IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, LLC, et al., Plaintiffs, v. KENNETH LEE "KEN" SALAZAR, et al., Defendants, DEFENDERS OF WILDLIFE, et al., Defendant-Intervenors.	)	CIVIL ACTION NO. 10-1663(F)(2) SECTION F JUDGE FELDMAN MAGISTRATE WILKINSON

MEMORANDUM IN SUPPORT OF
DEFENDANT-INTERVENORS' MOTION FOR DISQUALIFICATION

Pursuant to 28 U.S.C. § 455, Defendant-Intervenors Defenders of Wildlife, Sierra Club, Florida Wildlife Federation, Center for Biological Diversity, and Natural Resources Defense Council (collectively "Defenders") respectfully move this Court for disqualification from proceedings in this case. For the reasons set forth below, recusal is required for two reasons: First, the Court has a financial interest in the subject matter in controversy, and that interest could be substantially affected by the outcome of this case, *see* 28 U.S.C. § 455(b). Second, the

Court's ownership interests in companies engaged in oil and gas exploration in the Gulf of Mexico could cause the Court's impartiality reasonably to be questioned, *see* 28 U.S.C. § 455(a).

STATEMENT OF FACTS

Hornbeck Offshore Services filed its complaint on June 7, 2010. Doc. 1. Hornbeck sought to invalidate the federal government's six-month moratorium on deepwater exploratory oil and gas drilling in the Gulf of Mexico. It filed an amended complaint on June 9, adding several co-plaintiffs. Doc. 5. Plaintiffs moved for a preliminary injunction the same day. Doc. 7. Plaintiffs' preliminary injunction papers identified Exxon as the operator of one of the thirty-three deepwater rigs that was shut down by the government moratorium. *See* Exhibits C, E, & J to Plaintiffs' Motion for Preliminary Injunction, Doc. 7-2. Defenders moved to intervene in the case on June 16. Doc. 37. The Court granted the intervention motion on June 18. Doc. 42.

The parties completed briefing the preliminary injunction motion on June 20. The Court held a hearing on June 21. The following day, June 22, the Court granted a preliminary injunction prohibiting the government from enforcing the moratorium. Doc. 67.

One day later, on June 23, following news reports of the Court's personal investments, Defenders filed a motion seeking disclosure of the Court's current financial interests. Doc. 73. On June 24, the Court granted the motion and in the same order denied the government Defendants' motion to stay the preliminary injunction pending appeal. Doc. 82. On June 25, the Court released its Financial Disclosure Report for 2009 (Ex. A), along with a one-sentence letter, dated June 23, addressed to the Committee on Financial Disclosure of the U.S. Courts (Ex. B).

The Financial Disclosure Report lists the Court's holdings as of December 31, 2009. It reveals stock investments as of that date in Exxon Mobil Corp. and Allis Chalmers Corp. Ex. A, entries 51, 140. In addition, it identifies bond holdings in El Paso Corp., Sandridge Energy Inc.,

and Ocean Energy Notes. Ex. A, entries 79, 125, 14. All of these companies are engaged in oil and gas drilling or related work in the Gulf of Mexico.

The Court's June 23 letter advises that "the Exxon stock noted on line 140 of my 2009 Financial Disclosure Report was sold at the opening of the stock market on June 22, 2010, prior to the opening of a Court hearing on the Oil Spill Moratorium case." Ex. B. The hearing occurred on June 21. The letter does not report any sale of the Court's holdings in the four other companies identified above.

ARGUMENT

Section 455 of 28 U.S.C. governs the disqualification of a judge in a particular case. This motion first addresses § 455(b), which lays out particular grounds for recusal that apply here. It then addresses § 455(a), which provides an additional, general basis for recusal. Both provisions mandate disqualification in this case.

I. THE COURT HAS A FINANCIAL INTEREST IN THE SUBJECT MATTER OF THE CONTROVERSY, AND THAT INTEREST COULD BE SUBSTANTIALLY AFFECTED BY THE OUTCOME OF THE CASE.

Section 455(b) of 28 U.S.C. requires recusal if a judge "knows that he, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy . . . or any other interest that could be substantially affected by the outcome of the proceeding . . . ." 28 U.S.C. § 455(b)(4). The statute defines "financial interest" under § 455(b) to mean "ownership of a legal or equitable interest, however small . . . ." *Id.* § 455(d)(4). The Fifth Circuit has described the statute as having an "unforgiving bite," because it requires disqualification "for even paltry financial interests." *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1030, 1032 (5th Cir. 1998). Moreover, § 455(b) requires recusal "regardless of whether or not the [financial] interest actually

creates an appearance of impropriety." *Health Servs. Acquisition Corp. v. Liljeberg*, 486 U.S. 847, 859 n.8 (1988).

The Court's financial interests in several companies engaged in oil and gas drilling or related work in the Gulf mandate recusal. First, until early last week, the Court owned shares of stock in Exxon Mobil Corp., which operates one of the deepwater rigs directly covered by the moratorium. Accordingly, the Court had a financial interest in the subject matter in controversy.

The belated divestiture of the Exxon shares does not remove the Court from the strictures of § 455(b). The Fifth Circuit has ruled that "disqualification becomes automatic from the moment a judge discovers her financial interest in the litigation; relinquishment of that interest at any point after discovery is no remedy." *Tramonte*, 136 F.3d at 1031 (discussing Congress's partial adoption of the dissenting opinion in *Union Carbide Corp. v. U.S. Cutting Serv.*, 782 F.2d 710 (7th Cir. 1986)). The one exception to this rule applies to a financial interest in a party (rather than in the subject matter in controversy), when a judge has already devoted "substantial judicial time" to a case, and disqualification would therefore disrupt the efficient administration of justice. *See* 28 U.S.C. § 455(f); *Tramonte*, 136 F.3d at 1031-32. However, this exception was designed for complex litigation, like class actions or multidistrict litigation, where the judge has expended inordinate time and expertise by the time the conflict arises. *See* 134 Cong. Rec. 31054, 31062 (Oct. 14, 1988) (statement of Senator Heflin providing a section-by-section analysis of the Judicial Branch Improvements Act of 1988). In this case, the Court has had the matter before it for a matter of weeks. The exception also does not apply to interests that could be substantially affected by the outcome of the case. 28 U.S.C. § 455(f). As discussed below, the financial interests at issue here could be so affected.

Second, the 2009 Financial Disclosure Report reveals the Court's ownership of shares of Allis Chalmers Corp. Ex. A, entry 51. Based on our research, the only company trading under that name on the New York Stock Exchange is Allis-Chalmers Energy Inc., an oilfield services company with business interests "dependent on drilling activity in the Gulf of Mexico." *See* Allis-Chalmers Energy Inc., Quarterly Report (Form 10-Q), at 23-24 (May 7, 2010) (Ex. C), *available at* http://www.sec.gov/Archives/edgar/data/3982/000095012310046141/h72835e10vq.htm. Allis-Chalmers has announced that "prolonged periods of lower drilling activity . . . could have a materially adverse effect on [its] financial condition." *See* Allis-Chalmers Energy Inc., Annual Report (Form 10-K), at 13 (Mar. 9, 2010) (Ex. D), *available at* http://www.sec.gov/Archives/edgar/data/3982/000095012310022492/h70062e10vk.htm.

In addition to stock, the 2009 Disclosure Report indicates that the Court owns bonds in El Paso Corp., Sandridge Energy Inc., and Ocean Energy Notes. Ex. A, entries 79, 125, 14. El Paso Corp. is a North American independent oil and natural gas producer; in the Gulf of Mexico, it focuses on deepwater oil and gas production. *See* El Paso Corp., Annual Report (Form 10-K), at 18, 51 (Mar. 1, 2010) (Ex. E), *available at* http://www.sec.gov/Archives/edgar/data/1066107/000095012310019484/h69839e10vk.htm. SandRidge Energy, Inc. is an independent oil and gas company whose operations in the Gulf extend from 30 to 1100 feet in depth. *See* SandRidge Energy, Inc., Annual Report (Form 10-K), at 1, 6 (Mar. 1, 2010) (Ex. F), *available at* http://www.sec.gov/Archives/edgar/data/1349436/000119312510043667/d10k.htm.

Ocean Energy similarly has interests in Gulf deepwater drilling. In 2003, Ocean Energy merged into Devon Energy Corp., and Devon Energy assumed Ocean Energy's debts. *See Company News; Devon to Buy Ocean Energy for $3.5 Billion*, N.Y. Times, Feb. 25, 2003 (Ex. G), *available at* http://www.nytimes.com/2003/02/25/business/company-news-devon-to-buy-

ocean-energy-for-3.5-billion.html?ref=devon_energy_corporation; *Ocean Energy, Devon Energy Agree To Merge,* Houston Bus. J., Feb. 24, 2003 (Ex. H), *available at* http://www.bizjournals.com/houston/stories/2003/02/24/daily5.html. Devon Energy has an extensive deepwater exploration program in the Gulf. *See* Devon Energy Corp., Annual Report (Form 10-K), at 5 (Feb. 25, 2010) (Ex. I), *available at* http://www.sec.gov/Archives/edgar/data/1090012/000095012310017093/d71091e10vk.htm.

The 2009 Financial Disclosure Report identifies financial interests in the subject matter in controversy as well as interests that could be substantially affected by the outcome of the proceeding. Section 455(b) does not require certainty that a judge's financial interest will be affected by the outcome of the litigation. *See Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1114 (5th Cir. 1980). Rather, § 455(b) mandates disqualification when the outcome of the proceeding "may potentially affect that interest." *Id.* Here, because this proceeding may affect the Court's financial interests, disqualification is required.

II. THE COURT'S FINANCIAL HOLDINGS COULD CAUSE A REASONABLE PERSON TO QUESTION ITS IMPARTIALITY.

Section 455(a) of 28 U.S.C. requires a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Because § 455(a) is designed to promote public confidence in the integrity of the judicial process, the mere appearance of partiality, rather than actual partiality, triggers disqualification. *See Liljeberg*, 486 U.S. at 860 ("'The goal of section 455(a) is to avoid even the appearance of partiality.'") (quoting decision below from Fifth Circuit Court of Appeals); *Potashnick*, 609 F.2d at 1111 ("Clearly, the goal of the judicial disqualification statute is to foster the Appearance of impartiality. . . . Any question of a judge's impartiality threatens the purity of the judicial process and its institutions."). The appearance of partiality erodes public confidence in the

judiciary. *See* Model Code of Judicial Conduct R. 1.2 cmts. 1, 5; *see also* Code of Conduct for United States Judges Canon 2A ("A judge should . . . act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary.").

Section 455(a) imposes an objective standard, requiring recusal where a reasonable person, knowing all the circumstances would harbor "*any* reasonable factual basis for doubting the judge's impartiality." *Potashnick*, 609 F.2d at 1111 (emphasis added) (citing H.R. Rep. No. 93-1454, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6354-55). "Because [§ 455(a)] focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street." *Potashnick*, 609 F.2d at 1111; s*ee also Sensley v. Albritton*, 385 F.3d 591, 599 (5th Cir. 2004) ("[W]e must ask how these facts would appear to a 'well-informed, thoughtful and objective observer . . . .'") (citing *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995)).

The Court's financial holdings would raise in an objective mind a reasonable question concerning the Court's impartiality, requiring recusal under § 455(a).

First, Exxon, as operator of a deepwater rig that was shut down by the government moratorium, had an immediate and substantial interest in invalidating the moratorium. The validity of the moratorium is the core of the controversy the case presents. Whether the Court sold its shares on June 21 "prior to the opening of a Court hearing," Ex. B, or on June 22, *id.*, the Court sold its Exxon shares too late for purposes of § 455(b). The appearance problem arises from the Court's having owned the stock in the midst of the proceedings and deliberations directly affecting Exxon's interests. The sale of the stock at that time does not cure the appearance problem.

It is possible the Court was unaware that it owned Exxon stock. But that a judge lacks knowledge of a disqualifying circumstance does not eliminate the risk that other persons might reasonably question his impartiality. *Liljeberg*, 486 U.S. at 859. Even a judge's "forgetfulness . . . is not the sort of objectively ascertainable fact that can avoid the appearance of partiality." *Id.* at 860 (internal quotation and citation omitted).

Indeed, § 455(c) imposes an affirmative duty on a judge to "inform himself about his personal and fiduciary financial interests . . . ." 28 U.S.C. § 455(c). *See also Tramonte*, 136 F.3d at 1031 ("A judge has a duty to be watchful of such disqualifying circumstances . . . ."). Moreover, "a judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." Model Code of Judicial Conduct R. 2.11 cmt. 5. Here, the Court's Exxon interest and the divestiture of it came to light only after Defenders sought disclosure.

The Court's holdings in Allis-Chalmers, El Paso Corp., SandRidge Energy Inc., and Ocean Energy Notes (Devon Energy) present further appearance concerns. Each of these companies may have a substantial interest in nullifying the moratorium or in limiting its scope or duration. It is not difficult to discern the appearance problem the Court's ownership interest in any one of them would generate. The Court's own preliminary injunction decision describes the interrelated nature of the Gulf oil and gas industry. This was a premise of the Court's finding of irreparable injury to Plaintiffs. The Court wrote:

> The effect on employment, jobs, loss of domestic energy supplies caused by the moratorium as plaintiffs (and other suppliers, and the rigs themselves) lose business, and the movement of the rigs to other sites around the world will clearly ripple throughout the economy in this region.

Doc. 67 at 22. For § 455(a) purposes, the problem is that the Court owned and/or owns an interest in companies that comprise part of the network that supports the Gulf's oil and gas industry. In these circumstances, a reasonable person "would harbor doubts about" the Court's impartiality. *Potashnick*, 609 F.2d at 1111. The Fifth Circuit has ruled that "any reasonable factual basis for doubting the judge's impartiality" requires recusal. *Id*.

The national importance and visibility of this case underscore the necessity of recusal. The Court itself noted that "[t]he issues presented are of national significance," Doc. 23 at 2, and the preliminary injunction decision was reported on the front pages of newspapers across the United States. Since the BP spill, the nation's eyes are on the Gulf. The public nature of the litigation reinforces the need to vindicate the underlying purpose of § 455(a), which is to promote public confidence in the judiciary by protecting "the purity of the judicial process." *Potashnick*, 609 F.2d at 1111.

Finally, "[when] the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal." *In re Chevron USA, Inc.*, 121 F.3d 163, 165 (5th Cir. 1997) (quoting *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995)); s*ee also Potashnick*, 609 F.2d at 1112 (holding that § 455(a) "clearly mandates" a preference for judges to err on the side of caution and recuse themselves in questionable cases). Accordingly, recusal is required here.

CONCLUSION

For the reasons detailed above, pursuant to 28 U.S.C. § 455(a) and (b), Defenders respectfully urge the Court to disqualify itself from further proceedings in this case.

Respectfully submitted this 2nd day of July, 2010,

/s Catherine M. Wannamaker
John Suttles
Louisiana Bar No. 19168
Counsel for Defendant-Intervenor Defenders of Wildlife

/s Adam Babich
Adam Babich
Louisiana Bar No. 27177

and Center for Biological Diversity
SOUTHERN ENVIRONMENTAL LAW CENTER
200 West Franklin Street, Suite 330
Chapel Hill, North Carolina 27516
Telephone: (919) 967-1450
Facsimile: (919) 929-9421
jsuttles@selcnc.org

Counsel for Sierra Club
TULANE ENVT'L LAW CLINIC
6329 Freret Street
New Orleans, LA 70118
Telephone: (504)865-5789
Facsimile: (504)862-8721
ababich@tulane.edu

Catherine M. Wannamaker, admitted pro hac vice
GA Bar No. 811077
Counsel for Defendant-Intervenors Defenders of Wildlife
and Center for Biological Diversity
SOUTHERN ENVIRONMENTAL LAW CENTER
127 Peachtree Street, Suite 605
Atlanta, Georgia 30303
Telephone: (404) 521-9900
Fax: (404)521-9909

/s_Alisa A Coe____
Alisa A. Coe
La. Bar No. 27999
David G. Guest
Fla. Bar No. 0267228
Admitted pro hac vice
Monica K. Reimer
Fla. Bar No. 0090069
Admitted pro hac vice
Earthjustice
P.O. Box 1329
Tallahassee, FL 32302-1329
Phone: (850) 681-0031
Fax: (850) 681-00201

COUNSEL FOR SIERRA CLUB and FLORIDA WILDLIFE FEDERATION

/s Mitchell Bernard
Mitchell Bernard
NY Bar No. 1684307
Admitted pro hac vice
Natural Resources Defense Counsel
40 West 20th Street
New York, NY 10011
Phone: (212)727-4469
Fax: (212)727-2700

COUNSEL FOR NATURAL RESOURCES DEFENSE COUNCIL, INC.

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2010, I caused as copy of the foregoing to be served through the Court's CM/ECF system to all parties.

/s Catherine Wannamaker
Attorney