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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

TATYANA LEVINA, Plaintiff, v. SAN LUIS COASTAL UNIFIED SCHOOL DISTRICT, Defendant.)	CASE NO. CV 05-6586 R(MANx) ORDER GRANTING MOTION TO DISQUALIFY DISTRICT JUDGE
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On October 17, 2005, counsel for plaintiff moved to disqualify the district judge randomly assigned to preside over this case. In support of the motion, counsel filed a sworn declaration. Defendant has opposed the motion. The motion was randomly assigned to me, pursuant to General Order 05-06. I **GRANT** the motion to disqualify the district judge, because—and only because—as a result of developments occurring after this lawsuit was filed,¹ a reasonable person might reasonably question the ability of the trial judge to discharge his duties impartially. I do **not** find (and plaintiff’s counsel does not even contend) that the trial judge is actually biased.

¹The suit was filed on September 7, 2005.

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A. FACTS²

Counsel for plaintiff is married to a judge who sits on the Court of Appeals for the Ninth Circuit (“the Judge-Spouse”). The district judge assigned to this case knows of this marital relationship and has interacted with both spouses at various events. The Judge-Spouse also sits on the Judicial Council of the Ninth Circuit, which has authority to review any ruling issued by the Chief Judge of the Ninth Circuit on a misconduct complaint filed against a district judge. In 2003 an attorney filed such a complaint against the district judge assigned to this case. The Chief Judge dismissed that complaint. Just recently—on September 29, 2005—the Ninth Circuit Judicial Council upheld that dismissal. *In re Complaint of Judicial Misconduct*, ___F.3d ___, 2005 WL 2417648 (9th Cir. 2005). The Judge-Spouse filed a dissenting opinion in which, among other things, he stated,

I believe the judge who is the subject of the complaint in this case [*i.e.*, the district judge here] has committed serious misconduct by abusing his judicial power.... *Id.* at *4.

* * *

[The response of the district judge] is patently absurd. *Id.* at *14.

* * *

The transgression here . . . was particularly egregious

² All of the facts recited in this Order are set forth in the Judicial Council’s September 29, 2005 decision discussed herein or in plaintiff’s counsel’s unrefuted declaration.

1 and protracted, and . . . discipline must be imposed
2 consisting of nothing less than a public reprimand and
3 an Order that the district judge compensate [a party
4 involved in the underlying action] for the damage it
5 suffered as a result of the judge's unlawful injunction.

6 *Id.* at *17.

7
8 Thereafter, the attorney-complainant requested a review of the Judicial Council's
9 September 29, 2005 decision and also filed yet another misconduct complaint
10 against the district judge, arising out of the same alleged facts and circumstances.
11 Both such developments could again result in an appeal to the Judicial Council.
12 In that event, the Judge-Spouse would again sit in judgment about the alleged
13 conduct of the very judge assigned to preside over this case, in which his spouse
14 serves as counsel. Moreover, in this case plaintiff's counsel will be requesting the
15 district judge to award attorney's fees to her. The amount awarded pursuant to
16 such a request would have a direct financial impact on the Judge-Spouse.

17 **B. ANALYSIS.**

18 28 U.S.C. § 455(a) (under which this motion was brought) and the Code of
19 Conduct for United States Judges contain the following applicable provisions.

20 **28 U.S.C. § 455(a):**

21 Any judge of the United States shall disqualify himself in any
22 proceeding in which his impartiality might reasonably be questioned.

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24 **Code of Conduct for United States Judges, Canon 3:**

25 **C. Disqualification.**

26 (1) A judge shall disqualify himself or
27 herself in a proceeding in which the judge's
28 impartiality might reasonably be

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questioned.

Courts often apply these pronouncements broadly, because “[i]t is a general rule that the appearance of partiality is as dangerous as the fact of it.” *United States v. Conforte*, 624 F.2d 869, 881 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980). “Quite simply and quite universally, recusal [is] required whenever ‘impartiality might reasonably be questioned,’” even in the absence of actual bias or prejudice. *Liteky v. United States*, 510 U.S. 540, 548 (1994). As stated in *United States v. Antar*, 53 F.3d 568, 576 (3d. Cir. 1995), “If there is an appearance of partiality, that ends the matter.”

It is true that in this unusual situation there are factors that are inconsistent with an appearance of partiality on the part of the district judge. Thus, it was the Judge-Spouse, not plaintiff’s counsel and not plaintiff herself, who uttered the extremely critical comments about the district judge.³ Surely, neither of the spouses in question would accept the proposition that merely because of their marriage he or she is responsible for, much less bound by, the other’s remarks. The experienced district judge here understands that. Moreover, the district judge has, so far as I am aware, neither said anything about, nor taken any action to counter, the Judge-Spouse’s dissenting opinion. Nor, as noted above, does plaintiff’s counsel even suggest that the district judge has displayed any actual bias in this case.

So what, then, warrants recusal? Simply this: realistically viewed, *both* parties to this case are now forced to wonder - - reasonably - - what impact (if any) the Judge-Spouse’s dissenting opinion might have on the district judge’s

³ The actual personal bias requiring disqualification under 28 U.S.C. § 455(b)(1) is bias concerning a *party*. The Ninth Circuit has noted that “under specific circumstances [a judge’s] bias against an attorney can reasonably be imputed to [bias against] a party.” *United States v. Jacobs*, 855 F.2d 652, 656 n.2 (9th Cir. 1988).

1 conduct or rulings. A reasonable person would expect any person in this district
2 judge's position to feel aggrieved by the Judge-Spouse's forceful dissent, even
3 though (and perhaps especially because) a majority of the judges on the Judicial
4 Council declined to impose sanctions for the alleged misconduct and indeed
5 approved dismissal of the misconduct complaint. Thus, it is reasonable to assume
6 that the district judge is aggrieved by the Judge-Spouse's dissenting opinion.
7 Although the district judge could well be capable of ignoring or overcoming any
8 such resentment, if he ruled in favor of plaintiff, defendant and its counsel might
9 reasonably wonder whether the district judge was influenced by the humanly
10 understandable tendency to "bend over backwards to prove he lacked favoritism...
11 ." *United States v. Kelly*, 888 F.2d 732, 738 (11th Cir. 1989). In short, the district
12 judge now is subject to continuous and heightened scrutiny resulting from his
13 being placed in a position that casts doubt on his ability to be impartial.

14 In *United States v. Anderson*, 160 F.3d 231 (5th Cir. 1998), a district judge
15 denied a motion by a criminal defendant to recuse himself after the defendant's
16 attorney had testified against the judge in a disciplinary proceeding before the
17 Fifth Circuit's Judicial Council. The Fifth Circuit Court of Appeals overturned
18 the district judge's ruling and ordered that he be recused. The Court noted,

19
20 "In light of the specific facts of this case we hold that the [sic] Judge
21 McBryde abused his discretion and reversibly erred in failing to
22 recuse himself from Anderson's case. It is clear that a reasonable
23 person, when apprised of the relevant circumstances that surround
24 this case, would harbor doubts about Judge McBryde's impartiality.
25 The average person when viewing this specific situation, would
26 question Judge McBryde's ability to be impartial in a case involving
27 an attorney who has testified adversely against Judge McBryde in a
28 Judicial Council proceeding. ... This Court recognizes that it is

1 essential to avoid even the appearance of impropriety because it is as
2 important in developing the public confidence in our judicial system
3 as avoiding the impropriety itself. [United States v.] *Jordan*, 49 F.3d
4 152, 155-56.”⁴

5 *Id* at 234.

6 Under the foregoing authorities and for the foregoing reasons, the Court
7 GRANTS plaintiff’s motion to disqualify the district judge.⁵

8 IT IS SO ORDERED.

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11 Dated:

A. HOWARD MATZ
United States District Judge

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21 ⁴ In *Jordan*, the Court noted that animosity between a close friend of the judge and
22 a party in a case before that judge “creates a section 455 appearance” that requires
23 recusal. *Id*.

24 ⁵ The Court has reviewed the cases defendant cited in its opposition papers and
25 finds them inapposite, for the reasons stated in plaintiff’s reply. Plaintiff is on solid
26 ground in stressing that the likely pendency of yet further litigation involving the
27 newly-filed misconduct claim places the district judge in the untenable position
28 described above.