UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA
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WADE ROBERTSON, 11 Civ. 01919 (ESH)

Plaintiff,

-against-

WILLIAM C. CARTINHOUR, JR., VESNA KUSTUDIC, TANJA MILICEVIC (a.k.a. TANJA POPOVIC), ALEKSANDAR POPOVIC, ALBERT SCHIBANI, PATRICK J. KEARNEY, MICHAEL BRAMNICK, ROBERT S. SELZER, CARLTON T. OBECNY, JAMES G. DATTARO, NEIL GURVITCH, ANDREW R. POLOTT, H. MARK RABIN and ELYSE L. STRICKLAND,

Defendants.

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MEMORANDUM OF LAW
OF DEFENDANTS ALBERT SCHIBANI,
PATRICK J. KEARNEY, MICHAEL BRAMNICK, ROBERT S. SELZER,
CARLTON T. OBECNY, JAMES G. DATTARO, NEIL GURVITCH,
ANDREW R. POLOTT, H. MARK RABIN and ELYSE L. STRICKLAND'S
IN OPPOSITION TO
PLAINTIFF'S MOTION TO RECUSE

Of Counsel:
Peter C. Contino, Esq.
Mariana Bravo, Esq.
Peter R. Chatzinoff, Esq.
Matthew A. Ranck, Esq.

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted jointly on behalf of defendants Albert Schibani, Patrick J. Kearney, Michael Bramnick, Robert S. Selzer, Carlton T. Obecny, James G. Dattaro, Neil Gurvitch, Andrew R. Polott, H. Mark Rabin and Elyse L. Strickland's (hereinafter "the Attorney Defendants")[1] in opposition to plaintiff Wade Robertson's Motion to Recuse this Court pursuant to 28 USC §455, for alleged extrajudicial findings and comments, and alleged bias. The motion should be denied as it is premised upon delusion and distortion, having support neither in the facts nor the law.

Robertson's motion is motivated by his frustration with his consistent failure to gain any measure of satisfaction in his multiple, groundless lawsuits, and his refusal to acknowledge that these failures are owing to their lack of merit in fact or law. Now, unable to wear down the defendants, Robertson moves to recuse this Honorable Court in this matter, having unsuccessfully done so in the prior, related case, *Robertson v. Cartinhour,* 09-Civ 1642 (ESH) (the "Prior Action") .

As detailed below, recusal is unwarranted and inappropriate as (a) there were no extrajudicial proceedings in which Robertson had an interest; (b) the Court offered no opinion on any matters not properly before it; and (c) there is no evidence or even suggestion of bias by this Court. Rather, Robertson simply wants a new judge, hoping for better luck with a judge unfamiliar with his legacy of frivolous and spurious legal gamesmanship, much less one who did not preside at the trial of the Prior Action (wherein a jury determined that Robertson had breached his duties to co-defendant William C. Cartinhour, Jr., procured an unconscionable release from him by undue influence, and absconded with millions of dollars of his money).

[1] Defendant Albert Schibani, here defined as one of the Attorney Defendants, was not counsel to Cartinhour in the litigation of the Prior Action, and references to the conduct of that litigation exclude him.

FACTUAL AND PROCEDURAL OVERVIEW

Robertson filed a complaint in the Prior Action in 2009, seeking declaratory judgment against Cartinhour[2]. Robertson alleged in the Prior Action, as he does in the Complaint in this action, that he and Cartinhour were "engaged together . . . in a continuing and active [business] partnership".[3] The nature of the alleged partnership, for which initial agreements were executed in 2004, was that Cartinhour would transfer funds -- which would eventually exceed $3.5 Million -- and Robertson would continue as non-appearing co-counsel for the plaintiffs in a class-action securities lawsuit which was later dismissed.[4]

Robertson further alleges that Cartinhour had signed a written Indemnification Agreement[5], stating that Cartinhour "w[ould] not make any claims or demands, or file any legal proceedings against [plaintiff] Wade A. Robertson," including claims concerning "any future injuries, losses, and damages not now known or anticipated, but which may later develop or be discovered."

Robertson alleged in the Prior Action, and again alleges in the Complaint here, that after the class-action suit had been dismissed, and after it became apparent that Robertson had duped Cartinhour, his attorneys sent Robertson written demands for money and threatened a lawsuit against him, thus breaching the Indemnification Agreement.[6] In October 2009, Cartinhour filed

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[2] *See* Complaint, Docket #1, at ¶ 79 et. seq.
[3] *See* Docket #1 at ¶¶ 35-37.
[4] *See* Docket #1 at ¶¶ 20-21. The case, *In re Initial Public Offering Sec. Litig.* (*Liu v. Credit Suisse First Boston ["Liu"]),* was dismissed by the district court in April 2005. 383 F. Supp. 2d 566 (S.D.N.Y. 2005), *aff'd sub nom, Tenney v. Credit Suisse First Boston Corp.*, No. 05-3430, 2006 U.S. App. LEXIS 13050, 2006 WL 1423785, at *1-2 (2d Cir. May 19, 2006), *cert. denied sub nom, Liu v. Credit Suisse First Boston Corp.*, 549 U.S. 1077 (2006).
[5] *See* Docket #1 at ¶¶ 66, 79, 85.
[6] *See* Docket #1 at ¶¶ 72-75.

his answer and a countersuit against Robertson in the Prior Action.[7] Cartinhour, a then 82-year-old retiree, alleged that he had been introduced to Robertson, who had represented that he had been seeking an investor on behalf of some plaintiffs and their counsel in a "multi-billion dollar [securities] claim with a high likelihood of success."[8] In reliance upon those representations, Cartinhour contributed $3.5 million, of which $1.5 million was contributed after the securities litigation already had been dismissed.[9] Cartinhour countersued for accounting, fraud, breach of fiduciary duty, breach of partnership agreement, legal malpractice, negligent misrepresentation, conversion, and derivative action.[10]

In the course of litigation in the Prior Action, Cartinhour moved for a preliminary injunction to freeze Robertson's assets, which the Court granted, finding that the evidence showed a substantial likelihood of Cartinhour's success on the merits, irreparable harm, a lack of substantial harm to Robertson, and that the injunction was in the public interest.[11] The Court's Order was affirmed by the Circuit Court, which also denied Robertson's request that his case be assigned to a different judge on remand.[12] Robertson made several motions in the Prior Action, including a Motion to Recuse the Court, alleging in large part that the Court's granting the preliminary injuction was somehow tantamount to prejudging the case, or bias. That Motion to

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[7] *See* Ex. A, Counterclaims (all exhibits, unless otherwise indicated, are annexed to the declaration of Peter Chatzinoff, Esq., in Opposition to Motion to recuse).
[8] *Id.* at ¶ 6.
[9] *Id.* ¶¶ 10, 15, 21.
[10] *Id.* at ¶¶ 34-81.
[11] Ex. B, pgs. 107-108, 113.
[12] *Robertson v. Cartinhour*, 429 Fed. Appx. 1, 4 (D.C. Cir. 2011), *citing United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995) ("we reassign a case under 28 U.S.C. § 455(a) or § 2106 only if 'the facts might reasonably cause an objective observer to question the judge's impartiality'") (internal quotation marks and alteration omitted).

Recuse was denied,[13] and a petition to the Circuit Court for a writ of mandamus was denied, with the Circuit Court finding:

> The district court's statements, actions, and rulings at issue do not provide a sufficient basis to warrant recusal.[14]

Robertson commenced the instant action against Cartinhour, his attorneys (the Attorney Defendants) and others in November 2010[15] in the Southern District of New York, immediately after the filing of the Pre-Trial Statement in the Prior Action. Cartinhour moved in the Prior Action to stay the instant action, and while that motion was denied without prejudice, this Court, in its Memorandum of Decision filed December 30, 2010 recited Robertson's frivolous motions, appeals, surreptitious tactics and sanctions imposed upon Robertson's counsel for same.[16] This Court then addressed the motion to stay this action while the Prior Action proceeded:

> The instant motion arises from Robertson's recent attempt to find a new, perhaps more receptive, forum. Apparently dissatisfied with the proceedings to date, Robertson filed suit against Cartinhour, all of his counsel, and a cast of others in the Southern District of New York on November 9, 2010. See, Robertson v. Cartinhour, No. 10 CV 8442 (S.D.N.Y. Nov. 9, 2010) ("the New York action"). Although styled as a civil RICO complaint, the New York action centers largely on the same set of operative facts at issue in this case, namely Robertson's claims that Cartinhour threatened to sue him in violation of certain written agreements allegedly signed by Cartinhour, as well as events that have occurred in this litigation. Indeed, Robertson has named every partner in the law firm representing Cartinhour in this action as a defendant in the New York action, alleging that Cartinhour and his lawyers conspired to violate various federal laws, including RICO, during the course of the litigation before this Court. Cartinhour now seeks to enjoin Robertson from proceeding in the New York action and from filing any further lawsuits against Cartinhour in federal court.[17]

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[13] *Robertson v. Cartinhour*, 691 F. Supp. 2d 65 (D.D.C. 2010).
[14] *In re Robertson*, 2010 U.S. App. LEXIS 19454 (D.C. Cir. Sept. 15, 2010).
[15] At the same time, Robertson commenced a Bankruptcy proceeding in the name of the partnership (W.A.R. LLP) in the District Court for the Western District of Tennessee, initiating two adversary proceedings against Cartinhour.
[16] *See* Ex. C.
[17] Ex. C at 1-4.

This Honorable Court denied the motion to stay this action, and found insufficient evidence that Robertson's conduct rose to the level of being a vexatious litigant, but did so without prejudice, and warned Robertson as follows:

> The Court cautions Robertson, however, that if he persists, "at some point a continu[ed] pattern of groundless and vexatious litigation will support an order against further filings or complaints without the permission of the courts," as well as other sanctions.[18]

In February, 2011, the Prior Action was tried to a verdict and Judgment, wherein a jury determined that Robertson breached his duties to Cartinhour, procured an unconscionable release from him by undue influence, and absconded with Cartinhour's money. The jury awarded Cartinhour $3.5 Million in compensatory damages, and another $3.5 Million in punitive damages.

Robertson initially commenced this action in the Southern District of New York, in the hopes of avoiding this Court's judgment. Robertson thereby opened a new front, attacking Cartinhour, his attorneys in the Prior Action (the Attorney Defendants comprise all the then equity and non-equity partners in the firm representing Cartinhour in the Prior Action, and Schibani, who represented Cartinhour just prior to that action) and others, alleging specious and vacuous claims against the Attorney Defendants including RICO, fraud and other claims that allegedly arose from their litigation of the Prior Action.

In October, 2011, this Action was transferred from the Southern District to this Court, and Motions to Dismiss were served and filed by the Attorney Defendants and Cartinhour, on the strength of the collateral estoppel effect of the Prior Action's verdict, litigation privilege, and the various legal flaws in the Complaint. That motion is now *sub judice*, and Robertson's instant

[18] Ex. C at p. 6.

motion to recuse this Court is calculated to spare him the inevitable dismissal of his Complaint – which is inevitable not because of the judge but because of the utter lack of merit.

ARGUMENT

28 USC § 455 provides in pertinent part:

> (a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Under 28 U.S.C. § 455, a judge must recuse herself if the average citizen could reasonably question the judge's impartiality. [19] However, under this statute, the Court need not "accept [] as true" the facts alleged by a party in its papers. [20] "[T]he Court must begin its analysis of the allegations supporting . . . a request [for recusal under § 455] with a presumption against disqualification."[21]

Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.[22] Indeed, "[t]o be disqualifying, the court's bias and prejudice 'must

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[19] *United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981); see also 28 U.S.C. § 455(a)-(b) (requiring recusal if judge's "impartiality might reasonably be questioned" or if judge "has personal bias or prejudice concerning a party").

[20] *Heldt*, 668 F.2d at 1271.

[21] *Cobell v. Norton*, 237 F. Supp. 2d 71, 78 (D.D.C. 2003).

[22] *United States v. Liteky*, 510 U.S. 540, 555 (1994).

stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'"[23]

Recusal is not required under section 455(a) where statements are "not sufficient to raise the appearance of prejudice in the mind of a reasonable person who is familiar with all the facts."[24] In assessing the reasonableness of a section 455 challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision.[25] Disqualification for lack of impartiality must have a reasonable basis. [26]

POINT I

THERE HAVE BEEN NO EXTRAJUDICIAL FINDINGS OF EVIDENTIARY FACTS

Robertson concocts a morass of confused allegations and incomplete innuendos in an effort to create a 28 U.S.C. §455 violation by this Court where none exists. Specifically, Robertson alleges that the Court's concern and judicious approach to a potential issue of Cartinhour's fiscal acumen somehow amounts to "personal knowledge of disputed evidentiary facts concerning the proceeding" under §455.[27] Robertson's preposterous claim is wrong.

Robertson argues that this Court undertook to resolve the issue of Cartinhour's competency, but his characterization of the issue, and the Court's treatment thereof, is shamefully deceptive. When the then 82-year-old Cartinhour testified at the hearing on the

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[23] *United States v. Barry*, 938 F.2d 1327, 1340, 291 (D.C. Cir. 1991) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)).
[24] *Barry*, 961 F.2d at 263, 295.
[25] *Robertson v. Cartinhour*, 691 F. Supp. 2d 65, 78-80 (D.D.C. 2010)
[26] *See United States v. Haldeman*, 559 F.2d 31, 139 (D.C. Cir. 1976); *see also United States v. Marin*, 662 F. Supp. 2d 155, 158 (D.D.C. 2009) ("A judge need not, however, 'recuse himself because of unsupported, irrational, or highly tenuous speculation.'") (quoting *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir.1998)).
[27] Robertson's Memorandum in Support of the Motion to Recuse, pp. 20-22.

Preliminary Injunction in March 2010, he evidenced some level of confusion as to an affidavit he had executed.[28] The Court issued an injunction regarding the assets at issue, and added in supplementary dicta that it was concerned about Cartinhour taking care of his own financial affairs, directing counsel to look into the matter.[29] The issue of Cartinhour's competency was not before the Court at that hearing, and the Court did not issue a ruling about it.

Indeed, in seeking recusal, Robertson ignores the fact that Cartinhour's ability to handle his own funds was never a contested issue before the Court. Perhaps Robertson implies that it was related to the matter of Robertson's exercise of undue influence over Cartinhour in pressuring him to sign disadvantageous agreements, allowing Robertson to pilfer $3.5 million from Cartinhour, but such an implication is spurious. The Court did not rule on the seminal issue of undue influence at trial; rather, it was an issue for the jury, was fully presented to the jury, and that jury decided it conclusively against Robertson.

The Court did not revisit the issue of Cartinhour's competency until a year after the Preliminary Injunction was issued, when the Court determined the issue of release of the registry funds after the verdict.[30] Robertson had no standing, or even interest, in the Court's concern as to whether the release of the funds to Cartinhour presented an opportunity to assess whether

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[28] *See* Ex. B to Robertson's Motion to Recuse, at pp. 44-47.

[29] *See* Ex. B to Robertson's Motion to Recuse, at p. 107.

[30] Robertson's outrageous suggestions at pp. 6-7 of his Memorandum of Law -- that in the Circuit Court, the Attorney Defendants took a position that Cartinhour had been confused about an affidavit, and that the counterproposal to Robertson's settlement offer to Cartinhour included a global settlement – are pointless obfuscation. Mr. Kearney did indeed explain to the appellate court that Cartinhour had been quite clearly confused about an affidavit at the hearing, a confusion that continued under the stress of live testimony. Further, a global settlement demand (which is in any case confidential and improperly raised by Robertson here) logically included settlement of this Action as well as the Prior Action and relying on the correspondence and agreement alone, without testimony from Mr. Kearney and Mr. Griffin would paint an incomplete picture of what happened when the proposed agreement, which was withdrawn the following day, circulated. Most crucial, though, is that Robertson's mendacious allegations are irrelevant to the instant motion; this Court was not involved in either scenario.

Cartinhour was well enough to handle the money. It was then that the Court communicated with the attorneys, Mr. O'Donoghue and Mr. Grant, to seek their expertise in advising the Court. This was not done in secret, but was fully disclosed.[31]

Most critical, though, is that this consultation was irrelevant to any evidentiary matters before the Court, and had no bearing on Robertson whatsoever. Indeed, had the Court conducted a full hearing on the issue of Cartinhour's mental competency at that time, Robertson would have had no standing to participate.[32] A jury had already awarded the funds at issue to Cartinhour, and the Court merely expressed an interest in safeguarding those funds for Cartinhour.

In the absence of any objective basis, or the support of a single cited case, to conclude that a reasonable and informed observer would question the judge's impartiality based upon the aforementioned contacts with an advisor to the Court on a matter unrelated to Robertson or his interests, §455 does not apply, and recusal is inappropriate.[33]

POINT II

THE COURT MADE NO EXTRAJUDICIAL COMMENTS WHICH WOULD WARRANT RECUSAL

Robertson contends that the Court is required to recuse itself under 28 USC §455(a) because the Court, in its Decision on Cartinhour's Motion to Stay this action while the Prior Action proceeded to trial, made an extrajudicial comment when it ruled:

> The instant motion arises from Robertson's recent attempt to find a new, perhaps more receptive, forum. Apparently dissatisfied with the proceedings to date, Robertson filed suit against Cartinhour, all of his counsel, and a cast of others in the Southern District of New York on November 9, 2010. See, Robertson v. Cartinhour, No. 10 CV 8442 (S.D.N.Y. Nov. 9, 2010) ("the New York action"). Although styled as a civil RICO complaint, **the New York action centers largely**

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[31] *See* Ex D, transcript of proceedings of June 22, 2011, at pp. 6-7.

[32] *See Sturdza v. United Arab Emirates*, 562 F.3d 1186, 188 (D.C. Cir. 2009)(standing on a hearing to appoint a guardian is limited to those with a financial or tangible interest in the outcome, citing *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 854-55 (D.C. Cir. 1981)).

[33] *See United States v. Marin*, 662 F. Supp. 2d 155 (D.D.C. 2009).

> **on the same set of operative facts at issue in this case**, namely Robertson's claims that Cartinhour threatened to sue him in violation of certain written agreements allegedly signed by Cartinhour, as well as events that have occurred in this litigation. Indeed, Robertson has named every partner in the law firm representing Cartinhour in this action as a defendant in the New York action, alleging that Cartinhour and his lawyers conspired to violate various federal laws, including RICO, during the course of the litigation before this Court. Cartinhour now seeks to enjoin Robertson from proceeding in the New York action and from filing any further lawsuits against Cartinhour in federal court.[34] *[emphasis added]*

This Court then went on to state that "the New York complaint raises serious questions as to jurisdiction, venue, and whether [plaintiff] Robertson can survive a Rule 12(b)(6) motion."[35]

Robertson's contention is specious for several reasons. First, Cartinhour's motion to stay this action (then in the Southern District of New York) until the Prior Action was resolved was then before this Court. On such a motion, a court is compelled to consider the two actions, including the identity of the parties; the risk of inconsistent adjudications; the location of counsel familiar with the litigation; how far advanced each action is; and, in general, "equitable considerations genuinely relevant to the ends of justice," relating to the expeditious determination of the case without "unnecessary multiplication of litigation."[36]

This Court was compelled to examine this action to make the determination of whether to stay it while the Prior Action proceeded, and indeed, it concluded that a stay was inappropriate. The Court's ruling did not constitute an extrajudicial comment; the matters of this action's claims, parties, jurisdiction and venue were squarely before this Court on that motion.

Second, a Court's ruling on a matter before it, even if that issue were to resurface later in the litigation, does not constitute a basis for recusal. The purpose of § 455(a) is to promote

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[34] Ex. C, at pp. 1-4.
[35] Ex. C, at p. 6, fn 4.
[36] *See American Horse Protection Asso. v. Lyng*, 690 F. Supp. 40, 42-43 (D.D.C. 1988); *Columbia Plaza Corp. v. Security National Bank*, 525 F.2d 620, 627-28 (1975).

confidence in the judiciary by avoiding even the appearance of impropriety, which could be jeopardized by a judge's public comments relating to the issues before that Court in litigation.[37] Any public comment by a judge concerning the facts, applicable law, or merits of a case that is *sub judice* in her court, or any comment concerning the parties or their attorneys could raise doubts about the judge's objectivity and her willingness to reserve judgment until the close of the proceeding.[38] Here, the Court ruled in a judicial decision on a motion before it, on a matter before it, and did not stray from the matters germane to the determination of that motion. No aspect of §455 would properly apply, as no reasonable person would infer bias or partiality from a Court rendering a decision. Robertson is simply attempting to use this ruling in the hopes of avoiding adverse rulings.[39]

Robertson's reliance upon *United States v. Microsoft Corp.*[40] is abjectly misplaced. In *Microsoft,* a judge's recusal was deemed appropriate after the judge conducted lengthy press interviews about the case before him, disparaging the defense and its arguments. That judge was not then engaged in his judicial function, and his extrajudicial comments raised an appearance of possible prejudice. Here, in stark contrast, the Court determined an application to stay the Southern District action by assessing its connections with the case then before it, and rendered a judicial decision. No impropriety was committed nor was any appearance of impropriety created, and thus recusal is not warranted.

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[37] *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988); *United States v. Microsoft Corp.*, 253 F.3d 34, 114 (D.C. Cir. 2001).
[38] *Microsoft*, 253 F.3d at 114 (*citing William G. Ross, Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 589, 598 (1989).
[39] *See Sataki v. Broad. Bd. of Governors*, 733 F. Supp. 2d 54, 66 (D.D.C. 2010)(judicial rulings alone almost never constitute a valid basis for a §455 motion)(*citing Liteky*, 510 U.S. at 555).
[40] 253 F.3d 34 (D.C. Cir. 2001).

POINT III

THERE IS NO SUGGESTION OF THE COURT'S PREJUDGMENT BIAS OR THE APPEARANCE OF SUCH BIAS

28 U.S.C. §§ 455(a) requires recusal "in any proceeding in which [a judge's] impartiality might reasonably be questioned", as discussed above, and 455(b)(1) requires recusal where a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding".[41]

A party moving for recusal pursuant to Section 455(b) "[must] demonstrate actual bias or prejudice based upon an extrajudicial source."[42] In order for recusal of a judge to be warranted, a movant must show that the bias or prejudice will "result in an opinion on the merits [of a case] on some basis other than what the judge learned from his participation in the case."[43] Robertson has not shown evidence of any such bias as would warrant recusal.

Robertson contends that certain selected rulings by the Court demonstrate an improper bias, but judicial rulings and "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings" almost "never constitute a valid basis for a bias or partiality motion." The only cases where courts have granted

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[41] *In re Kempthorne*, 449 F.3d 1265, 1268 (D.C. Cir. 2006).

[42] *Middlebrooks v. St. Coletta of Greater Wash., Inc.*, 710 F. Supp. 2d 77, 79 (D.D.C. 2010), quoting *American Center for Civil Justice*, 680 F. Supp. 2d at 25 (citing *Tripp v. Executive Office of the President*, 104 F. Supp. 2d 30, 34 (D.D.C. 2000)). *See also Zernik v. U.S. Dep't of Justice*, 630 F. Supp. 2d 24, 26 (D.D.C. 2009) (a judge shall disqualify himself or herself in any proceeding in which the judge, inter alia, "has 'personal knowledge of disputed evidentiary facts concerning the proceeding[]'") (citation omitted); *Ivey v. Nat'l Treasury Employees Union, No. 05-1147*, 2008 U.S. Dist. LEXIS 67246 at *1 (D.D.C. Sept. 4, 2008) ("[A] judge shall disqualify [**5] himself '[w]here he has a personal bias or prejudice concerning a party.'") (citation omitted).

[43] *Liteky v. United States*, 510 U.S. 540, 545 (1993)(quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)).

recusal motions based on in-trial conduct tend to involve singular and startling facts.[44] No such facts are alleged here.

Robertson, aside from reprising his complaint about the wording of the Court's decision on the application for a stay of this matter while it was still venued in the Southern District of New York,[45] raises allegations of this Court's bias based the Court's not referring for discipline the Attorney Defendants for alleged misconduct. In fact, there was no misconduct, and thus the Court's inaction was proper.

First, Robertson complains that at the hearing on Cartinhour's application for a preliminary injunction, credibility questions were raised when Cartinhour testified a disavowal of an affidavit he had previously submitted. [46] Of course, this matter, and Cartinhour's apparent confusion in testimony[47]were part of the record before the Court when it decided its ruling, and when that ruling was affirmed by the Circuit Court.[48] There was and is nothing to substantiate Robertson's wild allegation that Cartinhour's affidavit was a fabrication, and Cartinhour eventually testified to his confusion at his *de bene esse* deposition introduced at trial.[49] The Court did not demonstrate any bias or appearance of bias by not disciplining Cartinhour's counsel in the absence of any proof of wrongdoing and in the clear absence of a request from Robertson's counsel while the Prior Action was pending.

Second, Robertson absurdly contends that the Court showed its bias in the Prior Action when it failed to sanction the Attorney Defendants after they purportedly defrauded the Court or

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[44] *Belue v. Leventhal*, 640 F.3d 567, 572-574 (4th Cir. 2011), citing *Liteky*, 510 U.S. at 555-56; *see also West v. Spellings*, 2007 U.S. Dist. LEXIS 51608 (D.D.C. July 18, 2007).
[45] *See supra*, Point II.
[46] *See* Robertson's Memorandum of Law at pp. 4-5.
[47] *See* Ex. B to Robertson's Motion to Recuse.
[48] *Robertson v. Cartinhour*, 429 Fed. Appx. 1 (D.C. Cir. 2011).
[49] Ex. E, pp. 198-99.

sanctioned such alleged fraud when as counsel for Cartinhour, defendant Patrick Kearney requested an adjournment of trial.[50] The Court showed no glimmer of partiality by granting the requested adjournment of trial based upon the proffered information of Cartinhour's health emergency.

As counsel for the octogenarian Cartinhour, Kearney requested the adjournment after his client advised of ill health, corroborated by a note from his physician indicating tachycardia.[51] This was then supplemented by affidavits of both treating physicians, produced to the Court and Robertson's counsel when the trial of the Prior Action commenced.[52] The trial eventually commenced and was completed to verdict. Robertson argues that the Court showed bias by refusing to accept his slanderous allegations of dishonesty, despite the physicians' attestations, Cartinhour's appearance and Kearney's representations to the contrary. Robertson's implication is outrageous and unfounded in law.[53]

Finally, Robertson imagines that the Court showed bias in the Prior Action by not disciplining the Attorney Defendants for their failure to identify Larry Ash as a potential witness.[54] Again, there was no basis for discipline, and thus the Court showed no bias, especially in light of the fact that Robertson did not seek sanctions after seeking and being granted leave to file a motion for such sanctions, and thus did not properly raise the issue to the Court. Nonetheless, there was no misconduct. Ash was not initially identified because he had no

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[50] *See* Robertson's Memorandum of Law at pp. 10-13.
[51] *See* Ex. F.
[52] *See* Ex. K to Robertson's Motion to Recuse, p. 12; physicians' affidavits, Ex. G.
[53] *See Liteky*, 510 U.S. at 556 ("A judge's ordinary efforts at courtroom administration ... remain immune"; *see also LoCascio v. United States*, 473 F.3d 493, 495-96 (2d Cir. 2007)).
[54] *See* Robertson's Memorandum of Law at pp. 13-14.

material testimony to offer in the Prior Action.[55] In any case, Ash was eventually identified, deposed and called as a trial witness, without further objection by Robertson, thus safeguarding Robertson from any prejudice from the delayed disclosure of this immaterial witness.

Robertson's allegations of this Court's actual or apparent bias based upon the Court's refusal to sanction Cartinhour's counsel in the Prior Action is thus exposed as just another flimsy effort to continue his forum shopping spree in the hope that somewhere there exists a judge he can fool. His argument ignores the plain meaning of § 455 and the substantial caselaw applying it, and instead mistakenly relies upon a couple of cases where recusal was appropriate, but which are completely inapposite to the case at bar. In *Mitchell,*[56] the judge had given interviews with television reporters, describing his prejudged opinions about an issue before him. In *Knapp,*[57] the trial judge functioned as a quasi-co-counsel for plaintiff, making strategic suggestions and himself conducting lengthy examination of witnesses. This Court demonstrated neither apparent nor actual bias even approaching what is described in those cases.[58]

This Court has exhibited no bias or appearance of bias, and thus recusal is not warranted.

POINT IV

ROBERTSON'S MOTION TO RECUSE IS UNTIMELY

A recusal motion must be timely made, and timeliness requires a party to raise a claim "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such

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[55] Ash eventually testified that he did not review the documents that would eventually be presented by Robertson to Cartinhour for execution, and he was unable anyway to offer advice about the proposed investment. *See* Transcript of Deposition, Ex. H.

[56] *Mitchell v. Sirica*, 502 F.2d 375, 386 (D.C. Cir. 1974).

[57] *Knapp v. Kinsey*, 232 F.2d 458 (6th Cir. 1956).

[58] Robertson's reliance on *Roberts v. Ace Hardware, Inc.*, 515 F. Supp. 29 (N.D. Ohio 1981) is equally unavailing, as that decision departed from the statutory language and judicial precedent to recuse based upon the movant's emotions ("Here, however, we are not concerned with facts, but with feelings").

a claim."[59] The timeliness requirement of 28 U.S.C. § 455 is gleaned by reading it in combination with 28 U.S.C. § 144, which expressly provides that a party moving for recusal make its motion in a timely fashion.[60] Accordingly, a motion under 28 U.S.C. Section 455(a) must be made "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim."[61]

Recusal motions must be made in a timely fashion because the absence of such a requirement would result in increased instances of wasted judicial time and resources and a heightened risk that litigants would use recusal motions for strategic purposes.[62]

This strategic use of a recusal motion is precisely what is before the Court. Robertson cites to numerous instances in the Prior Action that he claims demonstrate the Court's bias or the appearance of bias, but the trial of the Prior Action concluded more than a year ago. Once this action was transferred to the District of Columbia and assigned to this Court in November 2011,[63] Robertson had all the facts in his possession upon which he bases this motion seeking recusal. Instead, he chose to delay, acquiescing to the assignment to this Court, and even remaining silent about the alleged need for recusal in the status report filed with this Court, in which he listed all pending issues.[64]

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[59] *Ascom Hasler Mailing Systems Inc. v. United States Postal Service*, 2010 U.S. LEXIS 110981 *8 (D.D.C. 2010); *See United States v. Rubashkin*, 655 F.3d 849, 858 (8th Cir. 2011); *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003); *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987).

[60] *See Apple*, 829 F.2d at 333; *see also In re International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir. 1980); *Katzman v. Victoria's Secret Catalogue*, 939 F. Supp. 274, 277 (S.D.N.Y. 1996).

[61] *Gil Enterprises, Inc. v. Delvy*, 79 F.3d 241, 247 (2d Cir. 1996) (*quoting Apple*, 829 F.2d at 333).

[62] *Preston v. United States,* 923 F.2d 731, 733 (9th Cir. 1991); see *Ex Parte American Steel Barrel Co. and Seaman*, 230 U.S. 35, 44 (1913).

[63] *See* Docket Entry # 64.

[64] *See* Docket Entry # 70.

The recusal motion is thus untimely, as it is not being made at the earliest possible moment. Robertson is using the motion for strategic purposes, cavalier about his impugning the integrity of both this Court and the Attorney Defendants. The motion thus warrants denial.

CONCLUSION

For the reasons set forth herein, and in the accompanying Declaration and exhibits, it is respectfully requested that this Honorable Court deny Robertson's Motion to Recuse in its entirety, and for such other and further relief as this Court deems just and proper.

Dated: Uniondale, New York
February 24, 2012

Respectfully submitted,

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