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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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| HEADWATERS FOREST DEFENSE, et al<br><br>Plaintiffs,<br><br>**v.**<br><br>COUNTY OF HUMBOLDT, et al<br><br>Defendants. | CASE C-97-3989 VRW<br><br>**PLAINTIFFS' RECUSAL MOTION**<br><br>**POINTS AND AUTHORITIES**<br><br>April 24, 2003 |

Plaintiffs respectfully submit the following Points and Authorities in support of their Motion to Recuse Judge Vaughn R. Walker from this case:

As set forth in the attached Affidavit of Bias and Prejudice signed by Plaintiff Lundberg, plaintiffs and their attorneys believe that Judge Walker is actually biased and prejudiced against the plaintiffs herein and their claims. Plaintiffs and their attorneys also believe that any

reasonable person aware of the facts and circumstances would believe that Judge Walker is biased and prejudiced against the plaintiffs and their claims.

The bias and prejudice is clearly revealed by (a) particular findings that are set forth in Judge Walker's decision, filed October 26th, 1998, dismissing the case after a hung jury in the first trial of this lawsuit, and (b) Judge Walker's completely unjustifiable decision to conduct the re-trial of this case in a community that is known by Judge Walker to be extremely hostile to the plaintiffs.[1]

Plaintiffs do not argue that the *fact* of Judge Walker's rulings disqualify him. They argue that particular statements, particular findings, and particular rulings of Judge Walker reveal a biased and prejudiced mindset and that Judge Walker's biased and prejudiced mindset may be clearly discerned by any reasonable person.

The test to be applied in evaluating recusal and disqualification of judges was clearly stated many years ago in *Berger v United States* (1921) 255 U.S. 22: Does the Affidavit of Prejudice [executed by a party] give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment (225 U.S. at 33-34).

[1]Please see plaintiffs' Motion Re Situs of the Trial that is filed concurrently with the instant Motion and is incorporated by reference hereto.

In *Bell v Chandler* (10th Circuit, 1978) 569 F.2d 559, the Court observed that 28 U.S.C. 144[2] requires that a judge who is the subject of a motion for recusal must cease to act in the case after determining the legal sufficiency of the motion. The Court pointed out that no direct relationship between the judge and the party or the case is required under Section 144 in order to have a showing of bias. (569 F.2d at 569).

That Court also noted that, pursuant to 28 U.S.C. 455, subsection (a) questions whether "there exists a reasonable likelihood that the cause will be tried with the impartiality that litigants

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[2]28 U.S.C. 144 provides that: Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either 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.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for 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

28 U.S.C. 455(a) provides that: Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

have a right to expect in a United States district court." *United States v. Ritter*, 540 F.2d 459, 464 (10th Cir.), cert. denied, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976). The Court further explained that, under the same section, the Court held in *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358, 1361 (10th Cir. 1977), that the "appearance of impartiality is virtually as important as the fact of impartiality."

In *United States v Antar*, (3rd Circuit, 1995) 53 F.3d 568, the Court pointed out that the relevant consideration requires that, if a "reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality" under the applicable standard, then the judge must recuse. *In re Larson,* 43 F.3d 410, 415 (8th Cir.1994) (quoting *Potashnick v. Port City Constr. Co.,* 609 F.2d 1101, 1111 (5th Cir.), *cert. denied,* 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980)).

That Court also explained, "But in determining whether a judge had the duty to disqualify him or herself, our focus must be on the reaction of the reasonable observer. If there is an appearance of partiality, that ends the matter. *Haines v. Liggett Group Inc.,* 975 F.2d 81, 98 (3d Cir.1992); *Lewis v. Curtis,* 671 F.2d 779, 789 (3d Cir.) ("Impartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system."), *cert. denied,* 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 144 (1982)". The *Antar* Court also pointed out that the judge does not have to be *subjectively* biased or prejudiced, so long as he *appears* to be so.

**THE INSTANT CASE**

There can be no doubt that the conduct of Judge Walker demonstrates, both objectively and subjectively, that Judge Walker is biased and prejudiced against the plaintiffs in this case,

and that any reasonable person would believe that to be the case.

**THE OCTOBER 26, 1998, ORDER DISMISSING THE CASE**

In Judge Walker's Order, filed October 26, 1998, dismissing the case, he made a number of fact findings and mixed fact and law findings that were simply contrary to the evidence. In fact, the Ninth Circuit opinion that reversed Judge Walker referred to four particular findings of Judge

Walker that the Court of Appeals found to be contrary to the evidence.

Specifically, the Court of Appeals ruled[3] that Judge Walker's conclusion that "... the severity of the intrusion upon the arrestees' personal integrity was minimal" was simply wrong. The Court of Appeals found that the pepper spray caused excruciating pain, and that it was designed to cause intense pain. (240 F.3d at 1199).

The Court also found that Judge Walker was incorrect when he found that the officers made no attempt to open the eyes of the plaintiffs. The truth is that anyone, Judges of the Court of Appeals, Judges of the District Court, lay persons, and reasonable persons can simply view the videotape and see that Judge Walker mis-stated the facts.

The Court of Appeals also found that Judge Walker was incorrect when he stated that the use of pepper spray was necessary in order to *quickly* remove the protesters from the premises. The videotapes show that the protesters who "released" were permitted to remain at the site of the protest for quite some time after they released.

And the Court of Appeals also disagreed with Judge Walker's finding that the plaintiffs had failed to demonstrate that there were viable alternatives to using pepper spray.

Furthermore, as set forth in the attached Affidavit of Prejudice signed by plaintiff

[3]*Headwaters Forest Defense v Humboldt County,* 240 F.3d 1185 (1999)

Lundberg, there are still other findings made by Judge Walker in his Order dismissing the case, filed October 26, 1998, that are shown by the videotapes to be demonstrably false.

Judge Walker presided over the first trial. He is a highly intelligent person who was able to see the same things that the judges of the Court of Appeals were able to see in the videotapes. The only explanation for the fact that Judge Walker made the factual findings that the Court of Appeals so soundly rejected is that he did so because of bias and prejudice against the plaintiffs and their claims. There can be no "innocent" explanation of Judge Walker's misstatements of fact.

The same is true as to still other findings cited in the Lundberg Affidavit wherein Judge Walker's recitations in his October 26, 1998 Order dismissing the case are contradicted by the evidence, including the videotapes. Judge Walker's findings that are contrary to demonstrable facts could only have been made because of bias and prejudice. At the very least, any reasonable person would so believe.

**ORDER CHANGING VENUE**

As to Judge Walker's *sua sponte* decision to transfer the re-trial to Eureka, it is respectfully submitted that the decision to transfer the trial to a community which Judge Walker knows to harbor intense feeling of hostility toward the plaintiffs could only have been motivated by bias and prejudice against the plaintiffs. Once again, there is no other reasonable explanation for Judge Walker's action.

That conclusion is supported by several facts:

1. There was no request by the defendants to move the trial to Eureka. The transfer was Judge Walker's own creation;

2. Judge Walker did not give plaintiffs any opportunity to be heard prior to his pronouncement;

3. Judge Walker indicated that he had decided to try the case in Eureka because there had

been a hung jury in San Francisco. It is respectfully submitted that a hung jury/mistrial is not a proper basis for transferring the trial (particularly to a site that is hostile to plaintiffs);

4. Judge Walker failed to consider the convenience of the plaintiffs and their attorneys in his decision. He considered only convenience to (some) of the witnesses and to the defendants and their attorneys;

5. Judge Walker failed to respect the plaintiffs' choice of forum (despite the fact that in an unrelated case, *(Williams v Bowman* 157 F.Supp.2d 1103 (ND Cal, 2001)), Judge Walker himself acknowledged that plaintiff's choice of venue was entitled to great weight);

6. Judge Walker failed to consider the great imbalance of financial resources between plaintiffs and defendants in determining that he was going to try the case in Eureka;

7. Judge Walker decided to transfer the case to a site where jurors would face a conflict because, if they found for plaintiffs, the payment would, in effect, come from their own pockets;

8. Judge Walker decided to transfer the case to Eureka, knowing that the jurors in that community would likely favor the "home team" of local law enforcement officers, other officials, and attorneys for the defendants;

9. Judge Walker ignored the terms of Northern District General Order 44, which requires that the case be re-assigned to another judge if it is moved to another courthouse.

The transfer of the trial to "timber country", rife with hostility toward plaintiffs and "their kind", as well as the circumstances surrounding the transfer to Eureka lead to only one conclusion: Judge Walker is biased and prejudiced against the plaintiffs. Furthermore, Judge Walker's conduct also demonstrates to a reasonable person that there is grave doubt as to his impartiality.

## CONCLUSION

There can be no question that, pursuant to 28 U.S. C. 144, 28 U.S.C. 455, and Northern District of California Rule 3-15, Judge Vaughn R. Walker should be disqualified and recused

from any further consideration of this case, and that the matter should be remanded to the Clerk of the Court for random assignment to another judge of this Court.

Respectfully submitted on behalf of all plaintiffs,
DENNIS CUNNINGHAM
BENJAMIN ROSENFELD
WILLIAM SIMPICH
J. ANTHONY SERRA

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ROBERT BLOOM

April 14, 2003.