DISTRICT COURT OF GUAM

TERRITORY OF GUAM

DAVID G. MATTHEWS, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	CIVIL CASE NO. 07-00030 **ORDER** **RE: PLAINTIFF'S MOTION TO RECUSE JUDGE**

The Plaintiff David G. Matthews, proceeding *pro se* in this matter, requests this court recuse itself from presiding over his case. *See* Docket No. 58. He asserts that the court has been "unfair and biased." *See* Docket No. 58, p.1. The Defendant United States opposes the motion. *See* Docket No. 71.

In seeking the court's disqualification from this matter, the Plaintiff cites 28 U.S.C. § 455(a), which states: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

Under § 455, "[d]iscretion is confided in the district judge in the first instance to determine whether to disqualify [herself]." *In re Drexel Burnham Lambert Inc*., 861 F.2d 1307, 1312 (2d Cir. 1988). *See also United States v. Balistrieri*, 779 F.2d 1191, 1202-03 (7th Cir. 1985) ("Section 455 clearly contemplates that decisions with respect to disqualification should be made by the judge sitting in the case, and not by another judge. It requires the judge to

disqualify himself when any one of the statutory conditions is met. It makes no provision for the transfer of the issue to another judge.").

"[T]he test for recusal is 'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 714 (9th Cir. 1990) (quoting *Herrington v. Sonoma Cty.*, 834 F.2d 1488, 1503 (9th Cir. 1987)). In seeking recusal under § 455(a), the Plaintiff bears the burden of proof. "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. Exp. Corp.*, 974 F.2d 982, 985 (8th Cir. 1992).

The Plaintiff asserts two grounds for challenging the court's impartiality: prior rulings, and the fact that the Assistant U.S. Attorney representing the Defendant in this case has appeared before this court in other cases.

The Ninth Circuit has stated: "We, along with our sister circuits, have identified various matters which will not ordinarily require recusal under § 455: '(1) rumor, speculation, beliefs ... and similar non-factual matters;' (2) 'the mere fact that a judge has previously expressed an opinion on a point of law;' (3) 'prior rulings in the proceeding' . . . ." *United States v. Holland*, 519 F.3d 909, 914 (9th Cir. 2008) (citations omitted); *see also Clemens v. U.S. Dist. Court for Cent. Dist. of Ca.*, 428 F.3d 1175, 1178-79 (9th Cir. 2005) (citing the "list of various matters not ordinarily sufficient to require a § 455 (a) recusal").

The Plaintiff first argues that recusal is required on the basis of this court's prior rulings. It is well established, however, that to provide grounds for disqualification, the alleged prejudice must result from an extrajudicial source. *See United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986). In a factually analogous case, the Ninth Circuit in *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880 (9th Cir. 1991), rejected the appellant's argument that the district court judge should have recused himself. The court determined that "[a]ll of the [appellant's] allegations relate to incidents during the course of proceedings, and recusal under section 455 is required 'only if the bias or prejudice stems from an extrajudicial source and not from conduct

or rulings made during the course of the proceeding." *Id.* at 885 (quoting *Toth v. TransWorld Airlines*, 862 F.2d 1381, 1388 (9th Cir. 1988)). Indeed, the U.S. Supreme Court has made clear that "[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 required . . . ." *Liteky v. United States*, 510 U.S. 555 (1994). Because the Plaintiff's objections in this case are to the court's rulings, and do not stem from an extrajudicial source, this court's recusal is not required on this basis.

Next, the Plaintiff challenges this court's impartiality, apparently arguing that the Assistant U.S. Attorney representing the Defendant has received better treatment because his motions have been granted by the court. In contrast, neither the Plaintiff nor his prior attorney have done so. *See* Docket No. 58. As discussed above, a court's adverse rulings are not a sufficient basis for recusal. Moreover, the Plaintiff's mistaken belief "that he is on an unleveled playing field," (*see* Docket No. 58, p. 6), is based only only "[r]umor, speculation, beliefs, conclusions, innuendo, suspicion, opinion." *Clemens*, 428 F.3d at 1178 (9th Cir. 2005) (quoting *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir.1995)). The Plaintiff's perception and belief do not require this court's recusal.

The Plaintiff has not satisfied his substantial burden of proving that a reasonable person knowing all the facts would conclude this court's impartiality might reasonably be questioned. There are no facts presented that would require this court's disqualification pursuant to 28 U.S.C. § 455. Accordingly, this court must deny the request to recuse itself from this case.

SO ORDERED.

/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Mar 24, 2009