**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| ROBBIE EMERY BURKE, as the Special Administratrix of the Estate of Elliott Earl Williams, Deceased, | ) | |
| Plaintiff, | ) | |
| v. | ) | Case No. 11-CV-720-JED-PJC |
| STANLEY GLANZ, in his individual capacity, and VIC REGALADO, in his official capacity, | ) | |
| Defendants. | ) | |

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISQUALIFY TRIAL JUDGE**

**COMES NOW,** Plaintiff, Robbie Emery Burke ("Plaintiff"), as the Special Administratrix of the Estate of Elliott Earl Williams ("Mr. Williams"), deceased, and respectfully submits her Response in Opposition to Defendants Motion to Disqualify Trial Judge (Dkt. #339), as follows:

## Introduction and Background

Defendants' Motion to Disqualify Trial Judge (Dkt. #339) was filed just moments before the Pretrial Conference in this matter. The intent was obvious. Defendants wish to cause maximum disruption. They seek to delay these proceedings and thwart long-awaited justice for the Estate of Elliott Williams. They want to shop for a new judge after certain pretrial decisions have not gone their way. They seek to hold this Court and these proceedings hostage in hopes of keeping a jury from seeing and hearing evidence of the unconscionable, inhumane and unconstitutional mistreatment that Mr. Williams encountered in the days before his tragic, lingering and painful death at the Tulsa County Jail ("Jail"). The Court should not indulge Defendants in their mission of obstruction.

The Motion to Disqualify is truly frivolous, void of evidentiary support and blatantly untimely. Most troubling, it is based on a falsehood. Specifically, Defendants state that the "facts underlying this motion have ***recently*** come to light…." Dkt. #339 at 3 (emphasis added). That is simply untrue. Though Defendants, tellingly, fail to disclose it in the Motion, Mr. Brewster,[1] Mr. Fortney, Former Sheriff Glanz and Tulsa County[2] have, ***for years***, known the underlying "facts".

Particularly, the Motion to Disqualify is based on a case, *City of Tulsa v. Tulsa County et al.* CJ-2008-8659 ("City of Tulsa" case), filed in Tulsa County District Court in December ***2008***. In that case, the City of Tulsa brought claims against Defendants Tulsa

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[1] It is well established that counsel's knowledge is imputed to his client. *See, e.g., McDaniel v. GEICO Gen. Ins. Co.*, 55 F. Supp. 3d 1244, 1260 (E.D. Cal. 2014) ("An attorney's knowledge, whether actually told to a client or not, is imputed to the client."); *Veal v. Geraci,* 23 F.3d 722, 725 (2nd Cir. 1994) (concluding that appellant's civil rights action was time-barred because counsel's knowledge of a tainted line-up was imputed to the client despite client's lack of actual knowledge).

[2] And while Defendants may -- disingenuously -- claim that Sheriff Regalado only recently became a "party" to this action, and thus, had no opportunity to seek disqualification until now, such argument is easily vanquished. For one, Sheriff Regalado was substituted as the "official capacity" Defendant on April 25, 2016, nearly two hundred (200) days prior to the filing of the Motion to Disqualify. Much more importantly, however, Sheriff Regalado's knowledge, as an individual, is immaterial in this action. Sheriff Regalado is being sued purely in his official capacity as Sheriff of Tulsa County, and as successor to Former Sheriff Glanz. A claim against a state actor in his official capacity, such as Sheriff Regalado, "is essentially another way of pleading an action against ***the county*** or municipality" he represents and is considered under the standard applicable to § 1983 claims against municipalities or counties. *Porro v. Barnes,* 624 F.3d 1322, 1328 (10th Cir. 2010). *See also see Kentucky v. Graham,* 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."); *Monell v. Dep't of Soc. Servs. of City of N.Y.,* 436 U.S. 658, 691 (1978) ("official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent"). Thus, Sheriff Regalado's knowledge, in his official capacity, is the institutional knowledge of Tulsa County and the Tulsa County Sheriff's Office ("TCSO"), the entities he represents. As shown *infra*, Tulsa County and TCSO have known of the facts underlying the Motion to Disqualify since ***December 2008, at the latest.*** *See, e.g., City of Tulsa v. Tulsa County, et al.,* CJ-2008-8659 (Docket) (Ex. 1).

County, the Board of County Commissioners for Tulsa County ("BOCC") and Former Sheriff Glanz. *See* Petition (Dkt. #338-1). Notably, the lead attorneys for Defendants in the City of Tulsa case were ***Clark Brewster and Guy Fortney*** (*See* Motion to Dismiss (City of Tulsa case) (Ex. 2) at 20), the very same lawyers who have represented Former Sheriff Glanz and the Sheriff (in his Official Capacity) in the case at bar, since its inception. *See* Entries of Appearance (Dkt. ##10 and 11).

It is now the Defendants' assertion that because United States District Court Judge John Dowdell's ("Judge Dowdell") former law firm represented the City in the City of Tulsa case, "reasonable questions as to Judge Dowdell's impartiality are raised" and he must be disqualified. *See* Dkt. #339 at 4. However, because Brewster and Fortney were the lead defense counsel, and Glanz and the County were parties, in the City of Tulsa matter, they have -- clearly -- known the underlying "facts" since December 2008, ***over eight (8) years ago.*** *See* Motion to Dismiss (City of Tulsa case) (Ex. 2). This case has been pending since November 2011, and Judge Dowdell was assigned the case on January 4, 2013. *See* Dkt. #89. Therefore, Defendants have known of their ***alleged*** appearance of partiality for ***over four (4) years.*** Despite this long-held knowledge, Defendants, and counsel for Defendants, chose not to raise the issue until February 9, ***2017***, literally minutes before the Pretrial Conference, and just twelve (12) days prior to the beginning of trial. *See* Dkt. #339. This is impermissible.

As Defendants concede, their Motion to Disqualify must be "made ***as promptly and as soon*** as the matters underlying the motion come to light." Dkt. #339 at 3 (citing *United States v. Stenzel*, 49 F.3d 658, 661 (10th Cir. 1995)) (emphasis added). In other words, motions to disqualify a sitting trial judge must be filed in a timely manner and

without delay. In this regard, it is well established that ***"[t]he most egregious delay—the closest thing to per se untimeliness—occurs when a party already knows the facts purportedly showing an appearance of impropriety but waits until after an adverse decision has been made by the judge before raising the issue of recusal."*** *United States v. Vadner,* 160 F.3d 263, 264 (5th Cir. 1998) (emphasis added). Here, Defendants Motion to Disqualify is of the "most egregious" type. Indeed, in researching the issue, the undersigned has been unable to find ***any*** other motion to disqualify quite as "egregious" as Defendants'.

To wit, the present Motion to Disqualify is uniquely egregious in that: **(A)** movants had knowledge of the facts purportedly showing an appearance of impropriety for over eight (8) years; **(B)** despite their knowledge, the movants waited over four (4) years to file the motion to disqualify; **(C)** the motion to disqualify was filed minutes before the Pretrial Conference; **(D)** the motion to disqualify was filed on the eve of trial; **(E)** the motion to disqualify was filed after adverse decisions had been entered against Defendants (including denial of summary judgment); **(F)** the motion to disqualify contains demonstrably false assertions of fact (*i.e.,* "the facts underlying this motion have recently come to light"); and **(G)** the motion to disqualify was filed due to admitted dissatisfaction with the trial court's rulings (*see, e.g.,* Aff. of Regalado (Dkt. #339-2) at ¶¶ 15-16).[3]

When one views this background as whole, the Motion to Disqualify is not only egregiously, and "per se" untimely, it is a bad faith filing, warranting sanctions for

[3] Even the adverse Order relied upon by Sheriff Regalado was filed on July 20, 2016, over six (6) months prior to the filing of the Motion to Disqualify. *See* Aff. of Regalado (Dkt. #339-2) at ¶¶ 15-16.

vexatious multiplication of the proceedings and attempted manipulation of the judicial process. Due it its blatant untimeliness alone, the Motion to Disqualify should be denied.

Furthermore, even if the Court were to somehow determine that the Motion to Disqualify is timely, the Motion should ***still*** be denied on multiple grounds. First, Judge Dowdell never entered an appearance in the City of Tulsa action and did not sign the available pleadings. *See, e.g., See, e.g., City of Tulsa v. Tulsa County, et al.,* CJ-2008-8659 (Docket) (Ex. 1); Petition (Dkt. #388-1); and Response to Motion to Dismiss (Ex. 3). Second, Defendants provide ***no evidence*** in support of their claim that "[a]s a partner of the [Wohlgemuth] firm, …, Judge John Dowdell not only participated in strategic discussions about the Tulsa County Case with other partners and attorneys at the firm, but he benefitted financially from fees paid to his firm." Dkt. # 339 at 3. Third, Defendants provide nothing, other than unsubstantiated speculation, that Judge Dowdell had any knowledge concerning, or involvement in, the City of Tulsa action. Fourth, the City of Tulsa action had nothing to do with Mr. Williams or the treatment Mr. Williams received at the Jail (indeed, the City of Tulsa case was filed nearly three (3) years *before* Mr. Williams' death). Fifth, the nature of the claims brought in the City of Tulsa case was substantially dissimilar from the claims brought in the case-at-bar.

The Motion to Disqualify should be denied.

## Discussion

### A. The Motion to Disqualify Should be Denied as Untimely

"A motion to recuse must be filed promptly after the allegedly disqualifying facts are discovered." *Hinman v. Rogers*, 831 F.2d 937, 938 (10th Cir. 1987); *see also United States v. Pearson*, 203 F.3d 1243, 1276 (10th Cir. 2000). Tenth Circuit "precedent requires a party to act promptly once it knows of the facts on which it relies in its motion." *Pearson,* 203 F.3d at 1276 (citations omitted); *see also United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993) (A recusal motion "is not timely unless filed 'at the earliest moment after [the movant acquires] knowledge of the facts demonstrating the basis for such disqualification.'") (citations omitted). "Granting a motion to recuse many months after an action has been filed ***wastes judicial resources and encourages manipulation of the judicial process."*** *Willner v. University of Kansas,* 848 F.2d 1023, 1029 (10th Cir. 1988) (emphasis added). ***"The judicial process can hardly tolerate the practice of a litigant with knowledge of circumstances suggesting possible bias or prejudice holding back, while calling upon to court for hopefully favorable rulings, and then seeking recusal when they are not forthcoming."*** *Franks v. Nimmo,* 796 F.2d 1230, 1234 (10th Cir.1986) (citations and internal quotations omitted). In a similar vein, it has been observed that "[t]he most egregious delay—the closest thing to per se untimeliness—occurs when a party already knows the facts purportedly showing an appearance of impropriety but waits until after an adverse decision has been made by the judge before raising the issue of recusal." *United States v. Vadner,* 160 F.3d 263, 264 (5th Cir. 1998).

As set forth *supra*, Defendants' Motion to Disqualify breaks all of the timeliness rules as it is plainly motivated by adverse rulings and is an obvious attempt to manipulate the judicial process. Indeed, Defendants' Motion to Disqualify is *egregiously* untimely,

and otherwise frivolous. The present Motion to Disqualify is uniquely egregious in that: **(A)** movants had knowledge of the "facts" purportedly showing an appearance of impropriety for over eight (8) years; **(B)** despite their knowledge, the movants waited over four (4) years to file the Motion to Disqualify; **(C)** the Motion to Disqualify was filed minutes before the Pretrial Conference; **(D)** the Motion to Disqualify was filed just twelve (12) days prior to trial; **(E)** the Motion to Disqualify was filed after adverse decisions had been entered against Defendants (including denial of summary judgment, striking of counter-designations and overruling an objection to the Proposed Pretrial Order); **(F)** the motion to disqualify contains demonstrably false assertions of fact (*i.e.,* "the facts underlying this motion have *recently* come to light"); and **(G)** the motion to disqualify was filed due to admitted dissatisfaction with the trial court's rulings (*see, e.g.,* Aff. of Regalado (Dkt. #339-2) at ¶¶ 15-16).[4]

Defendants' Motion to Disqualify is the textbook example of why the timeliness requirement exists. Recusal must not be used by litigants as a tactical device to cause delay, multiply the proceedings or otherwise manipulate the judicial process. Parties are not permitted, while armed with knowledge of circumstances they allege suggests purported bias, to "lay behind the log", see how the case progresses, and then, years later, and at the last minute, seek recusal, effectively delay trial, and hope for the assignment of another judge who might provide more favorable rulings. The "judicial process can hardly tolerate" such sharp practices. *Franks,* 796 F.2d at 1234.

[4] Even the adverse Order relied upon by Sheriff Regalado was filed on July 20, 2016, over six (6) months prior to the filing of the Motion to Disqualify. *See* Aff. of Regalado (Dkt. #339-2) at ¶¶ 15-16

Adding insult to injury, Defendants' Motion is based on an outright lie. That is, Defendants claim that the "facts underlying th[e] motion have ***recently*** come to light…." Dkt. #339 at 3 (emphasis added). This is provably false as Mr. Brewster and Mr. Fortney were counsel for Former Sheriff Glanz and Tulsa County in the very "City of Tulsa" case at issue. *See, e.g., See, e.g., City of Tulsa v. Tulsa County, et al.,* CJ-2008-8659 (Docket) (Ex. 1); Petition (Dkt. #388-1); and Motion to Dismiss (Ex. 2). Thus, in truth, Defendants and their lawyers have known of the underlying "facts" for over eight (8) years and waited over four (4) after Judge Dowdell was assigned this case to seek recusal. Any assertion that the underlying facts "recently" came to light are manifestly false.

Under this backdrop, the Motion to Disqualify should be denied on timeliness grounds alone. And considering the timing of the Motion (i.e., the day of Pretrial), the amount of time that Defendants had knowledge of the underlying "facts" and the false assertion of fact which forms the basis of the Motion, Plaintiff asserts that Defendants' counsel should be sanctioned under the Court's inherent authority.

**B. In the Alternative, Even if the Court Finds the Motion to Disqualify to be Timely, the Motion Should Otherwise be Denied as Lacking Substantive Merit**

The Motion to Disqualify should be denied on timeliness grounds alone. Nevertheless, even if the Court were to somehow determine that the Motion to Disqualify is timely, the Motion should ***still*** be denied.

Defendants seek recusal, in a scatter shot manner, under 28 U.S.C. §§ 455 (and perhaps §144). Here, Defendants argue that "[g]iven the involvement of Judge Dowdell, and the firm, in litigation against Defendant Glanz and Tulsa County in CJ-

2008-8659 covering the events at issue in the instant matter-reasonable questions as to Judge Dowdell's impartiality are raised" and "[h]is disqualification is mandatory pursuant to 28 U.S.C. § 455." Dkt. #339 at 4. There are numerous problems with this argument that are fatal to the Motion to Disqualify.

**First,** there is no evidence, certainly no admissible evidence, that Judge Dowdell had ***any*** involvement in the City of Tulsa case. The only "support" Defendants provide concerning the purported involvement of Judge Dowdell are the speculative statements of Former Sheriff Glanz and Sheriff Regalado. *See* Dkt. #339-1 at ¶11 ("Upon information and belief, John Dowdell ***would have*** participated in the litigation between the City and County including myself, had discussions with his partners and other law firm attorneys. As a partner, John Dowdell ***would have*** shared in the revenues generated by the fees paid by the City in the litigation."); and Dkt. #339-2 at ¶14. Of course, neither Glanz nor Regalado has any personal knowledge concerning the inner workings of the Wohlgemuth law firm, and their statements concerning Judge Dowdell are pure conjecture. Rule 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." No such evidence has been introduced here. Moreover, Defendants do not even provide evidence that Judge Dowdell had any knowledge of the City of Tulsa case, let alone knowledge of the specific allegations made therein.

**Second,** and relatedly, Judge Dowdell never entered an appearance in the City of Tulsa action and did not sign any of the known pleadings. *See, e.g., See, e.g., City of Tulsa v. Tulsa County, et al.,* CJ-2008-8659 (Docket) (Ex. 1); Petition (Dkt. #388-1); and Response to Motion to Dismiss (Ex. 3).

**Third,** despite the assertion that the City of Tulsa matter "cover[ed] the events at issue in the instant matter", the two cases are substantially dissimilar.[5] Most importantly, the City of Tulsa action had nothing to do with Mr. Williams or the treatment Mr. Williams received at the Jail. *See* Petition (Dkt. #338-1). And the mistreatment and death of Mr. Williams are the central "events at issue in the instant matter." The Petition makes no mention of Mr. Williams or Ms. Burke. *Id.* This is unsurprising as the City of Tulsa action was filed nearly ***three (3) years before Mr. Williams' death.*** *Id.* Further, the legal claims and relief sought in the City of Tulsa case are materially different. Unlike the present case, there were no civil rights claims, or claims brought pursuant to 42 U.S.C. § 1983, in the City of Tulsa action. Rather, the City of Tulsa case involved the negotiation of a "Jail System Agreement" between the City of Tulsa and Tulsa County, and a dispute over the extent of the City's obligation for the Jail's operating costs. *See* Petition (Dkt. #338-1). While the Petition includes a reference to the Department of Justice's finding, ***in 1994***, that the conditions at the ***old*** jail "violated the constitutional rights of prisoners and detainees" (*Id.* at ¶16), it is an ancillary allegation. Nowhere in the Petition is there any allegation, or even suggestion, that the Jail's medical delivery system (at issue in the case at bar) is, or was, unconstitutional. In sum, the City of Tulsa case did not "cover[] the events at issue in the instant matter…."

Therefore, even if the Court were to find that the Motion to Disqualify is timely,

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[5] As the party moving for recusal under § 455(b), Defendants must demonstrate that the presiding judge or one of his former law partners "served in the matter in controversy." *See United States v. DeTemple,* 162 F.3d 279 (4th Cir.1998) (dismissing the defendant's § 455(b) argument after noting that he had failed to show that the judge's former law partners or the judge himself served in the "matter in controversy").

Defendants have failed to establish any basis for recusal under 28 U.S.C. §§ 455 or §144. There is no conflict, bias or other basis upon which Judge Dowdell's "impartiality might reasonably be questioned."[6]

WHEREFORE, premises considered, Plaintiff respectfully requests that the Court deny Defendants' Motion to Disqualify (Dkt. #339).

Respectfully submitted,

/s/ Robert M. Blakemore
Daniel Smolen, OBA #19943
Donald E. Smolen, II, OBA #19944
Robert M. Blakemore, OBA #18656
Smolen Smolen & Roytman
701 South Cincinnati Avenue
Tulsa, OK 74119
Phone: (918) 585-2667
Fax: (918) 585-2669

Louis W. Bullock, OBA #1305
Patricia W. Bullock, OBA #956
Bullock Bullock & Blakemore PLLC
110 West Seventh Street, Suite 707
Tulsa, OK 74119
Phone: (918) 584-2001
Fax: (918) 779-4383

Gregory J. Denney, OBA #17918
Carla R. Stinnett, OBA #19523
Gregory J. Denney & Associates, P.C.
1204 South Cheyenne Avenue
Tulsa, Oklahoma 74119

[6] Mr. Brewster also filed a separate Affidavit claiming that Judge Dowdell's apparent involvement in a habeas corpus action concerning former Plaintiff's counsel, Carla Stinnett, is grounds for recusal. For one, Ms. Stinnett has withdrawn from this case, and no longer represents Plaintiff. Therefore, the issue is moot. In addition, neither Plaintiff nor Ms. Stinnett raised this issue during the course of this action. And Plaintiff and Ms. Stinnett would seem to be the only persons with standing to raise such issue. Because they did not raise the issue, it has been waived, even if the matter had not been mooted be Ms. Stinnett's withdrawal.

Phone: (918) 295-0077
Fax: (918) 295-8578

Thomas Mortensen, OBA # 19183
Mortensen & Associates, LLC
1331 S. Denver Ave.
Tulsa, OK 74119
(918) 392-9992
(918) 392-9993 - Fax

***Attorneys for Plaintiff***

**CERTIFICATE OF SERVICE**

I hereby certify that on the 13th day of February, 2017, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants who have appeared in this case.

/s/ Robert M. Blakemore