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October 24, 2015

Mr. Joseph St. Amant, Senior Conference Attorney
U.S. Court of Appeals for the Fifth Circuit
John Minor Wisdom United States Court of Appeals Building
600 Camp Street
New Orleans, Louisiana 70130

Via e-mail attachment and regular mail
Joseph_St_Amant@ca5.uscourts.gov

Re: Judicial Complaint Nos. 05-14-90120 and 05-14-90121

Mr. St. Amant:

I wish to supplement my existing judicial misconduct complaint against Judge Walter S. Smith, Jr. Alternatively, you may consider this a new judicial misconduct complaint against Judge Smith.

I have enclosed a recusal motion filed on October 22, 2015 in *EJ Smith Construction Company, LLC v. Travelers Casualty & Surety Company et al* (Case No. 6:14-cv-00427), a case pending before Judge Smith. As set forth in that motion, Judge Smith had an attorney-client relationship with Greg White, an attorney who regularly practiced in his court. I have separately learned that Mr. White is representing Judge Smith in the judicial misconduct investigation listed above. Neither Judge Smith nor Mr. White disclosed their attorney-client relationship to the other parties and counsel who appeared before Judge Smith and opposite Mr. White.

The enclosed motion cites *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir. 1980), where the Court of Appeals disqualified a trial judge in part because the judge was being represented by the plaintiff's attorney in a separate matter while the underlying case was pending before the judge. The *Potashnick* court relied, in part, on the Code of Conduct for United States Judges, which states that a judge "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2(A), Code of Conduct for U.S. Judges. According to the official comment to Canon 2(A), "[a] judge must avoid all impropriety and appearance of impropriety."

Judge Smith has, at the very least, created a strong appearance of impropriety. According to Canon 3(C)(1), "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned..."

Thirty-five years ago in *Potashnick* (and several years before Judge Smith was appointed to the bench), the Fifth Circuit held that an attorney-client relationship between judge and counsel calls into question the impartiality of the judge, yet Judge Smith never disclosed his relationship with Mr. White. This only adds to the appearance of impropriety. According to Canon 3(D), a judge may disclose his conflicts and, if the parties agree in writing, the judge may continue to preside over the case in which he is conflicted. By failing to disclose his conflict in *EJ Smith Construction*, one can only infer that Judge Smith knew that some of the parties would object to his relationship with Mr. White, therefore he and Mr. White decided to conceal their relationship from the other parties.

I have personally participated in litigation where a state district judge had an undisclosed attorney-client relationship with my opposing counsel (and I later learned that the judge was receiving *free* legal services from my opposing counsel). Under those circumstances, it is nigh impossible to have any confidence in the fairness of the judge or the outcome. Ironically, the state judge was a non-party conspirator in a racketeering case pending before Judge Smith, and I later learned from the state judge's brother that Judge Smith and the state judge were personal friends. Judge Smith subsequently dismissed the racketeering case on the pleadings (without opportunity to amend), and he sanctioned my clients and me \$25,000 *sua sponte* and without notice or opportunity to respond.

In light of Judge Smith's long history of misconduct, he is unfit to serve as a judicial officer. I therefore encourage the Court of Appeals to suspend him as quickly as possible and refer his misconduct to the U.S. House of Representatives for impeachment proceedings.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ty Clevenger', with a long horizontal flourish extending to the right.

Ty Clevenger

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
WACO DIVISION**

UNITED STATES OF AMERICA FOR §
THE USE AND BENEFIT OF §
EJ SMITH CONSTRUCTION §
COMPANY, LLC §

v. §

Civil Action No. 6:14-cv-00427

TRAVELERS CASUALTY & SURETY §
COMPANY, FEDERAL INSURANCE §
COMPANY, LIBERTY MUTAL §
INSURANCE COMPANY, BALFOUR §
BEATTY/McCARTHY, A JOINT §
VENTURE, BALFOUR BEATTY §
CONSTRUCTION, LLC, and §
McCARTHY BUILDING §
COMPANIES, INC. §

AND §

TRAVELERS CASUALTY & SURETY §
COMPANY, FEDERAL INSURANCE §
COMPANY, LIBERTY MUTUAL §
INSURANCE COMPANY, BALFOUR §
BEATTY/McCARTHY, A JOINT §
VENTURE, BALFOUR BEATTY §
CONSTRUCTION, LLC, and §
MCCARTHY BUILDING §
COMPANIES, INC., §

Third-Party Plaintiffs, §

v. §

INTERNATIONAL FIDELITY §
INSURANCE COMPANY, §

Third-Party Defendant. §

**INTERNATIONAL FIDELITY INSURANCE COMPANY'S
MOTION TO RECUSE**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

International Fidelity Insurance Company (“IFIC”), having recently become aware of the attorney-client relationship between counsel of record for six litigants in this case and His Honor, respectfully files this Motion to Recuse, asking to transfer this case to another judge in accordance with the standard practices of this district.

SUMMARY

IFIC has recently learned that counsel for six parties in this case, Greg White, represents The Honorable Walter S. Smith, Jr. in a concurrently pending proceeding (the “Attorney-Client Relationship”). Greg White is and has been counsel of record for six litigants in this case for at least 11 months, and has signed and filed all of the pleadings, discovery, motions, responses, and replies of the six parties he represents. The Fifth Circuit has held that (1) a judge should err on the side of caution and disqualify himself in a questionable case, and (2) recusal is appropriate where, as here, the judge and counsel of record have an attorney-client relationship in unrelated proceedings. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1110 (5th Cir. 1980).

ARGUMENTS & AUTHORITIES

1. The Attorney-Client Relationship came to the attention of counsel for IFIC in the last week, and inquiry was made immediately to confirm the existence of the Attorney-Client Relationship, including a call to attorney White this week, and confirmation of the Attorney-Client Relationship. It is not necessary for IFIC to allege or even suggest that this court has acted improperly, as even the appearance of impropriety is to be avoided, and recusal is the remedy to preserve the actual and apparent propriety of the court. Accordingly, IFIC respectfully petitions this court for an order of recusal.

2. This is a complex case that just became much more complex when the court granted the motion of Mr. White's clients to change this case from a breach of contract case into a fraud case (Order, Doc. 70). There is a great deal of discovery to be completed and undoubtedly there will be discovery disputes requiring involvement of the court; multiple dispositive motions; and other pre-trial proceedings.

3. The law of recusal is intended to preserve the sanctity of the court, the litigation process, and the confidence of the public. Accordingly, "[a]ny...judge...of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). "Courts have interpreted this statute to require recusal if a reasonable person, knowing all of the facts, would harbor doubts concerning the judge's impartiality." *Sensley v. Albritton*, 385 F.3d 591, 599 (5th Cir. 2004). "The use of 'Might reasonably be questioned' in section 455(a) ... clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case." *Potashnick.*, 609 F.2d 1101, 1112 (5th Cir. 1980). Under the objective test of Section 455(a), a judge must recuse himself where he is being concurrently represented in a separate proceeding by counsel for a litigant. *Id.*

4. Here, Steven Gregory White ("Greg White") has been, and continues to be, counsel of record for six litigants in this case: Balfour Beatty/McCarthy, A Joint Venture and its individual members, Balfour Beatty Construction, LLC and McCarthy Building Companies, Inc.; Travelers Casualty & Surety Company; Federal Insurance Company; and Liberty Mutual Insurance Company (the "Six Litigants"). On November 19, 2014, he signed and filed the initial pleadings of the Six Litigants (Docs. 9, 10). He later signed and filed the Six Litigants' Third-Party Complaint Against IFIC, which brought IFIC into this lawsuit (Doc. 18). Two days ago, on

October 20, 2015, Greg White signed the Six Litigants' Amended Third-Party Complaint Against IFIC (Doc. 72), which the Court permitted (Doc. 70) despite IFIC's opposition (Doc. 65).

5. Recusal is appropriate because Greg White also represents His Honor in unrelated proceedings. *Potashnick*, 609 F.2d at 1111.

6. Courts across the country concur that recusal is "the singular appropriate response" where, as here, "an attorney for a party to a proceeding in the judge's court is concurrently representing the judge as attorney of record before another tribunal." *Monroe v. Blackmon*, 946 S.W.2d 533, 534 (Tex. App. – Corpus Christi 1997), *vacated on other grounds*, 969 S.W.2d 427 (Tex. 1998); *cf. Smith v. Sikorsky Aircraft*, 420 F. Supp. 661, 662 (C.D. Cal. 1976) (where attorney appearing before the court had represented the judge after he came on the bench in personal and official matters, judge would recuse himself). *Younce v. Pacific Gulf Marine, Inc.*, 827 So.2d 1144, 1145 (La. 2002) (recusal required where plaintiff's co-counsel was representing judge in a separate proceeding, even if the attorney-client relationship was short-lived and he withdrew as judge's attorney before trial); *In re Disqualification of Whitmore*, 704 N.E.2d 1235 (Ohio 1998) ("a judge must recuse himself or herself from a pending action where an attorney in that action is representing the judge in another proceeding."); *Alred v. Com., Judicial Conduct Com'n*, 395 S.W.3d 417, 432 (Ken. 2012); *Judicial Ethics Opinion 1999-3*, 86 P.3d 663 (Okla. 1999); *In re Fiftieth District Court Judge*, 193 Mich.App. 209 (1992); *Atkinson Dredging Co. v. Henning*, 631 So.2d 1129, 1130 (Fla. 4th DCA 1994) ("At issue is whether the trial judge/respondent should be prohibited from presiding over the pending case before her in which case one of the two parties' law firms is the same firm representing the trial judge ... in a separate, unrelated action. We conclude that she should.").

REQUEST FOR RELIEF

WHEREFORE, premises considered, IFIC respectfully requests that His Honor recuse himself, and that this case be re-assigned pursuant to standard procedures in this district.

Respectfully submitted,

LANGLEY LLP

/s/ Keith A. Langley

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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Counsel for Plaintiff / Cross-Claim Defendant UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF EJ SMITH CONSTRUCTION COMPANY, LLC

/s/ Keith A. Langley
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