STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Peter Rickmyer,

Plaintiff,

v.

Robert Hodson, *et al*,

Defendants.

Court File: 27-cv-10-3378
The Honorable Robert A. Blaeser

PLAINTIFF MEMORANDUM OF LAW IN SPPORT OF HIS NOTICE OF MOTION & MOTION TO REMOVE JUDICIAL OFFICER FOR CAUSE

INTRODUCTON & FACTUAL STATEMENT

There is evidence that the Honorable Robert A. Blaeser engaged in *ex parte* communications about this case, did not remain neutral, made pledges or promises as to the outcome of issues or proceedings in this case, and that these communications were not disclosed to Plaintiff by the Court. (See Exhibit A and B, appended to the Affidavit of Peggy Katch).

Plaintiff contends that, accordingly, the Judicial Officer currently assigned to this "civil" file should be removed. (Plaintiff does not waive any of his other arguments or positions.)

Under the circumstances, Plaintiff requests that the Honorable Robert A. Blaeser not be the one to decide whether this motion/memorandum is filed with Court Administration.

Plaintiff seeks a hearing on this motion to remove (if the notice of removal is not honored), before any "show cause" hearing.

DISCLOSURES SOUGHT

Plaintiff seeks full disclosure by this Court of all communications that are not part of the public records or otherwise disseminated to all parties.

ARGUMENT

I. REMOVAL WITHOUT CAUSE SHOULD BE HONORED.

Plaintiff's earlier pleading explains why, in Plaintiff's view, the Honorable Robert A. Blaeser should be "automatically" (by virtue of the Rules of Criminal Procedure, a timely-filed notice to remove) removed from this order to show cause proceeding.

II. JUDICIAL OFFICER SHOULD BE REMOVED FOR CAUSE.

The controlling principle is that no judge, when other judges are available, ought ever to try the cause of any citizen, *even though he be entirely free from bias in fact,* if circumstances have arisen which give a bona fide appearance of bias to litigants. Wiedemann v. Wiedemann, 228 Minn. 174, 36 N.W.2d 810 (1949); see also Payne v. Lee, 222 Minn. 269, 24 N.W.2d 259 (1946).

> "Because public trust and confidence in the judiciary depend on the integrity of the judicial decision-making process, **we can ill afford to ignore this problem.**" State v. Greer, 635 N.W.2d 82, 93 (Minn. 2001) ("*Greer I*") (emphasis added).

Parties have a constitutional right to an impartial judge. Impartiality is the very foundation of the American judicial system. *See* Greer v. State, 673 N.W.2d 151 (Minn. 2004) ("Greer III"), citing Payne v. Lee, 222 Minn. 269, 277, 24 N.W.2d 259, 264 (1946).

> [T]he rule laid down in *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), makes clear that the partiality of a judge as it relates to a party to a case violates due process protections: "[I]t certainly violates the Fourteenth Amendment, and deprives [a person] of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523. In *Bracy v. Gramley,* 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997), the Court reiterated that "the floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Id.* at 904-05 (quotation and citation omitted). *See also Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 821-25, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) (citing *Tumey*); *Ward v. Monroeville,* 409 U.S. 57, 58-62, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) (same); *Johnson v. Mississippi,* 403 U.S. 212, 215-16, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971) (per curiam) (holding that due process was violated where a judge presided in a case involving a party who had successfully sued him earlier. "Trial before 'an unbiased judge' is essential to due process."); *In re Murchison,* 349 U.S. 133, 137-39, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

Republican Party v. White, 416 F.3d 738, 2005 WL 1802507, *8 (8th Cir. 2005).

State v. Dorsey, 701 N.W.2d 238 (Minn. 2005) ("*Dorsey*"). That case highlights the importance of an impartial judge:

> Although the right to a trial before an impartial judge is not specifically enumerated in the Constitution, this principle has long been recognized by the United States Supreme Court. *Rose v. Clark,* 478 U.S. 570, 577, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (citing *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)); *see also Greer v. State,* 673 N.W.2d 151, 155 (Minn.2004) ("[I]mpartiality is the very foundation of the American judicial system."). In *Pederson v. State,* we said, "[t]o maintain public trust and confidence in the judiciary, judges should avoid the appearance of impropriety and should act to assure that parties have no reason to think their case is not being fairly judged." 649 N.W.2d 161, 164-65 (Minn.2002).

State v. Dorsey, 701 N.W.2d 238 (Minn. 2005). *Dorsey* also noted that judges must be able to "approach every aspect of each case with a neutral

and objective disposition," citing Liteky v. U.S., 510 U.S. 540, 561-62 (1994).

Several federal cases are also relevant to this inquiry.

An appellate court may require recusal when a district judge failed to make timely and appropriate disclosures under his ethical rules. Liljeberg v. Health Services Corp., 486 U.S. 847, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988). Failure to disclose is a separate basis to disqualify a judge. Liljeberg v. Health Services Corp., 486 U.S. 847, 865, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988) (district judge's failure to disclose once he became aware of his relationship to the case, was "inexcusable").

Recusal is required when a "reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits." In re Mason, 916 F.2d 384, 385 (7th Cir. 1990). See also Cheney v. United States District Court, 541 U.S. 913, 914, 124 S. Ct. 1391 (2004) (Scalia, J., in chambers).

Further, in *Moran*, the Eighth Circuit was "troubled" that the district judge had not made a full record. *Moran* at 649-50. Rickmyer contends that this case also sports a "troubling" record. When a judge is "tainted," he must be disqualified. In re Kensington Int'l, Ltd., 368 F.3d 289 (3d Cir. 2004).

The combined impact of the judicial rulings, as well as the way in which the District Judge handled the proceedings, should be considered. *See* U.S. v. Oaks, 606 F.3d 530, 536 (8th Cir. 2010), noting the district judge's handling of ordinary

proceedings will not be evidence of bias unless they portray a "deep-seated favoritism or antagonism that would make fair judgment impossible." See *Liteky*, 510 U.S. at 555-56.

As noted in Rosen v. Sugarman, 357 F.2d 794 (2d Cir. 1966), a case in which a judge threatened an attorney with contempt, "even when a judge's initial adverse reaction to a lawyer may have stemmed from reasons that were legitimate or at least understandable, it is undeniable that if such an antipathy has crystallized to a point where the attorney can do no right, the judge will have acquired "a bent of mind that may prevent or impede impartiality of judgment...." (quoting Berger v. U.S., 255 U.S. 22, 33-4 (1921).

Edgar v. K.L., 93 F.3d 256, 259 (7th Cir. 1996) held that "extra-judicial" includes off-the-record chambers discussions, because information conveyed to the judge in that circumstance leaves no trace on the record and cannot "be controverted or tested by the tools of the adversary process."

Comments or rulings by a judge may be relevant to question of existence of prejudice on his part. *Id. See also* Moran v. Clarke, 296 F.3d 638, 649 (8th Cir. 2002) (The inquiry whether a reasonable person, knowing all the relevant facts, would discern potential impropriety certainly warrants consideration of a judge's rulings, and also the judge's course of conduct).

As noted in Wolfson v. Palmieri, 396 F.2d 121, 125-26 (2d Cir. 1968), if there is a real doubt created as to the prejudice of a judge, that alone may be sufficient to

warrant his withdrawal from the case. Most importantly, "if the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal." Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995); *accord* United States v. Dandy, 998 F.2d 1344, 1348 (6th Cir. 1993).

B. Canons Potentially at Issue in this Case.

Canons potentially at issue here include:

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Definitions

"Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. See Canons 1, 2, and 4, and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.12, 3.13, 4.1, and 4.2.

"Pending matter" is a matter that has commenced.

1. Applicability of This Code.

(A) The provisions of the Code apply to all full-time judges.

(B) A judge, within the meaning of this Code, is anyone who is employed by the judicial branch of state government to perform judicial functions....

[1] The Rules in this Code have been formulated to address the ethical obligations of any person who serves a judicial function....

CANON 1:

Rule 1.2 Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes the public confidence in the independence ... of the judiciary...

Comment

Rule 1.2[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

CANON 2: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY....

Rule 2.2 Impartiality and Fairness

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] ...a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

Comment

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

Rule 2.3 Bias, Prejudice and Harassment

(A) A judge shall perform the duties of judicial office, including

administrative duties, without bias or prejudice.

Comment

[2] Examples of manifestations of harassment or bias include...demeaning nicknames, negative stereotyping...threatening, intimidating or hostile acts

Rule 2.4 External Influences on Judicial Conduct

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

Comment

[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular, with the public, the media, government officials or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

Rule 2.6 Ensuring the Right to be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

Comment

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

RULE 2.9 ***Ex Parte Communications***

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

...

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

Rule 2.10 Judicial Statements on Pending and Impending Cases

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Comment

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

Rule 2.11 Disqualification

(A) A judge shall disqualify himself [] in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge ... is ... (d) likely to be a material witness in the proceeding.

(4) The judge, while a judge or judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a

particular way in the proceeding or controversy.

Comment

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply. In many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

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As discussed in both *Powell* and *Dorsey*, the Canons of Judicial Ethics can require a judge to disqualify himself or otherwise become relevant to determining the rights of the parties to a lawsuit. As noted in *Dorsey*:

- judges must disqualify themselves if they have "personal" knowledge about the parties or the case. (*Dorsey*). The definition of personal is discussed at length in *Dorsey*. *Personal* knowledge in this case would include knowledge of the discussion with the

Signing Judge, a conversation that has not been disclosed to Plaintiff dispute his requesting disclosure, and would also include any "investigation" performed by the Assigned Judicial Officer (or in conjunction with someone else) (see *Dorsey* in which trial court judge performed investigation of evidence not proffered by a party);

- "nonpersonal" information that judges learn through routine professional duties or as a citizen (such as reading a story in the newspaper), does not necessarily require disqualification, but must be disregarded (*Dorsey*);
- Nothing on *Dorsey* sanctions other judges talking to the trier of fact judge about the case under deliberation as that is not routine professional information but rather is pointed, *ex parte* communications disallowed under other aspects of the law (such as *Schwartz*; and *Greer*, both discussed below). *See also Dorsey*, "[n]onpersonal" knowledge—depending on its source and nature—*could* create a reasonable question regarding the judge's impartiality." (Emphasis in original). (*Dorsey*);
- "The code does not set forth any exceptions to the rule in Canon 3D(1) [from the prior set of Canons] that a judge must disqualify herself if her impartiality may reasonably be questioned." (*Dorsey*).

The Oregon Supreme Court has already encountered a *Dorsey-type* situation in a

civil case. In Hallett v. Hallett, 153 Or. 63, 55 P.2d 1143 (1936), the [Oregon] Supreme Court reversed a child custody decision that the trial court based in part on evidence that it learned during its own investigation and that was not in the record. Lamonts Apparel, Inc. v. Si-Lloyd Assoc., 956 P.2d 1024, 1026 (Or. Ct. App. 1997) (and federal cases cited therein). "Knowledge possessed by the judge alone cannot be permitted to influence him in his judicial decisions." *Id.* As the Oregon Courts noted, ***undisclosed*** *ex parte* communications are even more harmful to the process. The Oregon Supreme Court held that *ex parte* communications with a judge deciding a civil motion, or presiding over a bench trial, are improper. That Court determined that such communications create a *presumption* of prejudice.

C. Judicial Officer in this Case should be Removed.

Several Minnesota cases have held that the Canons of Judicial Ethics are not merely aspirational, but may require a judge to disqualify himself. *See, e.g.,* Powell v. Anderson, 660 N.W.2d 107, 114 (Minn. Ct. App. 2003) and *Dorsey, supra.* Both of those cases discussed Canon 3D(1) of the Minnesota Code of Judicial Conduct and the requirement to disqualify. Although decided under the prior set of Canons, the analysis is still applicable to the current set of Canons.

Dated: March 22, 2011

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