IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

SHOLOM RUBASHKIN, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)	No. C13-1028-LRR No. CR08-1324-LRR **PETITIONER'S MOTION FOR LEAVE TO FILE OVERLENGTH BRIEF**

Petitioner Sholom Rubashkin, by the undersigned counsel, submits this Motion for Leave to File Overlength Brief, and states as follows:

1. Petitioner has contemporaneously filed a Motion to Recuse Chief United States District Court Judge Linda R. Reade (the "Motion to Recuse"). Petitioner's proposed Memorandum in Support of the Motion to Recuse exceeds the page limits set forth in Local Rule 7h.

2. Petitioner submits that a brief in excess of the page limits is appropriate and necessary in light of the complexity of the issues presented in the Motion to Recuse and complexity of the case in general. Petitioner's proposed Memorandum is attached as Exhibit A.

WHEREFORE, Petitioner respectfully requests that the Court enter an Order granting leave to file an overlength Memorandum of Law in Support of Plaintiff's Motion to Recuse Chief United States District Court Judge Linda R. Reade, and for such other relief as the Court deems fair and equitable.

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the parties to this action by serving a copy upon each of the attorneys listed below on January 29, 2014 by

☐	U.S. Mail	☐	FAX
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

SHOLOM RUBASHKIN, Movant, v. UNITED STATES OF AMERICA, Respondent.	)	No. C13-1028-LRR No. CR08-1324-LRR **MEMORANDUM OF LAW IN SUPPORT OF MOVANT SHOLOM RUBASHKIN'S MOTION TO RECUSE CHIEF UNITED STATES DISTRICT COURT JUDGE LINDA R. READE**

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INTRODUCTION

Sholom Rubashkin moves to recuse Chief United States District Court Judge Linda R. Reade (the "Presiding Judge") from presiding over his timely filed Title 28, section 2255 petition, which seeks to vacate his conviction and 27-year sentence for bank fraud and money laundering. Recusal is necessary because the case is littered with factual and legal issues so closely connected to the actions, statements, and relationships of the Presiding Judge that an observer might reasonably question her ability to remain impartial. Rulings will have to be made, for example, regarding the propriety of *ex parte* communications between the Presiding Judge and the prosecution prior to charges being filed in Mr. Rubashkin's criminal case; the propriety of additional *ex parte* communications between the Presiding Judge and the prosecution immediately prior to Mr. Rubashkin's sentencing; the involvement of the Bradshaw Fowler law firm (of which the Presiding Judge's husband is a senior partner) in past and future events in the case; and a conflict issue centered on the knowledge (or lack thereof) of one of Mr. Rubashkin's attorneys regarding allegedly confidential *ex parte* communications between the Presiding Judge and the government. No judge, no matter how well intentioned, could be expected to evaluate her own actions and statements, address matters in which her husband's law firm was – and still is – providing assistance to Mr. Rubashkin, and rule on other issues of which she has personal knowledge from extrajudicial sources without legitimate questions being raised about impartiality.

First, the government's Answer to the petition makes clear that the adjudication of the case will require the Court to make numerous factual and legal determinations relating to the Presiding Judge's *ex parte* communications with the United States Attorney's Office for the Northern District of Iowa ("USAO-NDIA"). The *ex parte* communications at issue include not

just those addressed in the Eighth Circuit Court of Appeals decision affirming Mr. Rubashkin's conviction on direct review, but also certain *ex parte* communications that occurred shortly before Mr. Rubashkin's sentencing hearing and yet, to this day, have not been produced to Mr. Rubashkin's counsel by the USAO-NDIA. Among other things, the Court will have to decide:

- whether to permit Mr. Rubashkin to take discovery regarding the *ex parte* communications;
- what actually occurred during the *ex parte* communications;
- whether the substance and context of the *ex parte* communications indicates an appearance of bias or partiality rising to the level of a due process violation; and
- whether the Presiding Judge's recollection of events should outweigh arguably inconsistent information in law enforcement memoranda and documents.

Second, the web surrounding the *ex parte* communications with the USAO-NDIA has grown even more tangled this month, as the government is now alleging the existence of a conflict on the part of one of Mr. Rubashkin's attorneys arising out of the attorney's former service as an Assistant United States Attorney for the Southern District of Iowa. The alleged conflict relates to the referral to the Southern District of Iowa of an investigation into possible threats against the Presiding Judge—the same investigation which led to the still-undisclosed *ex parte* communications between the Presiding Judge and the USAO-NDIA immediately prior to Mr. Rubashkin's sentencing. Counsel had no role in that investigation and is confident no conflict exists; however, the mere fact that the government intends to raise the issue with the Court means that the Presiding Judge, if not recused, will have to address a conflict issue relating

to an attorney's knowledge (or lack thereof) of her own allegedly confidential *ex parte* communications.[1]

Third, attorneys at the Bradshaw Fowler law firm, of which the Presiding Judge's husband is a senior partner, represented five companies closely affiliated with Sholom Rubashkin during the pendency of his criminal case and regularly met with Mr. Rubashkin to discuss strategy and other matters. These attorneys likely possess material information regarding a crucial issue in this case; namely, the improper interference of the government with the Agriprocessors business during bankruptcy proceedings. Indeed, fee petitions submitted by the Bradshaw Fowler firm to the bankruptcy court in 2009 and 2010 show that attorneys from the firm provided assistance to Mr. Rubashkin's criminal defense attorneys during his criminal case. A Bradshaw Fowler attorney also has provided, and is expected to continue providing, assistance to Mr. Rubashkin's counsel in *this* case. One or more Bradshaw Fowler attorneys may even be asked to testify in this matter regarding their interactions with attorneys for the Agriprocessors Trustee. An appearance of partiality arises when the Presiding Judge is asked to decide issues so closely linked to her husband's firm.

The denial of Mr. Rubashkin's Rule 33 motion for a new trial by the Eighth Circuit Court of Appeals, which involved the issue of certain *ex parte* communications, does not impact, much less foreclose, this recusal motion. *United States v. Rubashkin*, 655 F.3d 849, 857-58 (8th Cir.

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[1] To be clear, the government is not alleging that counsel should be disqualified as a result of the alleged conflict. Rather, the government asserts the existence of a waivable conflict. Although the alleged conflict is only between counsel and client, and although Iowa Rules of Professional Conduct are generally self-governing, the government has requested an assurance from counsel that Mr. Rubashkin has been advised regarding the alleged conflict and that he has provided informed consent to proceed with the representation. The government further states that it intends to disclose the conflict and assurance to the Court.

2011). On direct appeal, the Eighth Circuit's consideration of the *ex parte* contacts was limited to three specific issues: (1) whether Mr. Rubashkin's recusal request was timely or should have been made before trial; (2) whether the Presiding Judge's failure to recuse herself *sua sponte* constituted "plain error;" and (3) whether Mr. Rubashkin had shown actual bias on the part of the Presiding Judge. *Id.* at 585-59.

The Eighth Circuit did not address the issues that are central to this motion: (1) whether the Presiding Judge's personal knowledge of disputed facts – *i.e.*, her role as fact-provider rather than fact-finder – provides grounds for recusal under §455(b)(1); (2) whether Mr. Rubashkin should be permitted to take discovery of the *ex parte* communications, including the still-undisclosed *ex parte* communications from immediately prior to sentencing; (3) whether the connection between the Presiding Judge's husband's law firm and this case requires recusal; and (4) whether the totality of circumstances – including the Presiding Judge's personal knowledge of critical events, *ex parte* communications with the government both before trial and before sentencing, the arguable inconsistency between her personal recollection and law enforcement memoranda, the Bradshaw Fowler connection, and substantial criticism by former DOJ officials and federal judges, ethics experts, law professors and government officials – would coalesce to cause an average observer in possession of all the facts to question the Presiding Judge's ability to remain impartial.

STATEMENT OF THE RELEVANT FACTS AND PROCEDURAL HISTORY

I. *EX PARTE* COMMUNICATIONS PRIOR TO TRIAL AND SENTENCING.

The indictment of Sholom Rubashkin had its genesis in a massive federal raid of Agriprocessors, a kosher meatpacking plant in Postville, Iowa where Mr. Rubashkin worked as a vice-president. (App. 2.) The raid, carried out by approximately 600 Immigration and Customs

Enforcement Agency (ICE) agents, resulted in the arrest of 389 plant workers. (App. 3, 8.) The USAO-NDIA prosecuted 297 of these individuals, all of whom pled guilty over a four day period to immigration violations. Julia Preston, *Illegal Immigrants Sent to Prison in Federal Push*, N.Y. TIMES, May 24, 2008 (App. 13-17.). The Presiding Judge met with federal prosecutors and law enforcement agents numerous times for a period of seven months prior to the raid to discuss various matters relating to the raid and the prosecutions that arose from it. (App. 18-48.)

Less than six months after the raid, Sholom Rubashkin was arrested on multiple charges of harboring illegal immigrants for profit at Agriprocessors. (App. 50-51.) Ultimately, the USAO-NDIA indicted him on these and numerous other immigration and financial crimes. (App. 51-53.). A government lawyer told the House Judiciary Committee that the USAO-NDIA had given the Presiding Judge a routine "heads up" about an impending law enforcement operation. (App. 60.) Based on some of these facts and other media reports, trial counsel in a related case filed a motion to recuse the Presiding Judge. (App. 61-62.) In denying that motion, the Presiding Judge issued a written order stating that she "limited her actions in the [Agriprocessors] cases to her role as Chief Judge of the Northern District of Iowa, that is, performed duties in her official capacity." (App. 68.) Based on these facts, Mr. Rubashkin's trial counsel did not file a recusal motion, reasoning that it would be futile to do so. (App.77, 82-83.) Trial counsel, did, however, file a Freedom of Information Act (FOIA) request prior to trial requesting any and all documents related to the Agriprocessors raid. (App. 78.) They received no documents responsive to the FOIA request before the case went to trial before the Presiding Judge, nor did the USAO-NDIA voluntarily produce any documents.

The jury found Mr. Rubashkin guilty on 86 fraud-related counts.[2] (App. 86-94). On June 22, 2010, following two days of sentencing hearings, the Presiding Judge handed down a sentence of 27 years in prison – two years above what the USAO-NDIA had sought. (App. 4.) It was effectively a life sentence for the fifty-one-year-old Mr. Rubashkin, a husband and father of ten children, one severely disabled. (App. 5-6.).

Shortly before the first day of Mr. Rubashkin's sentencing hearing, the USAO-NDIA sent an email to Mr. Rubashkin's trial counsel with the subject line "disclosures." The email stated, in pertinent part:

> During the pendency of this matter, Chief Judge Linda R. Reade has received several communications that may be characterized as threatening. Some of these communications are or appear to be connected to this case. The investigations regarding the communications connected to this case are being conducted by the Federal Bureau of Investigation. The United States Attorney's Office for the Northern District of Iowa is recused from these investigations because they involve a Northern District Judge. Our office has been informed that the progress of the FBI's investigations is such that disclosure of the communications to you will not adversely affect the investigations. Enclosed please find copies of the communications being investigated.
>
> Chief Judge Reade has recently expressed concern to the United States Marshal's Service and our office's management about the progress of these investigations. Management has informed Chief Judge Reade we are recused on the matters and has directed her to the appropriate FBI Office (Cedar Rapids) and United States Attorney's Office (Southern District of Iowa).

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[2] The Presiding Judge severed the immigration counts from the financial crimes counts and ordered that the financial crimes be tried first, over Mr. Rubashkin's objection. *United States v. Rubashkin*, 655 F.3d at 854. Following Mr. Rubashkin's conviction, the government dismissed the immigration case against him. (App. 54.) But the severance and eventual dismissal did not mean that the immigration charges – derived directly from evidence obtained from the May 12, 2008 raid – went unmentioned in the financial-crimes trial. To the contrary, the evidence played a significant role. For nearly three days, the jury heard testimony from seven witnesses who testified that Mr. Rubashkin knew that many of his workers were illegal, set up a side payroll to avoid attracting attention, and gave some of his workers money to purchase fake documents that would allow them to work in the United States. (App. 9-10.)

(App. 95-96.) The USAO-NDIA did not state the form of the *ex parte* communications between its "management" and the Presiding Judge (email, phone call, in-person conversation, etc.) and has never provided the actual communications themselves.

After Mr. Rubashkin was sentenced, the government released numerous heavily-redacted documents responsive to trial counsel's FOIA request and lawsuit relating to the pre-raid activities. These documents, consisting largely of memoranda and emails authored by ICE officials, evidence numerous *ex parte* meetings between the Presiding Judge and the USAO-NDIA beginning in early October 2007, and continuing throughout the seven months leading up to the Agriprocessors raid on May 12, 2008. (App. 11-12, 18-48.) None of the meetings was recorded or transcribed. (App. 28.)

Although heavily-redacted, the ICE memoranda evidence that the Presiding Judge, federal prosecutors and ICE agents met *ex parte* more than ten times; one document states that the meetings were "scheduled weekly." (App. 42.) One of the prosecutors with whom the Presiding Judge met *ex parte* was AUSA Richard Murphy, part of the prosecution team that tried the case against Mr. Rubashkin and sought a 25-year sentence against him, a request the Presiding Judge exceeded by two years.

Documents obtained through the FOIA request refer to the Presiding Judge as a "stakeholder" in the operation and state that she was "willing to support the immigration operation in any way possible." (App. 38, 41). The memoranda show that the Agriprocessors raid targeted "at least one corporate official," as well as low-level employees. (App. 31.)

In a March 12, 2008 PowerPoint presentation describing the planned raid – which may have been shown during the March 17, 2008 meeting attended by the Presiding Judge – ICE identified Mr. Rubashkin as the "Vice-President of the company," and noted its belief "that one or

more company officials may have knowledge of criminal conduct on the part of the company and may even be culpable themselves." (*See* App. 98, 104.)

Whether or not the Presiding Judge actually saw the PowerPoint during the March 17, 2008 meeting, she did discuss with the USAO-NDIA "an overview of charging strategies, numbers of arrests and prosecutions, logistics, the movement of detainees and other issues related to the CVJ investigation and operation" on that date. (App. 25.) Three days later, at yet another *ex parte* meeting, the Presiding Judge asked the USAO and ICE for a "final game plan" for the raid. (App. 27.) A March 31, 2008 email refers to a planned meeting between the Presiding Judge and AUSA Murphy on April 4, at which AUSA Murphy planned to give a "presentation" to the Presiding Judge and asked ICE for "an operation plan" to incorporate into that presentation. (App. 29.) No unredacted document describes what occurred at that meeting.

Nonetheless, the state of the record allows for the inference that the "presentation" AUSA Murphy gave to the Presiding Judge included a documented titled "Exec[utive] Summary," which describes the planned raid in detail, explicitly states that the target of the raid is "Agriprocessors, Inc.," and indicates that "at least one corporate official" will be arrested. (App. 30.) Sholom Rubashkin was the only "corporate official" ever charged in connection with the raid. An unnamed ICE official forwarded the Executive Summary to another ICE official named Marcy Forman one month before the raid, after Forman sent an email to ICE asking, "What is the status of our Op [raid] plan? Where are we on the doc for the USAO fro [sic] his presentation to the judge?" (App. 30.) In the email accompanying the forwarded Executive Summary dated April 2, 2008, the unnamed ICE official wrote to Forman, "The Exec summary of the [raid] will satisfy [AUSA] Richard Murphy's requirement to brief the judge." (App. 30.)

The Presiding Judge has asserted that Mr. Rubashkin's identity and involvement in the case was never disclosed to her during these *ex parte* meetings. (Rule 33 Order at p. 5) Even if true, his identity and involvement reasonably would have become obvious once Mr. Rubashkin was arrested and first appeared before her. At that point, the Presiding Judge must have known that Mr. Rubashkin was the "corporate official" that the government had told her in *ex parte* communications had been targeted for prosecution. Although the Presiding Judge knew she had *ex parte* information about Mr. Rubashkin's case that both raised the appearance of bias as well as the danger of actual bias, the Presiding Judge did not recuse herself, nor did she inform trial counsel, both of whom have stated under oath that they would have sought to remove her from the case had they been made aware of this information. (App. 77, 84.)

Following the disclosure of the ICE memoranda, Mr. Rubashkin filed a Rule 33 motion, arguing that the Presiding Judge should have recused herself from presiding over his trial. The Presiding Judge denied the motion. (Rule 33 Order at p.) The Eighth Circuit Court of Appeals affirmed on narrow grounds, holding that, because trial counsel had failed to raise the recusal motion at the time of trial, reversal would be mandated only if Mr. Rubashkin could establish that the Presiding Judge's recusal "probably would have resulted in acquittal." *Rubashkin*, 655 F.3d at 857-59. Mr. Rubashkin filed a petition for certiorari with the Supreme Court on April 2, 2012. (App. 1.) Following the Supreme Court's denial of the writ for certiorari, Mr. Rubashkin timely filed his section 2255 petition. Because the Rules governing the filing of a section 2255 petition state that it must be filed in the district court where the prisoner was sentenced, Mr. Rubashkin's petition is currently pending before the Presiding Judge.

In its Answer to the § 2255 petition, the government denied withholding information regarding *ex parte* communications with the Presiding Judge. The government further asserted

that "[h]ad movant's trial counsel moved to recuse the judge based upon alleged ex parte contacts with the government, such a motion would have been properly denied and such denial would have been sustained on appeal." (App. 111-112)

II. THE CLOSE CONNECTION BETWEEN THE BRADSHAW FOWLER LAW FIRM, THE PROSECUTION OF SHOLOM RUBASHKIN, AND THE MATTERS RAISED IN RUBASHKIN'S § 2255 PROCEEDING.

The Presiding Judge's husband is a senior partner with the Bradshaw Fowler law firm in Des Moines, Iowa. *See United States v. Miell*, 2008 WL 974843 at *1, No. 07-CR-101-LRR, (April 8, 2008). In March 2009, during the pendency of Mr. Rubashkin's criminal case, Bradshaw Fowler was retained as bankruptcy counsel by four companies owned in substantial part by Sholom Rubashkin: Nevel Properties Corporation, Amereeka Properties, LLC, SFG Corporation, and Best Value, Inc. *See In re Nevel Properties Corporation*, Case No. 09-00415 (Bankr. N.D. Iowa.); *In re Amereeka Properties, LLC* No. 09-00416 (Bankr. N.D. Iowa); *In re SFG Corporation*, Case No. 09-00417 (Bankr. N.D. Iowa); and *In re Best Value, Inc.*, Case No. 09-00591 (Bankr. N.D. Iowa). The Bradshaw Fowler firm filed Chapter 11 bankruptcy proceedings on behalf of all four corporations in March 2009. (*Id.*)[3] Sholom Rubashkin was a principal and part-owner of each of those companies, and the fee petitions submitted by the Bradshaw Fowler firm in those cases reflect dozens of conversations and meetings with Mr. Rubashkin. (App. 114-248.) The Bradshaw Fowler firm identified Mr. Rubashkin as "one of the Debtor's primary liaisons with its counsel [Bradshaw Fowler]" and stated that Mr. Rubashkin played an active role in the cases "on almost a daily basis." (App. 251.)

[3] The Bradshaw Fowler firm also represented a fifth Rubashkin-affiliated company, Cottonballs, that did not end up in bankruptcy but that figures prominently in Mr. Rubashkin's § 2255 Petition. *See* § 2255 Memorandum at pp. 12-14; 36.

The fee petitions submitted by the Bradshaw Fowler firm in the bankruptcy cases also reveal dozens of conversations and emails between Bradshaw Fowler attorneys and Mr. Rubashkin's criminal defense attorneys. (App. 119, 136-137, 142, 155-156, 160, 174, 177, 184, 190, 191, 192, 204, 215, 231-233, 239-240.) These conversations and emails are often described as having involved "strategy" and occurred most heavily in the months leading up to Mr. Rubashkin's sentencing. (App. 137, 156, 160, 177, 190, 204, 240.) The day after the Presiding Judge sentenced Mr. Rubashkin to 27 years' imprisonment and ordered the payment of criminal restitution, a Bradshaw Fowler attorney spoke with one of Mr. Rubashkin's criminal defense attorneys regarding "bankruptcy implications" of the sentence. (App. 155.)

Although the Presiding Judge's husband is not mentioned in any of the Bradshaw Fowler fee petitions as having taken part in representing the Rubashkin-affiliated companies, ten other attorneys from the Bradshaw Fowler firm did bill time on the matters, as well as two law clerks and four legal assistants. (App. 121, 128, 132, 147, 159, 166, 176, 186, 193, 200, 202, 208, 219, 223-224, 234, 243, 246, 248.)[4] The Bradshaw Fowler firm has roughly 45 attorneys; meaning that nearly 25% of its attorneys billed time on the Rubashkin-affiliated matters. (App. 295.) The Bankruptcy Court approved the payment of more than $250,000 to the Bradshaw Fowler firm in connection with its work on the Nevel and Best Value bankruptcies. (App. 535, 562.) This amount includes fees incurred during "strategy" conversations with Mr. Rubashkin's criminal defense attorneys and other apparent assistance provided to those criminal defense attorneys. (App. 137, 156, 160, 177, 190, 204, 240.)

[4] The lead Bradshaw Fowler attorney on the matter was Jeffrey Goetz.

The Presiding Judge's rulings in Mr. Rubashkin's criminal case directly affected Bradshaw Fowler's representation of the Rubashkin entities, including, for example, when the Presiding Judge's decision to have Mr. Rubashkin detained following trial prevented him from appearing at a bankruptcy court hearing at which Bradshaw Fowler sought his attendance. (App. 296-299.) The dockets from the bankruptcy cases also reveal other examples of substantial entanglement between Best Value, Agriprocessors, the Bradshaw Fowler law firm, and Mr. Rubashkin's criminal case:

- Agriprocessors, Inc. owed more than $466,000 to Best Value at the time Best Value filed for bankruptcy. (App. 312.) Any restitution order in Mr. Rubashkin's criminal case (to which Agriprocessors was even a party until eventually being dismissed) would have affected Bradshaw Fowler's ability to recover that debt on behalf of Best Value.

- Cottonballs, Inc., paid part of the retainer to the Bradshaw Fowler firm for its representation of Best Value and was also a client of the firm. (App. 531.) A disputed issue at sentencing was whether the refusal to allow Agriprocessors to use Cottonballs for raising chickens caused part of the loss ultimately suffered by First Bank. (App. 321-322.)

- According to a filing by the Bradshaw Fowler firm, there were "rumors" that the Agriprocessors' trustee might assert an ownership interest by Agriprocessors in the assets of Best Value, and thus try to assert control over the Best Value bankruptcy. (App. 312.) Any assertion of control by Agriprocessors over Best Value's assets likely would have reduced Mr. Rubashkin's loss amount but also may have complicated Bradshaw Fowler's efforts to liquidate the Best Value estate.

- In the Best Value bankruptcy, the United States Trustee filed a motion to convert the case from Chapter 11 (reorganization) to Chapter 7 (liquidation). (App. 314-317.) The Agriprocessors Trustee joined the motion. (App. 538.) If granted, this motion would have effectively terminated Bradshaw Fowler's leading role as counsel in the matter, as a neutral Chapter 7 trustee would have been appointed to manage the liquidation. However, on the day the Presiding Judge issued an opinion imposing a 27-year sentence on Mr. Rubashkin, the United States Trustee withdrew the motion to convert. (App. 539.) The Agriprocessors Trustee joined the withdrawal the following day. (App. 540-541.)

- According to a Bradshaw Fowler fee petition, a Bradshaw Fowler attorney had several conversations with AUSA Rich Murphy regarding, apparently, whether the

conditions of pretrial release for Mr. Rubashkin could be relaxed to allow him to discuss bankruptcy matters with potential government trial witness Collin Cook. (App. 155.)

- In July 2010, Bradshaw Fowler filed a motion to withdraw from the Nevel bankruptcy matter on account of a conflict between the firm and its client. (App. 542-543.) Nevel's new counsel subsequently opposed Bradshaw Fowler's final fee petition in the matter. (App. 544-554.)

Cottonballs and Best Value play a prominent part in the allegations made by Mr. Rubashkin in his § 2255 motion. Mr. Rubashkin alleges that the USAO-NDIA told the Agriprocessors Trustee that Agriprocessors could not use Best Value to deliver products unless no other trucks were available. (§ 2255 Brief at p. 13.) Similarly, the § 2255 motion alleges that the government improperly prohibited Agriprocessors from using Cottonballs to raise chickens. (§ 2255 Brief at pp. 12, 36.) In short, Mr. Rubashkin alleges that "[t]he government's . . . operational intrusions into the Trustee's autonomy compromised the Trustee's ability to maximize value for the creditors of Agriprocessors in the bankruptcy." (§ 2255 Brief at p. 36.)

Bradshaw Fowler attorneys presumably have firsthand information regarding these operational intrusions, particularly as they relate to Best Value and Cottonballs. The Bradshaw Fowler fee petitions reflect numerous conversations with Dan Childers and Paula Roby, who served as counsel for the Agriprocessors Trustee. (App. 115-116, 124, 144, 153, 182-183, 196, 197-198, 207, 212-216, 226-227, 229, 232, 237-238, 242.) Ground 1 of the § 2255 petition revolves heavily around Ms. Roby's sentencing hearing testimony that the USAO-NDIA did not influence the decision of the Agriprocessor's Trustee not to do business with Cottonballs. (§ 2255 Memorandum at pp. 12-13.) Ms. Roby stated, in particular, that she, Mr. Childers, and a third attorney, Bob Reich, made this decision on their own, without influence from the USAO-NDIA. *See* Sent. Tr. 497:8-21.

ARGUMENT

III. RECUSAL IS REQUIRED BECAUSE THE PRESIDING JUDGE HAS PERSONAL KNOWLEDGE OF DISPUTED EVIDENTIARY FACTS, IS LIKELY TO BE A MATERIAL WITNESS AT TRIAL, LIKELY WILL HAVE TO EVALUATE TESTIMONY AND EVENTS INVOLVING HER HUSBAND'S LAW FIRM, AND BECAUSE OF A GENERAL APPEARANCE OF IMPROPRIETY.

A. The Presiding Judge Has Personal Knowledge of Disputed, Material Facts Surrounding Her Ex Parte Communications with the USAO-NDIA, and Thus Recusal Is Mandated Under 28 U.S.C. §455(b)(1).

The government's Answer to the § 2255 petition places the substance of *ex parte* communications between the USAO-NDIA and the Presiding Judge squarely at issue. The government alleges that Mr. Rubashkin's trial counsel already had all pertinent information regarding the *ex parte* communications prior to trial, and in any event the nature of the communications did not warrant recusal. (App. 111-112.) Establishing the truth or falsity of these allegations will require, in the first instance, a determination of what the communications *were*. This is a purely factual issue of which the Presiding Judge has personal knowledge—indeed, she is the key participant.

In orders denying defendant de la Rosa-Loera's recusal motion and Mr. Rubashkin's Rule 33 motion, the Presiding Judge made numerous factual assertions about her involvement with the prosecution in Mr. Rubashkin's case. Some of these assertions are in arguable conflict with other information in the record. None were sworn. For example, the ICE documents indicate that the Presiding Judge received numerous briefings over a six month period, including a briefing on charging strategies. These documents arguably conflict with statements by the Presiding Judge that she received only limited logistical information. *Compare, e.g.*, Rule 33 Order at 4-6, 19 *with* the ICE documents (App. 8-48.)

Similarly, an email identifies the Presiding Judge as a "stakeholder" in the ICE operation. The word "stakeholder" has a common meaning that indicates more than mere logistical cooperation. *See* Merriam-Webster Dictionary ("stakeholder. n. . . . 2. One that has a stake in an enterprise."). Based on orders and opinions written to date, the Presiding Judge presumably disagrees with the characterization of herself as a "stakeholder" in the operation. *See, e.g.*, Rule 33 Order at 19. The fact remains, however, that the word "stakeholder" was used, and thus a factual determination should be made concerning the appropriate interpretation of the email. *See, e.g., Hurles v. Ryan*, 706 F.3d 1021, 1039 (9th Cir. 2013) ("Even worse, [the trial judge] found facts based on her untested memory of the events, putting material issues of fact in dispute.")

Resolving these apparent conflicts in the evidence will be crucial to determining whether, as the government alleges, Mr. Rubashkin's trial counsel already had full awareness of the pre-trial *ex parte* communications and, if so, whether those communications were insufficient to warrant recusal. But no judge, no matter how well intentioned, should be put in the position of weighing his or her own recollection of disputed facts against the recollection of others. *See Hurles*, 706 F.3d at 1039 (remanding post-conviction relief matter for evidentiary hearing where "the facts [the trial judge] 'found' involved her own conduct, and she based those 'findings' on her untested memory and understanding of the events"). Indeed, in the Rule 33 Order, the Presiding Judge acknowledged that although she did not recall learning of a potential ICE enforcement action until December 2007, there was "reliable documentation" indicating her awareness as early as October 2007. *Id.* at 4, fn. 4.

In effect, the Presiding Judge has been transformed from a judge into a material witness. Her assertions regarding pre-raid *ex parte* communications may prove accurate, but up to this

point none have been subject to verification, clarification, or cross examination. *See In re Murchison*, 349 U.S. 133, 138 (1955) (due process violation existed where judge "called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination"). Because the assertions go to the heart of Mr. Rubashkin's constitutional claim regarding the violation of his due process rights, they cannot be accepted at face value. The Presiding Judge's unsworn statements, like the unsworn statements of any other witness, must be evaluated by a neutral judge and fully developed and evaluated in open court to determine whether the federal government obtained Mr. Rubashkin's conviction in violation of his constitutional rights. *Id.*

Moreover, the pre-raid *ex parte* communications are not the only *ex parte* communications at issue in this case. On April 23, 2010, one week before the first day of Mr. Rubashkin's sentencing hearing, government counsel sent an email to Mr. Rubashkin's trial counsel disclosing the existence of investigations into possible threats against the Presiding Judge that "are or appear to be connected to [Mr. Rubashkin's] case." *See* App. 95-96. The email stated that "[t]he United States Attorney's Office for the Northern District of Iowa is recused from these investigations because they involve a Northern District Judge." *Id.* Nonetheless, according to government counsel's email, the Presiding Judge "expressed concern to the United States Marshal's Service **and our office's management** about the progress of these investigations." *Id.* (emphasis added).

There is, of course, nothing wrong with the Presiding Judge communicating with law enforcement officers and prosecutors who are assigned to investigate possible threats against her. The problem is that the USAO-NDIA was *not* assigned to investigate the threats, but rather was

recused. Thus, the Presiding Judge engaged in *ex parte* communications with the USAO-NDIA regarding possible threats that "are or appear to be connected to [Mr. Rubashkin's] case" just one week before Mr. Rubashkin's sentencing despite the USAO-NDIA having no role in the investigation of those threats. This has the appearance of impropriety. *See Haller v. Robbins*, 409 F.2d 857, 858 (1st Cir. 1969) (reversing dismissal of habeas petition and remanding for evidentiary hearing regarding whether judge's *ex parte* communication with prosecutor at sentencing constituted a due process violation). Moreover, because the *ex parte* communications were not connected to the Presiding Judge's performance of official duties, there can be no question that they are extrajudicial. *See United States v. Greenspan*, 26 F.3d 1001, 1006 (10th Cir. 1994) (information obtained by judge from law enforcement agencies regarding threat "is properly characterized as an 'extrajudicial source'").

The nature and substance of the pre-sentencing *ex parte* communications are highly relevant to Mr. Rubashkin's § 2255 motion. Even if, as the government alleges, the pre-raid *ex parte* communications were insufficient to warrant recusal of the Presiding Judge, the existence of later *ex parte* communications may have had the "cumulative effect" of requiring recusal. *See United States v. Amico*, 486 F.3d 764, 775-76 (2d Cir. 2007) (recusal required on the basis of the "cumulative effect" of events); *see also Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (materiality of suppressed evidence is "considered collectively, not item by item"). Indeed, it is not unprecedented for recusal to be required at sentencing even if it was not required at trial. *See United States v. Jordan*, 49 F.3d 152, 159-60 (5th Cir. 1990) (affirming conviction but vacating sentence, and ordering the assignment of a new judge to the re-sentencing). But trial counsel never had the opportunity to explore the matter because the USAO-NDIA never disclosed the

full extent of the pre-raid communications in the first place. Nor has the government ever disclosed the pre-sentencing *ex parte* communications themselves.

The pre-sentencing *ex parte* communications also may shed light into the nature and meaning of the pre-trial *ex parte* communications. *Cf. United States v. Wonderly*, 70 F.3d 1020, 1023-24 (8th Cir. 1995) (holding in context of Fed. R. Evid. 404(b) that subsequent acts are admissible to determine a person's intent at an earlier time). Mr. Rubashkin has alleged that the pre-trial communications were sufficiently extensive and detailed to raise questions about an appearance of bias or partiality—in essence, they raise the appearance that the Presiding Judge was "on the same team" as the government. The government and the Presiding Judge deny this. However, the fact that the Presiding Judge later chose to contact the USAO-NDIA on an *ex parte* basis to discuss a matter related to Mr. Rubashkin's case despite the USAO-NDIA's recusal from that matter reinforces the notion that the two had a collaborative relationship. *See United States v. Barnwell*, 477 F.3d 844, 851 (6th Cir. 2007) (holding that defendant's due process rights were violated by *ex parte* communications between the judge and prosecution during which they "worked together in a spirit of cooperation").

Under these circumstances, factual investigation is necessary into issues with the Presiding Judge at the center and regarding which the Presiding Judge has personal knowledge obtained in an extrajudicial capacity. *See United States v. Greenspan*, 26 F.3d 1001, 1006 (10th Cir. 1994) (judge's awareness of threat "is properly characterized as an 'extrajudicial source'"). Recusal is therefore required under § 455(b)(1).

B. Recusal Is Required Under 28 U.S.C. § 455(b)(5) Because the Presiding Judge Is Likely to Be a Material Witness.

Rubashkin filed his federal petition under 28 U.S.C. § 2255. "The Rules governing section 2255 petitions make it abundantly clear that the judge may direct that the record be

expanded to include letters, documents, exhibits, answers under oath to interrogatories, requests for admission, and affidavits." *United States v. Goodman*, 590 F.2d 705, 713 (8th Cir. 1979). The court has the discretion to order discovery "in the form of interrogatories, requests for admission, documents and depositions." *Id.* The court may then determine whether an evidentiary hearing is required "to determine the merits" of the case. *Green v. United States*, 262 F.3d 715, 716 (8th Cir. 2001). The district court's decision to deny a section 2255 petition without an evidentiary hearing is reviewed *de novo*. The appellate court will affirm that decision only if "the motions and the files and the records of the case conclusively show that the [movant] is entitled to no relief." *Holloway v. United States*, 960 F.2d 1348, 1351 (8th Cir. 1992) (alteration in the original).

Based upon allegations in this recusal motion and the § 2255 petition, a judge who was not involved in, and had no firsthand knowledge of, the underlying facts would need to elicit additional information to determine whether the failure by the USAO-NDIA to provide the defense with full facts and details of pre-trial and pre-sentencing *ex parte* communications violated Mr. Rubashkin's due process rights. That determination cannot be made without a clear understanding of what those communications entailed. An uninvolved judge would therefore seek to expand the record through, inter alia, depositions and an evidentiary hearing, which may require the Presiding Judge's sworn testimony and will, under any circumstance, require factual findings regarding communications to which the Presiding Judge was a party. If the Presiding Judge continues to preside over this § 2255 action, she alone will determine whether the expansion of the record is necessary to assess the propriety of her own conduct – that is, she will decide whether to investigate herself. Courts have recognized that it is impossible for any judge in that position to make such a determination free from the impulse to

reflexively defend the integrity of his or her conduct.[5] *Amico*, 486 F.3d at 776 (finding district court's failure to recuse to be reversible error because a disinterested observer would believe that the judge's handling of issues relating to his personal communications with a key witness "was intended to protect his own reputation" and that the judge "had knowledge concerning potential evidence in the case and was permitting his concerns surrounding such knowledge to affect the way he conducted the proceedings").

The likelihood that the Presiding Judge will be a witness mandates her disqualification under §455(b)(5), which provides that a judge "shall" disqualify herself where she "[i]s to the judge's knowledge likely to be a material witness in the proceeding." *See also* Flamm Decl., ¶51 (App. 580-581) (a reasonable person would know that by relying on her own unsworn testimony, the Presiding Judge placed herself in the position of becoming a potential witness); *United States v. Scrushy*, 721 F.3d 1288, 1299 (11th Cir. 2013) (noting that section 455(b) requires recusal where the judge "acquired personal knowledge of disputed evidentiary facts and was likely to be a material witness in the proceeding," but finding recusal was not required because the judge resolved the disputed facts in the defendant's favor"); *United States v. Rivera*, 634 F. Supp. 204, 210 (S.D.N.Y. 1986) ("There is no doubt that if this Court were to be a witness at a hearing, recusal would be necessary"); *State v. Bennett*, 520 So.2d 1095, 1098

[5] There is no judicial privilege protecting a judge from being subpoenaed as a witness. *United States v. Roebuck*, 271 F.Supp.2d 712, 721 (D.C.V.I. 2003). "[J]udicial immunity was not designed to insulate the judiciary from all aspects of public accountability." *Dennis v. Sparks*, 449 U.S. 24, 31 (1980), *citing O'Shea v. Littleton*, 414 U.S. 488 (1974). There is no "rule generally exempting a judge from the normal obligation to respond as a witness when has information material to a criminal or civil proceeding." *Id., citing United States v. Nixon*, 418 U.S. 683, 705-07 (1974). *See Tyler v. Swenson*, 427 F.2d 412, 414 (8th Cir. 1970) ("A member of the judiciary has no peculiar competence in factual recollection of unrecorded events …. A party should be permitted to test a judge's recollection as a witness presenting factual material testimony, as he would any other witness upon cross-examination").

(Ct. App. La. 1987) ("It would not be feasible for Judge Broyles to sit in the witness chair and the judge's chair at the same time."); *Collins v. State*, 141 Ga. App. 121, 121 (Ct. App. Ga. 1977) (reversing for trial judge's failure to recuse where trial judge himself provided the crucial testimony to convict defendant); *State ex. Rel. Smith v. Wilcoxen*, 312 P.2d 187, 188 (Ct. App. Okla. 1957) (recusal required where trial judge "will be a material witness").

C. Recusal Is Necessary Because of the Bradshaw Fowler Law Firm's Involvement in Representing Rubashkin-Related Entities in Matters Directly Linked to this Case.

The Presiding Judge's husband is a senior partner with the Bradshaw Fowler law firm. *See United States v. Miell*, 2008 WL 974843 at *1, No. 07-CR-101-LRR, (April 8, 2008). The Bradshaw Fowler law firm represented four different Rubashkin-related entities in bankruptcy proceedings during the pendency of Mr. Rubashkin's criminal case. The fee petitions submitted by the Bradshaw Fowler firm in those cases reflect dozens of conversations and meetings with Mr. Rubashkin. *See* App. 114-248. The Bradshaw Fowler firm identified Mr. Rubashkin as "one of the Debtor's primary liaisons with [Bradshaw Fowler]" and stated that Mr. Rubashkin played an active role in the bankruptcy cases "on almost a daily basis." *See* App. 251.

The bankruptcy proceedings overlapped heavily with Mr. Rubashkin's criminal case, particularly with respect to sentencing. The Bradshaw Fowler fee petitions reflect numerous conversations with Mr. Rubashkin's criminal defense attorneys regarding "strategy," as well as a conversation regarding the "bankruptcy implications" of the Presiding Judge's sentencing order. *See* App. 137, 155, 156, 160, 177, 190, 204, 240. The fee petitions reflect that Bradshaw Fowler attorneys received fees for their assistance in connection with Mr. Rubashkin's criminal case. *See* App. 114-248. The Rubashkin entities were major clients of the Bradshaw Fowler firm, as ten different Bradshaw Fowler attorneys billed time to the bankruptcy matters, as well as two law

clerks and four legal assistants.[6] *See* App. 121, 128, 132, 147, 159, 166, 176, 186, 193, 200, 202, 208, 219, 223-224, 234, 243, 246, 248. This constitutes nearly 25% of the attorneys in the firm. *See* App. 295.

Counsel for Mr. Rubashkin in this case has had a lengthy privileged conversation with a Bradshaw Fowler attorney (Mr. Goetz) regarding this § 2255 proceeding and anticipates that the attorney will continue to provide assistance regarding legal and factual matters.

The involvement of the Bradshaw Fowler firm stems from its representation of companies owned by Mr. Rubashkin and his family members, including Best Value and Cottonballs. In this § 2255 proceeding, Mr. Rubashkin has alleged that the government improperly interfered with the relationship between Agriprocessors and both Best Value and Cottonballs, thus driving down the value of Agriprocessors in bankruptcy and driving up his loss amount at sentencing. *See* § 2255 Petition at pp. 12-14, 36. Bradshaw Fowler attorneys likely have firsthand information regarding these disputed factual issues, as fee petitions submitted by Bradshaw Fowler during bankruptcy proceedings reveal dozens of phone calls and communications between the firm's attorneys and Dan Childers or Paula Roby, the attorneys for the Agriprocessors Trustee. *See* App. 115-116, 124, 144, 153, 182-183, 196, 197-198, 207, 212-216, 226-227, 229, 232, 237-238, 242. The Bradshaw Fowler communications with Mr. Childers and Ms. Roby surely involved, at least in part, the restrictions placed by the government on the ability of Agriprocessors to conduct business with Best Value and Cottonballs.

At a minimum, an appearance of impropriety arises when a judge will have to address events occurring during her husband's law partners' representation of significant clients in

[6] The Presiding Judge's husband was not among the attorneys who billed time to the bankruptcy matters.

matters closely related to the case. *See United States v. Miell*, No. 07-CR-101-LRR, 2008 WL 974843 (N.D. Iowa April 8, 2008) (granting recusal motion in light of close connection between criminal case and matter involving spouse's law firm, even though law firm did not appear in the criminal case); *cf. Hadler v. Union Bank & Trust Co. of Greensburg*, 765 F. Supp. 976, 978-79 (S.D. Ind. 1991) (presiding judge recused himself under § 455(a) in light of personal relationship with material witness); *United States v. Ferguson*, 550 F. Supp. 1256, 1260 (S.D. N.Y. 1982) (granting motion for recusal under § 455(a) where judge's former law clerk was material witness). The status of the Presiding Judge's husband as a partner in the Bradshaw Fowler firm reinforces the need for recusal. *See Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1113 (5th Cir. 1980) ("[A] partner's interest in the outcome of any matter handled by his law firm is substantially greater than that of an associate or an employee."). So, too, does the fact that nearly 25% of the firm's attorneys participated in representing Rubashkin-related entities. *See SCA Services, Inc. v. Morgan*, 557 F.2d 110, 116-17 (7th Cir. 1977) (likelihood that judge's brother's law firm "will earn substantial legal fees in this matter" warranted recusal even though brother did not personally appear). Finally, the expected continued involvement of at least one Bradshaw Fowler attorney in assisting Mr. Rubashkin's counsel warrants recusal, particularly when that attorney or others at his firm likely has firsthand knowledge regarding disputed issues and may even be asked to testify as a witness.

The fact that this conflict arguably works in favor of Mr. Rubashkin – i.e., the Bradshaw Fowler firm effectively represented *him* and his companies – does not weaken the appearance of partiality. A party in Mr. Rubashkin's position "might legitimately be concerned that the judge will 'bend over backwards' to avoid any appearance of partiality, thereby inadvertently favoring the opposing party." *Pashaian v. Eccelston Properties, Ltd.*, 88 F.3d 77, 83 (2d Cir. 1996).

Moreover, the history between the Rubashkin entities and the Bradshaw Fowler firm is mixed—although the Bradshaw Fowler firm saw the Best Value bankruptcy through to the end, the firm was replaced as counsel in the Nevel bankruptcy and replacement counsel challenged Bradshaw Fowler's fees.

D. Recusal Also Is Appropriate Under § 455(a) In Light of the Appearance of Impropriety.

Recusal also is appropriate because the totality of circumstances – including numerous *ex parte* communications with the USAO-NDIA prior to the Agriprocessors raid; additional *ex parte* communications with the USAO-NDIA immediately prior to Mr. Rubashkin's sentencing; resolution of disputed facts based on her personal recollection; and prominent involvement of the Bradshaw Fowler law firm – creates an unavoidable risk of partiality.

A judge must recuse himself or herself "in any proceeding in which [her] impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Section 455(a) is a "catchall" provision, implementing the principle that "what matters is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994). Even a judge subjectively convinced of his or her impartiality may be disqualified to preserve the appearance or propriety. "Thus, in a situation where a reasonable person might question the judge's ability to be impartial, she must recuse herself even if she subjectively knows that she has no bias." Flamm Decl., ¶ 14 (App. 568), *citing, e.g., United States v. Honken*, 381 F. Supp.2d 936, 970 (N.D. Iowa 2005); *Muhammad v. Rubia,* No. C08 3209MMC(PR), 2009 WL 281947 at *2 (N.D. Cal. 2009) ("[I hold] no bias or prejudice against the plaintiff herein. Nevertheless, as a reasonable person might conclude that the facts alleged by plaintiff create an appearance of bias or prejudice, the Court, in an abundance of caution, will grant the motion").

The Eighth Circuit has given the language of § 455(a) a practical interpretation. "The question is 'whether the judge's impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case.'" *United States v. Dehghani*, 550 F.3d 716, 721 (8th Cir. 2008) (*quoting Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) (*en banc*)); *see also United States v. Beale*, 574 F.3d 512, 519 (8th Cir. 2009). In making this determination, the court is to take into consideration all circumstances, both public and private. *See United States v. Walton*, No. 07-CR-14-LRR, 2007 WL 1662332 at *1-2 (N.D. Iowa June 5, 2007).

In implementing the "average person on the street" test, the Eighth Circuit does not require the average person to be convinced of the judge's partiality in order to warrant recusal. Rather, recusal is required if a reasonable person "would harbor doubts about the judge's impartiality." *See Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 905 (8th Cir. 2009) (internal punctuation omitted).

Courts have recognized several circumstances in which this standard is satisfied and recusal is required:

First, recusal is warranted when there have been *ex parte* contacts between the judge and one party to the case. *See* Flamm Decl., ¶ 32 (App. 573-574),. "[N]ot only is it a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court, it is a dangerous procedure." *Haller v. Robbins*, 409 F.2d 857, 859 (1st Cir. 1969); *United States v. Hildebrand*, 928 F. Supp. 841, 854 (N.D. Iowa, 1996). That breach is all the more egregious when that adversary is a prosecutor, with the weight and credibility of government office behind him. *United States v. Earley*, 746 F.2d 412, 416 (8th Cir. 1984).

Second, when a judge appears to be invested in the case based on extrajudicial interests or associations, there is an appearance of partiality. *See United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994); *cf. United States v. Bauer*, 19 F.3d 409, 414 (8th Cir. 1994). Likewise, recusal may be necessary if the public perceives the judge to be excessively close with one side in the case. *See also Edgar*, 93 F.3d at 260; *Moran*, 296 F.3d at 649. And, where the judge appears to have given "advice" or "assistance" to the prosecution – especially *ex parte* – courts have long demanded recusal. *See, e.g., Schmidt v. United States*, 115 F.2d 394, 397-98 (6th Cir. 1940); *Bauer*, 19 F.3d at 414.

Third, an appearance of partiality is reinforced when, as here, a judge fails to disclose evidence that may warrant recusal. "[A] judge is expected to candidly disclose any and all information which the parties might consider relevant to the question of disqualification, even if she believes there is no basis for recusal." Flamm Decl., ¶ 36 (App. 575), *citing In re M.C.*, 8 A.3d 1215, 1226, 1231 (D.C. 2010). Thus, in this instance, a reasonable person would have expected full disclosure, at the outset of the proceedings, of the details of the Court's *ex parte* communications with law enforcement authorities. *See* Flamm Decl., ¶ 39 (App. 576). Accordingly, "the failure of the judge and prosecution to notify defense counsel, at their first court appearance, that the Court had communicated with the [U.S. Attorney's Office] about the raid … inevitably gave rise to the very appearance of partiality that § 455(a) was designed to avoid." Flamm Decl., ¶ 40 (App. 576-77). *See Liljeberg*, 486 U.S. at 866 (emphasizing the importance of prompt disclosure). The appearance of partiality becomes even worse when a judge later engages in further *ex parte* communications about matters that "are or appear to be related to [the] case," again without disclosing those communications to defense counsel. *See* Flamm Decl., ¶ 58 (App. 583).

The Eighth Circuit has explicitly condemned the failure to disclose the facts that are potentially relevant to recusal. In *Moran*, the judge had a social relationship with one of the parties to the case, which was itself cause for concern. But the *en banc* court found "particularly worrisome the district court's failure to disclose this conflict himself." 296 F.3d at 649. In light of that association and non-disclosure, the court vacated the district court decision and remanded "with the suggestion that it revisit and more thoroughly consider and respond to Moran's recusal request." *Id. See* ABA Model Code of Judicial Conduct, Rule 2.11, cmt. [5] (2007).

Fourth, for a judge to learn facts about the case from extrajudicial sources severely undermines the integrity of the adversarial process. That is why courts have insisted on recusal when judges have communicated, off the record, with witnesses or appointed experts. *E.g.*, *United States v. Beierman*, 584 F. Supp.2d 1167, 1178 (N.D. Iowa 2008) (internal citations omitted); *Edgar v. K.L.*, 93 F.3d 256, 259-62 (7th Cir. 1996). Eighth Circuit case law strongly condemns such interactions. *E.g.*, *Gentile v. Mo. Dep't of Corrs. & Human Res.*, 986 F.2d 214, 217 (8th Cir. 1993); *Ryan v. Clarke*, 387 F.3d 785, 793 (8th Cir. 2004); *see also Craven*, 239 F.3d at 103 ("When a judge receives information that does not enter the record, the reliability of that information may not be tested through the adversary process").

These themes coalesce in this case:

First, it is undisputed that the Presiding Judge communicated *ex parte* with law enforcement authorities who were investigating and would ultimately raid the plant that, according to the memoranda, was under the direction of Mr. Rubashkin. These communications focused on the raid that led to Mr. Rubashkin's prosecution and touched upon the merits of the eventual criminal cases, including "charging strategies" to be pursued by the prosecution. The

Presiding Judge then engaged in further *ex parte* communications with the USAO-NDIA shortly before Mr. Rubashkin's sentencing on a matter related to his case.

Second, the repeated *ex parte* meetings between the judge and the prosecutors create at least the appearance that they had become excessively close and were working in tandem. *See Edgar*, 93 F.3d at 260; *Bauer*, 19 F.3d at 414. The description of the Presiding Judge as a "stakeholder" in the operation and reference to her commitment to "support the operation in any way possible" would certainly give a "reasonable person … a justified doubt as to [her] impartiality." *Cooley*, 1 F.3d at 995; *Sentis Group*, 559 F.3d at 905. Moreover, the Presiding Judge's decision to contact the USAO-NDIA on an *ex parte* basis shortly before Mr. Rubashkin's sentencing to express concerns about the progress of a threat investigation that, by the government's own admission, was related or appeared to be related to Mr. Rubashkin's case and regarding which the USAO-NDIA was recused reinforces the appearance that she considered herself to be aligned with the USAO-NDIA.

Third, a reasonable observer's perception of possible bias may be reinforced by the Presiding Judge's arguable failure to disclose (a) some of the facts surrounding her role in pre-raid planning, and (b) all of the facts surrounding the pre-sentencing *ex parte* communications with the USAO-NDIA. *See, e.g.*, Order at 5-6, *United States v. De La Rosa-Loera*, No. 08-CR-1313 (N.D. Iowa Aug. 13, 2008) (App. 67-68) (describing her role as normal logistical cooperation). As in *Liljeberg*, the failure – especially when responding to a recusal request – to acknowledge the undisclosed facts is additional evidence that would lead an objective observer to question the appearance of impartiality. *See Liljeberg*, 486 U.S. at 865-67.

Fourth, at these meetings, updates on the status of the investigation made the Presiding Judge privy to "information that [did] not enter the record" and therefore "may not be tested

through the adversary process." *Craven*, 239 F.3d at 103; *Beiermann*, 584 F. Supp 2d at 1178. That these meetings were off-the-record, not transcribed, means they were "extrajudicial." *Edgar*, 93 F.3d at 259; See *Bauer*, 19 F.3d at 414. In *Jones v. Luebbers*, 359 F.3d 1005 (8th Cir. 2004), the Eighth Circuit noted that where allegations of bias arise from "closed proceedings that evade outside review, the appearance of partiality is great, application of the rule is simple, and due process may require recusal." *Id.* at 1013.

The pre-sentencing *ex parte* communications between Presiding Judge and the USAO-NDIA illustrate the problem. As noted above, those *ex parte* communications arose from an investigation of possible threats against the Presiding Judge that "are or appear to be related to [Mr. Rubashkin's] case." *See* App. 95-96. The USAO-NDIA was recused from the threat investigation, yet the Presiding Judge chose to reach out to the USAO-NDIA anyway shortly before Mr. Rubashkin's sentencing hearing to express concern regarding the progress of the investigation. The decision to reach out to the USAO-NDIA, despite its recusal from the investigation, creates the appearance that the Presiding Judge believed herself to be "on the same team" as the USAO-NDIA with respect to matters that "are or appear to be related to [Mr. Rubashkin's] case." *See United States v. Barnwell*, 477 F.3d 844, 851 (6th Cir. 2007) (holding that defendant's due process rights were violated by *ex parte* communications between the judge and prosecution during which they "worked together in a spirit of cooperation"); *Greenspan*, 26 F.3d at 1007 (concluding that "it is obvious to us that a reasonable person could question the judge's impartiality" where the judge learned of a threat shortly before sentencing and was so clearly affected by it that he expressed a desire to "get [the defendant] into the penitentiary system as quickly as possible").

Indeed, there are only two apparent reasons why the Presiding Judge would reach out to the USAO-NDIA to express concerns about the threat investigation despite that office's recusal: (1) she wanted to enlist the support of USAO-NDIA in trying to convince law enforcement agents to move the investigation along; or (2) she wanted to express frustration to a listener she perceived to be sympathetic. Either one raises serious appearance questions about whether the Presiding Judge was too close with the USAO-NDIA, and therefore whether she should have presided over Mr. Rubashkin's sentencing even if, as the government alleges, she properly presided over his trial. Mr. Rubashkin is entitled to flesh this issue out before a judge who was not involved in the underlying events.

E. The Government's Recent Assertion of a Conflict of Interest on the Part of One of Mr. Rubashkin's Attorneys Provides Yet Another Reason for Recusal.

The need for recusal grew even more acute this month in light of the USAO-NDIA informing one of Mr. Rubashkin's attorneys that it believes a conflict of interest exists as a result of his prior service as an Assistant United States Attorney for the Southern District of Iowa during the time of the threat investigation in April 2010. The alleged conflict relates to counsel's knowledge (or lack thereof) of confidential information relating to the threat investigation and is fleshed out in detail in the Declaration of Stephen H. Locher (App. 590-593), which, in an abundance of caution, is filed under seal. The USAO-NDIA asserts that the conflict is between counsel and Mr. Rubashkin and is waivable. *See* Attachment A to Declaration (letter from government counsel asserting the existence of a conflict under Iowa Rule Prof. Conduct 32.1.7(a)(2) at App. 594-597). Nonetheless, for unclear reasons, the USAO-NDIA has insisted that counsel provide an "assurance" to the government that Mr. Rubashkin has provided "informed consent" to the conflict. *See id.* The USAO-NDIA stated that it planned to disclose

to the Court the existence of the alleged conflict and counsel's "assurance" of having received informed consent. *See id.*

Unlike a criminal case, where the Sixth Amendment may require the government to take steps to ensure that a defendant is adequately represented, "[t]here is . . . no right to counsel in either state or federal post-conviction relief proceedings." *Pollard v. Delo*, 28 F.3d 887, 888 (8th Cir. 1994). "Where there is no constitutional right to counsel there can be no right to effective assistance of counsel." *Id.* "Since there is no right to effective assistance of counsel . . . ineffective assistance of counsel cannot serve as a cause for petitioner's default." *Id.* Thus, there is no reason for the government to interject itself between a § 2255 petitioner and his counsel or raise the matter to the Court's attention, even if the government perceives a conflict of interest to exist.

The USAO-NDIA's demands have created yet another reason for recusal. A conflict only exists if counsel: (1) possesses information, (2) that would be helpful to Mr. Rubashkin, but (3) which counsel cannot share with Mr. Rubashkin in light of counsel's ongoing duty of secrecy to the government. *See* Iowa Rule of Prof. Conduct 32.1.7(a)(2) ("A concurrent conflict of interest exists if . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer."). If any one of these three pieces is missing, no conflict exists. For example, if counsel possesses secret information that is *not* helpful to Mr. Rubashkin, there would be no "significant risk" of counsel's representation of Mr. Rubashkin being "materially limited" by his responsibilities to the government because he would have no reason to disclose the information.

The USAO-NDIA has asserted that a conflict does, in fact, exist. Accordingly, the USAO-NDIA must know there is something helpful to Mr. Rubashkin's § 2255 case that occurred during the threat investigation. Moreover, the government's stated intention of filing a notice with the Court implies that the government intends for the Court to *do something* about the alleged conflict—either to condone the continued presence of the attorney in the case, or to disqualify him. But the Presiding Judge's personal knowledge of undisclosed facts will be at the center of that decision. Indeed, the Presiding Judge presumably knows the information that gave rise to the USAO-NDIA's allegation of a conflict in the first place.

For reasons stated in the attached Declaration (App. 590-597), which, in an abundance of caution, is filed under seal, counsel believes no conflict exists and no "informed consent" is necessary. Counsel further believes that even if a waivable conflict *did* exist, the USAO-NDIA would have no right to demand "assurances" that informed consent had been provided, nor would disclosure to the Court be necessary or appropriate. *See* Iowa Rules of Professional Conduct at Preamble, note 10 ("The legal profession is largely self-governing."); *id.* at note 20 ("[T]he purpose of the rules can be subverted when they are invoked by parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule."). Nonetheless, because the government insisted that it would notify the Court of the alleged conflict, counsel is compelled to raise the issue to the Court's attention himself. But now that the government has forced this disclosure, the Presiding Judge is placed in the position of determining whether something should be done about an alleged conflict relating to confidential information regarding

her own extra-judicial actions or statements. No judge should be forced into this situation, and recusal is appropriate.

IV. THE CONCERNS EXPRESSED BY MANY OF THE NATION'S LEADING EXPERTS IN JUDICIAL ETHICS, FORMER FEDERAL PROSECUTORS, FORMAL FEDERAL JUDGES, AND SEVERAL DOZEN CURRENT MEMBERS OF CONGRESS FURTHER DEMONSTRATE THAT A DISINTERESTED OBSERVER WOULD FIND RECUSAL APPROPRIATE.

A. Members of Congress, Former DOJ Officials, and Others Expressed Disapproval of Chief Judge Reade's Actions.

The Presiding Judge's opinion denying Mr. Rubashkin's Rule 33 motion was met with disapproval from leaders of the law enforcement community, academia, and Congress – including 76 law professors and former Attorneys General, Assistant Attorneys General, U.S. Attorneys, and former state and federal judges who wrote to the Department of Justice requesting an investigation of the "troubling evidence" relating to the *ex parte* communications. (App. 323). The condemnation extended across the political spectrum to include three former Deputy Attorneys General from the Reagan, Clinton and George W. Bush administrations, and seventeen United States Attorneys from the Ford, Carter, Reagan, George H. W. Bush, Clinton, and George W. Bush administrations – including James H. Reynolds, formerly the United States Attorney for the Northern District of Iowa. Clearly, the average man on the street, when informed of the disapproval from so many eminent members of the judicial system, would, at a minimum "harbor doubts" as to the ability of the Presiding Judge to provide Mr. Rubashkin with a fair hearing. *Cf. Amico*, 486 F.3d at 776 (fact that government joined in recusal motion helped to demonstrate that a reasonable person would harbor doubts about impartiality).

A letter from Hon. Shirley M. Hufstedtler to Attorney General Holder and Solicitor General Verrilli exemplifies this criticism. Judge Hufstedtler is a former judge of the United

States Court of Appeals for the Ninth Circuit and a former Secretary of Education. Judge Hufstedtler wrote:

> In all of my more than fifty years of service on all levels of state and federal government, both as an appellate litigator and appellate Judge, the case of Sholom Rubashkin … stands out as one of the most unjust I have come across…. I feel strongly that the Department of Justice must stop defending the improper actions of Judge Reade in this case. These ex parte communications were wrong and DOJ needs to unequivocally state so. The Department must do so for the sake of Mr. Rubashkin and justice and because if they let it go by this time, it is very likely to recur in other cases as well.

(App. 340-341).

Additionally, six Senators (5 Republicans and 1 Democrat) and Fifty-one Congressman (29 Democrats and 22 Republicans) sent letters to United States Attorney General Eric Holder, and three subcommittees of the House of Representatives held hearings to probe allegations of misconduct. The letters were written by legislators of widely disparate political ideologies, ranging from Senator Carl Levin (D-MI) and Rep. Jerrold Nadler (D-NY and Judiciary Committee Member) to well-known conservative Senators Rand Paul (R-KY) and Jim DeMint (R-SC) (now president of The Heritage Foundation). The letters uniformly condemned the *ex parte* communications that lie at the heart of this motion. (The letters are reproduced at App. 342-434.)

Similarly, after the Eighth Circuit affirmed Rubashkin's conviction on direct appeal, his attorneys filed a petition for certiorari with the United States Supreme Court. Former U.S. Solicitor General Seth Waxman's amicus brief, filed on behalf of 86 former Attorneys General, Senior Department of Justice officials, United States Attorneys, and Federal Judges, is also illustrative of the criticism of the Presiding Judge's role in the case. Concerning the appearance of impropriety, he wrote:

> [T]he district judge's numerous *ex parte* contacts and personal involvement with the prosecution prior to the raid, together with the judge's failure to disclose the extent of that collaboration, seriously undermined that appearance of impartiality. The FOIA documents suggest that the district judge was intimately involved with the planning of Agriprocessors raid. … While the full story remains unknown, those facts that have emerged paint a deeply troubling picture that seriously compromised the appearance of impartiality.

Brief for 86 Former Attorneys General et al. as Amici Curiae in Support of Petitioner, at 12-13, *Rubashkin v. United States*, 133 S. Ct. 106 (2012) (No. 11-1203) (App. 450-451.).

Finally, many other amicus briefs were filed in conjunction with Mr. Rubashkin's petition for a writ of certiorari, all critical of the Presiding Judge's role.[7] One of these briefs, filed by the Association of Professional Responsibility Lawyers, dealt directly with the Presiding Judge's personal knowledge of disputed facts:

> Judge Reade's justification for the admitted *ex parte* contacts, and her consequent refusal to recuse herself, was plausible only if the FOIA materials were found to be both consistent with and probative of *her* recollection and understanding of these events. But *these were contested matters of fact.*
>
> * * * *
>
> It is unthinkable for a judge to "find" the facts (or "confirm" facts of which she already has personal knowledge,) especially when her own conduct and *bona fides* are implicated by them. Yet … that is exactly what Judge Reade did….

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[7] The following additional amicus briefs were filed in connection with Mr. Rubashkin's petition for a writ of certiorari in *Rubashkin v. United States*, ___ U.S. ___, 133 S. Ct. 106, 2012 WL 1119792 (2012) (No. 11-1203): Brief of the Washington legal Foundation et al. as Amici Curiae in Support of Appellant, Urging Vacatur; Amicus Curie Brief on Behalf of the American Civil Liberties Union of Iowa in Support Appellant [sic] Rubashkin's Request for Reversal and Remand; Amicus Brief of National Association of Criminal Defense Lawyers ("NACDL") in Support of Appellant; Brief of the Association of Professional Responsibility Lawyers (APRL) as Amicus Curiae in Support of Petitioner; Brief of Washington Legal Foundation and Criminal Law Scholars as Amici Curiae in Support of Petitioner; Brief of the National Association of Criminal Defense Lawyers and the Aleph Institute, as Amici Curiae in Support of Petitioner; Brief of Criminal-Justice and Legal-Ethics Professors as Amici Curiae in Support of Petitioner; Brief for Justice Fellowship and Criminal Law and Sentencing Professors and Lawyers as Amici Curiae in Support of Petitioner.

Brief at 6-7 (italics in original) (App. 483-484)[8]; *see also Hurles v. Ryan*, 706 F.3d 1021, 1038 (9th Cir. 2013).

B. Ethics Experts Conclude That the Presiding Judge Was Obligated to Recuse Herself from Presiding at Mr. Rubashkin's Trial

In addition to the groundswell described above, Mr. Rubashkin offered affidavits from two of the leading experts on legal ethics in the United States and an amicus brief included a declaration of yet a third leading expert.

1. Mark Harrison

One affiant was Mark Harrison, past Chair of the ABA Commission to Revise the Model Code of Judicial Conduct.[9] Based on his review of the ICE documents and other relevant information, Mr. Harrison concluded that:

> Chief Judge Reade violated the provisions of the Code of Conduct (and the comparable provisions of the 2007 Model Code) … and 28 U.S.C. § 455(a) by: … failing to disclose the nature, substance and extent of the *ex parte* communications to all parties at the earliest practicable time …; and … participating in numerous *ex parte* meetings with the prosecution and other law enforcement personnel and then failing to recuse herself from presiding over [Mr. Rubashkin's] trial.

(Affidavit of Mark Harrison, ¶10; App. 512-513.) Mr. Harrison also determined that the Presiding Judge should have required the preparation of a complete record of the *ex parte* meetings in which she participated – especially, if she wanted to preserve any possibility of presiding at the trial. *Id.*, ¶ 10b.[10]

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[8] The Association's brief was also critical of the procedure employed by the Presiding Judge to decide the Motion for a New Trial – deciding the motion based on her own recollection and characterization of events – which it referred to as "the worst possible course."

[9] The revised code was unanimously adopted by the ABA House of Delegates in February 2007.

[10] Mr. Harrison's affidavit also details other improprieties in Judge Reade's conduct. (*See* App. 503-514).

2. Stephen Gillers

The other affiant was Steven Gillers, a professor at the New York University School of Law and one of the leading national experts in legal ethics. Professor Gillers concluded "the U.S. lawyers should not have participated in the *ex parte* meetings with the Chief Judge to the extent that they did and, having done so, should have revealed their existence and the content of the communications (which they should have transcribed) to Mr. Rubashkin's lawyers as soon as they were identified after indictment." (Affidavit of Steven Gillers, ¶ 24; App. Exh. 524.)[11]

3. Geoffrey Hazard

The Brief of Criminal-Justice and Legal-Ethics Professors as Amici Curiae in support of Mr. Rubashkin's certiorari petition included the declaration of another leading legal ethics expert, Geoffrey C. Hazard, who was principal draftsman of the Code of Judicial conduct, "which in all material respects is now codified in 28 U.S.C. § 455." (Affidavit of Geoffrey C. Hazard, ¶ 2, App. 526)[12] Referring to the opinions described above, Professor Hazard states, "I entirely agree with the opinions of Mark Harrison concerning the conduct of Judge Reade, as summarized in paragraph 10 of [Mr. Harrison's] affidavit, and I entirely agree with the opinions of Professor Stephen Gillers concerning the conduct of the Government lawyers, as summarized in paragraph 24 of his Affidavit." *Id.*, ¶5. Professor Hazard's criticisms include the scope of the *ex parte* communications, the Presiding Judge's failure to make a record of them and her failure to fully disclose them. *Id.* ¶ 6. Professor Hazard concludes that available evidence "is certainly

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[11] Professor Gillers' affidavit also details additional, improper aspects of Judge Reade's handling of the matter. (App. 515-525).

[12] The Hazard Affidavit is Appendix B to the Supreme Court Brief of Criminal-Justice and Legal-Ethics Professors as Amici Curiae in Support of Petitioner, and is reproduced in the Appendix to this motion as App. 526-528.

sufficient to … create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity [and] impartiality is impaired." *Id.,* concluding paragraph.

4. Richard E. Flamm

In addition to the authorities cited above, Mr. Rubashkin supplements this motion with a declaration of Richard E. Flamm, the author of *Judicial Disqualification: Recusal and Disqualification of Judges* (Banks and Jordan Law Pub. Co., 2nd ed. 2007) ("Judicial Disqualification"), a leading treatise on the subject, which has been relied on by a host of state and federal courts, including the Eighth Circuit. *See* Declaration of Richard E. Flamm ("Flamm Decl."), ¶ 5 (App. 564.), *cited in, e.g., Fletcher v. Conoco Pipe Line Co.,* 323 F.3d 661, 665 (8th Cir. 2003). Mr. Flamm is one of the leading authorities on the subject of legal and judicial ethics. (Flamm Decl., ¶3.) (App. 564)

In *United States v. Fazio*, 487 F.3d 646, 653 (8th Cir. 2007), the Eighth Circuit held that "the key ingredient in a §455(a) recusal case is avoidance of the appearance of impropriety, as judged by whether the average person on the street might question the judge's impartiality." Mr. Flamm has examined many of the relevant documents[13] and offers the opinion that the Presiding Judge's *ex parte* contacts would cause an average observer to question her impartiality. (Flamm Decl., ¶¶11, 16, 21, 66; App. 566, 569, 571, 587.) Those doubts would be compounded by the failure of the Court and the U.S. Attorney's Office to notify defense counsel, at their first court appearance, of the *ex parte* communications and by the additional appearances of partiality

[13] In addition to this memorandum, Mr. Flamm has reviewed, *inter alia*: Mr. Rubashkin's Motion to Vacate; Chief Judge Reade's Order denying Mr. Rubashkin's Motion for a New Trial; the August 4, 2010 Declaration of Nathan Lewin (submitted with the Motion for a New Trial); the September 7, 2010 Affidavit of Mark I. Harrison (discussed above) (App. 503-514); the August 4, 2010 Declaration of Guy Cook; and the July 15, 2011 letter to Attorney General Holder and the Department of Justice's Office of Professional Responsibility (*see* § e.1., *supra*).

created by the pre-sentencing *ex parte* contacts and involvement of the Presiding Judge's husband's law firm in representing Mr. Rubashkin's companies in matters closely related to his criminal case. (Flamm Decl., ¶¶ 41, 59-61, App. 577, 583-84.)

Flamm also concludes that in assessing whether the Presiding Judge should recuse herself, an average person would know or expect:

- That while Chief Judges do have administrative duties, it is highly unusual for a Chief Judge to meet with prosecutors in a regular basis over a period of months to participate in planning a raid (Flamm Decl., ¶ 30, App. 573);

- That as "the only district court judge chambered in the eastern side of the district who handles criminal felony matters," Rule 33 Order at 5 n.5, Judge Reade knew when meeting with the government that she would likely be assigned to handle any prosecution resulting from the Agriprocessors raid (Flamm Decl., ¶ 32, App. 573-74);

- That the Court could have acted to assuage foreseeable concerns by having a court reporter transcribe her meetings with the government (Flamm Decl., ¶ 33, App. 574);

- That the defendant in a prosecution resulting from the Agriprocessors raid would want to know the details of Chief Judge Reade's meetings with the government (Flamm Decl., ¶ 34, 574); and

- That both the U.S. Attorney's Office and the Court would fully disclose the details of their meetings at the commencement of proceedings against Mr. Rubashkin (Flamm Decl., ¶ 39, App. 576).

Mr. Flamm concludes that a reasonable person knowledgeable about the facts "not only 'might,' but almost certainly would have at least some doubts as to the Court's ability to impartially preside over [Mr. Rubashkin's] §2255 motion." (Flamm Decl., ¶ 71, App. 588-89.)

CONCLUSION

For the foregoing reasons, Sholom Rubashkin respectfully requests that the Presiding Judge recuse herself from involvement in any further proceedings in this case pursuant to 28 U.S.C. §§455(a)(1), (b)(1) and (b)(5).

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the parties to this action by serving a copy upon each of the attorneys listed below on January 29, 2014 by

☐	U.S. Mail	☐	FAX
☐	Hand Delivered	☐	Electronic Mail
☐	FedEx/ Overnight Carrier	X	CM / ECF

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