IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division
Case No. 12-CV-22439-COOKE/McAliley

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, a sovereign nation and federally recognized Indian tribe,

Plaintiff,

vs.

BILLY CYPRESS; DEXTER WAYNE LEHTINEN; MORGAN STANLEY SMITH BARNEY, JULIO MARTINEZ; MIGUEL HERNANDEZ; GUY LEWIS; MICHAEL TEIN; and LEWIS TEIN, PL, a professional association,

Defendants.
_____/

MOTION TO DISQUALIFY THE HONORABLE JUDGE MARCIA G. COOKE AND INCORPORATED MEMORANDUM OF LAW[1]

The Miccosukee Tribe of Indians of Florida (the "Tribe") and its lawyers, Bernardo Roman, III, Esquire ("Mr. Roman"), Yinet Pino, Esquire, and Yesenia Lara, Esquire (together, the "Respondents"), move, pursuant to 28 U.S.C. §§ 144, 455(a) and (b)(1), to disqualify the Honorable Judge Marcia G. Cooke, and pursuant to 28 U.S.C. § 144, attach as Exhibit A the supporting affidavit by Mr. Roman.

TIMELINE AND BACKGROUND

September 24, 2012:	Defendants Guy Lewis, Esquire, Michael Tein, Esquire, and Lewis Tein P.L. ("LT") filed their motion for Rule 11 sanctions against Respondents. [DE 38].

[1] Unless otherwise indicated, all emphasis is added in the Motion and Exhibit E and all statutes are 2014.

September 4, 2013:	Defendant Dexter Lehtinen, Esquire ("Lehtinen") filed Rule 11 motion for sanctions against Respondents. [DE 273].
September 30, 2013:	The trial court granted LT's and Lehtinen's motion to dismiss the Second Amended Complaint. [DE 282].
November 22, 2013:	LT moved to supplement the record on their Rule 11 motion for sanctions against Respondent. [DE 286].
January 30, 2014:	The Honorable Judge Marcia G. Cooke entered an Order in *U.S. v. Lehtinen*, Case No. 13-23030-Civ-Cooke, determining that the Tribe waived attorney-client privilege based upon representations made by Lehtinen.
May 12, 2014:	The Court held a hearing on the Tribe's motion to reconsider the order dismissing the Second Amended Complaint, during which hearing the Court scheduled for June 5, 2013 an evidentiary hearing on LT's and Lehtinen's motion for Rule 11 sanctions. [Ex. B (May 12, 2014 Transcript)]. The Court granted LT's motion to supplement the record on their Rule 11 motion for sanctions against Respondents. [DE 298].
Evidentiary Hearing:	The evidentiary hearing occurred on: June 5, 2014 [DE 382]; June 6, 2014 [DE 383]; June 10, 2014 [DE 384]; June 16, 2014 [DE 388]; June 17, 2014 [DE 389]; June 24, 2014 [DE 387]; June 26, 2014 [DE 392]; and July 1, 2014 [Ex. C].

The evidentiary hearing on LT's and Lehtinen's motions for Rule 11 sanctions occurred over several days. During the evidentiary hearing, as well as the May 12, 2014 hearing which preceded it, the Honorable Judge Marcia G. Cooke made numerous comments demonstrating bias and partiality. Excerpts of comments by the Honorable Judge Marcia G. Cooke are attached as Exhibit D.

The comments made at and before the evidentiary hearing, while disturbing to Respondents and evidencing bias, distrust of Respondents, and partiality, were not immediately so pervasive as to lead Respondents to seek disqualification. Likewise, at that time, Respondents were not aware of any information the Court had received from outside of the filings in the

instant case. This all changed, however, after the conclusion of the evidentiary hearing, when Respondents discovered, for the first time, that the Court had not only reviewed information directly at issue in the Rule 11 proceedings but, on January 30, 2014, had also entered against the Tribe in *U.S. v. Lehtinen*, Case No. 13-23030-Civ-COOKE/TURNOFF ("IRS Case") what was effectively an *ex parte* order as to the Tribe, finding that the Tribe had waived its attorney-client privilege with respect to Lehtinen. [IRS Case DE 11].[2]

In the IRS Case, the IRS issued a summons to examine Lehtinen and his documents in connection with certain tax matters involving the Tribe and Lehtinen's advice to the Tribe regarding those tax matters. The Honorable Judge Marcia G. Cooke issued an order to show cause why Lehtinen should not be examined by the IRS. [IRS Case DE 7]. The Court ruled against the Tribe *without hearing from the Tribe* and *after being persuaded by Lehtinen's filing* on December 10, 2013, where Lehtinen excoriated the Tribe and Mr. Roman, stating:

> Obviously, the Tribe is now attempting to throw blame upon others for its own deliberate choice to ignore the tax advice it was given. Roman is likewise attempting to blame others for his advice that the Tribe's position had "merit". For these reasons, the Tribe and Roman will take every possible step to block the revelation of the truth regarding the advice that they actually received; and Respondent Lehtinen expects that such steps would include accusing Lehtinen of breach of attorney-client privilege if he were to testify regarding his tax advice without a court order (even though some of this advice, as illustrated by the exhibits herein, has been revealed in the state case, despite the Tribe's efforts to block these revelations). Both the Tribe and Roman will make every effort to avoid the truth herein, as the truth reveals both the Tribe and Roman to have acted deliberately and intentionally to misrepresent the truth. [IRS Case DE 10 at 5-6].

When the Court entered its order, finding that the Tribe waived attorney-client privilege, it did so without any notice to the Tribe or its Tribal Attorney, Mr. Roman, who were unaware of

[2] Attached at Exhibit E is the IRS Case Docket and Filings.

that proceeding. Neither Lehtinen nor the Court notified the Tribe that the Court was determining whether the Tribe waived attorney-client privilege by its conduct, thereby resulting in what was effectively an *ex parte* order as to the Tribe. This procedure is all the more alarming because of the timing of the Court's Order, which was issued at the same time the Court had pending before it motions for Rule 11 sanctions covering the same subject matter as the testimony sought by the IRS. Despite the temporal and subject matter overlap, neither Lehtinen nor the Court ever notified the Tribe or its attorneys that it entered the order in the IRS Case, not even while the Tribe and its attorneys were later before the Court and against Lehtinen on his motion for Rule 11 sanctions.

The pertinence of the information at issue in the IRS Case cannot be overstated, as the exhibits Lehtinen attached to his response to the Court's order to show cause (IRS Case DE 10-1), which included a tax memorandum (admitted into evidence as Lehtinen's "Exhibit E" at the evidentiary hearing), General Reports to the Tribe's General Council, and memoranda to and from the Tribe, were features of the evidentiary hearing. *See, e.g.*, Tr. 6-17-14 at 163-64, 169 [DE 389]; Tr. 6-24-14 at 95, 159 [DE 387]; Tr. 7-1-14 at 165 [Ex. C]; Tr. 6-6-14 at 21-23 [DE 383]; Tr. 6-10-14 at 146 [DE 384]; Tr. 6-26-14 at 90-95 [DE 392].[3] It was not until after the evidentiary hearing concluded that Respondents learned of Lehtinen's response to the Court's order to show cause in the IRS Case or that the Court had entered a ruling adverse to the Tribe without its participation or ability to defend itself or dispute Lehtinen's accusations.

[3] Please note that the official transcripts inadvertently misdate some of the transcripts from the evidentiary hearing: (1) The transcript for the June 10, 2014 hearing contains inaccurate footers indicating a June 6, 2014 date; (2) the transcript for the June 17, 2014 hearing contains an inaccurate title page indicating a June 14, 2014 date; and (3) the transcript for the June 26, 2014 hearing contains inaccurate footers indicating a June 6, 2014 date. All citations to the transcripts contained in this Motion and attached Exhibits refer to the dates the hearings actually took place.

Accordingly, the addition of this new information colors the partiality, bias, and distrust the Honorable Judge Marcia G. Cooke displayed at and before the evidentiary hearing and reasonably leads Respondents to believe that the Honorable Judge Marcia G. Cooke must be disqualified from this case.

DISCUSSION AND MEMORANDUM OF LAW

A. Statutory Grounds for Disqualification

Two statutes govern the standard for recusal and disqualification of federal district judges. First, 28 U.S.C. § 144 lays out the grounds for recusal based on the judge's personal bias or prejudice:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Accordingly, § 144 *requires* recusal if the judge's personal bias or prejudice against a party or in favor of an adverse party is shown by timely, sufficient affidavit. *Id.* An affidavit of bias is sufficient to disqualify a judge when it includes facts which (1) are "material and stated with particularity"; (2) "convince a reasonable man that a bias exists"; and (3) "show the bias is personal, as opposed to judicial, in nature." *Parrish v. Bd. of Comm'rs of Ala. State Bar*, 524 F.2d 98, 100 (5th Cir. 1975) (quoting *United States v. Thompson*, 483 F.2d 527, 528 (3d Cir. 1973)). There is no *per se* rule regarding the timeliness of the affidavit, but the Eleventh Circuit

requires it to be filed reasonably promptly. *Summers v. Singletary*, 119 F.3d 917, 921 (11th Cir. 1997).

Second, 28 U.S.C. §§ 455(a) and (b)(1) provide grounds for disqualification when the Judge evinces an appearance of impartiality or personal bias or prejudice:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

B. Disqualification Under 28 U.S.C. § 144

Generally, disqualification under § 144 requires bias or prejudice that results from an extrajudicial source. *Liteky v. United States*, 510 U.S. 540, 544-45 (1994). An exception exists, however, where the Court demonstrates a "pervasive bias." *Id.* at 551 (citing *Davis v. Bd. of Sch. Comm'rs of Mobile Cnty.*, 517 F.2d 1044, 1051 (5th Cir. 1975) (recognizing pervasive bias exception)). The "pervasive bias" exception supports disqualification if the Court's predisposition is "so extreme as to display clear inability to render fair judgment." *Id.* As the Eleventh Circuit has recognized, the pervasive bias exception applies when a judge has exhibited "partisan zeal" or has "stepped down from the bench to assume the role of advocate." *Hamm v. Members of Bd. of Regents of Fla.*, 708 F.2d 647, 651 (11th Cir. 1983) (quoting *Knapp v. Kinsey*, 232 F.2d 458, 467 (6th Cir. 1956)). As shown below and in the attached Exhibit D, this case involves both extra-judicial knowledge and pervasive bias.

C. Disqualification Under 28 U.S.C. §§ 455(a) and (b)

"Under § 455, the standard is whether an objective, fully informed lay observer would entertain significant doubt about the judge's impartiality." *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1329 (11th Cir. 2002) (quoting *Christo v. Padgett*, 223 F.3d 1324, 1333 (11th Cir. 2000)). As with § 144, "[t]he general rule is that bias sufficient to disqualify a judge must stem from extrajudicial sources[,]" *id.* (quoting *Hamm*, 708 F.2d at 651 (alteration in original)), and pervasive bias is an exception to the general rule. *Id.*

> The critical question presented by this statute "is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances.

United States v. DeTemple, 162 F.3d 279, 286 (4th Cir. 1998) (quoting *Hathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 41 (4th Cir. 1995)). Respondents submit that there is no doubt that one observing these proceedings would question the Court's impartiality.

That an objective observer would entertain significant doubt as to the Honorable Judge Marcia G. Cooke's impartiality due to her comments during the Rule 11 Evidentiary Hearing is further evidenced by the articles published by an objective observer, the writer for the local newspaper, the Daily Business Review ("DBR"), after each day of the Hearing. As the news articles (attached hereto at Exhibit F) demonstrate, the Honorable Judge Marcia G. Cooke's extreme conduct during the Hearing rose to a level in which her partiality, predisposition, favoritism towards LT and Lehtinen, and deep-seated antagonism toward the Respondents, was recognized by the DBR. *See, e.g.*, Ex. F. at 12 (noting that the Court "wondered aloud if Roman had ever 'read the rules of ethics.'"); Ex. F at 20 (interpreting the comments by the Honorable Judge Marcia G. Cooke, in response to a statement by the Tribe's disqualified attorney, Angel A.

Cortiñas, that the Tribe wanted new counsel for the Rule 11 Hearing, to mean that the "tribe may have had incompetent counsel in Roman and his associates"); Ex. F at 21 (noting the Court was "incensed"); Ex. F at 28 (describing the Honorable Judge Marcia G. Cooke, in connection with the May 12, 2014 hearing, as "[a]n exasperated federal judge").

D. The Court's Partiality, Bias, Hostility, and Antagonism toward Respondents

The Honorable Judge Marcia G. Cooke repeatedly made hostile remarks during and before the evidentiary hearing on LT's and Lehtinen's motions for Rule 11 sanctions. The Court's comments revealed the personal bias, partiality, and deep-seated antagonism that §§ 144 and 455 were designed to remedy. A more complete set of comments is at Exhibit D, but the following comments from the bench were particularly egregious.

At the May 12, 2014 hearing, where the Court scheduled the evidentiary hearing, the Honorable Judge Marcia G. Cooke, in addressing Mr. Roman, remarked:

> And not once in all of this, when you are lobbing – and maybe you have and I missed it, you are lobbing Molotov cocktails through the window, if his counsel is so bad, did you guys file a bar complaint? Tr. 5-12-14 at 34, 35 [Ex. B].
>
> But this is the problem: You now know that he didn't do it, that the representation may have been made by others, but you continue to feed the lie . . . . That Mr. Lehtinen lied. Tr. 5-12-14 at 38 [Ex. B].
>
> But I have to say, Mr. R[o]m[a]n, at some point in time, you need to sit with your client and decide is this the best way to run a railroad, because you are spending millions of dollars litigating and relitigating some issues that you may already know the answers to. Tr. 5-12-14 at 42 [Ex. B].

The Court's comments were disturbing given that the Court had not yet received any evidence on the motions for Rule 11 sanctions. Nevertheless, the Court had already determined that Mr.

Roman was making statements about Lehtinen that Mr. Roman knew to be untrue, or, as the Court put it "you continue to feed the lie …. That Mr. Lehtinen lied." Tr. 5-12-14 at 38 [Ex. B].

During the evidentiary hearing, the Honorable Judge Marcia G. Cooke personally attacked Mr. Roman's ethics and character and his candor with his own counsel:

> **I am beyond perplexed and bordering on anger because it's clear to me, Mr. Roman, that you've just probably never read the rule of ethics. And if you had, you must have been absent from school that day** because something tells me – maybe I'm wrong – you either never told the truth to Gunster Yoakley, when they agreed to this representation; and if you did, then maybe my anger right now is misplaced. Tr. 6-16-14 at 188, 189 [DE 388].

The Honorable Judge Marcia G. Cooke went so far as to advocate on behalf of LT's counsel, stating:

> Mr. Calli [LT's counsel] is standing, but I am certain he is very capable of speaking for himself, but I think one of the things he is going to say is, Judge, enough is enough. Tr. 6-5-14 at 74 [DE 382].

The Court continued advocating on behalf of LT later in the hearing, when, in response to LT's counsel making a weak argument to preclude the admissibility of evidence, the Honorable Judge Marcia G. Cooke prompted:

> I think you have one that's way easier than that. Tr. 6-10-14 at 112 [DE 384].

After disqualifying Respondents' counsel of choice, former Third District Court of Appeal Judge, Angel A. Cortiñas, for conflict of interest, based on a rule of ethics which, to date, the Court has never identified, the Court exclaimed:

> So at the risk of being insensitive to people who are visually challenged, Ray Charles could have seen that Mr. Cortinas shouldn't have been in this case. I mean, it really wasn't – it was really that apparent, and **I am beyond frustrated** . . . . So, in whatever difficulty was created, it has been created by counsel,

> counsel that still sits here and still represents this Tribe. Tr. 6-6-14 at 6, 7 [DE 383].

And, when Michael Tein, one of the LT movants, requested permission to leave early one day, the Court, continuing to voice its frustration in having to listen to Respondents put on their case, stated:

> I don't have a problem. He is represented by counsel. If he wishes to leave and have his counsel go, I understand, Mr. Tein….I just wish I was traveling with him. Tr. 7-1-14 at 106 [Ex. C].

The comments from the Honorable Judge Marcia G. Cooke reveal a deep and unequivocal antagonism toward the Respondents before and during the Rule 11 hearing, preventing the Court from rendering a fair decision on the merits of LT's and Lehtinen's motions for Rule 11 sanctions.

The Court's comments demonstrate the very type of prejudgment, antagonism, bias, and hostility that make impartiality impossible. *See Berger v. United States*, 255 U.S. 22, 29 (1921) (holding that the judge was properly disqualified for stating the defendants' "hearts are reeking with disloyalty"); *see also United States v. Womack*, 454 F.2d 1337, 1341 (5th Cir. 1972). The Honorable Judge Marcia G. Cooke's comments are akin to those made by the judge in *Berger* in that she disparages Respondent Mr. Roman's competency as an attorney, candor, and ethics throughout the Rule 11 proceedings.

The Honorable Judge Marcia G. Cooke's preference for Lehtinen over Respondent Mr. Roman is highlighted by the divergent remarks made by the Court in connection with the *pro se* request by Lehtinen versus Mr. Roman's request for counsel when the Court disqualified Mr. Cortiñas. As to Lehtinen's request to proceed *pro se*, the court commented:

> [U]sually, when this happens, I'm in court and I'm advising someone who is not as learned as you are in the law as to not representing themselves, but I will still make that same caution to

> you that, you know, there are plenty of lawyers out here, and you can have one, and it might be in your best interest to have one in these proceedings[.] Tr. 6-5-14 at 67 [DE 382].

Despite the Court recognizing the perils of representing oneself, when counsel to LT and Lehtinen successfully moved to disqualify the Respondents' counsel of choice, and Respondent Mr. Roman requested additional time to find counsel to represent him and the other Respondents, the Court tersely responded "**enough is enough**." Tr. 6-5-14 at 74 [DE 382].

When the Court began its antagonistic behavior toward Respondents at the May 12, 2014 hearing, Respondents were concerned and taken aback, but those comments, standing alone, were not sufficient to cause Respondents to take the unusual step of moving to disqualify the Honorable Judge Marcia G. Cooke. Additional comments made by the Court throughout the evidentiary hearing added to Respondents' concern, but Respondents were unclear as to the genesis of the Court's hostility. Then, Respondents discovered the order entered by the Court in the IRS Case and the documents filed in that case, both effectively done on an *ex parte* basis *vis a vis* Respondents.

The information or evidence a Judge receives in one case, does not necessarily, for purposes of another case, constitute bias or partiality arising an extrajudicial source. Here, however, the information the Honorable Judge Marcia G. Cooke received from the IRS Case is extrajudicial, or tantamount to it. Mr. Roman and the Tribe were not invited to participate in the IRS Case, were never informed of the IRS Case, and were unaware of the IRS Case until after the conclusion of the evidentiary hearing in this case. Accordingly, the IRS Case represents not only a different case, but a different case, which, with respect to Mr. Roman and the Tribe, proceeded *ex parte*. Without an opportunity to contest Lehtinen's vile allegations against the Tribe and Mr. Roman, the Honorable Judge Marcia G. Cooke was confronted with a one-sided

version of a hotly contested story. Information of this sort causes the very type of harm that disqualification based on extrajudicial information is intended to rectify. *See United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) ("The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis **other than what the judge learned from his participation in the case**."); *see also Santana v. RCSH Operations, LLC*, 10-61376-CIV, 2012 WL 414357 (S.D. Fla. 2012) ("Extrajudicial bias or prejudice 'refers to a bias [or prejudice] that is not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings.'") (quoting *Johnson v. Trueblood*, 629 F.2d 287, 291 (3rd Cir. 1978)).

The Court ruled against the Tribe in the IRS Case without Respondents' participation. This *ex parte* ruling deeply troubles Respondents. More concerning to Respondents, however, is that neither the Honorable Judge Marcia G. Cooke nor Lehtinen, to date, have ever advised the Tribe that the Court entered an Order in the IRS Case determining that the Tribe waived its attorney-client privilege. Indeed, at no time, either before the May 12, 2014 hearing, during the eight (8) day evidentiary hearing, or after, have Lehtinen or the Court ever notified Respondents that the Court possessed independent knowledge of the issues raised by the motions for Rule 11 sanctions.

WHEREFORE, Respondents respectfully request that the Honorable Judge Marcia G. Cooke be disqualified from presiding over this case.

Respectfully submitted,

By: /s/ William K. Hill

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CERTIFICATE OF GOOD FAITH

I hereby certify that this Motion is filed in good faith.

By: /s/ William K. Hill
William K. Hill

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2014, I filed with the Clerk of Court the foregoing along with the referenced sealed document, and served on the following Service List, via email or other means, the foregoing without the referenced sealed documents.

By: /s/ William K. Hill
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