

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT**

SALMA MERRITT and
DAVID MERRITT,
 Petitioners,

vs.

THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA, THE
COUNTY OF SANTA CLARA,
 Respondent,

ANGELO MOZILO, DAVID SAMBOL,
KENNETH LEWIS, MICHAEL
COLYER, COUNTRYWIDE HOME
LOANS, COUNTRYWIDE FINAN-
CIAL CORP., BANK OF AMERICA,
AND MERSCORP,

Real Parties in Interest

Petition No. H_____

**PETITION FOR PEREMPTORY
WRIT OF MANDATE TO
COMPEL RESPONDENT TO
ENFORCE DISQUALIFICATION
LAWS REGARDING JUDGE
DEFAULT ON STATEMENT OF
DISQUALIFICATION AND
FAILURE TO DISCLOSE PAST
CLIENT RELATIONSHIP**

**[SUPPORTING MEMORANDUM
OF AUTHORITIES]**

Superior Court No. 109 CV 159993
Hon. James Stoelker
Action Filed: December 23, 2009

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES
OF THE COURT OF APPEAL OF THE SIXTH APPELLATE DISTRICT OF
THE STATE OF CALIFORNIA:

CERTIFICATE OF INTERESTED ENTITIES AND PERSONS

CASE NAME: Salma and David Merritt, Plaintiffs and Appellants vs. Angelo Mozilo, et al.

Names of Interested Entities and Persons

Nature of Interests

Countrywide Financial Corporation

Owns 100% of Defendant Countrywide Home Loans, Inc.

Bank of America Corporation
(publicly traded on NYSE) as BAC

Owns 100% of Defendant Countrywide Financial, Home Loans, Inc and Bank Of America, N.A.

MERSCORP, Inc.

Owns 100% of Mortgage Electronic Registration System, Inc.

First American Title Company

Owner of FATC and commissioned Financial Title Company to issue title Insurance and escrow functions

Submitted by:

Dated: October 12, 2012

Plaintiffs-Petitioners


By: David Merritt

TABLE OF CONTENTS

Certificate of Interested Entites/Persons	2
Table of Contents	3
Table of Authorities	4,

I. PETITION FOR WRIT OF MANDATE

A. PARTIES TO ACTION	4
B. GRAVE & SEVERE IRREPARAGBLE HARM.....	5
C. Judge Stoelker Refused To Disclose Countrywide As Former Client.....	6
D. Judge Stoelker Automatically Disqualified Per CCP § 170.3	7
E. Improper Referral To Judge For Reviewing Disqualification	8
F. Judge Stoelker’s Conflict of Interest	9

II. LEGAL AUTHORITY-JUDICIAL CANONS

11

III. ARGUMENT WITH POINTS & AUTHORITIES

A. Automatically Disqualification	12
B. Undisclosed Conflict of Interests of Judge Stoelker	14
C. Violation of Canon 3E(2) of Judicial Ethics	14
D. Harming Integrity of Judicial Institutions & Administration of Justice...	15
V. CONCLUSION	18
Certificate of Service	19

Table of Authorities

<i>Hollingsworth v. Superior Court</i> (1987) 191 Cal.App.3d 22	11,
<i>Urias v. Harris Farms, Inc.</i> , 234 Cal.App.3d 415	11, 12, 13
<i>Lewis v. Superior Court</i> (1988) 198 Cal.App.3d 1101	11, 12,

Statutes

CCP § 170.3(c)(3)	5, 11, 16
CCP § 170.3(c)(4)	5, 7, 8, 11, 12, 13
2017.010	7

Other Authorities

<i>California Judicial Conduct Handbook</i> , 3d Ed. § 7.37 (2007) “Former Clients of Judge or of Lawyer Associated With Judge in Private Practice	11,
<i>Com. On Jud. Performance Ann. Rep.</i> (1993) Advisory Letter 23, p. 19. 11,	
Canon 3E(2) of Code of Judicial Ethics	14, 15
<i>Witkins 5th Ed.</i> Vol. II, (2008) § 124 “Judge’s Consent or Answer.”	12

I. PETITION FOR WRIT OF MANDATE

A. Parties To Action

Petitioners Salma Merritt and David Merritt are the Plaintiffs in the Action entitled *Merritt vs. Mozilo et al.* 109CV159993, now pending before Respondent.

Respondent is Judge James Stoelker, Superior Court Santa Clara, in which the above-entitled action is pending.

Real parties in interest are Countrywide Home Loans, Bank of America, Angelo Mozilo, David Sambol, Kenneth Lewis, Michael Colyer, MERSCORP, First American Title Company, Countrywide Financial Corp. (heretofore “Countrywide Defendants”). They have an interest that is affected by this proceeding in that they are defendants in this action.

B. Grave and Severe Irreparable Harm

On August 17, 2012, Plaintiffs filed and served personally upon Judge James Stoelker, in Santa Clara Superior Court, a Statement of Disqualification. See *Exhibit A*.

Under CCP § 170.3(c)(3) Judge Stoelker had ten (10) days to file consent or verified answer, making August 27, 2012 the deadline for the Judge to file one or the other.

According to the Superior Court Records no answer was filed within the 10 day time limit, meaning that Judge Stoelker defaulted and is officially recused

from the case. See *Exhibit B*—Santa Clara Superior Court partial docket sheet of case number 109cv159993.

The Superior Court did not follow CCP § 170.3(c)(4) which calls for the presiding Judge to replace the defaulting Judge, and instead permitted Judge Stoelker to file an Answer out-of-time. See *Exhibit C*—Verified Answer of Judge James L. Stoelker to Statement of Disqualification.

Judge Stoelker is refusing to follow these laws by not stepping down from the case.

C. Judge Stoelker Refused To Disclose Countrywide As Former Client

If this Appellate Court does not intervene at this time, severe irreparable harm of one of the greatest magnitudes will occur.

Specifically, on August 16, 2012, Petitioners uncovered that Judge Stoelker had previously worked for Countrywide Home Loans and First American Title Company for 2 or more decades collectively and he hide this fact from them throughout all proceedings.

Judge Stoelker earned a significant portion of his income from these defendants and has failed to disclose what his current financial interests are with them directly or via his former firm.

When brought to his attention, the Judge refused to recuse himself, or to disclose the specifics of his past and current relations, and Santa Clara Superior

Court's Presiding Judge neglected or refused to appoint a replacement judge after the disqualified judge was officially disqualified.

The Plaintiffs investigated and it appears that there is no procedure in place within Santa Clara Superior Court to enforce the 10-day disqualification rule. All Clerk supervisors admit this. And Plaintiffs also believe that this was not an intentional misdeed of the presiding Judge, but simply human error which is quite understandable considering the volume of the work load.

However, the Plaintiffs are still left with the burden of asking this Court to intervene in order to have these laws enforced.

PETITIONERS ALLEGE THE FOLLOWING:

D. JUDGE STOELKER AUTOMATICALLY DISQUALIFIED PER CCP § 170.3

1. Judge Stoelker's former clients are two of this action's key defendants.
2. On August 17, 2012, Judge Stoelker was properly served, and filed, with Statement of Disqualification per CCP § 170.3 which allowed him ten (10) days to file a Verified Answer objecting to the Statement. See *Exhibit A*.
3. On August 27, 2012, the Judge defaulted. No Answer was filed by the judge and the Clerk of Court failed to enforce CCP § 170.3(c)(4), in that there is no evidence that the presiding judge of Santa Clara Superior Court was informed of

Stoelker's failure to file Answer or that a replacement judge was selected. Per CCP § 170.3(c)(4), judge Stoelker was automatically recused.

4. The Clerk of the Court either did not inform the presiding judge on August 27, 2012 that judge Stoelker failed to Answer the Statement of Disqualification or the Clerk did inform presiding judge and the latter failed to enforce CCP § 170.3(c)(4).

5. After the ten (10) days for answering had expired, judge Stoelker files an untimely Answer. See *Exhibit C*.

E. IMPROPER REFERRAL TO JUDGE FOR HEARING DISQUALIFICATION

6. On October 1, 2012, the presiding judge, or someone else, sent or authorized the sending of Statement of Disqualification, with Verified Answer to Santa Cruz judge Timothy Volkmann to consider disqualification. See *Exhibit D* (October 2, 2012 Order of Judge Volkman)

7. On October 2, 2012, Timothy Volkman issued an order which disregarded § 170.3(c)(4), self-enforcing provision, and that focused solely on what Plaintiffs had articulated within Statement of Disqualification and not the fact that the Answer was filed beyond the 10-day limitation. *Exhibit E*.

8. Additionally, judge Volkman did not apply the well-established law regarding the appearance of bias that the facts demonstrated and the Code of Judicial Ethics regarding the duty of judges to disclose their representation of

former clients over the 2-year disqualification time limit.

9. The Merritts were never notified of any hearing or other proceeding in on this issue and no hearing is reported to have taken place per § 170(c)(6). *Ibid.*

10. Additionally, judge Volkman did not seek any input on the matter from the Merritts, did not even make it known that he was so appointed to review and rule upon their Statement of Disqualification, and failed to conduct any inquiry into the facts or law of this matter. *Ibid.*

11. On October 11, 2012, Plaintiffs spent two hours at Superior Court attempting to file Motion for Reconsideration which clerks and supervisory clerks, including presiding judge's clerk, would not accept until it was repeatedly demanded that they file such. See *Exhibit F*.

12. The clerks were told that Plaintiffs did not have any right or standing to file a motion for reconsideration and that since 170.6(d) holds that it is not an appealable decision and must be reviewed only upon Writ, they believed that Judge Loftus, the presiding judge will have to either deny or strike motion for reconsideration.

13. This compel's the filing of this Writ.

F. JUDGE STOLKER'S CONFLICT OF INTEREST

14. From sometime in the 1980s to at least 2007, Judge Stoelker was part of a law firm which represented Countrywide Home Loans and First American

Title Company, who are defendants to this case. *Exhibits A & B.*

15. Judge Stoelker had generated undisclosed thousands upon thousands of revenue from this case's defendants Countrywide Home Loans and First American Title Company, by serving as counsel to them both repeatedly throughout the years.

16. The exact number of times that he represented these defendants has not been disclosed by judge Stoelker, but the Merritts investigation reveals that there are at least dozens of times that he was attorney of record in different cases representing defendants Countrywide Home Loans and First American Title Company from the 1980s up until his appointment on the bench.

17. Judge Stoelker is a California Judge who is duty bound to know Judicial Ethics Code as 3E(2) and its disclosure requirements.

18. In January 2012, judge Stoelker was designated to hear the Discovery Case Docket matters.

19. From February 2012 to August 2012, judge Stoelker issued numerous Tentative Orders, Oral Orders and subsequent Written Orders which involved the Petitioners and Countrywide Defendants.

20. From February 2012 to August 2012, judge Stoelker never once disclosed to the Merritts that he had served as counsel for defendants Countrywide

Home Loans and First American Title Company during two decades of private practice.

21. Each and every ruling and order that judge Stoelker made in this case has always been in favor for the Countrywide Defendants even though these defendants did not comply with meet and confer rules; failed to file motion within 45 day time limitation set by code; sought financial information that is protected by the Constitution and completely denied the Merritts any right to access discovery from these defendants, which would help them prosecute this case.

22. Judge Stoelker rulings in favor of defendants, denial of the Merritts discovery rights and hiding the fact that he represented these defendants as a private practitioner, gives the appearance to a reasonable person that he is favoring defendants over Plaintiffs and showing bias thereto, which harms the Court's integrity.

II. LEGAL AUTHORITY-JUDICIAL CANONS

23. Under CCP § 170.3(c)(3) a judge has 10 days to file a verified answer to a statement of disqualification, and if not filed within 10 days, he “shall” be disqualified. CCP § 170.3(c)(4). See on point: *Hollingsworth v. Superior Court* (1987) 191 Cal.App.3d 22, 26.

24. A judge who neither answers nor strikes the statement of disqualification is disqualified and has no power to act in the case. See *Urias v.*

Harris Farms, Inc., 234 Cal.App.3d 415, 421 citing *Lewis v. Superior Court* (1988) 198 Cal.App.3d 1101, 1104.

25. Pursuant to 3E(2) of judicial canons, the judge was required to disclose his relationship with two of this action’s defendants, disclose whether he has any current financial interests directly or through his past law firm; and consider whether he needs to disqualify himself. See *California Judicial Conduct Handbook*, 3d Ed. § 7.37 (2007) “Former Clients of Judge or of Lawyer Associated With Judge in Private Practice.

26. Additionally, “A cautionary note – disclosure. Even *after two years*, although the judge may no longer be required to recuse, he or she should continue to disclose the relationship of former clients for some reasonable period.” *Ibid.* § 7.38 citing *Com. On Jud. Performance Ann. Rep.* (1993) Advisory Letter 23, p. 19. Emphases Petitioners.

III. ARGUMENT WITH POINTS & AUTHORITIES

A. Automatic Disqualification Per CCP § 170.3(c)(4)

27. It is well-established that judge Stoelker needed to file his Answer within 10 days or face immediate disqualification. There is no authority which holds otherwise. The 10-day limit is self-enforcing and must be administered by the Superior Court presiding Judge or Clerk who is put in charge of such. Please see *Witkins 5th Ed.* Vol. II, (2008) § 124 “Judge’s Consent or Answer.”

28. “Although a challenged judge has the power to order a statement of disqualification stricken as legally insufficient, that power must be exercised within the ten-day time limit for filing an answer to the statement of disqualification; thus judge who failed to timely strike statement of disqualification as legally insufficient was disqualified”. *Lewis v. Superior Court* (1988) 244 Cal. Rptr. 328, 198 Cal. App. 3d 1101.

29. Moreover, once he failed to answer within time limit, it is well-established that he had no power to act further in the case thereafter. See *Urias v. Harriss Farms, Inc.*, 234 Cal.App.3d 415, 421 citing *Lewis v. Superior Court* at 1104.

30. When the Plaintiffs learned that this matter had been referred to judge Volkmann, they simultaneously received Volkmann’s denial. They were not afforded any due process on this issue by Volkmann.

31. Additionally, the Plaintiffs also presumed that Stoelker would either recuse himself, or that the presiding judge would replace Stoelker with another judge who has no ties to any of the defendants, based on basic conflict of interest principles.

32. Once Stoelker filed his out-of-time answer, it was further presumed that the presiding judge was in the process of replacing Stoelker and would not be referring the case to any other judge for determination since CCP § 170.3(c)(4) is a

self-enforcing, mandatory provision.

33. Even if the Judge or reviewing Judge wished to construe the statement of disqualification as not demonstrating sufficient evidence of biasness, the law is clearly established that failure to answer within the 10-day limit is a consent by the judge to the disqualification. See *Urias v. Harris Farms, Inc.* (App. 5 Dist. 1991) 285 Cal. Rptr. 659, 234 Cal. App. 3d 415. (“Judge was disqualified, regardless of sufficiency of statement of disqualification, where judge neither struck statement nor filed answer within ten-day period admitting or denying allegations in statement”).

B. Undisclosed Conflict of Interests of Judge Stoelker

34. On or about January 2012, Judge James Stoelker was assigned as Santa Clara Superior Court’s Discovery Judge.

35. Before Judge Stoelker began serving on the bench, he worked as a partner in a San Jose law firm and his client case load included, First American Title Company and Countrywide Home Loans.

36. Based on research performed by Plaintiffs, Judge Stoelker represented First American for close to 20 years and Countrywide Home Loans over five years.

37. There is an undisclosed amount of money that judge Stoelker earned from Countrywide.

38. There is also undisclosed information as to whether judge Stoelker still has interests in his pre-judge law firm and whether the law firm still has on-going interests with Countrywide and First American.

39. This is a clear conflict of interest that needs to be addressed.

C. VIOLATION OF Canon 3E(2) of Judicial Ethics

40. Under Judicial Canons, Judge Stoelker had at minimum a duty to disclose the past employers who are party to this case. See *Com. On Jud. Performance, Ann. Rep.* (1993), Advisory Letter 23, p. 19 (Although judge is ‘not automatically disqualified’ if his relationship with party was beyond two year period, disclosure is still required).

41. This is a rule/law that Judge Volkmann failed to apply in reviewing the statement of disqualification, in addition to his failure to order disqualification based on Stoelker’s default.

42. Specifically, Canon 3E(2) of Code of Judicial Ethics actually mandates that a judge “shall disclose on the record information that judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification.”

43. The Canon goes on with this Advisory Notice: “Under this rule, a judge is *disqualified* whenever the judge’s *impartiality might reasonably* be questioned, or” Please see Opinion 45 issued 1997 § II.

44. What exacerbates this is the fact that Stoelker granted 100% of his former clients motions, and sanctioned the Plaintiffs while denying all of their motions even when the law is against Countrywide and in favor of Plaintiffs.

D. Harming Integrity of Judicial Institutions & Administration of Justice

45. On August 17, 2012, when the Merritts filed and served their Statement of Disqualification, there were some 15 local community citizens in the courtroom, specifically interested in this disqualification proceeding.

46. There was a local news reporter who listened to the announcement of judge Stoelker’s prior work with the defendants and Stoelker’s confirmation of such.

47. They next heard the judge not disqualify himself right away.

48. This story was then publicized nationally as a former Countrywide lawyer, now on the bench, asked to recuse himself after making biased rulings in his former clients favor. See *Exhibit G*.

49. The Code of Judicial Ethics is not meant to protect judges, but to protect the integrity of the judiciary.

50. The Plaintiffs feel as if the Superior Court does not wish to apply the law equally towards them and if this is so, it is a significant injury to Public Interests.

51. The Merritts contend that it is inappropriate for a reviewing judge to side with a judge simply because he is a judge, particularly if it is adding to the public perception that judges are corruptible as politicians. When there is a question or appearance of impropriety, the public confidence in our judiciary is enhanced when the courts self-corrects itself. This ability alone sets U.S. Courts heads and shoulders above most other countries.

WHEREFORE, Petitioners prays:

1. That the Court issue a writ of mandate directing presiding judge to enforce CCP § 170.3(c)(3) and (c)(4) by replacing judge Stoelker;
2. That the Court issue a writ of mandate or other writ directing presiding judge or judge Volkmann to vacate the October 2, 2012 order;
3. That on the return of the writ and the hearing of this petition, this Court issue its preemptory writ of mandate, or other writ, ordering respondent to issue order(s) enforces the laws herein regarding disqualification.
4. For such other and further relief as the court deems just and proper.

Dated: October 12, 2012


David Merritt

Dated: October 12, 2012


Salma Merritt

We, David Merritt and Salma Merritt, are the petitioners in the above-entitled proceeding. We have read the foregoing petition and know the contents thereof. The same is true of our own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, we believe them to be true.

We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated this October 12, 2012


David Merritt



Salma Merritt

CERTIFICATE OF SERVICE

I, Christopher Espanoza, being over 18 years of age, hereby certify that I sent true copy of PETITION FOR PEREMPTORY WRIT OF MANDATE TO COMPEL RESPONDENT TO ENFORCE DISQUALIFICATION LAWS REGARDING JUDGE DEFAULT ON STATEMENT OF DISQUALIFICATION AND FAILURE TO DISCLOSE PAST CLIENT RELATIONSHIP.

to: BRYAN CAVE C/O JAMES GOLDBERG, 333 Market st, 25th floor, San Fran, CA 94105;
by attaching first class postage thereto and placing it in US Post office and delivering copy to Superior Court of Santa Clara and emailing Supreme Court of California

On this 12 day of October 2012.


Christopher Espanoza
2050 SW Expy #66
San Jose, CA 95126