IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIAM M. WINDSOR,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	1:11-CV-1922-TWT
JUDGE WILLIAM S. DUFFEY, et al.	:	
	:	
	:	
Defendants.		

ORDER DENYING PLAINTIFF'S MOTION FOR RECUSAL

Presently before the Court is Plaintiff William M. Windsor's Motion for Recusal of U.S. District Court Judge Thomas W. Thrash ("Pl.'s Mot. Recuse") [Doc. 31]. This Motion was transferred to the undersigned following Judge Thrash's June 23, 2011 Order referring this motion to another judge pursuant to 28 U.S.C. § 144 [Doc. 29].

I. Litigation Background

This case is one of several lawsuits filed by Plaintiff Windsor in this court.[1]

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[1] *See Maid of the Mist Corp., et al. v. Alcatraz Media, LLC, et al.*, No. 1:06-CV-0714-ODE (N.D. Ga.) ("*Maid I*"); *Maid of the Mist Corp., et al. v. Alcatraz Media, LLC, et al.*, No. 1:09-CV-1543-WSD (N.D. Ga.) ("*Maid II*"); *Windsor v. United States, et al.*, No. 1:09-CV-2027-WSD (N.D. Ga.) ("*Windsor I*"); *Windsor v. Judge Orinda D. Evans, et al.*, No. 1:10-CV-0197-RJL (D.D.C.) ("*Windsor II*"); *Windsor v. Hatten, et al.*, No. 1:11-CV-1922-TWT (N.D. Ga.) ("*Windsor III*"); *Windsor v. Hatten, et al.*, No. 1:11-CV-1923-TWT (N.D. Ga.) ("*Windsor IV*");

In essence, these suits originally stem from a business dispute that was heard by U.S. District Court Judge Orlinda D. Evans. Windsor was one of several defendants in *Maid of the Mist Corp., et al. v. Alcatraz Media, LLC, et al.*, No. 1:06-CV-0714 (N.D. Ga. Mar. 28, 2006) ("*Maid I*"). Judge Evans found that the defendants had engaged in tortious business interference and further ordered them to pay plaintiff's attorney's fees because she found that they had been "stubbornly litigious." (*Maid I*, Ord. on Mot. for Summ. J. at 43, Aug. 9, 2007.) The order granting sanctions was upheld by the Court of Appeals for the Eleventh Circuit. *Maid of the Mist Corp. v. Alcatraz Media, LLC,* 294 Fed. Appx. 463 (11th Cir. Sept. 18, 2008). Although Plaintiff agreed to a Final Consent Order and Judgement waiving his right to an appeal as part of the negotiation of attorney's fees (*Maid I*, Consent Final Ord. on J., Dec. 9, 2008), he still continued to file sixty-two post judgement motions, such as motions for recusal (*Maid I*, Mot. for Recusal April 24, 2009.), to reopen (*Maid I*, Mot. to Reopen, April 24, 2009), for sanctions under Fed. R. Civ. P. 37 (*Maid I*, Mot. for Sanctions, April 27, 2009), and for discovery (*Maid I*, Mot. for Disc., May 14, 2009). The Court denied those motions and the Court of Appeals for the Eleventh Circuit affirmed the District Court's rulings. *Maid of the Mist Corp. v. Alcatraz Media, LLC,* No. 09-13086 (11th Cir. Sep. 9, 2009).

Following Plaintiff's numerous filings, Judge Evans entered an Order against

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Windsor v. Thrash, et al., No. 1:11-CV-2027(N.D. Ga.) (*Windsor V*").

Plaintiff enjoining him from filing any motion, pleading, or other paper in that case or filing any new suit from the same factual predicate or operative nucleus of facts, holding:

> Windsor's persistently litigious behavior undermines the integrity of the Consent Final Order and Judgment submitted by the parties and signed by the Court in this case, as well as the other orders thus far issued by the Court, through repeated unsubstantiated collateral attacks, procedurally improper postjudgment motions, and increasingly bitter rhetoric. Windsor's continued filing of frivolous, improper post-judgment motions also continues to subject Plaintiffs to needless trouble and expense.

(*Maid I*, Ord., Dec. 22, 2009 at 19.) The Court of Appeals affirmed the order, finding the "pleadings are long and repetitive, and the volume of his filings poses a burden to clerical and judicial operations and is an impediment to the administration of justice." *Maid of the Mist Corp. v. Alcatraz Media, LLC,* 388 Fed. Appx. 940, 942 (11th Cir. July 23, 2010).

In May 2009, Plaintiff filed a new suit and attempted to serve a subpoena on Judge Evans in an effort to obtain her testimony for a motion for recusal regarding the original *Maid of the Mist* dispute. The United States filed a motion to quash the subpoena, which U.S. District Court Judge William S. Duffey granted. (*Maid II*, Ord. on Mot. to Quash. June 30, 2009.) Plaintiff appealed that order as well (*Maid II*, Notice of Appeal, Sep. 15, 2009), and the Court of Appeals affirmed the District Court's decision. *Maid of the Mist Corp. v. Alcatraz Media, LLC*, No. 09-14735, (11th Cir. Feb. 26, 2010). Plaintiff moved to recuse Judge Duffey in that matter and the motion was subsequently denied by Judge Duffey. (*Maid II*, Mot. for Recusal, July 21, 2010.)

Next, Plaintiff filed a separate complaint against Judge Evans and the United States, along with several other parties, including the plaintiff and their counsel from the original *Maid of the Mist* suit. (*Windsor I*, Compl., July 7, 2009.) The United States moved to dismiss Plaintiff's complaint as frivolous, which the District Court granted and the Court of Appeals affirmed. (*Windsor I*, Ord. on Mot. to Dismiss, Oct. 20, 2010); *Windsor v. United States, et al.*, No. 10-14899 (11th Cir. June 1, 2011). Plaintiff filed a motion to recuse Judge Duffey and the Court denied that motion. (*Windsor I*, Mot. to Recuse, July 28, 2009; Ord., July 30, 2009.)

Plaintiff then attempted to attack Judge Evans' decisions from the original *Maid of the Mist* dispute once again by filing a complaint against her with the District Court for the District of Columbia. (*Windsor II*, Compl., Feb. 4, 2010) The District Court dismissed the complaint and the Court of Appeals for the District of Columbia affirmed. (*Id.*, Ord. Dismiss, Feb. 17, 2010); *Windsor v. Evans*, No. 10-5071 (D.C. Cir. Dec. 28, 2010).

Plaintiff most recently filed two new suits in Fulton County Superior Court against several defendants, including Judge Duffey, Judge Evans, and other employees of the District Court. These suits, styled *Windsor v. Duffey et al.*, 1:11-CV-1922 ("*Windsor III*") and *Windsor V. Hatten, et al.*, 1:11-CV-1923 ("*Windsor IV*"), were removed to this Court on June 13, 2011 and assigned to Judge Thomas W. Thrash.

These latest actions essentially arise from Plaintiff's original litigation against

Judge Evans, but add new parties and legal grounds for his claims. On June 17, 2011, Judge Thrash issued an order in both of these matters that quashed discovery and ordered that no party in these suits need respond to Plaintiff's filings absent an order by the court. Judge Thrash found that these suits were "the latest in a series of frivolous, malicious, and vexatious lawsuits filed by the Plaintiff." (*Windsor III*, Ord. on Mot. for Protective Ord. at 1, June 17, 2011; *Windsor IV*, Ord. on Mot. for Protective Ord. at 1, June 17, 2011.)

Following Judge Thrash's Order, on June 20, 2011, Plaintiff filed a complaint against Judge Thrash and all the judges in the Northern District, including the undersigned, in Fulton County Superior Court, styled *Windsor V. Thrash et al.*, No. 2011CV202263. The case was removed to this Court on June 22, 2011 and assigned to Judge Thrash under case number 1:11-CV-2027("*Windsor V*"). On June 23, 2011, Plaintiff filed the present motion for recusal in the three cases currently assigned to Judge Thrash. (*Windsor III*, Mot. for Recusal, June 23, 2011; *Windsor IV*, Mot. for Recusal. June 23, 2011; *Windsor V*, Mot. for Recusal, June 23, 2011.) Judge Thrash subsequently issued an order referring the motions to another judge pursuant to 28 U.S.C. § 144. (*Windsor III*, Ord., June 23, 2011; *Windsor IV*, Ord., June 23, 2011; *Windsor V*, Ord., June 23, 2011.)

II. Instant Motion to Recuse

A. Motion and Briefs

Plaintiff contends that Judge Thrash should be recused from these cases for several reasons. First, Plaintiff argues in his affidavit that Judge Thrash has "a pervasive antagonistic bias towards [Plaintiff]." (Windsor's Aff. of Prejudice ¶ 12.) Plaintiff asserts that Judge Thrash's finding that his latest complaints are nothing more than "the latest in a series of frivolous, malicious, and vexatious lawsuits filed by the Plaintiff" is false and blatant evidence of his bias. (Windsor's Aff. of Prejudice ¶ 75.) Second, Plaintiff cites several of Judge Thrash's rulings as evidence of bias against him, including: the court's having not made a sua sponte determination that the removal was facially defective[2]; the court's denial of Plaintiff's motion for a temporary restraining order ("TRO"); and the court's refusal to hold a hearing on the TRO motion. (Windsor's Aff. of Prejudice ¶¶ 22, 25, 30.) Third, Plaintiff avers that Judge Thrash "has demonstrated a bias against pro se parties and against anyone who would have the audacity to sue a federal judge." (Windsor's Aff. of Prejudice ¶ 58.)

In response, Defendants argue that Plaintiff's motion fails to meet the significant burden necessary to sustain a motion for recusal because there is no evidence of extrajudicial bias. (Def.'s Br. in Opp'n to Mot. to Recuse at 8.) Defendants also assert

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[2] The Court notes that a motion to remand the case subsequent to removal was never filed and therefore, was not in front of Judge Thrash. However, based upon the Court's independent review of the removal issue, the Court finds that jurisdiction properly lies in the federal court, as removal of this case was proper pursuant to 28 U.S.C. § 1442(a)(1) and 28 U.S.C. § 2679.

that even if Judge Thrash had a personal interest in the matter, under the rule of necessity, he need not recuse himself if there is no other judge left to hear the case due to Plaintiff's most recent suit that names all the judges in the Northern District as defendants. (*Id.* at 9.)

In his reply to Defendant's brief, Plaintiff argues that the standard for recusal does not require extrajudicial bias. (Pl.'s Reply to Def.'s Opp'n at 7.) He also argues the rule of necessity does not apply in this case because there are other federal judges outside of the Northern District who could hear his case, or the case should be remanded back to Fulton County Superior Court. (Pl.'s Reply to Def.'s Opp'n at 13.)

Plaintiff also moves to strike portions of Defendant's brief discussing his litigation history claiming that they were prejudicial. The Court finds that Defendant's summary is supported by the record in these cases, and that the litigation history is relevant to an assessment of Plaintiff's claims as well as motion for recusal. "A district court may take judicial notice of public records within its files relating to the particular case before it or other related cases." *Cash Inn of Dade, Inc. v. Metropolitan Dade County*, 938 F.2d 1289, 1243 (11 Cir. 1991). Therefore, Plaintiff's Motion to Strike [Doc. 35] is **DENIED**.

B. Analysis

Section 455(a) of Title 28 of the United States Code requires recusal of a judge

"in any proceeding in which his impartiality might reasonably be questioned" or when "he has a personal bias or prejudice concerning a party."[3] The standard under § 455(a) is "whether an objective, fully informed lay observer would entertain significant doubt about the judge's impartiality." *Thomas v. Tenneco Packaging Co., Inc.*, 293 F.3d 1306, 1329 (11th Cir. 2002). Generally, to warrant recusal, a "judge's bias must be personal and extrajudicial; it must derive from something other than which the judge learned by participating in the case." *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990). Recusal may be based on judicial rulings only if the judge's remarks in a judicial context demonstrate "pervasive bias and prejudice" against a party. *Thomas*, 293 F.3d 1306, 1329. As the Supreme Court has held, "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves, they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism ... 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) (citations omitted).

Plaintiff has failed to establish sufficient judicial grounds to recuse Judge Thrash.

First, while Plaintiff cites multiple disagreements with Judge Thrash's rulings, the

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[3] 28 U.S.C. § 455(b) sets forth other factors requiring recusal that are not at issue here, including situations where the judge previously served as a lawyer in the matter or has a financial interest in the matter.

great majorityof these pertain to the legal procedure utilized by Judge Thrash or the outcome of his rulings. Plaintiff's complaints in essence are legal objections that may be pressed as grounds for appeal, not as grounds for recusal. *Liteky*, 510 U.S. at 555.

Second, Judge Thrash clearly entered his rulings based on the Court record properly before him. The Plaintiff's prior cases in this Court provide relevant context for his current lawsuit and claims. As the Supreme Court has noted, "[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. (Emphasis added).

Plaintiff's affidavit and pleadings[4] fail to demonstrate the "deep-seated favoritism or antagonism" required as a predicate to establishing that Judge Thrash was biased and incapable of fair judgment in this matter. One remark falls at the centerpiece of Plaintiff's asserted evidence of Judge Thrash's bias: the Judge's finding that Plaintiff's latest lawsuit was "the latest in a series of frivolous, malicious, and vexatious lawsuits filed by the Plaintiff." (Windsor's Aff. of Prejudice ¶ 75; Order of June 17, 2011, Doc. 25.) However, the Supreme Court has held "Judicial remarks during the course of a trial that are critical

[4] The undersigned judge has authorized the Clerk's filing of all pleadings Plaintiff has presented relating to his motion for recusal so as to review all pertinent information Plaintiff may present in support of his motion.

or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Litkey*, 510 U.S. at 555. Judge Thrash's finding, while adverse to Plaintiff, was clearly based on his review of Plaintiff's pleadings in this action as well as related court decisions in prior cases involving the Plaintiff. "The objective appearance of an adverse disposition attributable to information acquired in a prior trial is not an objective appearance of personal bias or prejudice, and hence not an objective appearance of improper partiality." *Litkey*, 510 U.S. at 1156 n. 2.

Third, the only assertion Plaintiff makes regarding alleged bias from an extrajudicial source is that the Judge, who is now a subject of Plaintiff's latest suit, "has demonstrated a bias against pro se parties and against anyone who would have the audacity to sue a federal judge." (Windsor's Aff. of Prejudice ¶ 58.) However, Plaintiff fails to cite to factual evidence that supports his bald allegation of bias against pro se parties. Conclusory allegations in the requisite affidavit for a motion for recusal will not be deemed to properly establish grounds for recusal. *Jones v. Pittsburg Nat'l Corp.*, 899 F.2d 1350, 1356 (3rd Cir. 1990).

Fourth, the Plaintiff seeks recusal based on the purported bias of all judges of this Court, as he has by this date filed collateral lawsuits naming each judge, including Judge Thrash, as Defendants. The rule is well established that the filing of a collateral lawsuit against a judge clearly will not require recusal. *See Jones v. Pittsburgh Nat'l Corp.*, 899

F.2d 1350, 1355-56 (3d Cir. 1990); *United States v. Studley*, 783 F.2d 934, 940 (9th Cir. 1986) (holding a judge is not disqualified by a litigant's suit or threatened suit against him); *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977) (holding a judge is not disqualified merely because a litigant sues or threatens to sue him); *United States v. Whitesel*, 543 F.2d 1176, 1181 (6th Cir. 1976) (finding judges named in suit did not need to recuse themselves because "we do not think that the United States courts are so fragile as to be subject to being put out of existence by a civil suit which names all sitting judges"). Therefore, Judge Thrash cannot be recused simply because Plaintiff has filed suit against him.

Moreover, in his latest suit, Plaintiff sues Judge Thrash along with all the judges in this District, including the undersigned. (*See Windsor V.*) The judicial doctrine of a "the rule of necessity" provides that even when a judge has a personal interest in the case, he need not recuse himself when there would be no judge left in the district to hear the case. *Bolin v. Story*, 225 F.3d 1234, 1238 (11th Cir. 2000); *Brinkley v. Hassig*, 83 F.2d 351, 357 (10th Cir.1936) ("From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises."). *See also Pila v. American Bar Ass'n.*, 542 F.2d 56, 59 (8th Cir.1976) (stating that under rule of necessity, "where all are disqualified, none are disqualified") (citation omitted).

Plaintiff cites *Jefferson County v. Acker*, 92 F.3d 1561 (11th Cir. 1996) (rev'd on other grounds) to support his contention that all federal judges have not been disqualified as there are "thousands of federal judges in the U.S. to whom this civil action may be assigned." (Pl.'s Reply to Def.'s Opp'n. at 13, citing 92 F.3d 1561.) However, the court in *Jefferson County* decided that recusal was <u>not</u> warranted under the rule of necessity, despite the possible option of convening "an en banc court for this Circuit composed of non-disqualified judges exclusively drawn from other Circuits." 92 F.3d at 1583 n. 4. Furthermore, reviewing Plaintiff's litigation trail, it seems that each new complaint adds the name of the last judge who ruled against him. Following that logic, Plaintiff might likely file suit against any judge, regardless of his district, who ruled against Plaintiff. *See Davis v. Kvalheim*, 261 Fed. Appx. 231, 234 n.4 (11th Cir. 2008) (affirming the refusal of a district court judge named in a frivolous pro se complaint to recuse himself where it was clear that the Plaintiff would name, and thereby try to disqualify, any judge who ruled against him). Therefore, the rule of necessity provides further support for the Court's denial of Plaintiff's motion for recusal.

Plaintiff seeks to escape the "rule of necessity" by his request for an order directing Joel F. Dubina, Chief Judge of the 11th Circuit Court of Appeals, to certify this case to the Chief Justice of the United State Supreme Court for purpose of

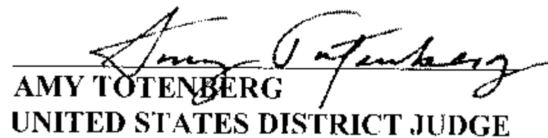
assignment of a new judge pursuant to 28 U.S.C. § 292(d). The Court finds insufficient grounds to make such a request of Chief Judge Dubina and moreover, has no authority to direct Chief Judge Dubina to issue such a certification request to the Supreme Court. Accordingly, the Plaintiff's motion for certificate of necessity [Doc. 37] is **DENIED**. Plaintiff's corresponding request for a hearing on the motion is similarly **DENIED**.

For all of the foregoing reasons, the Court **DENIES** Plaintiff's motion to recuse [Doc. 31] Judge Thrash.

C. SUMMARY OF RULINGS

The Court **DENIES** Plaintiff's motion to recuse [Doc. 31]. For the same reasons, the court **DENIES** Plaintiff's motion for certificate of necessity [Doc. 37] and corresponding motion for a hearing filed July 1, 2011. The Court additionally **DENIES** Plaintiff's Motion to Strike [Doc. 35].

SO ORDERED, this 1st day of July, 2011.



AMY TOTENBERG
UNITED STATES DISTRICT JUDGE