UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:12-cv-22439-MGC

MICCOSUKEE TRIBE OF INDIANS
OF FLORIDA,

Plaintiff,

vs.

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

Defendants.
_____/

LEWIS TEIN'S OPPOSITION TO MOTION TO DISQUALIFY JUDGE

"Impartiality is not gullibility."
Liteky v. United States, 510 U.S. 540, 552 (1994) (quotation omitted).

The Miccosukee Tribe of Indians, Bernardo Roman III, Yesenia Lara, and Yinet Pino ("Movants") have filed, through their lawyers, Gunster, an untimely and non-meritorious Motion to Disqualify Judge Marcia G. Cooke. Lewis Tein opposes the motion.

I. The Legal Analysis

"The mere filing of a § 144 affidavit does not automatically disqualify the judge[.]" *Harris v. Geico General Insurance Company*, 961 F. Supp. 2d 1223, 1227 (S.D. Fla. 2013) (citation omitted). "Once the affidavit is filed, the judge must determine whether the affidavit was timely, whether it was accompanied by the necessary certificate of counsel, and whether the affidavit satisfies the terms of the statute." *Id.* (citation omitted). An affidavit merely restating

in conclusory fashion a subjective belief that comments at a hearing are indicative of bias is not enough. *See id.* at 1229.

A judge's impartiality must "reasonably be questioned" for the judge to recuse because "there is the need to prevent parties from . . . manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking." *Id.* at 1228 (citations omitted).

II. Movants' Request to Disqualify is Untimely

Movants' filing is not timely. The latest of the remarks that Movants complain about occurred on July 1, 2014. Movants did not make contemporaneous objections or seek to disqualify the Court during the hearing. After the conclusion of the hearing, Movants filed a Supplemental Brief on Rule 11 Issues, and made sealed submissions, all without raising disqualification. The first time Movants raised their claim of disqualification was September 10, 2014, when they filed their motion.[1] More than two months have elapsed since the allegedly offending comments, evidencing Movants' untimeliness and strategic purpose.

Movants also complain about the Court's presiding in the case *United States v. Lehtinen*, Case No. 13-23030. *See* [D.E. 408-1] at 6. Roman's affidavit concedes that during the sanctions hearing, he was aware of an underlying IRS investigation but claimed he was unaware that a case was filed. Roman's affidavit does not state *when* he first heard of the case that the Movants complain about or *how* he claims to have first heard of it. Nor does the motion attach an affidavit from the other Movants. No affidavit indicates when the other Movants became aware of the case.

Movants' untimeliness problem is not cured by Roman's claim that the public court proceeding was somehow "*ex parte*" and somehow involving an issue touching on Movants' bad faith filing of this lawsuit. A judge's rulings even in related cases do not ordinarily serve as the

[1] Movants did not confer with the undersigned prior to filing their motion.

basis for recusal. *United States v. Chandler*, 996 F.2d 1073, 1103-04 (11th Cir. 1993) (no recusal when judge denied motion to strike death penalty from indictment, explicitly relying on evidence learned during related trial). Nor does knowledge of a disputed fact learned during an *in camera* hearing provide grounds for recusal. *United States v. Bailey,* 175 F.3d 966, 969 (11th Cir. 1999).

The only other argument asserted for disqualification is Roman's affidavit which speculates that "based on its recent Sealed Order" the Court's "apparent intent" is to proceed against Movants "with the maximum sanction." [D.E. 408-1] at 6. "Adverse rulings alone do not provide a party with a basis for holding that the court's impartiality is in doubt." *United States v. Berger*, 375 F.3d 1223, 1227 (11th Cir. 2004) (citation omitted); *see also Liteky,* 510 U.S. at 555 ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"). Roman's subjective beliefs about what the Court may or may not rule in the future cannot support disqualification. That amounts to simple speculation.

III. Movants Divorce The Court's Comments From Their Context

A review of the record exposes the out-of-context spin in which Movants and their sanctions defense lawyers have engaged. During the course of sanctions proceedings spanning over nine days, the Court made numerous rulings, interacted with the parties and their lawyers, asked questions, and reflected on the proceedings. All of this was absolutely appropriate. Suggesting otherwise grossly mischaracterizes the remarks and the proceedings in which they occurred.

Ultimately a point-by-point discussion of how Movants have divorced each of the Court's remarks or questions from its context, and why Movants' mischaracterizations are wrong, is unnecessary. Even imbued with Movants' spin, these remarks do not merit disqualification.

The Supreme Court has explained the issue neatly. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. This is a high standard -- the Supreme Court's example of such a case involved a judge's discriminatory comment in a World War I espionage prosecution of German Americans -- that "German Americans" have hearts "reeking with disloyalty" *Id.* (citing *Berger v. United States*, 255 U.S. 22 (1921)). In contrast,

> *Not* establishing bias or partiality are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration – remain immune.

Id. at 555-56 (emphasis original).

Simply put, judges are allowed to be exasperated or even angry at the parties and lawyers before them, without their comments risking disqualification, including when the parties or their lawyers engage in the untrustworthy and deleterious conduct exhibited here.

Movants' filing should be denied as untimely and lacking in merit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on September 18, 2014, we electronically filed the foregoing document with the Clerk of Court using CM/ECF. We also certify that the foregoing document is being served on this day on all counsel of record or pro se parties in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Filing.

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