UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ALBERT G. HILL, III, individually as a beneficiary of the Margaret Hunt Trust Estate, derivatively on behalf of the Margaret Hunt Trust Estate, individually as a beneficiary of the Haroldson Lafayette Hunt, Jr. Trust Estate, and derivatively on behalf of the Haroldson Lafayette Hunt, Jr. Trust Estate,	§	
	§	CIVIL ACTION NO. 3:07-CV-02020-P
Plaintiff,	§	
	§	**CONFIDENTIAL**
v.	§	**FILED UNDER SEAL**
MARGARET KELIHER, BRETT RINGLE, JOHN CREECY, WILLIAM SCHILLING, IVAN IRWIN, JR. WILLIAM HERBERT HUNT, ALBERT G. HILL, JR., ALINDA H. WIKERT, LYDA HILL, HEATHER H. WASHBURNE, and ELISA H. SUMMERS	§	
Defendants.	§	

ALBERT G. HILL, III'S SUPPLEMENTAL MOTION PURSUANT TO FED. R. CIV. P. 60(b) TO VACATE GLOBAL SETTLEMENT AGREEMENT AND FINAL JUDGMENT IN LIGHT OF THE HONORABLE REED O'CONNOR'S RECUSAL OR, IN THE ALTERNATIVE, FOR LEAVE TO TAKE DISCOVERY

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE SOLIS:

Plaintiff Albert G. Hill, III ("Hill III") files this Supplemental[1] Motion Pursuant to Fed. R. Civ. P. 60(b) to Vacate Global Settlement Agreement and Final Judgment in Light of the Honorable Reed O'Connor's Recusal Or, in the Alternative, For Leave to Take Discovery, and in support thereof respectfully shows the Court the following:

I. INTRODUCTION

A key issue in this litigation has been alleged theft and breaches of fiduciary duty with respect to Hunt Petroleum Corporation ("HPC"), a multi-billion dollar entity that was owned by two Hunt family trusts that were at issue in this action. During the litigation, the Hunt family trusts sold HPC to XTO Energy, Inc. ("XTO") over Hill III's objection. ExxonMobil Corporation ("Exxon") then announced that it was acquiring XTO. Exxon, as the prospective new owner of HPC, thereafter had an interest in the outcome of this litigation. Accordingly, promptly after Exxon announced in December 2009 that it was acquiring XTO, Hill III's then-attorneys – the Lanier Law Firm – filed a motion to withdraw as Hill III's counsel due to a conflict caused by their ongoing representation of Exxon in other matters. Judge Reed O'Connor granted that motion to withdraw, but did not disclose to the parties that he and his wife together owned between $1.2 and $5.5 million in Exxon stock and options.

In April 2010, after the litigation had been pending for nearly two and a half years, Judge O'Connor requested a private meeting with Hill III and his wife, Erin Hill, outside the presence of their counsel. During this meeting, Judge O'Connor "encouraged" Hill III to settle the litigation, and threatened Hill III with an indefinite stay of the proceedings if Hill III refused to

[1] Hill III has previously filed a motion to enforce the Final Judgment or, in the alternative, for relief pursuant to Fed. R. Civ. P. 60(b) based on Defendants' violations of the settlement agreement and Final Judgment, which motion is presently pending before this Court. ECF Nos. 1255, 1343.

settle. Hill III acquiesced and, approximately two weeks later, on May 14, 2010, the parties executed a Global Settlement and Mutual Release Agreement ("Settlement Agreement"). The Settlement Agreement included releases of Exxon and XTO. Within weeks after the settlement was signed, Exxon completed its purchase of XTO.

On March 12, 2012, shortly after discovering that Judge O'Connor has a substantial equity ownership interest in Exxon, Hill III filed a motion to recuse Judge O'Connor. Although Judge O'Connor had never disclosed his interest in Exxon to the parties, on May 15, 2012, Judge O'Connor denied Hill III's recusal motion, ruling that Hill III had notice of Judge O'Connor's Exxon holdings by April 2011 (*i.e.*, several months *after* the Final Judgment had already been entered) based on an email sent by Hill III's wife (a nonparty to this action) to a friend of hers, and that Hill III should therefore have filed the recusal motion earlier. Judge O'Connor's ruling was affirmed by the Fifth Circuit in an unpublished memorandum disposition.

On May 22, 2013, Judge O'Connor reversed course and recused himself from this action and two related actions without any explanation for his change of position. Between March 12, 2012 (when Hill III filed his recusal motion) and May 22, 2013 (when Judge O'Connor recused himself), no new parties were added to this action, no hearings have been held, and no substantive rulings were entered other than the order denying Hill III's recusal motion. Accordingly, the most logical explanation for Judge O'Connor's change of position is that Judge O'Connor determined that his equity ownership in Exxon creates a recusable conflict, or that he has another recusable conflict that pre-dates the filing of Hill III's recusal motion.

If Judge O'Connor's recusal is based upon his Exxon holdings, then he should have recused himself long ago – indeed, before he conducted the *ex parte* meeting with Hill III in April 2010 in which he successfully pressured Hill III to settle the case. Under *Liljeberg v.*

Health Servs. Acquisition Corp., 486 U.S. 847 (1988) and subsequent case law, when a court fails to timely recuse itself, rulings entered after the point at which the court should have recused itself may be subject to vacatur. Therefore, because of Judge O'Connor's recusal, Hill III should be granted relief under 28 U.S.C. § 455 and Fed. R. Civ. P. 60(b) – specifically, vacatur of the May 2010 Settlement Agreement that was a product of Judge O'Connor's *ex parte* meeting with Hill III, and all orders entered by Judge O'Connor after the settlement. In the alternative, and at a minimum, Hill III should be permitted to conduct discovery into the reasons for Judge O'Connor's recusal before this motion is resolved.

II. BACKGROUND

A. A Family Dispute Erupts Over Two Multi-Billion Dollar Trusts

In 1935, legendary oil tycoon H.L. Hunt and his wife established irrevocable trusts for each of their six children. This included the Margaret Hunt Trust Estate ("MHTE") for their daughter Margaret Hunt Hill ("Margaret"), and the Haroldson L. Hunt, Jr. Trust Estate ("HHTE") for their son Haroldson L. Hunt, Jr. ("Hassie").

The Trust Agreements for both the MHTE and the HHTE provide that the beneficiaries are entitled to receive distributions of net earnings as determined by the Trustee with the consent of an Advisory Board, but "[t]he Beneficiary shall have no right to the corpus of the Trust property." ECF No. 1-2 at 1, 10 (Trust Agreements Art. III, § 1).[2] The trust corpus of each of the MHTE and the HHTE was to "remain intact and undisturbed" until 21 years following the deaths of Margaret and Hassie respectively. *Id.* at 1-2, 11 (Trust Agreements Art. III, § 2 & Art. IV, § 3). The MHTE and HHTE Trust Agreements further provide that, at the end of the 21-year period following the initial beneficiary's death, the Trustee shall distribute the trust's assets

[2] Unless otherwise noted all ECF citations refer to documents filed in this action.

among the existing beneficiaries as of the termination date, and that "until such time no beneficiary shall ever be entitled to the dissolution, termination, or disruption of said trust…." *Id.* at 2, 11 (Trust Agreements Art. IV, § 3).

Thus, after Margaret and Hassie died, the beneficiaries of the MHTE and HHTE would have a right to receive a portion of the net earnings generated by trust assets at the discretion of the Trustees, but would have no right to receive any trust corpus for 21 years.

The primary asset of both the MHTE and the HHTE was HPC, a privately held oil and gas exploration company that was worth billions of dollars by 2005. The MHTE owned approximately 52% of HPC, and the HHTE owned the remaining approximately 48% of HPC.

Margaret married Albert G. Hill and they had three children: Defendants Albert G. Hill Jr. ("Hill Jr."), Lyda Hill, and Alinda Wikert. Hassie had no children and died in 2005, passing all of his interests in the HHTE to Margaret's heirs *per stirpes* via his Will. App. 1-14.

In March 2005, while Margaret was still alive, Hill Jr. executed an irrevocable disclaimer of most of his interests in the MHTE to his children. App. 15-17. The effect of Hill Jr.'s disclaimer was that when Margaret died, Hill Jr.'s children (including Hill III) would become current beneficiaries of the MHTE, with the right to receive discretionary distributions of trust income for 21 years after Margaret's death and then, assuming they were still alive, the distribution of trust corpus upon termination of the trust. Hill Jr. subsequently caused an "updated" disclaimer to be created in 2007 that reaffirmed the original March 2005 disclaimer, but which included certain revisions that were intended to avoid drawing IRS scrutiny to a tax fraud that was simultaneously being perpetrated with respect to Hassie's estate. App. 18-20.

Specifically, after Hassie's death, Hassie's estate attempted to conceal from the IRS the fact that Hassie had exercised a general power of appointment over the HHTE by devising his

interest to Margaret's descendants in his Will. App. 1-14, 21-41. The exercise of a general power of appointment constituted a taxable event which, if disclosed to the IRS, would have required Hassie's estate to pay in excess of $300 million in additional taxes that Hill III's family intended to avoid. However, Hill Jr.'s original 2005 disclaimer explicitly stated that Hill Jr. was exercising a "general" power of appointment with respect to the MHTE. Since the MHTE's trust instrument is identical to the HHTE's trust instrument, Hill Jr.'s reference to a "general" power was directly contrary to the position that the family was taking in connection with Hassie's estate. Hill Jr.'s "updated" 2007 disclaimer (which bore a March 2005 date) removed all reference to a "general" power of appointment, with the hope that Hassie's estate "might get under the radar screen" of the IRS. App. 42-43.

Margaret died in June 2007. After Margaret's death, Hill Jr., Lyda Hill, and Alinda Wikert implemented a criminal scheme to improperly distribute a substantial portion of the corpus of the MHTE and the HHTE to themselves long before the 21-year waiting period required by the Trust Agreements. In furtherance of this criminal scheme, Defendants hatched a plan to sell HPC – the primary asset of the two trusts – and to distribute a substantial portion of the sale proceeds to Hill Jr., Lyda Hill, and Alinda Wikert under the false pretense that the proceeds constituted "net distributable earnings" rather than trust corpus. ECF No. 483 at 2. To further the criminal scheme, new hand-picked board members were installed and awarded millions of dollars in golden parachute payments so that they would approve the sale. *Id.* at 12-15.

Even though Hill III became a current beneficiary of the MHTE in 2007 upon Margaret's death by virtue of Hill Jr.'s disclaimers, and stood to personally benefit if the corpus of the MHTE was prematurely distributed to the beneficiaries (including himself), Hill III nonetheless

opposed what he viewed to be flagrant violations of the law and Trust Agreements and attempted tax fraud by Defendants. His family told him in no uncertain terms that if he tried to stand in the way of the liquidation of the trusts, he would be disinherited. When Hill III continued to question the improper distribution of trust assets and attempted tax fraud, his family made good on their threats: Hill III was summarily fired from his positions in the family businesses, he and his wife were subjected to threats of physical force and other intimidation, and Defendants wrongfully tried to strip Hill III of his rights as a vested beneficiary in the MHTE by falsely claiming that Hill Jr. was mentally incompetent when he signed the disclaimers in Hill III's favor. App. 44-61.

In connection with Defendants' plan to crush Hill III for questioning the liquidation of trust assets and attempted tax fraud, in October 2007, Hill Jr. and his sisters filed pleadings in Texas state court in their capacities as co-executors of Margaret's estate seeking a declaratory judgment that, among other things, the disclaimer signed by Hill Jr. in 2005 was invalid due to Hill Jr.'s purported "incompetence." App. 54-61.

In November 2007, Hill III responded by filing a separate suit in Texas state court alleging, among other things, violations of the RICO Act (18 U.S.C. § 1961), fraud, and breach of fiduciary duty by Hill Jr., Alinda Wikert, Lyda Hill, Margaret Keliher (individually and in her capacity as a member of the Advisory Board of the HHTE), Brett Ringle (individually and in his capacity as Trustee of the HHTE), William Schilling (individually and in his capacity as a member of the Advisory Boards of the MHTE and the HHTE), Ivan Irwin, Jr., Tom Hunt (now deceased, but at that time the Trustee of the MHTE and Executor of Hassie's estate), and others in connection with the assets of the MHTE and the HHTE, particularly including HPC. The

defendants then removed the suit to the U.S. District Court for the Northern District of Texas. ECF No. 1.

The gravamen of Hill III's claims was that Defendants were engaged in a criminal conspiracy to loot the assets of the MHTE and the HHTE, even though Defendants had no legal standing to touch the trusts' corpus until 21 years after the deaths of Margaret and Hassie. Central to Defendants' conspiracy was the plan to sell HPC and distribute a large portion of the sales proceeds to Hill Jr., Alinda Wikert, and Lyda Hill under the pretense that the sales proceeds constituted "net distributable earnings." ECF No. 483 at 2.

B. <u>XTO Acquires HPC During the Litigation, and Is In Turn Acquired By Exxon</u>

Soon after Hill III filed suit, in June 2008, XTO announced that it was acquiring HPC. This transaction was a critical step in the Defendants' scheme to liquidate the trusts' assets and prematurely distribute hundreds of millions of dollars to Hill Jr. and his sisters, despite the fact that those individuals had no right whatsoever to receive any trust corpus until 21 years after the deaths of Margaret and Hassie.

Hill III objected to the XTO/HPC transaction, but the sale closed in September 2008 despite his opposition. Soon thereafter, approximately $700 million in sales proceeds were distributed to Hill Jr., Lyda Hill, and Alinda Wikert as part of the scheme described above. ECF No. 483 at 4. Hill III then sought recovery of billions of dollars in assets that had been transferred to XTO as part of the "objectionable sale of HPC and other Trust assets to XTO." ECF No. 616 ¶¶ 157, 253. Hill III also sought "the imposition of constructive trusts over the wrongfully applied Trust property." ECF No. 616 ¶¶ 169, 253. Had Hill III's claims been successful, XTO would have been required to return the disputed property.

In December 2009, while Hill III's claims were still being hotly contested, Exxon announced that it was acquiring XTO. ECF No. 1257-1 at App. 21-23. Just a few weeks previously, Hill III had retained the Lanier Law Firm and Lisa Blue to serve as his counsel in the *Hill v. Hunt* litigation and related state-court cases. ECF No. 354. Exxon's announcement that it was acquiring XTO (and thus HPC) created a conflict for the Lanier Law Firm, which at that time was representing Exxon in other matters. One day after the transaction was announced, on December 15, 2009, the Lanier Law Firm filed a motion to quash a court-ordered deposition. In that motion, the Lanier Law Firm explained that because XTO (and thus Exxon) was a "probable litigant . . . due to their involvement in the sale of Hunt Petroleum," the Lanier Law Firm likely could not continue to represent Hill III. ECF No. 398.

Judge O'Connor held a hearing on that motion the same day it was filed, during which hearing Hill III's then-lead attorney Mark Lanier described the conflict with Exxon:

> The Court: "I guess what I'm trying to understand is, is XTO, and some date between now and whenever they close this transaction, they will become Exxon, are they fact witnesses or are they parties, potential parties?"
>
> Mr. Lanier: "I believe—to the best of my understanding, Your Honor, I believe they are potential parties. I have not brought them in yet, because under Rule 13 I have an obligation to do the necessary discovery prior to doing that, and that's what I'm in the process of doing. But I will very clearly be taking deposition testimony that could very clearly be in conflict with the interests of another client that I have, namely Exxon."
>
> The Court: "Okay. That—okay. And the conflict is that you may be joining XTO as a party, and Exxon will then at some point presumably own XTO and they will be substituted in as the party?"
>
> Mr. Lanier: "Correct, Your Honor."

ECF No. 1280-1 at App. 11-12.

Two weeks later, the Lanier Law Firm filed a motion seeking leave to withdraw from representing Hill III and his wife on the basis of the conflict with Exxon. ECF No. 421.

Attached to the motion was an ethics opinion authored by University of Texas law professor Lynn A. Baker. ECF No. 421, Ex. A. The opinion noted that "Al Hill III and his wife, Erin Hill, have asked as part of an ongoing representation to now involve/pursue litigation with Exxon." *Id.* at 1. The opinion concluded that due to Mark Lanier's "longstanding and ongoing representation of Exxon, [he] could not reasonably be expected to provide zealous representation of a new client with regard to a matter including issues adverse to Exxon and Exxon's interests." *Id*. Shortly thereafter, the Court granted the Lanier Law Firm's motion for leave to withdraw. ECF No. 475. Judge O'Connor did not disclose during the hearing discussed above, or at any other point, that he and his family had a substantial equity ownership interest in Exxon.

XTO appeared in the action as an "Interested Party" approximately one month after the December 15, 2009 hearing, and has retained its "Interested Party" status to this day. *See* Docket in Civil Action No. 3:07-CV-02020-P. Then, in March 2010, Hill Jr. served a deposition and document subpoena on Exxon in this action for the stated purpose of inquiring into, and obtaining documents regarding, Hill III's potential claims against XTO and Exxon. ECF No. 596. As discussed more fully below, Judge O'Connor successfully pressured Hill III to settle the action before that deposition took place.

C. <u>Hill Jr. is Sanctioned for Testifying Falsely and Submitting Materials to the Court in Bad Faith and the Disclaimer Issue Is Set for Trial</u>

In September 2009, Hill III filed a motion for partial summary judgment as to whether he was a current beneficiary of the MHTE by virtue of Hill Jr.'s execution of two virtually identical irrevocable disclaimers – the original disclaimer from 2005 mentioned above and the updated disclaimer that Hill III alleged was executed in 2007 (at a time when Hill Jr. was admittedly competent) but which Hill Jr. asserted was executed in 2005. ECF Nos. 286, 287. Hill Jr. opposed Hill III's motion, and submitted his affidavit and an affidavit from Joyce Waller, an

employee of Hill Jr., attesting that both disclaimers were executed on March 22, 2005. ECF Nos. 378, 379. Hill Jr. alleged he was incapacitated in 2005 due to medication he had been taking for pain, and not competent to sign a valid disclaimer at that time. ECF No. 378 at 15-16. Judge O'Connor found that Hill Jr.'s submissions created a genuine issue of material fact as to whether the disclaimers were valid, and therefore denied Hill III's motion. ECF No. 423.

After the Court denied Hill III's motion for summary judgment, Hill III submitted new evidence – including deposition testimony from Hill Jr.'s longtime confidante Ivan Irwin, Jr. that had been obtained literally moments before Hill III's motion for summary judgment was denied in December 2009 – demonstrating that the updated disclaimer had indeed been created in 2007, and that Hill Jr. had caused it be affixed to the signature page from a draft signed and executed in 2005 to create the false appearance that the document had been signed and executed in 2005. ECF No. 440. Given this evidence of fraud that Hill III had uncovered, and after an evidentiary hearing in which Hill Jr. testified, in February 2010, Judge O'Connor sanctioned Hill Jr. for submitting "summary judgment materials in bad faith and with the intent of committing fraud on the Court," and for "intentionally [lying] under oath." ECF Nos. 541, 576. Judge O'Connor also set a trial date of April 2010, which was subsequently moved to May 2010, for determining the validity of the disclaimers signed by Hill Jr. ECF Nos. 630, 781.

D. <u>Judge O'Connor Pressures Hill III to Settle the Litigation</u>

In late April 2010, shortly before the scheduled trial date on the validity of Hill Jr.'s disclaimers, Judge O'Connor requested and was granted an *ex parte* meeting with Hill III and his wife, Erin Hill outside the presence of their attorneys. App. 62-64. During that meeting, which took place in Judge O'Connor's chambers, Judge O'Connor pressured Hill III to agree to settle

the litigation, and stated that he intended to indefinitely stay Hill III's claims unless a settlement was promptly reached. *See id.*; *see also* App. 65-70.

At that point, the litigation had already been pending for over 2½ years. Hill III was thus placed under enormous pressure to settle rather than have all of his claims stayed indefinitely and, on or about May 5, 2010, shortly after his meeting with Judge O'Connor, Hill III agreed to settle the litigation. *See* Docket in Civil Action No. 3:07-CV-02020-P, 5/5/2010 Electronic Minute Entry. The settlement was thereafter documented in a Settlement Agreement that was signed on or about May 13, 2010. ECF No. 879. The settlement was so favorable to Hill III's opponents that Hill Jr.'s counsel later was later awarded a $7.25 million bonus for having dramatically beaten Hill Jr.'s settlement expectations. App. 71-84.

At the insistence of the Defendants, the May 2010 Settlement Agreement included broad releases in favor of both Exxon and XTO. ECF No. 879 ¶ 1(d) & Ex. A. Soon after the Settlement Agreement was signed in mid-May 2010, Exxon announced that it had completed its acquisition of XTO. ECF No. 1257-1 at App. 28.

After the Settlement Agreement was signed, the parties continued to hotly contest certain issues relating to the settlement. For example, although the Settlement Agreement was silent on this point, the Defendants insisted that Judge O'Connor should order that the entire file in Hill Jr.'s separate state court divorce case be sealed as part of the Final Judgment. ECF No. 975-1 at 35. Hill III vigorously opposed the sealing of those records. ECF No. 990 at 7.

On October 22, 2010, Judge O'Connor held an in-chambers, "off the record" meeting with Hill III, Hill Jr., the Court-appointed guardian ad litem (discussed below), and several attorneys. ECF No. 982. The stated purpose of the meeting was for the parties to attempt to agree upon certain terms of the Final Judgment that would be entered on the Settlement

Agreement. During the meeting, the parties continued to disagree over certain material terms, including the guardian ad litem's insistence that Hill III agree to a life insurance policy that would pay his children in excess of $100 million dollars in the event of his death (a term that was not part of the settlement, and which Hill III believed was wholly inappropriate given that he had received death threats during the litigation, but which Judge O'Connor told Hill III that he was going impose if he could find any legal authority to do so). *See id.*

As the parties continued to disagree over various terms, Hill Jr. told Judge O'Connor during the October 22, 2010 meeting words to the effect that: "Hundreds of millions of dollars in taxes if not more are going to be owed and someone is going to be held accountable. You must settle this case before the end of this year." Hill Jr. was pointing at Judge O'Connor when he made these statements. Hill III understood that the "taxes" that Hill Jr. was referring to related to the sale of HPC, and that Hill Jr. was demanding that Judge O'Connor approve the parties' May 2010 settlement by December 31, 2010 in order avoid those taxes.

Just two weeks after the October 22 meeting, on November 9, 2010, Judge O'Connor entered a Final Judgment that purported to implement the parties' Settlement Agreement and that ordered Hill III to "release, acquit, and forever discharge" both Exxon and XTO. ECF No. 999 ¶ 35. Hill III unsuccessfully appealed certain aspects of the Final Judgment as exceeding the scope of the parties' Settlement Agreement. ECF No. 1384. Hill III also filed a motion to enforce the Final Judgment or, in the alternative, for relief pursuant to Rule 60(b) on the basis of his opponents' failure to provide him with copies of the books and records of the MHTE. ECF No. 1255. Magistrate Judge Toliver recommended that Hill III's motion be denied (ECF No. 1339), and Hill III's objections to that recommendation are presently pending before this Court (ECF No. 1343).

E. Hill III's Opponents Perpetuate Their Pattern of RICO Violations By Seeking to Have Him Indicted For Purported Mortgage Fraud

As discussed above, in February 2010, Judge O'Connor found that Hill Jr. had committed perjury concerning his testimony about the disclaimers, and that Hill Jr.'s counsel (Michael Lynn) had exceeded the bounds of appropriate advocacy in connection with the perjured testimony. ECF No. 541. Enraged by this finding, Hill Jr. directed his attorney, Mr. Lynn, to make a submission to the Dallas County District Attorney's Office a few days later that urged the D.A.'s Office to prosecute Hill III and his wife for purportedly making false statements in connection with a home equity loan. ECF No. 470-4 at App. 72 (3:10-cv-02269-P ("'2269")). The gravamen of the submission was an allegation by Hill Jr. that a trust of which he was a beneficiary supposedly owned 80% of the Hills' residence.

Between the time of this submission, in February 2010, and Dallas County District Attorney Craig Watkins' re-election as District Attorney in November 2010, Mr. Lynn's law partner Jeffrey Tillotson, donated or pledged $48,500 to Mr. Watkins' campaign. ECF No. 470-3 at App. 30-56 ('2269). Although neither Mr. Tillotson nor any other member of his firm had ever previously donated to Mr. Watkins' campaigns, these contributions made him one of Mr. Watkins' largest individual contributors. During this time frame, Ty Miller, Hill Jr.'s financial advisor, apparently secretly obtained Hill III's financial information from Hill III's banker and current trustee BB&T – and then provided that information to the D.A.'s Office in the hopes of prompting indictments.[3] App. 86.

[3] Mr. Miller is the former president of Bank One, an institution which was involved in numerous questionable transactions involving trust funds of which Hill III was a beneficiary. App. 85; ECF No. 936 at 18.

In addition, attorneys for several of the other Defendants also began making substantial contributions to D.A. Watkins around this same time. For example:

03/01/2010	$1,000 Hill Jr. Trust Attorney	Bill Sims, Vinson Elkins
03/09/2010	$2,500 Hill Jr. Trust Attorney	Vinson Elkins
05/18/2010	$5,000 MHTE Trust Attorney	Frank Branson, III
06/30/2010	$1,000 Hill Jr. Trust Attorney	Vinson Elkins
07/30/2010	$2,500 MHTE Trust Attorney	Haynes & Boone
08/20/2010	$1,000 MHTE Trust Attorney	Locke Lord
02/18/2011	$1,000 Hill Jr. Trust Attorney	Bill Sims, Vinson Elkins
02/24/2011	$1,000 MHTE Trust Attorney	Frank Branson, III

App. 87-99.

Moreover, Hill Jr. also caused David Pickett, Esq., the trustee of a trust of which Hill Jr. was a beneficiary, to make a nearly identical submission to the D.A.'s Office requesting that Hill III be indicted for purported mortgage fraud. ECF No. 517-6 at App. 1075-76 ('2269). When that submission failed to yield results, Mr. Pickett contacted the D.A.'s Office in September 2010, and then again in November 2010 shortly after the Final Judgment had been entered to insist that the D.A.'s Office indict Hill III. *Id.* at App. 1082-84. In the November 2010 communication, Mr. Pickett threatened to speak with the assistant district attorney's supervisor unless she moved forward with charges against Hill III. *Id.* at 1084-86.

Confirming that Hill Jr.'s plan was to crush his son for having dared to expose their RICO enterprise, in May 2010, Frances Wright, one of Hill Jr.'s attorneys, requested that Hill Jr. confirm in writing his promise to pay his attorneys a bonus "as we try to take them [Hill III and his wife] down!" App. 100.

Word of Hill Jr.'s efforts to influence the D.A. to prosecute the Hills reached Hill III's counsel in the spring of 2010, and Hill III's then-attorney Lisa Blue – who had close relationships inside the District Attorney's Office – offered to, and did, speak with then-First Assistant District Attorney Terri Moore about the matter. Ms. Blue later testified that she had a positive meeting with Ms. Moore in or about May 2010, in which Ms. Blue explained that this was a family fight and she hoped that there would not be an indictment. ECF No. 470-4 at App. 81 ('2269). Ms. Blue updated Hill III on this meeting shortly after it took place, and never provided him with any further update. *Id.* at App. 83, 123. Thus, the Hills understood that the District Attorney's Office was unlikely to seek any charges.

F. <u>A Fee Dispute Arises Between Hill III and His Counsel</u>

One term of the May 2010 Settlement Agreement was that the Court would appoint a guardian ad litem (the "GAL") to review and approve the Settlement Agreement on behalf of Hill III's minor children and any unborn beneficiaries of the MHTE. Judge O'Connor appointed Michael Hurst, Esq., to serve as the GAL on May 14, 2010. ECF No. 880. Soon after the GAL was appointed, a fee dispute arose between Hill III and his then-attorneys Lisa Blue, Charla Aldous, and Stephen Malouf (collectively, "BAM"). Despite the fact that the consideration that Hill III received pursuant to the May 2010 Settlement Agreement was very similar to a written settlement offer he had received in January 2010 just days before he signed a contingent fee agreement with BAM, BAM contended that it was entitled to a contingent fee of up to ***$90 million*** for the few months it had served as Hill III's counsel. BAM began to extensively lobby the GAL to support an enormous fee award in BAM's favor. *E.g.*, ECF No. 470-3 at App. 17-22 ('2269). Hill III disagreed that BAM was entitled to any such fee, and requested that BAM cease lobbying the GAL. App. 101-05.

Ultimately, the GAL recommended that Judge O'Connor award BAM a $30 million fee. Hill III objected to this recommendation in July 2010, and BAM promptly filed a motion to withdraw as his counsel. ECF Nos. 907, 913. Judge O'Connor granted BAM's motion to withdraw in November 2010, and ordered that BAM's fee claims against Hill III be tried in a "severed" action (3:10-cv-02269-P). ECF Nos. 996, 999 ¶ 40.

G. <u>Two Weeks Before Trial on BAM's $50+ Million Fee Claim is Set to Begin, Hill III is Indicted For Purported Mortgage Fraud</u>

The Hills' fee dispute with BAM was set to be tried on April 18, 2011. ECF No. 57 ('2269). On April 4, 2011 – two weeks before trial on BAM's $50+ million fee claim was set to begin – the Hills were notified that felony indictments had been returned against them for purported mortgage fraud, and that arrest warrants had been issued. The indictments at issue pertained to a home equity loan that was fully paid off long before any criminal investigation was ever opened, was never in default, and which was always fully secured by the Hills' undisputed equity in the home.

The Hills immediately moved for a continuance of their April 2011 fee trial against BAM, arguing that they would be forced to assert their Fifth Amendment rights if the trial proceeded as scheduled. Judge O'Connor denied the motion for continuance. ECF No. 239 at 54 ('2269). On the advice of counsel, the Hills invoked their Fifth Amendment rights and did not testify at the April 2011 fee trial. Faced with a one-sided record, Judge Toliver awarded BAM over $30 million in fees and costs. ECF No. 319 ('2269). Judge O'Connor subsequently reduced that award to $21.9 million in contingent fees, plus additional amounts in fees and costs. ECF No. 379 ('2269). Evidence obtained by the Hills after the trial demonstrates that the BAM attorneys actively sought to procure the Hills' indictments. The Hills have filed a motion for

relief from the judgment in favor of BAM on the basis of that new evidence, which motion is presently pending before this Court. ECF Nos. 470, 517 ('2269).

Relatedly, in November 2012, Hill III filed a motion in the criminal case against him in which he sought to dismiss all charges on the basis of prosecutorial misconduct (the D.A.'s Office had already voluntarily dismissed all charges against Erin Hill by that time). ECF Nos. 470-8-470-11 ('2269). That motion was granted in March 2013 and all criminal charges against Hill III were dismissed with prejudice following an evidentiary hearing at which State Court Judge Lena Levario made adverse credibility findings against the D.A. Office's witnesses, and at which (a) Ms. Blue invoked her Fifth Amendment rights and refused to testify, and (b) District Attorney Watkins was held in contempt for refusing to testify. ECF No. 517-6 at App. 945-46, 953-55, 1129-30, 1154, 1157 ('2269).

H. Hill III Moves to Recuse Judge O'Connor

Although Judge O'Connor never disclosed to the parties that his wife worked for Exxon, Hill III had discovered this fact around the fall of 2009. Under Fifth Circuit law, however, this fact did not constitute a basis for recusal, and so Hill III did not file a motion to recuse.[4]

In January 2012, Hill III's current counsel – who had been retained months *after* Judge O'Connor entered his Final Judgment in November 2010 – learned from public disclosures that not only does Judge O'Connor's wife work for Exxon, but that Judge O'Connor and his family also owned a significant financial interest in Exxon via ownership of Exxon equities. Specifically, Judge O'Connor and his wife together owned between $1.2 and $5.5 million in

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[4] The Fifth Circuit has expressly held that the fact that a judge's relative works for a party is not sufficient to require recusal. *E.g., DeAngelis v. City of El Paso*, 265 Fed. App'x 390, 397 (5th Cir. 2008); *Sensley v. Albritton*, 385 F.3d 591, 599-600 (5th Cir. 2004).

ExxonMobil financial interests, including interests in stock, 401(k) accounts, and options. ECF No. 1257-1 at App. 1-18.

In light of this new information, on March 12, 2012, Hill III filed a motion to recuse Judge O'Connor pursuant to 28 U.S.C. §§ 455(a) and 455(b)(4). ECF No. 1257. Judge O'Connor denied the motion as untimely, finding that – among other things – Hill III knew or should have known of Judge O'Connor's financial interest in Exxon based upon a December 2010 email from Hill III's wife (who is not a party to this action) to a friend of hers that referred in passing to Judge O'Connor's wife's "stock options," which email had been used as an exhibit in the April 2011 trial between Hill III and the BAM attorneys. ECF No. 1295.

Hill III appealed the denial of his recusal motion to the Fifth Circuit, which issued an unpublished disposition holding that Judge O'Connor had not abused his discretion by finding that Hill III's recusal motion was untimely. ECF No. 1384.

In addition to seeking Judge O'Connor's recusal, Hill III also filed a judicial misconduct complaint concerning, among other things, Judge O'Connor's *ex parte* efforts to coerce Hill III to settle the case. In connection with the misconduct complaint, Judge O'Connor admitted that he had met on an *ex parte* basis with Hill III in April 2010 to encourage him to settle, but asserted that he had done so at the request of Hill III's counsel, to whom he later awarded nearly $22 million. App. 65-70; ECF No. 379. Judge O'Connor also conceded that he had told Hill III that Hill III's claims would be stayed unless he agreed to settle, but contended "that [Judge O'Connor] felt that if the case were not settled, there were some issues that were ripe for review by the Fifth Circuit before he proceeded any further, and that the case would be stayed in his court pending consideration by the Fifth Circuit." *Id.* Judge Edith Jones dismissed Hill III's judicial complaint, which dismissal is presently on appeal. *Id.*

I. Judge O'Connor Voluntarily Recuses Himself From the Action

On May 22, 2013, over a year after denying Hill III's motion to recuse, Judge O'Connor recused himself from this action and two related actions. ECF No. 1382; ECF No. 528 ('2269); ECF No. 41 (3:12-cv-04599-P). Judge O'Connor did not provide any explanation for his recusal. No new parties have been added to this action since Hill III filed his motion to recuse in March 2012, and no hearings have been held in this action since that time. *See generally* Docket in Civil Action No. 3:07-CV-02020-P at ECF Nos. 1257-1382. The only substantive ruling entered by the district court in this action between the time that Hill III filed his motion to recuse and Judge O'Connor's May 22, 2013 order recusing himself was Judge O'Connor's May 2012 order denying the motion to recuse. *Id.*

III. DISCUSSION

A. Rule 60(b)(6) Allows a District Court to Vacate a Judgment When Appropriate to Accomplish Justice

Federal Rule of Civil Procedure 60(b) provides a district court the discretion to "relieve a party . . . from a final judgment" where justice so requires. FED. R. CIV. PROC. 60(b). Specifically, "Rule 60(b)(6) is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses." *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992).

B. In *Liljeberg*, the Supreme Court Established a Three-Part Test for Consideration of a Rule 60(b) Motion Based on a Judge's Failure to Timely Recuse Under 28 U.S.C. § 455

The United States Supreme Court has held that when a district court has failed to timely recuse itself, an appropriate remedy under certain circumstances is to vacate any orders and judgments entered after the point when the court should have recused itself. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988).

In *Liljeberg*, the district court held a bench trial in which the plaintiff sought a declaration of ownership of a hospital corporation. The district court ruled in favor of the plaintiff. Ten months later, the defendant learned that the district court had been a member of a university's board of trustees with whom the plaintiff had been negotiating over land on which to build a hospital, and that the benefit to the university with regard to those negotiations turned in large part on the plaintiff prevailing in the litigation before the district court. *Id.* at 850.

Based on this information the defendant filed a motion to vacate the judgment under Rule 60(b)(6) on the ground that the district court was disqualified under 28 U.S.C. § 455(a) at the time it presided over the trial and entered judgment in favor of the plaintiff. A different district court heard the motion and found that although the district court lacked actual knowledge of the conflict during the trial, the trial judge's position on the board gave rise to an appearance of impropriety under section 455(a). *Id.* at 851. However, the reviewing district court denied the defendant's Rule 60(b) motion on the basis that the prior judge lacked actual knowledge of the conflict at the time of the trial. *Id.* The Fifth Circuit reversed this ruling, finding that the appropriate remedy was to vacate the judgment entered by the district court based upon the appearance of impropriety. *Id.* at 851-52.

The Supreme Court affirmed the Fifth Circuit's ruling, and in doing so held that the following standard applies:

> We conclude that in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

Id. at 864.[5]

With regard to the first factor, the Supreme Court found that the "facts create precisely the kind of appearance of impropriety that § 455(a) was intended to prevent." *Id.* at 867. With regard to the second factor, the Court held that vacating the judgment "may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." *Id.* at 868. Finally, with regard to the third factor, the Court noted that "[t]he guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as to be so in fact." *Id.* at 869-70 (quoting *Public Utils. Comm'n of D.C. v. Pollak*, 343 U.S. 451, 466-67 (1952)). In sum, the Court held that the Fifth Circuit's decision to vacate the underlying judgment "reflect[ed] an eminently sound and wise disposition of this case." *Id.* at 870.

After *Liljeberg*, the Fifth Circuit and a number of other circuit and district courts have vacated judgments and other orders following a trial court's failure to timely recuse itself pursuant to section 455. *E.g.*, *Rep. of Panama v. Am. Tobacco Co.*, 217 F.3d 343, 347 (5th Cir. 2000) ("Because the district court should have recused itself the remand order and denial of the motion to stay proceedings, both entered following the disposition of the recusal motion should be vacated."); *U.S. v. Jordan*, 49 F.3d 152, 160 (5th Cir. 1995) (vacating sentence); *Shell Oil Co. v. U.S.*, 672 F.3d 1283, 1293-94 (Fed. Cir. 2012) (vacating judgment and summary judgment orders); *U.S. v. Microsoft Corp.*, 253 F.3d 34, 116 (D.C. Cir. 2001) (vacating order breaking up Microsoft); *Preston v. U.S.*, 923 F.2d 731, 735 (9th Cir. 1991) (vacating judgment and noting that "[t]he Supreme Court has never limited recusal requirements to cases in which the judge's conflict was with the parties named in the suit . . . [r]ather, the focus has consistently been on the

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[5] The *Liljeberg* factors apply equally to a Rule 60(b) motion based upon a failure to recuse under

question whether the relationship between the judge and an interested party was such as to present a risk that the judge's impartiality in the case at bar might reasonably be questioned by the public."); *In re Aetna Cas. & Surety Co.*, 919 F.2d 1136, 1146 (6th Cir. 1990) (vacating summary judgment order and ruling denying motion for consolidation); *El Fenix de Puerto Rico v. M/Y Johanny*, 954 F. Supp. 23, 27 (D.P.R. 1996) (vacating judgment).

C. Judge O'Connor's Recusal Appears to Warrant Relief Under Rule 60(b)

On May 22, 2013, Judge O'Connor recused himself from this action and two related actions. Judge O'Connor's recusal orders provide no explanation for his change of position. As discussed above, between the time that Hill III filed his recusal motion in March 2012 and the date on which Judge O'Connor recused himself, no new parties were added to this action, no hearings were held, and no substantive rulings were issued by the trial court other than Judge O'Connor's May 2012 order denying Hill III's recusal motion. On this record, the most logical conclusion is that Judge O'Connor determined that his financial interest in Exxon created a recusable conflict – or at a minimum, that Judge O'Connor has determined that he has another recusable conflict that has existed since before Hill III's recusal motion was filed.

If Judge O'Connor's recusal concerns his financial interest in Exxon, the recusal should have taken place when the Lanier Law Firm raised the Exxon conflict with Judge O'Connor in December 2009 – *i.e.*, well before Judge O'Connor held an *ex parte* meeting with Hill III in April 2010 and pressured him to settle the case. In such event, the untimely recusal would clearly warrant relief under Rule 60(b) pursuant to the *Liljeberg* factors.

The first of the considerations under *Liljeberg*, "the risk of injustice to the parties in the particular case," weighs heavily in favor of vacating the tainted May 2010 Global Settlement

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section 455(b). *Shell Oil Co. v. U.S.*, 672 F.3d 1283, 1292 (Fed. Cir. 2012).

Agreement, the November 2010 Final Judgment implementing it, as well as subsequent orders issued by the trial court.[6] Indeed, the undisputed evidence shows that at a time that Judge O'Connor held a substantial financial interest in Exxon, he had an *ex parte* meeting with Hill III in which he pressured Hill III to settle the case. *See* App. 62-70. That settlement removed a cloud over a multi-billion dollar asset that Exxon was in the process of acquiring, and included broad releases in favor of Exxon. Judge O'Connor's *ex parte* meeting with Hill III also resulted in Hill III accepting a settlement that was so far below what Hill III's opponents had been prepared to pay that Hill Jr.'s counsel was recently awarded a $7.25 million bonus by a jury on the basis that he had dramatically beaten Hill Jr.'s settlement expectations. App. 71-84.

The second consideration under *Liljeberg*, "the risk that the denial of relief will produce injustice in other cases," also weighs in favor of vacatur in this case. In *Liljeberg*, the Supreme Court found the second factor to be satisfied because the Fifth Circuit's "willingness to enforce § 455 may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." 486 U.S. at 868. That same reasoning applies here, because a decision to vacate the judgment may likewise prevent a similar injustice from occurring in a future case. Courts certainly should prevent litigants in future cases from being pressured to settle a matter during an *ex parte* meeting with a judge where an appearance of impropriety or actual conflict exists at that time.

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[6] In this regard, Hill III notes that the two related actions, *Campbell Harrison & Dagley, L.L.P. et al. v. Hill et al.*, Case No. 3:10-cv-02269-P and *Campbell Harrison & Dagley, L.L.P. et al. v. Hill et al.*, Case No. 3:12-cv-04599-P, only exist because of, and are dependent upon, the Final Judgment in this action. *See* ECF No. 999 ¶ 40. Accordingly, if the Final Judgment in this matter were to be vacated, the judgments and orders that have been entered in those matters would also need to be vacated. Fed. R. Civ. P. 60(b)(5); *see also Flowers v. S. Reg'l Physician Servs., Inc.,* 286 F.3d 798, 801-03 (5th Cir.

Finally, the third consideration under *Liljeberg*, "the risk of undermining the public's confidence in the judicial process," also weighs heavily in favor of vacatur. As the Supreme Court noted in *Liljeberg*, "[t]he guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as to be so in fact." *Id.* at 869-70. Not vacating the Settlement Agreement and judgment under the circumstances would severely risk undermining the public's confidence in the judicial process. In particular, there is a strong appearance of impropriety when a judge with a financial interest in a party conducts an *ex parte* meeting with another party outside the presence of his counsel for the purpose of encouraging settlement.

The above analysis of the *Liljeberg* factors may apply equally if Judge O'Connor's recusal was based upon a conflict other than his financial stake in Exxon, if said conflict was present prior to the Final Judgment being entered. As discussed above, the parties presently have no way to be certain whether Judge O'Connor recused himself due to his Exxon holdings or due to another issue. However, the fact that Judge O'Connor has yet to identify the reason for his recusal should not be held against Hill III. Given the extraordinarily unusual record presented here, this Court should find that the recusal relates to Exxon. Indeed, it would be a miscarriage of justice for this Court to simply assume that Judge O'Connor's recusal is unrelated to the issues raised in Hill III's March 2012 recusal motion.

D. <u>In the Alternative, Hill III Should Be Given Leave to Take Discovery Concerning Judge O'Connor's Conflict</u>

If the Court is not inclined to grant this motion outright, at a minimum the Court should allow Hill III to conduct limited discovery into the reason for Judge O'Connor's recusal. *E.g., Rohrbach v. AT&T Nassau Metals Corp.*, 915 F. Supp. 712, 717 (M.D. Pa. 1996) (noting that "if

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2002) (affirming district court's granting of Rule 60(b)(5) motion with respect to attorneys' fees award where underlying judgment upon which award was based had been vacated).

a stronger showing of conflict of interest or bias is necessary to warrant *vacatur*, then plaintiffs should be able to pursue avenues necessary to make that showing."). The discovery could either take the form of written interrogatories to Judge O'Connor concerning the nature and timing of the conflict that resulted in his decision to recuse, or in the form of a deposition on those same topics. Such discovery is clearly permissible in furtherance of a Rule 60(b) motion. *See, e.g.*, *MMAR Grp., Inc. v. Dow Jones & Co.*, 187 F.R.D. 282, 284-286 (S.D. Tex. 1999).

IV. CONCLUSION

For the foregoing reasons, Hill III respectfully requests that the Court vacate the Global Settlement Agreement (ECF No. 879), Final Judgment (ECF No. 999), and all orders relating thereto pursuant to Section 455 and Rule 60(b)(6) in light of Judge O'Connor's recusal. In the alternative, and at a minimum, Hill III respectfully requests that the Court permit Hill III to conduct limited discovery into the reasons for Judge O'Connor's recusal.

Respectfully submitted,

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Certificate of Service

This is to certify that the foregoing document was filed with the Clerk of the Court using the electronic case filing system which automatically sends notice of electronic filing to the attorneys of record who have consented to accept such notice on June 28, 2013.

/s/ Justin Klaeb