

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF CARVER

FIRST JUDICIAL DISTRICT
PROBATE DIVISION

Case Type: Special Administration

In the Matter of:

Court File No. 10-PR-16-46

Honorable Kevin W. Eide

Estate of Prince Rogers Nelson,

Deceased.

MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR DISQUALIFICATION**INTRODUCTION**

CAK Entertainment, Inc. (“CAK Entertainment”) and Charles Koppelman¹ (together, “CAK”), respectfully bring this motion pursuant to Rule 106 of the Minnesota General Rules of Practice for the District Courts (the “Motion”) requesting that this Court disqualify District Court Judge Kevin Eide (the “District Court”) from considering the August 2, 2018 Motion (the “Fee Motion”) filed by the Second Special Administrator (“SSA”) on behalf of the Estate of Prince Rogers Nelson (the “Estate”), seeking the return of purported “excessive compensation” received by CAK Entertainment and NorthStar Enterprises Worldwide, Inc. (“NorthStar” and, together with CAK Entertainment, the “Advisors”). Disqualification of the District Court is warranted based on the unique circumstances that exist here in which the District Court determined it needed to appoint the SSA, and thereafter authorized the SSA to pursue claims against CAK (among others) based in part on *ex parte* meetings with the SSA. Although the disqualification of a judge is a rare and severe remedy, CAK respectfully submits that when viewed through the

¹ Mr. Koppelman was not listed as a party to the Fee Motion, but this motion is brought on his behalf nonetheless because the SSA refers incorrectly to him interchangeably with CAK Entertainment in the Fee Motion. Mr. Koppelman does not waive, and reserves, all rights.

prism of the applicable objective standard, given the District Court's role in the SSA process, there are multiple reasons that warrant the District Court's disqualification. The District Court erroneously denied a similar motion to disqualify -- and this Court should grant this motion -- for several reasons.²

First, it is clear under Minnesota law that the standard on a motion to disqualify is an objective one, and not whether the District Court subjectively believes it is biased or prejudiced. Disqualification is warranted where an objective person would reasonably question the District Court's impartiality or there is an appearance of impropriety. As demonstrated in the Recusal Brief, there are ample bases to determine that an objective observer would reasonably question the District Court's impartiality given, among other things, the District Court's *ex parte* communications with the SSA and its statements showing its close affiliation with the Estate. In denying CAK's motion, the District Court failed to address the objective standard of review required under Minnesota law, and instead explained its subjective belief that it was not in fact biased or prejudiced. Indeed, the District Court focused on its belief that it was "uniquely qualified to consider and rule on" the Fee Motion, because it has been "integrally involved" in the administration of the Estate. The District Court's subjective views, however, are not relevant to the analysis, and its failure to address the objective standard demonstrates that its decision was erroneous.

Second, as shown in the Recusal Brief, the District Court engaged in multiple *ex parte* communications with the SSA about its analysis and the claims it recommended, as well as potential strategies for recovering money from the Advisors. Given these substantive *ex parte*

² CAK's Memorandum of Law in Support of Motion for Disqualification, filed on September 21, 2018 in support of CAK's prior motion to disqualify the District Court, is referred to herein as the "Recusal Brief" or "Recusal Br." The District Court's September 26, 2018 order denying CAK's Motion for Disqualification is referred to herein as the "Recusal Order."

discussions with the SSA, an objective observer would reasonably question the District Court's impartiality. In denying CAK's motion, the District Court conceded that these *ex parte* meetings took place, but described them as "limited to receipt and review of the SSA's reports," and stated that it "took no part in discussions developing strategies to recover compensation from CAK."

The District Court's most recent descriptions of these *ex parte* discussions, however, are inconsistent with its prior descriptions of its discussions with the SSA about [REDACTED] [REDACTED] whether the SSA should be granted authority to pursue the claims recommended in its reports, and [REDACTED]

[REDACTED] Given these various descriptions, and the fact that CAK was never notified of the specific substance of these *ex parte* communications nor provided an opportunity to respond to them, an objective observer would reasonably question the District Court's impartiality based on these *ex parte* communications.

Third, the District Court previously stated that it owed a "fiduciary duty" to the Estate, and equated itself to the Estate, stating that a fraud on or breach of duty to the Estate would be a fraud on or breach of duty to the District Court. As shown in the Recusal Brief, these comments would lead a reasonable person to question the District Court's impartiality with regard to the Fee Motion. The District Court explained its prior comments as "merely reflect[ing] [the District] Court's commitment in all probate proceedings to ensure an estate is managed in a fair and equitable manner, and that its assets are preserved for the benefit of the heirs," but that explanation does not prevent an objective observer from reasonably questioning the District Court's impartiality. The language that the District Court used previously, most notably equating a fraud on the Estate as a fraud on it, goes well beyond merely administering the Estate. The District Court also made additional and unnecessary statements in denying CAK's motion to

disqualify that imply that the Advisors should have returned the commissions the SSA seeks in the Fee Motion and that there was no basis to keep those commissions, which go to the merits of the very issues to be decided on the Fee Motion. Such statements, made prior to hearing the Fee Motion, would lead an objective observer to reasonably question whether the District Court has already decided the crux of the Fee Motion.

Fourth, the reasons that the District Court recused itself from the separate litigation between CAK and Jobu Presents, LLC (“Jobu”) that concerned issues identical to those addressed in one of the SSA’s reports also apply equally here. As with the Jobu litigation, any decision by the District Court “might be perceived as clouded” by the information the District Court previously obtained from, and discussed with, the SSA. The District Court’s contention that recusal was not warranted in this action because the information at issue is part of the record on the Fee Motion is not entirely accurate in that the substance of the *ex parte* communications between the District Court and the SSA are not part of the record, nor were they ever disclosed to CAK. Disqualification is therefore warranted for the same reasons as in the Jobu litigation.

Finally, even if any of these bases for disqualification were not sufficient on their own (and each are independently sufficient), the District Court failed to assess whether the cumulative effect of these circumstances warrant recusal. Given the numerous independent grounds for disqualification, the cumulative effect of those grounds would cause an objective observer to reasonably question the District Court’s impartiality, thereby requiring disqualification.

For these reasons, and for those discussed more fully below and in the Recusal Brief, the disqualification of the District Court from considering the Fee Motion is warranted here.

FACTUAL BACKGROUND

The Estate retained the Advisors to assist in exploiting the Estate's entertainment assets, and they did so with several deals that provided the Estate with [REDACTED]³ After their negotiation and execution, legal disputes arose concerning two deals: (i) a recorded music agreement with Universal Music Group (the "UMG Agreement"), which the Estate rescinded -- with the District Court's approval and even though it was not legally obligated to do so -- and returned the advances paid to it pursuant to that agreement, including commissions paid to the Advisors; and (ii) an agreement with Jobu to promote and stage a tribute concert in honor of Prince (the "Jobu Agreement"), which Jobu unilaterally terminated -- even though it had no right to do so -- and the Estate returned the initial payment Jobu made to it with a full reservation of rights.

A. THE SSA AND THE SSA REPORTS

Thereafter, given apparent conflicts of the Personal Representative with the former Special Administrator to the Estate, certain heirs asked the District Court to appoint a second special administrator to investigate whether the Estate had any claims concerning the UMG Agreement and the Jobu Agreement, and whether such claims should be pursued by the Estate. The District Court appointed Peter J. Gleekel and the law firm Larson King, LLP as the SSA to investigate the facts and circumstances concerning the rescission of the UMG Agreement, and the termination of the Jobu Agreement, and whether the Estate has or should pursue claims arising therefrom. (Ex. A; Ex. G.)⁴ In its orders appointing the SSA, the District Court clarified

³ The relevant background is set forth more fully in the Recusal Brief (pp. 4-11), and CAK respectfully refers the Court thereto for a more detailed discussion of the background.

⁴ Citations herein to "Ex. __" are to the exhibits annexed to the September 21, 2018 declaration of Erin K.F. Lisle, previously submitted.

that before the SSA could pursue any claims, the District Court would need to “approve the pursuit of [any recommended] claim.” (Ex. A; Ex. G.)

After two separate investigations -- each several-months long, involving the production to the SSA of a substantial amount of documents, and numerous witness interviews by the SSA -- the SSA issued two reports, one in December 2017 concerning the UMG Agreement (the “UMG Report”), and the other in May 2018 concerning the Jobu Agreement (the “Jobu Report,” and, together with the UMG Report, the “SSA Reports”). (See Ex. B; Ex. H.) The SSA recommended claims against the Advisors (among others) in each of the SSA Reports. (See Recusal Br. at 5-8; Ex. B at 30; Ex. H at 25-44.)

Following the UMG Report, in December 2017, certain of the parties whose actions were challenged by the SSA in the UMG Report (*e.g.*, the Special Administrator and NorthStar), asked the District Court [REDACTED] [REDACTED] (See Recusal Br. at 5-6; Ex. C at 1.) The District Court responded by letter stating that [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (Ex. E at 1.)

As the District Court indicated, it, in fact, held an *ex parte* meeting with the SSA, the Personal Representative, and the heirs’ counsel in early 2018, at which meeting the substance of the UMG Report was discussed, as were potential strategies for pursuing the claims recommended in that report. Indeed, invoices submitted by the SSA for payment of the SSA’s

[REDACTED]
[REDACTED] (See Recusal
Br. at 9.) [REDACTED]

[REDACTED]
[REDACTED] (Ex. L at 1; accord Ex. M; Ex. N.) On
July 3, 2018, the District Court responded stating that [REDACTED]

[REDACTED] (Id. at 1-2.)

Following the submission of the Jobu Report, on May 22, 2018, the District Court recused itself from the separate litigation captioned *Jobu Presents, LLC v. CAK Entertainment, Inc., et al.*, Court File No. 10-CV-17-368 (the “Jobu Litigation”), which concerns claims among, *inter alia*, Jobu, CAK Entertainment, and NorthStar regarding the Jobu Agreement. (See Ex. I.) Nearly all of those claims concern substantially similar, if not identical, issues and claims discussed and recommended in the Jobu Report. In the order recusing itself, the District Court explained that it “d[id] not believe it can listen to the arguments advanced in connection with [the Jobu Litigation] without concern that its decisions might be perceived as clouded by the information” that the District Court already reviewed as part of the Jobu Report. (Id. at 1.)

B. THE FEE MOTION AND RECUSAL MOTION

On August 2, 2018, without any attempt to meet and confer, any sharing of documents, or any discussion of the matter with CAK, the SSA filed the Fee Motion on behalf of the Estate, seeking an order, pursuant to Minnesota Statute Section 524.3-721, directing the Advisors “to

refund excessive compensation” purportedly received “related to the Jobu Presents and UMG transactions.” (Ex. P at 1.) The Fee Motion is based on the SSA’s allegations, analysis, and conclusions in the UMG Report, effectively asserts claims recommended in the UMG Report, and seeks much of the purported damages identified in the UMG Report. (Recusal Br. at 16-17.)

On August 28, 2018, CAK filed a letter with the District Court requesting that it recuse itself from considering the Fee Motion for the same reasons that it recused itself from the Jobu Litigation, and because it had engaged in *ex parte* “communications with the SSA (and potentially others) without the Advisors being present concerning the facts, allegations, and recommended claims in the SSA Reports.” (Ex. Q at 1-2.) The SSA objected to CAK’s request, but failed to address its *ex parte* communications with the District Court. (*See* Ex. R.) On August 31, 2018, the District Court denied the request for recusal and stated that, in connection with the Fee Motion, “[i]f there was a fraud upon the Court, or a violation of a fiduciary duty, it was a fraud or a violation of a duty on this Court.” (Ex. S at 3 (emphasis in original).) The District Court did not address the *ex parte* communications CAK raised.

Given that CAK made its request that the District Court recuse itself in a letter, and notwithstanding that that request was denied, on September 21, 2018, CAK made a formal motion to recuse to ensure that the proper procedures were followed (the “Motion to Recuse”).⁶ (*See* Recusal Br. 11.) In the Motion to Recuse, CAK argued that the District Court should recuse itself because an objective observer would reasonably question its impartiality based on (i) the District Court’s *ex parte* communications with the SSA; (ii) the same reasons for which the District Court recused itself from the Jobu Litigation; and (iii) the District Court’s statements that it “owed a fiduciary duty to the Estate” and that any breach of duty to or fraud on the Estate

⁶ The Motion to Recuse was also made in accordance with the procedure CAK understood that Chief Judge Messerich requested to be followed.

would also be a breach of duty to and a fraud on the District Court. (*See* Recusal Br. at 11-21.) The SSA submitted an opposition to the Motion to Recuse on September 21, 2018, but again failed to address its *ex parte* communications with the District Court.

On September 26, 2018, the District Court denied the Motion to Recuse. (*See* Recusal Order.) In the Recusal Order, the District Court acknowledged that the *ex parte* communications took place, and stated that it “participated in limited meetings and conference calls where the content and the recommendations stemming from the SSA’s reports were discussed,” but held that these *ex parte* communications were not grounds for recusal because “the [District] Court’s involvement in those discussions was limited to receipt and review of the SSA’s reports. The [District] Court took no part in discussions regarding developing strategies to recover compensation from CAK, it merely authorized the SSA to proceed with such claims if it deemed them warranted.”⁷ (Recusal Order at 4.)

The District Court also held that its recusal from the Jobu Litigation did not support a recusal on the Fee Motion because the SSA Reports were not part of the record in the Jobu Litigation, whereas those reports are part of record in this action. (Recusal Order at 4.) Finally, the District Court explained that its statements concerning its “fiduciary duty to the Estate” and its comparisons between itself and the Estate “merely reflect this Court’s commitment in all probate proceedings to ensure an estate is managed in a fair and equitable manner, and that its assets are preserved for the benefit of the heirs. They are not statements indicating a predisposition relating to the merits of the SSA’s pending motion.” (Recusal Order at 5.)

⁷ The District Court also stated that “[t]he advisors did not voluntarily refund the commissions to the Estate, nor did they offer an explanation for their retention which has been provided to this Court,” even though whether the Advisors did so or not was not relevant to the Recusal Motion. (Recusal Order at 3.) The District Court also declared itself “uniquely qualified” to rule on the Fee Motion because it has been “integrally involved” in the administration of the Estate. (Recusal Order at 5.)

This Motion follows the District Court's Recusal Order, and respectfully requests that this Court disqualify the District Court from considering the Fee Motion.

ARGUMENT

I. THE DISTRICT COURT FAILED TO APPLY THE CORRECT STANDARD

As CAK previously established (*see* Recusal Br. at 11-13), Rule 63.02 of the Minnesota Rules of Civil Procedure provides in part that “[n]o judge shall sit in any case if disqualified under the Code of Judicial Conduct.” Minn. R. Civ. P. 63.02. The Minnesota Code of Judicial Conduct (the “Code”), in turn, provides that “[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.” Minn. Code Jud. Conduct Rule 2.11. As the comment to Rule 2.11 provides, “a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific provisions” set forth in Rule 2.11 are applicable. (*Id.*)

In considering whether a judge is disqualified under Rule 2.11, the Minnesota Supreme Court has held that the question is “whether an objective examination of the facts and circumstances would cause a reasonable examiner to question the judge’s impartiality.” *In re Jacobs*, 802 N.W.2d 748, 752 (Minn. 2011); *accord State v. Burrell*, 743 N.W.2d 596, 601 (Minn. 2008). Minnesota courts have made clear that a judge’s own subjective determination that he or she is not impartial is not the standard by which disqualification is to be judged. Rather, “[t]he question of disqualification focuses on whether an objective assessment of the judge's conduct *produces a reasonable question about impartiality, not on the judge’s subjective perception of his or her ability to act fairly.*” *Roatch v. Puera*, 534 N.W.2d 560, 563 (Minn. Ct. App. 1995) (emphasis added). In conducting this objective analysis, disqualification is required “not only when there is in fact impropriety, but also when there is an *appearance of impropriety.*” *Roatch*, 534 N.W.2d at 563 (emphasis added); *accord In re Collection of*

Delinquent Real Prop. Taxes, 530 N.W.2d 200, 206 (Minn. 1995) (“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.”); *see also State v. Finch*, 865 N.W.2d 696, 703 (Minn. 2015) (holding that the objective evaluation is not to be considered from “the perspective of a chief judge, but rather from the perspective of a reasonable examiner: an objective, unbiased layperson with full knowledge of the facts and circumstances”).

In the Recusal Order, the District Court did not apply or address this objective standard. Indeed, the District Court did not conduct any analysis as to whether an objective observer, given the facts here, would reasonably question its impartiality in connection with the Fee Motion. The District Court instead focused on why it was not subjectively prejudiced or biased, and how it believed it was “uniquely qualified” to rule on the Fee Motion given its “integral[] involve[ment]” in the Estate.⁸ (Recusal Order at 5.)

While CAK does not doubt that the District Court is qualified to consider the Fee Motion, and believes it is capable of doing so impartially, that is not the standard for whether disqualification is warranted. Rather, this Court must conduct “an objective examination of whether the judge’s impartiality could reasonably be questioned.”⁹ *State v. Schlienz*, 774

⁸ The District Court, however, failed to recognize that some of the unique qualifications it believes it has to decide the Fee Motion are why disqualification is warranted. While there is no question that the District Court has been involved with all aspects of the administration of the Estate, the District Court is also the only Court that has had *ex parte* discussions with the SSA concerning the substance of the SSA Reports and whether pursuing claims would be in the best interests of the Estate (and how to do so). Given that the Fee Motion must be decided only on the record submitted therewith -- and not on the basis of the *ex parte* discussions with the SSA -- a different judge can easily review that record and decide the Fee Motion without raising questions of bias based on *ex parte* communications.

⁹ Any argument that Rule 106 of the Minnesota General Rules of Practice for the District Courts does not apply to this Motion because CAK does not argue that the District Court is

N.W.2d 361, 366 (Minn. 2009) (“[T]he fact that a judge avows he is impartial does not in itself put his impartiality beyond reasonable question.”) For the reasons set forth below and in the Recusal Brief, when applying such an objective standard, CAK respectfully submits that the District Court’s disqualification is warranted here.

II. THE DISTRICT COURT’S EX PARTE COMMUNICATIONS WITH THE SSA WARRANT DISQUALIFICATION

As shown in the Recusal Brief, the District Court’s multiple *ex parte* communications with the SSA concerning the SSA Reports and the SSA’s strategy in pursuing relief against the Advisors would cause an objective observer to reasonably question the District Court’s impartiality, and thus support disqualification here. (*See* Recusal Br. at 13-16.) The Code provides that “[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.” Minn. Code Jud. Conduct Rule 2.9. The Code does provide for limited exceptions to the prohibition on *ex parte* communications for “scheduling, administrative, or emergency purposes, which do[] not address substantive matters,” provided that “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.” (*Id.*)

actually prejudiced or biased is without merit. The comments to Rule 106 explain that the rule “specifies a uniform *procedure* for removal” because the “right to removal . . . is established by Minn. R. Civ. P. 63.02, but that rule does not establish any procedure for exercising that right.” 3A Minn. Prac., Gen. Rules Of Prac. Ann. R 106 (2018 ed.). Rule 63.02 of the Minnesota Rules of Civil Procedure was amended earlier this year to “apply the disqualification standard of [the Code] to disqualification under the civil rules” because the prior version of the rule -- which required “an affirmative showing of prejudice” -- did not “accurately state the correct standard.” Adv. Comm. Comment to Minn. R. Civ. P. 63.02. Thus, Rule 106 simply provides the procedure for seeking removal of a judge pursuant to Rule 63.02, which, in turn, as discussed, does not require actual prejudice or bias. Indeed, the District Court recognized the applicability of Rule 106 to this Motion in the Recusal Order: “[s]hould any party wish to have this decision reviewed by the Chief Judge . . . *as provided for in Rule 106* . . . they shall address their concerns to Chief Judge Kathryn Messerich.” (Recusal Order at 2 (emphasis added).)

Where, as here, *ex parte* communications have occurred that do not qualify for the limited exceptions in the Code, the District Court's disqualification is clearly warranted.¹⁰ *See Schlien*, 774 N.W.2d at 366-69 (*ex parte* communications between judge and litigant "reasonably called the judge's impartiality into question" and thus judge was required to recuse "[b]ecause a judge is disqualified when his or her impartiality is reasonably called into question").

The facts here are clear and undisputed. The District Court engaged in multiple *ex parte* communications with the SSA concerning a "pending or impending matter" -- namely, the SSA's investigations and its intent to seek relief from CAK on behalf of the Estate -- which communications were made outside the presence of CAK or its counsel (despite requests from CAK and other parties that they be given an opportunity to be heard).¹¹ (Recusal Br. at 13-16.) Indeed, these *ex parte* communications appear to have included discussions [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (See Ex. E at 1 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]; Ex. K at 1 (noting that the District Court discussed with the SSA whether the

¹⁰ CAK did not argue that recusal was warranted because the District Court had "personal knowledge" obtained outside the scope of its judicial function. Nonetheless, the SSA argued to the District Court, and the District Court held in the Recusal Order, that recusal is not warranted because of the District Court's "personal knowledge." (Recusal Order at 5.) Rather, CAK argued that recusal of the District Court was warranted because an objective observer would question its impartiality based on the multiple *ex parte* communications it had with the SSA. (Recusal Br. at 13-16.)

¹¹ At a minimum, CAK was a party to an "impending matter" before the District Court at the time of the District Court's *ex parte* communications with the SSA. By that time, the SSA had already recommended that the Estate bring claims against CAK, and was meeting with the District Court to discuss those recommendations and "impending" claims.

authorize claims); Ex. O at 1-2 [REDACTED]
[REDACTED]

Notwithstanding the District Court's assurances that, subjectively, these *ex parte* communications do not demonstrate that it is biased, the District Court's subjective beliefs are not the relevant standard. Rather, the District Court's descriptions of those *ex parte* communications confirm that an objective observer would reasonably question its impartiality in connection with the Fee Motion given the discussions concerned how the SSA could or should proceed, and the substance of the SSA's Reports (and their conclusions). At a minimum, the District Court's explanation in the Recusal Order only raises further doubts as to what exactly was discussed at these *ex parte* meetings, and the fact that the specifics of what was discussed have never been disclosed to CAK -- notwithstanding the general descriptions the District Court provided -- is sufficient reason alone that an objective person would reasonably question the District Court's impartiality.¹³ See *Schlienz*, 774 N.W.2d at 366-69 (disqualifying judge because "[t]he nature of the communication leads us to conclude that the communication, at a minimum, reasonably called the judge's impartiality into question"). Indeed, the policy behind disqualifying a judge based on *ex parte* communications is based on the fact that the excluded parties cannot know what the substance of the communications were, and here CAK should not be prejudiced by its lack of such knowledge.

¹³ Further, even assuming that the District Court did not "participate" in, but merely was present and only listened to, the discussions among the SSA, counsel for the Estate, and counsel for the heirs -- all of whom have interests adverse to CAK -- about how to proceed against CAK and others, disqualification would still be warranted. An objective observer would still have reasonable questions about the District Court's ability to be impartial under those circumstances. The District Court still listened to substantive discussions and had access to information from those discussions simply by being present even if it did not "participate" in them.

Second, the District Court’s explanation of its *ex parte* communications with the SSA demonstrates that those communications are inconsistent with communications allowed under Rule 2.9 and do not qualify for the limited exceptions thereunder. The District Court’s explanation demonstrates that its *ex parte* communications were substantive -- namely, concerning the “content and recommendations stemming from the SSA’s reports” -- and not for “scheduling, administrative, or emergency purposes.” Minn. Code Jud. Conduct Rule 2.9(1)(b) (Recusal Order at 4.) Moreover, the District Court never notified the excluded parties of the substance of those *ex parte* communications in a timely, or prompt manner, and only did so in its Recusal Order. Thus, as noted above, an objective observer would reasonably question the District Court’s impartiality given these impermissible *ex parte* communications and disqualification is warranted. *See Schlienz*, 774 N.W.2d at 366-69.

Finally, as Rule 2.9 provides, if any *ex parte* communications take place during a matter, the District Court must give those parties not present an opportunity to respond to the *ex parte* communications. [REDACTED]

[REDACTED] (Ex. E at 1; Ex. O at 1), no such opportunity ever was given to CAK prior to the SSA’s filing of the Fee Motion or otherwise.

III. THE DISTRICT COURT’S STATEMENTS WARRANT DISQUALIFICATION

As demonstrated in the Recusal Brief, the District Court made numerous statements concerning its relationship to the Estate that would cause an objective observer to reasonably question its impartiality. (*See* Recusal Br. at 19-21.) Most notably, the District Court stated that (i) “[t]his Court has a fiduciary duty to the Estate to attempt to preserve the assets and to pursue claims of wrongdoing against the Estate” (Ex. K at 2); and (ii) “[i]f there was a fraud upon the Court, or a violation of a fiduciary duty, it was a fraud or a violation of a duty on this Court” (Ex.

S at 3 (emphasis in original).) While CAK respectfully disagrees with the accuracy of those statements,¹⁴ assuming they are accurate, they demonstrate the District Court's close relationship with the Estate that would lead an objective observer to reasonably question the District Court's impartiality. (Recusal Br. at 19-21.)

In the Recusal Order, the District Court held that those statements were not sufficient to warrant recusal because they "merely reflect [the District] Court's commitment in all probate proceedings to ensure an estate is managed in a fair and equitable manner, and that its assets are preserved for the benefit of the heirs. They are not statements indicating a predisposition relating to the merits of the SSA's pending motion." (Recusal Order at 5.) The District Court, however, failed to address the objective standard for disqualification and whether an objective person would reasonably question its impartiality given those statements. When viewing those statements on an objective basis, disqualification is warranted here.

The District Court's prior statements went well beyond a reflection that the District Court is required to administer the Estate in a fair and equitable manner. It is undisputed that the District Court is responsible for overseeing and administering the probate of the Estate. However, the District Court used the specific term "fiduciary duty," and effectively equated itself with the Estate by saying a fraud on the Estate was a fraud on the District Court, and those statements go far beyond the District Court's role in overseeing the Estate. The District Court's statements reflecting its close affiliation with the Estate warrant disqualification here given that they would certainly cause an objective observer to reasonably question its impartiality. *See*

¹⁴ As shown (Recusal Br. at 20), the District Court is not a "fiduciary" of the Estate, nor would any fraud or a breach of fiduciary duty by the Advisors on the Estate (and there were none), amount to a fraud on or breach of duty to the District Court, as the Advisors made no false representations to the District Court, and never were acting as fiduciaries of the District Court. The SSA does not allege, or even suggest -- nor can it -- that the Advisors defrauded the District Court or breached any duty to the District Court.

Schlienz, 774 N.W.2d at 368-69 (holding that judge’s use of “inclusive language referring to the State and the court as ‘us’” raised question as to judge’s impartiality).

Moreover, other statements in the Recusal Order further confirm that an objective observer would reasonably question the District Court’s impartiality in considering the Fee Motion that seeks the return of commissions paid to the Advisors. The District Court stated unnecessarily that “[t]he advisors did not voluntarily refund the commissions to the Estate, nor did they offer an explanation for their retention which has been provided to this Court.” (Recusal Order at 3.) The District Court, however, failed to note in the Recusal Order that the Estate never asked the Advisors to return their commissions, and that the Advisors objected to the rescission of the UMG Agreement and expressly argued that the Estate’s decision to rescind was a business decision that should not have any legal impact on the Advisors, including their right to retain the commissions they earned. (*See* Ex. J.) The District Court’s statement, particularly without referencing these other points, would cause an objective observer to question whether the District Court already believes that the Advisors should have offered to return, or in fact, actually returned their commissions -- precisely the issue being litigated in the Fee Motion. These statements particularly raise reasonable questions about the District Court’s impartiality because the statements were unnecessary, as the issues were not relevant to the Recusal Motion. Therefore, these statements, especially when combined with the District Court’s earlier statements, warrant disqualification here.

IV. THE DISTRICT COURT’S PRIOR RECUSAL ALSO WARRANTS DISQUALIFICATION

As shown in the Recusal Brief, the same rationale on which the District Court relied for its recusal from the Jobu Litigation -- someone may believe that any decision the District Court made could be “clouded by information in the reports” -- applies equally and supports

disqualification here on the Fee Motion. (Recusal Br. at 16-19.) Most notably, because of the District Court's familiarity with the SSA Reports and its *ex parte* discussions with the SSA, any decision the District Court makes concerning the Fee Motion would be subject to the very same perception that such a decision was "clouded by information in the reports" that the District Court cited as the basis for recusing itself from the Jobu Litigation. (*Id.* at 17.)

In the Recusal Order, the District Court stated that the circumstances here are different from those in the Jobu Litigation because: (i) the SSA Reports were not part of the record in the Jobu Litigation, whereas they are part of the record in this matter, and (ii) all of the parties relevant to the Fee Motion have been subject to the jurisdiction of the District Court at all relevant times. (*See Ex. S* at 4.) However, the District Court failed to account for the fact that its pre-existing knowledge of the SSA's analysis and strategies arising from its participation or mere presence in the several *ex parte* communications it had with the SSA would lead an objective observer to reasonably question whether the District Court could consider the Fee Motion in an impartial manner. (Recusal Br. at 16-19.) Indeed, the substance of those *ex parte* discussions with the SSA are *not* part of the record in this matter or in connection with the Fee Motion, and were never disclosed to CAK. Given these circumstances, disqualification is warranted here as much as it was in the Jobu Litigation. *See State v. Osterkamp*, No. A11-1103, 2012 WL 3262953, at *6 (Minn. Ct. App. Aug. 6, 2012) (disqualifying a judge from bench trial after a plea deal was abandoned because the judge previously requested and reviewed a presentence investigation report and conducted the plea hearing).

V. THE DISTRICT COURT FAILED TO CONSIDER THE CUMULATIVE EFFECT OF THE CIRCUMSTANCES HERE

As shown herein and in the Recusal Brief, each of the grounds on which CAK relies for disqualification is independently sufficient to warrant disqualification, but even if those reasons

are not independently sufficient, the cumulative effect of all of these circumstances warrants disqualification. (*See* Recusal Br. at 13.) In the Recusal Order, the District Court failed to consider the cumulative effect of the multiple grounds for disqualification. When viewed collectively, all of these circumstances taken together would lead an objective observer to reasonably question the District Court’s impartiality, and provide a sufficient basis for disqualification. *See, e.g., In re Martinez-Catala*, 129 F.3d 213, 221 (1st Cir. 1997) (“The cumulative effect of a judge’s individual actions, comments and past associations could raise some question about impartiality, even though none (taken alone) would require recusal . . . the cumulative effect would warrant [recusal] . . .”).

CONCLUSION

For the reasons set forth above, CAK respectfully requests that this Court enter an order disqualifying the District Court from considering the Fee Motion.¹⁵

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¹⁵ Should this Court find it helpful, CAK will make itself available at the Court's convenience for oral argument on this Motion.