



February 27, 2023

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**VIA EMAIL AND ECF**

Hon. Kathie F. Steele  
Circuit Court Judge  
Clackamas County Circuit Court  
807 Main Street, Room 304  
Oregon City, OR 97045

**Re: *Mark Kramer and Todd Prager v. City of Lake Oswego and State of Oregon*  
Clackamas County Case No. CV12100913**

Dear Judge Steele:

This letter addresses certain statements in the Court's letter opinion dated February 17, 2023, which denied the Lake Oswego Corporation's ("LOC") Motion to Vacate (the "Letter Opinion").

At the outset, we emphasize that we are aware of the volume of material presented to the Court, both factually and legally, for consideration. We also appreciate that the Court was only recently assigned to this case, and the time and attention that has already been required of the Court.

Given the significance of this matter, however, we believe that it is important to note certain statements in the Letter Opinion that are, or appear to be, factually inconsistent with the record, as presented by all parties related to the Motions to Disqualify and Motion to Vacate. Because the Letter Opinion appears to rely on those statements in material ways, we respectfully request that the Court reconsider the ruling on the Motion to Vacate in light of the following points.

To assist the Court's review, we have numbered and quoted the statements below, followed by an explanation of the record as to each statement.

1. "Judge Ryan \* \* \* minimized this contact in his order, finding the contact not to be substantive or substantial." (Letter Opinion at 2.)

Judge Ryan's Order dated July 28, 2022 (the "July 28 Order") stated in relevant part: "[T]he record does support that, in 2014 as a public official, Judge Lininger briefly participated personally concerning this matter in her fully appropriate role as a state legislator."

LOC has no record that the 2014 discussion between Judge Lininger and Plaintiffs was recorded, and, other than the emails produced by Plaintiffs in June 2022, LOC knows of no other record of the communications between Judge Lininger, Plaintiffs and Plaintiffs' counsel. Other than what is stated in the July 28 Order, Judge Ryan did not make any finding as to the substance

or substantiality of the communications between Plaintiffs and Judge Lininger. In particular, Judge Ryan did not make a factual finding that the contact was “not substantive or substantial.”<sup>1</sup>

2. “Judge Lininger notified the parties of this contact prior to issuing her opinion regarding Final Phase One Findings of Fact and Conclusions of Law[.]” (Letter Opinion at 2.)

This statement is not accurate in two respects. First, no party claimed, and the record does not support, the assertion that Judge Lininger ever “notified the parties” of her prior communications with Plaintiffs. It is undisputed that, at the time she initially was assigned to the case in November 2020, Judge Lininger did not inform the parties that she had previously discussed this matter with Plaintiffs or met with Plaintiffs in her role as a state legislator in response to Plaintiffs’ request to discuss this case. Nor did she do so at any time after that date, including before April 19, 2022 (the date of the initial Phase One Findings of Fact and Conclusions of Law) or before May 25, 2022 (the date of the Final Phase One Findings of Fact and Conclusions of Law).

It would have been impossible for Judge Lininger to notify the parties of the prior contact with Plaintiffs at any of those times, because Judge Lininger confirmed that she *did not recall* the contact until LOC and the City of Lake Oswego (the “City”) brought the matter to Judge Lininger’s attention, for the first time, on June 30, 2022. Judge Lininger confirmed her lack of recollection in a letter to the parties dated July 6, 2022, in which she stated: “I did not describe the interaction at that time because I did not recall it,” referring to the parties’ original status conference held in November 2020. (TCF 07/06/2022 Letter to Counsel at 1.)

The record related to the dates and circumstances of this issue—including what Judge Lininger stated to the parties in November 2020 and when LOC and the City became aware of the “contact”—is outlined in detail in the parties’ filings related to the Motions to Disqualify. (See TCF 07/06/2022, LOC’s Motion to Disqualify at 6, 9-10; TCF 07/07/2022, City’s Motion to Disqualify at 7-8; TCF 07/18/2022 LOC’s Reply in Support of Motion to Disqualify at 4-5.) Attached hereto are relevant portions of the Declarations from LOC, the City, and the State related to those issues. No party materially disputed the facts outlined above.

Second, the LOC and the City of Lake Oswego only became aware of the prior contact between Judge Lininger and Plaintiffs one month *after* the Final Phase One Findings of Fact and Conclusions of Law. (As parties to the 2014 meeting and email communications, Plaintiffs were aware of it all along.) The relevant timeline, which no party disputes, is:

- April 19, 2022: Phase One Findings and Conclusions
- May 25, 2022: Final Phase One Findings and Conclusions

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<sup>1</sup> The Letter Opinion also states that Judge Ryan made a finding on “Page 5 of his decision of July 28, 2022.” LOC could not locate a finding on the cited page, as Judge Ryan’s July 28 Order is two pages.

- June 23, 2022, 10 p.m.: Plaintiffs produce documents revealing the contact with Judge Lininger.
- June 29, 2022: LOC reviews the produced documents and discovers the communications between Judge Lininger and Plaintiffs for the first time.
- June 30, 2022: LOC and the City both write letters to Judge Lininger about the prior contact with Plaintiffs.

3. “[T]he issue only arose after she issued the opinion.” (Letter Opinion at 2.)

For the reasons outlined above, this statement is accurate, but the implication of the statement—that LOC and/or the City strategically waited until the outcome of Phase One before raising “the issue”—is inaccurate. LOC and the City first learned of Plaintiffs’ meeting with Judge Lininger one month after entry of the Final Phase One Findings into the record.

4. “Judge Lininger has subsequently recused herself.” (Letter Opinion at 2.)

This statement is not consistent with the record. Judge Lininger chose not to recuse herself after the issue was brought to her attention. (*See* TCF 07/06/2022 Letter to Counsel.) Judge Lininger’s decision not to recuse herself resulted in the City’s and LOC’s motions to disqualify, which were subsequently granted by Judge Ryan.

5. “Judge Ryan apparently specifically stated that no injustice resulted to Defendant Lake Corp or the City as a result of the violation.” (Letter Opinion at 3.)

LOC has reviewed the record of the hearing on July 19, 2022, and Judge Ryan’s July 28 Order. LOC could not locate a statement by Judge Ryan that meets, or implies, this description. In particular, Judge Ryan made no finding regarding the impact of the violation of the Code of Judicial Conduct except the following: “Nothing in the record supports this Court finding a due process violation.” (TCF 07/28/2022 Order; *see also* TCF 07/06/2022 LOC Motion to Disqualify at 20 (asserting federal due process argument).)

6. “In addition, litigants should not be encouraged to withhold allegations or allege bias until after receiving an unfavorable judicial ruling. *See United States v. Conforte*, 457 FSupp 641, 645 (1978).” (Letter Opinion at 3.)

For the reasons stated above, there is no evidence in the record supporting the inference that LOC or the City withheld allegations or waited to file the motions to disqualify until after receiving an unfavorable ruling on Phase One.

For that reason, *United States v. Conforte*, 457 F Supp 641 (D Nev 1978), is distinguishable. In that case, the judge, before trial, “took care to explain to the defendants and their counsel that he

was well aware of Mr. Conforte’s past criminal activity and that his knowledge of the defendant was such that *he would not be qualified to sit as a juror on a case against Mr. Conforte*. He then asked the defendants if they understood and were willing to waive ‘any basis of disqualification because of my prior knowledge of the facts concerning Mr. Conforte.’” *Id.* at 655 (emphasis added). Therefore, the judge’s statements in *Conforte* clearly disclosed the basis for disqualification pre-trial—the judge’s knowledge of the defendant’s reputation and criminal activity. The defendant chose to proceed notwithstanding that unambiguous disclosure, and the defendant only asserted disqualification after the court’s ruling. In this case, no disclosure remotely similar to the judge’s statements in *Conforte* occurred, and there is no basis to conclude that LOC or the City knowingly failed to object to the basis for the disqualification in November 2020.

To be clear, Plaintiffs and the State argued that LOC and the City *could have* learned of the basis for disqualification earlier (by questioning Judge Lininger further or issuing discovery requests related to Phase II proceedings). That argument, however, is different from the statement in the Letter Opinion, which is that LOC and the City *actually knew* of the grounds for disqualification, but deliberately withheld filing a motion to disqualify until after a ruling.<sup>2</sup> Nothing in the record supports the latter assertion.

7. “As previously indicated, Judge Lininger’s violation of the Oregon Code of Judicial Conduct was neither serious nor clear when she considered it earlier. No party objected to her continued participation at that time until after her decision.” (Letter Opinion at 3.)

For the reasons outlined above, this statement is inaccurate. LOC and the City first learned of the basis for disqualification on June 29, 2022, after having an opportunity to review documents produced by Plaintiffs on June 23, 2022. LOC and the City brought the matter to Judge Lininger’s attention the next judicial day. Therefore, at no point earlier or before June 30, 2022, did Judge Lininger “consider[]” her possible violation of the Code of Judicial Conduct.

In addition, for the reasons outlined above, the record does not support the assertion that the Defendants were aware of the basis for Judge Lininger’s disqualification, but did not object to her continued participation promptly. In fact, the City and LOC asserted their objections in their letters of June 30, 2022, one day after becoming aware of Judge Lininger’s prior contact with Plaintiffs. Plaintiffs and their counsel also did not object or raise the issue, despite their first-hand knowledge.

8. “Lastly there is no evidence that a risk of undermining public confidence in the judicial process would result with denying vacatur. As previously indicated, Judge Lininger’s technical violation of the Oregon Code of Judicial Conduct was neither serious nor clear

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<sup>2</sup> LOC also addressed that argument—which would create an adversarial posture between litigants and a judge at the outset of the case—in detail in its Reply in Support of the Motion to Disqualify. (TCF 07/18/2022, LOC’s Reply in Support of Motion to Disqualify at 6-9.)

when she considered it earlier. No party objected to her continued participation at that time until after her decision. Defendant Lake Corp did not explain or posit what risk of injustice it would suffer if her prior orders remained. Suspicion is just insufficient.”  
(Letter Opinion at 3.)

This paragraph repeats the misunderstanding of the record outlined above, *viz.* that Judge Lininger disclosed the basis for her later disqualification and no party objected to her continued participation. For the reasons outlined above, Defendants had no basis to object to her continued participation in the matter until June 2022, and LOC and the City promptly did so.

In addition, the *Liljeberg* factors, in particular the third factor, do not require a showing of actual bias or prejudice to the parties. As the Court accurately notes, the third *Liljeberg* factor (often cited as the most important factor) focuses on the risk of undermining **public confidence** in the judicial process, not on whether the parties would suffer any injustice. And, because of the high regard that courts have for public confidence in the process and outcomes of the judicial system, suspicion on the part of the public is sufficient, even dispositive. For the reasons stated in LOC’s filings, this factor supports vacatur in this situation.

In light of the record as presented and argued by all parties, (1) there is no support for the argument that LOC and the City had prior notice of the basis for disqualification and strategically waited to bring it to the Court’s attention until after the Phase One ruling (and thus vacatur would not implicate any policy disfavoring such behavior); (2) the record does not contain any evidence as to the insubstantial nature of Plaintiffs’ contact with Judge Lininger; and (3) the third and most important *Liljeberg* factor does not require a showing of actual prejudice to the parties, but focuses on public perception of and confidence in the judicial system. LOC respectfully requests that the Court reconsider whether vacatur is appropriate in this case based on the points above.

Thank you for your consideration of this matter.

Very truly yours,



Brad S. Daniels

cc: All Counsel via email and ECF

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Main 503.224.3380 Fax 503.220.2480

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF CLACKAMAS

MARK KRAMER and TODD PRAGER,

Plaintiffs,

v.

CITY OF LAKE OSWEGO; and the  
STATE OF OREGON, by and through the  
State Land Board and the Department of  
State Lands,

Defendants,

and

LAKE OSWEGO CORPORATION,

Intervenor-Defendant.

Case No. CV12100913

DECLARATION OF BRAD S. DANIELS  
IN SUPPORT OF LAKE OSWEGO  
CORPORATION'S MOTION FOR  
DISQUALIFICATION AND  
REASSIGNMENT

I, Brad S. Daniels, declare as follows:

1. I am one of the attorneys representing Intervenor-Defendant Lake Oswego Corporation in this case. I am over the age of 18 years old, and I make this declaration in support Lake Oswego Corporation's Motion for Disqualification and Change of Judge (the "Motion to Disqualify"). I have personal knowledge of the facts stated in this declaration.

2. On June 23 and July 4, 2022, Plaintiffs produced emails to Lake Corp revealing—for the first time—certain communications between the Plaintiffs and then-Representative Lininger. A true and correct copy of emails cited in the Motion to Disqualify, which were produced by Plaintiffs on Thursday, July 23, 2022, at 10:00 p.m.

(PLAINTIFFS\_000052 to 000064) and in a supplemental production made on July 4, 2022,

1 at 5:34 p.m. (PLAINTIFFS\_000076-78, 000162, 000188 to 000190) are attached as

2 **Exhibit 1.**

3 3. To the best of my memory and knowledge, Judge Lininger did not disclose to  
4 the parties when she was assigned to the case in November 2020, or at any time thereafter,  
5 that she had communications and a meeting with Plaintiffs, as reflected in the emails attached  
6 as Exhibit 1.

7 4. On June 3, 2022, Lake Corp contacted Plaintiffs' counsel to request dates on  
8 which Lake Corp could depose Plaintiffs. Plaintiffs had been deposed in this case once  
9 before—in August 2013—but Lake Corp took the position that additional deposition time  
10 was necessary to address facts occurring after 2013 and Plaintiffs' new legal theory.  
11 However, Lake Corp was not aware of Plaintiffs' communications (or any similar contacts)  
12 with Judge Lininger at the time of making that request or before the emails attached as  
13 Exhibit 1 were produced on June 23 and July 4, 2022. On June 10, 2022, Plaintiffs informed  
14 Lake Corp that they opposed Lake Corp's request for depositions. On June 14, 2022,  
15 Judge Lininger agreed with Plaintiffs and rejected Lake Corp's request for depositions of  
16 Plaintiffs.

17 5. Several emails produced by Plaintiffs refer to attachments, without those  
18 attachments being included, and certain information in some of the produced emails (such as  
19 the date or sender fields) is incomplete. For example, PLAINTIFFS\_000061 refers to  
20 Plaintiff Kramer attaching a "draft Amicus Brief (endorsed by Willamette Riverkeepers)" to  
21 his email, but Plaintiff Kramer did not produce the corresponding attachment. No metadata  
22 associated with the emails produced by Plaintiffs has been produced. Lake Corp understands  
23 that Plaintiffs continue to review documents collected from Plaintiffs Prager but have not yet  
24 completed their production of documents collected from him.

25 6. From 2012 until 2021, including when this case was on appeal in the Oregon  
26 Court of Appeals and the Oregon Supreme Court, Plaintiffs were represented by Thane W.



1 Tienson of Landye Bennett Blumstein LLP. Greg Adams appeared as additional counsel in  
2 April 2013. Mr. Adams remains of counsel for Plaintiffs to this day.

3           7. Judge Lininger was assigned to the case effective November 9, 2020. At that  
4 time, Plaintiffs were represented by Mr. Tienson and Mr. Adams. On November 17, 2020,  
5 Judge Lininger held an initial status conference with the parties. I attended that  
6 November 17, 2020, hearing. At no point in time during that status conference—or at any  
7 other time during this action—did Mr. Tienson, Mr. Adams, or Judge Lininger disclose prior  
8 contacts with Plaintiffs or their counsel of record that related to this case or its subject matter.  
9 At that hearing, I recall Judge Lininger stating that she lived in Lake Oswego for 20 years  
10 and referred to the fact that she was a state representative for the district that included  
11 Lake Oswego. I do not recall additional comments at that hearing regarding Judge Lininger  
12 meeting with advocates with respect to the facts and issues in this case. However, if Lake  
13 Corp had been aware of Judge Lininger’s communications and/or meeting with Plaintiffs  
14 about this case, Lake Corp would not have consented, would not have waived  
15 disqualification, and would have requested reassignment. My office has requested an audio  
16 recording of the November 17, 2020, hearing. If one is received, we will have a transcript of  
17 that recording prepared and will provide it to the Court as soon as possible.

18           8. In March 2022, Judge Lininger presided over the first phase of a two-phase  
19 bifurcated trial. The second phase of that trial is scheduled to begin on Tuesday July 19—a  
20 two-week trial before an advisory jury—with an orientation scheduled for July 18. A pre-  
21 trial conference is scheduled for July 12, 2022, at 11:30 a.m.

22           9. Attached as **Exhibit 2** is a correct copy of the trial court docket in this action  
23 printed from the Court’s electronic trial court file register. Below is a list of some of the case  
24 events most relevant to this motion:

25           10/30/2012: Plaintiffs file this action, represented by Mr. Tienson

26           04/12/2013: Mr. Adams appears as additional counsel for Plaintiffs



1        06/04/2013:    Order entered authorizing Lake Corp's intervention in the action  
2        02/06/2014:    Judgment entered dismissing Plaintiffs claims following grant of  
3                           summary judgment in favor of Defendants and Lake Corp  
4        02/26/2014:    Plaintiffs file notice of appeal with Oregon Court of Appeals  
5        05/03/2017:    Oregon Court of Appeals decision issues  
6        08/01/2019:    Oregon Supreme Court decision issues  
7        11/15/2019:    Oregon Supreme Court decision issues that clarifies and adheres to the  
8                           original decision on reconsideration  
9        02/28/2020:    Appellate judgment entered in trial court docket  
10       11/09/2020:    Judge Lininger assigned to action  
11       03/17/2021:    Ms. Dahab appears as additional counsel for Plaintiffs; Mr. Adams  
12                           remains as counsel  
13       03/08/2022:    Phase I bench trial begins before Judge Lininger (ends 03/15/2022)  
14       04/19/2022:    Judge Lininger issues Phase I ORCP 62 A Findings and Conclusions  
15                           in favor of Plaintiffs  
16       04/29/2022:    Lake Corp timely files objections to Findings and Conclusions  
17       05/25/2022:    Final Phase I ORCP 62 A Findings and Conclusions issue  
18       06/23/2022:    Plaintiffs produce communications with then Rep. Lininger  
19       07/04/2022:    Plaintiffs produce additional communications

18       10.       On June 30, 2022, at 4:07 p.m., I emailed to Judge Lininger (copying all  
19 counsel) a letter requesting that Judge Lininger recuse herself from this matter. A true and  
20 correct copy of that letter (excluding attachments) is attached as **Exhibit 3**. Earlier that same  
21 day, at 4:05 p.m., counsel for the City of Lake Oswego (the "City") emailed a similar letter to  
22 Judge Lininger. A true and correct copy of that letter (excluding attachments) is attached as  
23 **Exhibit 4**. Attached to both of those letters were certain emails that Plaintiffs had produced  
24 on Thursday July 23, 2022 (PLAINTIFFS\_00052 to PLAINTIFFS\_00064). *See* Ex. 1.

25       11.       On July 1, 2022, Plaintiffs emailed Judge Lininger requesting an opportunity  
26 to submit a written response and an in-person hearing on these requests. I responded to that

1 email on behalf of Lake Corp, and Steve Olson also responded on behalf of the City. A true  
2 and correct copy of that email exchange is attached as Exhibit 5.

3 12. On July 1, 2022, Christina Still, Judicial Clerk to Judge Lininger, emailed the  
4 parties and directed the parties to appear on July 6, 2022, at 11:30 a.m. for hearing on the  
5 matter. I emailed Ms. Still to clarify two points in that email and Ms. Still responded. A true  
6 and correct copy of that July 1, 2022, email exchange (without the attachments that I re-sent  
7 to Ms. Still) is attached as Exhibit 6.

8 13. On July 5, 2022, I provided to Judge Lininger (with a copy to all parties) a  
9 copy of the certain emails contained within the supplemental production made by Plaintiffs  
10 on July 4, 2022 (PLAINTIFFS\_000076-78, 000162, 000188-90). See Ex. 1.

11 14. Attached as Exhibit 7 are true and correct copies of excerpts of the Oregon  
12 Code of Judicial Conduct (eff. December 1, 2013) provisions that are cited in the Motion for  
13 Disqualification and Reassignment.

14 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE  
15 BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE  
16 FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

17 DATED: July 6, 2022

18  
19 s/ Brad S. Daniels  
BRAD S. DANIELS

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF CLACKAMAS

MARK KRAMER and TODD PRAGER,

Plaintiffs,

v.

CITY OF LAKE OSWEGO; and the STATE  
OF OREGON, by and through the State Land  
Board and the Department of State Lands,

Defendants

and

LAKE OSWEGO CORPORATION,

Intervenor-Defendant.

Case No. CV12100913

DECLARATION OF NINA R. ENGLANDER IN  
SUPPORT OF STATE OF OREGON'S  
OPPOSITION TO LAKE OSWEGO  
CORPORATION'S MOTION FOR  
DISQUALIFICATION AND REASSIGNMENT,  
CITY OF LAKE OSWEGO'S MOTION FOR  
DISQUALIFICATION AND CHANGE OF  
JUDGE, AND LAKE OSWEGO  
CORPORATION'S MOTION TO POSTPONE  
TRIAL DATE

**ORS 20.140 - State fees deferred at filing**

I, Nina R. Englander, declare as follows:

1. I am an attorney representing Defendant State of Oregon, by and through the State Land Board and Department of State Lands ("State") in the above-captioned matter. I am over 18 years old, and I make this declaration in support of the State of Oregon's Opposition to Lake Oswego Corporation's Motion for Disqualification and Reassignment, City of Lake Oswego's Motion for Disqualification and Change of Judge, and Lake Oswego Corporation's Motion to Postpone Trial Date. This declaration is based on my personal knowledge.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the Order Granting the City of Lake Oswego and Lake Oswego Corporation's Motions to Bifurcate.

Page 1 - DECLARATION OF NINA R. ENGLANDER IN SUPPORT OF STATE OF OREGON'S  
OPPOSITION TO LAKE OSWEGO CORPORATION'S MOTION FOR  
DISQUALIFICATION AND REASSIGNMENT, CITY OF LAKE OSWEGO'S MOTION  
FOR DISQUALIFICATION AND CHANGE OF JUDGE, AND LAKE OSWEGO  
CORPORATION'S MOTION TO POSTPONE TRIAL DATE



1           3.       Attached hereto as **Exhibit 2** is a true and correct copy of the State's Phase I Trial  
2 Memorandum.

3           4.       Attached hereto as **Exhibit 3** is a true and correct copy of Defendant City of Lake  
4 Oswego's Joinder in Defendant Lake Oswego Corporation's Motion to Dismiss Plaintiffs'  
5 claims under ORCP 54.

6           5.       Attached hereto as **Exhibit 4** is a true and correct copy of the Phase-One Trial  
7 Findings of Fact and Conclusions of Law, issued by Judge Lininger on April 19, 2022. On May  
8 25, 2022, Judge Lininger issued a Final Phase-One Findings of Fact and Conclusions of Law per  
9 ORCP 62B, which made only minor non-substantive corrections.

10          6.       I attended the November 17, 2020, status conference with Judge Lininger and  
11 counsel for all parties. Attached hereto as **Exhibit 5** is a true and correct copy of my  
12 contemporaneous notes from that status conference. At the status conference, no party asked any  
13 follow up questions of Judge Lininger nor asked for additional time to consider the assignment  
14 of the case to her.

15          7.       Attached hereto as **Exhibit 6** is a true and correct copy of the June 2021  
16 Scheduling Order setting the March 2022 and July 2022 trial dates.

17          8.       Attached hereto as **Exhibit 7** is a true and correct copy of Lake Oswego  
18 Corporation's First Request for Production of Documents to Plaintiffs, served on June 2, 2022.  
19 Plaintiffs began producing responsive documents on June 23, 2022. My files indicate that, to  
20 date, the City of Lake Oswego has not served any requests for production of documents on  
21 Plaintiffs.

22          9.       Attached hereto as **Exhibit 8** is a true and correct copy of Judge Lininger's July 6,  
23 2022, letter to counsel, without attachments.

24  
Page 2 - DECLARATION OF NINA R. ENGLANDER IN SUPPORT OF STATE OF OREGON'S  
OPPOSITION TO LAKE OSWEGO CORPORATION'S MOTION FOR  
DISQUALIFICATION AND REASSIGNMENT, CITY OF LAKE OSWEGO'S MOTION  
FOR DISQUALIFICATION AND CHANGE OF JUDGE, AND LAKE OSWEGO  
CORPORATION'S MOTION TO POSTPONE TRIAL DATE

Date Entered:	Author:	Entry Type:	E-mail Notification
11/17/2020	ne1	Attorney Note	
<p>Status conference with Judge Linninger and all counsel.</p> <p>Judge flagged her background:  Lived in Lake O for 20 years. Don't live there now. The state rep. representing Lake O for close to 4 years. Clackamas County Commissioner. Have heard people express opinions about whether the lake should be public access. Believes that she can be unbiased.</p> <p>Counsel indicated no concerns.</p> <p>Motion to bifurcate has been fully briefed. Set a date for the oral argument. No more than hour. Second she will address Plaintiffs' right to jury trial. Two rounds of motion practice with motion to bifurcate going first. Aug. 12 2020 scheduling order.</p>			

IN THE CIRCUIT COURT FOR THE STATE OF OREGON  
FOR THE COUNTY OF CLACKAMAS

MARK KRAMER and TODD PRAGER,

Plaintiffs,

v.

CITY OF LAKE OSWEGO; and the STATE  
OF OREGON, by and through the State Land  
Board and the Department of State Lands,

Defendants.

and

LAKE OSWEGO CORPORATION,

Intervenor-Defendant.

Case No. CV12100913

**DECLARATION OF STEVEN OLSON  
IN SUPPORT OF DEFENDANT CITY  
OF LAKE OSWEGO'S MOTION FOR  
DISQUALIFICATION AND CHANGE  
OF JUDGE**

I, STEVEN OLSON, declare as follows:

1. I am an attorney representing City of Lake Oswego, a Defendant in the above-captioned matter. I make this declaration based upon personal knowledge and if called to testify would attest to the facts herein.

2. I make this declaration in support of Defendant City of Lake Oswego's Motion for Disqualification and Change of Judge.

3. I attended the Court's July 6, 2022 hearing regarding Defendants' correspondence to the Hon. Ann M. Lininger regarding Defendants' request for Judge Lininger's recusal from this case.



1           4.       At the July 6, 2022 hearing, Judge Lininger stated that at a conference with  
2 attorneys Paul Conable, Brad Daniels, Nina Englander, and Thane Tienson in November 2020  
3 she disclosed that she had: (1) lived in Lake Oswego for 20 years; (2) served as a Clackamas  
4 County Commissioner; (3) was aware of this dispute and litigation; (4) had talked with  
5 individuals on both sides of the issue; (5) that it was possible she talked to a plaintiff but had no  
6 specific recollection of doing so; and (6) that she previously worked for the Sierra Club legal  
7 defense fund.

8           5.       At the July 6, 2022 hearing, Judge Lininger asked counsel for the Lake  
9 Corporation, Brad Daniels, the following series of questions: (1) whether he had any reason to  
10 believe she had actually introduced the legislation Plaintiffs' sought in their meeting; (2) whether  
11 he had any reason to believe any legislator actually introduced such legislation; (3) whether he  
12 had seen Plaintiffs' emails with other legislators asking them to introduce legislation; (4) his  
13 recollection of the date the case was initially appealed to the Oregon Court of Appeals; (5)  
14 whether the decisions rendered by the courts in this case were publicly available; (6) whether he  
15 recalled her disclosing that she had lived in Lake Oswego and served as a state representative;  
16 (7) whether he recalled asking Judge Lininger questions at the November 2020 hearing; (8)  
17 whether he recalled asking Judge Lininger for more time to consider her disclosures; and (9)  
18 "what it was you think I did" as a legislator, if not meet with constituents.

19           6.       At the July 6, 2022 hearing, Judge Lininger asked counsel for the City of Lake  
20 Oswego Paul Conable to confirm his statement in his correspondence that he did not recall "as  
21 robust a discussion" regarding Judge Lininger's prior communications with Plaintiffs as  
22 described by Plaintiffs in their papers opposing recusal. Judge Lininger asked Mr. Conable  
23 whether the lack of a robust discussion was due to a lack of further questions.

24           7.       At the July 6, 2022 hearing, counsel for the State of Oregon, Nina Englander,  
25 recited from her notes from the November 2020 conference. Those notes stated that Judge  
26 Lininger "flagged her background" having lived in Lake Oswego and served as a state legislator.

1 Ms. Englander's notes reflect a disclosure to the effect of having "heard people express  
2 opinions" about access to Lake Oswego. Ms. Englander's notes did not include mention of  
3 having exchanged emails or met in person with the Plaintiffs about this case, nor that Judge  
4 Lininger might have met with the Plaintiffs in this case.

5 8. At the July 6, 2022 hearing, current counsel for Plaintiffs, Nadia Dahab, read  
6 from the notes of Plaintiffs' prior counsel Thane Tienson, from the November 2020 conference.  
7 Those notes reflect disclosure that Judge Lininger was a former resident, a former state  
8 representative of the area for four years, a former county commissioner, and had met with  
9 advocates on all sides. Mr. Tienson's notes do not mention any communications or meetings  
10 with the Plaintiffs about this case, or that Judge Lininger may have met with the Plaintiffs.

11 9. At the July 6, 2022 hearing, Judge Lininger asked Ms. Dahab if, in her review of  
12 documents, she had seen any documents indicating Judge Lininger actually introduced the  
13 requested legislation, or that Plaintiffs found any "allies" to sponsor to introduce such legislation.

14 10. At the July 6, 2022 hearing, Judge Lininger declined to recuse herself. In  
15 announcing her decision, she stated it was "hard to understand why we're here." She stated that  
16 the timeline was important, emphasizing that the communications were approximately eight  
17 years ago, and only brought to light after a decision "unfavorable" to the Defendants. She  
18 further emphasized that she did not actually introduce the legislation Plaintiffs requested at their  
19 meeting. She stated there was no basis to recuse.

20 11. According to the docket in this case, attorney Greg Adams filed a notice of  
21 association as counsel for Plaintiffs in this case on April 10, 2013. (TCF – 4/12/2013 – Notice).

22 12. Attached as Exhibit 1 is a true and correct copy of an email exchange between  
23 Plaintiff Mark Kramer and state representative Mitch Greenlick, in June of 2014, regarding this  
24 case and potential legislation. The emails were produced by Plaintiffs in this case on June 23,  
25 2022 at bates PLAINTIFFS\_000052-54. Plaintiff Mark Kramer states on June 17, 2014: "I write  
26 based on my experience with you (and your leadership) on the penalty and other issues of public