THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WILLIAM STARBUCK, Plaintiff, v. RJ. REYNOLDS TOBACCO COMPANY, *et al.*, Defendants.	Case No: 3:09-cv-13250-WGY-HTS

MOTION FOR RECUSAL OF THE TRIAL JUDGE

Defendant Philip Morris USA Inc. ("PM USA") respectfully moves for the recusal of the Honorable Mark W. Bennett from any proceedings in this case or future *Engle* progeny cases pursuant to 28 U.S.C. § 455(a).

In an article lauding the "American Trial Lawyer," Judge Bennett asserted that trial lawyers deserve the credit for products that "are safer and kill and maim far fewer Americans," and he specifically opined that due to the efforts of trial lawyers,"***[h]undreds of thousands of lives have been spared from tobacco-related deaths, and billions have been saved in health care costs.***" Hon. Mark W. Bennett, *Voir Dire*, "Obituary: The American Lawyer Trial Lawyer, Born 1641-- Died 20??" (Fall/Winter 2013), at 9 (emphasis added) (Ex. A).

Judges often write and speak outside the courtroom. "Where, however, a judge makes specific remarks that indicate that he harbors a bias towards or against a litigant (or group of litigants) or a particular legal claim or theory, recusal is required under § 455." *Jenkins v. McCalla Raymer, LLC*, 492 F. App'x 968, 970 (11th Cir. 2012). Section 455(a) requires a judge to recuse himself "whenever 'impartiality might reasonably be questioned.'" *Liteky v. United*

States, 510 U.S. 540, 548 (1994) (citations omitted). "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988). Thus, "what matters is not the reality of bias or prejudice but its appearance." *Liteky*, 510 U.S. at 548. Recusal is required here because Judge Bennett's extrajudicial expression of his opinion on the value of lawsuits against tobacco company defendants would lead a reasonable person to question his impartiality in presiding over this case or other cases involving such defendants.

BACKGROUND

In reviewing Judge Bennett's prior judicial opinions and extrajudicial publications in preparation for the upcoming trial in this case, PM USA became aware of an article by Judge Bennett entitled, "Obituary: The American Lawyer Trial Lawyer, Born 1641—Died 20??," published in the Fall/Winter 2013 issue of *Voir Dire*. The article portrays the American Trial Lawyer, or ATL, as an heroic figure, "more responsible for our enduring freedoms and the enforcement of our nation's laws than any other." *Id*. at 9. In describing the societal role of the American Trial Lawyer, Judge Bennett emphasizes his view that the work of trial lawyers is literally life-saving. He credits trial lawyers with both safer products in general, and a lower death-toll from tobacco in particular:

> American products, from airplanes to scalding coffee, pharmaceutical drugs, and scores of others, are safer and kill and maim far fewer Americans. ***Hundreds of thousands of lives have been spared from tobacco-related deaths, and billions have been saved in health care costs***.

Id. at 9 (emphasis added).

Judge Bennett contrasted his vision of the ATL with the "American Litigators," whom he characterized as "paper tigers," and a "fraud" who "bill endless hours for developing untested

and unrealistic trial strategies" and "never work alone, always traveling in packs." *Id.* at 10.[1]

ARGUMENT

This case presents the precise circumstances in which Section 455(a) requires recusal. Judge Bennett has publically declared the view that lawsuits like this one – and the lawyers who bring them – are the saviors of hundreds of thousands of lives, as well as billions of dollars in healthcare costs. A reasonable, disinterested lay person would be justified in doubting whether a judge who has expressed these views could be impartial in cases involving the defendants in such lawsuits. Whether the Court *actually* is partial of course is not the test. Recusal is mandatory whenever "'an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.'" *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003) (quoting *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988)).

Moreover, because the purpose of the statute is to ensure public confidence in the judiciary, "any doubts must be resolved in favor of recusal." *Patti*, 337 F.3d at 1321; *see also United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989) (same); *United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987) (same); *In re Boston's Children First*, 244 F.3d 164, 167 (1st Cir. 2001), *as amended on denial of reh'g and reh'g en banc* (Mar. 2, 2001) ("'[I]f the question

[1] The legal press has reported that Judge Bennett similarly expressed his distaste for large law firms in an email stating:

> In my 35 years of experience in the legal profession I have almost always been considerably under whelmed by East Coast law firms. I am not impressed by inflated rates and even more inflated billing practices, 6 lawyers to take a simple deposition, a total lack of civility, obstructionist discovery tactics at every turn, poor trial skills and unsurpassed arrogance. Also, not one lawyer could not name a single state that borders Iowa.

See http://abovethelaw.com/2010/06/judge-of-the-day-judge-mark-bennett-of-iowa-is-underwhelmed-by-east-coast-law-firms/ (quoting email by Judge Bennett).

of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal'") (citations omitted). "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 486 U.S. at 865.

Thus, recusal is required when a judge's extrajudicial statements raise a reasonable doubt about his impartiality. While "the mere fact that a judge has spoken or written on a particular issue or area of law does not require him to automatically recuse himself when that issue arises," where "a judge makes specific remarks that indicate that he harbors a bias towards or against a litigant (or group of litigants) or a particular legal claim or theory, recusal is ***required*** under § 455." *Jenkins*, 492 F. App'x at 970 (citing *Hathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 41 (4th Cir. 1995)) (emphasis added).[2] For example, in the *Hathcock* case – cited with approval by the Eleventh Circuit in *Jenkins* – the Fourth Circuit required the trial judge's recusal based primarily on his "blunt remarks at an auto torts seminar," which evinced "a predisposition against Navistar and other product liability defendants." 53 F.3d at 41.[3] At that seminar, the trial judge had asserted that "[e]very defense lawyer objects to the net worth coming in on the issue of punitive damages and all of that. Then after that verdict you can get up there and call them the son-of-a-bitches that they really are." *Id.* at 39. And he commented as to three pro-plaintiff judicial decisions that "[w]hat makes these decisions so great is that the lawyers that represent these habitual defendants, they met these three decisions with about the same degree of

[2] Likewise, while the Code of Conduct for United States Judges provides that a judge may write "on both law-related and nonlegal subjects," at the same time "[t]he Code's authorization for extrajudicial writing, however, is subject to various limitations," including the caveat that a judge's writings should not "reflect adversely on the judge's impartiality." Committee on Codes of Conduct, Advisory Opp. No. 55 (discussing Canon 4).

[3] The panel also noted the trial judge's "*ex parte* contacts requesting the [plaintiffs'] counsel to draft at least the factual basis of a default order, and possibly its legal conclusions as well," but it found those actions "probably insufficient to merit recusal in isolation," and it found the trial judge's extra-judicial remarks at the torts seminar to be "[e]ven more telling." *Id.*

joy and enthusiasm as the fatted calf did when it found out the prodigal son was coming home. That indicates that that's some pretty good decisions." *Id.* at 39. The Fourth Circuit concluded that "[o]verall, the appearance of impropriety in this case requires that the presiding district court judge be recused and his order vacated pursuant to 28 U.S.C. § 455(a)." *Id.*

The appearance of impropriety is at least as great, if not greater, in this case. Although the language in Judge Bennett's article is not as colorful as the judge's remarks in *Hathcock*, Judge Bennett's views were expressed in a formal, published article. Thus, unlike the spoken remarks at issue in *Hathcock* – which could be viewed as having an element of off-the-cuff hyperbole – a reasonable reader would presume that Judge Bennett's published words were carefully chosen and considered. And the message those words convey is clear – in Judge Bennett's opinion, lawsuits against tobacco companies serve a critical purpose because – in his view – they save hundreds of thousands of lives and billions of dollars. Likewise, Judge Bennett's effusive praise of products liability (plaintiff) trial lawyers necessarily suggests to a reasonable, objective observer his antagonism to those who defend such tort lawsuits – and in particular those who defend smoking and health cases. He could hardly look with favor on the opponents of trial lawyers he sees as life-savers. Just as in *Hathcock*, the judge's expressed views create a public perception of hostility to "defendants and defense counsel" requiring recusal. And, also as in *Hathcock*, the judge's rhetoric is pointedly hostile to a specific group of litigants – there auto-tort defendants, here tobacco company defendants – giving strong reasons for an "'an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought . . . [to] entertain a significant doubt about the judge's impartiality." *Patti*, 337 F.3d at 1321 (citing *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988)); *see also Haines v. Liggett Grp. Inc.*, 975 F.2d 81, 98 (3d Cir. 1992)

(remanding case involving tobacco company defendants to a different district judge where the former judge stated that "the tobacco industry may be the king of concealment and disinformation"); *United States v. S. Fla. Water Mgmt. Dist.*, 290 F. Supp. 2d 1356, 1359-60 (S.D. Fla. 2003) (ordering disqualification of district judge where, in light of his comments on Governor Bush and amendments to the Everglades Forever Act, "an objective viewer would reasonable doubt whether . . . any . . . party supporting the amendments . . . which were signed by Governor Bush would be treated impartially").

For these reasons, PM USA respectfully submits that Judge Bennett's strong approval of product liability lawsuits directed at the tobacco industry and his high praise for the plaintiff attorneys who file them – lawsuits and attorneys who, in his express and specific opinion, spare "hundreds of thousands from tobacco-related deaths" and save "billions . . . in health costs" – are sufficient, without more, to raise the "reasonable concern" of partiality that mandates his recusal in any tobacco product liability case.

Additionally, while that reasonable concern impacts all stages of the case, it is particularly salient during the jury selection process given the high-profile history of these cases and the biases of potential jurors with which any presiding *Engle* judge must deal fairly and without even the appearance of prejudgment or partiality. These issues have resulted in protracted and continuing motions practice over the form of *voir dire* in these federal cases and the manner in which every judge presiding over a federal *Engle* trial, following the clear law of the Eleventh Circuit, must not only identify such potential juror bias but then also carefully determine, with the exercise of his or her discretion, whether each such juror is so *unalterably* biased he or she may not sit. *See, e.g.*, *United States v. Rhodes*, 177 F.3d 963, 966 (11th Cir. 1999) (prospective juror's statements did not require dismissal where "further examination by

the court revealed that [she] could lay aside her [bias] and [treat the defendant] fairly and impartially"); *United States v. Martin*, 749 F.2d 1514, 1518 (11th Cir. 1985) ("It is . . . sufficient if a juror can lay aside his impressions or opinions and render a verdict based upon the evidence presented in court."). In the course of that debate, plaintiffs' counsel have repeatedly stated that they believe the high level of publicity surrounding the *Engle* cases as a whole, as well as the scores of individual verdicts to date, have produced venire pools in Florida in which many have clear biases either for, or against, the plaintiffs who file such lawsuits and the companies which must defend them. For their part, the defendants have acknowledged that potential jurors may come to a trial with such biases, but have stressed the corresponding clear duty of each presiding *Engle* judge (rather than attorneys committed to a particular result) to question each potential juror carefully and make an impartial judgment on their ability to serve.

The presiding judge's role in ruling impartially (and, equally importantly, appearing to rule impartially) on such "cause" challenges obviously is critical to any fair *Engle* trial. Yet here Judge Bennett's express endorsement of such lawsuits, and praise for the plaintiff attorneys who file them, would cause a reasonable observer to doubt the impartial application of that considerable discretion. Most obviously, if a potential juror expresses similar approval of tobacco product liability lawsuits, either as a vehicle for regulatory change (and hence the saving of hundreds of thousands of lives and billions in health care costs) or simply to compensate the alleged victims (which may have the same effect), that juror will be expressing a bias which with this Court has expressly agreed. How then can the Court appear to be impartial in ruling on a defense motion to excuse the juror as "biased"? And yet that may be the necessary ruling (and one often made in these cases) in many instances. On the other hand, there will undoubtedly be other potential jurors who will be challenged by plaintiffs' counsel, solely because they honestly

express the contrary opinion that these lawsuits by smokers, warned of the risks of smoking since at least 1964, are unwarranted and should not succeed. That view is obviously the direct contradiction of the views expressed by Judge Bennett in his article. If the Court then excuses that potential juror for cause – as plaintiffs' counsel have with varying degrees of success many time in the federal *Engle* trials – can anyone say it would not be "reasonable" for an objective observer to conclude that the Court's expressed and quite passionate opinion contradictory to the jurors' beliefs may have played a role?

There is obviously no "magic answer" or litmus test in assessing such potential juror biases, nor as to the degree to which the potential juror may or may not be able to put bias aside and hence sit. Those are matters entrusted to the discretion of a federal judge on the assumption it will be exercised completely impartially. And, again, all that is required to shatter that trust is even the appearance of a biased decision, not the reality: "what matters is not the reality of bias or prejudice but its appearance." *Liteky*, 510 U.S. at 548.

CONCLUSION

For the foregoing reasons, PM USA respectfully moves for Judge Bennett's recusal from this and any future *Engle* progeny case, and for assignment of a new trial judge.

LOCAL RULE 3.01 CERTIFICATION

Counsel have conferred pursuant to Local Rule 3.01(g) and Plaintiff opposes this motion.

Dated: October 31, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 31, 2014 I caused the foregoing document to be electronically filed with the Clerk of Court using CM/ECF, which will deliver the document to all counsel of record. A complete, duplicate copy of this document has been forwarded directly to Judge Young in Boston, Massachusetts.

/s/Mallori B. Openchowski
Mallori B. Openchowski