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20 **IN THE UNITED STATES DISTRICT COURT**
21 **FOR THE DISTRICT OF ARIZONA**

22 Manuel de Jesus Ortega Melendres,) CV-07-2513-PHX-GMS
23 *et al.*,)
24)
25 Plaintiffs,) **RESPONSE IN OPPOSITION TO**
26) **SHERIFF ARPAIO AND CHIEF**
27 v.) **DEPUTY SHERIDAN'S MOTION**
28) **FOR RECUSAL OR**
Joseph M. Arpaio, *et al.*,) **DISQUALIFICATION OF**
Defendants.) **THE COURT**
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INTRODUCTION

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2 Plaintiffs respectfully submit this Response in Opposition to Sheriff Arpaio and
3 Chief Deputy Sheridan’s Motion for Recusal or Disqualification of the Court. The
4 motion fails to meet the standards for recusal in 28 U.S.C. §§ 144 and 455, and runs afoul
5 of the long-settled principle that rulings and judicial remarks made during the course of
6 litigation are almost never a basis for recusal. *Liteky v. United States*, 510 U.S. 540, 550-
7 51 (1994). The motion also fails to demonstrate actual bias or an appearance of bias. The
8 Court’s actions—questioning the movants about MSCO investigations—were proper and
9 relevant to the ongoing contempt hearing and the question of remedies to ensure
10 compliance with prior orders. The motion is also untimely and appears to be filed for
11 purposes of manipulation and delay. In the words of ethics expert Professor Stephen
12 Gillers, each of the asserted grounds for recusal “is baseless. Some are frivolous.”
13 Gillers Decl. ¶ 5. The motion should be denied.

FACTUAL BACKGROUND

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15 The procedural history of this case is centrally relevant under the recusal
16 standard, since the Court’s actions and statements must be viewed in light of the evidence
17 it has seen. *Liteky*, 510 U.S. at 550-51.

Evidence of Sheriff Arpaio and Chief Deputy Sheridan’s Defiance of the Court

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19 During the 18 months between the issuance of the Supplemental Permanent
20 Injunction [Doc. 606] and the beginning of the contempt hearing on April 21, 2015, the
21 Court saw evidence that top commanders of the MCSO, including Sheriff Arpaio and
22 Chief Deputy Sheridan, had repeatedly violated court orders, made statements that
23 mischaracterized and disparaged the Court’s orders to MSCO personnel, and expressed
24 defiance towards the Court’s orders. Those statements are set forth in Plaintiffs’
25 Memorandum of Law and Facts re Contempt Proceedings and Request for Order to Show
26 Cause at 12-16 [Doc. 843], incorporated by reference here. *See also* Tr. of Status
27 Conference (Oct. 28, 2014) at 68:25-72:20. Among other things, in August 2013, Sheriff
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1 Arpaio stated in a letter to supporters that he “won’t stand for” a Court-appointed
2 monitor. [Doc. 843 at 15]. And during the contempt hearing, Plaintiffs introduced a
3 video recording of a press interview in October 2013, after issuance of the Supplemental
4 Permanent Injunction, in which the Sheriff proclaimed, “I’m an elected constitutional
5 sheriff, and no one is going to take away my authority that I have under the Constitution.”
6 Ex. 193C; Tr. of Apr. 23, 2015 at 581:25-582:17. And in October 2014, Sheriff Arpaio
7 made another defiant statement, telling a reporter that he would conduct the Guadalupe
8 operation—one of the saturation patrols the Court held to have violated Plaintiffs’
9 constitutional rights—“all over again.” Tr. of Oct. 28, 2014 at 61:9-77:5; Tr. of Apr. 23,
10 2015 at 583:20-584:6.

11 **Grounds for Civil Contempt**

12 In addition, over a period of months starting in May 2014, the three charged
13 grounds for contempt came to light. In April-May 2014, a former MCSO deputy,
14 Charley Armendariz, who had been a key witness at trial, was arrested and subsequently
15 committed suicide. MCSO searched Armendariz’s home pursuant to a criminal warrant.
16 The search ultimately revealed, among other things, that there was a widespread practice
17 among MCSO personnel of recording traffic stops, that MCSO had no policy governing
18 the recording of traffic stops, and that such recordings should have been disclosed to
19 Plaintiffs before trial, but were not. Tr. of of Dec. 4, 2014 at 22:15-22:25. The failure to
20 disclose the recordings before trial is one of three charged grounds for civil contempt.
21 [Doc. 880 at 8, 18-21].

22 The second ground for contempt arose on May 14, 2014. During a status
23 conference on that date, the Court ordered Sheriff Arpaio and Chief Deputy Sheridan to
24 cooperate with the Monitor in formulating a plan to “quietly” collect the recordings of
25 traffic stops throughout MCSO. [Doc. 880 at 22]; Tr. of May 14, 2014 Status Conference
26 at 61 [Doc. 700]. The movants violated that court order that same day, by putting into
27 action a plan without the Monitor’s approval, and then agreeing to a different plan in
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1 consultation with the monitor, while failing to disclose that the initial, unapproved plan
2 had already been implemented. [Doc. 880 at 23].

3 The third ground for contempt came to light during the November 20, 2014 status
4 conference when Defendants' counsel disclosed that one of the traffic stop recordings
5 recovered by the MCSO during the Armendariz investigations demonstrated that deputies
6 had violated the Court's preliminary injunction order. Counsel also revealed that the
7 Court's preliminary injunction order had never been communicated to MCSO deputies.
8 Tr. of Nov. 20, 2014 at 67:10-67:24 [Doc. 804].

9 **Relevance of MCSO's Internal Investigations**

10 During the same period leading to the contempt hearing, the adequacy of
11 MCSO's internal investigation processes became a central issue. Immediately upon
12 learning of the Armendariz investigations in May 2014, Plaintiffs raised concerns about
13 MCSO's internal investigation process. Tr. of May 14, 2014 at 102:6-18. In September
14 2014, the Monitor reported serious deficiencies with MCSO's Armendariz-related
15 internal investigations. [Doc. 795-1]. Plaintiffs also raised numerous issues with
16 MCSO's internal investigations and gave notice of their intent to seek remedies to protect
17 the interests of the Plaintiff class. *See* Plaintiffs' Response to the Monitor's Report at 7-
18 10 (Oct. 21, 2014) [Doc. 753]; Tr. of Dec. 4, 2014 at 23:1-24:21 [Doc. 812].

19 Prior to the beginning of the contempt hearing on April 21, 2015, the Court
20 indicated that it would not limit the scope of the evidence to liability for civil contempt,
21 but would take evidence on the remedies needed to ensure compliance with the Court's
22 prior orders, with a particular focus on the adequacy of MCSO's internal investigations.
23 *See, e.g.*, Tr. of Mar. 20, 2015 at 11:6-12, 12:21-25, 13:1-21; Tr. of Apr. 21, 2015 at
24 15:19-22; [Doc. 1007]; [Doc. 880 at 25].

25 **Questioning About Defendants' Investigations of the Court**

26 During the contempt hearing, as during the bench trial, the Court questioned
27 witnesses after the parties' counsel, and gave counsel an opportunity to object to
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1 questions and to re-examine the witnesses after its examination. On April 23, 2015, the
2 Court questioned Sheriff Arpaio, beginning with the grounds for civil contempt. The
3 Court also questioned the Sheriff about the re-assignment of Captain Steven Bailey from
4 the command of the Special Investigations Division, with oversight of its subunit the
5 Human Smuggling Unit (which had been primarily responsible for the constitutional
6 violations found after trial), to the command of the Internal Affairs unit. Tr. of Apr. 23,
7 2015 at 637:2-642:22. Bailey's reassignment occurred during a time when the Human
8 Smuggling Unit was under investigation by the Internal Affairs department because of
9 misconduct uncovered after Deputy Armendariz's arrest and death, and the apparent
10 conflict was an issue in the litigation leading up to the contempt hearing.

11 The Court then questioned Sheriff Arpaio about an article that had appeared in the
12 *Phoenix New Times* newspaper on June 4, 2014, reporting that two MCSO detectives,
13 Brian Mackiewicz and Travis Anglin, a member of the MCSO's civilian "Cold Case
14 Posse," Mike Zullo, and a paid confidential informant named Dennis Montgomery, were
15 engaged in an investigation of a "bizarre conspiracy theory" that the Court and the U.S.
16 Department of Justice were conspiring to "get" Sheriff Arpaio. Wang Decl., Ex. A. The
17 Court questioned the Sheriff about the source of funding for the investigation and
18 whether Captain Bailey was involved in that process. Tr. of Apr. 23, 2014 at 658:4-
19 659:1.

20 During the Court's questioning of Sheriff Arpaio about the MCSO-Montgomery
21 investigation reported in the *Phoenix New Times* article, the Sheriff testified that there
22 was a second investigation involving the Court. The Sheriff testified that an outside
23 investigator hired by Defendants' then-counsel had investigated an allegation that the
24 Court's spouse had stated to a woman named Grissom that "Judge Snow wanted to do
25 everything to make sure I'm not elected." Tr. of Apr. 23, 2015 at 654:6-655:12.

26 The next day, on April 24, 2015, Defendants' counsel examined Chief Deputy
27 Sheridan about the investigations implicating the Court and the Court's spouse. After
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1 asking defense counsel if she had any objection and emphasizing that she should interrupt
2 with any objection, Tr. of Apr. 24, 2015 at 966:4-11, the Court joined in questioning of
3 Chief Deputy Sheridan on the subject of Karen Grissom's allegations about the Court's
4 spouse. In response to the Court's questions, Sheridan testified that Defendants' counsel
5 had hired a private investigator who had interviewed Karen Grissom and her family, and
6 that MCSO did not do anything to follow up on the investigation. *Id.* at 968:5-9. The
7 Court then proceeded to question Chief Deputy Sheridan about the grounds for contempt,
8 MCSO's internal affairs operations, and other matters, and finally asked Chief Deputy
9 Sheridan about the MCSO-Montgomery investigation.

10 Chief Deputy Sheridan testified and stated publicly that MCSO ultimately decided
11 not to pursue the investigation of the Grissom allegations relating to the Court's spouse.
12 Tr. of Apr. 24, 2015 at 968:5-9; Tr. of May 14, 2015 at 10:1-24. Both Arpaio and
13 Sheridan testified that they concluded that confidential informant Dennis Montgomery
14 was not credible. Tr. of Apr. 23, 2015 at 650:18-25, Tr. of Apr. 24, 2015 at 961:1-11,
15 1002:14-15. Arpaio, however, testified that he did not know whether the Montgomery
16 investigation was still ongoing. Tr. of Apr. 23, 2015 at 652:5-6. Documents later
17 produced by the Defendants indicate that the MCSO-Montgomery investigation
18 continued at least up until the eve of the contempt hearing. Wang Decl., Ex. E.

19 The Court directed the Sheriff to preserve all documents relating to both of these
20 investigations. Tr. of Apr. 23, 2015 at 653:9-654:2, 655:13-17, 656:3-6, 656:25-657:2.
21 The Court later directed that copies of the documents be produced and instructed defense
22 counsel to review the material for attorney-client privilege, work product, and
23 confidential information. Tr. of May 8, 2015 at 30:1-4. The Court also sua sponte raised
24 a potential security issue about documents that Dennis Montgomery purportedly had
25 obtained from the U.S. Central Intelligence Agency, and proposed that the Monitor and
26 Defendants review such documents prior to disclosure to the Plaintiffs, and that defense
27 counsel communicate with the CIA. Both Plaintiffs' and Defendants' counsel agreed to
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1 that proposal. Tr. of May 8, 2015 at 30:25-31:15. Contrary to Defendants' assertions,
 2 the Court did not order the production of documents that may be protected by the
 3 attorney-client privilege or work product doctrine.

4 At the close of the four days of evidence, the Plaintiffs had not completed their
 5 case-in-chief. Prior to the evidentiary hearing, on April 7, 2015, the Court had
 6 anticipated that four days of testimony might be insufficient and tentatively set additional
 7 dates for a continuation of the evidentiary hearing, on June 16-19 and 23-26, 2015. Tr. of
 8 Apr. 7, 2015 at 32:13-23.

9 ARGUMENT

10 I. The Court's Actions During the Contempt Hearing Do Not Show Actual 11 Bias and Are Not a Ground for Recusal

12 In moving to disqualify the Court based upon actual bias under 28 U.S.C.
 13 § 455(b)(1), Sheriff Arpaio and Chief Deputy Sheridan point to the Court's actions and
 14 statements during the contempt proceeding.¹ The motion therefore fails because "rulings
 15 and conduct" during litigation "almost never constitute a valid basis for a bias or
 16 partiality motion." *Liteky*, 510 U.S. at 555; *see also In re Marshall*, 721 F.3d 1032, 1041
 17 (9th Cir. 2013); *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012). Judicial
 18 actions or remarks in the litigation will be a ground for recusal only if "they reveal such a
 19 high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*,

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 23 ¹ Although they do not assert it as a basis for recusal, the movants insinuate that the
 24 timing of the Court's trial ruling was "curious and problematic" because it issued nine
 25 months after the bench trial and purportedly one week before a recall petition against
 26 the Sheriff was due. Defendants' imputation of bad intent due to the time it took the
 27 Court to issue its 142-page trial ruling is unwarranted. The movants also fail to
 28 mention that the Sheriff faced a regular election six months earlier, in November 2012
 (see [http://recorder.maricopa.gov/electionarchives/2012/11-06-
 2012%20Final%20Summary%20Report.pdf](http://recorder.maricopa.gov/electionarchives/2012/11-06-2012%20Final%20Summary%20Report.pdf))—a more opportune time for a court, if it
 had been biased, to time a ruling for improper purposes.

1 510 U.S. at 555; *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000). The
2 motion entirely fails to meet this standard.

3 As evidence of actual bias, the motion cites only “rulings and conduct” during the
4 contempt hearing—that the Court asked leading questions on “irrelevant matters; offered
5 “his own testimony”; was “argumentative” with Chief Deputy Sheridan on the stand;
6 interrupted Chief Deputy Sheridan and “challenged” his decision to use Dennis
7 Montgomery as a confidential informant; ordered the production of documents relating to
8 non-party Dennis Montgomery and his attorney Larry Klayman “that may be protected
9 by the work product doctrine or attorney client privilege”; inquired into matters
10 “unrelated to the contempt proceeding” and thereby purportedly deprived Sheriff Arpaio
11 of his due process rights; and “improperly expanded” the Monitor’s authority into
12 purportedly irrelevant matters. These are matters that should be raised, if at all, through
13 appeal, not through a recusal motion. *Liteky*, 510 U.S. at 555.

14 The motion also mischaracterizes the record. The Court questioned Sheridan
15 about how the MCSO-Montgomery investigation was conducted in order to elicit the
16 evidence. Tr. of Apr. 24, 2015 at 1000:19-1008:13. Nothing in the course of that
17 examination can fairly be construed as “argumentative,” as the movants claim. But even
18 if it were true that the Court expressed hostility toward Sheridan, that would not be a
19 ground for recusal. *See Gillers Decl.* ¶ 7.

20 The judge who presides at a trial may, upon completion of the evidence, be
21 exceedingly ill disposed toward the defendant, who has been shown to be a
22 thoroughly reprehensible person. But the judge is not therefore recusable for bias
23 or prejudice, since his knowledge and the opinion it produced were properly and
necessarily acquired in the course of the proceedings, and are indeed sometimes
(as in a bench trial) necessary to completion of the judge's task.

24 *Liteky*, 510 U.S. at 550-51. Thus, a judge’s “expressions of impatience, dissatisfaction,
25 annoyance, and even anger” during litigation are not a ground for recusal. *Id.* at 555-56.

26 Moreover, none of the challenged actions by the Court was erroneous, much less
27 a ground for recusal. It is entirely proper for a court to examine witnesses and to
28 comment on the evidence (which Sheriff Arpaio and Chief Deputy Sheridan attempt to

1 mischaracterize as “testifying,” *see* Gillers Decl. ¶ 8). Fed. R. Evid. § 614(b). A court
2 “should not hesitate to ask questions for the purpose of developing the facts; and it is no
3 ground of complaint that the facts so developed may hurt or help one side or the other.”
4 *Barba-Reyes v. United States*, 387 F.2d 91, 93 (9th Cir. 1967); *see also United States v.*
5 *Larson*, 507 F.2d 385, 389 (9th Cir. 1994); *United States v. Robinson*, 449 F.2d 925, 933
6 (9th Cir. 1971); *Hanson v. Waller*, 888 F.2d 806, 810, 813 (11th Cir. 1989) (judges may
7 ask leading questions even in jury trial); *Ruiz v. Estelle*, 679 F.2d 1115, 1130 (5th Cir.
8 1982), *amended in part and vacated in part on other grounds*, 688 F.2d 266 (5th Cir.
9 1982).

10 The Court’s questions do not indicate any bias. Gillers Decl. ¶¶ 16-20. They
11 were a proper exercise of the Court’s inherent power to protect the integrity of the
12 judicial process and ensure compliance with its prior orders, as they were relevant to
13 Sheriff Arpaio’s attitude toward the Court and compliance with the Court’s orders and to
14 the subject of MCSO’s internal investigations. The *Phoenix New Times* article that the
15 Court introduced as an exhibit indicated that the MCSO-Montgomery investigation was
16 aimed at developing a conspiracy theory to discredit the Court during that same time
17 period (October 2013 through April 2015) in which the movants had expressed defiance
18 of the Court’s Supplemental Permanent Injunction, in which there were numerous
19 instances of noncompliance with the Court’s orders, and leading up to the April
20 evidentiary hearing on contempt charges and remedies. Documents later produced by the
21 Defendants support the newspaper account that—contrary to the testimony of Arpaio and
22 Sheridan—the MCSO-Montgomery investigation targeted the Court. Wang Decl., Ex. B,
23 F. The documents also reveal that MCSO personnel continued to press Dennis
24 Montgomery for results up until the eve of the contempt hearing, even though they had
25 already concluded that he was not credible. Wang Decl., Ex. C, D, E. The evidence thus
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1 suggested that the MCSO-Montgomery investigation might be an attempt to undermine
2 the Court's authority rather than comply with its lawful orders.² This was particularly
3 problematic in light of the Monitor's recent finding that MCSO was only 29 percent in
4 compliance with the Supplemental Injunction despite the passage of one-and-a-half years.

5 The movants' allegation that the Court "requested that the U.S. Attorney function
6 as his investigator to determine whether criminal contempt of his Preliminary Injunction
7 had occurred" (Mot. at 7) is false. The Court invited the U.S. Attorney's Office to attend
8 status conferences in this case so that the government would be apprised of the facts and
9 would be in a position to make an independent determination whether to proceed with a
10 criminal contempt prosecution, if the Court were to make a referral in the future. Tr. of
11 Dec. 4, 2014 at 29:5-9, 29:24-30:3. Defendants did not object to the presence of a federal
12 prosecutor or even to the Court's suggestion that relevant documents be provided to the
13 U.S. Attorney's Office. *Id.* at 30:4-14. Moreover, Defendants themselves subsequently
14 sought the participation of the United States Attorney's Office in their efforts to settle the
15 contempt issues. Tr. of Feb. 26, 2015 at 32:23-34:1, 34:2-6, 34:8-17. Contrary to the
16 movants' assertion, the U.S. Attorney's Office never declined any referral, as none has
17 yet been made. Tr. of Mar. 20, 2015 at 28:2-6.

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20 ² Even more troubling, as the Court noted in a post-hearing status conference, the
21 evidence indicates that Dennis Montgomery informed MCSO personnel—with Chief
22 Deputy Sheridan's knowledge—that he was using a database of information
23 "harvested by the CIA and confiscated by him" in his investigation, and also purported
24 to be tracking telephone calls between the Court, the Attorney General, the Assistant
25 Attorney General, and the U.S. Attorney for the District of Arizona. Tr. of May 14,
26 2015 at 44:22-45:2, 45:10-16; Wang Decl., Ex. C, F. This implicates possible
27 violations of federal criminal laws by MCSO personnel in the course of the MCSO-
28 Montgomery investigation. See, e.g., 18 U.S.C. §§ 793(b)-(f) (taking or
communication of documents relating to national defense); 798 (disclosure of
classified information); 1503 (intimidation of federal court and obstruction of justice);
1509 (obstruction of court orders); 1924 (unauthorized removal of classified
information); 2511 (intercepting electronic communications); 2701 (unlawful access to
stored communications).

1 Further, the Court properly authorized the Monitor to investigate MCSO's
2 "investigative operations." Overruling the Defendants' objections, the Court stated that it
3 would not require the Monitor to give Defendants advance notice of topics of interviews,
4 but that Defendants could contemporaneously raise any objections during any interviews
5 and that the Court would make itself available to hear such objections. The Court further
6 stated that the Monitor's investigations would be limited to the enforcement of the
7 Court's prior orders. Tr. of May 14, 2015 at 53:12-56:25. There was nothing improper
8 in these orders since they were directly relevant to enforcing compliance with the Court's
9 prior orders.

10 Sheriff Arpaio and Chief Deputy Sheridan also mischaracterize the record when
11 they allege that the Court ordered the disclosure of confidential materials that "may be"
12 subject to the attorney-client privilege or work product immunity.³ In fact, the Court
13 gave the Defendants an opportunity to review documents for privilege and to produce a
14 log prior to producing documents relating to the MCSO-Montgomery investigation, and
15 the Court also proposed procedures to ensure that any confidential or sensitive documents
16 would be protected from disclosure. Tr. of May 8, 2015 at 30:1-4, 30:25-31:15.
17 Moreover, even if the Court had issued such an order, any objection should be addressed
18 through ordinary litigation, not through a recusal motion. *Liteky*, 510 U.S. at 555.

19 Finally, Sheriff Arpaio and Chief Deputy Sheridan's assertion that the Court
20 violated their due process rights by failing to give notice of its intent to question them
21 about the MCSO-Montgomery investigations is misplaced. The Court stated clearly prior
22 to the beginning of the evidentiary hearing that subjects relating to remedies, and

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24 ³ The movants also allege that the Court "apparently took evidence outside of court."
25 Mot. at 15. In fact, the Court stated on the record that it had been informed that the
26 Cold Case Posse "has its own funds" and asked Sheriff Arpaio whether that was
27 "possible." Tr. of Apr. 23, 2015 at 658:1-2. Defense counsel did not object. The
28 record reveals that the Court did not take the information at face value, but asked the
Sheriff whether it was true. The Court's actions were proper. Gillers Decl. ¶ 15.

1 particularly relating to MCSO investigations, would be within the scope of the hearing.
2 *See* Tr. of Mar. 20, 2015 at 11:6-12, 12:21-25, 13:1-21; [Doc. 880 at 25]; [Doc. 1007 at
3 2]; Tr. of Apr. 21, 2015 at 15:19-22. Arpaio and Sheridan were not unfairly surprised;
4 they acknowledged reading the *New Times* article and were also provided a copy by the
5 Court. Tr. of Apr. 23, 2015 at 642:17-25, 643:1-24; Tr. of Apr. 24, 2015 at 959:9-10,
6 959:17-18. Defense counsel made no objection to the Court's questions and indeed
7 initiated the questioning of Sheridan on this subject.

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9 **II. Neither the Court nor the Court's Spouse Has a Disqualifying Interest**

10 Sheriff Arpaio and Chief Deputy Sheridan argue for recusal under 28 U.S.C.
11 § 455(b)(5)(iv), which provides for recusal when a judge, his or her spouse, or a person
12 within a third degree of relationship to either of them, "[i]s to the judge's knowledge
13 likely to be a material witness in the proceeding," and under 28 U.S.C. § 455(b)(1),
14 which provides for recusal when a judge "has a personal bias or prejudice concerning a
15 party, or personal knowledge of disputed evidentiary facts concerning the proceeding."
16 These arguments fail on the merits.

17 First, the movants argue that recusal is required because the Court's brother-in-law
18 is a partner in the Washington, D.C. office of Covington & Burling (Mot. at 13), but they
19 *expressly* waived any recusal argument when they learned of this fact in 2012. *See* [Doc.
20 537 (order setting status conference on issue)]; Tr. of June 29, 2012 at 5:19-7:2 (Court's
21 offer to recuse on request of any party); *id.* at 16:6-17:2 (Defendants statement that they
22 would be prejudiced by Court's recusal and any order vacating prior orders); [Doc. 541
23 (Defendants' written waiver of appeal of any recusal issue)]; [Doc. 542]. Moreover, the
24 Court's previous ruling on the merits was correct. Gillers Decl. ¶¶ 9-10.

25 Sheriff Arpaio and Chief Deputy Sheridan also assert that the Court must recuse
26 because the interests of the Court and the Court's spouse are "substantially affected by
27 the outcome of this proceeding." Mot. at 13. The movants now insinuate that the Court's
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1 interests are at stake because the allegations of the MCSO-Montgomery investigation—
2 that the Court conspired with the Attorney General of the United States and others to
3 subvert the random case assignment process—may actually be true. Mot. at 13. This
4 assertion fails because both Sheriff Arpaio and Chief Deputy Sheridan testified that they
5 concluded that the MCSO-Montgomery investigation was not credible and indeed was
6 “junk.” Tr. of Apr. 23, 2015 at 650:18-25; *see also* Tr. of Apr. 24, 2015 at 961:1-11,
7 1002:14-15. Documents relating to the MSCO-Montgomery investigation support that
8 testimony. Wang Decl., Ex. C, D, E.

9 Sheriff Arpaio and Chief Deputy Sheridan further assert that recusal is required
10 under § 455(b)(5) because the Court’s spouse is a material witness. While they do not
11 explain, presumably they assert that she is a witness on the factual issues arising from
12 their investigation of Karen Grissom. This assertion should be rejected because Chief
13 Deputy Sheridan testified that after a private investigator hired by their counsel
14 interviewed Ms. Grissom and her family members in 2013, MCSO chose not to pursue
15 the allegations. Tr. of Apr. 24, 2015 at 968:5-9; Tr. of May 14, 2015 at 10:1-24. And
16 Defendants’ own counsel, after reviewing the private investigators’ report, stated that
17 “the Grissom information is so fundamentally flawed in its substance that it likely cannot
18 be used in a Rule 60 motion, appeal, or otherwise, without the lawyer who does so
19 violating the federal courts rule of civil procedure and the Arizona Rules of Professional
20 Conduct.” [Doc. 1115 at 13-14 (letter from Timothy J. Casey to Joseph M. Arpaio dated
21 Nov. 6, 2013)]. This is likely because of the numerous inconsistencies in the various
22 statements that Karen and Dale Grissom made about their meeting with Mrs. Snow. *See*
23 Gillers Decl. ¶¶ 4.1-4.4, 12.

24 Notably, in asserting the grounds for recusal for actual bias, Sheriff Arpaio and
25 Chief Deputy Sheridan do not explicitly include Karen Grissom’s allegation which—in
26 the strongest version, appearing in her Facebook message to the Sheriff more than a year
27 after her alleged conversation with Mrs. Snow—was that that Mrs. Snow stated that the
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1 Court “hates” the Sheriff and “will do anything to get [him] out of office.” *See* Mot. at
2 14-16 (grounds for assertion of actual bias based upon Court’s statements and actions
3 during contempt proceedings). But in any event, the Court’s spouse is not a material
4 witness on any issue in this litigation. Whether Mrs. Snow made the alleged statement to
5 Mrs. Grissom is not admissible evidence of the Court’s state of mind. Gillers Decl.
6 ¶¶ 13-14. Moreover, a court has an independent and self-executing obligation under 28
7 U.S.C. § 455(b)(1) to recuse if it has an actual bias, and the Court has not done so here.
8 Gillers Decl. ¶ 14.

10 **III. No Reasonable Observer Would Perceive an Appearance of Bias**

11 Sheriff Arpaio and Chief Deputy Sheridan move for recusal based upon 28
12 U.S.C. § 455(a), which requires “[a]ny justice, judge, or magistrate judge of the United
13 States [to] disqualify himself in any proceeding in which his impartiality might
14 reasonably be questioned.” Section 455(a) imposes an objective standard, requiring
15 recusal when “a reasonable third-party observer would perceive that there is a ‘significant
16 risk’ that the judge will be influenced by the threat and resolve the case on a basis other
17 than the merits.” *United States v. Holland*, 519 F.3d 909, 914 (9th Cir. 2008). The
18 standard is applied based upon “all the relevant facts” and an examination of the record
19 and the law. *Id.* (citing *LoCascio v. United States*, 473 F.3d 493, 496 (2d Cir. 2007)).

20 As an initial matter, Sheriff Arpaio and Chief Deputy Sheridan do not clearly
21 state the basis for their motion under § 455(a), but Plaintiffs presume that it is based upon
22 the same allegations underlying their assertions under §§ 455(b)(1) and (b)(5). The
23 motion therefore should fail because a reasonable observer would understand that in the
24 context of the record, as set forth above, none of the Court’s conduct gives rise to any
25 appearance of improper bias. “Rumor, speculation, beliefs, conclusions, innuendo,
26 suspicion, opinion, and similar non-factual matters” are generally not sufficient to
27 warrant recusal under § 455(a). *Clemens*, 428 F.3d at 1178. Nor are “baseless personal
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1 attacks on or suits against the judge by a party,” or “quotes attributed to the judge or
2 others, but which are in fact false or materially inaccurate or misleading,” or “attempts to
3 intimidate the judge.” *Id.* at 1179.

4 Moreover, Sheriff Arpaio and Chief Deputy Sheridan’s argument under § 455(a)
5 should fail because courts have held that a party cannot manufacture a basis for recusal.
6 In this case, the movants appear to argue that there is an appearance of bias because they
7 themselves launched investigations to develop proof that the Court is biased, one of those
8 investigations (the MCSO-Montgomery investigation) was leaked to the press,⁴ and the
9 Court inquired about the news report, leading to the Sheriff’s testimony about both the
10 MCSO-Montgomery and Grissom investigations. Contrary to the testimony of Arpaio
11 and Sheridan, the investigations were done by MCSO and MSCO’s paid agents and they
12 did attempt to call the Court’s impartiality into question. Sheriff Arpaio’s testimony that
13 the MCSO-Montgomery investigation did not target the Court is contradicted by
14 documents later produced by Defendants. Wang Decl., Ex. F. And when asked whether
15 MCSO had investigated the Court’s spouse, Chief Deputy Sheridan equivocated by
16 answering “it depends on how you define, ‘investigated your wife.’” Tr. of Apr. 24, 2015
17 at 967:11-14. But in fact, Chief Deputy Sheridan’s complete testimony and documents
18 produced under an order by Magistrate Judge Boyle demonstrate that the investigation
19 was aimed at determining whether Mrs. Snow made the statement. [Doc. 1115].

20 Controlling cases do not require recusal in these circumstances. In cases where a
21 party has made allegations against the Court, for example, the Ninth Circuit has held that
22 recusal is not required. “A judge is not disqualified by a litigant’s suit or threatened suit
23 against him, ... or by a litigant’s intemperate and scurrilous attacks.” *United States v.*

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⁴ One of the documents produced by the Defendants suggests that an MCSO investigator leaked the MCSO-Montgomery investigation to the *Phoenix New Times*. Wang Decl., Ex. B.

1 *Studley*, 783 F.2d 934, 940 (9th Cir. 1986) (citing *Ronwin v. State Bar of Ariz.*, 686 F.2d
2 692, 701 (9th Cir. 1981); *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977)).
3 Otherwise, “defendants could readily manipulate the system ... [and] force delays....
4 Such blatant manipulation would subvert our processes, undermine our notions of fair
5 play and justice, and damage the public’s perception of the judiciary.” *United States v.*
6 *Holland*, 519 F.3d 909, 915 (9th Cir. 2008); *see also United States v. Spangle*, 626 F.3d
7 488, 496 (9th Cir. 2010) (court properly declined to recuse after police found personal
8 information about judge and judge’s family in the defendant’s car). Numerous cases
9 have held that “a party cannot effect recusal of a trial judge by the party’s own actions,”
10 such as through statements critical of the judge or accusing the judge of wrongdoing.
11 *United States v. Cerrella*, 529 F. Supp. 1373, 1380 (S.D. Fla. 1982) (citing *United States*
12 *v. Bray*, 546 F.2d 851 (10th Cir. 1976); *United States v. Garrison*, 340 F. Supp. 952, 957
13 (E.D. La. 1972); *United States v. Fujimoto*, 101 F. Supp. 293, 296 (D. Haw. 1951)). In
14 *Bray*, 546 F.2d at 857-58, the Tenth Circuit rejected a recusal motion based upon the
15 moving party’s accusation that the judge had committed bribery and conspiracy.
16 Similarly, the First Circuit held that negative statements about the court in a newspaper
17 the moving party owned, well into the proceedings, could not require recusal because
18 otherwise a party might manipulatively create a basis for recusal. *In re Union Leader*
19 *Corp.*, 292 F.2d 381, 388-89 (1st Cir. 1961). In short, the law does not permit a party to
20 trigger recusal at will, simply by alleging that the Court participated in a conspiracy to
21 “get” him.

22 A reasonable observer with full knowledge the record of this case, and the
23 caselaw, would not conclude that there is an appearance of bias.

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25 **IV. The Motion Should Be Denied as Untimely**

26 The recusal motion also should be denied because it is untimely. Sheriff Arpaio
27 and Chief Deputy Sheridan knew of Karen Grissom’s allegations in August 2013, and
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1 documents reveal that they had concluded their interviews on that issue by November
2 2013—almost *two years* before filing this motion. [Doc. 1115]. Defendants knew of the
3 relationship between the Court and Keith Teel in June 2012—*three years* before filing
4 their motion—and expressly waived any claim to recusal. And to the extent the movants
5 now rely upon an insinuation that the allegations in the MCSO-Montgomery
6 investigation are true, despite their repudiation, they should be foreclosed as they knew
7 Montgomery was not credible at least by November 2014 (Wang Decl., Ex. C), seven
8 months before filing their motion. In light of these extraordinary delays, the recusal
9 motion should be denied as untimely. Gillers Decl. ¶¶ 9, 11-12. *E. & J. Gallo Winery v.*
10 *Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992) (recusal motion untimely when
11 filed seven months after assignment of case to judge and after adverse ruling); *Studley*,
12 783 F.2d at 939 (recusal motion filed “weeks after” conclusion of trial in which court
13 allegedly exhibited bias was untimely).

14 These cases are based on the presumption that a party that delays the filing of a
15 recusal motion is presumed to be filing the motion for purposes of manipulation, after
16 suffering adverse rulings. *See E. & J. Gallo Winery*, 967 F.2d at 1295; *United States v.*
17 *Rogers*, 119 F.3d 1377, 1380 (9th Cir. 1997); *Bivens Gardens Office Bldg., Inc. v.*
18 *Barnett Banks of Fla., Inc.*, 140 F.3d 898, 913 (11th Cir. 1983) (recusal “cannot be used
19 as an insurance policy to be cashed in if a party’s assessment of his litigation risks turns
20 out to be off and a loss occurs”). In this case, there is good reason to believe that the
21 motion was in fact filed for manipulative purposes. Sheriff Arpaio and Chief Deputy
22 Sheridan attempted repeatedly to avoid the evidentiary hearing on contempt by filing
23 motions to vacate the hearing.⁵ It was only after those efforts failed, after the hearing

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25 ⁵ Defendants assert that the Court improperly refused to grant those motions and
26 rejected proposed remedies that Plaintiffs had agreed to as settlement terms. Mot. at 6.
27 This assertion on its face violates the confidentiality provision of Federal Rule of
28 Evidence 408 and also is misleading. Plaintiffs made clear on the record that they
(continued...)

1 brought forth clear evidence of their willful and systematic violations of the Court's
 2 orders,⁶ and after the Court indicated in post-hearing status conferences that strong
 3 remedies were in order (Tr. of May 8, 2015 at 19:8-21:4), that they finally moved for
 4 recusal.⁷ Moreover, after filing the recusal motion, the Defendants initially took the
 5 position that ongoing activities toward compliance with the Supplemental Permanent
 6 Injunction were stayed, contrary to the terms of the Court's far more limited stay order.
 7 Wang Decl., Ex. G; [Doc. 1120]. The timeliness requirement prevents precisely this sort
 8 of manipulation. Gillers Decl. ¶ 11.

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 10 **V. The Motion Fails To Meet the Requirements for Recusal Under § 144**

11 Finally, the recusal motion fails to meet the requirements of 28 U.S.C. § 144,
 12 which provides for reassignment of a case to another judge upon the filing of "a timely
 13 and sufficient affidavit that the judge before whom the matter is pending has a personal
 14 bias or prejudice either against him or in favor any adverse party." Section 144 provides
 15 that a party may only file one such affidavit in any case. *See also Adesanya v. West Am.*
 16 *Bank*, 1994 WL 56960, at *3 (9th Cir. Feb. 25, 1994) (unpub. op.) (construing recusal
 17 motion as filed under § 455 because party previously filed affidavit under § 144).
 18 Defendants Sheriff Arpaio, MCSO, and Maricopa County previously moved for the

19 _____
 20 never agreed to any settlement. Tr. of Feb. 26, 2015 at 38:7-11, 41:20-42:24.
 21 Plaintiffs opposed Defendants' Motion to Vacate because Plaintiffs had not had an
 22 opportunity to take discovery relevant to whether Defendants' violations were
 deliberate, or on the adequacy of remedies [Doc. 952 at 2-4], and the Court denied
 Defendants' motions on that ground. [Doc. 1003, 1007].

23 ⁶ For example, the evidence developed during the contempt hearing on April 21-24,
 24 2015 demonstrated that Chief Deputy Sheridan was not truthful with the Court-
 appointed Monitor about the events of May 14, 2014 underlying one of the charged
 25 grounds of contempt. Tr. of Apr. 24, 2015 at 840:10-841:15; 846:22-848:5; 850:6-11;
 851:22-25; 853:20-859:19; 861:4-11; 868:19-869:6.

26 ⁷ Tellingly, immediately after the Court's examination of the Sheriff, his specially
 27 appearing counsel (who filed the instant motion) stated publicly that there was no basis
 for recusal of the Court. Wang Decl., Ex. H.

1 recusal of Judge Murguia through the filing of an affidavit under § 144. [Doc. 63].
2 While that affidavit was signed by then-Chief Deputy David Hendershott, it was done on
3 behalf of the Defendants as parties to this litigation.

4 In any event, § 144 does not present any independent basis for recusal. It is
5 settled that the same substantive and timeliness standards apply whether the statutory
6 basis asserted is § 144 or § 455. *Liteky*, 510 U.S. at 548 (noting that § 144 “seems to be
7 properly invocable only when § 455(a) can be invoked anyway”). The remaining
8 distinction between § 144 and § 455 appears to be that under § 144, the motion shall be
9 referred to a different district judge. But that is so only if the judge to whom the motion
10 is directed first determines that the affidavit is timely and sufficient. *United States v.*
11 *Sibla*, 624 F.2d 864, 868 (9th Cir. 1980); Gillers Decl. ¶ 3. For all the reasons set forth
12 above, the motion under § 144 should be denied.

13
14 **CONCLUSION**

15 Sheriff Arpaio and Chief Deputy Sheridan’s motion to disqualify the Court
16 should be denied.

17 RESPECTFULLY SUBMITTED this 12th day of June, 2015.

18
19 By: /s/ Cecillia D. Wang

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2015, I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court’s electronic filing system or by mail as indicated on the Notice of Electronic Filing.

/s/ Cecillia D. Wang