

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 12-1302 (RMC)

_____)
TODD DISNER, <i>et al.</i> ,)
)
Plaintiffs,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)
_____	/

PLAINTIFF’S TODD DISNER AND DWIGHT OWEN SCHWEITZER’S MOTION TO REOPEN AND SET ASIDE THE JUDGEMENT OF DISMISSAL AND TO RECUSE JUDGE COLLYER FOR CAUSE

The plaintiffs in the above captioned matter hereby move that the judgment of dismissal in the above captioned case be set aside and the matter be reopened and that, thereafter, Judge Collyer recuse herself from consideration of the plaintiffs’ claim for declaratory relief and cite in support thereof the following:

1. Factual and Procedural Background

1. The plaintiffs did not receive written notice of the assignment of their case to Judge Collyer however they did include in their opposition to the transfer of the above captioned matter to the D.C. District that should the matter be assigned to Judge Collyer they would move to recuse her.
2. The plaintiffs also did not receive notice from the D.C. District Court that their complaint had been dismissed.

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3. In 28 U.S.C.A. § 455 (a) there includes the provision that ‘Any...Judge of the United States shall disqualify himself (sic) in any proceeding in which his (sic) impartiality might reasonably be questioned.
4. Furthermore 28 U.S.C.A. § 455 (b) (1) provides for recusal ‘where he (sic) has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.
5. The indicia of the appearance of bias in the underlying matter begins with the selection of this forum and indeed this Judge which was manufactured by the Secret Service by enlisting agents located out of their Washington office despite the fact that the locus of the acts and individuals that gave rise to the events of which the plaintiffs complain, occurred in the Northern District of Florida where the Secret Service also has offices.
6. Judge Collyer was required by law, for process to issue, not simply to find probable cause; the fourth amendment standard to authorize the search and seizure in the case the plaintiffs complain of, she had the additional responsibility for process to issue of independently determining from her review of the presentation of the government, that they had offered her sufficient facts for her to reasonably conclude that the government was likely to prevail at trial.
7. The addition of this added requirement is found in the forfeiture statute, 18 U.S.C. § 981(a)(1)(C) and is of pivotal importance in the case of a forfeiture in rem in that the potential for harm, especially to innocent third parties is great, and in the case where the plaintiffs were affected and of which they complain, that number exceeded 100,000 people.

8. While bias is generally not founded upon judicial decision making in a given case as the normal recourse is to appeal; the plaintiffs claim that the indicia of bias is so clear and convincing and appear on the face of the documents complained of to show that they have been deprived of their due process rights ab-initio, and therefore they ought not be put to the burden of an appeal, at least before their claims have been addressed on the merits.
9. The Federal District Court for the Southern District of Florida, Altanoga, J. in it's order transferring this matter, pointed the plaintiffs and the D.C. District Court to the holding in *Katz v. United States*, 389 U.S. 347, 353 (1967) which expressly rejected the notion that a property interest is determinative of one's right to the protection afforded them by the fourth amendment to the U.S. constitution.
10. Rather the appropriate standard, and that which the plaintiffs plead, is their reasonable expectation of the privacy that attached to their personal, encrypted, password protected and unique URL's on ASD's servers; by analogy more akin to the holding in *Katz* than the cases cited by Judge Collyer as offering a basis for dismissing the plaintiffs complaint out of hand.
11. This in light of the fact that the Florida District Court had two separate opportunities to dismiss the plaintiffs complaint on the same theory, and twice declined to do so.
12. The entire focus of the plaintiff's case is on what occurred between the period from the onset of the investigation by the Secret Service to the date that Judge Collyer approved the governments complaint and authorized the seizures in rem.

13. The differences between a business being a Ponzi scheme or not requires a degree of expertise in forensic accounting, business organization, and a comprehensive factual analyses of the target organization by those who have the expertise to so opine, expertise totally lacking in the presentation made to judge Collyer to authorize the search and seizure of the plaintiffs records, and yet, without any further inquiry, judge Collyer rubber stamped a document which deprived over 100,000 people of their business records, their tax ID numbers, and in many cases their businesses and homes.
14. In an ex post facto fashion, Judge Collyer cites the defendant Bowdoin's admission that he operated a Ponzi Scheme, an admission that was a necessary part of his plea bargain.
15. When the coerced confession of an 80 year old man facing what amounts to life imprisonment while his wife dies of Alzheimer's disease before the very same judge who had illegally deprived him of the resources to fight back, then confesses in the hope of receiving some degree of leniency, the plaintiffs contend, does not validate an otherwise illegal search and seizure.
16. While no motion to suppress was filed on behalf of the principal of ASD his attorneys did receive an evidentiary hearing during which they presented testimony from two expert witnesses on multi-level marketing, one of whom participated successfully in defending the Amway litigation and the other, also a nationally recognized expert on multi-level marketing, and both of whom opined that the business model of ASD was not a Ponzi scheme, however judge Collyer

rejected their opinions in the absence of any expert opinion testimony to the contrary.

17. Indeed the government was so confident of judge Collyer's decision that, upon information and belief of the plaintiffs, they put no evidence to the contrary before the court at all.
18. Although the government, to the best of the plaintiffs knowledge, presented no witnesses that offered a contrary expert opinion, judge Collyer found the expert testimony offered by those experts unworthy of credibility simply based on a dissimilar choice of terms for the type of business ASD was engaged in, vernacular which had no bearing on the fundamental issue of whether the business model of ASD was or was not a Ponzi scheme.
19. Of greater significance in showing the court's bias on behalf of the government was Judge Collyer's treatment of the defense's contention that the verification necessary for the court to have authorized the forfeiture in the first place was inadequate on its face to meet the oath or affirmation requirements for a search and seizure.
20. Judge Collyer employed what can only be described as sophistry by not only ignoring the clear and concise fourth amendment requirements for the minimal content that the oath or affirmation clause in support of a search and seizure warrant must contain, she chose instead to base her decision rejecting the defendants claim by relying on verification standards found in non fourth amendment cases to validate Agent Dodson's equivocal verification of the governments complaint.

21. This, despite the fact, that judge Collyer not only approved a verification that was legally inadequate on it's face, she did so in a context where the burden on the government was higher, not lower than that required by the oath or affirmation clause of the fourth amendment to the U. S. Constitution.
22. To authorize a forfeiture in rem the verifier must aver that his facts are not only true of his own knowledge or, when the facts came from others, offers the reviewing authority a basis to demonstrate that they were legitimately relied upon *but also* were sufficient not only establish probable cause but to demonstrate that the government has presented and verified sufficient actual facts to enable judge Collyer to go on to find that the government would likely prevail at trial.
23. The body of the forfeiture complaint, on it's face, was so factually deficient that it simply could not enable an unbiased and disinterested judge or magistrate to have the ability to make an independent determination of the existence of probable cause, let alone find that the complaint met the higher statutory requirement of containing sufficient facts to independently demonstrate the likelihood of the government prevailing at trial.
24. It should be noted that, by the governments own admission, over 100,000 people were either the victims of ASD or the victims of an overzealous government who acted in haste leaving those thousands to repent at leisure.
25. It is also worthy of note that the District Court for the Southern District of Florida, prior to transferring the case to the D.C. District, had two distinct opportunities to dismiss the plaintiffs complaint for the very reasons that judge

Collyer employed and judge Altonaga declined although the applicable law is no different in the District of Columbia than it is the Southern District of Florida.

26. The plaintiffs complaint raised the issue of their business records and tax ID numbers being taken without probable cause and the reasonable expectation of privacy that attached to those records, claims totally ignored by Judge Collyer despite the fact that Judge Altonaga was kind enough to point out to the plaintiffs and Judge Collyer, the applicability of Katz v. United States, 389 U.S. 347, 353 (1967), where the issue was also the reasonable expectation of privacy, however judge Collyer limits herself to discussing our money, but ignores the taking of our business records and tax ID numbers and the reasonable expectation of privacy that would both logically and legally attach to them.
27. For Judge Collyer to suggest that the taking of those records and the consequent effect on the plaintiffs does not amount to a case or controversy is pure sophistry, as was her limiting the discussion to money and not the legal and tax implications of the deprivation of records which would prevent the plaintiffs from filing accurate tax returns required by the same government that took them.
28. Judge Collyer also ignored the significant and sui generis issue that in an in rem action the defendant is property and property does not have a voice.
29. That the property seized was able to be accessed by a presumed defendant does not remove the reasonable expectation of privacy any more than the telephone conversation in a public telephone booth deprived Mr. Katz of the reasonable expectation of privacy that attached to his conversation with a third party.

30. The plaintiffs claim is that their records were taken at the inception of the government's case and without affording them due process of law.

31. .The exhibits attached to the plaintiffs complaint clearly demonstrate that this was not a Ponzi scheme and but for the admission compelled by a plea bargain, the only competent evidence offered by the government as a fact, showed that the business operated profitably over a period of 16 months and no similar records were ever offered judge Collyer impeaching those numbers although they were at a time when ASD's maximum return for viewing the sites of others was at 150% of the cost paid to have their sites viewed, but to receive it, or any part of it, they first had to view 15 to 24 sites of others for 15 seconds each, and do so day after day week after week, whenever they chose assuming that they chose to view at all. *See e.g. the plaintiffs' complaint ¶ 48. And Ex's 6, 7, & 8.*

2. Argument:

The Impartiality of Judge Collyer can Reasonably be Questioned

The general rule enunciated in *Liteky v. United States, 510 U.S. 540 (1994)* is that 'judicial rulings alone **almost never** constitute valid basis for a bias or partiality recusal motion'. The Supreme Court went on to say however that recusal is required when there is evidence of deep seated favoritism or antagonism as would make fair judgment impossible. (*emphasis supplied*)

Here, we are confronted with one of those rare instances where deep seated favoritism is sufficiently apparent on the face of the record and it was in evidence before the court made any rulings, as a 'ruling' is defined as the product of a contested proceeding where one side wins and the other loses after both had the opportunity to be heard, each offering the tribunal what

their side thought germane to the particular issue, and only after such a presentation does the court make a ruling. That concept is defined as procedural due process, in effect the guarantee of fair procedures. What is key to the analysis is that the parties are offered the opportunity to be heard prior to a decision being made. Here the plaintiffs complain of what was done to them without the opportunity to be heard; their complaint is of a ‘finding’, not a ruling, and that finding was made without both procedural and substantive due process having been afforded to the plaintiffs.

Here, the ‘defendant’ was not represented at the time that the search and seizure of the plaintiffs records and tax ID numbers was authorized and the plaintiffs’ only advocate in the courtroom when the taking complained of was authorized by judge Collyer was the protection offered them by *‘the law’*, and not only of statutory law but their legitimate reliance on the legal principles that are a cornerstone of the very foundation upon which our system of jurisprudence is based, the fourth amendment of the Bill of Rights of the U.S. Constitution.

The plaintiffs have alleged and shown in their complaint seeking declaratory relief, that both the complaint seeking forfeiture, and the verification confirming it, were both so lacking in meeting the threshold requirements of the law relating to search and seizure, let alone meeting the additional burden superimposed upon those requirements by 18 U.S.C. § 981(a)(1)(C) et sec. that process could only have been found adequate and issued but upon a deep seated favoritism on behalf of the government and at the expense literally and figuratively not only of the plaintiffs but of tens of thousands of others similarly situated.

In the case of *In re Murchinson, 349 U.S. 133 (1955)*, Justice Black stated: “A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even

the probability of unfairness. To this end, no man can be a judge in his own case, and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered” *id. at 136*. The Court went on to state “Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.” While that case concerned a judge who sat as a one man grand jury and later conducted a contempt matter against one of the witnesses that had testified before him in that capacity, the Supreme Court found his having done so to be impermissible.

What makes that case precedent for recusal here is that judge Collyer, in being required to find not simply probable cause, but also that the government was likely to prevail at trial is sitting in an analogous position to a one person grand jury.

The issuance of a forfeiture complaint is also analogous with a court weighing evidence presented prior to issuing an indictment, and in the case of a forfeiture complaint, findings of fact beyond probable cause are required, placing the reviewing authority in the position of literally pre judging the likelihood of the outcome above and beyond finding the existence of probable cause. The Murchinson Court opined that “it would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. . . .A single "judge-grand jury" is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process, a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. *Id. at 137*

By analogy, judge Collyer, having been acting in accordance with, and as a consequence of the decision she made and of which the plaintiffs complain, for some 4 years, she cannot but

be presumed to have a bias in favor of the very action that began the process in the first place. This, not simply because she would have been required to find probable cause but because she was also required to make a finding that the government had presented her with “sufficiently detailed facts to support a reasonable belief that the government will be able to meet it’s burden of proof at trial” *18 U.S.C. § 981(A)(i) and Rule 983, see plaintiffs’ complaint ¶16.*

Given the nature of the plaintiff’s complaint and the requested relief, judge Collyer should have recused herself sua sponte, as it is her actions and hers alone to which the plaintiffs request for declaratory relief is addressed. Just as the court observed in *Murchinson*, a grand jury cannot then become the trial jury precisely because of the taint the prior involvement places on the process. See, *Withrow v. Larkin, 421 U.S. 35, 47(1975)* This is exactly the kind of situation that the Court referred to when it stated “Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.” Simply replace the words State with Government and accused with the plaintiffs and the rule applies.

As the foregoing suggests, it is the reasonableness of the request for recusal when viewed in light of all the facts and circumstances of the individual case that, in sum, create a legitimate concern in the mind of a litigant that he is not before an impartial tribunal. The test to be applied here is that if the plaintiffs prevail in obtaining the relief they seek then the only explanation for what occurred and of what they complained of is, at the very least, the appearance of bias on the part of judge Collyer as there can be no other explanation to explain such a significant and fundamental departure from such well settled law relating to what the government needs to present to a neutral and detached judge or magistrate in order to authorize a search and seizure, let alone meet the additional burden imposed on both the government and then the court by 18

U.S.C. 981, 983. Moreover, having operated under the authority she gave herself for four long years, it is reasonable to find that it created in her “the possible temptation not to hold the balance nice, clear, and true.

3. Conclusion:

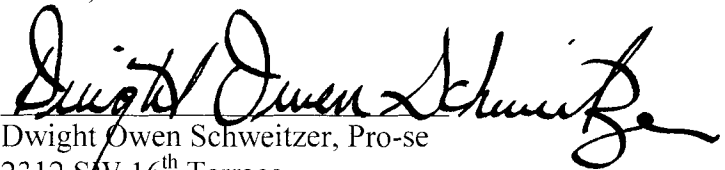
For the foregoing reasons the plaintiffs move that the dismissal of their case by judge Collyer be reopened and that she, thereafter, recuse herself from further consideration of the plaintiffs claims and that it be reassigned within the D.C. District Court judicial panel.

Respectfully submitted,

Plaintiffs



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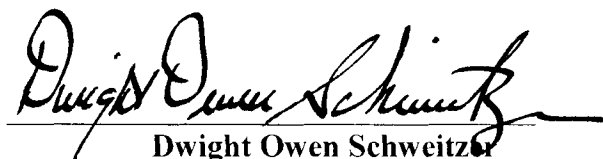


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CERTIFICATION OF SERVICE

I hereby certify that on this the 14th day of September, 2012 I sent a copy of the foregoing motion to the Clerk of the Federal District Court for the District of Washington DC, 333 Constitution Ave., NW, Washington DC 20001 and to:

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