

1 LINDA E. SHOSTAK (CA SBN 64599)
 LShostak@mofo.com
 2 DEREK F. FORAN (CA SBN 224569)
 DForan@mofo.com
 3 CHRISTOPHER L. ROBINSON (CA SBN 260778)
 ChristopherRobinson@mofo.com
 4 MORRISON & FOERSTER LLP
 425 Market Street
 5 San Francisco, California 94105-2482
 Telephone: 415.268.7000
 6 Facsimile: 415.268.7522

7 Attorneys for Plaintiff
 NATIONAL ABORTION FEDERATION (NAF)

8
 9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA

11
 12 NATIONAL ABORTION FEDERATION (NAF),

13 Plaintiff,

14 v.

15 THE CENTER FOR MEDICAL PROGRESS,
 BIOMAX PROCUREMENT SERVICES LLC,
 16 DAVID DALEIDEN (aka "ROBERT SARKIS"),
 and TROY NEWMAN,

17 Defendants.
 18
 19
 20

Case No. 3:15-cv-3522-WHO

Judge: Hon. James Donato

**NATIONAL ABORTION
 FEDERATION (NAF)'S
 OPPOSITION TO MOTION FOR
 DISQUALIFICATION OF THE
 HONORABLE WILLIAM H.
 ORRICK III**

Date Action Filed: July 31, 2015

Trial Date:

1 **I. INTRODUCTION**

2 Center for Medical Progress (“CMP”), and David Daleiden have moved to disqualify
3 Hon. William Orrick, nearly two years into this case and four court days before a hearing on an
4 Order to Show Cause why they should not be held in contempt of court. Their motion is an
5 obvious attempt to derail the contempt proceedings. It is based on information that was known to
6 them long ago, yet they did not seek to disqualify Judge Orrick until the specter of contempt was
7 raised. The Court should deny their motion on these grounds alone. And if the Court were to
8 reach the “merits” of the motion, it should still be denied. The motion is frivolous: it is based on
9 incomplete facts and a string of inferences that no reasonable observer would draw. CMP and
10 Daleiden have not come close to meeting their burden of establishing that a reasonable person,
11 viewing all the facts, would question Judge Orrick’s impartiality. Under clear Ninth Circuit
12 precedent, neither Judge Orrick’s former relationship with an organization that is not even a party
13 in this case, nor his wife’s Facebook activity, nor the statements he made from the bench about
14 Daleiden’s violation of the preliminary injunction constitute grounds for recusal. NAF
15 respectfully asks the Court to deny this motion forthwith and without the necessity of a hearing
16 pursuant to Local Rule 7-1(b), so that the contempt hearing may proceed.

17 **II. BACKGROUND**

18 **A. The Procedural History of This Case.**

19 This lawsuit was filed nearly two years ago, on July 31, 2015, and was randomly assigned
20 to Judge Orrick. (Dkt. 1.) The National Abortion Federation (“NAF”) alleged that defendants
21 and their co-conspirators mounted a campaign using deceit to gain access to NAF’s annual
22 meetings, surreptitiously record 504 hours of videotape from the meetings, then release excerpts
23 of those tapes—in violation of confidentiality agreements that defendants knowingly and
24 voluntarily signed. (Dkt. 1 at 21-32.) Defendants’ release of similar videos prior to NAF’s
25 lawsuit “directly led to a significant increase in harassment, threats, and violence directed not
26 only at the ‘targets’ of CMP’s videos but also at NAF and its members more generally.” (Dkt.
27 354 at 36.) Judge Orrick initially issued a TRO enjoining the defendants from releasing, inter
28 alia, any tapes taken at NAF’s meetings, and set an expedited briefing and discovery schedule for

1 NAF's preliminary injunction motion. (Dkt. 15, 27.)

2 There are 434 docket entries in this 23-month old case. During that time dozens of
3 motions have been submitted to Judge Orrick for decision. He has issued 95 orders in this case.
4 Defendants have repeatedly tried to have Judge Orrick's orders reversed, and every time the
5 Ninth Circuit has rebuffed their efforts.

6 After entry of the TRO, the defendants filed a motion to "clarify" Judge Orrick's order to
7 allow them to provide copies of the enjoined materials to law enforcement. (Dkt. 57.) Judge
8 Orrick ultimately denied that motion. (Dkt. 162.) Defendants also filed a motion to strike the
9 complaint under California's anti-SLAPP law and to immediately stay discovery. (Dkt. 68.)
10 Judge Orrick denied the motion to stay discovery, holding defendants' arguments were
11 "unpersuasive to the point of being frivolous." (Dkt. 95 at 13.) Defendants filed a petition for a
12 writ of mandamus and an emergency motion to stay Judge Orrick's order, which the Ninth Circuit
13 denied. *In re Center for Medical Progress*, No. 15-72844, slip op. (9th Cir. Sep. 23, 2015). "Far
14 from being clearly erroneous," the Ninth Circuit held, Judge Orrick's "decision to permit
15 discovery [was] necessary [and] consistent with Ninth Circuit precedent." *Id.* at 7.

16 Defendants then claimed they had a Fifth Amendment right to avoid discovery into their
17 conduct. (Dkt. 103.) Judge Orrick overruled those objections, holding defendants were
18 "attempting to hide the ball, contrary to my prior Orders," and that it was "time to end this shell
19 game." (Dkt. 244 at 8, 12.)

20 Defendants also attempted to block discovery into the identities of funders and backers of
21 CMP who had received a top secret "report" regarding the infiltration and taping of NAF's
22 meetings. (Dkt. 244 at 5.) Judge Orrick ordered them to produce that information. (*Id.*) Again,
23 defendants filed a mandamus petition and an emergency motion to stay in the Ninth Circuit.
24 Again, the Ninth Circuit denied defendants' petition and emergency motion, holding that Judge
25 Orrick committed no error in ordering defendants to provide this discovery, which was "highly
26 relevant to the scope of any preliminary injunction" Judge Orrick might issue. *In re Center for*
27 *Medical Progress*, No. 15-17318, slip op. at 5 (9th Cir. Dec. 3, 2015). On December 4, 2015,
28 Justice Kennedy denied defendants' emergency motion to stay Judge Orrick's order. *Center for*

1 *Medical Progress v. National Abortion Federation*, No. 15A590 (Dec. 4, 2015).

2 In the meantime, defendants violated an order that Judge Orrick issued in connection with
3 a congressional subpoena, and that violation turned out to have deadly consequences.

4 Specifically, in response to a subpoena that defendants had received from a congressional
5 committee, Judge Orrick ordered them “not [to] provide to Congress any footage, documents or
6 communications that have not been specifically requested by the subpoena.” (Dkt. 155 at 3.)

7 Defendants immediately produced all 504 hours of videotape subject to the TRO, without regard
8 to subject matter. Judge Orrick later held that defendants had violated his order by “produc[ing]
9 materials that were not covered by the subpoena, but were covered by the TRO, contrary to my
10 Order allowing a response to the subpoena.” (Dkt. 354 at 16 n.18.) Weeks after this violation, an
11 individual by the name of Charles C. Johnson, a friend of Daleiden’s since college, published
12 10 hours of enjoined material on the internet, claiming he had received it via a “leak” from
13 Congress. (Dkt. 221-4 at 7.) This disclosure of enjoined materials led directly to another increase
14 in incidents of intimidation and harassment perpetrated against NAF members, culminating in the
15 murder of three individuals at a NAF-member clinic in Colorado. (Dkt. 348 at 7.)

16 The case finally wound its way to a hearing on NAF’s motion for a preliminary
17 injunction, on December 18, 2015. (Dkt. 303.) Judge Orrick granted that motion on February 5,
18 2016. (Dkt. 354.) After carefully reviewing a substantial record submitted by the parties, and
19 having reviewed hours of the videotape in question, Judge Orrick issued a 42-page opinion in
20 which he held that NAF had “made a strong showing on all relevant points,” including a “strong
21 showing of likelihood of success on its contract claims.” (Dkt. 354 at 42, 35). Judge Orrick
22 found that NAF’s allegations “turned out to be true” and that “defendants secured false
23 identification and set up a phony corporation to obtain surreptitious recordings in violation of
24 agreements they had signed that acknowledge that the NAF information is confidential.” (Dkt.
25 354 at 1.) He also found that NAF had established a “strong showing of irreparable injury” to it
26 and its members in the absence of injunctive relief. (Dkt. 354 at 42, 38, 35.)

27 The Ninth Circuit affirmed Judge Orrick’s preliminary injunction, holding that it had little
28 to add to Judge Orrick’s “careful discussion,” and that Judge Orrick had “carefully identified the

1 correct legal standard and [his] factual determinations were supported by the evidence.” *In re*
2 *Center for Medical Progress*, No. 16-15360, Dkt. No. 154-1 at 4, (9th Cir. Mar. 29, 2017). On
3 May 8, 2017, the Ninth Circuit granted defendants’ unopposed motion to stay the mandate
4 pending the filing of a certiorari petition and made clear that the “preliminary injunction entered
5 by the district court remains in effect.” *In re Center for Medical Progress*, No. 16-15360, Dkt.
6 No. 171 at 1, (9th Cir. May 8, 2017).

7 **B. Judge Orrick’s Order to Show Cause re Contempt and Daleiden’s and**
8 **CMP’s Motion to Disqualify.**

9 **1. The Order to Show Cause**

10 On May 25, 2017, CMP, Daleiden, and two lawyers who represent Daleiden in related
11 criminal proceedings publically disclosed on the internet, inter alia, over 146 hours of videotape
12 subject to the preliminary injunction. (Dkt. 417.) Judge Orrick set an emergency telephonic
13 hearing that day, and ordered Daleiden to be present. (Dkt. 408.) Despite Judge Orrick’s order
14 for Daleiden’s presence, he did not appear. (Dkt. 417-7 at 4:3-14.) Following the emergency
15 telephone conference, Judge Orrick issued an order directing the immediate removal of all
16 enjoined materials. (Dkt. 409.) He also ordered CMP, Daleiden, and his two criminal lawyers to
17 show cause why they should not be held in contempt of court. (*Id.* at 2.) Judge Orrick set a
18 hearing on his Order to Show Cause re Contempt for Wednesday, June 14, 2017. (*Id.*)

19 **2. Daleiden’s and CMP’s Motion to Disqualify**

20 On June 7, four court days before the hearing on the Order to Show Cause re Contempt,
21 CMP and Daleiden filed their motion to disqualify Judge Orrick. (Dkt. 428.) Troy Newman, a
22 defendant in this action who is not subject to Judge Orrick’s Order to Show Cause re Contempt,
23 does not seek Judge Orrick’s disqualification.

24 Daleiden and CMP offer three reasons for Judge Orrick’s disqualification:

25 **First**, they point to Judge Orrick’s “longstanding relationship as a past board member” of
26 a San Francisco-based charity, Good Samaritan Family Resource Center (“Good Samaritan”).
27 (Dkt. 428 at 3.) Founded in 1894, Good Samaritan provides services to low-income Latino
28 immigrant families. (Dkt. 428-1 at 11-12; 105.) Defendants claim that in 2001, Good Samaritan

1 entered into a “key partnership” with a Planned Parenthood affiliate, Planned Parenthood Shasta
2 Pacific, now named Planned Parenthood Northern California. (Dkt. 428 at 4.) Defendants
3 maintain that Planned Parenthood Northern California “has membership in NAF” and that they
4 only recently “discovered” that Judge Orrick was Secretary of Good Samaritan’s Board in 2001,
5 when this partnership began. (*Id.*) They also claim that he “continued to be publically
6 associated” with Good Samaritan, because he is listed on their stationary as an “emeritus” Board
7 member. (Dkt. 428 at 5.)

8 In fact, neither Planned Parenthood Shasta Pacific nor the successor entity, Planned
9 Parenthood Northern California, is or ever has been a NAF member. (Fowler Decl. ¶ 3.) In
10 addition, the clinic located at Good Samaritan’s Family Resource Center, which is operated by
11 Planned Parenthood Northern California, is a satellite facility that does not provide abortion
12 services. (Dkt. 428-1 at 103.)

13 Moreover, defendants admit they were aware of Judge Orrick’s “longstanding”
14 relationship with Good Samaritan when this case was filed. (Dkt. 428 at 3.) Judge Orrick’s
15 June 12, 2012 Senate Judiciary Committee Questionnaire discloses that Judge Orrick has been
16 President, Vice-President, and an officer of Good Samaritan, and that he provided legal counsel to
17 Good Samaritan through 2009. (Dkt. 428-1 at 18, 44.)

18 Judge Orrick has had no operational or managerial role with Good Samaritan since at least
19 2006. (Paz Decl. ¶ 3.) He is only listed on Good Samaritan’s stationary as an “emeritus” Board
20 member in recognition of his past service to the organization, not because he has any current
21 relationship with the organization. (*Id.* ¶ 4.)

22 **Second**, CMP and Daleiden claim Judge Orrick should be disqualified because in 2015
23 his wife “pinkified” her Facebook page, indicating her support of Planned Parenthood, and
24 “liked” two Facebook posts, the first of which was critical of CMP and Daleiden’s videotaping
25 campaign, the second of which referred to Daleiden’s indictment on felony charges by a grand
26 jury in Houston, Texas in January 2016. (Dkt. 428 at 5.)

27 **Third**, CMP and Daleiden point to a comment Judge Orrick made during the May 25
28 emergency telephonic hearing to the effect that Daleiden (who did not appear at the hearing,

1 despite being ordered to do so) “is obligated to follow the Court’s orders [and] not to skate
2 around them and cause real harm to human beings.” (*Id.* at 11.) They claim this comment
3 evidences “prejudice” on Judge Orrick’s part, and his “belief that [Daleiden] is an evil person.”
4 (*Id.*)

5 3. **The Referral to Judge Donato**

6 Judge Orrick expressed serious doubt about the merit of the motion to disqualify him:
7 “Having reviewed the motion and affidavit, I do not think that it is legally sufficient. In other
8 words, a reasonable person with knowledge of all the facts would *not* conclude that my
9 impartiality might reasonably be questioned.” (Dkt. 430 at 2.) He also expressed “concerns
10 about its timeliness and whether the timing is simply an attempt to delay the resolution of the
11 OSC re Contempt.” (*Id.*) Specifically, he observed that the “motion was filed over two years
12 after the case had been pending before me and four court days before an Order To Show Cause
13 Re Contempt hearing regarding whether to sanction defendants or their agents for violating the
14 Preliminary Injunction in this case.” (*Id.* at 1.)

15 Nevertheless, Judge Orrick referred the motion to the Clerk so that it could be randomly
16 assigned to another Judge for resolution. (*Id.* at 2-3.) He vacated the scheduled June 14, 2017,
17 hearing on the Order to Show Cause re Contempt, but he ordered that the briefing schedule on
18 that motion remain in place. (*Id.* at 1 n.1.) The disqualification motion was referred to Judge
19 Donato. (Dkt. 431.)

20 **III. ARGUMENT**

21 CMP and Daleiden bear a heavy burden in moving to disqualify Judge Orrick. ““Since a
22 federal judge is presumed to be impartial, the party seeking disqualification bears a substantial
23 burden to show that the judge is biased.”” *Mendia v. Garcia*, No. 10-cv-03910-MEJ, 2017 U.S.
24 Dist. LEXIS 64238, at *10 (N.D. Cal. Apr. 27, 2017).

25 Daleiden and CMP cannot meet that burden here, for two reasons. First, they delayed in
26 filing their motion until two years into this case, and brought it for purely tactical reasons. *See*
27 *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992). Second, no
28

1 “reasonable person, with knowledge of all the facts,” would question Judge Orrick’s impartiality.
 2 *United States v. Hernandez*, 109 F.3d 1450, 1453-54 (9th Cir. 1997).

3 **A. CMP and Daleiden Delayed in Bringing Their Motion for Purely Tactical**
 4 **Reasons.**

5 “Whether [the party] raised the disqualification issue in a timely fashion presents a serious
 6 threshold issue.” *United States v. Rogers*, 119 F.3d 1377, 1380 (9th Cir. 1997) (citing *E. & J.*
 7 *Gallo Winery*, 967 F.2d at 1295). This is true under both statutes on which CMP and Daleiden
 8 base their motion, 28 U.S.C. §§ 144 and 455. Section 144 “expressly requires that a motion to
 9 disqualify must be timely,” and the Ninth Circuit “require[s] as much under 28 U.S.C. § 455.”
 10 *Id.* at 1380.

11 The timeliness of disqualification motions must be policed to prevent litigants from using
 12 recusal motions “for strategic purposes.” *E. & J. Gallo Winery*, 967 F.2d at 1295; *In re City of*
 13 *Detroit*, 828 F.2d 1160, 1167-68 (6th Cir. 1987) (per curiam) (“Timeliness is a factor that
 14 obviously merits consideration by a court that is trying to determine whether a judge is truly
 15 biased or a litigant is merely trying to avoid an impending adverse decision.”). Otherwise,
 16 litigants could “play fast and loose with the judicial process.” *Jones v. Pittsburgh Nat’l Corp.*,
 17 899 F.2d 1350, 1356 (3d Cir. 1990) (affirming denial of recusal motion after sanctions were
 18 imposed against moving party); *In re Medtronic, Inc., Sprint Fidelis Leads Prod. Liab. Litig.*, 623
 19 F.3d 1200, 1209 (8th Cir. 2010) (affirming denial of recusal motion “interposed for suspect
 20 tactical and strategic reasons following the district court’s adverse rulings” because “the grant of
 21 such a belated motion would have serious adverse effects on the efficient use of judicial resources
 22 and the administration of justice”) (quotations omitted).

23 CMP and Daleiden’s motion should be rejected at the threshold as untimely. The facts
 24 demonstrate they filed their belated motion solely for tactical reasons—to delay the impending
 25 contempt hearing:

- 26 • They filed this motion two years into this case. Judge Orrick
 27 has issued dozens of orders in that time frame, and has entered
 28 a Preliminary Injunction against them. Defendants’ repeated
 challenges to his lawful orders in the Ninth Circuit and
 Supreme Court have been rejected time and again.

- 1 • They admit they were well aware of Judge Orrick’s “long-standing” charitable work with Good Samaritan, including
2 through 2009, at the outset of this case.
- 3 • Judge Orrick issued an Order to Show Cause re Contempt on
4 May 25. Without explanation, Daleiden failed to appear before
5 Judge Orrick despite being ordered to do so.
- 6 • Daleiden and CMP filed their recusal motion four court days
7 before the contempt hearing.
- 8 • Co-defendant Troy Newman, not subject to the contempt
9 proceeding, did not join CMP and Daleiden’s motion.
- 10 • Daleiden and CMP initially did not file their motion in the
11 closely related case also pending before Judge Orrick, *Planned
12 Parenthood Federation of America, Inc. v. Center for Medical
13 Progress*, Case No. 16-cv-00236-WHO, in which Planned
14 Parenthood Northern California is a plaintiff. Realizing their
15 error, defendants filed the identical motion to disqualify in that
16 case days later, on June 13.

17 The two-year delay, coupled with compelling evidence that they filed this motion to derail
18 the contempt proceedings, is reason alone to deny their motion. *Rogers*, 119 F.3d at 1380 (“a
19 party having information that raises a possible ground for disqualification cannot wait until after
20 an unfavorable judgment before bringing the information to the court’s attention”); *Academy of
21 Motion Picture Arts & Sciences v. GoDaddy.com, Inc.*, No. 10-3738, 2014 WL 12560876, at *1
22 (C.D. Cal. Feb. 4, 2014) (denying motion to recuse where movant raised the issue after it lost
23 several motions and when it had “litigated before the [judge] for years”).

24 Nor can CMP and Daleiden establish good cause for their delay. *Rogers*, 119 F.3d at
25 1382 (“[A] delay in bringing a motion to disqualify may only be excused for good cause.”). CMP
26 and Daleiden cite two reasons for their delay, neither of which constitutes good cause.

27 **First**, they claim that they delayed in bringing this motion because they only recently
28 learned that Judge Orrick was Good Samaritan’s Secretary in 2001, when Good Samaritan
29 “entered into its ‘key partnership’ with” Planned Parenthood Shasta Pacific. (Dkt. 428 at 4.) This
30 does not excuse their delay. Judge Orrick’s former relationship with Good Samaritan—including
31 his service to that organization in 2001—was known to CMP and Daleiden at the outset of this
32 case. (*Id.*) Daleiden and CMP were aware then, based on their “investigation” of Judge Orrick,
33 that he served as Good Samaritan’s President of the Board, Vice-President, and Officer, and that

1 he provided legal counsel to the organization *through 2009* (Dkt. 428-1 at 20, 44), *eight years*
 2 after Planned Parenthood Shasta Pacific partnered with Good Samaritan. (Dkt. 428-1 at 8.)¹

3 **Second**, CMP and Daleiden also claim that they only recently learned that “Judge Orrick
 4 continued to be publicly associated” with Good Samaritan through September 2015. (Dkt. 428 at
 5 5.) But Daleiden admits he knew this in January 2017 (*id.*), five months before he filed his
 6 motion. That alone suffices to reject the motion as untimely. *See e.Digital Corp. v. ArcSoft, Inc.*,
 7 No. 15-cv-56-BEN (DHB), 2015 U.S. Dist. LEXIS 117929 (S.D. Cal. Sept. 2, 2015) (denying
 8 recusal motion based on a five month delay). Additionally, Judge Orrick is listed as an
 9 “emeritus” Board member solely in recognition of his *past* service to the organization. (Dkt. 428-
 10 1 at 101; Paz Decl. ¶ 4.) CMP and Daleiden knew in 2015 that Judge Orrick was a former Board
 11 member. This information is not new.

12 CMP and Daleiden have no excuse for waiting to bring this motion until after Judge
 13 Orrick issued an Order to Show Cause. The motion should be denied for that reason.

14 **B. No Reasonable Person Would Question Judge Orrick’s Impartiality.**

15 In any event, the untimely motion is meritless, to the point of being frivolous. The
 16 standard for a recusal motion is “whether a reasonable person with knowledge of all facts would
 17 conclude that the judge’s impartiality might reasonably be questioned.” *Hernandez*, 109 F.3d at
 18 1453-54.² The “reasonable person is not someone who is hypersensitive or unduly suspicious,
 19 but rather is a well-informed, thoughtful observer.” *U.S. v. Holland*, 519 F.3d 909, 913 (9th Cir.
 20 2008) (citations and quotations omitted); *Johnson v. U.S.*, No. 13-cv-02405-JD, 2014 U.S. Dist.
 21 LEXIS 73368, at *7 (N.D. Cal. May 28, 2014) (same). Hence, “a judge should be disqualified
 22 only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-

23 _____
 24 ¹ Daleiden and CMP appear to suggest that Judge Orrick’s alleged status as Good
 25 Samaritan’s Secretary in 2001 is somehow material because it means Judge Orrick was in a
 26 “fiduciary relationship” with the organization then. (Dkt. 428 at 2.) But if, as Judge Orrick’s
 27 Questionnaire states, he provided legal counsel to Good Samaritan through 2009 (Dkt. 428-1
 28 at 18, 44), then he was a fiduciary of the organization throughout that time. *Frazier v. Sup. Ct.*,
 97 Cal. App. 4th 23, 35 (2002) (“Few precepts are more firmly entrenched than that of the
 fiduciary relationship between attorney and client.”). This is a distinction without a difference.

² This test applies under both 28 U.S.C. §§ 144 and 455. *See Hernandez*, 109 F.3d at
 1453-54.

1 minded person could not set aside when judging the dispute.” *Liteky v. U.S.*, 510 U.S. 540, 558
2 (1994) (Kennedy, J., concurring).

3 While reasonable recusal motions should be carefully considered, it is equally important
4 that judges *not* recuse where it is not warranted. “[I]n the absence of a legitimate reason to recuse
5 himself, ‘a judge should participate in cases assigned’” to him. *Holland*, 519 F.3d at 912 (citation
6 omitted). Judges are obligated to hear all cases coming before them, without preference, and
7 must not recuse themselves lightly. *See id.* Accordingly, in applying the “reasonable person”
8 test, “it is critically important . . . to identify facts that might reasonably cause an objective
9 observer to question [the judge’s] impartiality.” *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d
10 864, 871-72 (9th Cir. 1991) (quotation omitted, emphasis added). The “reasonable person” test
11 “‘must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is
12 mandated upon the merest unsubstantiated suggestion of personal bias or prejudice.’” *Holland*,
13 519 at 913.

14 Applying these principles here, none of the three grounds raised by CMP and Daleiden,
15 taken together or individually, comes closing to causing a reasonable person to question Judge
16 Orrick’s impartiality.

17 **1. Judge Orrick’s Past Service with Good Samaritan is Not**
18 **Disqualifying.**

19 CMP and Daleiden’s primary argument is that Judge Orrick should be disqualified
20 because of his past relationship with Good Samaritan. The argument has no merit.

21 As an initial matter, Judge Orrick’s prior charitable work with Good Samaritan, a
22 venerable, 100-year-old organization that provides assistance to low-income Latino families in
23 San Francisco, does not call into question his impartiality in a case in which Good Samaritan is
24 not even involved. Judges are entitled—indeed they are encouraged—to participate in civic life
25 and to be full members of their community without being subject to accusations of disqualifying
26 “bias.” A judge “‘must have neighbors, friends and acquaintances, business and social relations,
27 and be a part of his day and generation.’” *In re Compl. of Judicial Misconduct*, 816 F.3d 1266,
28 1268 (9th Cir. 2016). “[M]any judges have a history of activity in politics or strong political

1 connections, and such a background is insufficient to require recusal.” *Hulihan v. Reg’l Transp.*
 2 *Comm’n of S. Nev.*, No. 2:09-cv-01096-ECR-RJJ, 2011 U.S. Dist. LEXIS 131323, at *5 (D. Nev.
 3 Nov. 10, 2011).

4 Moreover, CMP and Daleiden’s claim of bias rests on a string of inferences, speculation,
 5 and innuendo that fails at every step. “Disqualification must rest upon a *factual* basis” and
 6 “should *not* be based on tenuous speculation; if it were, litigants would have veto power over the
 7 assignment of judges.” *Laxalt v. McClatchy*, 602 F. Supp. 214, 217-18 (D. Nev. 1985) (emphases
 8 added); *Adams v. Albertson*, No. C-10-4787-WHA, 2012 U.S. Dist. LEXIS 50904 *6 (N.D. Cal.
 9 Apr. 11, 2012) (“Recusal must be based upon facts and not on conjecture, speculation or
 10 statement of opinion”). The facts here demonstrate that Judge Orrick has no relationship to the
 11 parties in this case or even any connection to the issues before the Court:

- 12 • It is not true that Judge Orrick “*has* a longstanding and close
 13 relationship” with Good Samaritan. (Dkt. 428 at 9 (emphasis
 14 added).) Judge Orrick *had* a relationship with Good Samaritan,
 15 but that ended in 2009. He has had no operational or
 16 managerial role with Good Samaritan since at least 2006. (Paz
 17 Decl. ¶ 3.) Good Samaritan listed Judge Orrick as an
 18 “emeritus” Board member only in recognition of his past
 19 service to the organization. (Paz Decl. ¶ 4.).
- 20 • Neither Planned Parenthood Shasta Pacific nor Planned
 21 Parenthood Northern California is or ever has been a NAF
 22 member. (Fowler Decl. ¶ 3.)
- 23 • The satellite clinic located at Good Samaritan provides no
 24 abortion services. (Dkt. 428-1 at 103.) Thus, Judge Orrick’s
 25 former relationship with Good Samaritan does not connect him
 26 in any way with the issues in this case, all of which relate to
 27 abortion services.
- 28 • CMP and Daleiden’s claim that Judge Orrick was “necessarily
 . . . involved in the board’s decision to initiate the partnership
 between,” Good Samaritan and the clinic in 2001, (Dkt. 428
 at 9), is pure speculation, for which zero evidence is presented.

24 Simply put, all that the evidence shows is that Judge Orrick *used to have* a relationship
 25 with a charitable organization (Good Samaritan) that provides space for a clinic that *does not*
 26 *provide* abortion services and is operated by a larger organization (Planned Parenthood Northern
 27 California) that *is not a NAF member*. This is far too attenuated and speculative to cause a
 28 reasonable observer to question Judge Orrick’s impartiality.

1 Last, disqualifications motions are regularly rejected in cases in which there is a far deeper
2 connection between the judge and the issues in the case—such as where the judge’s religious or
3 political beliefs may be implicated, or where the judge shares a fundamental characteristic with a
4 party. *See Feminist Women’s Health Ctr. v. Codispoti*, 69 F.3d 399, 400-401 (9th Cir. 1995)
5 (judge need not recuse from hearing abortion-related case where judge’s deeply held religion
6 teaches that abortion is sinful); *U.S. ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1076 (9th Cir.
7 1998) (judge’s annual contribution to the university’s law school alumni association would not
8 “reasonably lead one to question his impartiality” even though defendants were associated with
9 the university); *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1124 (N.D. Cal. 2011) (that the
10 judge was in a same-sex relationship did not disqualify him from hearing case involving marriage
11 for same-sex couples).

12 Judge Orrick’s past service with Good Samaritan is plainly not disqualifying.

13 2. Mrs. Orrick’s Facebook Activity is Irrelevant.

14 Next, CMP and Daleiden argue that Judge Orrick should be disqualified because in 2015
15 his wife “pinkified” her Facebook page and “liked” two Facebook posts that were critical of
16 Daleiden and his videotaping campaign. (Dkt. 428-1 at 4-5.)

17 **First**, CMP and Daleiden misrepresent Mrs. Orrick’s Facebook activity. They ascribe
18 numerous quotes to Mrs. Orrick that were not actually her words. For example, according to
19 Daleiden and CMP, Mrs. Orrick “stated her position that the videos were ‘heavily edited,’ that
20 CMP is ‘run by extremists,’ and Mr. Daleiden and CMP ‘will stop at nothing to deny women
21 legal abortion services.” (Dkt. 428 at 10, *citing nothing*.) The quotations that CMP and Daleiden
22 claim were “stated” by Mrs. Orrick were not her personal statements. To ascribe every statement
23 embedded in Facebook posts that Mrs. Orrick “liked,” as if they were statements made personally
24 by Mrs. Orrick, is misleading and ignores the realities of how people use Facebook. *See Adams*,
25 2012 U.S. Dist. LEXIS 50904 at *6 (“[r]ecusal must be based upon facts and not on conjecture
26 [or] speculation”).

27 **Second**, *even if* Mrs. Orrick made the statements that CMP and Daleiden attribute to her,
28 as a matter of law a judge’s spouse’s views “cannot be imputed to [the judge], no matter how

1 prominently she expresses them.” *Perry v. Schwarzenegger*, 630 F.3d 909, 912 (9th Cir. 2011)
2 (Reinhardt, J.); *see id.* at 916 (“The views are hers, not mine, and I do not in any way condition
3 my opinions on the positions she takes regarding any issues.”); *Akins v. Knight*, No. 2:15-CV-
4 4096-NKL, 2016 U.S. Dist. LEXIS 2802, at *7 (W.D. Mo. Jan. 11, 2016) (denying recusal
5 motion on basis of spouse’s critical comments relating to subject matter at issue and holding that,
6 “[a]s to any views [my spouse] may express on a subject that has come before this Court, he is an
7 independent person who need not obtain the undersigned’s approval or agreement to speak about
8 whatever subject he chooses. His views are his own.”). The notion that Mrs. Orrick’s own
9 personal views could disqualify Judge Orrick is based on “an outmoded conception of the
10 relationship between spouses.” *Perry*, 630 F.3d at 912.

11 Nor can Mrs. Orrick’s Facebook activity mean she has any “‘interest’ in the outcome of
12 this case that might be substantially affected by its outcome, over and beyond the interest of any
13 American with a strong view” on the issues here. *Id.* at 915; *see Hewlett-Packard v. Bausch &*
14 *Lob, Inc.*, No. C 84-20642 RPA, 1988 WL 281516 (N.D. Cal. Aug. 1, 1988) (denying recusal
15 motion where judge’s son had been employed by the plaintiff because interests in the litigation
16 “do not affect” the judge’s son); *Akins*, 2016 U.S. Dist. LEXIS 2802, at *7 (denying recusal
17 motion on basis of spouse’s critical comments relating to subject matter at issue because “[s]uch
18 criticism establishes no interest . . . in the outcome of this case”). Accordingly, “a reasonable
19 person with full knowledge of all the facts would not reasonably believe that [Judge Orrick]
20 would approach a case in a partial manner due to [Mrs. Orrick’s] independent views.” *Perry*, 630
21 F.3d at 916.

22 3. Judge Orrick’s Comments at the May 25 Emergency Hearing Do Not 23 Stem From an Extra-Judicial Source and Were Well Founded.

24 Finally, CMP and Daleiden point to Judge Orrick’s comment during the emergency
25 telephone conference on May 25 that “Mr. Daleiden better be well advised by his lawyers,
26 regardless, that he is obligated to follow the Court’s orders and not to try to skate around them
27 and cause real harm to human beings.” (Dkt. 428-1 at 183:3-7.) CMP and Daleiden claim that
28 Judge Orrick’s response “revealed his prejudice against Mr. Daleiden and a belief that he is an

1 evil person.” (Dkt. 428 at 11.)

2 Under the “extra-judicial source” rule, “[j]udicial remarks during the course of a trial that
3 are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do
4 not support a bias or partiality challenge.” *Liteky*, 510 U.S. at 555 (Kennedy, J., concurring).
5 Accordingly, as a matter of law, “expressions of impatience, dissatisfaction, annoyance, and even
6 anger, that are within the bounds of what imperfect men and women, even after having been
7 confirmed as federal judges, sometimes display,” do not establish bias or partiality. *Id.* at 555-56.
8 Ninth Circuit cases on this point are legion. *See e.g., Holland*, 519 F.3d at 913-914 (“[T]he
9 ‘extrajudicial source’ factor . . . generally requires as the basis for recusal something other than
10 rulings, opinions formed or statements made by the judge during the course of trial.”); *In re*
11 *Marshall*, 721 F.3d 1032, 1043 (9th Cir. 2013) (judge’s comments toward party not a basis for
12 recusal, which “might also be reasonably seen as the product of [the judge’s] frustration with [the
13 party’s] behavior throughout the litigation”); *In re Yagman*, 796 F.2d 1165, 1181-82 (9th Cir.
14 1986) (affirming denial of recusal motion and holding that “[o]ften the judge may be angry with
15 the attorney for violating one or more rules. Without more, this natural responsive attitude does
16 not provide reasonable grounds to question the judge’s impartiality”).

17 Judge Orrick’s comment at the May 25 emergency hearing did not stem from an “extra-
18 judicial” source and therefore cannot constitute grounds for recusal. To the contrary, Judge
19 Orrick was expressing understandable frustration in the face of a gross and disturbing violation of
20 his orders, a violation to which Daleiden’s lawyers admitted during the May 25 conference. (Dkt.
21 428-1 at 176:1-9 (Judge Orrick: “If Mr. Daleiden was here, as I ordered, on the phone, I would
22 ask him the same question, and so I guess Ms. Short, I ask you, is that true?” Ms. Short: “That –
23 that – what, I understand that, I went to the same website, yes, there are or were videos on the
24 website, and there were the names of the Does on the website . . .”).)

25 Indeed, Judge Orrick’s comment that Mr. Daleiden was “obligated to follow the Court’s
26 orders and not try to skate around them and cause real harm to human beings,” (Dkt. 428-1 at
27 183:3-7), was well-founded in the record. In granting NAF’s motion for preliminary injunction,
28 Judge Orrick held that Daleiden’s release of videos led to a “significant increase in harassment

1 and violent acts,” “including the most recent attack in Colorado Springs” where three people were
2 gunned down at a NAF-member clinic. (Dkt. 354 at 36.) He further held that if the enjoined
3 materials “were publicly released, it is likely that the NAF attendees shown in those recordings
4 would . . . face an increase in harassment, threats, or incidents or violence.” (*Id.* at 36.)

5 The Ninth Circuit affirmed Judge Orrick’s finding that NAF and its members would suffer
6 irreparable harm absent an injunction, pointing out that, after Daleiden and CMP “made some of
7 the recordings public . . . incidents of harassment and violence against abortion providers
8 increased, including an armed attack at the clinic of one of the video subjects that resulted in three
9 deaths.” *In re Center for Medical Progress*, No. 16-15360, Dkt. No. 154-1 at 3, (9th Cir.
10 Mar. 29, 2017). Irreparable harm, including death, is “real harm.” Judge Orrick’s admonishment
11 was entirely proper, accurate, and well-taken in light of the serious violations of the preliminary
12 injunction and the potential for grave harm that Judge Orrick had already found would result from
13 such violations.

14 **IV. CONCLUSION**

15 The motion should be denied. NAF respectfully asks the Court to issue an order as
16 promptly as possible so as not to delay the contempt proceedings any further.

17
18 Dated: June 16, 2017

LINDA E. SHOSTAK
DEREK F. FORAN
CHRISTOPER L. ROBINSON
MORRISON & FOERSTER LLP

19
20
21 By: /s/ Derek F. Foran
DEREK F. FORAN

22
23 Attorneys for Plaintiff
24 NATIONAL ABORTION FEDERATION
25
26
27
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