

1 PHILLIP A. TALBERT
United States Attorney
2 PHILIP A. SCARBOROUGH (SBN 254934)
Assistant United States Attorney
3 501 I Street, Suite 10-100
Sacramento, CA 95814
4 Telephone: (916) 554-2700
Facsimile: (916) 554-2900
5 Philip.Scarborough@usdoj.gov
6 Attorneys for Joseph R. Biden, Jr.

7
8 IN THE UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10 JOY GARNER, et al.,
11 Plaintiffs,
12
13 v.
14 JOSEPH R. BIDEN, JR., in his
official capacity as the
15 President of the United States
of America,
16
17 Defendant.

CASE NO. 2:20-CV-02470-WBS-JDP
OPPOSITION TO PLAINTIFFS' MOTION TO
VACATE AND DISQUALIFY
DATE: February 22, 2022
TIME: 1:30 p.m.
JUDGE: Hon. William B. Shubb
COURT: Courtroom 5

1 Defendant Joseph R. Biden, Jr., sued in his capacity as the
2 President of the United States, respectfully submits this opposition
3 to plaintiffs' Motion to Vacate Order and Judgment of Dismissal and
4 for Disqualification of Judge Shubb (ECF 48). Because plaintiffs have
5 appealed the judgment, this Court no longer has jurisdiction to vacate
6 it, and the Court cannot grant plaintiffs' motion. *See, e.g., Scott*
7 *v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984). To the extent this
8 motion is characterized as requesting an indicative ruling under
9 Federal Rule of Civil Procedure 62.1, the Court should deny it.

10 **BACKGROUND**

11 Plaintiffs initiated this action on December 14, 2020, naming
12 then-President Donald Trump as the sole defendant in his official
13 capacity. *See* ECF 1. On January 25, 2021, after President Biden had
14 been inaugurated, plaintiffs filed a First Amended Complaint ("FAC").
15 ECF 21.¹ Plaintiffs also filed a motion for a preliminary injunction.
16 ECF 22. President Biden moved to dismiss the complaint for lack of
17 standing and under the political question doctrine, ECF 28, and
18 opposed the motion for a preliminary injunction. ECF 29. On February
19 22, 2021, the Court held a hearing on the pending motions. *See* ECF
20 34. The Court thereafter entered an order holding that plaintiffs
21 lacked standing, dismissing the complaint for lack of jurisdiction,
22 and denying the motion for a preliminary injunction. *See* ECF 36. The
23 Court entered judgment on February 23, 2021. ECF 37. Plaintiffs
24 filed a notice of appeal within the 60 days allowed under Federal Rule
25 of Appellate Procedure 4(a)(1)(B). *See* ECF 44.²

26 _____
27 ¹ Pursuant to Federal Rule of Civil Procedure 25(d), President
Biden was automatically substituted as the defendant. *See* ECF 27.

28 ² Plaintiffs also filed petitions for mandamus at the Ninth
Circuit and the Supreme Court. Both petitions were denied. *See*

1 The Court of Appeals docketed the case and set a briefing
2 schedule. See ECF 45; Time Schedule Order, Dkt. 1-1, *Garner v. Biden*,
3 No. 21-15587 (9th Cir. Apr. 2, 2021). Briefing in the appeal is
4 complete.³

5 On January 5, 2022, plaintiffs filed the current motion to vacate
6 the judgment in this Court due to a purported financial conflict of
7 interest of the district judge who presided over the case. See ECF
8 48.

9 ARGUMENT

10 A. This Court Lacks Jurisdiction to Grant Plaintiffs' Motion.

11 A motion under Federal Rule of Civil Procedure 60(b) is the
12 appropriate vehicle to obtain relief when a purported judicial
13 conflict of interest is discovered after a judgment is entered. See,
14 e.g., *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850-
15 51 (1988). But when an appeal of the judgment is pending, a district
16 courts lack jurisdiction to grant a Rule 60(b) motion without the
17 Court of Appeals first remanding the case. See *Scott v. Younger*, 739
18 F.2d 1464, 1466 (9th Cir. 1984); *Long v. Bureau of Economic Analysis*,

19 _____
20 Order, *In re Joy Garner*, No. 21-70925, Dkt. 2 (9th Cir. May 13, 2021)
21 (denying plaintiffs' mandamus petition); Order List at 8-9 (S. Ct.
Nov. 1, 2021) (denying mandamus petition in *In re Joy Garner*, No. 21-
300).

22 ³ The appeal was scheduled to be submitted on the briefs on
23 February 8, 2022, for decision by U.S. Circuit Judges Wardlaw, Ikuta,
and Bade. On February 2, 2022, plaintiffs filed a motion to recuse
24 Judge Wardlaw on grounds substantially similar to those raised in this
25 motion. On February 4, 2022, Judge Wardlaw issued an order stating
that, "[a]lthough [she] d[oes] not believe that any conflict exists
26 that would require recusal, in the interest of avoiding any potential
appearance of impropriety," she recused herself from hearing the
27 appeal and denied the motion for recusal as moot. Order, *Garner v.*
Biden, No. 21-15587, Dkt. 36 (9th Cir. Feb. 4, 2022). Submission of
28 the appeal has been deferred until a replacement judge is drawn. See
id. As explained below, nothing in that order by Judge Wardlaw
requires granting plaintiffs' motion here.

1 646 F.2d 1310, 1318 (9th Cir. 1981), *vacated on other grounds*, 454
2 U.S. 934 (1981) (“[T]he rule has generally been stated that the filing
3 of a notice of appeal divests the district court of jurisdiction to
4 dispose of the motion after an appeal has been taken, without a remand
5 from this court.”); *see also* Fed. R. Civ. P. 62.1(a).⁴

6 Because the Court lacks jurisdiction over the judgment while the
7 appeal is pending, the Court cannot grant plaintiffs’ motion.
8 Instead, it can (1) defer consideration of the motion until the appeal
9 is resolved; (2) deny the motion; or (3) issue an indicative ruling
10 stating that it would grant the motion if the Court of Appeals
11 remanded the case for that purpose or that the motion raises a
12 substantial issue. Fed. R. Civ. P. 62.1(a). For the reasons
13 explained below, the Court should deny plaintiffs’ motion.

14 **B. Plaintiffs’ Motion Is Untimely.**

15 Requests for recusal under 28 U.S.C. § 455 must be made in a
16 timely fashion. *See, e.g., Preston v. United States*, 923 F.2d 731,
17 732-33 (9th Cir. 1991) (noting that § 455 “contains no explicit
18 requirement of timeliness” but that “it is well established that a
19 motion [under] § 455 must be made in a timely fashion” (internal
20 quotations and citations omitted)). Prompt identification of
21 potential recusal issues is necessary to prevent “wasted judicial time
22 and resources” as well as to avoid the “risk that litigants would use
23 recusal motions for strategic purposes.” *Id.* at 733. Although no per

24
25 ⁴ A district court retains jurisdiction to decide a Rule 60
26 motion if the Rule 60 motion was filed within 28 days of entry of the
27 judgment. *See* Fed. R. App. P. 4(a)(4)(B)(i). But plaintiffs’ Rule 60
28 motion was filed on January 5, 2022, more than 10 months after the
judgment was entered on February 23, 2021, so Federal Rule of
Appellate Procedure 4(a)(4)(B)(i) does not apply here. *See* ECF 37
(judgment entered on February 23, 2021); ECF 48 (Rule 60 motion filed
on January 5, 2022).

1 se time frame exists for recusal motions, they "should be filed with
2 reasonable promptness after the ground for such a motion is
3 ascertained." *Id.*

4 The Court should deny plaintiffs' motion because it is untimely.
5 The plaintiffs filed their motion for recusal more than ten months
6 after the Court entered judgment against them. A recusal motion filed
7 after judgment is entered against a party generally is considered
8 untimely. *See, e.g., E. & J. Gallo Winery v. Gallo Cattle Co.*, 967
9 F.2d 1280, 1295 (9th Cir. 1992). Plaintiffs attempt to excuse their
10 late motion by arguing they only learned of the potential conflict of
11 interest in late December 2021. *See* ECF 48 at 5. To make this
12 assertion, they misleadingly state that "Judge Shubb's financial
13 disclosures were made public for the first time on October 15, 2021,
14 as announced indirectly by the Federal Judiciary on December 31,
15 2021." *Id.* at 5 n.5. In fact, judicial financial disclosures are a
16 matter of public record; a simple form is available on the website of
17 the United States Courts which any member of the public can use to
18 obtain the disclosures of any federal judge. *See*
19 <https://www.uscourts.gov/sites/default/files/ao010a.pdf>.

20 Plaintiffs' counsel claims he first learned of the purported
21 conflicts on December 31, 2021, when Chief Justice Roberts published
22 his year-end report on the federal judiciary. *See* ECF 48-1 ¶ 2. That
23 report referred to an article from the *Wall Street Journal* published
24 in late September 2021, stating that 131 federal judges in 685 court
25 cases over the last 11 years had failed to recuse themselves in cases
26 involving companies in which they or their family owned stock. *See*
27 *James v. Grimaldi, et al.*, 131 Federal Judges Broke the Law by Hearing
28 Cases Where They Had a Financial Interest, *Wall St. J.* (Sept. 28,

1 2021). But neither the Chief Justice's year-end report nor the *Wall*
2 *Street Journal* article mention Judge Shubb or provide any specific
3 information relevant to this case. Plaintiffs' argument, therefore,
4 apparently is that they only thought to review Judge Shubb's financial
5 disclosures after they read a newspaper article published months
6 earlier that talked about general recusal issues.

7 The information on which plaintiffs rely to justify their belated
8 recusal motion therefore was available for at least three months
9 before plaintiffs filed their motion. They fail to explain why that
10 delay should be excused.

11 **C. The Standard for Recusal Is Not Met.**

12 Even if the Court considers plaintiffs' motion on the merits,
13 there is no conflict of interest that requires recusal. Plaintiffs
14 point to 28 U.S.C. § 455(b)(4) as the basis for recusal. See ECF 48
15 at 5-6. That section requires recusal when a judge "knows that he,
16 individually or as a fiduciary, or his spouse or minor child residing
17 in his household, has a financial interest in the subject matter in
18 controversy or in a party to the proceeding, or any other interest
19 that could be substantially affected by the outcome of the
20 proceeding." 28 U.S.C. § 455(b)(4). Plaintiffs assert that Judge
21 Shubb's stock holdings in several companies that plaintiffs allege
22 manufacture vaccines - specifically, Johnson & Johnson, Abbot Labs,
23 Bristol-Myers Squibb, and Proctor & Gamble - gave him a financial
24 interest in the outcome of the case. See ECF 48 at 5-6.

25 There is no such interest in the outcome of the case. None of
26 these companies are parties to this litigation. Plaintiffs argue
27 instead that, had the Court "ruled in favor of pausing mandatory
28 vaccination in this case, or otherwise recognizing Petitioners'

1 evidence that liability-free vaccines line the pockets of Pharma and
2 its stockholders," the value of those stocks would have decreased.
3 See ECF 48 at 4. But plaintiffs' complaint never names any of the
4 four companies at issue, and plaintiffs never asked to prohibit the
5 use of any vaccine, whether manufactured by one of the four identified
6 companies or any other company. See generally ECF 21. The complaint
7 does not seek to "paus[e] mandatory vaccination" or to invalidate the
8 statutes governing vaccine liability. To the contrary, the complaint
9 specifically admitted that there are no mandatory federal vaccination
10 schedules and disclaimed any intent to challenge specific vaccine
11 approvals. See ECF 21 ¶ 52(A) ("CDC recommended vaccine schedules are
12 recommended rather than mandated, so [federal agencies] are not the
13 only cause of and cannot offer relief to end" the alleged injuries);
14 *id.* ¶ 51 ("Petitioners request no statutory relief or regulatory
15 relief whatsoever"); *id.* ¶ 52 ("Petitioners specifically do
16 not seek relief from agencies" notwithstanding that such agencies are
17 "involved in vaccine licensing, recommendation, promotion, and product
18 sales"). The complaint also specifically disclaimed any intent to
19 change vaccine liability statutes. *Id.* ¶¶ 32-33. The only relief
20 plaintiffs sought was an order requiring the President to use his
21 "reasonable executive discretion" to conduct a vague, undefined
22 "survey" of unvaccinated individuals followed by an undefined informed
23 consent procedure and to stop third parties from discriminating
24 against unvaccinated individuals. See *id.* ¶¶ 49, 172(E).

25 Plaintiffs no doubt will point to Judge Wardlaw's decision to
26 recuse herself from hearing the appeal, which she made after they
27 filed a substantially similar motion based on her financial
28 disclosures, as a reason to grant the motion in this case. But

1 nothing in Judge Wardlaw's recusal decision requires recusal here.
2 Judge Wardlaw's order specifically stated that she did "not believe
3 that any conflict exists that would require recusal." Order, *Garner*
4 *v. Biden*, No. 21-15587, Dkt. 36 (9th Cir. Feb. 4, 2022). Moreover,
5 she made that decision before defendant had an opportunity to file an
6 opposition to note that none of the identified companies were
7 implicated in the case in any manner.

8 In this circumstance - where the specific companies that
9 plaintiffs claim generate a financial interest were never mentioned in
10 the complaint and where the complaint did not seek to prohibit the use
11 of vaccines or obtain any relief with respect to any specific company
12 or vaccine - it cannot be said that the presiding judge "has a
13 financial interest in the subject matter in controversy." 28 U.S.C.
14 § 455(b)(4).

15 **CONCLUSION**

16 Plaintiffs' motion should be denied.

17 Respectfully submitted,

18 Dated: February 8, 2022

PHILLIP A. TALBERT
United States Attorney

19
20 By: /s/ Philip A. Scarborough

PHILIP A. SCARBOROUGH
Assistant United States
Attorney

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23 Attorneys for President Joseph
R. Biden, Jr.