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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

GUSTAVO McKENZIE,

vs.

SERGEANT G. ELLIS, JOHN
MITCHELL, M. VORISE, W. TIETZ,
T. OCHOA, D. BELL and DOES 1 and 2,

Defendants.

CASE NO. 10cv1490-LAB (AJB)
**ORDER DENYING MOTION FOR
DISQUALIFICATION OR
RECUSAL**

Plaintiff Gustavo McKenzie has filed a motion for disqualification or recusal (the "Motion"). Recusal of federal judges is governed by 28 U.S.C. §§ 144 and 455. Under § 144, a party must show "personal bias or prejudice either against him or in favor of any adverse party" Under § 455(b), a judge must disqualify himself if any of certain specific conditions are met. "Under both statutes, recusal is appropriate where a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993) (internal quotation marks and citation omitted). The Ninth Circuit has explained that judges should only recuse when there is good reason for doing so: "[A] judge has as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts

1 require.” *Clemens v. U.S. Dist. Court for Cent. Dist. of California*, 428 F.3d 1175, 1179 (9th
2 Cir. 2005) (citation and internal quotation marks omitted).

3 McKenzie believes Judge Larry Burns has been “totally biased against [him] at/in
4 every single proceeding[] in this matter” (Motion, 3:15–17.) He then cites examples
5 of adverse rulings, or rulings he believes are adverse.

6 First, he points to the Court’s order denying entry of a Clerk’s default against certain
7 Defendants. McKenzie’s argument is based on his claim that these Defendants had missed
8 a pleading deadline.

9 Under these circumstances, there was no reason to enter default against these
10 Defendants. Under Fed. R. Civ. P. 55(a), an entry of default is not automatic if a pleading
11 deadline is missed; it is appropriate only where a defendant “has failed to plead or otherwise
12 defend” However, Defendants had already appeared and were defending against
13 McKenzie’s claims; they had removed this action from state court, and they also filed a
14 motion for extension of time in which to answer or otherwise respond, which was pending
15 while the Court was considering McKenzie’s request. The Court later granted the extension.
16 And even if default had been entered, default judgment would certainly have been denied.
17 See *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986) (citation omitted) (noting the
18 “general rule that default judgments are ordinarily disfavored” and explaining that “[c]ases
19 should be decided upon their merits whenever reasonably possible”). McKenzie objects both
20 to the date his motion was accepted for filing, which made no material difference; and the
21 Court’s decision to grant Defendant’s motion for an extension, which was not erroneous.

22 McKenzie next objects to the Court’s alleged delay in ruling on his application for an
23 extension of time in which to oppose Defendants’ motion to dismiss the complaint. After
24 making application however, he timely filed his opposition, mooting the request for an
25 extension. The request for an extension was denied as moot by Magistrate Judge Mitchell
26 Dembin, to whom it had been referred.

27 McKenzie next cites to some wording in the Court’s order adopting Magistrate Judge
28 Dembin’s report and recommendation. The Court’s order (Docket no. 34) noted that

1 McKenzie's objections to the report and recommendations "obliquely argued" that he had
2 served a particular Defendant with process.¹ The report and recommendation had found
3 that this Defendant was never served. The Court overruled this objection. McKenzie now
4 says he never claimed to have served all Defendants. Even assuming this were true, the
5 Court's rejection of an argument McKenzie says he did not make does not evidence bias.

6 Most of the examples McKenzie cites are not adverse rulings; they are merely rulings
7 he thinks should have been worded or handled differently. But even if they were, adverse
8 rulings do not reasonably show bias. See *Taylor v. Regents of Univ. of California*, 993 F.2d
9 710, 712–13 (9th Cir. 1993). McKenzie's own belief that the Court is biased against him
10 does not make recusal proper.

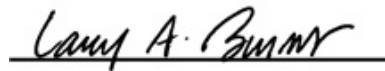
11 For these reasons, McKenzie's motion for recusal or disqualification is **DENIED**.

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13 **IT IS SO ORDERED.**

14 DATED: January 5, 2012

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HONORABLE LARRY ALAN BURNS
United States District Judge

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27 ¹ McKenzie's objections state that "[o]n 6-21-10, the defendants were served with the
28 complaint, summons, and related documents." (Docket no. 33, 2:16–17.) The Court construed this as meaning all Defendants had been served on that date, and construed this as an objection to the report and recommendation's finding that one Defendant had never been served.