. There is no extrajudicial source for this statement. All
other grounds relate to legal rulings by the Court.

For the reasons stated, Plaintiff's Motion to Disqualify
Judge Oliver W. Wanger is DENIED.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IT IS SO ORDERED.

Dated: July 1, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE