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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. PHILLIP KAY LYMAN, Defendant.	**MOTION TO DISQUALIFY** Case No. 2:14-CR-00470-RJS Judge Robert J. Shelby

Defendant Phillip Kay Lyman, by his attorneys, respectfully moves the Court to disqualify itself pursuant to 28 U.S.C. § 455(a). In this criminal case in which Mr. Lyman's liberty and reputation are at stake, we submit that a reasonable person might reasonably question the Court's impartiality. For the reasons set forth below, we request that this motion be granted.

BACKGROUND

1. In a Superseding Misdemeanor Information, Mr. Lyman was charged in Count I for conspiring with others to operate off-road vehicles through public lands restricted to off-road vehicles and administered by the Bureau of Land Management, in violation of 18 U.S.C. § 371,

and in Count II for knowingly and willfully operating an off-road vehicle through land closed to off-road vehicles administered by the Bureau of Land Management, in violation of 43 U.S.C. §§ 1701, 1733, 43 CFR § 8341.1(c) and 18 U.S.C. § 2. Mr. Lyman was convicted after a jury trial of both counts on May 1, 2015.

2. Prosecution of Mr. Lyman was strongly urged by the Southern Utah Wilderness Alliance ("SUWA"), a non-profit organization supporting the closing of Recapture Canyon to all off-road vehicles. SUWA maintains a website on which it has sharply criticized Mr. Lyman and pushed for the prosecution of Mr. Lyman in numerous postings.

3. SUWA has also had extensive direct contact with the government concerning the prosecution of this case. For example, in the course of discovery, the government produced emails and other documents from SUWA regarding the prosecution of Mr. Lyman and others.

4. SUWA's involvement was specifically made the subject of voir dire of the jury in this case.

5. We have confirmed with counsel for co-defendant Monte Wells that the Legal Director of SUWA, Steven Bloch, attended the full trial of Mr. Lyman and his co-defendants.

6. Mr. Bloch and others at SUWA have been actively involved in the prosecution of Mr. Lyman. SUWA has joined with the Grand Canyon Trust, the Natural Resources Defense Council and the Utah Chapter of the Sierra Club in writing a letter to this Court advocating a stiff sentence for Mr. Lyman.

7. This Court and his family are close personal friends with Mr. Bloch and his family. Mr. Lyman only recently learned of this relationship through the Court's disclosure in another matter, *In re Jointly Managed R.S. 2477 Road Cases Litigation*, Case Nos. 2:10-cv-1073

and 2:11-cv-1045. Disclosure was not made to Mr. Lyman, and Mr. Lyman did not know of the direct, personal relationship the Court has with Mr. Bloch until on or about May 26, 2015, well after the trial had concluded. Specifically, in the civil case, the Court advised the parties as follows:

> JUDGE SHELBY: I just wanted to start with a disclosure, Steve Bloch, on behalf of SUWA, Steve Bloch and his wife Kara are friends of mine and have been for a long, long time. I practiced with Kara at Snow Christensen starting in 1999. My wife and I have socialized with the two of them since that time, we continue to socialize. My son is close friends with Steve's son, they play on the same soccer team, in the same school class. We have dinner, are couples together and with other friends not infrequently.
>
> I don't hear any cases in which Steve appears, he had not entered an appearance and still has not, I don't think, in Kane County. I was unaware until this weekend that Steve had entered appearances in any of the roads cases.
>
> I thought about it over the weekend, and my view is that I needed to make disclosure about that, but I don't recuse from any matters involving SUWA. I don't think I know anyone else that works at SUWA. If I do, I don't know who they are. And so long as Mr. Bloch's not involved in our case, I intend to remain in the case, but I wanted to make that disclosure.

See Excerpt of Transcript of Jointly Managed Cases Status Conference, at 7-8, attached as Exhibit A.

8. In Mr. Lyman's criminal case, no such disclosure was made. Further, the R.S. 2477 litigation is a civil matter involving large government entities. In contrast, Mr. Lyman's case involves a federal criminal case in which Mr. Lyman's liberty is at stake. It is personal. As part of the sentencing process, the Court will determine whether or not Mr. Lyman should be incarcerated. The Court will also determine whether Mr. Lyman is individually responsible for alleged damages of approximately $172,302.70.

LEGAL ANALYSIS

The appearance of justice is critical in our judicial system, especially in a criminal case. At the Supreme Court noted in *In re Murchison* sixty years ago:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of justice has always endeavored to prevent even the probability of unfairness…Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the very best way "justice must satisfy the appearance of justice."

349 U.S. 133, 136 (1955).

Section 455(a) of 28 U.S.C. embraces that fundamental principle. It provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." In a thorough opinion by Senior Judge Jenkins, the applicable legal standard was set forth in detail:

> Under § 455, judges should apply an objective standard in determining whether to recuse. A judge contemplating recusal should not ask whether he or she believes he or she is capable of impartiality presiding over the case. According to our court of appeals, under § 455(a), "[t]he test in this circuit is " " 'whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." " ' *United States v. Cooley*, 1 F.3d 985, 992 (10th Cir. 1993) (quoting *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992), *cert. denied*, 507 U.S. 1033 (1993) (quoting *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987))). Under § 455(a), "a judge has a continuing duty to recuse before, during, or, in some circumstances, after a proceeding, if the judge concludes that sufficient factual grounds exist to cause an objective observer reasonably to question the judge's impartiality." *Id.* (citing *Liljeberg*, 486 U.S. at 861, *Frates v. Weinshienk*, 882 F.2d 1502, 1505-07 (10th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990), and *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989)).
>
> > In applying § 455(a), the judge's actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue. See, e.g., *Hall v. Small Business Admin.*, 695 F.2d 175, 179 (5th Cir. 1983); Susan B. Hoekema, Comment, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)*, 60

> Temp. L.Q. 697, 727 (1987) …. The standard is purely objective. 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… *Id.* at 993 (citing Gipson, 835 F.2d at 1325; *Willner v. University of Kansas*, 848 F.2d 1023, 1026-27 (10th Cir. 1988); *United States v. Hines*, 696 F.2d 722, 729 (10th Cir. 1982); *In re: Allied Signal, Inc.*, 891 F.2d 967, 970 (1st Cir. 1989), *cert. denied*, 495 U.S. 957 (1990)).

The language of § 455(a), requiring recusal in any case "in which [the judge's] impartiality might be reasonably questioned" has led courts in every circuit to adopt some version of the "reasonable person" standard. As the Eighth Circuit explained, "We apply an objective standard of reasonableness in determining whether recusal is required. 'Under § 455(a), "disqualification is required if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual, bias or prejudice has been shown." *Tucker*, 78 F.3d at 1324 (citation omitted)." *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003).

> The Fourth Circuit has clarified that the hypothetical reasonable observer is not a judge, because judges, keenly aware of the obligation to decide matters impartially, "may regard asserted conflicts to be more innocuous than an outsider would." At the same time, the hypothetical observer "is not a person unduly suspicious or concerned about a trivial risk that a judge may be biased." The Fifth and Seventh Circuits have noted that while a judge must ask "how things appear to the well-informed, thoughtful observer rather than to a hypersensitive or unduly suspicious person," an outside observer is "less inclined to credit judges' impartiality and mental discipline than the judiciary…"

Federal Judicial Center, *Recusal: Analysis of Case Law Under 28 U.S.C. § 455 & 144* 16 (2002) (footnotes omitted) (quoting *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 1793 (1999); *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990), *United States v. Jordan*, 49 F.3d 152, 156, 157 (5th Cir. 1995).)

"If the issue of whether § 455(a) requires disqualification is a close one, the judge must be recused." *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 659 (10th Cir. 2002); see *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995). But the court of appeals has also said "[t]here 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 *Nichols*, the Tenth Circuit listed seven frequently alleged bases for recusal that

> usually do not warrant it: (1) Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters; (2) the mere fact that a judge has previously expressed an opinion on a point of law or has expressed a dedication to upholding the law or a determination to impose severe punishment within the limits of the law upon those found guilty of a particular offense; (3) prior rulings in the proceeding, or another proceeding, solely because they were adverse; (4) mere familiarity with the defendant(s), or the type of charge, or kind of defense presented; (5) baseless personal attacks on or suits against the judge by a party; (6) reporters' personal opinions or characterizations appearing in the media, media notoriety, and reports in the media purporting to be factual, such as quotes attributed to a judge or others, but which are in fact false or materially inaccurate or misleading; and (7) threats or other attempts to intimidate the judge. *Nichols v. Alley*, 71 F.3d at 351.

MacArthur v. San Juan County, 2005 WL2716300 at *1-2(D. Utah 2005) (footnotes and page numbers omitted). None of these bases are made here. Rather, it is undisputed that this Court and his family have a close and long-standing personal relationship with Steven Bloch, Legal Director of SUWA, and his family. SUWA has had a high level of involvement in this matter as one of the principal groups urging the BLM and the U.S. Attorney's Office to prosecute Mr. Lyman and now advocating that this Court stiffly punish Mr. Lyman. This relationship and involvement lead a reasonable person to question the Court's impartiality, and thus require that this Court disqualify itself.[1]

Under the circumstances, we respectfully submit that the Court should disqualify itself from all proceedings in this matter and remand the case for random assignment to another judge.

[1] Prior to 1974, some Courts of Appeals had applied a judicial "gloss" to § 455. They had created a "duty to sit," whereby judges resolved close questions against disqualification. In 1974, however, amendments to § 455 shifted the balance by requiring disqualification whenever a judge's impartiality "might" be reasonably questioned, and the legislative history made clear that in revising the statute, Congress sought to end "the duty to sit." H.R. R. No. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355. Consistent with § 455, as noted, the Tenth Circuit and numerous other circuits have ruled that close questions should be decided in favor of disqualification.

DATED this 20th day of July 2015.

CLYDE SNOW & SESSIONS

/s/ Anneli R. Smith
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July 2015, I electronically filed the foregoing Motion to Disqualify with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

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