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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BERNARDO MENDIA,  
Plaintiff,  
v.  
JOHN M. GARCIA, et al.,  
Defendants.

Case No. [10-cv-03910-MEJ](#)  
**ORDER RE: MOTION TO  
DISQUALIFY JUDGE**  
Re: Dkt. No. 223

**INTRODUCTION**

Plaintiff Bernardo Mendia moves to disqualify this Court from presiding over this action. Mot., Dkt. No. 223. Defendants John Garcia, Ching Chang, and the United States of America (collectively, “Defendants”) filed an Opposition (Dkt. No. 233) and Plaintiff filed a Reply (Dkt. No. 237). This matter came before the Court on April 27, 2017. Having considered the parties’ arguments, the record in this case, and the relevant legal authority, the Court **DENIES** Plaintiff’s Motion.

**BACKGROUND**

This action arises out of allegedly unlawful immigration detainers that Garcia and Chang (together, the “Federal Defendants”), both U.S. Immigration and Customs Enforcement (“ICE”) agents, placed on Plaintiff in 2007 while he was in pretrial detention. Plaintiff, proceeding pro se, initiated this action in 2010. *See* Compl., Dkt. No 1. He filed his First Amended Complaint (“FAC”) on August 11, 2011. Dkt. No. 28.

On March 20, 2012, the Court dismissed the FAC on the ground that Plaintiff lacked Article III standing. Dkt. No. 51. Plaintiff appealed (Dkt. No. 52), and on April 8, 2014, the Ninth Circuit reversed, holding Plaintiff could show that Defendants caused his injury and thus

1 had standing to sue. *See Mendia v. Garcia*, 768 F.3d 1009 (9th Cir. 2014).

2 On December 17, 2014, the Court granted Plaintiff 90 days to obtain counsel and seek  
3 leave to file a second amended complaint (“SAC”). Dkt. No. 63. Plaintiff did not retain counsel,  
4 but timely sought leave to amend on March 10, 2015 (Dkt. No. 64) and filed his SAC on April 1,  
5 2015 (Dkt. No. 68). Defendants moved to dismiss the SAC. Dkt. Nos. 87, 90. Plaintiff  
6 subsequently obtained pro bono counsel (Dkt. No. 93; *see* Dkt. No. 101 at 1) and filed Oppositions  
7 to both Motions to Dismiss (Dkt. Nos. 96, 98). Thereafter, the parties notified the Court that  
8 Plaintiff intended to seek leave to file a third amended complaint (“TAC”) and stipulated to  
9 suspend the briefing deadlines related to the Motions to Dismiss pending the Court’s ruling on  
10 Plaintiff’s anticipated motion for leave to file a TAC. Dkt. Nos. 99-100.

11 On February 26, 2016, the Court granted in part and denied in part Plaintiff’s Motion for  
12 Leave to File a TAC. Dkt. No. 107. The Court permitted Plaintiff to amend the SAC to assert (1)  
13 Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 2671 et seq., claims against the United States for  
14 intentional infliction of emotional distress, false imprisonment, and negligence; and (2) *Bivens*<sup>1</sup>  
15 claims against the Federal Defendants for violations of Plaintiff’s First Amendment right to free  
16 speech, Fourth Amendment right against unreasonable seizure, and Fifth Amendment right to  
17 equal protection. *Id.* at 10-31. The Court found the Federal Defendants were not entitled to  
18 qualified immunity at that time. *Id.* at 26-31. The Court did not permit amendment as to  
19 Plaintiff’s proposed (1) Fifth Amendment self-incrimination and substantive due process claims,  
20 (2) Eighth Amendment excessive bail claim against the Federal Defendants, (2) declaratory relief  
21 claims, and (3) claims against ICE Field Office Director Timothy Aitken. *Id.* at 31-42. On April  
22 22, 2016, the Federal Defendants appealed that Order. Dkt. No. 134.

23 On May 10, 2016, the Court denied the Federal Defendants’ Motion to Dismiss the TAC.  
24 Dkt. No. 138. Among other things, the Court again found the Federal Defendants were not  
25 entitled to qualified immunity. *Id.* at 8-19. The Federal Defendants appealed this Order as well.  
26 Dkt. No. 146.

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28 <sup>1</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

1           On June 14, 2016, the Court “partially stay[ed] discovery against [the Federal] Defendants  
2 as to the *Bivens* claims but allow[ed] discovery against them restricted to their roles as witnesses  
3 in the FTCA claims against the United States.” Dkt. No. 143 at 10. The parties engaged in  
4 discovery thereafter and participated in a settlement conference.

5           Plaintiff’s counsel withdrew from representation on August 25, 2016. Dkt. No. 170.  
6 Consequently, the Court stayed all proceedings, vacated all deadlines, and referred Plaintiff to the  
7 San Francisco Federal Pro Bono Project to attempt to find an attorney to represent Plaintiff in  
8 settlement proceedings. Dkt. No. 171. The Pro Bono Project was unable to find new counsel for  
9 Plaintiff. *See* Dkt. No. 173. On October 31, 2016, the Court determined “the matter must proceed  
10 with Plaintiff representing himself pro se for the time being.” *Id.* It lifted the stay, scheduled a  
11 case management conference (“CMC”), and ordered the parties to meet and confer and file a joint  
12 CMC statement no later than one week prior to the conference. *Id.*

13           The parties filed separate CMC statements. Dkt. Nos. 175 (Defs.’ Statement), 177 (Pl.’s  
14 Statement). Defendants represented that “since November 18, 2016, Defendants’ counsel ha[d]  
15 repeatedly (and unsuccessfully) tried to seek Plaintiff’s compliance with the Court’s October 31,  
16 2016, order” but that “[a]s of filing, Defendants’ counsel ha[d] heard nothing more from Plaintiff  
17 about the Amended Case Management Statement, as well as other discovery-related matters.”  
18 Defs.’ Statement at 2 n.1. Defendants also noted several discovery concerns, including (1)  
19 Plaintiff’s failure to engage in discovery discussions; (2) Plaintiff’s failure to comply with his  
20 discovery obligations under Federal Rule of Civil Procedure 26(a)(1)(A)(iii); (3) Plaintiff’s  
21 unauthorized disclosure of documents covered by the parties’ protective order; and (4) difficulties  
22 with holding in-person meet and confer sessions, as Plaintiff had moved to Mexico. *Id.* at 7-13;  
23 *see* Pl.’s Statement at 1 (“Plaintiff is domiciled in Mexico City.”). In his statement, Plaintiff  
24 indicated he was in the process of obtaining counsel and requested a sixty-day continuance of the  
25 CMC to allow him to do so. Pl.’s Statement at 6-8.

26           The Court held the CMC on December 22, 2016. Attorney H. Nelson Meeks appeared on  
27 Plaintiff’s behalf for the limited purpose of representing Plaintiff at the CMC. Dkt. No. 183; *see*  
28 Dkt. No. 178. At the conference, the Court ordered Plaintiff to, among other things, recall any

1 documents covered by the protective order that he had disclosed to third parties. Dkt. No. 182 ¶ 2.  
2 The Court also set a further CMC for February 23, 2017 to give Plaintiff additional time to obtain  
3 counsel. *Id.* ¶ 4.

4 On February 16, 2017, Plaintiff filed a status report describing his unsuccessful search for  
5 counsel. Dkt. No. 190. Plaintiff also filed a Motion to Stay the proceedings pending resolution of  
6 the Federal Defendants' appeals. Dkt. No. 189.

7 The Court held a further CMC on February 23, 2017, at which Plaintiff appeared. The  
8 Court ordered, inter alia, Plaintiff to request his file from his former counsel and produce to  
9 Defendants documents pertaining to the computation of his damages. Dkt. No. 194 ¶¶ 1-2. The  
10 Court stated it would hold a hearing on Plaintiff's Motion to Stay and confirm Defendants had  
11 received the requested documents on March 23, 2017. *Id.* ¶ 4.

12 Just five days after the February 23 CMC, Defendants notified the Court that they had been  
13 unable to obtain Plaintiff's cooperation to engage in an in-person meet and confer. Dkt. No. 196.  
14 Defendants asserted Plaintiff failed to provide a list of his damages as required by Federal Rule of  
15 Civil Procedure 26(a), by Judge Beeler to facilitate settlement discussions, and by this Court on  
16 February 23, 2017. *Id.* at 7-8; Dkt. No. 194. Defendants also contended Plaintiff failed to appear  
17 at meet and confer sessions scheduled for December 15, 2016 and February 23, 2017, despite  
18 Plaintiff's representations that he would attend. Dkt. No. 196 at 8.

19 Plaintiff did not respond to the notice, and the Court set a hearing on the matter, which it  
20 construed as a motion to compel, for March 9, 2017. Dkt. No. 200. Plaintiff appeared in person at  
21 the March 9, 2017 hearing. The Court ordered him to appear in person at a meet and confer  
22 session with Defendants in the Court's jury room at 9:00 a.m. on March 23, 2017, the same day  
23 Plaintiff noticed the hearing on his Motion to Stay. Dkt. No. 203 ¶ 4. The Court also ordered  
24 Plaintiff to attend his deposition, which the United States noticed for March 22, 2017, absent a  
25 Court order excusing his appearance. *Id.* ¶ 3. On March 15, 2017, the Court denied Plaintiff's  
26 request to excuse his appearance at his deposition, finding good cause did not exist. Dkt. No. 210.

27 On March 17, 2017, Defendants filed a notice that the documents Plaintiff produced in  
28 response to the Court's March 9, 2017 Order were deficient, as they did not pertain to the

1 calculations of his damages. Dkt. No. 213. On March 21, 2017, Plaintiff filed three documents.  
2 First, Plaintiff responded to Defendants' March 17 notice by filing his own notice of the  
3 concurrently filed "Preliminary Calculation of Damages Specific to Federal Tort Claims Act  
4 Claims." Dkt. Nos. 215-16. Second, Plaintiff filed "Objections to Defendant United States of  
5 America's Notice of Deposition of Bernardo Mendia," in which he set forth eight objections to his  
6 March 22, 2017 deposition. Dkt. No. 217. Third, Plaintiff filed a "Notice of Unavailability of  
7 Bernardo Mendia Due to Medical Treatment and Request for Postponement of Proceedings." Dkt.  
8 No. 218. Plaintiff explained he was unavailable to participate in the proceedings until April 2017  
9 due to medication prescribed for an unspecified "medical treatment of an ailment that required  
10 medical attention on Sunday March 19th 2017." *Id.* at 1. In support, Plaintiff attached a "medical  
11 letter of Mr. Mendia's attending physician in Mexico City," which was written in Spanish. *Id.*;  
12 *see id.*, Ex. 1. Plaintiff did not attach a certified translation of the letter. Plaintiff requested the  
13 Court "postpone the proceedings . . . till [sic] Monday April 3rd 2017 for a status update" and  
14 represented that he "submit[ted] the motion [to stay] on the pleadings and has[d] no further  
15 argument to make before the Court on that Motion." *Id.* at 2.

16 The Court overruled Plaintiff's objections, denied Plaintiff's request to postpone  
17 proceedings, and ordered Plaintiff to attend his deposition. Dkt. No. 220. In declining to postpone  
18 the proceedings, the Court explained that it would not consider the letter from Plaintiff's physician  
19 because Plaintiff did not provide a certified translation of the document, and because Plaintiff did  
20 not explain why his medication prevented him attending the deposition, the Court-ordered meet  
21 and confer session, or the hearing. *Id.* at 2. The Court stated "[t]he deposition, meet-and-confer,  
22 and hearing shall proceed as previously ordered." *Id.* The Court further warned that "[i]f Plaintiff  
23 does not attend his deposition, he will be responsible for paying the reasonable fees and costs  
24 Defendants' counsel have incurred in travelling to San Francisco." *Id.*

25 Plaintiff did not attend his March 22 deposition or the March 23 meet and confer session  
26 and hearing on his Motion to Stay.<sup>2</sup> Dkt. Nos. 221, 225. Instead, on March 23, 2017, Plaintiff

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28 <sup>2</sup> The Court issued an Order to Show Cause as to why it should not impose sanctions on Plaintiff  
for his repeated disobedience to the Court's orders. Dkt. No. 224. The Court will address

1 filed the instant Motion to Disqualify the undersigned. *See* Mot.

2 **DISCUSSION**

3 “[A] judge has ‘as strong a duty to sit when there is no legitimate reason to recuse as he  
4 does to recuse when the law and facts require.’” *Clemens v. U.S. Dist. Court for Cent. Dist. of*  
5 *Cal.*, 428 F.3d 1175, 1179 (9th Cir. 2005) (quoting *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir.  
6 1995)). “‘Since a federal judge is presumed to be impartial, the party seeking disqualification  
7 bears a substantial burden to show that the judge is biased.’” *Harper v. Lugbauer*, 2012 WL  
8 734167, at \*1 (N.D. Cal. Mar. 6, 2012) (quoting *Torres v. Chrysler Fin. Co.*, 2007 WL 3165665,  
9 at \*1 (N.D. Cal. Oct. 25, 2007)).

10 Plaintiff seeks disqualification pursuant to 28 U.S.C. §§ 455(a), (b)(1), and (b)(4).  
11 “Section 455 imposes a self-enforcing duty on a judge to consider any obvious basis for recusal,  
12 even when the only basis is personal bias or prejudice.” *Ou-Young v. Roberts*, 2013 WL 6155877,  
13 at \*2 (N.D. Cal. Nov. 22, 2013) (citing *United States v. Sibla*, 624 F.2d 864, 868 (9th Cir. 1980)).  
14 The individual judge has the discretion to rule over a motion to disqualify.<sup>3</sup> *In re Bernard*, 31  
15 F.3d 842, 843 (9th Cir. 1994). Plaintiff asserts the same bases for recusal under each provision,  
16 namely, that the undersigned’s rulings demonstrate favoritism toward Defendants and that the  
17 undersigned has an interest in disposing of the action before the Ninth Circuit rules on the pending  
18 appeals.

19 **A. 28 U.S.C. § 455(a)**

20 1. Legal Standard

21 Section 455(a) requires that “[a]ny . . . magistrate judge of the United States shall  
22 disqualify h[er]self in any proceeding in which h[er] impartiality might reasonably be questioned.”  
23 28 U.S.C. § 455(a). “Section 455(a) covers circumstances that appear to create a conflict of  
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25 Plaintiff’s Motion to Stay once it resolves the Motion to Disqualify.

26 <sup>3</sup> 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; *Ou-Young*, 2013 WL 6155877,  
at \*2.

1 interest, whether or not there is actual bias.” *Herrington v. Sonoma Cty.*, 834 F.2d 1488, 1502  
 2 (9th Cir. 1987), *opinion amended on denial of reh’g sub nom. Herrington v. Cty. of Sonoma*, 857  
 3 F.2d 567 (9th Cir. 1988). The central concern of § 455(a) is “whether a reasonable person  
 4 perceives a significant risk that the judge will resolve the case on a basis other than the merits.”  
 5 *Clemens*, 428 F.3d at 1178 (internal quotation marks omitted). As such, the test for  
 6 disqualification under § 455(a) asks “whether a reasonable person with knowledge of all the facts  
 7 would conclude that the judge’s impartiality might reasonably be questioned.” *United States v.*  
 8 *Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (internal quotation marks omitted). “The ‘reasonable  
 9 person’ in this context means a ‘well-informed, thoughtful observer,’ as opposed to a  
 10 ‘hypersensitive or unduly suspicious person.’” *Id.* (quoting *In re Mason*, 916 F.2d 384, 386 (7th  
 11 Cir. 1990)). “The ‘objective’ standard is a check to avoid even the appearance of partiality, . . .  
 12 and ensure that the judge’s decision is reasonable to an informed observer.” *Holland*, 519 F.3d at  
 13 914.

14 But “§ 455(a) is limited by the ‘extrajudicial source’ factor which generally requires as the  
 15 basis for recusal something other than rulings, opinions formed or statements made by the judge  
 16 during the course of trial.” *Id.* at 913-14; *see King v. U.S. Dist. Court for Cent. Dist. of Cal.*, 16  
 17 F.3d 992, 993 (9th Cir. 1994) (“Recusal ordinarily is required only if the bias or prejudice stems  
 18 from an extrajudicial source, and not from a judge’s conduct or rulings during the course of  
 19 judicial proceedings.” (internal quotation marks omitted)); *Herrington*, 834 F.2d at 1502 (“Bias  
 20 under 28 U.S.C. § 455 must derive from extrajudicial sources.”). “[S]ection 455(a) claims are  
 21 fact driven, and as a result, the analysis of a particular section 455(a) claim must be guided, not by  
 22 comparison to similar situations addressed by prior jurisprudence, but rather by an independent  
 23 examination of the unique facts and circumstances of the particular claim at issue.” *Clemens*, 428  
 24 F.3d at 1178 (quoting *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999)). As a “general  
 25 rule . . . ‘rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-  
 26 factual matters’ do not form the basis of a successful recusal motion.” *Sivak v. Hardison*, 658  
 27 F.3d 898, 926 (9th Cir. 2011) (quoting *Clemens*, 428 F.3d at 1178) (brackets omitted).

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1           2.       Analysis

2           Plaintiff fails to show the undersigned must recuse herself pursuant to § 455(a). Plaintiff  
3 offers no facts that would cause a reasonable person to believe the undersigned is biased and  
4 cannot resolve the case on its merits. Plaintiff’s only purported evidence of bias is the Court’s  
5 rulings and orders, which he contends show favoritism toward Defendants (Mot. at 4-5); however,  
6 “[a]dverse findings do not equate to bias.” *United States v. Johnson*, 610 F.3d 1138, 1148 (9th  
7 Cir. 2010). Absent unusual circumstances, “judicial rulings alone almost never constitute a valid  
8 basis for a bias or partiality motion.” *Liteky v. United States*, 510 U.S. 540, 555 (1994) (citing  
9 *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)); see *Guadarrama v. Small*, 2010 WL  
10 3154555, at \*1 (S.D. Cal. Aug. 9, 2010) (“[E]ach of [p]etitioner’s asserted grounds for  
11 disqualification involve previous rulings in this matter, but ‘prior rulings in the proceeding’ do not  
12 require recusal ‘except in the rarest of circumstances.’” (quoting *Holland*, 519 F.3d at 914 n.5)).  
13 Such circumstances are absent here.

14           Plaintiff asserts that “[t]he key concern for [the undersigned] is resolving the case at bar  
15 well in advance of a ruling from the Ninth Circuit Court of Appeals on the consolidated appeals  
16 before that court. That is clearly an extra judicial fact[.]” Mot. at 5. Plaintiff offers no evidence  
17 to support this contention. Without more, Plaintiff’s assertion is mere speculation or suspicion.  
18 See *Clemens*, 428 F.3d at 1180 (“Section 455(a) does not require recusal based on speculation.”);  
19 *Hernandez v. Fed. Home Loan Mortg. Corp.*, 2013 WL 12142956, at \*1 (C.D. Cal. Jan. 4, 2013)  
20 (rejecting argument that it would be “‘inappropriate’ for [j]udge . . . to preside over the instant  
21 case because two of the [p]laintiffs . . . are also parties to a similar case now pending before the  
22 Ninth Circuit in which they also attack [the] [j]udge[’s] . . . impartiality” where plaintiff “fail[ed]  
23 to explain . . . how the pending appeal would affect [the] [j]udge[’s] . . . impartiality in this case.”).

24       **B.       28 U.S.C. § 455(b)(1)**

25           1.       Legal Standard

26           Section 455(b)(1) provides that a judge “ shall . . . disqualify h[er]self . . . [w]here [s]he  
27 has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary  
28 facts concerning the proceeding[.]” This provision “addresses the matter of personal bias and



1 prejudice specifically[.]” *Liteky*, 510 U.S. at 553; *see Sibla*, 624 F.2d at 867 (“[S]ection  
2 [455](b)(1) simply provides a specific example of a situation in which a judge’s impartiality might  
3 reasonably be questioned pursuant to section 455(a).” (internal quotation marks omitted)). The  
4 extrajudicial source factor applies equally to § 455(b)(1). *Liteky*, 510 U.S. at 553. But while §  
5 455(a) concerns the appearance of bias, “[§] 455(b) covers situations in which an *actual* conflict of  
6 interest exists, even if there is no appearance of one.” *Herrington*, 834 F.2d at 1502 (emphasis in  
7 original). In addition, Section 455(b) requires the judge to apply a “subjective standard . . . to  
8 determine whether [s]he can be truly impartial when trying the case. This is a test for actual bias.”  
9 *Holland*, 519 F.3d at 915.

10 2. Analysis

11 Plaintiff fails to show the existence of any actual conflict justifying recusal under §  
12 455(b)(1). Plaintiff’s reliance upon prior rulings and orders, without extrajudicial facts, is  
13 insufficient to prove actual bias. *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986) (“The  
14 alleged prejudice must result from an extrajudicial source; a judge’s prior adverse ruling is not  
15 sufficient cause for recusal.”). Because Plaintiff lacks evidence of actual bias, § 455(b)(1) does  
16 not require recusal here.

17 **B. Section 455(b)(4)**

18 1. Legal Standard

19 Section 455(b)(4) requires a judge to disqualify herself when “[sh]e knows that [s]he,  
20 individually or as a fiduciary, or h[er] spouse or minor child residing in his household, has a  
21 financial interest in the subject matter in controversy or in a party to the proceeding, or any other  
22 interest that could be substantially affected by the outcome of the proceeding.” “The latter basis  
23 of ‘any other interest,’ unlike the former basis which is not so modified, requires recusal only if  
24 these non-pecuniary interests “could be substantially affected by the outcome in the proceeding.”  
25 *Perry*, 790 F. Supp. 2d at 1119, 1124–25 (N.D. Cal. 2011), *aff’d sub nom. Perry v. Brown*, 671  
26 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct.  
27 2652 (2013) (quoting *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1308 (9th Cir. 1982)).

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