



1 30. Plaintiff objected to the taking of her deposition. On April 28, 2009 the undersigned overruled  
2 Plaintiff's objections to being deposed. (Docket No. 19). Defendants again noticed the deposition  
3 of Plaintiff. Plaintiff then objected to the deposition going forward and, on May 6, 2009, Magistrate  
4 Judge Bencivengo granted Defendants' motion to compel and the deposition was once again renoticed.  
5 (Docket No. 23). Plaintiff filed objections to the order compelling her deposition testimony and, on  
6 May 27, 2009, the undersigned overruled Plaintiff's objections and referred the matter to Magistrate  
7 Judge Bencivengo regarding the imposition of sanctions for her failure to comply with the May 6,  
8 2009 order requiring Plaintiff to submit to a deposition. (Docket No. 32).

9 On June 3, 2009 Magistrate Judge Bencivengo conducted a status conference to address the  
10 matter of sanctions. (Docket No. 33). "Plaintiff represented to the Court that despite the two orders  
11 directing her to make herself available for deposition, she would not appear at a deposition noticed  
12 by Defendants." (Report and Recommendation Regarding Discovery Sanctions at p.2:21-22, Docket  
13 No. 36). Plaintiff objected to the recommended dismissal and, on July 13, 2009, the undersigned  
14 adopted the recommendation and dismissed the action because of Plaintiff's willful refusal to comply  
15 with two court orders. Plaintiff appealed the dismissal to the Ninth Circuit and, on December 9, 2009,  
16 the Ninth Circuit summarily affirmed the undersigned's dismissal of the action with prejudice.  
17 (Docket No. 49).

18 Plaintiff now moves to recuse the undersigned based upon the dismissal of the earlier-filed  
19 action.

## 20 DISCUSSION

### 21 **Recusal Under 28 U.S.C. §455**

22 The court concludes that recusal is not appropriate under Section 455. This section sets forth  
23 a broad ground for recusal: a federal judge must recuse "in any proceeding in which his (or her)  
24 impartiality might reasonably be questioned." 28 U.S.C. §455(a). The obligations set forth in Section  
25 455 are "self-enforcing on the part of the judge." United States v. Sibla, 624 F.2d 864, 867-68 (9th  
26 Cir. 1980). Disqualification is required if a reasonable factual basis exists for questioning the judge's  
27 impartiality. "The inquiry is objective, from the point of view of a reasonable person with access to  
28 all of the facts." New York city Housing Develop. Corp. v. Hart, 796 F.2d 976, 980 (7th Cir. 1986).

1 Section 455(a) requires disqualification “to be evaluated on an objective basis, so that what matters  
2 is not the reality of bias or prejudice, but its appearance.” Liteky v. United States, 510 U.S. 540, 548  
3 (1994). The test for disqualification is whether an average, reasonable person knowing all the  
4 circumstances would harbor doubts about the judge’s impartiality. Milgard Tempering, Inc. v. Selas  
5 Corp. of America, 902 F.2d 703, 714 (9th Cir. 1990).

6 Plaintiff moves for recusal “because Judge Miller has personal knowledge of the July 20, 2009  
7 unresolved complaint for judicial misconduct.” (Motion at p.4:226-27). In support of her request for  
8 recusal, Plaintiff submits the complaint for judicial misconduct, dated July 23, 2009. (Klat Affidavit,  
9 Exh. A ¶4). The Complaint of Judicial Misconduct or Disability represents that the statement of facts  
10 is set forth in “2 part attachments w/ support documents.” (Id. at p.8). In the supporting documents,  
11 Plaintiff sets forth the following as the basis for her complaint:

12 Judge Miller has and is relying on information to issue disposition Orders in the above  
13 entitled case being tried in a United States District Court on the basis of guidance and  
14 opinion of a magistrate judge in possession of an active license to practice law in the  
15 State of California (Cal. Bar # 138791) while simultaneously executing judicial duties  
16 in a manner consistent with an individual acting as an attorney in the case which is  
17 forbidden under Title 28 of the United States Code section 454.

18 (Id. at p.10). In other words, Plaintiff complains that Magistrate Judge Bencivengo “is practicing law  
19 while holding a position and making decisions as a United States Magistrate Judge in violation” of  
20 28 U.S.C. §454 and Rules of Conduct Rule 3-210 and 2-400. (Id. at p.11).<sup>2</sup>

21 The court concludes that Plaintiff fails to identify any cogent basis for recusal. The fact that  
22 the undersigned considered the Report and Recommendations of Magistrate Judge Bencivengo is  
23 consistent with and specifically authorized by 28 U.S.C. §636 and Fed.R.Civ.P. 72. Even if the  
24 undersigned erroneously adopted the Report and Recommendations, the fact that a judge makes  
25 erroneous rulings in a case is not enough to show bias or prejudice. Cintron v. Union Pac. R.R. Co.,  
26 813 F.2d 917, 921 (9th Cir. 1987). Moreover, just as judges have an obligation to recuse themselves  
27 when their impartiality may reasonably be questioned, judges also have an obligation to refrain  
28 from recusal when there is no basis for disqualification. New York City Housing Develop. Corp., 796 F.2d

---

29 <sup>2</sup> The court notes that the “active” status maintained by Magistrate Bencivengo with the State  
30 Bar of California presents no ground for recusal. Moreover, there is no indication by Plaintiff that  
31 Magistrate Judge Bencivengo is, apart from her judicial functions, practicing law in violation of the  
32 rules of professional conduct.

1 at 980.

2 Finally, the court notes that the grounds for recusal identified by Plaintiff would result in the  
3 recusal of every judge of this bench because the Magistrate Judges in this district play an integral role  
4 in every civil action. L.R. 72.1, 72.2, 72.3. Further, the fact that the Magistrate Judges, like the  
5 District Court Judges, are also members of the State Bar of California, is not a basis for recusal.

6 In sum, as a reasonable, well-informed observer would not reasonably question the  
7 undersigned's impartiality by using a Magistrate Judge, licensed by the State Bar of California, there  
8 is no basis for recusal. The motion for recusal is denied.

9 **Recusal Under 28 U.S.C. §144**

10 This provision provides an alternative means for recusal. Under this provision, once a party  
11 "makes and files a timely and sufficient affidavit" showing that the judge "has a personal bias or  
12 prejudice" against the party, another judge shall be assigned to hear the matter. 28 U.S.C. §144. The  
13 affidavit "shall state the facts and the reasons for the belief that bias or prejudice exists." Id. Here,  
14 for the above stated reasons, the grounds for recusal identified by Plaintiff are so insubstantial that  
15 Plaintiff fails to make a sufficient threshold showing of bias or prejudice. The unnecessary transfer  
16 of this motion for determination by another judge is inherently inefficient and delays the  
17 administration of justice. Under these circumstances, not only does the court deny the motion but  
18 declines to transfer the motion to another judge because of the insubstantial showing of bias or  
19 prejudice.

20 **The Motion to Strike Defendants' Motion to Dismiss**

21 Plaintiff also moves to strike or set aside Defendants' motion to dismiss filed on or about  
22 February 16, 2010 on the ground that Defendants have "not verified, acknowledged, signed or  
23 complied with the necessary return release form verifying entity acceptance of waiver of service of  
24 summons and complaint." (Motion at p.2:3-5).<sup>3</sup> As Plaintiff fails to identify any authority requiring  
25 Defendants to waive service under Fed.R.Civ.P. 4(d) as a condition for bringing a Fed.R.Civ.P. 12(b)  
26 motion, the motion to strike is denied.


---

27  
28 <sup>3</sup> The court notes that Defendants filed a Waiver of Service on February 16, 2010. (Docket  
No. 6).

1 In sum, the court denies the motion for recusal and denies the motion to strike Defendants'  
2 motion to dismiss for failure to state a claim. For the reasons set forth herein, the court also denies  
3 the motion to recuse Magistrate Judge Bencivengo.

4 **IT IS SO ORDERED.**

5 DATED: March 9, 2010

6   
7 Hon. Jeffrey T. Miller  
United States District Judge

8 cc: All parties

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28