

1 PAUL B. SALVATY (State Bar No. 171507)  
PSalvaty@winston.com  
2 **WINSTON & STRAWN LLP**  
333 S. Grand Ave., 38th Fl.  
3 Los Angeles, CA 90071-1543  
4 Telephone: (213) 615-1700  
Facsimile: (213) 615-1750

5 ABBE DAVID LOWELL (*pro hac vice*)  
AbbeLowellPublicOutreach@winston.com  
6 **WINSTON & STRAWN LLP**  
1901 L St., N.W.  
7 Washington, DC 20036-3508  
8 Telephone: (202) 282-5875  
Facsimile: (202) 282-5100

9 BRYAN M. SULLIVAN (State Bar No. 209743)  
bsullivan@earlysullivan.com  
10 ZACHARY C. HANSEN (State Bar No. 325128)  
zhansen@earlysullivan.com  
11 **EARLY SULLIVAN WRIGHT GIZER & McRAE LLP**  
6420 Wilshire Boulevard, 17th Fl.  
12 Los Angeles, CA 90048  
13 Telephone: (323) 301-4660  
Facsimile: (323) 301-4676

14 Attorneys for PLAINTIFF  
15 ROBERT HUNTER BIDEN

16 **UNITED STATES DISTRICT COURT**  
17 **CENTRAL DISTRICT OF CALIFORNIA**

18 ROBERT HUNTER BIDEN, an  
19 individual,

20 Plaintiff,

21 vs.

22 GARRETT ZIEGLER, an individual;  
23 ICU, LLC, a Wyoming Limited Liability  
24 Company d/b/a Marco Polo; and DOES  
1 through 10, inclusive,

25 Defendants.  
26  
27  
28

**Case No.: 2:23-cv-07593-HDV-KS**

*To Be Heard By The Honorable Monica  
Ramirez Almadani*

**OPPOSITION TO DEFENDANTS’  
REQUEST FOR JUDICIAL NOTICE  
IN SUPPORT OF DEFENDANTS’  
MOTION TO RECUSE**

Date: April 25, 2024  
Time: 1:30 p.m.  
Place: 10B

1 Plaintiff Robert Hunter Biden opposes Defendants’ request for judicial notice in  
2 support of Defendants’ motion to recuse (“Request”) as to Exhibits 1-6 and 11, as well  
3 as the purported facts set forth in Paragraphs 23, 28 and 29.<sup>1</sup> Courts may take judicial  
4 notice of “a fact that is not subject to reasonable dispute because it: (1) is generally  
5 known within the trial court’s territorial jurisdiction; or (2) can be accurately and  
6 readily determined from sources whose accuracy cannot reasonably be questioned.”  
7 Fed. R. Evid. 201(b). Here, the objected-to facts and exhibits are irrelevant; represent  
8 an improper attempt to use out of court statements to argue the merits of this case; and  
9 at least one purported “fact” is incorrect. Accordingly, the Court should decline to  
10 take judicial notice of Exhibits 1-6 and 11, as well as the purported facts set forth in  
11 Paragraphs 28 and 29.

12 **I. DEFENDANTS IMPROPERLY SEEK JUDICIAL NOTICE OF**  
13 **IRRELEVANT AND PREJUDICIAL MATERIAL**

14 Under Federal Rules of Evidence 401(b), evidence is relevant if “the fact is of  
15 consequence in determining the action.” District courts will decline to take judicial  
16 notice of facts that are not of consequence to resolving motions to dismiss. *See, e.g.,*  
17 *Laatz v. Zazzle*, -- F. Supp. 3d --, 2023 WL 4600432, at \*5 (N.D. Cal. 2023) (citing *In*  
18 *re Juul Labs, Inc., Antitrust Litig.*, 555 F. Supp. 3d 932, 968 (N.D. Cal. 2021))  
19 (declining to take judicial notice of documents that were not relevant to determining  
20 the sufficiency of plaintiff’s complaint). Here, many of Defendants’ “facts” and  
21 exhibits are of no consequence to resolving any aspect of Defendants’ Motion to  
22 Recuse, which is limited to determining whether, under 28 U.S.C. § 455(a), “a  
23 reasonable person with knowledge of all the facts would conclude that [Judge Vera]’s  
24 impartiality might reasonably be questioned.” *United States v. Holland*, 519 F.3d 909,  
25 912 (9th Cir. 2008). First, Exhibits 3-6 and 11 are interview transcripts and a hearing  
26 video from the pending impeachment inquiry of President Biden. As explained in the

27 \_\_\_\_\_  
28 <sup>1</sup> For the convenience of the Court, Appendix A to this opposition is a summary table  
of Plaintiff’s objections to Defendants’ challenged “facts” and exhibits.

1 Opposition, Defendants never explain how the present case will have any effect on the  
2 impeachment investigation, nor does the existence of the investigation indicate that  
3 Judge Vera’s partiality in this case could reasonably be questioned. Second, Exhibit 2  
4 is a webpage from Defendants’ website identifying news stories that mention  
5 Defendants’ activities. Defendants apparently include this to support their argument  
6 that a finding of liability in this case could inhibit the public from accessing relevant  
7 data. But that possibility does not bear upon whether Judge Vera’s partiality could  
8 reasonably be questioned, and in any event, an *actual* ruling in a case – let alone a  
9 potential future one – cannot serve as a basis for recusal. *See, e.g., Holland*, 519 F.3d  
10 at 913-14 (“extrajudicial source” rule “generally requires as the basis for recusal  
11 something *other than* rulings, opinions formed or statements made by the judge during  
12 the course of trial.”) (emphasis added).

13 Third, paragraph 29 in the Request addresses facts relating to the Senate  
14 committee and floor votes on Judge Vera’s nomination. Defendants apparently  
15 believe these facts support their argument that Judge Vera must be disqualified  
16 because he was nominated by President Biden. But “[t]here is no support whatsoever  
17 for the contention that a judge can be disqualified simply on the identity of the  
18 President who appointed him.” *Straw v. United States*, 4 F.4th 1358, 1363 (Fed. Cir.  
19 2021) (citing multiple authorities). That remains true even where, as here, the  
20 appointing President is related to a party in a “politically charged” case. *See Trump v.*  
21 *Clinton*, 599 F. Supp. 3d 1247, 1250 (S.D. Fla. 2022). Just as the identity of the  
22 appointing President is irrelevant to the recusal analysis, so too are the votes taken on  
23 a judge’s nomination.

24 Finally, Exhibit 1 of the Request consists of excerpts of Defendants’ “Report”  
25 developed from the data they purloined from Plaintiff. Although the “Report” is  
26 relevant to the case in general – in that it evidences Defendants’ wrongful access to  
27 Plaintiff’s private data – Defendants do not show how the “Report” bears upon Judge  
28 Vera’s partiality. Moreover, the excerpts are replete with intimate photographs of third

1 parties, as well as unredacted correspondence and contact information (such as email  
2 addresses and phone numbers) of multiple third parties. Under the circumstances of  
3 this motion, any probative value of the “Report” excerpts is outweighed by their unfair  
4 prejudice, and should be disregarded pursuant to Fed. R. Evid. 403.

## 5 **II. DEFENDANTS IMPROPERLY SEEK JUDICIAL NOTICE OF** 6 **FACTS THAT ARE IN DISPUTE.**

### 7 **A. Congressional Hearing Transcripts**

8 Defendants improperly seek judicial notice of facts that are in dispute, including  
9 assertions contained in transcripts and videos of Congressional proceedings.

10 Specifically, Defendants cite Exhibits 3–6 and 11, not simply for the fact that their  
11 “Report” was mentioned, but also to imply that Defendants’ assertions in the “Report”  
12 are *true*. (See, e.g., Mot. at 3–4 (citing Ex. 11 for proposition that the “Report” would  
13 “be something good to read” in connection with the impeachment investigation.)

14 The allegations contained within these transcripts cannot “be accurately and  
15 readily determined from sources whose accuracy cannot reasonably be questioned.”  
16 Fed. R. Evid. 201(b). Rather, by their very nature, they are disputed facts. See  
17 *Wilkins v. VanDiver*, 2022 WL 18229997, at \*7 (C.D. Cal. Oct. 25, 2022) (“However,  
18 the Court will not take judicial notice of facts which are subject to reasonable  
19 dispute.”). Accordingly, courts have repeatedly noted that while they may take  
20 judicial notice of the *existence* of public records, they may not accept as true the facts  
21 asserted in those documents. See, e.g., *F.D.I.C. v. O’Flahaven*, 857 F. Supp. 154, 157  
22 (D.N.H. 1994) (taking judicial notice only of the filing of affidavits and not the truth  
23 of their averments, citing multiple authorities). Thus, although the *existence* of  
24 Exhibits 3–6 and 11 are judicially noticeable, the Court cannot take judicial notice of  
25 the assertions contained within the documents for their truth.

### 26 **B. Defendants’ Website Discussing News Articles**

27 Next, Defendants seek judicial notice of a page on their own website, which  
28 purports to list hundreds of news articles citing the “Report,” for the claimed *fact* that

1 “there have been at least 441 citations to Marco Polo’s work by media outlets.” (Mot.  
2 at 3, RJN Ex. 2 & ¶ 8.) Again, Defendants improperly seek to use judicial notice to  
3 establish the *truth* of a document instead of its *existence*. “[T]o the extent the court  
4 *can* take judicial notice of press releases and news articles, it can do so only to  
5 ‘indicate what was in the public realm at the time, not whether the contents of those  
6 articles were in fact true.’” *Gerritsen v. Warner Bros. Ent. Inc.*, 112 F. Supp. 3d 1011,  
7 1029 (C.D. Cal. 2015) (citing *Von Saher v. Norton Simon Museum of Art at Pasadena*,  
8 592 F.3d 954, 960 (9th Cir. 2010)).

9 Defendants cite *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 978 (E.D. Cal.  
10 2000), for the proposition that judicial notice of the *content* of a website is proper  
11 “when neither party questions the authenticity of the site.” (RJN ¶ 2.) *Pollstar* is  
12 readily distinguishable: because neither party objected to taking judicial notice of the  
13 website, the court expressly declined to address the standards for taking judicial notice  
14 under Federal Rule of Evidence 201(b). *See* 170 F. Supp. 2d at 978. Here, in stark  
15 contrast, (1) Plaintiff *does* object to Defendants’ attempt to judicially notice the  
16 content of their own websites for their truth; and (2) those cases that *do* apply Rule  
17 201’s standards to websites reach the results set forth in *Gerritsen* and *Von Saher*.

### 18 **III. DEFENDANTS’ “FACTS” RELATING TO THE TIMING OF JUDGE** 19 **VERA’S APPOINTMENT ARE INCORRECT.**

20 In Paragraphs 23 and 28 of their Request, Defendants seek judicial notice of the  
21 purported fact that Judge Vera was “appointed” by President Biden on June 13, 2023.  
22 Not only is this purported fact “not subject to reasonable dispute” as required for  
23 judicial notice under Rule 201, it is *wrong*. As a quick review of Judge Vera’s  
24 biographical information shows, he was confirmed by the Senate on June 13, but he  
25 was nominated on January 3, 2023, and did not take the bench until receiving his  
26 commission, on June 15, 2023. *See* Ellis Decl. Ex. A. Because Paragraphs 23 and 28  
27 are incorrect, the Court cannot take judicial notice of the factual assertions contained  
28 therein. Although Defendants’ factual error is not central to the motion, it further

1 demonstrates that the motion springs from Defendants’ suspicion toward Judge Vera  
2 and their desire to stimulate support in right-wing media.

3 **IV. CONCLUSION**

4 Because the purported facts documents identified above are irrelevant,  
5 incorrect, or cited for purposes beyond which are allowed under Rule 201, the Court  
6 must deny Defendants’ request for judicial notice as to Exhibits 1-6, 11, and  
7 Paragraphs 23, 28, and 29.

8  
9 Dated: April 4, 2024

Respectfully submitted,

10 WINSTON & STRAWN LLP

11  
12 By: /s/ Paul B. Salvaty

13 Paul Salvaty  
14 Abbe David Lowell  
15 Attorneys for Plaintiff

16 EARLY SULLIVAN WRIGHT  
17 GIZER & McRAE LLP

18 By: /s/ Bryan M. Sullivan

19 Bryan M. Sullivan  
20 Zachary C. Hansen  
21 Attorneys for Plaintiff

## APPENDIX A

## Bases for Opposition to Defendants' Purported Facts and Exhibits

<u>Exhibit Number</u>	<u>Bases for Opposition</u>
Ex. 1	Document improperly cited for its truth instead of its existence; FRE 403
Ex. 2	Website improperly cited for its truth instead of its existence; irrelevant
Ex. 3	Transcript improperly cited for its truth instead of its existence; irrelevant
Ex. 4	Transcript improperly cited for its truth instead of its existence; irrelevant
Ex. 5	Transcript improperly cited for its truth instead of its existence; irrelevant
Ex. 6	Transcript improperly cited for its truth instead of its existence; irrelevant
Ex. 11	Hearing video improperly cited for its truth instead of its existence; irrelevant
<b>Paragraphs 23</b> (purported "fact" of "the appointment of Judge Vera to the federal bench by President Biden on June 13, 2023") and <b>28</b> (purported "fact" that Judge Vera "was appointed to the federal bench on June 13, 2023, by President Biden")	Purported "fact" is incorrect – Judge Vera was nominated on January 3, 2023, confirmed by the Senate on June 13, 2023, and received his commission on June 15, 2023 (Ellis Decl. Ex. A.)
<b>Paragraph 29</b> (facts relating to Senate votes on Judge Vera's nomination)	Irrelevant