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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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STEPHEN W. BRANCO AND SARI
HUMES BRANCO,

NO. CIV. 2:09-3485 WBS DAD

Plaintiffs,

ORDER OF RECUSAL

v.

BANK OF AMERICA; WMC
MORTGAGE CORPORATION; UNITED
VISION FINANCIAL REALTY, INC.;
DAN MICHAELS; JEREMY ZAFT
and DOES 1-20 inclusive,

Defendants.

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Because the spouse of one of my law clerks owns a small amount of stock in the Bank of America, I must recuse myself from this case. This memorandum is written to explain why I have reluctantly come to that conclusion.

Under 28 U.S.C. § 455(b)(4), a "justice, judge, or magistrate judge of the United States" is required to disqualify himself if "[h]e knows that he, individually or as a fiduciary, or his spouse or minor child residing in his

1 household, has a financial interest in the subject matter in
2 controversy or in a party to the proceeding." With several
3 itemized exceptions, including mutual funds the judge does not
4 manage and government securities, § 455(d)(4) defines "financial
5 interest" to include "ownership of a legal or equitable interest,
6 however small, or a relationship as director, adviser, or other
7 active participant in the affairs of a party." Accordingly, a
8 judge must recuse himself from any case in which he owns stock in
9 a corporate party or in a parent corporation of a corporate
10 subsidiary party.

11 In addition to mandating recusal because of a judge's
12 financial interests, § 455(b)(4) expressly extends the
13 disqualification of a judge to include financial interests owned
14 by the judge's spouse or minor children residing with the judge.
15 Neither § 455(b)(4) nor its relevant legislative history,
16 however, even suggest that a judge should be concerned if his
17 staff, including his law clerks, have a financial interest in a
18 party. If Congress felt that the appearance of impartiality
19 could be threatened if a judge's law clerk has a financial
20 interest in a party, it could have legislated accordingly when it
21 made the pertinent amendments to § 455 in 1974 or in the more
22 than thirty-five years that have followed. It has not, and such
23 congressional inaction should not be so easily disregarded.

24 Not only is disqualifying law clerks from working on
25 cases because of financial interests at odds with the express
26 limitations in § 455(b)(4), expansion of such disqualification to
27 law clerks would seem to be wholly unnecessary to preserve the
28 impartiality of the judiciary. Disqualification of a judge under

1 § 455(b)(4) preserves the appearance of impartiality because it
2 assures the parties and the public that even a speculative or
3 hypothetical financial interest held by the judge or his
4 immediate family will not influence the judge's decision in a
5 case. The rationale behind § 455(b)(4) does not apply to the
6 work of a law clerk. Judges, not law clerks, decide cases.

7 Nonetheless, in 1995 the Judicial Conference of the
8 United States went ahead and enacted the "Codes of Conduct for
9 Judicial Employees" and extended the disqualifications of §
10 455(b)(4) to judges' staff attorneys and law clerks.

11 Specifically, canon 3F(2) of the Code states:

12 Certain judicial employees, because of their relationship
13 to a judge or the nature of their duties, are subject to
14 the following additional restrictions: (a) A staff
15 attorney or law clerk should not perform any official
16 duties in any matter with respect to which such staff
17 attorney or law clerk knows that: . . . (iii) he or she,
18 individually or as a fiduciary, or the spouse or minor
19 child residing in his or her household, has a financial
20 interest in the subject matter in controversy or in a
21 party to the proceeding.

22 This canon adopts the definition of "financial interest" set
23 forth in § 455(d)(4) and states that "[a] judicial employee who
24 is subject to canon 3F(2) should keep informed about his or her
25 personal, financial and fiduciary interests and make a reasonable
26 effort to keep informed about such interests of a spouse or minor
27 child residing in the judicial employee's household." Code of
28 Conduct for Judicial Employees, Canon 3F(4).

 Given its adoption of the definition of "financial
interest" that applies to any interest, "however small," not only
did the Judicial Conference needlessly extend § 455(b)(4) to law
clerks, it also carried forth the fiction that an individual's

1 financial holdings will always be affected in any case involving
2 a corporate party simply because the individual owns a minuscule
3 amount of stock in that party. See S. Rep. No. 93-419 (1974)
4 (Individual Views of Mr. Dennis of Indiana on S. 1064--Concurred
5 in by Mr. Butler of Virginia), reprinted in 1974 U.S.C.C.A.N.
6 4093, 6362:

7 I have serious reservations on the merits of this bill.
8 . . . on a [] utilitarian level, it is my judgment that
9 the approach taken in this bill is unreasonable and
10 unrealistic. . . . The necessary effect of [mandatory
11 disqualification for any financial interest] is that, by
12 legislative enactment, we could have a true Daniel come
13 to judgment--or a Learned Hand upon the bench--and if the
14 case involved, let us say, the Exxon Corporation, and the
15 judge owned 20 shares of common stock, which he had
16 inherited from his parents many years before and had
17 never particularly thought of since, he absolutely could
18 not sit To me, an inflexible provision of this
19 kind does not make good sense, does not make for the
20 highest quality of justice, and represents an over-
21 reaction to a problem which, so far as the Committee has
22 been advised, is largely non-existent.

23 In Maintaining the Public Trust: Ethics for Federal
24 Judicial Law Clerks, which the Federal Judicial Center ("FJC")
25 published in 2002, the FJC explains:

26 Like the judges they serve, law clerks should not perform
27 official duties in matters in which they have a financial
28 interest. [A law clerk's] work on cases in which she has
a financial interest would be inconsistent with Canon
3F(2). Her judge can assign another law clerk to the
matter.

29 Id. at 11. After my law clerk inquired into the precise
30 restrictions canon 3F imposes, an ethics officer of the General
31 Counsel's Office of the Administrative Office of the United
32 States Courts advised that a law clerk with a financial interest
33 in a party should be "screened" from the party's case, which
34 "would mean that the screened clerk should not talk to the other

1 clerks about the case.”

2 The ethics officer recognized that there is not an
3 advisory opinion directly mandating such screening, but
4 analogized to other advisory opinions that address
5 disqualification of law clerks. For example, section 3.5-1(f) of
6 the Compendium of Selected Opinions suggests that a disqualified
7 law clerk should be isolated from a case in which the law clerk
8 has an ethical conflict: “A law clerk whose spouse is an
9 associate in a firm should be isolated from any case handled by
10 that firm, whether the spouse actually participates in the
11 representation or not.” In the Committee on Codes of Conduct’s
12 opinion, isolation of a disqualified law clerk is a simple and
13 effortless solution: “[T]he disqualification of a judge is far
14 more disruptive to the administration of justice than the
15 disqualification of a law clerk. Most judges have more than one
16 clerk, and the matter may be transferred easily to another
17 clerk.” Committee on Codes of Conduct, Advisory Op. No. 51.

18 In theory, isolating one law clerk from a case and
19 assigning any work from that case to another law clerk may seem
20 to be an easy solution to the conflict created by canon 3F. In
21 practice, however, the physical design of my chambers and the way
22 in which I have determined that I can most efficiently and
23 judiciously manage my caseload renders isolation of one law clerk
24 impracticable. Not only is it impossible to meaningfully isolate
25 a law clerk from every aspect of a case, I have found that
26 conferring with all of my law clerks on a matter enables me to
27 more correctly reach a decision. I also encourage my law clerks
28 to freely confer with each other because it aides in their

1 development of thorough and well-reasoned work product.

2 The practical absurdity of isolating a law clerk from a
3 case is further illustrated by the Committee on Codes of
4 Conduct's explanation about how a judge should proceed if he only
5 has one law clerk:

6 If a judge has only one clerk, an arrangement may be made
7 to trade the services of the law clerk for the services
8 of a law clerk to another judge on the same bench.

9 Committee on Codes of Conduct, Advisory Op. No. 51. The
10 recommendation to simply trade law clerks with another judge
11 falsely assumes that law clerks are fungible commodities and
12 ignores the disruption and imposition such arrangements would
13 impose. Each judge's chambers functions in a unique way, and the
14 judge's selection of and development of his working relationship
15 with his law clerks is usually a vital component to the dynamic
16 of chambers. Because many corporations, such as the Bank of
17 America, are frequent parties in federal court, trading law
18 clerks also threatens to alter the traditional role law clerks
19 play for their judges and convert the positions into attorney
20 pools that might lack the trust and working relationships
21 developed in chambers.

22 Moreover, even when a judge attempts to isolate a law
23 clerk from any direct involvement in cases in which that law
24 clerk has a conflict, there is no assurance that the problems
25 created by the canon will be avoided. Not all of the work
26 performed by law clerks is necessarily case specific. For
27 example, legal research in connection with a motion in one case
28 may be later incorporated in an order on a similar motion in
another case. If a law clerk has a "financial interest" in one

1 corporation, e.g., the Bank of America, could the research done
2 by that law clerk in a case against a different bank be used in
3 connection with a similar case against the Bank of America?
4 Would it make a difference whether the court became aware of the
5 similarity before or after the law clerk performed the research?
6 These are not the kind of questions that judges and their law
7 clerks should have to worry about, particularly when they involve
8 a subject as grave as the very ethics that govern the conduct of
9 judges and lawyers.¹

10 Despite the valued discourse and collaboration
11 isolation thwarts, I undertook to isolate one of my law clerks
12 from cases in which that law clerk has a "financial interest."
13 The approach proved to be exceedingly impractical, counter-
14 productive, and a hindrance to the performance of my official
15 duties. Prudence therefore dictates that henceforth I recuse
16 myself from cases in which one of my law clerks has a conflict
17 under canon 3F.

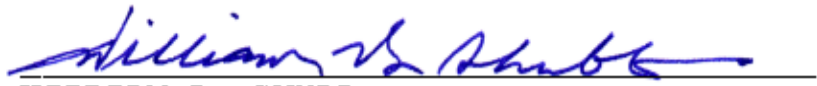
18 IT IS THEREFORE ORDERED that the Clerk of the Court
19 reassign this case to another judge for all further proceedings,
20 making appropriate adjustments in the assignments of civil cases
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24 ¹ Maintaining the Public Trust: Ethics for Federal
25 Judicial Law Clerks advises, and the ethics officer indicated,
26 that a judge may request a formal advisory opinion from the
27 Committee on Codes of Conduct about these and other questions
28 regarding the extent to which a law clerk with a financial
conflict must be isolated from a case. However, the issuance of
a formal opinion usually takes three weeks, and in the meantime
the work of the court must go on, motions must be decided, and
cases must be managed.

1 to compensate for such reassignment.²

2 DATED: December 21, 2009

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WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

² The law clerk in question assisted me in the preparation of this Order. If that was wrong, *mea culpa*.