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**IN THE UNITED STATES DISTRICT COURT**
**DISTRICT OF UTAH, CENTRAL DIVISION**

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| UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION,<br><br>Plaintiff,<br><br>v.<br><br>GREGORY D. MCKEE, T & L LIVESTOCK, INC., MCKEE FARMS, INC, AND GM FERTILIZER, INC.,<br><br>Defendants. | **MEMORANDUM IN OPPOSITION TO UTE INDIAN TRIBE'S VERIFIED MOTION TO RECUSE**<br><br>Case No. 2:18-cv-00314-CW<br><br>Judge Clark Waddoups |

Defendants Gregory D. McKee ("**McKee**"), T & L Livestock, Inc. ("**T&L**"), McKee Farms, Inc ("**McKee Farms**"). and GM Fertilizer, Inc. ("**GM**) (collectively "**Defendants**"), by and through their undersigned counsel, respond to the *Ute Indian Tribe's Verified Motion to Recuse* ("**Motion**") filed by the Ute Indian Tribe of the Uintah & Ouray Reservation (the "**Tribe**) as follows.

## INTRODUCTION

By its Motion, the Tribe seeks to recuse Judge Clark Waddoups from this case pursuant to 28 U.S.C. §§ 144 and 455(a).[1] The Motion states as the basis for recusal Judge Waddoups's alleged "bias against the Ute Tribe" and "hostility towards the tenets of Federal Indian law," including "the doctrine of Indian tribal sovereignty and the federal policy of supporting tribal self-governance."[2] The Tribe apparently believes that, based on Judge Waddoups's adverse rulings, primarily in other, unrelated cases, it "can reasonably infer" that Judge Waddoups's alleged "hostility" "is a function of *implicit*, if not *explicit*, racial bias."[3] In other words, Judge Waddoups rules "against the Tribe and in favor of the Tribe's non-Indian, white-majority race opponents" because he is a racist.[4]

The Tribe has adduced no factual basis for such a calumnious and melicious accusation. Rather, the Tribe's inference of racial bias is rooted entirely in its dissatisfaction with Judge Waddoups's rulings. Dissatisfaction with adverse rulings is grounds for appellate review; it is not the basis for recusal or an allegation of bias. This Court should deny the Motion.

## ARGUMENT

### I. This Court has already considered and rejected the Tribe's claims and argument.

The Motion and supporting Declaration in Support of Ute Indian Tribe's Motion to Recuse (the "**Declaration**") rely primarily on the Tribe's pleadings, Judge Waddoups's rulings, and transcripts from the companion cases of *Ute Tribe v. Lawrence, et al,* Case No. 2:16-cv-00579

[1] ECF No. 29 at p. 1.
[2] *Id.* at p. 2.
[3] *Id.* at pp. 13-19.
[4] *See id.* at p. 16.

("***Lawrence***") and *Becker v. Ute Tribe*, Case No. 2:16-cv-00958 ("***Becker***"), asserting that Judge Waddoups's statements and conduct in those cases "reveal such a high degree of antagonism toward the Tribe and towards federal Indian law and policy that a reasonable observer would conclude that Judge Waddoups' [*sic*] antagonism makes a fair judgment impossible."[5]

However, the Tribe has already unsuccessfully tested this argument in a Verified Motion to Recuse, filed on February 13, 2018 in *Becker*. In that motion, the Tribe made substantially identical arguments to those presented in this matter, alleging that Judge Waddoups had a "personal animus towards the Ute Indian Tribe" and "an antagonism toward the legal doctrines that form the bedrock of Federal Indian law – the doctrines of Indian Tribal sovereignty and sovereign immunity."[6]

In a Memorandum Decision and Order Denying Defendants' Verified Motion to Recuse dated February 13, 2018, Chief Judge David Nuffer rejected the Tribe's arguments, holding that none of the facts adduced by the Tribe supported disqualification of Judge Waddoups.[7] Judge Nuffer held that reversal of Judge Waddoups's rulings by the Tenth Circuit was irrelevant to provide a basis for disqualification.[8] As a "reasonable observer," Judge Nuffer held that the timing of rulings in the cases, Judge Waddoups's practice of questioning attorneys, and the factual account in Judge Waddoups's most recent decision "represents the judicial function of the court and not reliance 'upon knowledge acquired outside [the] proceedings' or 'deep-seated and unequivocal antagonism that would render fair judgment impossible.'"[9] Similarly, in this case,

[5] *Id.* at p. 7.
[6] Case No. 2:16-cv-00958, ECF No. 101 at p. 2.
[7] *Id.*, ECF No. 102 at p. 4.
[8] *Id.*
[9] *Id.* at pp. 4-5.

there is no factual showing that Judge Waddoups is incapable of rendering a fair judgment. The Motion should be denied.

## II. The Tribe has failed to meet its burden under 28 U.S.C. § 144 to show "personal bias or prejudice."

Section 144 provides that a district court judge may be disqualified when a party files "a timely and *sufficient* affidavit" showing that the judge "has a *personal* bias or prejudice either against him or in favor of any adverse party." (emphasis added.) Under Section 144, "the affidavits filed in support of recusal are strictly construed against the affiant and there is a substantial burden on the *moving party* to demonstrate that the judge is not impartial." *United States v. Burger,* 964 F.2d 1065, 1070 (10th Cir. 1992) (*cert. denied,* 507 U.S. 1033 (1993) (emphasis added). While the Court must assume the truth of the affidavit's *factual* assertions, "it is not bound to accept the movant's conclusions as to the facts' significance." *See Hoffman v. Caterpillar, Inc.*. 368 F.3d 709, 718 (7th Cir. 2004).

An affidavit is "insufficient if it merely states conclusions, rumors, beliefs and opinions." *Glass v. Pfeffer,* 849 F.2d 1261, 1267 (10th Cir. 1988). Accordingly, the Tribe's conclusions, beliefs and opinions concerning Judge Waddoups's prior orders in other, unrelated cases fall woefully short of its burden under 28 U.S.C. § 144. "[J]udicial rulings alone almost never constitute a valid basis" for disqualification under Section 144. *See Liteky v. United States,* 510 U.S. 540, 555 (1994). The record in this case contains *no* evidence of *actual* personal bias, animosity or malice on the part of Judge Waddoups as required under Section 144, and the Tribe has proffered none.

Under Section 144, a federal judge may be disqualified only "upon a showing of *actual* bias or prejudice." *Varela v. Jones*, 746 F.2d 1413, 1416 (10th Cir. 1984) (emphasis

added). "[P]ersonal bias or prejudice refers to some sort of antagonism or animosity toward a party arising from sources or events outside the scope of a particular proceeding." *Id*. (citation omitted). "[O]nly personal animus or malice on the part of the judge can establish actual bias." *Hoffman v. Caterpillar, Inc.*, 368 F.3d 709, 718 (7th Cir. 2004).

"Factors that do not merit disqualification include: rumor, speculation, beliefs, conclusions, or other non-factual matters; the fact that the judge has previously expressed an opinion on a point of law; and prior rulings that were adverse to the moving party in this proceeding, or in another proceeding, solely because they were adverse." *Estate of Bishop v. Equinox Intern. Corp.,* 256 F.3d 1050, 1058 (10th Cir.2001) (internal citations omitted).

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.... In and of themselves (*i.e.,* apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required ... when no extrajudicial source is involved. *Almost invariably, they are proper grounds for appeal, not for recusal.*

*Liteky v. United States,* 510 U.S. 540, 555 (1994) (emphasis added).

> Second, opinions 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. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or *even hostile to*, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

*Id.* (emphasis added).

Further, there is "no authority for the proposition that the 'time and manner of [the judge's] ruling creates a reasonable doubt about impartiality, absent any other indicia of bias or partiality.'" *Estate of Bishop v. Equinox Intern. Corp.,* 256 F.3d 1050, 1058 (10th Cir.2001).

"The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for "bias or prejudice" recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a *sufficient* condition for 'bias or prejudice' recusal, since *some* opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will *not* suffice." *Liteky v. U.S.*, 510 U.S. 540, 554 (1994) (emphasis in original).

In *Liteky*, the Supreme Court cited as an example of antagonism a statement that was alleged to have been made by the District Judge in *Berger v. United States*, 255 U.S. 22, 28 (1921), a World War I espionage case against German–American defendants: "One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans" because their "hearts are reeking with disloyalty." *Liteky*, 510 U.S. at 55 (internal quotation marks omitted).

In *Liteky,* the petitioners claimed that recusal was required because the judge had displayed "impatience, disregard for the defense, and animosity" toward him, his codefendants, and their political beliefs. 510 U.S. at 542. The alleged evidence of bias included admonishments of the *pro se* defendants and defense counsel by the judge in front of the jury, limiting defense counsel's cross-examination, questioning witnesses, and interrupting the closing argument of one of the codefendants. *Id.* at 542-43.

"[E]xpressions 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" do not establish partiality. *Id.* at 555-56. "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 556.

In their briefs to the Supreme Court, the *Liteky* petitioners "referred to additional manifestations of alleged bias in the District Judge's conduct of the trial below, including the questions he put to certain witnesses, his alleged "anti-defendant tone," his cutting off of testimony said to be relevant to defendants' state of mind, and his post-trial refusal to allow petitioners to appeal *in forma pauperis*." *Id*. at 547. "All of these grounds are inadequate under the principles we have described above: They consist of judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses." *Id*.

The Tribe complains that Judge Waddoups is biased in this case because the Clerk failed to enter a default or default judgment when Defendants failed timely to respond to the Complaint. After the Answer was filed, the Court then entered an order denying the Tribe's application for default judgment on the grounds that "there is no prejudice to Plaintiff as a result of the delay, and courts prefer to resolve disputes on the merits."[10] While the Tribe may find this disposition "curious," it seems more like routine case management and is inadequate to demonstrate bias against the Tribe or in favor of the Defendants.

Whether to recuse is a decision "committed to the sound discretion of the district court," and the court of appeals will not reverse a judge's refusal to recuse absent an abuse of that discretion. *United States v. Burger,* 964 F.2d at 1070.

### III. The Tribe has failed to meet its burden under 28 USC § 455 to show that a reasonable person would harbor doubts about impartiality.

Under Section 455, a federal judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned" or "where he has a personal bias or prejudice

[10] ECF No. 24.

concerning a party." 28 U.S.C. § 455(a), (b)(1). "Section 455 contains an objective standard: disqualification is appropriate only where the reasonable person, were he to know all the circumstances, would harbor doubts about the judge's impartiality." *In re McCarthey*, 368 F.3d 1266, 1269 (10th Cir. 2004). "The inquiry is limited to outward manifestations and reasonable inferences drawn therefrom. In applying the test, the initial inquiry is whether a reasonable *factual* basis exists for calling the judge's impartiality into question." *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993) (citations omitted.) "Section 455 does not require recusal based only on assumptions about a judge's beliefs that are not substantiated by the facts of record." *McCarthey*, 368 F.3d at 1269-70.

Section 455(b)(1) reiterates Section 144's requirement of a showing of actual personal bias, and requires disqualification only if "actual bias or prejudice is 'proved by compelling evidence.'" *See Hook v. McDade,* 89 F.3d 350, 355 (7th Cir. 1996). "The negative bias or prejudice from which the law of recusal protects a party must be grounded in some personal animus or malice that the judge harbors against him, of a kind that a fair-minded person could not entirely set aside when judging certain persons or causes." *Id.*

In contrast to Section 144, under Section 455, the affiant's "factual allegations need not be taken as true." *Glass v. Pfeffer,* 849 F.2d 1261, 1268 (10th Cir. 1988). Nor is the judge "limited to those facts presented by the challenging party." *Hinman v. Rogers,* 831 F.2d 937, 939 (10th Cir. 1987). "A party introducing a motion to recuse carries a heavy burden of proof; a judge is *presumed to be impartial* and the party seeking disqualification bears the substantial burden of proving otherwise." *Pope v. Fed. Express Corp.,* 974 F.2d 982, 985 (8th Cir.1992) (citation omitted).

The Tenth Circuit has held that "section 455(a) must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice." *United States v. Hines*, 696 F.2d 722, 729 (10th Cir. 1982). "Neither is the statute intended to bestow veto power over judges or to be used as a judge shopping device." *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995). "There is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." *Hinman v. Rogers,* 831 F.2d 937, 939 (10th Cir.1987). "A judge should not recuse ... on unsupported, irrational, or highly tenuous speculation." *Id.*

In this case, the Tribe has put forward only "unsupported, irrational and highly tenuous speculation" that Judge Waddoups bears a racial animus toward the Tribe. No reasonable person would harbor doubts about Judge Waddoups's impartiality based upon such a baseless accusation.

## CONCLUSION

The Court should deny the Tribe's Motion because (1) the Utah Federal District Court has already considered and rejected the Tribe's substantially identical arguments in *Becker*, (2) the Tribe has failed to demonstrate personal bias or prejudice based solely on Judge Waddoups's prior orders in other, unrelated cases, or his decision to not grant default judgment after Defendants had already filed an Answer in this case, and (3) the Tribe has failed to show that Judge Waddoups is impartial based on their unsupported and speculative allegations of racial animus.

RESPECTFULLY SUBMITTED this 23rd day of October, 2018

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of October, 2018, I electronically filed the foregoing **MEMORANDUM IN OPPOSITION TO UTE INDIAN TRIBE'S VERIFIED MOTION TO RECUSE** with the Clerk of Court using the CM/ECF system, which caused a true and correct copy of the foregoing to be served upon the counsel of record, including the following:

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