CASE NO. 21-7125

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LARRY KLAYMAN

Plaintiff – Appellant

v.

THOMAS J. FITTON, JAMES F. PETERSON,
PAUL ORFANEDES AND CHRISTOPHER FARRELL

Defendants – Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLEES' OPPOSITION TO THE MOTION TO DISQUALIFY THE HONORABLE A. RAYMOND RANDOLPH PURSUANT TO 28 U.S.C. § 144

RICHARD W. DRISCOLL (436471)
DRISCOLL & SELTZER, PLLC
2000 DUKE STREET, SUITE 300
ALEXANDRIA, VIRGINIA 22314
703.822.5001 TELEPHONE
703.997.4892 FACSIMILE
EMAIL: RDRISCOLL@DRISCOLLSELTZER.COM

ATTORNEYS FOR APPELLEES THOMAS J. FITTON, JAMES F. PETERSON, PAUL ORFANEDES AND CHRISTOPHER FARRELL

I. INTRODUCTION

Appellees' Thomas J. Fitton, James F. Peterson, Paul J. Orfanedes and Christopher J. Farrell hereby oppose Appellant's Motion to Disqualify the Honorable A. Raymond Randolph. Similar to the Complaint at issue in this appeal, Klayman's Motion "stumbles out of the starting gate" by failing to meet the standard required for filing a proper motion to disqualify. The motion does not identify any ground on which to base a personal bias or prejudice. Instead, Klayman misquotes Judge Randolph and mischaracterizes Appellees' arguments, presumably to delay the outcome of this proceeding.

Historically, Klayman is a vexatious movant for recusal and disqualification, usually based on judicial rulings with which he disagrees. In the action *Klayman v. Judicial Watch, et al.*, No. 06-cv-0670 (D. D.C.), he filed at least five unsuccessful motions to recuse Judge Kollar-Kotelly and unsuccessfully sued her at least twice in independent actions. After an unsuccessful effort to appeal the $2.9 million dollar judgment in that case, Klayman sued every member of this Court claiming collusion and a deprivation of civil rights merely because his appeal was unsuccessful. *Klayman v. Rao, et al.*, No. 21-cv-2473 (D. D.C.). The motion to disqualify is Klayman's "go-to" tool to delay and/or frustrate the orderly progress of a proceeding. As with each of the prior motions, this Motion for Disqualification of

Judge Randolph fails to meet the standard to justify relief and should be promptly denied.

II. STANDARD OF REVIEW

A. STANDARD FOR RECUSAL OR DISQUALIFICATION UNDER 28 U.S.C. § 144

Under 28 U.S.C. § 144, a judge may be disqualified on grounds of bias or personal prejudice as follows:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144. Motions for disqualification under 28 U.S.C. § 144 are committed to the sound discretion of the court. *Chitimacha Tribe of Louisiana v. Harry I. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983).

Judges are presumed to be impartial. *United States v. Mitchell*, 377 F. Supp. 1312, 1315 (D.D.C. 1974) (citing *Beland v. United States*, 117 F.2d 958, 960 (5th

Cir.), *cert. denied*, 313 U.S. 585 (1941). Recusal is required only upon the filing of a "timely and sufficient affidavit." 28 U.S.C. § 144.

Whether the motion and supporting affidavit are legally sufficient is for this Court to determine. *United States v. Haldeman*, 559 F.2d 31, 131 (D.C. Cir. 1976) ("It is well settled that the involved judge has the prerogative, if indeed not the duty, of passing on the legal sufficiency of a Section 144 challenge."); *see also United States v. Heldt*, 668 F.2d 1238, 1272 n.69 (D.C. Cir. 1981) (noting that "under section 144 . . . the transfer to another judge for decision is 'at most permissive"') (quoting *Haldeman*, 559 F.2d at 131). To determine whether an affidavit states a legally sufficient basis for disqualification, the Court "must accept the affidavit's factual allegations as true even if the judge knows them to be false." *S.E.C. v. Loving Spirit Found. Inc.*, 392 F. 3d 486, 496 (D.C. Cir. 2004).

"[J]udicial rulings alone almost never *constitute* a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also United States v. Hite*, 769 F.3d 1154, 1172 (D.C. Cir. 2014) (stating that "unfavorable judicial rulings alone almost never constitute a valid basis for reassignment."); and *United States v. Microsoft Corp*., 56 F.3d 1448, 1463 (D.C. Cir. 1995) (*per curiam*) ("That a judge commits error, of course, is by itself hardly a basis for imputing bias or even the appearance of partiality."). "Expressions of impatience, dissatisfaction, annoyance, and even anger" do not evidence the level of bias required. *Liteky*, 510

U.S. at 555-56. A party's legal disagreements with the Court's rulings or unduly harsh treatment during a proceeding are also not grounds for recusal. *United States v. Williamson*, 903 F.3d 124, 137 (2018).

The facts alleged in the affidavit "must give fair support to the charge of a bent mind that may prevent or impede impartiality." *Berger v. United States*, 255 U.S. 22, 33-34 (1921). "The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case." *Ex parte Am. Steel Barrel Co.*, 230 U.S. 35, 43 (1913).

III. ARGUMENT

A. KLAYMAN'S AFFIDAVIT DOES NOT ALLEGE SUFFICIENT FACTS TO REQUIRE RECUSAL OR DISQUALIFICATION

To support this Motion, Klayman attaches a five-page affidavit consisting of 14 paragraphs identifying two circumstances that occurred during oral argument and a transcript of the October 4, 2022, Oral Argument. *See* Appellant's Motion for Disqualification ("DQ Motion") with attached Affidavit of Plaintiff Larry Klayman ("Klayman Affidavit"). First, Klayman seeks disqualification based on a question asked by Judge Randolph. Second, he argues that counsel for Appellees "lied" regarding the impact of a finding made in the earlier filed Florida case.

A diligent search of relevant case law did not yield a single authority to demonstrate that a disqualification can arise from a simple inquiry from the Court. The DQ Motion and Affidavit do not advance any grounds that support disqualification.

1. The Motion Entirely Misrepresents the Question Asked by Judge Randolph

Careful review of the oral argument transcript shows that Klayman is mischaracterizing the oral argument and Judge Randolph's question. After Klayman asserted it was "obvious" that Appellee Fitton was the source of Stone's statement, Judge Katsas inquired: "How do we know that?" noting that Klayman and Judicial Watch were involved in a very public dispute lasting more than 10 years. *See Klayman v. Judicial Watch, Inc., et al.*, Case No. 06-cv-670 (D. D.C.) and *Klayman v. Judicial Watch, Inc.*, 6 F.4th 1301 (D.C. Cir. 2021). Klayman then denied that he ever sexually harassed the Judicial Watch office manager. Exhibit 1 to the Klayman Affidavit at p. 6, lines 1-3. At this point, Judge Randolph simply asked: "Do you deny that you physically assaulted your wife?" *Id*. at p. 6, lines 8-9. Rather than simply answer the question and move on, Klayman accused Judge Randolph of being prejudiced for simply asking the question. *Id*. at p. 7, lines 15-19. Asking Klayman to "Back it up," Judge Randolph stated: "You think because I read an opinion of our court that that prejudiced me?" *Id*. at p. 8, lines 8-9. Klayman then mistakenly asserted that the opinion "did not say that."

In his Affidavit, Klayman describes the foregoing back-and-forth as follows:

> Shortly after I began my oral argument, the Judge Randolph abruptly, heatedly and angrily interrupted my presentation and stated I had been found, in a case styled *Klayman v. Judicial Watch Inc.*, 06-cv-670 (D.D.C.), presided upon by the Honorable Colleen Kollar-Kotelly, to have sexually harassed the office manager of Judicial Watch and also found to have beaten my former wife.

Klayman Affidavit at ¶ 4. First, Judge Randolph's question was asked in a normal voice that was not abrupt, heated, or angry. In addition, he never stated Klayman was found to have sexually harassed the office manager or to have beaten his former spouse. Instead, Judge Randolph explained his question and that of Judge Katsas as follows:

> The point is, the point here is that, and I think this is what Judge Katsas was asking you about, was that this was spread all over the newspaper a year before Roger Stone made the statement you're complaining about - all this information, the jury verdict, the evidence that came in and so on - so it seems to me that your submission that the only way that Stone could have known this is from Fitton is belied by the fact that it was a public trial.

Id. at p. 7, lines 5-14.

The allegations in the underlying Complaint must be considered in the context of Klayman's forced resignation from Judicial Watch, which was the subject of a very public trial in 2018. In making his assertion of bias, Klayman disregards his appeal of the multi-million dollar verdict to this Court and the lengthy opinion referred to by Judge Randolph, which includes the following language:

> A thirteen-day jury trial took place in 2018. **The primary factual issue was the reason for Klayman's departure**. . . . To support its position that Klayman was forced to resign, Judicial Watch elicited testimony from Judicial Watch officers Fitton and Orfanedes about the meeting in which Klayman told them of his misconduct. Klayman objected that this testimony was irrelevant, but the district court overruled the objection. **Judicial Watch also introduced the deposition of DeLuca, Klayman's ex-wife, in which she testified that Klayman physically assaulted her** and called her vulgar names. . . **The jury returned a verdict for Judicial Watch, awarding a total of $2.3 million**.
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> * * *
>
> **The evidence regarding Klayman's forced resignation and name-calling of his ex-wife was relevant.** Judicial Watch asserted that Klayman engaged in unfair competition in violation of the Lanham Act by falsely representing in his Saving Judicial Watch campaign that he left Judicial Watch to run for U.S. Senate. To prove those statements were false, Judicial Watch introduced the evidence that Klayman had been forced to resign due to his misconduct. This evidence of misconduct included his ex-wife's testimony about the vulgar names that Klayman had called her, and she included these allegations of verbal abuse in her divorce complaint, a copy of which Klayman had shown to Fitton and Orfanedes. **Accordingly, evidence that Klayman was forced to resign due to misconduct tended to make the fact that he left to run for Senate less probable than it would have been without that evidence. And the fact of Klayman's departure was of consequence for Judicial Watch's Lanham Act claim because it had to prove that Klayman made a false representation.**

Klayman v. Judicial Watch, Inc., 6 F.4th 1301, 1309, 1317-18 (2021) (emphasis added). When considered in the context of the underlying dispute and Klayman's

forced departure from Judicial Watch, the question by Judge Randolph is neither biased nor irrelevant.

2. The Motion Entirely Misrepresents Argument by Appellees' Counsel

The claims in the underlying Complaint were initially alleged in separate litigation filed in the U.S. District Court for the Southern District of Florida. *See Klayman v. Fitton*, Case No. 1:19-cv-20544-JEM (S.D. Fla., Feb. 11, 2019) (the "Florida Case"). Prior to ruling on the Defendant's motion to dismiss for lack of personal jurisdiction, the Florida District Court permitted Klayman to "conduct a 2-hour deposition of [Fitton] limited to personal jurisdiction discovery." *See* May 21, 2019, Order in the Florida Case [Docket # 24]. The deposition, taken on June 13, 2019, covered a wide range of topics including lack of communication between Fitton and Stone, personal and work computers, cell phones, phone applications and more. After completing the deposition, Klayman filed the entire 91-page transcript with the Florida District Court. *See* Florida Case at Docket # 32-1. On October 31, 2019, Judge Jose E. Martinez adopted the Magistrate's Report and Recommendation granting the Motion to Dismiss, and expressly found: "Plaintiff has failed to show that Defendant committed any tortious acts – negligent or intentional – in Florida." *See* Florida Case, October 31, 2019, Order at p. 2 [Docket # 59].

Klayman's characterization of Appellees' argument regarding the Florida Case is deceptive and false. Describing the final order from the Florida Case, Appellees' counsel merely stated:

> Judge Martinez found that there was no tortious or wrongful conduct in Florida, and the law of Florida, the long-arm jurisdiction law of Florida, can encompass both an act in Florida or an act outside of Florida directed at Florida.

Exhibit 1 to the Klayman Affidavit at p. 17, lines 11-16. Klayman asserts that Appellees' counsel was "not honest" in representing the finding and that the representation was a lie designed to deceive the Court.

Comparison of Klayman's characterization and the facts demonstrates that Appellees' counsel accurately described the content of Judge Martinez' Order and that there is no issue relevant to the DQ Motion arising therefrom. In essence, Klayman is resorting to *ad hominin* attacks to advance his appeal.

B. KLAYMAN'S AFFIDAVIT APPEARS TO BE AN IMPROPER ATTEMPT TO SUBMIT A POST-ORAL ARGUMENT BRIEF

A substantial portion of Klayman's Affidavit is an attempt to submit additional argument that he omitted from briefs and oral argument. *See* Klayman Affidavit at ¶¶ 8-10. These paragraphs have nothing to do with a motion for disqualification. Instead, Klayman is using the Affidavit to submit two pages of argument regarding the absence of factual foundation for his Complaint.

Under Fed. R. App. P. 28(j) and D.C. Cir. Rule 28(f), a party may raise pertinent and significant authority after oral argument by submitting a 350-word (or less) letter to the Clerk with copies of the decisions. Here, Klayman submits over 440 words of argument and cites a June 28, 2021, unreported decision[1] from the U.S. District Court for the Western District of Texas to explain why he failed to allege the time, place, content, and listener for the alleged statement by Fitton. This opinion has no precedential value and is not binding on any court. In addition, submitting argument unrelated to the Motion to Disqualify is an improper use of the process and calls into question the reason for filing the motion. Finally, Klayman continues to ignore the glaring absence of any allegations of fact to support the nexus between Stone's statement and any utterance by Appellee Fitton.

IV. CONCLUSION

The Klayman Affidavit lacks any grounds to reasonably demonstrate that Judge Randolph harbors an extrajudicial, personal bias or prejudice against the Appellant. The question posed by Judge Randolph and the argument made by Appellees' counsel do not support disqualification. Neither allegation meets the required standard. "[I]t is well settled that actions of a judge in pending or previous litigation in which the movant has been involved are not grounds for disqualification

[1] Klayman ignores Circuit Rule 32.1 by failing to provide a copy of the unreported decision.

under § 144." *Southerland v. Irons*, 628 F.2d 978, 980 (6th Cir. 1980). Klayman did not identify anything that Judge Randolph learned beyond the bounds of this action as cause for his Motion. There is no basis at all for a reasonable and informed observer to question the Court's impartiality. *S.E.C. v. Loving Spirit Found. Inc.*, 392 F. 3d 486, 493 (D.C. Cir. 2004). The Motion for Disqualification is without merit and should be promptly denied.

Dated: October 17, 2022

Respectfully submitted,

/s/

Richard W. Driscoll (436479)
Driscoll & Seltzer, PLLC
2000 Duke Street, Ste. 300
Alexandria, VA 22314
Telephone: (703) 879-2601
Facsimile: (703) 997-4892
rdriscoll@driscollseltzer.com

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fed. R. App. P. 32(g)(1), that the foregoing Appellees' Opposition Memorandum complies with length limit set by Fed. R. App. P. 27(d)(2) because the document contains only 2506 words or 236 lines on 11 pages. The Opposition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the document was prepared in a proportionally spaced typeface using Microsoft Word 2022 in 14-point times new roman type style.

/s/

Richard W. Driscoll

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October 2022, a true copy of the foregoing Appellees' Opposition was electronically transmitted by the Court's ECF system, U.S. mail and by email to:

Larry Klayman, Esq.
7050 W. Palmetto Park Rd.
Boca Raton, FL 33433
leklayman@gmail.com

/s/

Richard W. Driscoll