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13 UNITED STATES DISTRICT COURT  
14 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

15 ANTHONY JOHNSON, an individual,  
16 Plaintiff,

17 v.

18 MANUEL ALTAMIRANO, an individual,  
19 RICHARD TURNER, an individual,  
20 DAVID KINNEY, an individual, DAVID  
21 HUFFMAN, an individual, PAUL  
22 TYRELL, an individual, SEAN  
23 SULLIVAN, an individual, STORIX, INC.,  
24 a California corporation, and DOES 1-5,  
25 inclusive,

26 Defendants.

Case No. 19-cv-01185 H (BLM)

OPPOSITION TO JOHNSON’S  
MOTION TO RECUSE BY  
DEFENDANTS STORIX, INC.,  
TYRELL & SULLIVAN

Filed: June 24, 2019  
Judge: Hon. Marilyn L. Huff  
Court: Courtroom 15A

27 **I. INTRODUCTION**

28 Plaintiff Anthony Johnson filed a motion demanding that the Honorable Marilyn L. Huff recuse herself from presiding over this action. Johnson’s motion lacks merit as neither fact nor law mandate (or even support) the need for recusal. Johnson merely reiterates his grievances of losing prior claims in this court and many

1 adverse findings, and is seeking to forum shop in the hope that doing so will lead to a  
2 different result. The Ninth Circuit previously rejected Johnson’s request that his case  
3 be reassigned from Judge Huff. Once again, his request should be denied.

## 4 **II. ARGUMENT & AUTHORITIES**

### 5 **A. Johnson Fails to Establish Recusal is Warranted**

6 Johnson claims that Judge Huff must recuse herself from this action under 28  
7 U.S.C. §§ 144 and/or 28 U.S.C. 455, claiming that Judge Huff is incapable of  
8 remaining impartial given her past rulings in the prior related litigation between the  
9 parties over which she presided. While Johnson contends he is not “attempt[ing] to  
10 have Judge Huff recused because of a bad ruling,” (Mot. at p. 5 [brackets added])  
11 that is precisely what he seeks to do. In fact, every example of “bias” Johnson  
12 provides to justify his request for Judge Huff’s removal merely constitutes a  
13 complaint he has about a ruling the court made in the prior litigation between  
14 Johnson and Storix with which Johnson disagrees, or a statement the court made  
15 during argument or deliberations. Johnson fails to point to any legitimate basis to  
16 warrant recusal.

17 “Section 455(a) of Title 28 of the United States Code requires a federal judge  
18 to ‘disqualify himself in any proceeding in which his impartiality might reasonably  
19 be questioned.’” *Liteky v. United States*, 510 U.S. 540, 541, 114 S.Ct. 1147, 127  
20 L.Ed.2d 474 (1994) (quoting § 455(a)). “[P]redispositions developed during the  
21 course of a trial will sometimes (albeit rarely) suffice” to cause a judge’s impartiality  
22 to be reasonably questioned, *id.* at 554, 114 S.Ct. 1147, while “judicial rulings alone  
23 almost never constitute a valid basis for a bias or partiality motion,” *id.* at 555, 114  
24 S.Ct. 1147. The question is whether the judge’s opinions formed on the basis of facts  
25 introduced or events occurring in the course of the proceedings “display[ed] a deep-  
26 seated favoritism or antagonism that would make fair judgment impossible.” *Id.*

27 The Ninth Circuit employs “an objective test for determining whether recusal  
28 is required: ‘whether a reasonable person with knowledge of all the facts would

1 conclude that the judge’s impartiality might reasonably be questioned.” *United*  
2 *States v. Johnson*, 610 F.3d 1138, 1147 (9th Cir. 2010), quoting *Clemens v. U.S.*  
3 *Dist. Court for the Cent. Dist. of Cal.*, 428 F.3d 1175, 1178 (9th Cir. 2005). The  
4 court also has “noted several factors that are ordinarily insufficient to require recusal  
5 including the following: [T]he mere fact that a judge has previously expressed ... a  
6 dedication to upholding the law or a determination to impose severe punishment  
7 within the limits of the law upon those found guilty of a particular offense; [ ] prior  
8 rulings in the proceeding, or another proceeding, solely because they were adverse; [ ]  
9 ] mere familiarity with the defendant(s), or the type of charge, or kind of defense  
10 presented.” *Id.*, citing *Clemens*, 428 F.3d at 1178-79.

11       Legions of cases have rejected the notion that an unsuccessful litigant can  
12 force a judge to recuse simply because of that litigant’s dissatisfaction with prior  
13 proceedings. In *United States v. Johnson*, the Ninth Circuit rejected the contention  
14 that the district judge who presided over a prior civil case and made adverse rulings,  
15 including sanctions and cost awards against the defendant, had to recuse himself  
16 given such rulings:

17       “Judge Alsup’s dismissal of the defendants’ prior civil case, his order of  
18 sanctions against their attorney, his award of costs and fees to the civil  
19 defendants, and his referral of the matter to the U.S. Attorney’s Office  
20 were judicial actions that will not serve as bases for recusal absent  
21 unusual circumstances not present here. *Liteky*, 510 U.S. at 555, 114  
22 S.Ct. 1147. Adverse findings do not equate to bias. Nothing Judge  
23 Alsup did was outside of his official duties or even shown to be  
24 erroneous in any way. Further, the defendants’ civil attorney’s  
25 declaration filed under seal in their civil case did not constitute an  
26 extrajudicial source potentially prejudicing Judge Alsup; it was an event  
27 occurring in the course of prior proceedings. *Id.* It was not an abuse of  
28 discretion for Judge Ilston to conclude that Judge Alsup’s prior rulings  
did not display a ‘deep-seated favoritism or antagonism that would  
make fair judgment impossible,’ *id.*, or suggest that ‘his impartiality  
might reasonably be questioned,’ 28 U.S.C. § 455(a).”

*United States v. Johnson*, 610 F.3d 1138, 1148 (9th Cir. 2010). See also *Myers v.*

1 *United States*, 673 F. App’x 749, 751 (9th Cir. 2016) [Ninth Circuit denying a  
2 recusal request under section 455(a) and *Liteky*, based on a claim that the district  
3 judge demonstrated “bias and lack of impartiality,” after making unfavorable  
4 comments about the appellate panel following a prior remand.]; *Ketab Corp. v.*  
5 *Mesriani & Assocs., P.C.*, 734 F. App’x 401, 411 (9th Cir. 2018) [Denying recusal  
6 request: “Finally, Ketab argues that the district court judge’s impartiality might  
7 reasonably be questioned, and therefore, under 28 U.S.C. § 455(a), the judge should  
8 have been recused. The judge’s remarks to which Ketab points do not establish bias  
9 or partiality. (citation). Moreover, recusal is not required if bias or prejudice arose  
10 from conduct or rulings made during the course of proceedings.” (Citation omitted)].

11       Moreover, even if a judge becomes aware of extrajudicial information, recusal  
12 is not mandated automatically even if the information relates to the case at hand. The  
13 Ninth Circuit recently affirmed a district court order finding a magistrate did not  
14 need to recuse despite reading a *Fresno Bee* article that addressed the defendant’s  
15 alleged illegal base jumping conduct. *United States v. Carey*, 929 F.3d 1092, 1105  
16 (9th Cir. 2019). “In our modern, interconnected, endlessly broadcast world,  
17 complete blinders are impracticable, as a reasonable person would surely conclude.  
18 Moreover, courts have regularly held that outside knowledge does not on its own  
19 prejudice judicial proceedings.” *Id.*

20       In this case, Johnson is simply unhappy with past rulings of the court, and  
21 wants to forum shop for a potentially more sympathetic audience. That is not the  
22 standard for granting recusal. Johnson complains that “Judge Huff’s opinion of  
23 Johnson took an unexpected turn after the Supreme Court issued a ruling that didn’t  
24 support an award of attorney fees against Johnson.” *See Mot.* at p. 6. Yet, he simply  
25 complains about the court’s commentary during oral argument, and the court’s  
26 subsequent ruling. He then complains “Judge Huff made unwarranted and  
27 unsupported comments about Johnson’s character and intentions,” yet simply cites to  
28 the court’s orders assessing the evidence, his testimony, and his conduct. *Mot.* at pp.

1 9-12. Similarly, Johnson argues that “Judge Huff ignored facts and circumstances  
2 proving the fees were unwarranted.” Mot at p. 12. Yet again, Johnson is simply  
3 rehashing the motion for attorneys’ fees, and his disagreement with the court’s  
4 conclusion. He does not demonstrate an objective basis to conclude the existence of  
5 wrongful bias. *Liteky v. United States*, 510 U.S. at 554–56 [A judge’s questioning  
6 during oral arguments, and a judge’s “expressions of impatience, dissatisfaction,  
7 annoyance, and even anger” do not typically warrant recusal.]; *United States v.*  
8 *Hudson*, 701 F. App’x 603, 605 (9th Cir. 2017)[“Although, here, the proceedings  
9 below were often tense and antagonistic, the judge’s actions were insufficient to  
10 require recusal.”].

11 Johnson further claims “Judge Huff never made any mention of the  
12 misconduct of the Storix’s attorneys.” Mot at p. 14. The alleged “misconduct”  
13 Johnson decries apparently involves Storix filing a California state court lawsuit  
14 against him for breach of fiduciary duty, which filing coincided with a scheduled  
15 settlement conference in the prior related federal action. *Id.* He also accuses Storix  
16 counsel of “*illegally* defending against the shareholder derivative lawsuit Johnson  
17 brought on Storix’s behalf.” *Id.* at p. 15. Johnson contends that because he has now  
18 sued Storix’s counsel in this action, Judge Huff cannot maintain impartiality. *Id.* at p.  
19 16. Johnson’s baseless attacks on Storix’s counsel (which are the subject of pending  
20 motions to strike and dismiss) do not meet the high threshold warranting recusal, and  
21 are frankly frivolous. Allowing litigants the license to forum shop by merely naming  
22 opposing counsel as parties to an action, thereby requiring a judge’s recusal, would  
23 wreak havoc on the order and civility with which litigation proceedings are to be  
24 conducted. Johnson’s motion should be denied.

25 **B. Low-Number Rule and Appropriate Procedure for Determining**  
26 **this Motion**

27 Defendants frankly do not understand Johnson’s complaint about the standard  
28 application of the low-numbered rule. Clearly Johnson’s newly-filed action is related

1 to the prior copyright action between Johnson and Storix, as the entire premise of his  
2 new claim is that he is owed money for the transfer of the same SBAdmin copyright  
3 that the parties litigated in that case. The relatedness of the cases is made clear in  
4 Defendants' pending motions to strike and dismiss, particularly with respect to the  
5 issues of res judicata and preemption that are addressed in those motions.

6 Both actions "arise from the same or substantially identical transactions,  
7 happenings or events," and "involve the same or substantially same parties or  
8 property," and "call for determination of the same or substantially identical questions  
9 of law," and given the court's familiarity with the background facts, relating the  
10 cases would avoid unnecessary duplication of labor by a different judge. Johnson's  
11 attempt to circumvent the relatedness of the two actions by seeking to expand the  
12 litigation by adding Storix's attorneys as parties should not be permitted to succeed.

13 Defendants believe that Judge Huff has discretion to determine this motion  
14 herself. In particular, section 455 appears to contemplate judges making their own  
15 determinations about the basis for the disqualification. *See* 28 U.S.C. § 455(a) ["Any  
16 justice, judge, or magistrate judge of the United States shall disqualify himself in any  
17 proceeding in which his impartiality might reasonably be questioned." (Underline  
18 added)]; 28 U.S.C. § 455(b) ["He shall also disqualify himself in the following  
19 circumstances: ..." (Underline added)]. Defendants do not object to Judge Huff  
20 deciding this motion. In the event that the court decides the motion is appropriate for  
21 referral to another district judge, Defendants do not object to such referral.

### 22 III. CONCLUSION

23 Johnson does not demonstrate that Judge Huff has exhibited any improper bias  
24 against him, or that she will be unable to remain impartial in presiding over this  
25 action. Accordingly, Johnson's motion for recusal must be denied.

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DATED: September 16, 2019

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