APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DCO-069

No. 24-1460

VICTOR MONDELLI,
Appellant
v.

BERKELEY HEIGHTS NURSING AND REHABILITATION CENTER; MARINA FERRER; DIANE WILVERDING

(D.N.J. No. 2:16-cv-01569)

Present: PHIPPS, CHUNG and SMIITH, Circuit Judges

1. Motion by Appellant for Extension of Time to File Brief and Appendix Until March 3, 2025;

2. Motion by Appellees to Dismiss Appeal for Failure to Timely File Briefs and Appendix and Response in Opposition to Extension Request;

3. Response by Appellant to Appellee's Motion to Dismiss Appeal.

Respectfully,
Clerk/pdb

ORDER

The foregoing are considered. Appellant's motion for an extension of time to file brief and appendix is DENIED. Appellees' motion to dismiss the appeal is GRANTED.

By the Court,

s/ Cindy K. Chung
Circuit Judge

Dated: March 26, 2025
PDB/cc: All Counsel of Record

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

VICTOR MONDELLI, **Plaintiff,** **v.** **BERKELEY HEIGHTS NURSING & REHABILITATION CENTER, *et al.*,** **Defendants.**	**Case No. 16-cv-01569-ES-ESK** **ORDER**

THIS MATTER having come before the Court for a telephone status conference on October 29, 2021; and the Court of Appeals for the Third Circuit having remanded this matter to conduct "an inquiry into [plaintiff's] competency" (ECF No. 33-2 p. 12); and the parties having advised the Court of their respective positions on how this matter should proceed (ECF Nos. 40, 41); and for the reasons stated on the record,

IT IS on this **1st** day of **November 2021** **ORDERED** that:

1. Defendants are granted leave to serve written discovery requests on plaintiff relating to the issue of "[p]laintiff's incompetence and need for the appointment of a Guardian Ad Litem" (ECF No. 40 p. 2) by **November 12, 2021.** Plaintiff shall respond to defendants' discovery requests by **December 10, 2021**.

2. Plaintiff is directed to file motions to: (a) prohibit "any proceedings in this case [from] be[ing] conducted by a Magistrate Judge" (ECF 41 p. 1); and (b) for the recusal of District Judge Esther Salas. Plaintiff shall file these separate motions by **November 12, 2021**. Defendants shall file oppositions, if any, by **November 29, 2021**.

3. A telephone conference is scheduled for **January 7, 2022 at 11:30 a.m.** before Magistrate Judge Edward S. Kiel. The dial in number is 1-888- 684-8852 and the access code is 310-0383#. The parties shall file a joint letter, at least three business days before the conference advising of the status of discovery, any pending motions, and any other issues to be addressed.

/s/ Edward S. Kiel
EDWARD S. KIEL
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

VICTOR MONDELLI, **Plaintiff,** **v.** **BERKELEY HEIGHTS NURSING & REHABILITATION CENTER, *et al.*,** **Defendants.**	**Case No. 16-cv-01569-ES-ESK** **ORDER**

THIS MATTER having come before the Court for a telephone status conference on March 28, 2022 (Conference); and plaintiff's counsel having failed to appear for the Conference; and defendants having advised the Court that plaintiff has failed to comply with the Court's February 18, 2022 order (ECF No. 55); and defendants having filed a motion for sanctions (Motion) (ECF No. 57); and for the reasons stated on the record at the Conference,

IT IS on this **29th** day of **March 2022** **ORDERED** that:

1. The competency hearing scheduled for April 5, 2022 (ECF No. 51 p.9) is adjourned *sine die* pending resolution of the Motion.

/s/ Edward S. Kiel
EDWARD S. KIEL
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

VICTOR MONDELLI,	
Plaintiff,	
v.	**Civil Action No. 16-1569 (ES) (ESK)**
BERKLEY HEIGHTS NURSING & REHABILITATION CENTER, et al,	**ORDER**
Defendants.	

SALAS, DISTRICT JUDGE

This matter having come before the Court upon requests (D.E. Nos. 73 & 75) by defendants Berkley Heights Nursing & Rehabilitation Center, Marina Ferrer, and Diane Wilverding (together "Defendants") that this matter be dismissed with prejudice pursuant to the Court's June 2, 2023, letter order (D.E. No. 70 (the "June 2, 2023 Order")), and it appearing that

1. On June 2, 2023, the Court issued a letter order denying Plaintiff's appeal and affirming the Honorable Magistrate Judge Kiel's order administratively terminating this action, pending Plaintiff's compliance with discovery requests. (*Id.*).

2. In the June 2, 2023 Order, the Court specifically ordered Plaintiff to "(i) provide releases for his relevant medical providers, or, alternatively, submit to Defendants the specific names and approximate dates of treatment for his medical providers so that Defendants can prepare medical releases for Plaintiff to sign; (ii) submit to a deposition; and (iii) submit to an independent medical examination." (*Id.*).

3. The June 2, 2023 Order further provided that a failure to comply with these directives could result in a dismissal of this action with prejudice. (*Id.*).

4. More than six months have passed since the Court issued the June 2, 2023 Order and Plaintiff has not complied with any of the directives therein. Accordingly, Plaintiff has failed to respond to the outstanding discovery requests necessary for this Court to make a determination of Plaintiff's present competency pursuant to Federal Rule of Civil Procedure 17. (*See* D.E. Nos. 73 & 75). In fact, Plaintiff and his counsel failed to appear at a July 19, 2023, telephone conference (D.E. No. 74), and have provided no response to the Court's June 2, 2023 Order or Defendants' requests for dismissal. Consistent with the Court's June 2, 2023 Order, therefore, this action must be dismissed.

Accordingly, IT IS on this 8th day of February, 2024,

ORDERED that this action be **DISMISSED** *with prejudice*; and it is further

ORDERED that the Clerk of the Court **CLOSE** this matter.

s/Esther Salas
Esther Salas, U.S.D.J.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

VICTOR MONDELLI, **Plaintiff,** **v.** **BERKELEY HEIGHTS NURSING & REHABILITATION CENTER, *et al.*,** **Defendants.**	**Case No. 16-cv-01569-ES-ESK** **ORDER**

THIS MATTER having come before the Court for a telephone status conference on January 7, 2022 (Conference); and the parties having filed a joint status letter on January 5, 2022 (ECF No. 48); and for the reasons stated on the record at the Conference,

IT IS on this **10th** day of **January 2022** **ORDERED** that:

1. Plaintiff shall respond to defendants' written discovery requests by **January 28, 2022**.

2. Defendants may depose plaintiff and may require plaintiff to undergo independent medical examinations relating to plaintiff's competency. Notices for plaintiff's deposition and independent medical examinations shall be served on plaintiff's counsel by **January 28, 2022**. Plaintiff is ordered to cooperate in the scheduling of his deposition and the independent medical examinations.

3. A telephone status conference is scheduled for **February 18, 2022 at 9:00 a.m.** before Magistrate Judge Edward S. Kiel. The dial in number is 1-888-684-8852 and the access code is 310-0383#. The parties shall file a joint letter, at least **three business days** before the conference advising of the status of discovery, any pending motions, and any other issues to be addressed.

/s/ Edward S. Kiel
EDWARD S. KIEL
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

VICTOR MONDELLI, **Plaintiff,** **v.** **BERKELEY HEIGHTS NURSING & REHABILITATION CENTER, *et al.*,** **Defendants.**	**Case No. 16-cv-01569-ES-ESK** **OPINION AND ORDER**

KIEL, U.S.M.J.

THIS MATTER having come before the Court on defendants' motion "to dismiss ... [p]laintiff's [c]omplaint with prejudice, together, with any and all relief ... deem[ed] just and equitable" as sanctions pursuant to Federal Rule of Civil Procedure (Rule) 37 (Motion) (ECF No. 57 p.6); and plaintiff having filed an opposition to the Motion (ECF No. 62); and defendants having filed a reply in further support of the Motion (ECF No. 64); and the Court finding,

1. Plaintiff commenced this case on March 21, 2016 seeking to recover damages for intentional infliction of emotional distress and violations under Title II of the Americans with Disabilities Act. (ECF No. 1.)

2. Following the initial scheduling conference, the Court entered an order on November 17, 2016, directing fact discovery to close on July 31, 2017. (ECF No. 10 ¶3.) The parties were directed to serve their discovery requests by December 30, 2016 and to respond to each other within 30 days of receipt. (*Id.* ¶4.) Although defendants timely served plaintiff with their discovery requests, plaintiff failed to respond. (ECF No. 16 p.2.) The Court granted plaintiff an extension until February 17, 2017 to respond, however, plaintiff again failed to meet the deadline. (*Id.* pp.2, 3.)

3. Due to plaintiff's repeated failure to comply with the Court's orders to respond to defendants' discovery requests (*see id.* pp. 1–3), the Court directed plaintiff to show cause as to "why sanctions should not be imposed against him pursuant to [Rules] 16(f) and 37" (ECF No. 17). Plaintiff advised the Court that due to his "current mental and physical health, [he] ha[d] been unable to properly communicate with [his] lawyer and prosecute this case." (ECF No. 18 ¶11.)

Pursuant to plaintiff's request, the Court administratively terminated this case on May 22, 2017. (*Id.* ¶12; ECF No. 19). The parties were granted leave to request to reopen this case within 180 days. (ECF No. 19.)

4. On November 20, 2017, plaintiff filed a motion "to [e]xtend [t]ime to [r]eopen [c]ase or, in the [a]lternative, to [r]eopen case" (Motion to Reopen). (ECF No. 20.) On April 27, 2018, the Court held a hearing and denied the Motion to Reopen and dismissed this case with prejudice (Dismissal Order). (ECF Nos. 26, 31.)

5. On May 29, 2018, plaintiff appealed from the Dismissal Order to the Third Circuit. (ECF No. 27.) The Third Circuit entered a judgment on June 15, 2021, vacating the Dismissal Order and remanding this case "for the [District] Court to reexamine [plaintiff's] competency" to determine the need to appoint a Guardian Ad Litem "and to then reevaluate whether dismissal is warranted." (ECF No. 32; ECF No. 33-2 pp.3, 11.)

6. Upon the reopening of this case (ECF No. 34), the Court directed the parties to "file letter briefs ... setting forth the[ir] respective positions on how this [case] should proceed." (ECF No. 39 ¶1.) Defendants requested that a competency hearing be scheduled and that they be granted leave to conduct limited discovery. (ECF No. 40 p.2.) Meanwhile, plaintiff asserted that "the directives of the ... Third Circuit" must be fulfilled but noted that he "does not consent to any proceedings in this case to be conducted by a Magistrate Judge." (ECF No. 41 p.1.) Following the October 29, 2021 telephone status conference (ECF No. 43), the Court granted: (a) defendants permission "to serve written discovery requests on plaintiff relating to the issue of '[p]laintiff's incompetence and need for the appointment of a Guardian Ad Litem'"; and (b) plaintiff leave to file recusal motions (ECF No. 42 ¶¶1, 2 (alteration in original) (quoting ECF No. 40 p.2)).

7. On November 12, 2021, plaintiff filed his recusal motions. (ECF Nos. 44, 45.) The recusal motions were denied on January 6, 2022. (ECF No. 49.)

8. Defendants advised in their status letter filed before the January 7, 2022 telephone status conference that plaintiff had yet to provide discovery. (ECF No. 42 ¶1; ECF No. 48.) On January 10, 2022, the Court again ordered plaintiff to respond to defendants' discovery requests by a date certain and granted defendants permission to depose plaintiff and have him undergo an independent medical examination (January Order). (ECF No. 50 ¶¶1, 2.) The Court also scheduled plaintiff's competency hearing for April 5, 2019. (ECF No. 51 p.9.)

9. At the February 18, 2022 telephone status conference, defendants noted that plaintiff's independent medical examination could not be scheduled without plaintiff's answers to their discovery requests. (ECF No. 56 p.11.) Plaintiff advised that while he would not respond to any discovery, he would "submit[] HIPPA forms so that the defendant[s'] examiner can examine him with the medical records that [defendants] are seeking. (*Id.* pp.2, 5, 6.) Plaintiff also indicated that he would be "willing to submit to" a deposition and "show up for [his] [independent medical exam]." (*Id.* pp.8, 10, 11.) The Court, thereafter, entered an order: (a) "deem[ing] [plaintiff] to be in violation of the ... January [Order]"; (b) directing plaintiff to "provide releases for his records for the medical providers" defendants identified; and (c) instructing "plaintiff's deposition [to] proceed on March 22, 2022." (ECF No. 55.)

10. Plaintiff refused to appear for his deposition and failed to provide releases for his medical records, thereby, once again, violating the Court's order. (ECF No. 57, p.13; ECF No. 60.)

11. On March 1, 2022, defendants filed the Motion. (ECF No. 57.) Defendants argue that they "have been prejudiced by the tortured procedural history of this [case], the futile recusal motions ..., and the refusal by [p]laintiff to cooperate, or respond, in any meaningful way to discovery." (*Id.* p.6.) In opposition, plaintiff argues that pending determination of his competency, he need not respond to defendants' discovery requests. (ECF No. 62 p.5.) Plaintiff also notes that while he agreed to provide medical releases, defendants never provided plaintiff with the release forms. (*Id.* p.8.) Defendants, however, emphasize that they do not have the burden to provide plaintiff with the release forms. (ECF No. 64 p.4.)

12. Pending resolution of the Motion and given plaintiff's continued failure to comply with the Court's orders, the Court adjourned plaintiff's competency hearing *sine die*. (ECF No. 61 ¶ 1; ECF No. 63 pp.4, 5.)[1]

13. To the Court's knowledge, plaintiff has yet to respond to any discovery requests, offer to reschedule his deposition, or provide signed releases for his medical records.

14. "Both the [Rules] and a court's inherent authority to control its docket empower a district court to dismiss a case as a sanction for failure to follow procedural rules or court orders." *Knoll v. City of Allentown*, 707 F.3d 406, 409 (3d Cir. 2013). Dismissal is, however, recognized as a "drastic sanction." *Id.*

[1] At the March 28, 2022 telephone status conference, for which plaintiff's counsel did not appear, the Court noted that "[t]here's no way ... [to] have a competency hearing without .... any kind of discovery." (ECF No. 61 pp.3, 5.)

(quoting *Poulis v. State Farm and Casualty Co.*, 747 F.2d 863, 867 (3d Cir. 1984)). Therefore, before imposing a sanction, which would "deprive a party of [their] day in court and preclude review of potentially meritorious claims," a court must balance the six enumerated factors announced in *Poulis*. *Id.* at 409–10. These factors need not be considered "when [the] sanctions do not preclude *all* claims or defenses such that a party still has [their] day in court." *Id.* at 410.

15. Given the Third Circuit's determination that plaintiff presented "verifiable evidence concerning his potential incompetence," the Court recognizes its obligations to assess plaintiff's competency before considering the dismissal of this case. (ECF No.33-2 pp.8–13.) However, without plaintiff's cooperation in obtaining discovery relating to his competency, the Court is left with a Sisyphean task. The Court can continue to order plaintiff to respond to discovery, sit for his deposition, and be examined by an independent medical examiner. But plaintiff's behavior to date indicates that he will continue to refuse to comply with the Court's orders. If the Court schedules a competency hearing, plaintiff will likely not appear and, if he does appear, he will likely not permit himself to be examined. Thus, there is little chance that a competency hearing at this stage will yield a resolution of the issue the Third Circuit tasked upon this Court.

16. Accordingly, this case will be administratively terminated until such time that plaintiff is willing to either respond to discovery requests relating to his claims and/or alleged incompetency so that a competency hearing can be conducted.

Accordingly,

IT IS on this **20th** day of **October 2022** **ORDERED** that:

1. For efficient case management and preservation of judicial resources, this case is **ADMINISTRATIVELY TERMINATED**. Plaintiff may file a formal motion to reinstate this case by setting forth his: (a) responses to defendants' discovery requests relating to his claims and/or alleged incompetency, including the releases for his medical records, (b) availability for an independent medical examination; and (c) availability to be deposed.

2. The Motion is **DENIED** without prejudice. The Clerk is directed to terminate the Motion at ECF No. 57.

/s/ Edward S. Kiel
EDWARD S. KIEL
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
ESTHER SALAS
UNITED STATES DISTRICT JUDGE

MARTIN LUTHER KING
COURTHOUSE
50 WALNUT ST.
ROOM 5076
NEWARK, NJ 07101
973-297-4887

January 6, 2022

LETTER OPINION AND ORDER

Re: ***Mondelli v. Berkeley Heights Nursing & Rehabilitation Center, et al.***
Civil Action No. 16-1569 (ES) (ESK)

Dear counsel:

Before the Court is (i) Plaintiff's affidavit of prejudice and motion seeking recusal of the Undersigned pursuant to 28 U.S.C. §§ 144 and 455 (D.E. No. 45); *see also* D.E. No. 37), and (ii) Plaintiff's motion for an Order determining whether Magistrate Judge Edward S. Kiel has jurisdiction to conduct proceedings in this matter pursuant to 28 U.S.C. § 636, Federal Rules of Civil Procedure 72 and 73, and Local Civil Rules 72.1 and 73.1 (D.E. No. 44); *see also* D.E. Nos. 38 & 41). The Court writes for the parties and addresses each motion in turn.

I. RECUSAL

Plaintiff claims that the Undersigned's bias or prejudice is evidenced by the fact that she (i) dismissed his case in violation of the Federal Rules of Civil Procedure; (ii) demonstrated deep-seated antagonism towards Plaintiff "in previously implying that his counsel should withdraw rather than preserve Plaintiff's rights in light of his disability"; and (iii) issued a text order indicating that there may be a reevaluation of whether dismissal is warranted. (D.E. No. 37 at 2 (ECF Pagination); D.E. No. 45-3 at 4). Defendants oppose the Undersigned's recusal. (D.E. No. 47).

Pursuant to Section 144:

> 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 good 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.

"The mere filing of an affidavit of bias pursuant to 28 U.S.C. § 144 does not require a trial judge to disqualify [her]self from a particular case." *United States v. Dansker*, 537 F.2d 40, 53 (3d Cir. 1976). "Indeed, if the affidavit submitted is legally insufficient to compel [her] disqualification," it is the judge's duty to preside. *Id.* Accordingly, "a trial judge need only recuse [her]self if [she] determines that the facts alleged in the affidavit, taken as true, are such that they would convince a reasonable [person] that [she] harbored a personal, as opposed to a judicial, bias against the movant." *Id.*

Akin to Section 144, recusal under Section 455(a) is appropriate when "a reasonable person, with knowledge of all the facts, would conclude that the judge's impartiality might reasonably be questioned." *Arrowpoint Cap. Corp. v. Arrowpoint Asset Mgmt., LLC*, 793 F.3d 313, 329 (3d Cir. 2015) (quoting *United States v. Wecht*, 484 F.3d 194, 213 (3d Cir. 2007)); (*see* D.E. No. 45-3 at 4 (conceding that "[t]he analysis under both sections is the same[.]")). Section 455(b)(1) provides for recusal where a judge has "a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."[1] As to the substantive aspect of Sections 144 and 455, "[i]f a party claims that a judge should recuse because of personal bias, prejudice or lack of impartiality toward that party, he generally must show that such bias or prejudice is grounded in extrajudicial sources, such as personal animus[.]" *Thompson v. Eva's Village & Sheltering Program*, No. 04-2548, 2005 WL 2474930, at *2 (D.N.J. Oct. 5, 2005); *see also United States v. Sciarra*, 851 F.2d 621, 635 (3d Cir. 1988) (finding that Section 455(a) "requires only the objective appearance of bias, subsection (b)(1) requires bias-in-fact"). Extrajudicial bias is "not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings." *Johnson v. Trueblood*, 629 F.2d 287, 291 (3d Cir. 1980). Without extrajudicial bias, "a party seeking recusal must show that a judge has a 'deep-seated and unequivocal antagonism that would render fair judgment impossible . . . .'" *Thompson*, 2005 WL 2474930, at *2 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

Plaintiff fails to demonstrate that the Undersigned either lacks impartiality, has a personal bias or prejudice against him derived from extrajudicial sources, or harbors a deep-seated antagonism that renders fair judgment impossible. As to the first reason, "incorrect rulings do not prove that a judge is biased or prejudiced," although errors may require additional or new proceedings. *United States v. Gallagher*, 576 F.2d 1028, 1039 (3d Cir. 1978); *Jacobsen v. Citi Mortg. Inc, (NJ)*, 715 F. App'x 222, 223 (3d Cir. 2018) ("Adverse legal rulings are not proof of prejudice or bias, and are almost never a basis for recusal."); *Arrowpoint*, 793 F.3d at 330 ("[A]dverse rulings—even if they are erroneous—are not in themselves proof of prejudice or bias."); *Smith v. Danyo*, 585 F.2d 83, 87 (3d Cir. 1978) ("The Smiths also object that some rulings were wrong. Such errors, even compounded, do not satisfy the requirements of [§] 144."). The Supreme Court has noted that while "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion" they are "[a]lmost invariably[] . . . proper grounds for appeal, not

---

[1] The Court construes Plaintiff's motion under Section 455, subparts (a) and (b)(1) only. (*See* D.E. No. 45-3 at 3–6).

for recusal." *Liteky*, 510 U.S. at 555. Notably, Plaintiff already succeeded on appeal because a competency hearing did not occur prior to dismissal.

As to the second reason, the exchange between the Undersigned and Plaintiff's counsel on April 27, 2018, does not reflect "deep-seated antagonism." (*See* D.E. No. 31 ("Tr.") at 9:16–10:16). By way of background, Plaintiff missed multiple discovery deadlines, which prompted Magistrate Judge Steven C. Manion to issue an order to show cause. (D.E. No. 17). Plaintiff requested that the matter be administratively terminated for 180 days, which the Court granted. (D.E. Nos. 18 & 19). On November 20, 2017, Plaintiff moved to extend the termination deadline and simultaneously sought Judge Mannion's recusal. (D.E. Nos. 20 & 21).[2] Accordingly, the April 27, 2018 dialogue regarding counsel's predicament—particularly in light of Plaintiff's apparent lack of communication with counsel and the case's posture—does not demonstrate favoritism or antagonism. *See, e.g.*, *Liteky*, 510 U.S. 555–56 (finding that "expressions of impatience, dissatisfaction, annoyance and even anger" do not establish bias and that "[a] judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune"). Importantly, the Court expressed no view on Plaintiff's rights or his alleged disability.[3] (*See generally* Tr.).

As to the final reason, Plaintiff takes issue with the Court's September 16, 2021 text order, which stated the following: "In light of the appellate ruling, the Clerk of Court shall reopen this matter so that the Court may proceed with a hearing to evaluate Plaintiff's competency and then **a reevaluation whether dismissal is warranted**." (D.E. No. 34 (emphasis added)). Plaintiff claims that the bolded portion of the text order was a "prejudicial statement" because he believes that "issues of [his] competency should be conducted first before any such statements are considered to be made." (D.E. No. 37 at 2 (ECF Pagination)). The text order does not purport to prejudge any issue in this case, including the issue of Plaintiff's competency. Rather, the text order mirrors the Third Circuit's instructions on remand: "We will therefore vacate the dismissal order and remand for the Court to examine [Plaintiff's] competency, as required by Federal Rule of Civil Procedure, **and to then reevaluate whether dismissal is warranted**." (D.E. No. 33-2, Third Circuit Opinion at 3 (emphasis added)).

Based on the above, a reasonable person could not find that the Undersigned is unable to render a fair and impartial decision or harbors any "deep-seated antagonism" toward Plaintiff.

---

[2] The Undersigned denied Plaintiff's request to recuse Judge Mannion on April 27, 2018 (Tr. at 8:2–5), and the matter was reassigned to Judge Kiel in September 2021 after remand from the Third Circuit.

[3] Furthermore, because the Third Circuit remanded this matter for a competency determination in the first instance, there are no "previously-expressed views or findings" of the Undersigned that were "determined to be erroneous" with respect to Plaintiff's competency. *See United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977); (*contra* D.E. No. 45-3 at 5–6). Nor is there any evidence that recusal would "preserve the appearance of justice." *See Robin*, 553 F.2d at 10. Instead, recusal would "entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *See id.*

II. MAGISTRATE JUDGE KIEL'S JURISDICTION

Plaintiff maintains that following remand from the Third Circuit, Judge Kiel scheduled and conducted status conferences without the parties' consent to proceed before a magistrate judge. (D.E. No. 44-3 at 1–2). On October 4, 2021, the same day of the first scheduled conference, Plaintiff objected to Judge Kiel's jurisdiction to conduct proceedings, and by letter dated October 18, 2021, he reiterated the objection. (D.E. Nos. 38 & 41). On October 29, 2021, during a subsequent conference, Judge Kiel ordered Plaintiff to file a formal motion detailing his objection. (D.E. No. 42).[4] In his motion, Plaintiff argues that Judge Kiel may not conduct any proceedings pursuant to 28 U.S.C. § 636 without his consent, or alternatively, Judge Kiel may conduct dispositive matters—including any proceedings in connection with remand—by making recommendations to the Undersigned pursuant to Rule 72. (D.E. No. 44-3 at 1–6; D.E. No. 44-1, Proposed Order). Defendants note that the parties did not consent to Judge Kiel's jurisdiction over any dispositive motions. (D.E. No. 46).[5] Otherwise, they take no position on Plaintiff's motion. (*Id.*).

Section 636(b)(1)(A) states that a district judge "may designate a magistrate judge to hear and determine any pretrial matter pending before the court" except for certain dispositive motions. A non-exhaustive list of excepted motions include those that seek injunctive relief, judgment on the pleadings, and summary judgment, and motions "to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action." 28 U.S.C. § 636(b)(1)(A); *Virgin Islands Water & Power Auth. v. Gen. Elec. Int'l Inc.*, 561 F. App'x 131, 133 (3d Cir. 2014) ("This list of dispositive motions is not an exhaustive one, but instead merely 'informs the classification of other motions as dispositive or nondispositive.'" (citation omitted)). Local Civil Rule 72.1(a)(2) provides for the same exceptions and adds motions "for judicial review of administrative determinations, for review of default judgments and for review of prisoners' petitions challenging conditions of confinement." Notably, however, a district judge "may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A) . . . ." 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b)(1) (providing that when a magistrate judge reviews a dispositive matter without the parties' consent, "[a] record must be made of all evidentiary proceedings" and the "magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact"); *see also* L. Civ. R. 72.1(a)(2); *Equal Emp. Opportunity Comm'n v. City of Long Branch*, 866 F.3d 93, 99 (3d Cir. 2017).

---

[4] His Honor also ordered that Plaintiff file a formal motion for the Undersigned's recusal, addressed *supra*. (D.E. No. 42).

[5] The procedure for consent exists under Federal Rule of Civil Procedure 73, which provides that "[w]hen authorized under 28 U.S.C. §636(c), a magistrate judge may, if all parties consent, conduct a civil action or proceeding, including a jury or nonjury trial." Fed. R. Civ. P. 73(a)–(b); L. Civ. R. 73.1.

The Federal Rules do not squarely address whether competency hearings under Rule 17 are excepted from a magistrate judge's purview. But it appears that magistrate judges regularly conduct competency hearings under subparagraphs (A) and (B) of Section 636(b)(1), whether by final determination or report and recommendation. *Compare Adamson v. Hayes*, No. 05-2286, 2010 WL 5069885, at *5–6 (D. Ariz. Dec. 7, 2010) (final determination), *and Lewis v. Karas*, No. 20-7532, 2020 WL 5913740, at *1 (S.D.N.Y. Oct. 5, 2020) (commenting on the same), *with Smith v. Howell*, No. 14-1374, 2016 WL 426603, at *1 (W.D. Okla. Feb. 3, 2016) (report and recommendation), *and Thompson v. Covenant Transp., Inc.*, No. 07-0275, 2008 WL 4372789, at *8 n.5 & 9 (W.D.N.C. Sept. 22, 2008) (same).

Here, Plaintiff's argument looks beyond the competency determination to the Third Circuit's directive, instructing the Court to "then reevaluate whether dismissal is warranted." (D.E. No. 33-2 at 1; *see* D.E. No. 44-3 at 4–6). Accordingly, because the Court must reevaluate dismissal after and in consideration of the competency determination, the Court may refer the competency proceeding to Magistrate Judge Kiel pursuant to 28 U.S.C. § 636(b)(1)(B) and Rule 72(b)(1). This course of action is consistent with other Rule 17 proceedings that have been conducted by magistrate judges throughout the country by way of reports and recommendations. *See, e.g.*, *Smith*, 2016 WL 426603, at *1; *Thompson*, 2008 WL 4372789, at *8 n.5 & 9.

III. CONCLUSION

For the foregoing reasons, Plaintiff's request for the Undersigned's recusal is denied. *See In re Kensington Int'l Ltd.*, 353 F.3d 211, 224 (3d Cir. 2003) (noting that "[d]iscretion is confided in the district judge in the first instance to determine whether to disqualify [her]self" (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988))). Plaintiff's competency determination is referred to Magistrate Judge Kiel, who shall issue a report and recommendation to the Undersigned in due course. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b)(1); L. Civ. R. 72.1(a)(2).

Accordingly, IT IS on this 6th day of January 2022,

ORDERED that Plaintiff's request for the Undersigned's recusal (D.E. Nos. 37 & 45) is DENIED; and it is further

ORDERED that Magistrate Judge Edward S. Kiel shall conduct all necessary proceedings to determine Plaintiff's competency and issue a report and recommendation to the Undersigned, *see* 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1) and L. Civ. R. 72.1(a)(2); and it is further

ORDERED that Docket Entry Numbers 44 and 45 are TERMINATED.

s/Esther Salas
Esther Salas, U.S.D.J.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-1460

VICTOR MONDELLI,
Appellant

v.

BERKELEY HEIGHTS NURSING AND REHABILITATION CENTER;
MARINA FERRER; DIANE WILVERDING

(District Court No. 2:16-cv-01569)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, SMITH*, *Circuit Judges*

The petition for rehearing filed by the Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the

---

* Judge Smith's vote is limited to panel rehearing only.

panel and the Court en banc, is denied.

BY THE COURT,

s/ *Cindy K. Chung*
Circuit Judge

Date: May 1, 2025
PDB/cc: All Counsel of Record