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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

MARTIN MONICA,

Plaintiff,

v.

BRYAN WILLIAMS, et al.,

Defendants.

Case No. [15-cv-04857-BLF](#)

**ORDER DENYING PLAINTIFF'S
MOTION FOR NEW TRIAL**

[Re: ECF 85]

Civil rights cases are among the most important matters to come before the Court. Ordinary people have the opportunity to vindicate their constitutional rights before a jury. In these difficult cases, confidence in the fairness of the judicial system is paramount for both the winner and the loser of the case in order to sustain the integrity of the judicial system. It is with these principles in mind that the Court considers Plaintiff's motion for new trial.¹

In this case, Plaintiff Martin Monica seeks a new trial pursuant to Fed. R. Civ. P. 59(a), claiming that the undersigned was biased against him. Mot. for New Trial ("Mot."), ECF 85. Plaintiff's motion is based on claims related to the Court's ruling on summary judgment, including the Court's comments at the hearing; the Court's repeated reference to a portion of Plaintiff's deposition testimony that the Court identified as unfavorable to Plaintiff; the Court's rulings on trial objections; the Court's handling of a sidebar discussion and subsequent ruling; and the undersigned's tone of voice and facial expressions at trial. Plaintiff supports this motion with counsel's declaration recounting his recollection of the comments made by the Court. No trial transcripts have been submitted.

¹ Pursuant to Civ. L.R. 7-1(b), the Court finds Plaintiff's motion suitable for submission without oral argument and hereby VACATES the hearing scheduled for July 6, 2017.

1 Defendants, City of Santa Clara Police Officers Bryan Williams and Luke Erickson,
2 respond that Plaintiff received a fair trial and that there was no actual bias at any stage of the
3 proceedings. Defendants point to rulings made that were favorable to Plaintiff and unfavorable to
4 Defendants throughout the litigation. Defendants further argue that Plaintiff never made a
5 contemporaneous record at the time counsel formed these perceptions of bias so as to allow the
6 Court and defense counsel to respond and correct Plaintiff's counsel's impressions. Defendants
7 contend that Plaintiff's counsel's impressions of bias are speculative and without foundation.

8 **I. BACKGROUND**

9 Mr. Monica brought this civil rights case against the City of Santa Clara and several of its
10 officers after he was stopped for purportedly not having a front license plate. The incident
11 escalated to the point where the officers took Mr. Monica out of his car and handcuffed him after
12 he informed the officers that he was a retired police officer and police chief, but did not have such
13 identification with him that night. Mr. Monica claimed that he was unlawfully detained, arrested,
14 handcuffed, and injured by police. As a result of the incident, Mr. Monica sued for violation of
15 his constitutional rights under 42 U.S.C. § 1983. Compl., ECF 1. Defendants denied all claims
16 and asserted that they were entitled to qualified immunity. Answer, ECF 11. Defendants filed a
17 motion for summary judgment that was denied on virtually all grounds. The Court granted
18 summary judgment only on the constitutionality of the initial *Terry* stop. The Court ruled that all
19 other issues would proceed to trial. *See* Order Granting in Part & Denying in Part Mot. Summ. J.
20 ("Summ. J. Order"), ECF 41. The case did proceed to jury trial over four days, resulting in a
21 defense verdict on all counts. Jury Verdict, ECF 77. Plaintiff timely filed this motion for new
22 trial.

23 **II. LEGAL STANDARD**

24 **A. Motion for a New Trial**

25 Under Federal Rule of Civil Procedure 59(a)(1), a court "may, on motion, grant a new trial
26 on all or some of the issues." Fed. R. Civ. P. 59(a)(1). A court may grant a new trial "if the
27 verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence,
28 or to prevent a miscarriage of justice." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir.

1 2007) (citation and internal quotation marks omitted). A judge should only grant a new trial if she
 2 “is left with the definite and firm conviction that a mistake has been committed.” *Landes Constr.*
 3 *Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371–72 (9th Cir. 1987) (internal citations
 4 omitted)). The court is not required to view the trial evidence in the light most favorable to the
 5 verdict when it considers a Rule 59(a) motion. *Experience Hendrix L.L.C. v.*
 6 *Hendrixlicensing.com Ltd.*, 762 F.3d 829, 842 (9th Cir. 2014). Instead, “the district court can
 7 weigh the evidence and assess the credibility of the witnesses.” *Id.* (citation omitted).
 8 “Ultimately, the district court can grant a new trial under Rule 59 on any ground necessary to
 9 prevent a miscarriage of justice.” *Id.* (citing *Murphy v. City of Long Beach*, 914 F.2d 183, 187
 10 (9th Cir. 1990)).

11 **B. Judicial Bias**

12 “The Due Process clause ‘requires a fair trial in a fair tribunal before a judge with no actual
 13 bias against [any party] or interest in the outcome of [the] particular case.’” *Smith v. Mahoney*,
 14 611 F.3d 978, 997 (9th Cir. 2010) (quoting *Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997)); *see*
 15 *also Tracey v. Palmateer*, 341 F.3d 1037, 1048 (9th Cir. 2003) (“A fair trial in a fair tribunal is a
 16 basic requirement of due process.” (citation and quotation marks omitted)). However, “[o]nly in
 17 the most extreme of cases would disqualification on the basis of judge bias be constitutionally
 18 required.” *Id.* (alteration omitted) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821
 19 (1986)). “A judge’s conduct justifies a new trial if the record shows actual bias or leaves an
 20 abiding impression that the jury perceived an appearance of advocacy or partiality.” *United States*
 21 *v. Marks*, 530 F.3d 799, 806 (9th Cir. 2008) (citations omitted). The Ninth Circuit has recognized
 22 that there are three general circumstances in which an appearance of bias violates due process: (1)
 23 a judge who “has a direct, personal, substantial pecuniary interest in reaching a conclusion against
 24 one of the litigants;” (2) a judge who “becomes embroiled in a running, bitter controversy with
 25 one of the litigants;” and (3) a judge who “acts as part of the accusatory process.” *Crater v.*
 26 *Galaza*, 491 F.3d 1119, 1130 (9th Cir. 2007) (internal citations and quotation marks omitted)).

27 Under 28 U.S.C. §§ 144 and 455, judges must remove themselves from cases if they have
 28

1 a personal bias.² See generally *United States v. Sibla*, 624 F.2d 864 (9th Cir. 1980); *United States*
2 *v. Azhocar*, 581 F.2d 735, 738 (9th Cir. 1978), *cert. denied*, 440 U.S. 907 (1980).

3 Under 28 U.S.C. § 455, a judge must disqualify himself, inter alia: (1) “in any proceeding
4 in which his impartiality might reasonably be questioned,” *id.* § 455(a); (2) “[w]here he has a
5 personal bias or prejudice concerning a party,” *id.* § 455(b)(1); or (3) where “[h]e knows that he . . .
6 . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any
7 other interest that could be substantially affected by the outcome of the proceeding,” *id.* §
8 455(b)(4). Bias under section 455 must derive from extrajudicial sources. *In re Beverly Hills*
9 *Bancorp (Commercial Paper Holders v. R.W. Hine)*, 752 F.2d 1334, 1341 (9th Cir. 1984).

10 Section 455(a) covers circumstances that *appear* to create a conflict of interest, whether or
11 not there is actual bias. *Davis v. Xerox*, 811 F.2d 1293, 1295 (9th Cir. 1987). Section 455(b)
12 covers situations in which an *actual* conflict of interest exists, even if there is no appearance of
13 one. *Id.* Section 455(b) also describes situations that create an *apparent* conflict, because it
14 provides examples of situations in which a judge’s “impartiality might reasonably be questioned”
15 pursuant to section 455(a). See *United States v. Conforte*, 624 F.2d 869, 880–81 (9th Cir.), *cert.*
16 *denied*, 449 U.S. 1012 (1980) (citation omitted). *Actual* bias is a per se ground for
17 disqualification. *Davis*, 811 F.2d at 1295. The Ninth Circuit has defined bias to consist of “an
18 attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded
19 person could not entirely set aside when judging certain persons or causes.” *Conforte*, 624 F.2d at
20 881. The test for creation of *apparent* bias sufficient to require dismissal under sections 455(a)
21 and 455(b) is an objective one: “whether a reasonable person with knowledge of all the facts
22 would conclude that the judge’s impartiality might reasonably be questioned.” *United States v.*
23 *Nelson*, 718 F.2d 315, 321 (9th Cir. 1983) (citations omitted).

24 In order to prevail on a claim of judicial bias, a litigant must overcome a “strong
25

26 ² Plaintiff does not invoke 28 U.S.C. § 144 as a basis for disqualification, nor does he attach an
27 affidavit of bias to his Motion. As such, the Court need not refer Plaintiff’s Motion for random
28 assignment to another Judge. See 28 U.S.C. § 144; Civ. L.R. 3-14; *Mendia v. Garcia*, No. 10-CV-
03910, 2017 WL 1508673, at *4 n.3 (N.D. Cal. Apr. 27, 2017). While Plaintiff has also not
invoked section 455, the Court discusses it because Defendants rely on it in their opposition to
Plaintiff’s motion. See Opp’n 4.

1 presumption that a judge is not biased or prejudiced.” *Sivak v. Hardison*, 658 F.3d 898, 924 (9th
2 Cir. 2011) (quoting *Rhoades v. Henry*, 598 F.3d 511, 519 (9th Cir. 2010)). “A new trial based on
3 judicial misconduct is warranted only if, from the record, a judge’s action ‘shows actual bias or
4 leaves an abiding impression that the jury perceived an appearance of advocacy or partiality.’”
5 *Closson v. Bank of Am., NA*, 600 Fed. Appx. 575, 576 (9th Cir. 2015) (citing and quoting *United*
6 *States v. Laurins*, 857 F.2d 529, 537 (9th Cir. 1988)); *see also see Shad v. Dean Witter Reynolds,*
7 *Inc.*, 799 F.2d 525, 531 (9th Cir.1986) (holding that trial judge’s conduct was not improper when
8 judge questioned witness, criticized counsel, and managed the pace of the trial).

9 **III. DISCUSSION**

10 In reviewing the record in this case, the Court has considered all of its rulings and
11 summarizes them here. The Court conducted a case management conference early in the litigation
12 and set the case schedule on February 18, 2016. ECF 17. The parties managed the case
13 throughout discovery without requesting Court intervention. Defendants filed a motion for
14 summary judgment in accordance with the scheduling order and Plaintiff requested a modification
15 of the scheduling order to extend the date for his response and to postpone the hearing date in
16 order to complete discovery, which was granted without opposition. ECF 29. The Court ruled on
17 Defendants’ motion for summary judgment, finding that Defendants had not demonstrated
18 entitlement to qualified immunity on the de facto arrest or excessive force claims and granted
19 summary judgment as to the City of Santa Clara and Officer Estes, without objection. *See*
20 *generally* Summ. J. Order. The Court also granted summary judgment as to the initial *Terry* stop
21 and detention, finding that the officers had reasonable suspicion to make the traffic stop. *Id.*
22 Thus, the case proceeded to trial.

23 The Court conducted its final pretrial conference, ruling on *in limine* motions. As to
24 Plaintiff’s two motions, the Court granted in part the motion to exclude Defendants’ police
25 practices expert, excluding all of the opinions identified by Plaintiff as improper regarding legal
26 conclusions and credibility determinations, and cautioning defense counsel that his questions must
27 be properly stated to avoid further exclusion. Order re Mots. in Lim. (“Order re MILs”) 2–3, ECF
28 63. Plaintiff had argued that the evidence was irrelevant and highly prejudicial. *Id.* at 3. The

1 Court deferred ruling on the second motion to exclude evidence of Plaintiff’s prior political
 2 activities, lawsuits, and his reason for being in the area of the incident. *Id.* At trial, the Court
 3 granted the exclusion motion over Defendants’ objections. As to the defense motions *in limine*,
 4 the Court granted two motions that Plaintiff did not oppose and denied the third. *See generally id.*
 5 The Court thereafter conducted an in-chambers, unreported jury instruction conference. With the
 6 collaboration of counsel and the Court’s determination of the disputed issues, a complete set of
 7 jury instructions and verdict form were developed in advance of trial. There are no objections to
 8 the jury instructions or verdict form at issue in this motion.

9 The case proceeded to trial over four days. At the close of the evidence, the Court deferred
 10 ruling on Defendants’ Rule 50(a) motion and allowed the case to go to the jury. The jury returned
 11 a verdict for Defendants.

12 Plaintiff identifies a number of rulings or other conduct by the Court in support of his
 13 motion. The Court will address each separately.³

14 **A. Summary Judgment Hearing and Ruling**

15 Plaintiff argues that the Court “first became involved in the merits of the case in the
 16 hearing on defendants’ motion for partial summary judgment.” Mot. 2. Plaintiff makes three
 17 allegations of impropriety during that hearing. The Court addresses each in turn.

18 First, Plaintiff claims that the Court improperly relied on facts not most favorable to him as
 19 the non-moving party when it granted summary judgment on the initial detention. Mot. 2.
 20 Plaintiff points to the Court’s discussion at the hearing of a portion of Plaintiff’s own deposition

21
 22 ³ Plaintiff relies on a number of cases to support his motion for new trial. Those cases aptly set
 23 forth the standard the Court must consider but do not support his claims. *See* Mot. 5–7; *GPNE*
 24 *Corp. v. Apple, Inc.*, 830 F.3d 1365, 1373 (Fed. Cir. 2016) (no finding of misconduct where judge
 25 allowed improper attorney argument); *Duckett v. Godinez*, 67 F.3d 734, 740 (9th Cir. 1995)
 26 (finding “troubling” where judge took over questioning of witnesses on behalf of the State);
 27 *Kennedy v. Los Angeles Police Dep’t*, 901 F.2d 702, 709 (9th Cir. 1990) (as amended), *overruled*
 28 *on other grounds by Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) (no finding of
 bias where trial court’s questions were “quite pointed and intemperate”); *Laurins*, 857 F.2d at 537
 (finding fact that judge interrupted the prosecutor 60 times to assist him did not affect fairness of
 trial); *United States v. Mostella*, 802 F.2d 358, 361 (9th Cir. 1986) (trial judge’s extensive
 questioning of defense witness did not require reversal); *Knapp v. Kinsey*, 232 F.2d 458, 466–67
 (6th Cir. 1956) (judicial bias found where judge actively questioned witness, advocated for the
 plaintiff, and suggested litigation activity favorable to plaintiff throughout the case); *United States*
v. Harmon, 21 F. Supp. 3d 1042, 1049 (N.D. Cal. 2014) (juror bias case).

1 testimony regarding the location of his license plate, claiming that the Court relied on testimony
2 not identified by either party and that the Court improperly refused to consider other evidence
3 favorable to Plaintiff. *Id.* 2–3; Boskovich Decl. ISO Mot. (“Boskovich Decl.”) ¶¶ 3–4, ECF 85-1.
4 Defendants respond that the license plate testimony was submitted by Plaintiff, and that testimony
5 contradicted Plaintiff’s affidavit submitted in opposition to summary judgment. Opp’n 4–5, ECF
6 86 (citing ECF 32-2). Regardless, however, as is explained below, the Court did not rely on the
7 disputed portion of Plaintiff’s testimony.

8 Second, Plaintiff takes issue with the Court’s comments about the effect of the license
9 plate testimony, claiming that the Court’s tone and manner of questioning on this issue revealed
10 bias. Mot. at 3. Specifically, Plaintiff’s counsel avers that “the Court felt that this was devastating
11 evidence that would totally destroy plaintiff’s credibility at trial.” Boskovich Decl. ¶ 4.
12 Defendants contend that Plaintiff has not accurately recounted the Court’s comments or tone.
13 Opp’n 5. Defense counsel states that he recalls the Court’s tone as “matter of fact,” and does not
14 recall the Court using the term “devastating” in regard to the license plate testimony or saying that
15 it would “destroy” Plaintiff’s credibility. Stock Decl. ISO Opp’n (“Stock Decl.”) ¶ 3, ECF 86-4.

16 The Court’s recollection is more in line with that of Defendants. The Court conducted the
17 hearing based solely on the evidence presented by the parties and does not agree with Plaintiff’s
18 complaint about the Court’s tone in questioning counsel. The Court addresses difficult questions
19 to all parties with equal seriousness and always endeavors to identify for counsel all aspects of the
20 case that may benefit from counsel’s further discussion on the record before a decision is made on
21 the merits of the motion.

22 At the hearing on Defendants’ motion for partial summary judgment, the Court properly
23 probed whether Plaintiff’s affidavit directly contradicted his prior sworn testimony about whether
24 the license plate was affixed to the front of the car or inside the car at the time of the traffic stop.⁴
25 The prior sworn testimony contained in Mr. Monica’s deposition that the Court focused on

26 _____
27 ⁴ In support of its motion for summary judgment, Defendants offered the declaration of Defendant
28 Officer Bryan Williams who stated, “I informed Monica that I had stopped him for not having a
front license plate. Monica said he had it inside the vehicle, and the passenger, his son, retrieved it
from inside the vehicle and showed it to me.” Williams Decl. ISO Mot. Summ. J. ¶ 7, ECF 23.

1 provided⁵:

2 Q: Okay.

3 A: I didn't say anything to him. I just was thinking in my mind,
4 "Serious?" I did ask him one thing. I said, "Where is my license
5 and registration?" He said, "It's over there on your car. Go get it."
6 So then I walked over to my car to get my license plate—my
7 registration, license, and they all just jumped in their cars and took
8 off like -- they're gone."

9 Ex. A to Boskovich Decl. ISO Opp'n to Mot. Summ. J. ("Monica Dep.") 84:3–10, ECF 32-2.

10 As a preliminary matter, "opinions formed by the judge on the basis of facts introduced or
11 events occurring in the course of the current proceedings . . . do not constitute a basis for a bias or
12 partiality motion unless they display a deep-seated favoritism or antagonism that would make fair
13 judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Thus, even if the Court
14 "felt that this was devastating evidence," as Plaintiff purports, it would not demonstrate bias. *Id.*
15 ("[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile
16 to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.").
17 Moreover, the discussion on the record was in line with Ninth Circuit law requiring a court to
18 make a factual determination that an affidavit is a "sham" before excluding it. *See Kennedy v.*
19 *Allied Mutual Ins. Co.*, 952 F.2d 262 (9th Cir. 1991).

20 As to the latter, under Ninth Circuit and Supreme Court law, a party cannot create an issue
21 of fact by an affidavit contradicting his prior deposition testimony. *Id.*; *Cleveland v. Policy Mgmt.*
22 *Sys. Corp.*, 526 U.S. 795, 806 (1999). Exclusion of an affidavit requires the Court to make a
23 factual determination that the contradiction was actually a "sham." *Kennedy*, 952 F.2d at 267.
24 The testimony submitted to the Court indicated that after the stop, Plaintiff retrieved his license
25 plate that was "on his car" along with his license and registration, contrary to the statement in the
26 affidavit.⁶ Nevertheless, based on the discussion at the hearing, the Court did not make a factual
27 determination that the contradiction was actually a "sham," and the disputed deposition testimony

28 ⁵ This testimony pertains to the period of time immediately after Mr. Monica was released from
detention by the Officer Defendants.

⁶ At the hearing, the Court recalls Plaintiff's counsel indicating that he had not been aware of that
portion of the deposition transcript.

1 was not a factor in the Court’s ruling.⁷

2 In granting summary judgment on this limited issue, the court relied on a different portion
3 of Mr. Monica’s sworn testimony, offered by the defense, that provided:

4 Q: In your opinion, would somebody seeing [your license plate] at
5 night not necessarily immediately recognize [it] as a license plate?

6 A: Yes, because the way it was pushed back, um, you know, it’s not
7 a normal, in the sense, phewt [*sic*], out. So if you’re looking for it in
8 that capacity, you could have a difficulty in recognizing it.

9 Q: So you don’t fault the officers for suspecting that you didn’t have
10 a front license plate, you fault them for not checking it after you told
11 them, “Go look for it, it’s there”?

12 A: Correct.

13 Monica Dep. 52:10–21. In its ruling, the Court fully credited Mr. Monica’s testimony that his
14 license plate was affixed to the car, considered the declaration and photograph offered in
15 opposition to summary judgment, and held that “[b]ecause Monica admit[ted] that the ‘mistake’
16 was reasonable, and because stopping a driver for a violation of the California Vehicle Code is
17 permitted under the Fourth Amendment, Williams [was] entitled to qualified immunity for the
18 initial traffic stop under the ‘constitutional violation’ prong of the qualified immunity analysis.”
19 Summ. J. Order 8. Thus, the Court cannot agree that the undersigned’s tone and manner of
20 questioning on this issue revealed bias.

21 Third, Plaintiff suggests that the Court’s refusal to consider his affidavit authenticating a
22 photograph showing the front of his car with a license plate affixed in the bumper area was wrong
23 as a matter of law. (Plaintiff stated in his declaration: “The photograph accurately depicts the
24 condition of the vehicle and the placement of the license plate on 22 October 2013.” Monica
25 Decl. ISO Opp’n to Mot. Summ. J. ¶ 4, ECF 32-4). Plaintiff’s claim that the Court improperly
26 applied the wrong legal standard in evaluating the evidence at summary judgment is not grounds
27 for a new trial based on judicial bias. *Liteky*, 510 U.S. at 555; *Hasbrouck v. Texaco, Inc.*, 842 F.2d
28 1034, 1045–46 (9th Cir. 1987) (“Texaco supports its allegations of bias merely by pointing to

⁷ The Court further notes that Plaintiff submitted the photograph showing his affixed license plate at trial without objection or comment by the Court to the jury.

1 alleged errors at trial in refusing a request to disqualify jurors, formulating preliminary and final
 2 jury instructions, and overruling defense objections. Even if these ruling[s] were erroneous . . . ,
 3 they could not justify a finding of judicial bias.” (citations omitted)); *cf. Szanto v. Marina*
 4 *Marketplace 1*, No. 11-cv-394, 2014 WL 5293088, at *3 (D. Nev. Oct. 15, 2014) (“Even assuming
 5 for the sake of argument that the Court made legal errors in this case, legal error does not
 6 constitute grounds for recusal without a showing of external personal bias.”). Having failed to
 7 show external personal bias, this purported legal error cannot support a claim for bias.

8 **B. The Court’s *Sua Sponte* Reference to the License Plate Testimony at the Pretrial**
 9 **Conference**

10 Plaintiff further argues that the Court *sua sponte* brought up the license plate testimony at
 11 the final pretrial conference in “a somewhat derogatory manner,” and responded in a “sarcastic”
 12 manner upon learning that Mr. Monica had made a clarifying correction to his deposition. Mot. 3.
 13 Plaintiff’s counsel recalls the Court saying “words to the effect of ‘of course he did.’” *Id.*;
 14 Boskovich Decl. ¶ 7. Plaintiff further takes issue with comments he attributes to the Court at the
 15 in-chambers jury instruction conference stating that the undersigned again brought up the issue of
 16 the license plate testimony and *sua sponte* said “words to the effect that the District Court wished
 17 this was her case as a lawyer so she could cross-examine Mr. Monica on this testimony.” Mot. 3–
 18 4; Boskovich Decl. ¶ 8. Defendants disagree with Plaintiff’s perception of the Court’s tone and
 19 attitude, stating that Plaintiff’s complaints are speculative and lack foundation. Opp’n 3–4.

20 The Court does not dispute that it further discussed the license plate testimony at the
 21 pretrial conference and at the in-chambers jury instruction conference. However, the Court did not
 22 harbor any bias against Mr. Monica or treat him unfairly at any time. The Court also does not
 23 deny that it made a comment, in chambers at the close of the jury instruction conference, about
 24 cross-examining Mr. Monica on the license plate testimony. That was an improper comment but
 25 was not meant to disparage Mr. Monica nor was it indicative of any bias against Plaintiff. *Cf.*
 26 *United States v. Lopez–Martinez*, 543 F.3d 509, 513–14 (9th Cir. 2008) (judge’s colloquy with
 27 prosecutor on what she needed to do to improve case did not show bias against defendant and in
 28 any event was not prejudicial because outside presence of jury); *Duckett v. Godinez*, 67 F.3d 734,

1 740–41 (9th Cir. 1995) (finding no actual bias where state court judge in a criminal case took over
2 the questioning on behalf of the state to lay foundation to allow a witness to testify, expressed
3 clear frustration and hostility toward a defense witness, and encouraged the prosecution to object
4 “for the heck of it”).

5 Moreover, any such statement was based exclusively on evidence presented to the Court
6 during summary judgment, and therefore does not demonstrate bias. *See Liteky*, 510 U.S. at 555–
7 56 (“[J]udicial remarks . . . that are critical or disapproving of, or even hostile to, counsel, the
8 parties, or their cases . . . may [support a bias or partiality challenge] if they reveal an opinion that
9 derives from an extrajudicial source; and they will do so if they reveal such a high degree of
10 favoritism or antagonism as to make fair judgment impossible . . . [but] expressions of impatience,
11 dissatisfaction, annoyance, and even anger, . . . are within the bounds of what imperfect men and
12 women, even after having been confirmed as federal judges, sometimes display.”); *see also*
13 *Spencer v. Cavazos*, No. 09-cv-2541, 2013 WL 3761286, at *26 (S.D. Cal. July 15, 2013) (“The
14 trial judge’s acknowledgement that he would not have found Spencer to be a credible witness in
15 light of the evidence presented, and that her denial of responsibility on the witness stand would
16 have given him reason to sentence her more harshly than he did was, quite simply, an ‘opinion
17 formed by the judge on the basis of facts introduced or events [which occurred] in the course of
18 the . . . proceedings.’ It does not, therefore, rise to the level of judicial bias or prejudice, nor is it
19 evidence that Spencer received a fundamentally unfair trial.” (citation omitted)). Further, Plaintiff
20 does not challenge the fairness of the jury instructions.

21 **C. Evidentiary Rulings at Trial**

22 Plaintiff next contends that the Court unfairly sustained more of Defendants’ trial
23 objections than his and interfered with Plaintiff developing his theory of the case. Counsel claims
24 that the Court appeared angry and hostile towards Mr. Monica, his son, and his wife while they
25 testified. Mot. 4.

26 First, as to claims of anger and hostility towards the witnesses, the Court disagrees with
27 Plaintiff’s counsel’s impression. Although it is impossible to know what specific conduct Plaintiff
28 is referring to, the Court recalls rarely speaking to the witnesses, except to ask them to speak

1 louder or more slowly (a common request to all witnesses). This conduct does not demonstrate
2 actual bias. *United States v. Mostella*, 802 F.2d 358, 361 (9th Cir. 1986) (“It is entirely proper for
3 [the judge] to participate in the examination of witnesses for the purpose of clarifying the
4 evidence, confining counsel to evidentiary rulings, controlling the orderly presentation of the
5 evidence, and preventing undue repetition of testimony.” (citations omitted)); *see also Swinton v.*
6 *Potomac Corp.*, 270 F.3d 794, 808 (9th Cir. 2001) (finding proper the court’s effort to streamline
7 the presentation of evidence).

8 The Court also denies any tone of voice or expressions that would indicate anger towards
9 counsel or any witness. “A judge’s ordinary efforts at courtroom administration—even a stern and
10 short-tempered judge’s ordinary efforts at courtroom administration—remain immune.” *Liteky*,
11 510 U.S. at 555; *see Kennedy v. Los Angeles Police Dep’t*, 901 F.2d 702, 709 (9th Cir. 1990) (as
12 amended), *overruled on other grounds by Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir.
13 1993) (holding reversal was not required where the court’s “questioning was not marked by
14 completed indifference [and instead sometimes was] quite pointed and intemperate”).

15 Plaintiff further claims that he was prevented from eliciting testimony on his primary
16 theory of the case. Mot. 4; Boskovich Decl. ¶ 11. In particular, Plaintiff contends that his theory
17 of the case was that Defendants acted as they did because they did not believe that Mr. Monica
18 “could possibly be a retired police officer and former chief of police.” Mot. 4. Plaintiff argues
19 that his counsel asked Officer Williams “directly if it were true that he did what he did in
20 conformity with this theory,” and the Court sustained defense counsel’s objection to the question
21 as argumentative “with an emotional tone.” *Id.* Defendants contend that these perceptions are
22 speculative and lack foundation. Opp’n 3–4.

23 The Court’s recollection differs from that of Plaintiff’s. Throughout trial, the Court ruled
24 on objections posed by defense counsel that certain questions were argumentative and the Court
25 can only say that the rulings reflected the undersigned’s best judgment at the time as to the
26 propriety of the question. The Court disagrees that it used “an emotional tone.” Nevertheless, the
27 Court allowed counsel to restate the questions and did not prevent Plaintiff from examining the
28 witnesses on all issues.

1 Plaintiff also seems to suggest that by his tally the Court sustained more defense objections
2 than Plaintiff's objections. Mot. 4. Even if that is true, fairness is not measured by numerical
3 equivalence and the Court only ruled on objections posed to the Court. *Liteky*, 510 U.S. at 555
4 (“[Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In
5 and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot
6 possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances
7 evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is
8 involved. Almost invariably, they are proper grounds for appeal, not for recusal.” (internal
9 citation omitted)); *see also Valle v. Gonzalez*, No. CV 14-6115, 2015 WL 4776944, at * (C.D.
10 Cal. July 2, 2015) (“The trial judge’s adverse evidentiary ruling does not serve as a predicate for
11 finding judicial bias.”). There is no suggestion that the Court interposed its own objections or in
12 any way interfered with Plaintiff’s presentation of the case absent a duty to rule on objections
13 when made.

14 **D. Side Bar Ruling**

15 Plaintiff next contends that the Court again raised the license plate testimony at a side bar
16 and instructed defense counsel to recall Mr. Monica. Mot. 4. Plaintiff states that at the close of
17 Plaintiff’s case, defense counsel called for a side bar to request leave to recall Officer Williams,
18 acknowledging that he had not complied with the Court’s pretrial witness notification
19 requirement.⁸ Before the Court decided the issue, Plaintiff claims the Court “changed gears” and
20 directly asked defense counsel why he had not examined Mr. Monica on the license plate
21 deposition testimony, in light of the Court’s view of its importance. *Id.* When defense counsel
22 informed the Court that he had forgotten, Plaintiff asserts that “the Court’s demeanor turned to
23 something akin to anger and the Court instructed defense counsel to call Mr. Monica as his first
24 witness” to inquire about that testimony. Mot. 5 (emphasis omitted); Boskovich Decl. ¶ 14.
25 Plaintiff’s counsel states that he responded that Mr. Monica was not getting a fair shake. When
26 counsel returned to their seats and defense counsel attempted to recall Mr. Monica, the Court

27 _____
28 ⁸ Pretrial, the Court ruled that counsel must notify opposing counsel by 6:00 pm of the witnesses
expected to be called the next trial day.

1 changed its ruling and did not permit Mr. Monica to be recalled. Plaintiff’s counsel asserts that
2 the Court was angry and stared directly at Plaintiff’s counsel. Mot. 4–5.

3 Defense counsel responds that the side bar was requested by him to seek the Court’s
4 permission to recall Officer Williams in spite of the fact that he had not advised Plaintiff the
5 previous night that he intended to recall Officer Williams in accordance with the Court’s
6 requirement. Opp’n 6. Defense counsel states that at side bar he indicated that he wanted to recall
7 Officer Williams to address Mr. Monica and his son’s testimony that the license plate was affixed
8 to the vehicle. *Id.* Defense counsel further states that he recalls the Court asking him why he had
9 not simply read the license plate deposition testimony into the record during Mr. Monica’s cross-
10 examination, to which he candidly responded that he had forgotten. *Id.* Defense counsel recalls
11 that the Court stated that it would let him recall Mr. Monica. Defense counsel states, “[a]t no time
12 did the Court order, instruct, or mandate that defense counsel recall Plaintiff as a trial witness.”
13 *Id.*; Heaberlin Decl. ISO Opp’n Mot. ¶ 7, ECF 86-1.

14 In considering the side bar discussion, the Court concurs with defense counsel’s
15 recollection. In the face of Plaintiff’s counsel’s strong objection to recalling Officer Williams, the
16 Court explored other means for Defense counsel to put on evidence in accordance with the Court’s
17 pretrial orders. After Plaintiff’s counsel further objected, the Court reconsidered whether it would
18 allow the defense to recall Mr. Monica. When the parties returned to counsel table, the Court
19 made clear that it had changed its ruling and was denying Defendants’ request. Neither Officer
20 Williams nor Mr. Monica was recalled. The Court was not angry or hostile and, in fact, the Court
21 recalls looking directly at defense counsel when instructing him that he would not be permitted to
22 recall Mr. Monica.

23 Additionally, Plaintiff’s objection here is surprising since he prevailed on the objection and
24 it was defense counsel who was left standing before the jury with the Court refusing to allow him
25 to call his next witness. Moreover, upon reflection, the Court believes that it applied its pretrial
26 witness notification requirement too broadly against Defendants when it sustained Plaintiff’s
27 objection to recalling Officer Williams. At side bar, it was clear that the defense planned to recall
28 Officer Williams for impeachment only. Prior disclosure of impeachment witnesses is not

1 required by Fed. R. Civil P. 26(a)(1)(A)(i) (Initial disclosures include “the name...of each
2 individual likely to have discoverable information...that the disclosing party may use to support
3 its claims or defenses, unless the use would be solely for impeachment.”). Thus, to the extent the
4 Court’s ruling was incorrect, the harm was to Defendants.

5 **E. Conclusion**

6 Considering Plaintiff’s claims as a whole, his allegations relate entirely to the
7 undersigned’s adverse rulings and remarks, and discussion at hearings, in chambers and at side
8 bar, and perceived tone and facial expressions at trial, none of which supplies adequate grounds
9 for a new trial. *Liteky*, 510 U.S. at 555; *Leslie v. Grupo ICA*, 198 F. 3d 1152, 1159 (9th Cir.
10 1999). Indeed, plaintiff’s allegations are more properly bases for appeal, not a new trial.
11 Because nothing raised by Plaintiff rises to the level of conduct demonstrating bias, the Motion for
12 New Trial is DENIED.

13 **IT IS SO ORDERED.**

14
15 Dated: May 31, 2017

16 
17 BETH LABSON FREEMAN
18 United States District Judge