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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

RAUL ERNEST ALONSO-PRIETO,  
Plaintiff,  
v.  
B. PIERCE, et al.,  
Defendants.

Case No. 1:11-cv-00024-MJS (PC)

**ORDER DENYING PLAINTIFF'S  
MOTIONS TO COMPEL, FOR  
RECONSIDERATION, RECUSAL, AND  
TRANSFER OF VENUE**

**(ECF Nos. 69 & 70)**

**ORDER TAKING UNDER SUBMISSION  
PLAINTIFF'S MOTION TO DISMISS  
ACTION AND DIRECTING DEFENDANT  
TO RESPOND WITHIN FOURTEEN DAYS**

**(ECF Nos. 69 & 70)**

Plaintiff is a former federal prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999 (1971). This matter proceeds on an excessive force claim against Defendant Pierce.

Pursuant to the Court's scheduling orders, discovery closed on December 16, 2013 (ECF No. 30); dispositive motions were due by February 24, 2014 (Id.); the pretrial conference is set for December 1, 2014 (ECF No. 60); and trial is set for January 13, 2015. (Id.)

Before the Court are Plaintiff's October 16, 2014 motions to compel discovery, reconsider orders denying discovery, recuse the undersigned for bias, transfer venue, and

1 voluntarily dismiss this action.

2 **I. MOTION TO COMPEL DISCOVERY**

3 The Court twice denied Plaintiff's motions to compel discovery responses because  
4 of procedural deficiencies. (See ECF Nos. 55, 58.) The specific reasons and procedural  
5 requirements are set out in the orders denying relief.  
6

7 The Court also denied reconsideration of the above orders. (See ECF Nos. 58, 65.)  
8 Plaintiff was advised of the reasons why reconsideration was denied. He was specifically  
9 advised that:

10 If [he] believes he needs and is entitled to additional discovery he may motion the  
11 Court to reopen discovery and modify scheduled deadlines. Any such motion should  
12 specifically explain what is needed, why it is relevant to this action and reasonably  
13 calculated to lead to the discovery of admissible evidence, why discovery was not  
14 completed prior to the deadline, and why there is good cause to modify current  
15 scheduling.

16 (See ECF No. 65 at 2:26-3:3.)

17 Plaintiff has not moved to reopen discovery. The instant motions repeat, but do not  
18 correct, deficiencies previously noted by the Court. The Court remains unaware of what  
19 discovery was served on Defendant, when it was served, how Defendant responded, why  
20 Defendant's responses are believed to be insufficient, and why Plaintiff failed to move to  
21 compel further responses prior to the discovery close date.

22 Nothing in the instant motions justifies further discovery.

23 **II. MOTION FOR RECONSIDERATION OF DISCOVERY ORDERS**

24 To the extent Plaintiff seeks another reconsideration of the Court's discovery orders,  
25 he presents no new or different facts or extraordinary circumstances warranting  
26 reconsideration. See Fed. R. Civ. P. 60(b)(6); *Harvest v. Castro*, 531 F.3d 737, 749 (9th  
27 Cir. 2008). Local Rule 230(j) requires, in relevant part, that Plaintiff show "what new or  
28 different facts or circumstances are claimed to exist which did not exist or were not shown

1 upon such prior motion, or what other grounds exist for the motion,” and “why the facts or  
2 circumstances were not shown at the time of the prior motion.” Plaintiff makes no such  
3 showing.

4 Plaintiff’s repeat of the same-argument does not demonstrate any error of fact or law  
5 in the above discovery orders or any basis for reconsideration.

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7 **III. MOTION TO RECUSE MAGISTRATE JUDGE**

8 Plaintiff maintains the undersigned “has illustrated severe bias” by holding him, a pro  
9 se, to the same standards as an attorney. (ECF No. 69 at 10:1-5.)

10 Under 28 U.S.C. § 144, “[w]henver a party to any proceeding in a district court  
11 makes and files a timely and sufficient affidavit that the judge before whom the matter is  
12 pending has a personal bias or prejudice either against him or in favor of any adverse  
13 party, such judge shall proceed no further therein, but another judge shall be assigned to  
14 hear such proceeding.” 28 U.S.C. § 144; see *Pesnell v. Arsenault*, 543 F.3d 1038, 1043  
15 (9th Cir. 2008); *U.S. v. Johnson*, 610 F.3d 1138, 1147 (9th Cir. 2010). Section 144  
16 expressly conditions relief upon the filing of a timely and legally sufficient affidavit. *Id.*, citing  
17 inter alia *United States v. Azhocar*, 581 F.2d 735, 738-40 (9th Cir. 1978).

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19 Under 28 U.S.C. § 455(a), “[a]ny . . . judge . . . shall disqualify himself in any  
20 proceeding in which his impartiality might reasonably be questioned.” *Pesnell*, 543 F.3d at  
21 1043. Section 455(b) provides in relevant part, “[h]e shall also disqualify himself in the  
22 following circumstances: [w]here he has a personal bias or prejudice concerning a party.”  
23 28 U.S.C. § 455(b)(1). A motion under section 455 is addressed to, and must be decided  
24 by, the very judge whose impartiality is being questioned.” *Bernard v. Coyne*, 31 F.3d 842,  
25 843 (9th Cir. 1994). “Section 455 clearly contemplates that decisions with respect to  
26 disqualification should be made by the judge sitting in the case, and not by another judge.”  
27 *Id.*, quoting *United States v. Balistreri*, 779 F.2d 1191, 1202 (7th Cir. 1985).  
28

1 Under both recusal statutes, the substantive standard is “[w]hether a reasonable  
2 person with knowledge of all the facts would conclude that the judge's impartiality might  
3 reasonably be questioned.”<sup>1</sup> *Pesnell*, 543 F.3d at 1043, quoting *United States v.*  
4 *Hernandez*, 109 F.3d 1450, 1453 (9th Cir.1997). However, the bias must arise from an  
5 extrajudicial source and cannot be based solely on information gained in the course of the  
6 proceedings. *Id.*, citing *Liteky v. United States*, 510 U.S. 540, 554-56 (1994). “Judicial  
7 rulings alone almost never constitute a valid basis for a bias or partiality motion.” *In re*  
8 *Focus Media, Inc.*, 378 F.3d 916, 930 (9th Cir.2004), quoting *Liteky*, 510 U.S. at 555). “In  
9 and of themselves . . . they cannot possibly show reliance upon an extrajudicial source; and  
10 can only in the rarest circumstances evidence the degree of favoritism or antagonism  
11 required . . . when no extrajudicial source is involved.” *Id.*

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14 Judicial bias or prejudice formed during current or prior proceedings is sufficient for  
15 recusal only when the judge's actions “display a deep-seated favoritism or antagonism that  
16 would make fair judgment impossible.” *Liteky*, 510 U.S. at 555; *Pesnell*, 543 F.3d at 1044.  
17 “[E]xpressions of impatience, dissatisfaction, annoyance, and even anger” are not grounds  
18 for establishing bias or impartiality, nor are a judge's efforts at courtroom administration.  
19 *Liteky*, 510 U.S. at 555–56; *Pesnell*, 543 F.3d at 1044. Judicial rulings may support a  
20 motion for recusal only “in the rarest of circumstances.” *Liteky*, 510 U.S. at 555.

21  
22 Plaintiff's motion to recuse is unsupported by any affidavit. It reflects nothing more  
23 than disagreement with the Court's orders. The assertion that the undersigned did not  
24 liberally construe pro se filings is not alone a basis for recusal. *Liteky*, 510 U.S. at 554-56.  
25 There is a “presumption of honesty and integrity in those serving as adjudicators.” *Caperton*

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28 <sup>1</sup> Although § 144 applies only to District Court Judges, not Magistrate Judges, “[b]ecause the grounds for  
disqualification in § 455 and § 144 are similar, they may be considered together.” *United States v. Faul*, 748  
F.2d 1204, 1210 (8th Cir. 1984).

1 v. *A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 891 (2009), citing *Withrow v. Larkin*, 421 U.S.  
2 35, 47 (1975). Plaintiff has provided no facts suggesting a deep-seated, or any, favoritism  
3 on the part of the undersigned such as to make fair judgment impossible.

4 Plaintiff does not support his motion to recuse the undersigned.

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6 **IV. MOTION TO TRANSFER VENUE**

7 Plaintiff alternatively requests that if discovery relief is denied, the case should be  
8 transferred to the U.S. District Court for the Central District of California, and then stayed  
9 until Defendant responds to discovery.

10 Under 28 U.S.C. § 1391(b), venue is proper in this Court because the Defendant  
11 was employed at, and Plaintiff's claim arose at the Kern County Detention Center in  
12 Bakersfield, California, which is located in the Eastern District of California.<sup>2</sup> (ECF No. 17.)

13 Plaintiff's claim of bias and does not justify transfer of the action.

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15 **V. MOTION FOR VOLUNTARY DISMISSAL**

16 Plaintiff alternatively requests that, should discovery relief be denied, the matter be  
17 dismissed without prejudice.

18 Where defendant has appeared in the action by filing an answer, plaintiff may  
19 dismiss the action only by stipulation signed by all parties who have appeared, Fed. R. Civ.  
20 P. 41(a)(1)(ii), or court order on terms the court considers proper. Fed. R. Civ. P. 41(a)(2).

21 Here the Defendant has filed an answer (ECF No. 29.) No stipulation for dismissal  
22 signed by Defendant is before the Court.

23 The Court will direct Defendant to file and serve a response to Plaintiff's dismissal  
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<sup>2</sup> The federal venue statute requires that a civil action, other than one based on diversity jurisdiction, be  
27 brought only in "(1) a judicial district where any defendant resides, if all defendants reside in the same state,  
28 (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or  
a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which  
any defendant may be found, if there is no district in which the action may otherwise be brought." 28 U.S.C. §  
1391(b).

1 motion, advising if Defendant stipulates to dismissal as proposed. The motion will be held  
2 under submission pending Defendant's response.

3 **VI. ORDER**

4 For the reasons stated, it is HEREBY ORDERED that:

- 5
- 6 1. Plaintiff's motions to compel discovery and for reconsideration, recusal and  
7 transfer of venue (ECF Nos. 69, 70) are DENIED,
- 8 2. Defendant is directed to file, within fourteen days following entry of this order,  
9 a response to Plaintiff's dismissal motion (ECF Nos. 69 & 70), advising if  
10 Defendant stipulates to dismissal as proposed, and
- 11 3. Plaintiff's dismissal motion (ECF Nos. 69 & 70) is taken under submission  
12 pending Defendant's above response.  
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15 IT IS SO ORDERED.

16 Dated: October 30, 2014

17 */s/ Michael J. Seng*  
18 UNITED STATES MAGISTRATE JUDGE  
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