FILED
2007 AUG -3 PM 4:55
CLERK, US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ________ DEPUTY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. EP-06-CR-1369FM
	)	
JOHN TRAVIS KETNER,	)	
ELIZABETH "BETTI" FLORES	)	
	)	
Defendants.	)	

MARTIE JOBE'S MOTION TO RECUSE THE HONORABLE FRANK MONTALVO SO AS TO ALLOW HIM TO TESTIFY AS A DEFENSE WITNESS REGARDING THE SETTLEMENT OF THE CLASS ACTION LAWSUIT AT ISSUE AND TO PRESERVE THIS COURT'S APPEARANCE OF IMPARTIALITY[1]

INTRODUCTION

Movant Martie Jobe is a licensed attorney practicing and residing in El Paso County, Texas. Movant has been identified as an uncharged co-conspirator by and through the artifice of a description in the Introduction to the June 8, 2007 Information filed in this cause charging Defendant Travis Ketner with four different counts of criminal violations. Subsequently, Assistant U.S. Attorney Debra Kanof confirmed in writing that Movant is a target of the current criminal investigation in this cause.

STANDING AND TIMING OF THE MOTION

This motion is brought pursuant to 28 U.S.C. §455(a) and (b), which bear on the extent to which a judge should disqualify himself in a "proceeding." "Proceeding," for purposes of these

---

[1] In accordance with Western District of Texas Local Rule AT-4, this motion was tendered to Assistant United States Attorney Debra Kanof on the morning of August 3, 2007. As of the time of filing said motion, the United States has not indicated whether it opposes or joins in this motion.

sections, includes "pretrial, trial, appellate review, *or other stages of litigation.*" 28 U.S.C. §455(d)(1). The general rule on timeliness requires that "one seeking disqualification must do so at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification." *Travelers Ins. Co. v. Liljeberg Entrs., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994).

To her knowledge, Martie Jobe has not been charged with a crime in the above-entitled matter, and is thus "pre-indictment." On July 26, 2007, however, this Court issued an order disqualifying counsel in this same cause number who sought to represent three individuals who have not been indicted. In issuing the disqualification order, the Court held that it had the jurisdiction and authority to issue an order disqualifying counsel from representing the three unindicted individuals because,

> Nonetheless, the undersigned judge has authorized and supervised the interceptions and signed the search warrants referenced in the Government's Motion to Disqualify, and additionally accepted Ketner's and Flores' guilty pleas in this cause. By logical extension, it seems the Court's supervisory role in the above-captioned cause provides a sufficient jurisdictional basis for entertaining the merits of the Government's Motion to Disqualify...
>
> In addition, the Court finds it has what has been referred to as "anomalous jurisdiction" to disqualify Stillinger (footnote and citations omitted). That anomalous jurisdiction gives this Court authority to entertain the merits of matters arising from federal criminal investigations under its supervision, regardless of whether the targets of such investigation are actually under indictment. *Memorandum Opinion and Order Regarding Attorney Stillinger's Motion to Strike And The Government's Motion To Disqualify*, 3:06-CR-01369-FM, Doc. No. 24, at 23-24.

Martie Jobe respectfully submits herein that to the extent this Court has jurisdiction to disqualify counsel with respect to three unindicted individuals on the basis of its anomalous jurisdiction and supervisory role over this federal criminal investigation, so too does it have the

jurisdiction and obligation to examine the recusal issues raised herein with respect to another unindicted individual.

THE UNITED STATES ATTORNEY'S ALLEGATIONS IN COUNT THREE OF THE JUNE 8, 2007 INFORMATION CHARGING DEFENDANT TRAVIS KETNER

The only allegations involving movant Jobe in the 18-page Information state that a different uncharged co-conspirator instructed Defendant Ketner to represent former El Paso County Commissioner Betti Flores in a personal legal matter in order to secure Flores' vote to approve the settlement of a class action lawsuit in which Martie Jobe represented El Paso's Sheriff Officers against El Paso County. Important and critical details about the overtime lawsuit, its origins, history and resolution are omitted from the summary of the Conspiracy or the Overt Acts in the Information. Specifically, the class action lawsuit included claims for violations of the federal Fair Labor Standards Act, was certified as a class action, and was pending before this Honorable Court. More specifically, the Honorable Judge of this Court, Frank Montalvo, entered a detailed and extensive order approving the settlement of the lawsuit after the El Paso County Attorney, Martie Jobe, and Jobe's co-counsel (a board certified labor lawyer who specializes in FLSA cases) all jointly moved the Court to do so. Had the United States Attorney disclosed these facts to the Court, it is likely that this motion would be unnecessary and moot because federal judges have an affirmative duty to disqualify themselves when they become aware of facts and circumstances that require mandatory disqualification such as knowledge of material facts, and when there is a likelihood that said judge would be a material witness in a cause pending before the judge.

THE SHERIFF'S OFFICERS' CLASS ACTION LAWSUIT AT ISSUE

Upon information and belief, the class action lawsuit to which the Ketner Information refers

is Cause No.EP-02-CA-0564-FM, styled *Juan Acosta, et al.v. The County of El Paso, Texas*. Martie Jobe filed the lawsuit on behalf of the Sheriff Officers in November of 2002. The case was initially assigned to the Honorable Judge Philip R. Martinez, who presided over the first stages of the case. Upon the recommendation of United States Magistrate Judge Michael McDonald, Judge Martinez entered an order certifying the class and staying the FLSA federal claims pending the arbitration of the state law breach of contract claims. On September 12, 2003, United States District Judges Martinez and David Briones entered an order transferring multiple cases to the dockets of newly appointed federal judges Kathleen Cardone and Frank Montalvo. The class action lawsuit at issue was reassigned from Judge Martinez to Judge Montalvo in that order.

On July 7, 2004, the Court-facilitated class notice to putative opt-in class members was mailed to more than 800 current and former sheriff officers who comprised the putative class. The deadline to opt-in was August 4, 2004. On August 6, 2004, this Honorable Court lifted Judge Martinez's previous stay of the FLSA claims and issued a scheduling order setting the case for trial. This Court ordered Martie Jobe to submit a written offer of settlement to the County no later than October 6, 2004, and Jobe complied with said order. On November 30, 2004, the Assistant County Attorney representing the County initiated settlement discussions immediately prior to the Sheriff's deposition. That same day, a tentative agreement was reached with the Assistant County Attorney as to the dollar amount of the potential settlement. On December 7, 2004, the Assistant County Attorney presented the settlement offer to the El Paso County Commissioner's Court in closed executive session as permitted under state law, and Commissioner's Court authorized the Assistant County Attorney to bind the County to a settlement figure of $635,000.00. The Assistant County Attorney then executed several documents on behalf of the County, including a Joint Motion for

Approval of Settlement on December 16, 2004, which specifically requested this Court to find that the settlement amount was "fair, reasonable, and accurate." Judge Frank Montalvo entered the Order Approving the Settlement on December 17, 2004, and entered a Final Judgment that same day concluding the class action lawsuit.

JUDGE MONTALVO WILL BE A DEFENSE WITNESS IN ANY CRIMINAL CASE REGARDING THE CLASS ACTION LAWSUIT AT ISSUE

The Fair Labor Standards Act and Federal Rule of Civil Procedure 23(e) mandated that Judge Montalvo review, analyze, and approve any proposed settlement of the Sheriff Officers' class action lawsuit before entering his order of approval. The Court's role in this regard is not perfunctory, and district courts have a duty to determine whether the settlement is fair, reasonable, and adequate. *Parker v. Anderson*, 667 F.2d 1204, 1208-09 (5th Cir.), cert. denied, 459 U.S. 828, 103 S. Ct. 63, 74 L. Ed. 2d 65 (1982); and *Camp v. Progressive Corp.,* 2004 U.S.Dist.LEXIS 19172 (E.D. La.2004)(court must employ Fed.R.Civ.P. 23(e) factors to verify that a settlement in a collective action under the FLSA is fair and reasonable, and devoid of fraud or collusion). Factors that Judge Montalvo was required to and did analyze included (1) the complexity, expense, and likely duration of the litigation; (2) the stage of the proceedings and the amount of discovery completed; (3) the factual and legal obstacles prevailing on the merits; (4) the possible range of recovery and the certainty of damages; and (5) the respective opinions of the participants, including class counsel, class representative, and the absent class members. *Parker*, 667 F.2d 1204, at 1209. Moreover, in addition to evaluating the substantive aspects of the proposed settlement, the Court examined "the process by which the settlement was arrived at, to make sure that the settlement is not the product of fraud, overreaching, or collusion." *Murillo v. Tex. A&M Univ. Sys.*, 921 F.Supp. 443, 445

(S.D.Tex.1996); *Camp v. Progressive Corp.*, 2004 U.S.Dist.LEXIS 19172 (E.D. La.2004).

As set forth above, the allegations against Martie Jobe contained in the Ketner Information and as reported in the *El Paso Times* appear to be that Jobe conspired with others to bribe County Commissioner Betti Flores to approve the settlement of the class action lawsuit by providing Flores a criminal lawyer for a personal legal matter. Any such allegations are false, and would be vigorously challenged in front of a jury and/or at trial to Judge Montalvo alone. In addition to a myriad of witnesses who would testify regarding the dearth of any factual support for these allegations, and the factual and legal impossibility associated with them, Jobe would also argue that no bribe was necessary because the settlement of the lawsuit was fair and reasonable, a conclusion that Judge Montalvo himself reached in his capacity as presiding judge over the class action lawsuit.

Moreover, recently acquired campaign finance reports of former Commissioner Betti Flores reveal that she retained Defendant Ketner before Judge Montalvo even unfroze the class action lawsuit in August of 2004. It was not until August of 2004 that Judge Montalvo lifted Judge Martinez's order staying the FLSA claims, and ordered Martie Jobe to make a settlement demand on El Paso County. Flores' campaign finance reports reveal that Flores retained Ketner in June of 2004, while the class action lawsuit was frozen, and that before, during, and after the settlement of the class action lawsuit, Flores paid Ketner attorney's fees from her campaign account in a sum that exceeded $5,000.00. Notwithstanding that any allegation that Flores received a "free lawyer" in return for a vote to approve the lawsuit settlement that Judge Montalvo himself approved is unsupported in fact, Judge Montalvo has become a defense witness on the material issue of whether a bribe was even needed in the first place.

The Ketner Information alleges a bribe in connection with the settlement of a lawsuit for "approximately $700,000.00." In the end, El Paso County and the Sheriff Officers jointly submitted to Judge Montalvo a proposed settlement agreement that provided for a payment of $635,000.00. Judge Montalvo approved the parties' proposed settlement and in doing so necessarily considered "the possible range of recovery," as explained *supra*. Judge Montalvo concluded that a figure of $635,000.00, when assessed against the other Rule 23 factors listed *supra*, was within "the possible range of recovery." The moving papers that the lawyers in the civil lawsuit submitted to Judge Montalvo do not explain the process by which $635,000.00 figure was derived, although they do explain the *pro rata* distribution scheme and the incentive awards given to class members who actively participated in the litigation.

Fed.R.Evid. 401 defines "relevant evidence" as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Judge Montalvo's conclusions regarding the "possible range of recovery" are relevant because an ultimate settlement or attempted settlement within that range renders the need for any bribe to secure it less probable. Jobe is entitled to argue that not only is any allegation regarding a conspiracy to pay a bribe false, there was never any reason to pay a bribe in the first place because all contemplated settlement figures were "within the possible range of recovery."

There is exactly one person in the world whose job it was to evaluate and analyze possible ranges of recovery in the lawsuit at issue, and who acted upon and rendered a conclusion thereon: Judge Montalvo. Judge Montalvo is the only person and witness who can speak to the extent of his duty-bound analysis and considerations in establishing the "possible range of recovery." The Court

never rendered any written opinion regarding this analysis, and the Court record does not reflect any submissions to the Court that would have allowed it to conduct its analysis. Accordingly, the materials on which the Court relied to reach its ultimate conclusion with respect to possible and reasonable "ranges of recovery" are all "extra-judicial," and are all subjects on which only Judge Montalvo can testify.

Finally, as explained *supra*, in presiding over the class action lawsuit and in approving its settlement, this Court must have necessarily examined "the process by which the settlement was arrived at, to make sure that the settlement is not the product of fraud, overreaching, or collusion." *Murillo v. Tex. A&M Univ. Sys.*, 921 F.Supp. 443, 445 (S.D.Tex.1996). Judge Montalvo never rendered any written opinion or order memorializing his findings that the settlement was not the product of fraud or collusion, rendering any such conclusion and any materials relied upon to reach it "extra-judicial." As Judge Montalvo's examination in this regard necessarily preceded his approval of any settlement, Martie Jobe is entitled to present to the jury that Judge Montalvo was not only duty-bound to conduct the examination, but she is entitled to present to the jury the extent of Judge Montalvo's efforts in resolving this issue and his ultimate conclusion. The existence of an affirmative duty to verify the absence of fraud, and Judge's Montalvo's actual conclusion verifying such absence, are *ipso facto* relevant to the issue of the existence of any fraud. Judge Montalvo having been affirmatively charged with this duty, Martie Jobe would be entitled to present his testimony to the jury in this regard.

MARTIE JOBE HAS A 6TH AMENDMENT RIGHT TO CALL JUDGE MONTALVO AS A DEFENSE WITNESS

For the reasons explained *supra*, Martie Jobe has a Sixth Amendment right to seek to compel

the attendance of the Court as a witness on her behalf. The United States Supreme Court has written with respect to the Sixth Amendment,

> The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States. This Court had occasion in In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948), to describe what it regarded as the most basic ingredients of due process of law. It observed that:
>
> 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-a right to his day in court-are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' 333 U.S. at 273, 68 S.Ct. at 507 (footnote omitted).
>
> *Washington v. Texas*, 388 U.S. 14, 18, 87 S.Ct. 1920, 1923 (1967).

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, and the right to present the defendant's version of the facts to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, so too does she have the right to present her own witnesses to establish a defense. This right is a fundamental element of due process of law.

Federal courts allow the testimony of judges in the criminal cases where constitutional rights surrounding life and liberty are at play. In *Wilson v. Lash*, 457 F.2d 106 (7th Cir.), cert. denied, 409 U.S. 881 (1972), the trial judge testified at a habeas corpus hearing that the performance of the habeas petitioner's attorney was above-average, responding to a claim of ineffective assistance of counsel. *Id.*, at 110. In habeas cases, and to an even greater extent in criminal cases, an overriding concern for the constitutional rights surrounding life and liberty outweigh any judicial interest

militating against a judge testifying in a subsequent hearing, such as a judicial interest in finality of litigation. If it was proper for the trial judge to testify *against* the habeas petitioner in *Wilson*, the competency of a trial judge to testify with respect to exculpatory issues in a criminal case is beyond challenge. *See Weidner v. Thieret*, 932 F.2d 626, 633 (7th Cir. 1991)(citing *Sanders v. United States*, 373 U.S. 1, 8, 83 S.Ct. 1068 (1968) and allowing the affidavit of a state judge into evidence to explain the basis of a prior ruling), cert. denied, 502 U.S. 1036 (1992).

Before ever being formally charged, and before being afforded any discovery in this matter, Martie Jobe has identified Judge Montalvo as a potential witness on her behalf, on substantive areas on which any defense will be based. She also enjoys a Sixth Amendment right to seek compulsory process for any and all defense witnesses, thus creating a possible scenario whereby this Court is forced to decide whether its own conclusions and conduct in the underlying class action lawsuit mandate its testimony in the instant action.

FRE 605 WOULD PREVENT JUDGE MONTALVO FROM TESTIFYING ON MARTIE JOBE'S BEHALF AT TRIAL IF HE REMAINED AS TRIAL JUDGE, VIOLATING MARTIE JOBE'S SIXTH AMENDMENT RIGHTS

Fed.R.Evid. 605 is clear and unambiguous: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." The Tenth Circuit has written,

> (FRE 605's) prohibition on judicial testimony eliminates difficult questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Adherence to Rule 605 also prevents prejudice which may arise from a judge's influential position with the jury.

United States v. Nickl, 427 F.3d 1286, 1293 (10th Cir. 2005). Accordingly, should Judge Montalvo remain as the presiding judge in this criminal matter, Martie Jobe's constitutional rights would be violated because the United States would seek to preclude Judge Montalvo from testifying for Jobe on the basis of FRE 605. Moreover, FRE 605 would prevent Judge Montalvo from being a witness at any recusal hearing, depriving any reviewing Court assessing the issue of Judge Montalvo's recusal the opportunity for a full record. "Trial" as used in Rule 605 encompasses any evidentiary hearing. *Cheeves v. Souther Clays, Inc.*, 797 F.Supp. 1570, 1582 (M.D. Ga. 1992). A judge presiding in a recusal matter is incompetent to testify as a witness pursuant to Federal Rule of Evidence 605. *Id.*; *United States v. Roebuck*, 271 F. Supp. 2d 712, 720 (D. V.I. 2003) ("A search by this Court revealed no case where a judge has been required to submit to discovery or compelled to testify in connection with a motion for his disqualification."); *United States v. Jonnet*, 597 F. Supp. 999, 1003 (W.D. Pa. 1984) (quashing subpoena served on judge presiding over recusal motion hearing).

Were Martie Jobe to be charged and become a defendant in this matter, the only means by which Jobe's Sixth Amendment right to present a material witness in her defense would be by transferring this matter to a new trial judge with no connection to the underlying class action lawsuit at issue.

JUDGE MONTALVO'S RECUSAL IS MANDATORY UNDER 28 U.S.C. 455(b)(5)(iv) BECAUSE HE IS LIKELY TO BE A MATERIAL WITNESS FOR THE DEFENSE IN THIS PROCEEDING

When "to the judge's knowledge (he is) likely to be a material witness in the proceeding," he is required to recuse himself and there is no room for discretion. 28 U.S.C. 455(b)(5)(iv)("He shall also disqualify himself in the following circumstances…He or his spouse…(i)s to the judge's

knowledge likely to be a material witness in the proceeding"). "Proceeding" encompasses every state of the litigation, and thus would include any recusal hearing. 28 U.S.C.§455(d)(1)("proceeding includes pretrial, trial, appellate review, or other stages of litigation"). For the reasons stated *supra*, and so as to preserve Martie Jobe's 6th Amendment and Due Process rights, Judge Montalvo is likely to be a material defense witness, mandating his recusal from the instant action.

JUDGE MONTALVO SHOULD RECUSE HIMSELF UNDER 28 U.S.C. 455(a) BECAUSE HIS OVERSIGHT, PERSONAL KNOWLEDGE, AND INVOLVEMENT IN THE CLASS ACTION LAWSUIT AT ISSUE WOULD BE USED AS A SWORD AGAINST THE DEFENSE, THEREBY JEOPARDIZING THE IMPARTIALITY OF THE PROCEEDINGS

"Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a). A judge contemplating recusal should not ask whether he or she believes he or she is capable of impartially presiding over the case. The language of §455(a) creates an objective standard, and every circuit has adopted some version of the "reasonable person standard.[2]" In the Fifth Circuit, the standard for judicial disqualification under 28 U.S.C. § 455 is whether a reasonable person, with full knowledge of all the circumstances, would harbor doubts about the judge's impartiality. *Vieux Carre Prop. Owners v. Brown*, 948 F.2d 1436, 1448 (5th Cir. 1991). The Fifth Circuit has also written that because 28 U.S.C. §455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to

---

[2] See, e.g., *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 1793 (1999); *In re Hatcher*, 150 F.3d 631, 637 (7th Cir. 1998); *Baldwin Hardware Corp. v. Franksu Enter. Corp*, 78 F.3d 550, 557 (Fed. Cir. 1996); *Blanche Rd. Corp. v. Bensalem Township*, 57 F.3d 253, 266 (3rd Cir. 1995); *United States v. Lovaglia*, 954 F.2d 811, 815 (2nd Cir. 1992); *Vieux Carre Prop. Owners v. Brown*, 948 F.2d 1436, 1448 (5th Cir. 1991); *In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991); *United States v. Nelson*, 922 F.2d 311, 319 (6th Cir. 1990); *Little Rock Sch. Dist. V. Arkansas*, 902 F.2d 1289, 1290 (8th Cir. 1990); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988); *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987); *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986); *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).

consider how his participation in a given case looks to the average person on the street. *Potashnick v. Port City Costruction Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980).

In this case, were Martie Jobe to be formally charged, she would be ostensibly accused of seeking to illegally manipulate the settlement of the class action lawsuit that this Court was duty-bound to evaluate for reasonableness, fairness and the absence of fraud. Judge Montalvo's presiding over such a criminal trial would convey to the "average person on the street" (and to a reasonable juror, for that matter) that Judge Montalvo was presiding over an investigation of an apparent fraud perpetrated on him, creating a taint and stigma of guilt that no prophylactic or curative instruction could address. The appearance of Judge Montalvo's presiding over a criminal trial in which the United States could argue that Martie Jobe allegedly committed a fraud on this Court in securing the class action settlement would irreparably skew any and all burdens of proof.

Moreover, during the course of any trial, Judge Montalvo would be permitted to question Martie Jobe regarding her activities in the class action lawsuit and representations made to the Court during the course of it. It is well-settled that it is "within the prerogative of a federal judge to manage the pace of a trial, to comment on the evidence, and even to question witnesses and elicit facts not yet adduced or clarify those previously presented." *E.g., United States v. Reyes*, 227 F.3d 263, 265 (5th Cir. 2000); see also *Calif. Ins. Co. v. Union Compress Co.*, 133 U.S. 387, 417, 33 L. Ed. 730, 10 S. Ct. 365 (1890)("In the courts of the United States, as in those in England, from which our practice was derived, the judge, in submitting a case to a jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, call their attention to parts of it which he thinks important, and express his opinion upon the facts . . . .")(quotation and citation omitted). The Federal Rules of Evidence also explicitly provide for a Court's interrogation of

witnesses. Fed.R.Evid. 614(b)("The court may interrogate witnesses, whether called by itself or by a party").

Judge Montalvo, in examining Martie Jobe about her conduct in the settlement of the class action lawsuit that Judge Montalvo approved, all of which was beyond reproach, would nevertheless create the impression of acting as a second prosecutor, thus creating an irreparably prejudicial situation. Morever, both the United States and the defense would call expert witnesses to testify regarding the reasonability of any and all settlement figures for purposes of establishing or negating the need for any bribe to secure a settlement. Were Judge Montalvo to remain the trial judge, he would necessarily preside over hearings regarding the qualifications and competency of expert witnesses whose testimony might criticize his own finding that the settlement figure was fair and reasonable. In other words, were the United States to offer an expert witness to testify that a bribe was needed to secure any settlement exceeding, say, $100,000.00, because of an alleged weakness in Ms. Jobe's case, Judge Montalvo would be forced to rule on the admissibility of witnesses and evidence criticizing his own findings in the class action litigation. Judge Montalvo's placement in any such scenario would certainly cast doubt on the impartiality of the proceedings.

A federal judge, by virtue of his or her position in presiding over a trial and its lawyers, jurors, and witnesses, automatically bears the imprimatur of character, credibility, and reliability. Were the impression conveyed that Judge Montalvo was investigating and presiding over a prosecution of Martie Jobe for alleged malfeasance in his Court in securing a settlement that Judge Montalvo himself approved, Jobe would never be able to overcome the weight of any such impression given the prestige and credibility of the judicial office as compared to her position as a mere litigant. The United States would in effect be in a position to convey an argument to the jury

that Martie Jobe should be convicted not only on the basis of fact and the law, but also because she allegedly committed a fraud on Judge Montalvo.

The Fifth Circuit has zero-tolerance for even the *appearance* of impartiality. In *Patterson v. Mobil Oil Corp.,*335 F.3d 476 (5th Cir. 2003), one of the parties moved to recuse the trial judge because the judge's former law partner (not the trial judge) represented another party "more than twenty-five years ago," *Patterson*, 335 F.3d at 483-484, and also because the trial judge was involved in similar but unrelated litigation "twenty-seven years ago." *Id.,* at 482. The Fifth Circuit held that even though nearly three decades had passed and the trial judge had not represented any of the parties before him nor participated in any prior litigation among the parties, it was a "close call," mandating the judge's recusal under §455(a).

> When considering a claim under § 455(a), we must consider "whether a reasonable and objective person, knowing all of the facts, would *harbor doubts* concerning the judge's impartiality." *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997) (internal quotation marks omitted) (emphasis added). This is because the goal of this provision is to "avoid even the appearance of partiality." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988) (internal quotation marks omitted). Thus, recusal may be required even though the judge is not actually partial. *In re Cont'l Airlines Corp.*, 901 F.2d 1259, 1262 (5th Cir. 1990).
>
> At first glance, a reasonable person might be inclined to think Judge Cobb could be biased in favor of his former law partner and firm, especially given Judge Cobb's participation in at least one similar case. But a reasonable person would temper this inclination with the knowledge that the events in question occurred almost three decades ago. Thus, considering *all* the relevant facts, one could conclude that Judge Cobb did not abuse his discretion with regard to § 455(a). Nevertheless, we recognize that this is a close question. "'If the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal.'" *In re Chevron*, 121 F.3d at 165 (quoting *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995)); *see also In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1998) (noting that "'people

> who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges'" (quoting *Liljeberg*, 486 U.S. at 864-65)). We are bound to conclude that, given the specific facts alleged in the plaintiffs' original and supplemental motions to disqualify, Judge Cobb should have recused himself under § 455(a). Thus, we need not address the other provisions of § 455.
>
> *Patterson*, 335 F.3d at 484-85.

If an "almost three decades" gap between the *Patterson* lawsuit and its trial judge's participation in similar but unrelated litigation and his law partner's prior representation of one of the parties is a "close call" mandating recusal, then Judge Montalvo's having presided over and analyzed the settlement of the lawsuit Jobe is alleged to have illegally manipulated mandates this Court's disqualification as well.

EXHIBITS

In support of this motion, Martie Jobe relies on the following attached exhibits:

1. 6/8/07 Travis Ketner Information;
2. 7/6/07 Elizabeth "Betti" Flores Information;
3. 4/15/2003 Report and Recommendation of U.S. Magistrate Judge Michael McDonald;
4. 6/3/03 Order Adopting Report and Recommendation, by Judge Philip R. Martinez;
5. 9/12/03 Order Transferring Class Action Lawsuit to Judge Montalvo;
6. 8/6/04 Scheduling Order Issued by Judge Montalvo;
7. 12/16/04 Joint Motion By El Paso County and Sheriff Officers To Approve Settlement;
8. 12/17/04 Judge Montalvo's Order Approving Settlement; and
9. 12/17/04 Judge Montalvo's Final Judgment Terminating Case.

PRAYER

Martie Jobe recognizes that she not been formally charged, she has received no discovery, and she is not privy to the United States' investigation and Grand Jury activities. Moreover, she concedes that the issues raised herein are substantive enough that were they raised in post-indictment, pre-trial motions in limine or in other evidentiary motions, the analysis of each of these issues would require greater factual development and legal analysis. Jobe raises these issues at this time, however, not for the purpose of requesting the Court to analyze and render binding evidentiary rulings pre-indictment, but to make the Court and all parties aware now of issues and circumstances mandating this Court's recusal because of its approval of the lawsuit settlement Martie Jobe is alleged to have illegally sought to manipulate. An early resolution of these matters at the trial court level or on mandamus review at the Fifth Circuit would benefit all parties, would be in the interest of judicial economy, would guarantee the appearance of impartiality, and would ensure that Martie Jobe would be free to exercise the full range of her constitutional rights should she need to establish her innocence in this matter. Accordingly, she prays for this Court's recusal in this cause number.

Respectfully submitted,

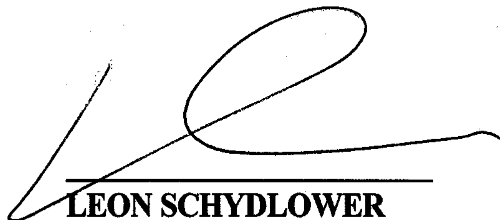
LEON SCHYDLOWER
Attorney at Law
303 Texas Avenue, 9th Floor
El Paso, Texas 79901
Tel No.: (915) 532-0900
Fax No.: (915) 532-0904

Leon Schydlower
State Bar No. 00795639

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd of August, 2007, the above motion was served via-hand delivery upon:

Debra P. Kanof
United States Attorney
700 E. San Antonio, Ste. 200
El Paso, TX 79901



LEON SCHYDLOWER

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiffs,)
)
v.) Case No. EP-06-CR-1369FM
)
JOHN TRAVIS KETNER,)
ELIZABETH "BETTI" FLORES)
)
Defendants.)

ORDER

The Court, having reviewed Martie Jobe's Motion to Recuse, finds that said Motion should be, in all things GRANTED.

SO ORDERED.

____
UNITED STATES DISTRICT JUDGE