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13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF ARIZONA**

15 Victor Parsons, *et al.*, on behalf of themselves
and all others similarly situated; and Arizona
16 Center for Disability Law,
Plaintiffs,

17 v.

18 Charles Ryan, Director, Arizona Department
of Corrections; and Richard Pratt, Interim
19 Division Director, Division of Health Services,
Arizona Department of Corrections, in their
20 official capacities,
Defendants.

NO. 2:12-cv-00601-DKD

**MOTION TO DISQUALIFY
MAGISTRATE JUDGE DUNCAN
FROM ALL FURTHER
PROCEEDINGS**

(Oral Argument Requested)

22 “An independent, fair and impartial judiciary is indispensable to our system of
23 justice.” *See* ABA Model Code of Judicial Conduct, Preamble (2007). This tenet is so
24 critical that a judge presiding over a case must avoid not only actual impropriety, but also
25 the mere “appearance of impropriety.” *See* Code of Conduct for United States Judges,
26 Canon 2; *see also* *Offutt v. United States*, 348 U.S. 11, 14 (1954) (“[J]ustice must satisfy
27 the appearance of justice.”). The violation of either one “diminishes public confidence in
28 the judiciary and injures our system of government under law,” and requires

1 disqualification from a proceeding. *See* 28 U.S.C. § 455; Judicial Code of Conduct,
2 Cannons 1 (commentary) & 3(C).

3 Pursuant to 28 U.S.C. § 455(a) and (b) and Fed. R. Civ. P. 73(b)(3), Defendants
4 Charles Ryan and Richard Pratt respectfully move the Court to disqualify Magistrate
5 Judge Duncan from all further proceedings in this matter. Magistrate Judge Duncan has
6 acknowledged conduct that violates the Code of Conduct for United States Judges
7 (“Judicial Code of Conduct”), the ABA Model Code of Judicial Conduct (“ABA Model
8 Code”), and the Model Civil Jury Instructions. His statements and other recent actions
9 call into serious question his ability to be fair and impartial in this case. He has expressly
10 abandoned his role as a neutral arbiter. He has pre-judged the evidence and veracity of
11 Defendants’ witnesses. He has relied on an unsubstantiated media report, internet
12 research, and previously undisclosed *ex parte* communications that deny Defendants the
13 right to have this matter adjudicated by a fair and impartial fact-finder.

14 The federal statute governing this Motion, 28 U.S.C. § 455(a) and (b)(1), mandates
15 that any magistrate “shall disqualify himself in any proceeding in which his impartiality
16 might reasonably be questioned [or] [w]here he has a personal bias or prejudice
17 concerning a party.” Here, Magistrate Judge Duncan’s on-the-record disclosures and
18 other actions demonstrate he should disqualify himself to maintain the integrity and
19 fairness of future proceedings and to ensure the outcome of future proceedings is the
20 result of judicious decision-making and not grounded in animus or anger toward one
21 party. *See United States v. S. Fla. Water Mgmt. Dist.*, 290 F. Supp. 2d 1356, 1358 (S.D.
22 Fla. 2003) (disqualifying district court judge for relying on newspaper coverage as
23 grounds for order to appoint special master).

24 Given the gravity of this evidence, either the Chief Judge (The Honorable Raner C.
25 Collins) or the Article III district court judge assigned to this case (The Honorable Diane
26 J. Humetewa) should decide this Motion to ensure a fair and objective resolution.

27
28

1 **I. FACTUAL BACKGROUND**

2 **A. The Lawsuit, Stipulation, and Magistrate Judge Duncan’s Role**

3 In March 2012, Plaintiffs—13 inmates in the custody of ADC, and the Arizona
4 Center for Disability Law—filed this class-action lawsuit in the United States District
5 Court for the District of Arizona. (Dkt. 1.) The complaint alleged inadequate health care
6 and unlawful conditions of confinement, in violation of the Eighth Amendment, and
7 sought prospective relief. (Id.) The district court certified a Class and a Subclass in
8 March 2013. (Dkt. 372.) Corizon, Inc. has been the private vendor providing healthcare
9 to ADC inmates since March 2013. (Dkt. 344.)

10 On the eve of trial, the parties entered into a settlement agreement (“Stipulation”),
11 whereby ADC agreed to comply with 103 healthcare performance measures and
12 nine maximum custody outcome measures, for a conditional period of time. (Dkt. 1185,
13 ¶¶ 8, 18; Dkt. 1185-1 at 8-15, 38-39.) Magistrate Judge Duncan facilitated the settlement
14 agreement and impartially assisted the parties with negotiations. (Dkt. 1193.) The
15 purpose of the Stipulation was to settle the case; Defendants denied all allegations in the
16 complaint. (Dkt. 1185, ¶¶ 4-5.) There has never been a finding that Defendants violated
17 any inmate’s constitutional rights.

18 After executing the Stipulation, the parties agreed to allow Magistrate Judge
19 Duncan to conduct all further proceedings in the case. (Dkt. 1194.) The parties agreed to
20 this reassignment “because his constructive participation in the settlement negotiations has
21 provided him with a unique ability to effectuate the parties’ intent in any future
22 proceedings.” (Dkt. 1194.) For the Stipulation, Magistrate Judge Duncan would be
23 responsible for ruling on motions to enforce it and resolving disputes that arose during the
24 monitoring/compliance phase. (Dkt. 1185, ¶¶ 31, 35.) Ultimately, Magistrate Judge
25 Duncan “retain[s] the power to enforce this Stipulation through all remedies provided by
26 law,” subject to several exceptions. (Id., ¶ 36.) While the parties chose Magistrate Judge
27 Duncan to enforce the Stipulation, Defendants did so based on the assumption he would
28 continue to be a fair and impartial arbiter like he had been during settlement negotiations.

1 **B. The Monitoring and Compliance Phase of the Litigation**

2 Magistrate Judge Duncan approved the Stipulation on February 25, 2015 (Dkt.
3 1458), and monitoring/compliance began in March 2015. With respect to the healthcare
4 performance measures, ADC contract monitors review monthly a random sample of
5 medical records applicable to a particular measure and determine whether those records
6 reflect care in compliance with the measure’s requirements. (Dkt. 1185-1 at 17-36; Dkt.
7 1842-3, ¶¶ 17-21.) ADC then reports those compliance levels (of those random samples)
8 to Plaintiffs’ counsel and Magistrate Judge Duncan. For each performance measure at
9 each complex, the Stipulation requires 75% compliance in the first 12 months; 80%
10 compliance in the second 12 months, and 85% compliance thereafter. (Dkt. 1185,
11 ¶¶ 10.a.)

12 As the monitoring phase progressed, Defendants were in compliance with the
13 majority of performance measures, but not compliant with some. (Dkt. 1583, 1709, 2030,
14 2403.) Magistrate Judge Duncan made his frustration known on the record. (See, e.g.,
15 Dkt. 1691 at 5 [“the compliance failure is substantial at best and abject at worst”]; Dkt.
16 1622 at 4 [noting his “disappointment” in Defendants’ remedial plan]; id. at 5 [noting
17 Defendants’ plan includes statements “ranging from the absurd”].) He issued orders
18 purportedly aimed at enforcing the Stipulation. (See, e.g., Dkt. 1754, 1917.)

19 **C. Magistrate Judge Duncan’s Frustration Turns Into Bias and Prejudice**
20 **Against Defendants.**

21 Magistrate Judge Duncan’s tone and demeanor changed in 2017. His earlier
22 frustration, and even anger, over Defendants’ instances of non-compliance with certain
23 performance measures escalated to hostility, confrontation, personal animus, and bias and
24 prejudice, devoid of impartiality. For example:

- 25 • Magistrate Judge Duncan declared that his “preliminary view” of the issues
26 “is probably 8 out of 10 times to agree with what the plaintiffs have said,”
27 (Ex. 1, R.T. 1/26/17, at 7:17-8:1), and that he would “micromanage” ADC
28 until the “promise that was made to the inmates is being delivered, and

1 that's what I'm here for" (Ex. 6, R.T. 7/21/17, at 25:10-20; Ex. 7, R.T.
2 8/08/17 at 38:5-16; Ex. 8, R.T. 8/9/17 at 139:23-140:3; 180:11-181:20).
3 (See also Ex. 11, R.T. 11/7/17, at 38:19-39:1 [stating it was his "task ... to
4 try to deliver the promise of a stipulation to the people for whom it matters,
5 the inmates in the prison system who are not getting the healthcare that was
6 promised to them, it can't be my full time job, but I wish it could. And I
7 have told you I wish I could go live in the prison so that I could understand
8 this better because I'm just so frustrated with getting everything months late
9 and secondhand."].)

- 10 • Magistrate Judge Duncan told Defendants that he was "overruling virtually
11 every one of" their objections to testimony without any evidentiary basis
12 and was "on a fishing expedition" into whatever he is interested in. (Ex. 2,
13 R.T. 3/21/17, at 64:7-17; Ex. 9, R.T. 8/24/17, at 7:18-20; see also Ex. 3,
14 R.T. 4/17/17, at 556:15-557:23; Ex. 4, R.T. 5/10/17, at 759:19-760:6; Ex. 5,
15 R.T. 7/14/17, at 109:23-110:25; Ex. 10, R.T. 9/11/17, at 48:9-49:3; Ex. 12,
16 R.T. 11/8/17, at 7:21-9:22.)
- 17 • Magistrate Judge Duncan told Defendants that he "wish[ed]" Plaintiffs had
18 more "soldiers" to "engage[]" Defendants "in this battle." (Ex. 11, R.T.
19 11/7/17, at 37:20-39:9 ["And the availability of soldiers to be engaged in
20 this battle ... If I could have full time engagement of the plaintiffs' lawyers
21 on this case, I would be pleased about that. ... And unfortunately, just as I
22 can't devote full time to it, they can't either, but I wish they could. I wish
23 they could be on this more than they are."].)
- 24 • Magistrate Judge Duncan scolded Defendants' counsel merely for seeking a
25 solution to the number of complaint letters Plaintiffs' counsel send on a
26 daily basis—"you have the chutzpah to say they have been sending us too
27 many letters"—and calling it an "incredulous" request. (Ex. 11, R.T.
28 11/7/17, 35:17-36:6, 38:8-14; see also *id.* at 37:9-11 ["You have heard me

1 berate your counsel in this case previously about responsiveness, failures to
2 respond.”].)

- 3 • Magistrate Judge Duncan deferred to extra-judicial sources in resolving
4 evidentiary issues. (See Ex. 5, R.T. 7/14/17, at 127:3-128:24 [in determining
5 disputed allegations of retaliation, he considered “what has been told to me
6 over the years by many people who have been in custody and have appeared
7 here for settlement conferences.”]; Ex. 11, R.T. 11/7/17, at 183:1-9
8 [contrary to Defendants’ expert’s opinion, he opined: “I know when I have
9 dealt with dead animals and dead people that I have encountered in my life I
10 never saw rigor mortis within 30 minutes but you now tell me that’s
11 possible.”].)

12 The breadth and depth of Magistrate Judge Duncan’s relinquishment of his
13 impartiality and his hostility toward Defendants were palpable during at least two status
14 hearings.

15 **July 21, 2017 Status Hearing**

16 At a July 21, 2017 emergency telephonic hearing to address an allegation of
17 retaliation against an inmate,¹ Magistrate Judge Duncan referred to the inmate as his
18 “client” for whom he had an obligation to ensure their voice is heard:

19 And what I have to do is I have, at the end of that process, to
20 make sure that I have a client that exists in the prison in which
21 inmates feel completely safe in communicating their views to
22 the Court. Their views may not be right. Their views may be
wrong. Their views may be lies. But I have to have the
opportunity to hear what those views are.

23 (Ex. 6, R.T. 7/21/17, at 14:12-17, emphasis added.) The inmate class is represented by
24 counsel and it is their job to speak and stand for the inmates, not the judge presiding over

25 ¹ This inmate alleged that, when she left her cell to attend a court hearing, ADC
26 staff “rolled up” her property. (Dkt. 2423.) This was standard operating procedure; when
27 an inmate leaves the facility for a court hearing, staff remove and safeguard their property
28 from other inmates. (Id.) The inmate further alleged that, a few days after her testimony,
ADC replaced her cell mate with another inmate. (Id.) ADC made that cell reassignment,
however, to accommodate a housing issue involving the new cell mate (she was pregnant
and needed a lower bunk). (Id.)

1 contested proceedings. While refusing to give Defendants an opportunity to present
2 evidence refuting the inmate’s claim, Magistrate Judge Duncan ordered that inmates “who
3 testify in my court are off limits with respect to your decision on the yard of how to deal
4 with other problems you have.” (Id. at 20:2-16.) When Defendants’ counsel asked for
5 clarification as to whether ADC was prohibited from making housing decisions with
6 respect to the particular inmate involved for the duration of the Stipulation, Magistrate
7 Judge Duncan retorted: “That is a preposterous argument” (Id. at 20:17-21:7.)
8 When Defendants’ counsel tried to explain that the ramifications of his order—which
9 extended to any inmate whom Plaintiffs’ counsel talked to (up to 33,000 inmates)—was
10 unduly burdensome on ADC operations, particularly since the source allegation had not
11 even been proven, Magistrate Judge Duncan shouted back: “Ms. Love, your hyperbole is
12 extreme and unpersuasive. . . . [and] preposterous.” (Id. at 29:14-31:1.)

13 **December 20, 2017 Status Hearing**

14 On December 19, 2017, KJZZ published a story, titled: *On the Inside: The Chaos*
15 *of Arizona Prison Health Care*. The article was based on allegations by a former temp-
16 agency OB-GYN who worked with Corizon (Jan Watson) at ASPC-Eyman for about
17 5 months. According to the article, Dr. Watson claimed that: she experienced delays in
18 treating chronic care inmate patients; she prescribed pain medication that would often run
19 out; Corizon often denied her patient specialty referrals; and Corizon would ask her to
20 cancel authorized specialty referrals. See [http://kjzz.org/content/572976/inside-chaos-](http://kjzz.org/content/572976/inside-chaos-arizona-prison-health-care)
21 [arizona-prison-health-care](http://kjzz.org/content/572976/inside-chaos-arizona-prison-health-care).

22 On December 20, 2017, the parties attended a regularly scheduled status hearing.
23 After counsel announced their appearances, Magistrate Judge Duncan—clearly upset,
24 standing, and waving and pointing to his iPad—yelled at Defendants’ counsel, during the
25 course of which he made statements acknowledging conduct that constitutes violations of
26 the Judicial Code of Conduct, the ABA Model Code, and the Model Civil Jury
27 Instructions:

28

1 THE COURT: Well, I'm standing because in the most
2 literal sense I'm standing up for the inmates of the Arizona
3 Prison System. It is my job to be the enforcement officer on
4 this Stipulation, which I have earnestly tried to do for months
5 expecting people to comply with my orders in good faith.

6 I read on the website from KJZZ this morning a memo
7 from Sara Neese at Corizon ...

8 (Ex. 13, R.T. 12/20/17, at 5:1-7, 8:8-9, emphasis added.) He proceeded to read that memo
9 (from the Corizon employee to Dr. Watson), which asked the doctor to cancel two
10 infectious disease consults, one because Corizon did not have a provider scheduled for the
11 inmate. He then summarily declared the KJZZ story to be a "smoking gun memo," called
12 ADC "evil," and—with no evidentiary basis whatsoever—accused Defendants' counsel of
13 being dishonest:

14 As I read this, there is no other way to read it than an end
15 run around the monitoring program, an end run around the
16 Stipulation.

17 ...

18 I have used words in this courtroom like flabbergasted,
19 stunned. I've run out of words. I've run out of a way to
20 communicate what is such an egregious departure from honest
21 representation in a case, from the defendants' side of this case.

22 ...

23 What I now see is a window that undercuts my entire
24 agenda, undercuts my entire program, and that is, it's just a
25 game. It's just a game to try to beat the judge and his
26 monitoring program. It's just a game to try to beat the State's
27 monitoring program.

28 I am without words. I don't know. I cannot have
contemplated that anybody in a system -- the Corizon lawyers
have been coming to the courtroom, they've been listening to
this. They certainly are aware of what's going on in their shop.
They're aware of what's going on in my shop. The two don't
work together, and they're not going to work together.

What's going to happen is I'm going to find out exactly
what's going on. I'm going to get this doctor into this
courtroom and I'm going to hear her testimony. I'm going to
get this Sara Neese person in this courtroom, or if she's
outside of my jurisdiction I'll get her on the telephone. I will
hear from these people. I will get every single memo that of
this like. And I am now changing the entire approach here. It's
not my agenda anymore, it's digging down deep to see how

1 deep this evil goes of trying to dissemble to the Court to see if
2 it's true.

3 (Id. at 5:18-20, 6:1-5, 7:12-8:7, 11:5-11, emphasis added.)

4 Magistrate Judge Duncan then accused ADC employee witnesses of lying to him:

5 But over the time that I have been involved in this case,
6 there have been warning signs that this is not false. There have
7 been warning signs that come in the nature of the memo that
8 was posted on the wall that I've already seen. There have
9 been warning signs of the testimony that I've had here where I
10 thought that the persons that were telling me the truth were the
11 inmates and the people that are lying through their teeth were
12 the people at the Department of Corrections. And that's not
13 every single one of them. There are decent and honorable
14 people on the correction side, and there are liars on the
15 prisoners' side.

16 But I tell you that as a fact finder in this case in my role,
17 the people that I have thought have lied to me have not been
18 the prisoners, they have been the people working for the
19 prison. And I've laid that out for you.

20 (Id. at 8:12-9:1, emphasis added.)

21 Magistrate Judge Duncan then disclosed that he had received *ex parte*
22 communications from potential fact witnesses (unnamed Corizon employees), and that
23 those communications had influenced his enforcement of the Stipulation:

24 And so the additional thing that I get is something I can't
25 work with because it's impermissible under the rules. We
26 receive phone calls in chambers, my staff receives phone calls
27 in chambers from people who work for Corizon who say
28 essentially, it is so much worse than you think. And we cannot
do anything other than to say, if you would like to come forward, we will have you in court any day to talk to us about that. Then they ask us, can you protect us? And my staff is told to instruct them, no, we cannot protect you. I can't guarantee what can happen.

 And so some of those -- some of those people may have told us something that would be relevant, but I really haven't acted on it because it's not testimony. It's just people calling on the telephone. I can't act upon it.

But what it does is it adds to the filter of how I evaluate
what I see on a website from KJZZ that indicates that a memo
went from the contractor to the contractor's doctors instructing
them how to do an end run around my Stipulation-monitoring
responsibilities. And it's just disgusting.

 (Id. at 9:2-21, emphasis added.)

1 Relying solely on the uncorroborated hearsay allegations in the KJZZ article and
2 the *ex parte* communications he and his staff had received over the phone in chambers,
3 Magistrate Judge Duncan summarily declared that he now doubted the veracity of the
4 entire evidentiary record of compliance over the past two years, stating: “I’m now
5 concerned that I cannot trust those numbers without further inquiry.” (Ex. 13, R.T.
6 12/20/17, at 10:12-13.) He stated that he would re-evaluate the entire record, commenting
7 that Plaintiffs were making a “stronger, stronger argument” of non-compliance in light of
8 the KJZZ article, which he claimed was “prima facie” evidence of Defendants’
9 dishonesty, characterizing the monitoring reports as “complete fabrication.” (Id. at 10:13-
10 11:16, 19:17.) Magistrate Judge Duncan then instructed Plaintiffs’ counsel “to marshal
11 the case” and present evidence to substantiate them. (Id. at 19:10-22, 20:14-21:17.)

12 To emphasize that he was abandoning his role as a neutral arbiter, Magistrate Judge
13 Duncan proclaimed: “I’m not in the typical role of the neutral judge, I’m the enforcer of
14 the Stipulation.” (Ex. 13, R.T. 12/20/17, at 18:17-18.) He ordered an evidentiary hearing
15 for February 27, 2018. (Dkt. 2559.)

16 At the January 18, 2018 Status Hearing, Magistrate Judge Duncan again
17 acknowledged that the KJZZ story was unsubstantiated, and that he set the hearing based
18 on allegations “tak[en] from the street.” (Ex. 14, R.T. 1/18/18, at 5:9-13.) He also
19 confirmed that the KJZZ story called into question the veracity of the evidentiary record
20 of Defendants’ compliance, and that he would be actively “playing a role in checking on
21 the veracity of the monitoring program.” (Id. at 17:6-7.)

22 **II. MAGISTRATE JUDGE DUNCAN’S DISQUALIFICATION IS** 23 **NECESSARY BECAUSE OF HIS BIAS AGAINST DEFENDANTS.**

24 “A judge shall avoid impropriety and the appearance of impropriety.” ABA Model
25 Code, Canon 2. The appearance of impropriety exists if “the conduct would create in
26 reasonable minds a perception that the judge’s ability to carry out judicial responsibilities
27 with integrity, impartiality and competence is impaired.” *Caperton v. A.T. Massey Coal*
28 *Co., Inc.*, 556 U.S. 868, 888 (2009) (quoting ABA Model Code, Canon 2A); *see also*

1 Judicial Code of Conduct, Canon 2A commentary (“An appearance of impropriety occurs
2 when reasonable minds, with knowledge of all the relevant circumstances disclosed by a
3 reasonable inquiry, would conclude that the judge’s honesty, integrity, impartiality,
4 temperament, or fitness to serve as a judge is impaired.”). Under both the ABA Model
5 Code and the Judicial Code of Conduct, a judge must disqualify himself if his
6 “impartiality might reasonably be questioned.” *See* Judicial Code of Conduct, Canon
7 3(C); ABA Model Code, Canon 2, Rule 2.11.

8 Section 455 incorporates these ethical codes. *See United States v. Baca*, 610 F.
9 Supp. 2d 1203, 1212 (E.D. Cal. 2009). Under § 455(a), a magistrate judge “must recuse
10 himself whenever his impartiality might reasonably be questioned.” *Liteky v. United*
11 *States*, 510 U.S. 540, 548 (1994) (internal quotation omitted). This is an objective
12 standard that turns on the *appearance* of impartiality rather than its actual existence.
13 *Davis v. Xerox*, 811 F.2d 1293, 1295 (9th Cir. 1987); *see also United States v. Holland*,
14 519 F.3d 909, 913 (9th Cir. 2008) (test for recusal is “an objective test based on public
15 perception.”). The adjudication of an improper appearance of impartiality involves
16 ascertaining “whether a reasonable person with knowledge of all the facts would conclude
17 that the judge’s impartiality might reasonably be questioned.” *Preston v. United States*,
18 923 F.2d 731, 734 (9th Cir. 1991).

19 Section 455(b) “covers situations in which an *actual* conflict of interest exists, even
20 if there is no appearance of one.” *Herrington v. Sonoma County*, 834 F.2d 1488, 1502
21 (9th Cir. 1987). “[A]ctual bias is a per se ground for disqualification.” *Id.* “Frequently,
22 an overlap will occur—an act will appear to create [an apparent] conflict and will fall
23 within the per se rule.” *Davis*, 811 F.2d at 1295. Thus, § 455(b) provides “concrete
24 examples where the *appearance* of partiality suffices to establish a ground for recusal
25 under § 455(a) even absent actual bias.” *Preston*, 923 F.2d at 734 (emphasis added).
26 Among those disqualifying situations are proceedings where the magistrate judge has “a
27 personal bias or prejudice concerning a party” or is “acting as a lawyer in the proceeding.”
28 *See* 28 U.S.C. §§ 455(b)(1), -(b)(5)(ii); *see also* Judicial Code of Conduct, Canon

1 3(C)(1)(a), -(d)(ii).

2 Magistrate Judge Duncan has violated § 455 and these codes of conduct and, unless
3 he recuses himself, he must be disqualified from all further proceedings.

4 **A. Magistrate Judge Duncan’s Acknowledged Reliance on a Media Story
5 and Internet Research Violates the Codes of Judicial Conduct.**

6 Rule 2.9(C) of the Model Code of Judicial Conduct forbids judges from conducting
7 their own personal research into the issues before them: a judge “[can]not investigate facts
8 in a matter independently, and shall consider only the evidence presented and any facts
9 that may properly be judicially noticed.” ABA Model Code, Canon 2, Rule 2.9(C); *see*
10 *also* Judicial Code of Conduct, Canon 2A commentary (judge prohibited from engaging in
11 “harmful” conduct). Magistrate Judge Duncan engaged in this prohibited conduct when
12 he *sua sponte* researched and read the KJZZ article outside the court proceedings. He
13 then acted on this improperly obtained out-of-court information and issued rulings based
14 upon it to Defendants’ detriment. *See* ABA Comm. on Ethics & Prof’l Responsibility,
15 Formal Op. 478 (Dec. 8, 2017) (addressing independent factual research by judges via the
16 internet). And without any substantiation and refusing Defendants an opportunity to
17 refute the hearsay allegations in the KJZZ article, Magistrate Judge Duncan angrily
18 proclaimed he was “standing up for the inmates of the Arizona Prison System”; accused
19 Defendants’ counsel of dishonest representation; declared that he was changing his
20 “agenda” to “see how deep the evil goes”; called ADC employees/witnesses liars; and
21 discredited all prior evidence of Defendants’ compliance with the Stipulation.

22 At the very least, Magistrate Judge Duncan’s impartiality might reasonably be
23 questioned, and unless he recuses himself, he should be disqualified from presiding over
24 future proceedings.

25 **B. Magistrate Judge Duncan’s Statements Demonstrate He Has
26 Abandoned His Duty to Be a Fair and Impartial Fact-Finder.**

27 The Manual of Model Civil Jury Instructions 3.2 instructs jurors to limit their
28 findings to “only the evidence received in the case” and expressly prohibits them from
communicating or conducting research on the internet, and from reading, watching, or

1 listening to “any news or media accounts or commentary about the case or anything to do
2 with it.” The instruction further explains that the purpose of the prohibition is to protect
3 the parties’ rights to due process because “research or investigation outside the
4 courtroom,” and “any information through improper communications,” are not under oath
5 and could result in a verdict improperly “influenced by inaccurate, incomplete or
6 misleading information.” *Id.* The Manual of Model Criminal Jury Instructions 7.2
7 provides substantially the same instruction, likewise explaining: “The law requires these
8 restrictions to ensure the parties have a fair trial based on the same evidence that each
9 party has had an opportunity to address.”

10 Magistrate Judge Duncan—the fact-finder in this matter—acknowledged that he
11 read the KJZZ article on-line, and based on what he read, he concluded Defendants were
12 not telling the truth about their reported compliance. Indeed, if a juror had done what
13 Magistrate Judge Duncan has done, a mistrial would be declared or, at the very least, that
14 juror would be removed from the jury. Failure to comply with the basic duty of a fact-
15 finder—to be open-minded and not reach any conclusions until both sides have an
16 opportunity to present their case—demonstrates to a reasonable observer of these
17 proceedings that Magistrate Judge Duncan’s independence and impartiality have been
18 compromised.

19 Furthermore, the record demonstrates Magistrate Judge Duncan abdicated his role
20 as a “neutral judge,” proclaiming that he was “standing up for the inmates of the Arizona
21 Prison System,” and declaring that he had “a client that exists in the prison.” He also pre-
22 judged the veracity of witnesses when he stated he would defer to Plaintiffs’ arguments
23 “8 out of 10 times” and that he is inclined to deny “virtually every one” of Defendants’
24 objections.” Just as professional ethics rules prohibit a lawyer from serving as both
25 advocate and witness in the same case to protect against appearances that could bring
26 “distrust on the legal profession,” *United States v. Birdman*, 602 F.2d 547, 554 & n. 23
27 (3d Cir. 1979), § 455(b)(5)(ii) disqualifies a magistrate judge for “acting as a lawyer in the
28 proceeding” to protect “the integrity and independence of the judiciary.” *See* Judicial

1 Code of Conduct Canon 1. Magistrate Judge Duncan’s statements are not protected by
2 purported efforts to enforce the Stipulation. *See Jacobsen v. Filler*, 790 F.2d 1362, 1364-
3 65 (9th Cir. 1986) (rejecting pro se inmate’s argument that court had the duty to advise
4 him, explaining “courts generally do not intervene to save litigants from their choice of
5 counsel, even when the lawyer loses the case [I]t is not for the trial court to inject
6 itself into the adversary process on behalf of once class of litigant.”); *see also In re*
7 *Cement Antitrust Litig.*, 688 F.2d 1297, 1310 (9th Cir. 1982) (stating “the appearance of
8 impropriety is similar whether the interest is in a named party or a class member, class
9 members should be viewed as parties for purposes of recusal under the statute.”); *In re*
10 *Cement & Concrete Antitrust Litig.*, 515 F. Supp. 1076, 1079 (D. Ariz. 1981) (holding
11 “where it counts, class members and parties are identical” for the purposes of determining
12 financial conflict under § 455(b)(4)).

13 **C. Magistrate Judge Duncan Improperly Relied on *Ex Parte***
14 **Communications in Making His Rulings.**

15 Judges are prohibited from “*ex parte* communications or any ‘communications
16 concerning a pending or impending matter that are made outside the presence of the
17 parties or their lawyers.’” *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1173-
18 74 (9th Cir. 2017) (quoting Judicial Code of Conduct, Cannon 3A(4)). They “[can]not
19 initiate, permit, or consider *ex parte* communications.” ABA Model Code, Canon 2, Rule
20 2.9(A). Magistrate Judge Duncan stated that he entertained *ex parte* communications—
21 from potential fact witnesses—and considered those communications in ruling on issues,
22 in violation of the Judicial Code of Conduct and the ABA Model Code. Like the KJZZ
23 article, Magistrate Judge Duncan stated that these communications contributed to his
24 anger and actions and served as a “filter” for his assessment of the case. *See El Fenix de*
25 *Puerto Rico, Inc. v. M/Y “Johanny”, Aurelio Varona-Perez*, 954 F. Supp. 23, 26 (D.P.R.
26 1996) (disqualification for apparent bias where judge may have received *ex parte*
27 comments that affected judge’s weighing of witness credibility even though the judge
28 denied actual bias, but noting that disqualification would have been *required* if the judge

1 actually received “ex parte information regarding evidentiary facts (namely the credibility
2 of witnesses)”).

3 Magistrate Judge Duncan has further stated he has resolved disputed allegations of
4 retaliation based upon his prior settlement judge experience in inmate lawsuits against
5 ADC, due to “what has been told to me over the years by many people who have been in
6 custody and have appeared here for settlement conferences.” *See* ABA Model Code,
7 Canon 2, Rule 2.9(C); Model Civil Jury Instructions 3.2.

8 He has further acknowledged that he based an evidentiary ruling rejecting
9 Defendants’ *expert’s* opinion on the medical principles of rigor mortis solely upon his
10 personal life experience rather than the actual medical evidence before him. *See* ABA
11 Model Code, Canon 2, Rule 2.9(C); Model Civil Jury Instructions 3.2.

12 In a factually analogous case, the Southern District of Florida’s chief judge
13 disqualified a district court judge (who had presided over a complex case since its
14 inception in 1988, and retained jurisdiction to enforce a consent decree entered after
15 settlement in 1992), finding apparent bias under § 455(a) because he participated in *ex*
16 *parte* communications with several media outlets concerning issues relating to an order he
17 made appointing a special master to assist him in enforcing the consent decree. *S. Fla.*
18 *Water Mgmt. Dist.*, 290 F. Supp. 2d at 1358. The court found that the judge’s references
19 to newspaper coverage of proposed legislation and evidence of his *ex parte*
20 communications with newspaper reporters who quoted him were sufficient cause for
21 disqualification because a “disinterested observer fully informed of the facts would
22 entertain a significant doubt as to the judge’s impartiality.” *Id.* at 1360-61.

23 Like the district court judge in that case, Magistrate Judge Duncan should be
24 disqualified for conducting internet research on the KJZZ website, and then relying on it,
25 other *ex parte* communications, and personal experiences to issue rulings to Defendants’
26 detriment, all in violation of the Judicial Code of Conduct, the ABA Model Code, and the
27 Model Civil Jury Instructions. He was required to follow these codes of conduct and
28 avoid the appearance of impropriety.

1 **D. At a Minimum, There is an Appearance of Impropriety.**

2 Whether actual or apparent, the bias that saturates this record requires Magistrate
3 Judge Duncan’s disqualification. Indeed, the mere appearance of impropriety is sufficient
4 grounds for disqualification under the law. The overwhelming evidence presented here—
5 his consideration of the KJZZ article; his reliance on *ex parte* communications; his
6 pronounced abdication of his role as a neutral arbiter; and all of his other statements
7 recounted above—demonstrate that a reasonable person could at least conclude that
8 Magistrate Judge Duncan’s impartiality is irreparably compromised. The evidentiary
9 record demonstrates that his comments reveal much more than mere anger at or frustration
10 with Defendants. It reveals a longstanding history of hostility toward Defendants,
11 concluding they are “liars,” and accusing them of “lying through their teeth,” and plotting
12 an “evil” plan to deceive him. The appearance of impropriety is buttressed by the
13 circumstances surrounding the KJZZ article.

14 Before publishing the article, the reporter boasted that the article would “bring
15 about real change” (Ex. 15, JW001169) and that, given his relationship with Plaintiffs’
16 counsel, they planned on “enter[ing] it into the court docket so the judge will see it!” (Ex.
17 15, JW001141). On December 12, 2017, a week before publishing, he boasted, “I think
18 we have them on the ropes.” (Ex. 15, JW001170.) Not coincidentally, he published the
19 story on December 19, the day before the already-scheduled Status Hearing and, just as he
20 had hoped, Magistrate Judge Duncan read it and allowed it to influence his decision-
21 making. The reporter attended the December 20 Status Hearing. (Ex. 15, JW001123.)
22 The next day, he claimed credit for Magistrate Judge Duncan’s outburst (recounting it in
23 detail in another story),² and urged Dr. Watson to bring up any other issues she had at the
24 ordered evidentiary hearing and even suggested some topics for her testimony. (Ex. 15,

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26 ² That story was titled: *Federal Judge Calls For Hearing After KJZZ Report on*
27 *Arizona Prison Health Care*. See [https://kjzz.org/content/583172/federal-judge-calls-](https://kjzz.org/content/583172/federal-judge-calls-hearing-after-kjzz-report-arizona-prison-health-care)
28 [hearing-after-kjzz-report-arizona-prison-health-care](https://kjzz.org/content/583172/federal-judge-calls-hearing-after-kjzz-report-arizona-prison-health-care). The story noted that Magistrate
Judge Duncan “furiously addressed the courtroom,” it quoted much of what Magistrate
Judge Duncan said, and noted he was “[w]aiving his iPad and pointing to” the December
20 KJZZ story. *Id.*

1 JW001119.) They then joked that the evidentiary hearing and the role the KJZZ article
2 played was “like a once-in-a-life-time soap box moment,” and they “just need the abusive
3 husband!” (Id.)

4 These emails reveal that even the media readily saw Magistrate Judge Duncan’s
5 animosity toward and bias and prejudice against Defendants and (successfully) sought to
6 exploit it. *See* Judicial Code of Conduct, Canon 2(B) (“A judge should ... no[t] convey or
7 permit others to convey the impression that they are in a special position to influence the
8 judge.”); ABA Model Code, Canon 2, Rule 2.4(C) (“A judge shall not convey or permit
9 others to convey the impression that any person or organization is in a position to
10 influence the judge.”); *see id.*, comment (“Confidence in the judiciary is eroded if judicial
11 decision making is perceived to be subject to inappropriate outside influences.”).

12 To protect and uphold the independence and integrity of the justice system, this
13 matter should be reassigned to an Article III judge or magistrate judge who has not pre-
14 judged the evidence, witnesses, or Defendants, and who can avoid outside influences such
15 as the media from influencing their decision-making.

16 **III. CONCLUSION**

17 Magistrate Judge Duncan’s own statements demonstrate that he is no longer fair
18 and impartial and that he has allowed out-of-court sources of information, which
19 Defendants have not had an opportunity to test or challenge, influence his decisions and
20 rulings. Under these unusual circumstances, unless Magistrate Judge Duncan recuses
21 himself, he should be disqualified.

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DATED this 23rd day of February 2018.

STRUCK LOVE BOJANOWSKI & ACEDO, PLC

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CERTIFICATE OF SERVICE

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