IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DISTRICT (JACKSON)

TLS MANAGEMENT & MARKETING SERVICES, LLC
d/b/a TAX LAW SOLUTIONS, LLC **PLAINTIFF**

VS. **CASE NO. 14-881-CWR-LRA**

MARDIS FINANCIAL SERVICES, INC.,
CAPITAL PRESERVATION SERVICES, LLC
AND J. TODD MARDIS **DEFENDANTS**

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR DISQUALIFICATION OF TRIAL JUDGE

Defendants, Mardis Financial Services, Inc., Capital Preservation Services, LLC and J. Todd Mardis, file this Brief in Support of their Motion for Disqualification of the presiding trial judge, as follows:

I. INTRODUCTION

In its Motion for Default Judgment, Plaintiff TLS mischaracterized testimony and distorted facts in order to concoct a story that Defendants' intentionally destroyed evidence and gave false testimony to conceal such conduct. Inexplicably, without conducting an evidentiary hearing, this Court accepted and even amplified TLS' concocted story to justify the imposition of this extreme sanction. As a consequence, TLS' claims have been conclusively established by default without regard to the actual merits, and the only remaining issue for trial is TLS's alleged damages. In preparing Defendants' Motion for Reconsideration, which is incorporated herein by reference, it became clear that the Court's ruling, and its pejorative comments in particular, require disqualification.

II. ARGUMENT

A. The Standard for Disqualification

"The right to trial by an impartial judge 'is a basic requirement of due process.'" *In re Murchison*, 349 U.S. 133 (1955). A litigant "is entitled to a trial before a judge who is not biased against him at any point" during the proceedings. *United States v. Holland*, 655 F.2d 44 (5th Cir. 1981).

Under 28 U.S.C. § 455, a district court judge "should disqualify himself if a reasonable person, knowing all the relevant circumstances, would harbor doubts about the judge's impartiality." *See Liteky v. United States*, 510 U.S. 540 (1994). Opinions formed and comments made by a trial judge during the course of judicial proceedings constitute a basis for recusal where "they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *U.S. v. Landerman*, 109 F.3d 1053, 1066 (5th Cir. 1997) (quoting *Liteky,* 510 U.S at 554). A judge's pejorative comments directed toward a party cross this line when they reveal a predisposition that is "wrongful or inappropriate" either because they are "undeserved" or "excessive in degree." *Liteky*, 510 U.S. at 550.

Liteky involved a criminal appeal in which the defendant sought to vacate his conviction on the grounds that the trial judge should have recused himself. The defendant unsuccessfully argued the judge displayed antagonism and hostility toward him during his trial through various "words and actions."[1] The Supreme Court found that, while the judge

[1] The Court described the judge's conduct, as follows: (1) a statement at the outset of the trial that "its purpose was not to provide a political forum;" (2) observing after the defendant's opening statement "that the statement should have been directed to the anticipated evidentiary showing;" (3) limiting defense counsel's cross-examination; (4) questioning witnesses; (5) periodically cautioning defense counsel to confine his questions to issues material to trial; (6) admonishing witnesses to keep answers responsive; (7) admonishing the defense that closing argument should not be a political speech; and (8) imposing an excessive sentence. *Liteky*, 510 U.S. at 542.

may have been "stern and short-tempered" with the defense at times, his conduct involved "ordinary efforts at courtroom administration." As such, the judge did not cross the line, and his recusal was not required. *Id*. at 555.

In *Liteky*, the Court cited *Holland*, 655 F.2d at 44 and *Nicodemus v. Chrysler Corp.*, 596 F.2d 152 (6th Cir. 1979) as examples of cases where recusal was required based upon a judge's comments which did cross the line. *Liteky*, 510 U.S. at 561 (Kennedy, J., concurring). In *Holland*, a criminal defendant successfully overturned his conviction based on an interaction the trial judge had with the jury during deliberations. When the defendant returned before the same trial judge for a retrial, the trial judge commented that the defendant had "broken faith" with the court by raising his jury interaction as an error on appeal. After a second conviction, the Fifth Circuit reversed and ordered a new trial before a different judge. The Court found that the judge's comment, although made during the course of a judicial proceeding, reflected a bias against the defendant that would cause a reasonable person to question his impartiality. *Holland*, 655 F.2d at 47.

Nicodemus, 596 F.2d at 155-56, was an employment discrimination/retaliatory discharge case. The trial judge presided over a preliminary injunction hearing concerning Chrysler's decision to terminate the plaintiff's employment. The trial judge granted the plaintiff's request for interim relief, which included back pay and reinstatement, but he did not make a final determination on the merits of all claims. In his ruling, the trial judge made disparaging comments about Chrysler—that it was not "worthy of credence by anybody" and was comprised by "a bunch of villains." *Id.*

On appeal, the Sixth Circuit found that the judge's remarks were unsupported by the record and that he had "overstepped." *Id.* at 156. Equally troubling for the Court was the

perception that the judge's derisive comments about Chrysler, although formed and expressed during a preliminary hearing, would taint the fairness of any future proceedings. Because the judge's comments "place[d] into doubt his ability to conduct unbiased future proceedings," the Court reversed the injunction ruling and *sua sponte* assigned the case to a different judge on remand. *Id*. at 157; *see also Webbe v. McGhie Land Title Co.*, 549 F.2d 1358, 1361 (10th Cir.1977) (recusal required where court announced that insurance company was "stuck" on liability before considering merits); *In re Murchison*, 349 U.S. 133, 138 (1955) (recusal required where trial judge placed on the record his characterization of the defendant's attitude as "insolent" and "defiant"); *In re Antar*, 71 F.3d 97, 101-102 (3d Cir. 1995) (recusal required where judge's comments suggested outcome was predetermined); *Roberts v. Bailar,* 625, F.2d 125, 126 (6th Cir. 1980)(recusal required once judge expressed "ardent sentiments" about a key witness' credibility because "objective appearance of impartiality vanished").

B. The Court's Derisive Comments Require Recusal

For the reasons set forth in Defendants' Motion for Reconsideration, the Court's ruling is an unconstitutional abuse of discretion and must be vacated. That is, the default judgment cannot stand as a discovery sanction because, in addition to being "unjust," it lacks a "substantial nexus" to several threshold liability issues which are unrelated to the discovery abuse. *See Insurance Corp. of Ireland, LTD., v. Compagnie des Bauxistes de Guinee*, 456 U.S. 694, 707 (1982); *See also Chudasama v. Mazda Motor Corp*., 123 F.3d 1353, 1365 (11th Cir. 1997)(vacating default judgment as a discovery sanction which "could not stand" and reassigning case on remand to different judge based on "the extent of the judge's abuse of discretion").

The most troubling aspect of the ruling is the extent to which the Court vilifies the Defendants in an attempt to justify a clearly excessive and unconstitutional sanction. Specifically, the Court describes the Defendants and their key witnesses as "liars" and "egregious wrongdoers." Dkt. 187 at pgs. 4, 8. Then, to drive home its point, the Court concludes with this commentary:

> Defendants knew that they had data relevant to this lawsuit, and spent years resisting discovery. Resistance failing, they systematically destroyed places that data was stored. Defendants took extraordinary steps to disguise that destruction, including lying under oath and permanently erasing data. This is more than ordinary wrongdoing. It is unacceptable**. It is an assault on this Court's ability to find truth and do justice.**

Dkt. 187 at pg. 10 (emphasis added).

As set forth in Defendants' Motion for Reconsideration, the Court overstepped in making these predicate findings which are unsupported by the record and were determined without an evidentiary hearing. But more importantly for these purposes, the Court's remarks cross the line and taint the fairness of these proceedings.

These remarks cannot be described as mere expressions of the Court's aggravation or indignation with a party's discovery abuse. Rather, they reflect a deep-seated antagonism toward Defendants based on the Court's perception that they committed an "assault on [its] ability to find truth and do justice." The Court's "assault" comment is arguably more serious than the judge's "broken faith" comment in *Holland*. Likewise, the Court's derisive remarks describing Defendants as "liars" and "egregious wrongdoers" are no different than the judge's vilification of Chrysler in *Nicodemus*. As in those cases, it is clear that the Court's comments about Defendants in this case were "undeserved" and "excessive in degree." *See*

Liteky, 510 U.S. at 550. These comments reflect a predisposition and antagonism against Defendants which is both wrongful and inappropriate, rendering fair judgment impossible.

The Court's remarks are particularly troubling because this case is to be tried as a bench trial. The trial judge will be determining all remaining issues, including the issue of damages to be assessed against Defendants. Even if the Court vacates its Order, a reasonable person would still "harbor doubts" about its ability to impartially preside over a trial or any other future proceedings in this case. Accordingly, under *Liteky* and 28 U.S.C. § 455, recusal is required.

III. CONCLUSION

For these reasons, Defendants' Motion for Disqualification of the Trial Judge should be granted, and this case should be immediately reassigned to a different judge for all future proceedings.

RESPECTFULLY SUBMITTED this the 28th day of February, 2018.

MARDIS FINANCIAL SERVICES, INC., CAPITAL PRESERVATION SERVICES, LLC AND J. TODD MARDIS

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CERTIFICATE OF SERVICE

I do hereby certify that the foregoing pleading was filed electronically through the Court's CM/ECF system and served electronically on all parties enlisted to receive service electronically.

This the 28th day of February, 2018.

/s/ W. Thomas McCraney, III
W. Thomas McCraney, III