IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No. 06-0026**
	)	**Electronically Filed**
CYRIL H. WECHT	)	

MEMORANDUM OPINION AND ORDER OF COURT DENYING DEFENDANT'S MOTION FOR RECUSAL OF THE TRIAL JUDGE (DOC. NO. 269)

I. INTRODUCTION

After winning most of the "calls" in the pretrial phase, the defense team is disappointed about some recent calls that went against them, and express their disappointment in defendant's motion for recusal (doc. no. 269), even though the conduct of this Court and the management of this case consistently implemented recommendations and suggestions taught at the schools for federal trial judges, and contained in the publications of the Federal Judicial Center and the Criminal Justice Standards Committee of the American Bar Association. See Section XII hereof. The issue before this Court in the motion for recusal -- and the issue that will soon be before the United States Court of Appeals for the Third Circuit[1] -- is whether the randomly assigned United States District Judge, or an attorney(s) for one of the parties, will regulate and manage the course

[1]Lead trial counsel for defendant announced in open court at the eighth status conference on June 16, 2006 (see minute entry, doc. no. 239), that the defense team intended to file a motion for mandamus to the United States Court of Appeals for the Third Circuit, in the event this Court denied the motion for recusal which counsel said he expected to file the week of June 26, 2006. The 47 page Motion for Recusal (with 55 pages of exhibits) (doc. no. 269) and the 51 page supporting brief (doc. no. 270) were filed on the Friday of the 4th of July weekend at 3:09 PM and 3:15 PM respectively.

and conduct of the pretrial proceedings and the jury trial.

Upset that this Court's recent rulings (1) prevented the defense team from ignoring with impunity this Court's carefully crafted pretrial, case management, scheduling and other orders, including the agreed-to overall Pretrial Order of March 1, 2006 (doc. no. 42) (see Sections V through X hereof), and (2) prevented defendant from launching a fishing expedition predicated upon speculation about an alleged conspiracy between an FBI Special Agent, the District Attorney of Allegheny County, Pennsylvania, and the United States Attorney for the Western District of Pennsylvania (see Section XI hereof), the defense team filed the instant motion for recusal. The defense team in their motion for recusal have added the presiding judge to the list of co-conspirators. Doc. no. 269.

Now, with jury questionnaires having been sent to 300 prospective jurors, with the almost three hour charge conference completed, and with the agreed-to trial date of October 16, 2006, less than 90 days hence, the defense team wishes to start all over again. Granting the motion for recusal would require a new trial judge to revisit this Court's rulings on over 1,350 government trial exhibits and becoming familiar with the over 240,000 pages of documents in the electronic database, coupled with revisiting this Court's numerous rulings throughout this case which has almost 300 docket entries (since January 20, 2006) including the Court's decisions on the motion for discovery (doc. no. 69), motion to suppress (doc. no. 55), and motion to dismiss (doc. no. 180).[2]

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[2]The defense team is greatly upset that the Court reviewed, and ruled upon, the approximately 1,350 government trial exhibits and the related approximately 240,000 pages of documents in the electronic database, as well as staying current with the never-ending motion practice. The defense argues that such diligence on the part of the federal district court judge and his staff is evidence of bias since an "unbiased" judge would not work so hard.

The Court has reviewed the applicable instructional material for federal court judges (see Section XII hereof), thoroughly analyzed the facts and applicable law (see Section XIII hereof), and has concluded (see Section XIV) that there exists no bias or prejudice, nor any appearance of bias or prejudice, in fact or in law, to grant said motion for recusal. Thus, the Court will enter an Order denying the motion for recusal.

II. BACKGROUND OF CRIMINAL CASE - - THE INDICTMENT

On January 20, 2006, the government brought an 84 count indictment alleging that defendant, Dr. Cyril Wecht, committed the crimes of theft of honest services - wire fraud and mail fraud, mail fraud, wire fraud, and theft concerning an organization receiving federal funds, in violation of 18 U.S.C. §§ 1341 1342, 1343 and 1346, 18 U.S.C. §§ 1341 and 1342, 18 U.S.C. §§ 1342 and 1343, and 18 U.S.C. § 666, respectively, when he unlawfully used his public office as the coroner of Allegheny County, Pennsylvania, for his private financial gain. Indictment at doc. no. 1. More specifically, the indictment alleges, among other things, that defendant falsely billed his clients (through the mail) for services such as limousine rides to the airport and other private engagements, while using county coroner's office vehicles and employees to drive him to the airport and other private engagements; that defendant created false travel agency bills and false limousine reports and transmitted them via facsimile from the coroner's office to private clients in other states; and, that defendant otherwise used the Allegheny County Coroner's Office employees to perform other personal work, including secretarial work, for his own private financial gain. Defendant categorically denies these allegations. The trial of this case will commence on October 16, 2006, as agreed-to by the parties in the March 1, 2006 Pretrial Order. Doc. no. 42.

III. CONTEXT OF MOTION FOR RECUSAL - - MEMORANDUM OPINION AT DOC. NO. 224

A detailed review of the Court's decision at doc. no. 224 provides an understanding of the context of the pending motion for recusal (doc. no. 269), since said motion follows after the filing of the Court's decision at doc. no. 224, and since the numerous decisions of the Court therein form a substantial part of the basis for the motion for recusal. Doc. no. 224 is entitled, "Memorandum Opinion Re: Denial of Defendant's Motion for Reconsideration (Doc. No. 183) of the Court's May 17, 2006 Order (Doc. No. 152) Pertaining to the Admissibility of Government's Trial Exhibits; Memorandum Opinion Re: Denial of Defendant's Motion to Modify (Doc. No. 203) Court's Pretrial Order Dated March 1, 2006 (Doc. No. 42); and Court's Rulings on Defendant's Untimely Objections (Doc. No. 211) to Government's Trial Exhibits."

Although the decision is a painful 43 pages, it accurately summarizes the record in this case. Defense counsel's motion for recusal and related brief fail to support any alleged inaccuracies in the Court's numerous citations to the record which are throughout doc. no. 224.

Further, said Memorandum Opinion (doc. no. 224) (dated June 14, 2006) also provides a review of the case as a whole. As of June 23, 2006, around the end of the fifth month of this criminal case, there were more than 250 docket entries - - approximately 50 per month and approximately two (2) per "court-open" days. Thus, one of the best and easiest methods to gain an understanding of the record of this criminal case is by reading and analyzing said Memorandum Opinion (doc. no. 224); and said decision, with its numerous citations to the record, also provides a roadmap into the specifics of the record.

IV. LEGAL STANDARD FOR MOTION FOR RECUSAL - - THE BATTING AVERAGE OF THE PARTIES IS NOT THE LEGAL TEST FOR ALLEGED BIAS OR PREJUDICE

In *Kensington International Limited and Springfield Associates, LLC,* 353 F.3d 211 (3d Cir. 2003), the United States Court of Appeals for the Third Circuit reiterated the legal test for determining whether recusal is warranted. Under 28 U.S.C. § 455(a), the test for recusal is whether an objective, reasonable person, with knowledge of all the facts, would conclude that the judge's impartiality might reasonably be questioned. Whereas section 455(a) is a standard catch-all provision for disqualification, section 455(b)(1) is more narrow in that it compels a judge to disqualify himself if "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." *Id.* (quoting 28 U.S.C. § 455(b)(1)) (other citations omitted).

The personal bias, in order to form a basis for recusal, must come from a source outside of the official proceedings (an "extrajudicial source"). *Blanche Road Corp. v. Bensalem Township*, 57 F.3d 253, 266 (3d Cir. 1995). Judicial rulings alone almost never constitute a valid basis for a partiality or bias challenge, because they cannot possibly show reliance upon extrajudicial sources and can only in the rarest of circumstances show the degree of partiality or favoritism required when no extrajudicial source is involved. *Liteky v. United States*, 510 U.S. 540, 555 (1994).

V. EVALUATION OF THE DEFENSE TEAM'S CLAIM THAT THEY NEVER WIN

The defense team contends that the Court has demonstrated "prejudice and bias" in that allegedly defendant has had no "wins" on any of the "calls" this Court has made (i.e., his

supposed low batting average indicates bias of the Court in favor of the government). The defense team's claim that defendant has never had a "win" in the case (or almost never), not even one call of "safe" at first base, is factually incorrect. The defense team has had numerous "hits," and even some "inside the park" home runs, as follows:

1. The Court, at the request of the defense team, ordered the government to pay one-half of the cost of the creation and production of the entire database of approximately 300,000 documents, in electronic form, over strenuous objection of the government. Doc. no. 44 (granting defendant's motion at doc. no. 26; see also defendant's supporting brief at doc. no. 30). The Court granted said relief even though defense counsel was unable to cite even one case where this specific relief had previously been granted by a trial court to a criminal defendant. See doc. nos. 26 and 30.

2. The Court, at the request of the defense team, ordered (doc. no. 44) the government to rapidly make production of said database within weeks of the first status conference. See minute entry for proceedings at the third status conference of February 27, 2006 (doc. no. 40). A reading of the transcript of the third status conference will demonstrate how the Court assisted defense counsel in obtaining "rolling production" of Rule 16 documents. Doc. no. 246 at pages 32-34.

Leading up to the entry of doc. no. 44 (the revised Order granting defendant's motion requiring the government to pay one-half of costs of said production), the Court granted defendant's Emergency Motion for Status Conference and Access to Rule 16 Material (doc. no. 33, filed by defendant on February 24, 2006), by Order at doc. no. 34. The Court required a response by the government within three (3) days (February 27, 2006 at 11:00 AM) and

scheduled (at defense counsel's request) an immediate conference on defendant's Motion for Access to Rule 16 Material for 2:00 PM on February 27, 2006. See doc. no. 33. On the same day as the filing of doc. no. 33 (or with said filing), defendant also filed doc. no. 36 - - Motion for [Accelerated] Discovery.

The Court believes that a fair reading of the record indicates that the rapid production of the Rule 16 material (as requested by the defense team over "veins showing in the face," strenuous objection of counsel for government) was a home run for the defense. See. doc. no. 224 at pages 12-19.

Defense counsel fails to cite any criminal case where the defense team was provided with all of the government's evidence (database of 300,000 documents) so quickly - - and where one-half of the cost was paid by the taxpayers.

"[In] February and March, 2006, it was counsel for defendant who continually, . . . vigorously and successfully argued for document production [Rule 16 material], electronic database, and cost-sharing - - over strong objections of the government." See doc. no. 224 at page 18 (emphasis in original).

3. The Court, at the request of the defense team, ordered the government in the Pretrial Order (doc. no. 42) to perform specific tasks, set forth therein, at dates closer to (and even earlier than) the dates suggested by the defense team compared to the dates suggested by counsel for government. See doc. no. 224 at pages 2-11 and doc. nos. 11, 23, and 24.

4. The Court, at the request of the defense team, ordered the government to make specific disclosures to the defendant, under the terms of the Pretrial Order (doc. no. 42), months before normally required, again over strenuous objections of the government, as follows:

(a) The government was required to provide a preliminary trial exhibit list to defense counsel (with bates numbers tied to the database) on April 21, 2006 (see doc. no. 42 at ¶ 3(c)(2)) (even though the trial was in October, 2006) - - and the government complied, with the identification of approximately 1350 trial exhibits (with corresponding bates numbers to the electronic database), which comprised of approximately 240,000 documents of the original electronic database of 300,000 documents.

(b) The government was required to provide a trial witness list to defense counsel (see doc. no. 42 at ¶ 3(a)), by September 1, 2006, six (6) weeks before trial, despite concern of government counsel of possible witness intimidation (see transcript of February 17, 2006, second status conference doc. no. 39 at pages 10 to13).

(c) The government was "encouraged" in the Pretrial Order to produce Jencks material (see doc. no. 42 at ¶ 4) by August 1, 2006, eleven (11) weeks before trial.

5. The Court has worked hard to protect defendant from an "on the eve of trial" superceding indictment. Doc. no. 23. The final Pretrial Order (doc. no. 42) stated in the second sentence of paragraph 2 as follows:

> The government, having advised the Court of the probability of a superceding indictment in this matter, will notify the Court and the parties of the status of any superceding indictment, to the extent practicable and permissible under Rule 16(e) of the Federal Rules of Criminal Procedure, on or before June 2, 2006.

When the government, on June 2, 2006, in its Notice to the Court Regarding Status of Superceding Indictment (doc. no. 198), stated that a superceding indictment (if any) would occur around August 1, 2006, the Court intervened, on defendant's behalf, and in fairness to defendant, and required said superceding indictment to be filed by June 30, 2006 ("absence unusual circumstances"), if the government wished to prosecute any new count(s) in the October 16, 2006 trial. See doc. no. 224 at page 36, and minute entry of proceedings for the first pretrial conference of June 6, 2006 (doc. no. 213).

The Court also directed trial counsel to "work on a schedule relating to the superceding indictment, if any; [and directed] a Joint Status Report . . . regarding points of agreement and disagreement relating to the superceding indictment . . . be filed by 7/10/06 . . . ." See doc. no. 239. The second pretrial conference was scheduled for July 12 and 13, 2006. Doc. no. 42.

Subsequently, on June 22, 2006, the government filed a Notice (doc. no. 251) advising the Court and the defense team that "no superceding indictment will be sought . . . ."

6. The Court, at defendant's request, granted, in part, defendant's Motion to Suppress and for Evidentiary Hearing (doc. no. 55), by ordering "an evidentiary hearing on the execution of the [search] warrant related to [the seizure of] the 'boxes.'" Doc. no. 193 at pages 1 and 17.

The Court granted said request based upon the defense team's filing of the affidavit (Exhibit Z of doc. no. 55) of "Dr. Wecht's wife, Sigrid Wecht, Esquire (whose law office was located in the place [across the hall] to be search[ed])," Doc. no. 193 at pages 16-17. Also, at the hearing, the defense team alleged that one of the seized boxes (i.e., "Box 20") was labeled "Wecht Law Firm."

However, at the suppression hearing, the defense team failed to call Ms. Wecht to testify, and failed to offer evidence that even one page in "Box 20" related to the Wecht Law Firm. Doc. no. 220. Out of an abundance of caution, the Court reviewed, electronically, the entire contents of Box 20 (trial exhibit G-318 (bates nos. 1B1-20-000001 through 002837)) and discovered no Wecht Law Firm documents therein. Since the date of the suppression hearing, defense counsel has not supplied the Court with the bates number(s) of any alleged Wecht Law Firm document(s) in Box 20.

While it is correct that the defense team did not "win" the suppression of the "boxes," their request for hearing was granted, and yet the defense team tactically decided not to have Ms. Wecht testify, nor to offer any specific evidence that Box 20 contained any Wecht Law Firm document(s). See minute entry of suppression hearing of June 8, 2006, at doc. no. 214.

7. The Court granted the request of the defense team to receive a copy of the government's *In Camera Ex Parte* Motion for Ruling as to Whether Possible "Impeachment/ Credibility" Information Must be Disclosed (doc. no. 60) immediately, at the seventh status conference on May 12, 2006, upon their verbal motion (which motion was made 5 weeks after the filing of doc. no. 60). See doc. no. 222, at page 4. There has been much litigation in this case over doc. no. 60 relating to previous disciplinary reports on the FBI Special Agent investigating the Wecht matter. The Court's detailed analysis thereof is set forth in Memorandum Opinion at doc. no. 222.

Upon the filing of doc. no. 60., the Court ordered the government to produce to counsel for defendant the material referred to in said *In Camera Ex Parte* Motion, in a Sealed Order of Court (doc. no. 61), as follows:

> And now, this 7th day of April, 2006, it is hereby ordered that the government shall comply with its discovery obligations pursuant to the dictates of *Brady/Giglio/Kyles* and shall disclose the unredacted 1998 and 2001 reports of reprimand concerning Special Agent Orsini. This disclosure shall occur in accordance with the Pretrial Order requiring that all *Brady/Giglio* impeachment materials be produced by August 1, 2006, unless there is a legal requirement that it be produced earlier. If the government wishes to make the foregoing disclosure pursuant to a protective order, the government shall file a formal motion thereon after consultation with counsel for defendant.

While the Court denied defendant's later request to unseal doc. no. 60, the Court granted the intervener media outlets' motions to unseal doc. no. 60, which would have made doc. no. 60

public on June 30, 2006, as the defense team requested, under the procedure set forth in doc. no. 222 at pages 6 and 7, if the government did not appeal. However, on June 27, 2006, the government appealed the Court's ruling unsealing doc. no. 60 (doc. no. 256).

The defense team contends that the fact that this Court granted the government's motion for leave to file under seal (doc. no. 53) without an adequate explanation on the record regarding the items the government requested to seal somehow evidences that this Court engaged in improper ex parte communication with the government relating to doc. no. 60. Nothing could be further from the truth - - the Court did not have any ex parte discussions with counsel for government relating to doc. no. 60.

As is the customary practice with the advent of the ECF filing system, the government filed the motion for leave to file under seal, and simultaneously contacted this Court's deputy clerk to arrange for a courtesy copy of the underlying motion to be delivered to chambers.[3] Upon receipt of the ECF motion for leave to file under seal (doc. no. 53), and the courtesy copy of the within motion which was hand delivered to chambers, this Court considered the government's motion for leave to file under seal and promptly issued an order (doc. no. 54) granting said motion. While defendant speculates that the fact that this Court issued an order granting the motion for leave to file under seal, in a timely manner, evidences some antecedent improper ex parte communication with the government, again, such accusation is false.

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[3]The procedure of contacting chambers staff on scheduling and logistical matters is not only common, but is encouraged in this Court's written chambers practices and procedures. See the website for the United States District Court for the Western District of Pennsylvania, www.pawd.uscourts.gov. This Court notes that the defense team has also contacted chambers on a number of occasions to alert the Court that they would be filing, or had filed, motions for leave to file documents under seal, and as discussed below, this Court acted expeditiously on those requests as well.

The defense team argues that the Court showed bias by ruling on the government's motion to leave to file under seal (doc. no. 53) in 9 minutes - - however, the Court granted a similar motion of defendant (doc. no. 121) in 3 minutes.

One only need to look as far as the other docket entries to determine that this Court acts expeditiously in handling all motions, including motions of defendant, seeking leave to file a document under seal. See, e.g., doc. no. 110 - motion for leave to file under seal by defendant at 11:27AM on 5/1/2006, and text order granting said motion at 11:45am on 5/1/2006; doc. no. 121 - motion for leave to file under seal by defendant at 9:10am on 5/10/2006, and text order granting said motion at 9:13am on 5/10/2006.

Furthermore, and most importantly, as stated above, this Court ruled in favor of disclosure of *Brady/Giglio/Kyles* materials to the defendant on the underlying motion (doc. no. 60) which sought a ruling on whether the government must turn over the reports of reprimand of Special Agent Orsini. No matter how defendant attempts to spin the procedures this Court followed in ruling on doc. no. 60, the fact remains that defendant "won" on the issue of disclosure of the reports of reprimand of Special Agent Orsini.

8. While the Court did deny defense counsel's emergency motion (doc. no. 146) to declare unconstitutional Local Rule 83.1 of the United States District Court for the Western District of Pennsylvania, in effect since 1971, and entitled "Free Press - - Fair Trial Provision" (see Memorandum Opinion at doc. no. 212, filed by the Court on June 8, 2006), it is hardly evidence of bias that this Court upheld a Local Rule that has applied to every civil and criminal case filed in the United States District Court for the Western District of Pennsylvania over the past 45 years.

Local Rule 83.1 was included in the Pretrial Order of March 1, 2006 (doc. no. 42) at the request of all counsel (see doc. no. 23), even though it is not incorporated in this Court's standard criminal pretrial order. See detailed discussion of the agreement of defense counsel thereto in doc. no. 212, at pages 4 and 5.

Defense counsel also sought to modify the Pretrial Order, to delete the incorporation of Local Rule 83.1 in paragraph 9C of the Pretrial Order, by arguing that the disobedience of Local Rule 83.1 would have less risk to defense counsel, if it were not in an Order of Court. The Court rejected that argument because as members of the bar of the United States District Court for the Western District of Pennsylvania, defense counsel have agreed to comply with the "Local Rules" as part of their admission. See Local Rules 1.1(c) and (d), 83.1, and 83.3.1.

Defense counsel contends that Local Rule 83.1 inhibits their ability "zealously" to represent their client. With all the press and television coverage to date, and defense counsel's interviews after many conferences, it is difficult to imagine whatever else the defense team wishes to publicize. For instance, at the June 16, 2006 eighth status conference (for which defense counsel had not filed a notice of any item to be placed on the agenda, as required by the notice process, by noon on Wednesday before each conference), defense counsel announced that they would seek to have the Court removed from the case. Somehow, immediately thereafter at 9:15 AM, the cameras were waiting for the defense team, and defendant gave a television interview.

If defense counsel wish for more "publicity" than they are currently receiving, they should disclose to this Court and the Court of Appeals what more they have in mind. As stated in Memorandum Opinion upholding the constitutionality of Local Rule 83.1 (doc. no. 212 at pages

8 and 9) and Memorandum Opinion unsealing doc. no. 60 (doc. no. 222 at page 6), this Court continues to be concerned about possible efforts to influence the pool of prospective jurors.

9. The Court, by Order of Court at doc. no. 113, granted some of defense counsel's requests in their Motion for Discovery (doc. no. 69), while some requests were denied as moot since the timing of such production was already set forth in the Pretrial Order (doc. no. 42), and other requests were denied. See also Text Order of 4/19/06.

10. The Court granted, by Order of Court at doc. no. 81, a very important request of defense counsel. Over the government's objection, the Court ordered the government to send a letter to all grand jury witnesses to clarify that the grand jury subpoena did not bar grand jury witnesses from talking to defense counsel. See doc. nos. 66, 68, 80, and 87.

11. While it is a small matter, the Court granted every motion of the defense team for "Leave to File Excess Pages," including motion at doc. no. 207 relating to the 72 page brief in support of motion to dismiss (see also doc. nos. 56 and 181) and motion at doc. no. 268 relating to the combined motion for recusal, exhibits and brief of 153 pages (doc. nos. 269 and 270), and every motion of defendant to file matters under seal. See doc. nos. 64, 65, 84, 86, 93, 110, 121, 126, 140 and 179.

12. Significantly, the Court, in support of the defense team's position, worked through the "conflict of interest" "concerns" raised by the government, as to whether defendant's current defense team would have to recuse themselves (or otherwise be removed) because one partner on the defense team advised a possible witness relating to this specific matter. The Court made substantial efforts, successfully, to assist in keeping the defense team, in place and intact, through an extensive process of briefs (doc. nos. 75, 101, and 105), affidavit of Dr. Wecht (doc. no. 128),

and then a waiver colloquy of Dr. Wecht on the record at the seventh status conference on May 12, 2006 at doc. no. 226 at pages 16-23. See Order of Court at doc. no. 139 which permitted the defense team to continue representation of defendant. See also minute entry for proceeding at sixth status conference of April 21, 2006, (doc. no. 82); transcript of argument on April 28, 2006 (doc. no. 227 at pages 6-8) (see also doc. no. 82); minute entry for proceedings of seventh status conference of May 12, 2006 (doc. no. 133 at page 2 regarding conflict of interest).

13. The Court also has accommodated numerous personal requests of the defense team - - starting status conferences a little later because of child care matters, scheduling around vacations, and granting extensions of time for personal family matters of counsel, plus granting every travel request of defendant (even to travel outside of the country) and permission to renew his passport. Doc. no. 367.

14. Although the Court could not and did not grant the relief as requested in defendant's Motion to Reconsider the Court's Ruling of May 17, 2006, the Court did, nevertheless, rule on each and every one of defendant's untimely objections to the government's trial exhibits. Defendant objected to 99.78% of the government's trial exhibits (i.e., 1348 of the 1351 trial exhibits) - - with multiple, boilerplate objections which lacked specificity, thereby requiring the Court to review each one of the objected-to 1348 trial exhibits and the related approximately 240,000 pages in the electronic database. See doc. no. 224 at pages 37 to 43. The Court, sua sponte, even excluded certain irrelevant and/or potentially embarrassing documents which the defense team failed to include in their objections.

15. The Court even granted defendant's motion (doc. no. 253) to use portions of doc. no. 60 in his motion for recusal over the government's objections. See doc. no. 265.

16. Recently, the Court granted 61 of defendant's 63 requested questions for inclusion in the Jury Questionnaire, by Text Order of July 11, 2006. The Jury Questionnaires were mailed to 300 prospective jurors on July 14, 2006, after the completion of the second pretrial conference of July 12, 2006, where the proposed jury instructions of the government and defendant were reviewed in detail. See Hearing Memorandum of July 12, 2006 (doc. no. 290).

In conclusion, this Court will obviously leave the matter to the Court of Appeals to calculate the defense team's batting average - - but the contention that the defense always loses and the government always wins, is not supported by the record. In fact, the defense team has done quite well - - so what happened?

VI. THE IMPLEMENTATION OF PRETRIAL ORDER OF MARCH 1, 2006 (DOC. NO. 42)

A. Brief History of Doc. No. 42

Without repeating the detailed background and history of the Pretrial Order (doc. no. 42) set forth in Memorandum Opinion denying Motion for Reconsideration and Motion to Modify Pretrial Order (doc. no. 224, at pages 2-12), counsel and the Court worked diligently to craft a three-phase Pretrial Order that would ensure the October 16, 2006 trial date. Specific dates and the sequencing of specific tasks were negotiated for these three phases. The three phases were: (1) document production, witness identification and offers of proof, identification of trial exhibits and objections thereto, and ruling on objections to trial exhibits "at or before the June 7 and 8, 2006 pretrial conference"; (2) filing of motion to suppress and motion to dismiss, filing of joint stipulations, and submission of jury instructions and voir dire questions, for consideration "at or before the July 12 and 13, 2006 pretrial conference" - - jury questionnaire was sent to prospective

jurors on July 14, 2006; and (3) filing of motions in limine, including motions under Fed. R. Evid 104(a), for determination "at or before the September 7 and 8, 2006 pretrial conference". The final Pretrial Order (doc. no. 42) was consented-to by counsel for defendant without objection and by counsel for the Government with objections. See doc. no. 35 and the transcript of the third status conference of February 27, 2006 (doc. no. 246).

Based upon the discussions at the second status conference, the Court ordered the parties to submit a revised joint proposed Pretrial Order by February 24, 2006 at noon. Doc. no. 24. Again, no counsel proposed a change in the task sequence or phases. A revised proposed Pretrial Order was submitted on February 24, 2006 (with certain objections by the government and with no objections by defendant). See doc. no. 35. No objection was raised by the defense team at the third status conference on February 27, 2006. See transcript of third status conference of February 27, 2006, at page 6, doc. no. 246. No objections were filed by the defense team thereafter.

Thus, the terms of the Pretrial Order were drafted, negotiated, revised, submitted, and agreed-to by both counsel for defendant and counsel for government (except for certain objections of the government) (doc. no. 30). See doc. no. 5 and doc. no. 11, Text Order of 2/10/06, Text Order of 2/14/06, doc. no. 23, and doc. no. 35. It was adopted by the Court as Pretrial Order of March 1, 2006. Doc. no. 42.

B. Government's Compliance with Pretrial Order (Doc. No. 42) and Revised Order of Court (Cost-Sharing) (Doc. No. 44)

The government fulfilled its obligation to produce the documents electronically. No motion to compel was ever filed by defendant after the entry of doc. nos. 42 and 44.

On schedule, on April 21, 2006, the government filed its Notice of Serving Preliminary Exhibit List. Doc. no. 83. At no time did counsel for defendant file a motion to compel relating to the adequacy of the government's compliance with its pretrial obligation (doc. no. 42) set forth in paragraph 3(c)(2) ("The government shall provide to the defendant a copy of the documents/exhibits (with bates numbers and exhibit numbers) it intends to use at trial on or before April 21, 2006, to be timely supplemented . . . ."). Defendant never filed a motion to compel the government to provide defense counsel with a paper copy of each of the approximately 1350 trial exhibits. Defendant never filed a motion to compel complaining that the government's trial exhibit list was captioned "preliminary." Defendant never filed a motion to compel, or to modify the Pretrial Order, to add an additional column to the trial exhibit chart (due May 15, 2006), requiring the government to set forth its legal theory relating to each trial exhibit. And, defense counsel never filed a motion to clarify who had primary or initial responsibility for preparing the trial exhibit chart.

Further, defense counsel neither filed a motion to modify the time schedule of the Pretrial Order (until June 6, 2006 - - at 11:40 AM, less than 21 hours before the start of the June 7, 2006 pretrial conference at 8:15 AM which had been scheduled by agreement of counsel over three (3) months earlier on March 1, 2006), nor a motion to extend any scheduled pretrial dates.

On May 5, 2006, defendant filed a Notice of Serving Preliminary Exhibit List in Accordance with this Court's March 1, 2006 Pretrial Order. Doc. no. 119. Defendant did not file any motion, notice, or other pleading indicating there was any problem with the government's document production, or with its April 21, 2006 trial exhibit list. Defendant also did not file any objections to the upcoming scheduled May 11, 2006 meeting of counsel "in an

effort to agree on admissibility of joint exhibits."

The Pretrial Order provided for the parties to meet, after having had the opportunity to review each other's trial exhibit lists (i.e., government's trial exhibits since April 21, 2006 and defendant's trial exhibits since May 5, 2006), to reach agreement on admissibility of trial exhibits, and thereby make said exhibits the "agreed-to" exhibits (i.e., joint exhibits). Since many, if not most, of the government's trial exhibits came from the "files" of defendant, it appeared at the February 17, 2006 second status conference (and still appears to the Court) that a substantial agreement thereon was possible and so provided in the second proposed pretrial order. See. doc. no. 23. Such agreed-to (or "not objected to") exhibits were to be "marked J-1, J-2, J-3 etc." See doc. no. 42, ¶ 3(c)(4).

A trial exhibit chart was to be filed with the Court by the parties on May 15, 2006, as stated in the last two sentences of paragraph 3(c)(4) of the Pretrial Order, as follows:

> Additionally, a trial exhibit chart shall be provided to the Court, in hard copy and email form, on or before **May 15, 2006**, identifying each trial exhibit by exhibit number, bates number, bar code, date of exhibit, author of exhibit, brief description of the exhibit, brief description of the nature of the objection (if any), brief description of the response thereto, and a space for the Court's ruling on the objection(s). Objections will be handled at or before the **June 7 and 8, 2006** pretrial conferences.

Again, no motion was filed by defense counsel to modify or clarify this joint obligation, which obviously and intentionally required mutual cooperation of counsel.

C. Defendant's Non-Compliance with Pretrial Order (Doc. No. 42)

On Friday, May 12, 2006, at the seventh status conference, the Court asked for a report of the May 11, 2006 "meet and confer" conference. See minute entry of May 12, 2006 proceeding, doc. no. 133. The government stated that the meeting was "unsuccessful" and that counsel for

defendant left the meeting in less than one-half hour. This report was not contradicted by counsel for defendant. The Court "remind[ed] parties of the March 1, 2006 Pretrial Order requiring parties to meet and attempt to agree on joint trial exhibits . . . ." Doc. no. 133.

On May 15, 2006, the government filed Government's Notice of Providing Government Exhibits and List in Accordance with the Court's March 1, 2006, Order at Docket No. 42. Doc. no. 142. The Notice stated in paragraphs 1, 2 and 3 as follows:

> 1. Counsel for the Government met with defendant's counsel on May 11, 2006 in an effort to reach agreement on Joint Exhibits. The defendant's counsel objected to all of the Government's proposed exhibits. Thus, the government has provided to the Court in hard-copy and e-mail form an exhibit list identifying the Government's proposed exhibits as G-1 through G-1351 in accordance with the Court's Order. A copy has been served upon the defendant's counsel as well. The summaries identified as Exhibits G-139, G-376, G-1228, G-1230, G-1238, G-1240, G-1242, G-1244, G-1289, and G-1306 have also been provided to the Court in e-mail and hard-copy form pursuant to the Court's direction at the Friday, May 12, 2006, Status Conference. (emphasis added.)
>
> 2. Scanned images of each of the Government's proposed exhibit have been reduced to disc form [approximately 240,000 documents] and will be available for viewing by the Court at the Court's convenience. The Government will make available the necessary personnel and equipment to allow the Court's review of the scanned documents as the Court directs. (emphasis added.)
>
> 3. The Government in good faith reviewed defendant's proposed exhibits in advance of the May 11, 2006, meeting of counsel, and has the following position with respect to those exhibits (emphasis added.): . . . .

Since counsel for defendant refused to conduct a meaningful "meet and confer," and since counsel for defendant objected to all government trial exhibits and failed to cooperate on the "trial exhibit chart," the government provided its trial exhibit list (together with the electronic database) to the Court, with columns setting forth exhibit numbers, bates numbers, and description of author and document. Said trial exhibit list contains no objections from defendant, because the defense team failed to provide any specific objections to the government. The government agreed to five (5) of defendant's trial exhibits and objected to 30 trial exhibits setting

forth the specific objections with only one objection per exhibit. Doc. no. 142.

Instead of honoring the May 15, 2006 deadline; instead of filing a motion to amend the pretrial schedule relating to the trial exhibits; instead of filing a motion to extend time for a few days; instead of seeking clarification of the Pretrial Order (doc. no. 42), if, in fact, defense counsel was confused about obligations under that Order; - - the defense team ignored the May 15, 2006 date and filed no objections to the government's trial exhibits.

D. Court Orders the Admissibility of All of the Government's Trial Exhibits Because of Defense Counsel's Failure to File Objections

Thereafter, on May 17, 2006, the Court entered an Order (doc. no. 152) ruling that, since defendant failed to file objections to the government's trial exhibits, said exhibits would be admitted into evidence as follows:

> Since the Court has received no specific objection from Defendant as to Government's trial exhibits (G-1 through G-1351) (which were served upon counsel for Defendant in discovery and were set forth on the Government's "Preliminary Exhibit List" served on or about April 21, 2006 (see doc. no. 83)), as required by paragraph 3.c. of the Pretrial Order in Criminal Case (dated March 1, 2006) (doc. no. 42), Government trial exhibits G-1 through G-1351, are admitted into evidence, subject only to possible relevancy objections (see minute entry, doc. no. 133, ¶ 1) which may result solely from future rulings on the Motion to Suppress (doc. no. 55) or any Motion to Dismiss. (emphasis added.)

Further, despite the Order of Court of May 17, 2006 (doc. no. 152), the defense team never filed with the Court any objections to the government's trial exhibits before the June 7, 2006 pretrial conference; nor attached any such objections to any motion to modify or reconsider the May 17, 2006 Order. The Court eventually was required to order, sua sponte, defense counsel to submit the objections to the Court. See minute entry for proceeding, doc. no. 213.

Said objections were filed, by the defense team, after the conclusion of the June 7, 2006 pretrial conference. See doc. no. 211 (filed June 7, 2006 at 1:59 PM).

E. Other Conduct of Defense Counsel which Occurred During Period of Non-Compliance

After obtaining the Pretrial Orders of Court (doc. no. 42 and 44); after receiving document production of the "100 boxes", in electronic form, at one-half of the expense of the government; and after receiving accelerated "rights" to discover the government's witness list (6 weeks before trial), the government's preliminary trial exhibit list (6 months before trial), and the Jencks material (11 weeks before trial) (see doc. no. 42) - - all over the strenuous objections of the government (doc. no. 35) - - defense counsel began making "substitutions" without leave of court.

Instead of complying with the pretrial schedule and the agreed-to sequence of tasks, defendant found time to prepare and file a motion to suppress (doc. no. 55) and a motion to dismiss (doc. no. 180), accelerating the pretrial schedule for those items, while delaying the review and analysis of trial exhibits and the filing of objections. Counsel for defendant filed a motion to suppress (doc. no. 55) on April 7, 2006, 66 days ahead of schedule (see doc. no. 42), and his motion to dismiss (doc. no. 180) on May 26, 2006, 17 days ahead of schedule, together with a supporting brief of 79 pages (doc. no. 207 - see also doc. no. 181). In essence, the defense team wanted "phase two" of the Pretrial Order completed first (i.e., motion to suppress and motion to dismiss), having already reaped the above benefits of "phase one" from the government, without complying with defendant's obligation under "phase one" of the Pretrial Order.

VII. DEFENDANT'S MOTION FOR RECONSIDERATION (DOC. NO. 183) AND MOTION TO MODIFY (DOC. NO. 203)

Instead of filing objections (even late - - but before the June 7, 2006, pretrial conference),

defense counsel filed (1) a Motion for Reconsideration (doc. no. 183) of the Court's May 17, 2006 Order Pertaining to the Admissibility of the Government's Exhibits (Docket No. 152), on the Friday before Memorial Day weekend, May 26, 2006, at 5:10 PM, with supporting brief filed at 5:17 PM, and (2) a Motion to Modify (doc. no. 203) the Court's Pretrial Order dated March 1, 2006 (doc. no. 42), on June 6, 2006 at 11:40 AM, 21 hours before the day of the scheduled June 7, 2006 pretrial conference. And, defendant filed his Motion to Dismiss (doc. no. 180), on May 26, 2006, the very day the Motion for Reconsideration (relating to the Court's admission of the government's trial exhibits) was filed.

At the time of the June 7, 2006 pretrial conference specifically scheduled to focus on trial exhibits and any objections thereto, the defense team remained 23 days out of compliance.

A. Motion for Reconsideration (Doc. No. 183)

Defendant raised numerous arguments in the Motion for Reconsideration, which were dealt with at length in this Court's Memorandum Opinion denying said Motion at doc. no. 224 at pages 30 to 32 and 33 to 36, so the Court will not repeat its analysis herein except to say that said arguments were without merit. Importantly, as stated above, the Motion for Reconsideration did not even attach the overdue objections so the Court could work on them prior to the June 7, 2006 pretrial conference. Thus, defense counsel prevented the Court from ruling on defendant's objections to the government's trial exhibits in accordance with the agreed-to "phase one" time schedule.

The Court also rejected the argument of defense counsel wherein they contended that (a) they could totally disregard the agreed-to Pretrial Order, while gaining the benefits thereof, and that (b) the Court was without authority to remedy this conduct because to do so "will

operate to deny Dr. Wecht his constitutional right of due process and fair trial . . . ." Doc. no. 184, page 1.

In the proposed order attached to the Motion for Reconsideration, defense counsel sought an order setting a new date for the completion of the trial exhibit chart with the government adding its responses to defendant's objections, and sought "a further order on the methodology for resolving objections . . . ." The Court denied this requested relief since the parties and the Court previously had crafted a "methodology" (i.e., phase one) in the Pretrial Order (doc. no. 42), agreed-to by the defendant, and defense counsel ignored the agreed-to methodology.

Nevertheless, while the Court was unwilling to rewrite the pretrial schedule, the Court did rule, in detail, on each and every of defendant's 92 pages of untimely objections, in Section XI of the Court's Memorandum Opinion at doc. no. 224. The Court's action thus eliminated any then-existing "penalty" for defendant's non-compliance, by the Court actually ruling on said objections to each trial exhibit.

B. Motion to Modify Pretrial Order (Doc. No. 203)

Defendant reiterated the same theme in his Motion to Modify (doc. no. 203) filed on June 6, 2006, the day before the June 7, 2006 pretrial conference. Attached to the Motion to Modify, defense counsel requested, for the first time, in the proposed Order of Court, as follows:

> AND NOW, to-wit, this ____ day of June, 2006, this Court modifies its Pretrial Order (Document No. 42) as follows:
>
> 1. Paragraph 3C is modified, such that objections to the Government's summary exhibits, as well as the Defendant's preliminary exhibits, will be heard by the Court on _____, 2006.
>
> 2. Paragraph 6 of Document No. 42 is modified, such that proposed jury instructions, verdict slips, voir dire and proposed jury questionnaire are now all due on or before _____, 2006.

Not only did defense counsel in said Motion to Modify seek to delay the rulings on trial

exhibits, but also to delay the filing of and rulings on "proposed jury instructions, verdict slips, voir dire and proposed jury questionnaire."

Under defendant's proposed Order of Court, the trial could not occur on the agreed-to date of October 16, 2006. As the Court stated in its Memorandum Opinion at doc. no. 224, page 32, that if the Court granted said Motion to Modify, "defendant would have successfully delayed the agreed-to trial date - - but the right of the public to have a fair, just and timely determination of the issues raised in this important public corruption case would have been thwarted. See the Mission of the United States District Court for the Western District of Pennsylvania at www.pawd.uscourts.gov."

C. Court's Rulings on the Motion for Reconsideration and Motion to Modify

The Court denied the Motion for Reconsideration, by Text Order, dated June 6, 2006, and the Court denied the Motion to Modify, by Text Order, dated June 9, 2006. The detailed Memorandum Opinion followed on June 14, 2006 at doc. no. 224.

VIII. COURT RULED ON DEFENDANT'S UNTIMELY OBJECTIONS

Although the Court denied both the Motion for Reconsideration and the Motion to Modify which sought to re-make the pre-trial schedule, the Court did re-examine its Order of May 17, 2006 (doc. no. 152), which had admitted all of the government's trial exhibits into evidence. The Court thereafter did rule on every objection raised by the defense team. Doc. no. 224 at pages 37 to 43.

The Court received defendant's "preliminary" objections (doc. 211) to government's trial exhibits, which objections were filed at 1:59 PM on June 7, 2006, after the conclusion of the June 7, 2006 pretrial conference. Defendant's objections consisted of 92 pages of objections, and

these objections, described somewhat generously by defense counsel as "good faith written objections" (doc. no. 181 at ¶ 31), objected to 1348 of 1351 trial exhibits of the government. Only exhibits G-12, G-13, and G-224 had no objections. As to the other 1348 exhibits, defendant had multiple objections to each exhibit, as set forth in the chart created by the Court, in its Memorandum Opinion at doc. no. 224, at pages 37-38.

Interestingly, defense counsel's "good faith objections" even challenge the "foundation" and "chain on custody" of defendant's own records, including personal tax returns, corporate tax returns, and corporate general/profit loss ledgers (G-203 through G-223), and the "authenticity" of the "Wecht Corporate General Ledger/Profit and Loss" documents (G-218 through G-223). Countless other business records of Dr. Wecht were objected to on the blanket basis of "Relevance (FRE 402); Hearsay (FRE 802); Authentication (FRE 901); Foundation; and Chain of Custody."

The Court sustained certain objections of defendant, overruled certain objections, and excluded certain irrelevant and/or potentially embarrassing trial exhibits sua sponte. See doc. no. 224 at pages 39 to 42.

IX. COURT SCHEDULED A POST-TRIAL CONTEMPT HEARING

Thus, when defendant filed his Motion for Reconsideration on May 26, 2006 (and through the date of the Court's Memorandum Opinion of June 14, 2006 (doc. no. 224)), the Court was faced with what appeared to be a strategy of consistent and significant violations of the Pretrial Order, by the defense team, including:

1. Failure to conduct a meaningful meet/confer on May 11, 2006.
2. Failure to work with counsel for government to create a trial exhibit chart.
3. Failure to file objections to the government's trial exhibits, on or before

May 15, 2006; and failure to file the objections any time before the June 7, 2006 pretrial conference.

4. Failure to be prepared and participate, in good faith, at the June 7, 2006, pretrial conference.

5. Failure to make good faith objections (doc. no. 211) to the government's trial exhibits, forcing the Court to review 99.78% of the government's trial exhibits (1348 of 1351 trial exhibits) and the related electronic database of approximately 240,000 pages.

Earlier, in the Order of May 17, 2006 (doc. no. 152), the Court also stated as follows:

> Pursuant to paragraph 3.c.(3), second sentence, "[c]ounsel for the parties will meet on or before **May 11, 2006** in an effort to agree upon the admissibility of joint exhibits." Counsel for Government reported at the Seventh Status Conference on May 12, 2006, that counsel for Defendant left the meeting after less than one-half hour. This statement was not rebutted by counsel for Defendant at said conference. Whether a "good faith" "effort to agree upon the admissibility of joint exhibits" occurred at said May 11, 2006 meeting will be determined at a future hearing. (emphasis added.)

Despite the "warning" of a "future hearing," and despite the consequence of the admission of the government's trial exhibits -- both set forth in the May 17, 2006 Order, defense counsel remained in non-compliance for 23 days as to the required filing of objections through the June 7, 2006 pretrial conference.

Since in its Memorandum Opinion doc. no. 224 (dated June 14, 2005), the Court ruled on the objections anyway, thereby having eliminated any "consequence" for defendant's non-compliance, the Court decided that said purported violations necessitated consideration by the Court within its discretion, pursuant to the contempt power of the Court. See *Young v. United States ex rel Vuitton et Fil, S.A.*, 481 U.S. 787, 796 (1987) (ability to punish disobedience to judicial orders "essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches. 'If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside,

then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery.'"), quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911); *Pounders v. Watson*, 521 U.S. 982 (1997) ("advocacy that is fearless, vigorous, and effective does not extend to . . . knowing violation of clear and specific direction from trial judge for purposes of contempt determination"); *Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers, Appeal of Freedman,* 552 F.2d 498, 506 (3d Cir. 1976) ("a direct order of the trial judge fixes the limits of proper advocacy; the vigor permissible in representing a client's interests has never included the flouting of a judge's rulings. . . . Disobedience is not an ingredient of contentiousness; defiance is not an element of zealousness.").

Thus, the Court scheduled a future contempt hearing in its Memorandum Opinion at doc. no. 224, at page 37, as follows:

> After the trial, the Court will schedule a contempt hearing to adjudicate whether defense counsel's conduct in repeatedly ignoring this Court's Pretrial Order without taking appropriate steps to modify said Order constitutes contempt and, if so, what would be the appropriate penalty. *In re Morrisey*, 168 F.3d 134 (4th Cir. 1999).

Similar to their argument that Local Rule 83.1 (which was incorporated into the Pretrial Order) infringes their client's "right to zealous representation" through unfettered extra-judicial publicity, the defense team now seeks the recusal of the Court, arguing that the Court's above written statement in doc. no. 224 (i.e., that after trial, the Court will schedule "a contempt hearing") somehow inhibits their "zealous" representation of their client.

Importantly, the Court did not propose to conduct the contempt hearing prior to trial with the "penalty" phase later, as has occurred in other cases. (Additionally, the defense team and the

defendant have publicly contended that the Court has already ruled that the defense counsel are in contempt - - which contention is inaccurate.) Also, if the Court, after trial, scheduled the hearing without giving defense counsel notice now, the Court believes that would have not been fair to the defense team; nor would it have placed defense counsel on notice, as they are now on notice, that there may be serious consequences for refusal to abide by Orders of Court.

Further, to conduct the contempt hearing before trial potentially would distract from the pretrial process and trial preparation. Also, if there are additional violations of Orders of Court in the future, it would be prudent to handle all such instances at one time, and not piece-meal, since any contempt hearing should not only examine each instance individually, but also the totality of all the instances. See *Sacher v. United States*, 343 U.S. 1, 9 (1952) (it is appropriate for trial judge to defer judgment on counsel's contempt of court orders until completion of the trial, noting that although counsel has the right to raise and vigorously pursue even "farfetched and untenable" positions and claims, once counsel receives an adverse ruling, "it is not counsel's right to resist it or to insult the judge - his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation.")

Thus, the Court does not believe that it shows bias or prejudice to hold defense counsel to their agreement set forth in the Pretrial Order of March 1, 2006 (doc. no. 42) - - where the terms of the Pretrial Order were drafted, negotiated, revised, submitted, and agreed-to by both counsel for defendant (with no objections) and counsel for government (with certain objections by the government). See doc. no. 224 at pages 3 and 6. Nor is the umpire "prejudiced" against a team because the umpire calls more strikes than balls. To be "fair" must the balls and strikes calls be

50/50? Does the defense team need to "win" at least one-half of the motions for the Court to avoid the charge of bias and prejudice? The Court believes not - - if the defense counsel believes that the Court erred in any of the above rulings, said matters may, and should be, resolved on appeal (if any).

X. DEFENSE TEAM'S LATEST COMPLAINT

After the second preliminary pretrial conference on July 12, 2006, dealing with the case-specific Jury Questionnaire and the Jury Instructions, one day later on July 13, 2006, the day before the Jury Questionnaire was mailed to 300 prospective jurors, the defense team filed a document entitled "Motion to Modify Prospective Juror Letter at Doc. No. 289." Doc. no. 291.

The defense team alleged in said Motion at doc. no. 291 that the Court's "expression of appreciation" cover letter which accompanied the Jury Questionnaire to the 300 prospective jurors was an act of "actual bias and failure to maintain the appearance of impartiality."

The Court denied said motion by Order of Court at doc. no. 294 with Memorandum at doc. no. 295, both on July 14, 2006. The Court believes said denial was proper and required for the following reasons:

First, defense counsel cited no statute, no rule of criminal procedure, no local rule of the United States District Court for the Western District of Pennsylvania, and not even one case to support this most extraordinary request.

Second, defendant argued that the cover letter to prospective jurors (filed by the Court at doc. no. 289) which accompanied the Juror Questionnaire sent to 300 prospective jurors (1) should not have been signed by the trial judge and (2) should not have been stated that the answers to the Jury Questionnaire are made "under the penalty of perjury." Defendant's

argument lacked merit since this Court's cover letter was almost word-for-word based upon a 2002 cover letter signed by Senior Judge Maurice B. Cohill, Jr., formerly Chief Judge of this District. Judge Cohill's letter used the words "under penalty of perjury." Further, the standard printed jury questionnaire form, sent to all prospective jurors, in every case in this District, states that all answers are "under the penalty of perjury."

Third, although Judge Cohill signed the cover letter accompanying the Jury Questionnaire in his case, as did this Court, defense counsel did not wish this Court to sign the cover letter because of the pending Motion to Recuse (doc. no. 269), supposedly so that the prospective jurors would not know the identity of the trial judge. However, inconsistent with defense counsel's new founded position (only one day old), defendant's own proposed Jury Questionnaire (doc. no. 230) and the revised proposed Jury Questionnaire filed by defendant on July 13, 2006 (doc. no. 287), at questions 37 and 43, respectively, disclose this Court's full name. Without objection, defense counsel agreed that said question should be included in the Final Jury Questionnaire at the second pretrial conference on July 12, 2006. See hearing memorandum of July 12, 2006 (doc. no. 239). One day later, on July 13, 2006, defense counsel reversed position in doc. no. 291 and wanted the Court's name deleted from the cover letter - - however, counsel did not object to question 43 in the Final Jury Questionnaire, which states, "Do any of you know the Judge in this case, Arthur J. Schwab." The Court believes that it was proper to sign personally the cover letter (see doc. no. 289) in which the Court expressed its appreciation to the prospective jurors for time they will expend in answering the questions in the Final Jury Questionnaire, as well as the other accompanying juror forms.

Fourth, defense counsel contended that use of Judge Cohill's form letter by this Court, the use of the language "under the penalty of perjury" contained in Judge Cohill's cover letter and in the standard printed jury questionnaire form, and the Court's signing of the cover letter, is evidence of this Court's "actual bias and failure to maintain the appearance of impartiality." This Court does not believe that following the practice of a distinguished jurist of the United States District Court for the Western District of Pennsylvania constitutes bias or lack of impartiality.

Finally, implicit in defendant's motion was a complaint that the Court had yet not ruled on the motion for recusal. Defense counsel waited for 14 days to file the motion, from the announcement of defense counsel that a motion for recusal would be filed at the eighth status conference of June 16, 2006 (and the related news interview of defendant) and to the actual filing thereof on June 30, 2006, the Friday of the 4th of July weekend. The government's response in opposition (doc. no. 274) was filed on July 6, 2006. Defendant's reply brief was filed on Monday, July 10, 2006. Doc. no. 283. To expect the Court to rule on such an important motion in 2 to 4 days, while it took defense counsel 14 days to prepare said motion, is unreasonable. See hearing memorandum of second preliminary pretrial conference of July 12, 2006 (doc. no. 290) (wherein the Court stated that it would file its decision on said motion within 14 days of July 10, 2006). The decision contained herein, in fact, was filed in less than 14 days, today, on July 20, 2006.

Thus, defense team's allegation of "actual bias" based upon this Court's cover letter (at doc. no. 289) is without merit.

XI. THE ALLEGED ORSINI - ZAPPALA - BUCHANAN CONSPIRACY

Defendant's motion for recusal in large part condemns this Court's refusal to indulge defendant's conspiracy theory, purportedly involving Special Agent Orsini and District Attorney Zappala, and then United States Attorney Buchanan, when the Court, in substantial part, denied his motion to suppress, motion to dismiss, and motion for discovery. The defense team is seeking interlocutory appellate review now, as opposed to at the end of trial, of this Court's ruling on these three motions, through the motion for recusal.[4]

Because the allegations about Special Agent Orsini and his alleged connection with the Allegheny County District Attorney, and then United States Attorney Buchanan, are at the core of defendant's motion to suppress, motion to dismiss, and motion for discovery, and now motion for recusal, it is necessary to examine all of the "facts" offered by defendant in support of his request for dismissal of all charges, sweeping discovery, and an extensive *Franks* hearing *(Franks v. Delaware*, 438 U.S. 154 (1978)).

Defendant's motion to dismiss recites no facts, and the brief in support relies entirely on the accusations made against Orsini and Zappala in his motion to suppress. See Brief in Support of Motion to Dismiss (doc. no. 181) at 3 ("Dr. Wecht incorporates the facts and history of the genesis of this case set forth in his Motion to Suppress. It has become clear that the genesis of the Government's case lies in the relationship between the lead FBI agent on this case, Bradley Orsini ("Orsini"), and Stephen Zappala ("Zappala"), the District Attorney. Zappala's

[4]The motion for recusal and related brief reminds the Court of the following statement of Winston S. Churchill, "The ideas set forth in [the] memorandum appeared to me to err in trying to be too clever, and to enter into refinements . . . unsuited to the . . . simplicity and grandeur of the . . . issues at stake." August 3, 1940.

questionable motives are now a matter of existing record . . . .").

However, speculation remains speculation, no matter how many times someone repeats it, as this Court explained in the decision denying defendant's motion to dismiss: "[D]efendant repeatedly refers to allegations of misconduct as if they were facts of record. However, the only record supporting these allegations are defendant's own prior motions and supporting memoranda. Simply because defendant repeats the same allegations (that District Attorney Zappala had a vendetta against Wecht and that vendetta somehow transferred to the United States Attorney's Office) does not suffice to state a claim for vindictive prosecution." Mem. Op. and Order Denying Motion to Dismiss (Doc. no. 264) at 28. Thus, it is fair to say that all of the factual and inferential support defendant offers to support his requests for dismissal, a *Franks* hearing, sweeping discovery, and his claim of vindictive prosecution, is contained in his motion to suppress.

In his "Introduction" to the motion to suppress, defendant offers this summary of his conspiracy theory: District Attorney Zappala was upset with defendant because defendant used his office as Coroner of Allegheny County to challenge the District Attorney's authority in [Wecht's] championing the cause of persons that had been killed during altercations with police officers; defendant "refused to keep peace" with Zappala, which "prompted . . . Zappala's referral to the federal agents involved here for an improper purpose . . ."; Zappala was not "really" concerned that defendant was using his office for personal gain, as "evidenced" by defendant's allegations that Zappala was (in a completed unrelated and irrelevant matter) using the office of the District Attorney for his own personal gain even "more obviously" than defendant was using the office of Coroner for his personal gain; the District Attorney "was

quoted in the newspaper" on February 12, 2005, as "stating that Dr. Wecht should be prosecuted for violations of the State Ethics Act, and . . . the federal Hobbs Act . . ." specifically referring to defendant's participation in the "Dixon" case as an expert witness for the decedent's family in their litigation against the Borough of Mt. Oliver and its officials and police officers; and subsequent to that quote in the newspaper, the federal investigation commenced. Motion to Suppress (Doc. no. 55) at 1-7.

To the extent this Introduction is intended to state "facts" supporting an Orsini-Zappala conspiracy, the best inference in defendant's favor that can reasonably be drawn from those "facts" is that perhaps Special Agent Orsini read the newspaper article which quoted the District Attorney as saying defendant should be investigated and prosecuted for state ethics violations and the Hobbs Act (there are no Hobbs Act charges in this case), because a couple of months later, a federal investigation commenced. One would expect these vague "facts" stated in the Introduction to be followed by specific "facts" that would support defendant's attacks on the character of an FBI Special Agent and the Allegheny County District Attorney and their conspiracy with the United States Attorney for the Western District of Pennsylvania to bring these charges against Dr. Wecht, but one would search in vain to find any such "facts" set forth in the motion to suppress. See Motion to Suppress, "II. FACTS," ¶¶ 1-70.

To the contrary, the "facts" consist mostly of exaggerated inferences built upon speculation, as follows:

> Introduction, page 7, note 7: "Counsel for Dr. Wecht represents, by way of proffer, that they have repeatedly interviewed a witness with personal knowledge of Orsini's reputation and tactics and who was personally asked by him to lie

during a Department of Justice investigation into his misconduct."

¶¶ 1-2: "Following Zappala's referral in February[5], less than two months later, Orsini devised a plan" to apply for search warrants based only on his own affidavits.

¶¶ 3-4: Orsini had been transferred from the FBI's Newark New Jersey office after being disciplined for improprieties, and was known to be a "problematic agent[ ]."

¶¶ 5-20. Defendant identifies what he -- erroneously -- perceived to be grievous, material omissions and misstatements in his affidavits of probable cause presented to United States Magistrate Judge Amy R. Hay, who issued the search warrants.

¶ 21. The affidavits, in addition to identifying [but not naming] numerous former and current employees of the ACCO, also names "confidential sources" as supplying some of the probable cause information. Without any factual support, defendant speculates that the "confidential source" must be Zappala, stating: "Evidently, Zappala and Orsini agreed that Zappala would be treated as a 'confidential source' while Orsini did his bidding." (emphasis added.)

¶ 24: Defendant's smoking gun to show the Orsini-Zappala conspiracy, upon which he demands sweeping discovery, a *Franks* hearing, and dismissal of the prosecution, is paragraph 24: Orsini's affidavits state that defendant's secretary at ACCO, Ms. Eileen Young, did private work for defendant on her laptop [actually, it was ACCO's laptop which she used], and the one and only example that Orsini states in his affidavits "gave away the improper reason for the initiation of the investigation and Zappala's role in it.

---

[5]Defendant labels Zappala's quote in the newspaper article as a "referral" by Zappala, as if it were a "fact."

> Specifically, the only evidence said to be on the [laptop] computer was that Ms. Young had typed the [Dixon] report on it . . . . That suggestion almost certainly had to come from his 'confidential source' -- Zappala." (emphasis added.)
>
> ¶ 25: This slender reed -- i.e., the Dixon report information "evidently" and "almost certainly" came from Zappala, an exaggerated inference that ignores that Orsini's affidavits also list as sources ACCO 1 through ACCO 16, conversations with other federal, state and local law enforcement officers, information from confidential sources (plural), documents, photographs and reports prepared by other law enforcement agents -- becomes the *cornerstone* of defendant's conspiracy theory, to-wit: "The reference [in the affidavit] to the Dixon case is, however, a remarkable, albeit disguised, admission of the relationship of this investigation to Zappala's desire to silence Dr. Wecht from rendering scientific opinions in cases of police misconduct causing citizen homicides . . . ." (emphasis added.)

Those are all of the breathless accusations and conclusory inferences which, to defendant, reveal the "disguised" Orsini-Zappala connection, and which amount to a "remarkable . . . admission" of that connection. Significantly, the motion to suppress does not aver a single fact that suggests Orsini and Zappala worked with or even knew each other, to support any Zappala - Buchanan link, to suggest how Orsini and Zappala may have conspired to convince a United States Magistrate Judge to issue search warrants (which were supported by probable cause having nothing to do with Zappala), or to suggest how Orsini and Zappala may have conspired to convince a federal grand jury to return an 84 count public corruption Indictment against Dr. Wecht.

Defendant's averments that Mr. Orsini was a "problem agent" in New Jersey prior to 2001 do not support the conjecture that Orsini was somehow connected with Zappala and conspired with him to prosecute defendant for political reasons. Orsini's personnel file shows: (1) that he was disciplined in 1998 for violating FBI policies with regard to evidence forms, but without intent to violate policies or to compromise evidence; and (2) he was disciplined in 2001 chiefly for matters of a personal and internal-office nature, although Orsini's superiors also considered an incident in 1993 wherein he failed to follow FBI procedures regarding consensual searches.[6] Orsini's 1998 and 2001 disciplinary records about matters occurring in a previous assignment do not remotely support an allegation that, in his affidavits of probable cause in this case, Orsini made material misstatements or omissions that were deliberately false or demonstrated a reckless disregard for the truth, and they were and still are immaterial to the probable cause and *Franks* inquiries.

At the suppression hearing, the government did not call Orsini as its witness, which is not unusual in suppression hearings where other agents are available to testify about all facts and issues relevant to the suppression hearing about the 20 boxes of evidence removed from Wecht Pathology offices. Defendant called Orsini as if on cross-examination, since he was a material witness to the challenged search and seizure, although he was not on the searched premises at Wecht Pathology. Orsini's testimony was entirely consistent with the testimony of the government's witnesses, the agents who were on the scene, in all material respects, although

[6] Although defendant claims that document no. 60 remains a "secret," he has known since May 17, 2006 all of the specifics about Orsini's disciplinary records. The Court's references herein must remain vague, however, because document no. 60 is still sealed from public view pending the disposition in the United States Court of Appeals for the Third Circuit of the government's appeal of this Court's unsealing order at document no. 222.

there were some minor, non-material inconsistencies.

The evidentiary hearing on June 8, 2006 was narrow and was directed to "the manner and execution of the search and seizure, and whether the actions of the agents at Wecht Pathology's Penn Avenue Office were reasonable and in good faith. . . ." Findings of Fact and Conclusions of Law Re: Denial of Defendant's Motion to Suppress (Doc. No. 55) 29 Boxes Containing Private Autopsy Files, dated June 13, 2006 (Doc. No. 220), at 2. This Court's determination that the execution of the search warrant at the Penn Avenue Office of Wecht Pathology on April 8, 2005 did not exceed the scope of the warrant and was executed by the agents at the scene in good faith was not predicated on Orsini's testimony but rather on the testimony of the agents at the scene, although Orsini's testimony corroborated the government's witnesses in all material respects. Nothing about Orsini's disciplinary record, therefore, would conceivably reflect upon, or alter this Court's determination of, the credibility of the government's witnesses, SA Thomas Welsh, the Acting Supervisor for Squad 15, assigned to execute the Penn Avenue warrant, and SA Brad Swim, the ERT leader for the search, upon whose testimony this Court based its decision.

As this Court held in its Memorandum Order Re: Motion to Suppress (Doc. No. 55), (Doc. No. 193), defendant's speculation, accusations and inferences do not even come close to satisfying the defendant's threshold burden for a *Franks* hearing. *See, e.g., United States v. Calisto*, 838 F.2d 711, 714 (3d Cir. 1988). Affidavits filed in support of a search warrant are presumptively valid, and a proponent of a *Franks* hearing must make a substantial preliminary showing to prevent the misuse of such hearings for purposes of discovery or obstruction. *Franks*, 438 U.S. at 170-71. Specifically, "[t]here must be allegations of deliberate falsehood or of

reckless disregard for the truth . . . accompanied by an offer of proof." *Id*. at 171. Similarly, no showing has been made that conceivably would warrant dismissal of the charges, or the discovery fishing expedition defendant attempted to launch.

Summary of "Facts" Proffered on Orsini - Zappala - Buchanan Conspiracy

To recap then, here are all of the averments set forth in defendant's motions and briefs to support an Orsini- Zappala- Buchanan conspiracy:

- Orsini had some disciplinary problems in completely unrelated matters in New Jersey, before he was transferred to the Pittsburgh office.
- District Attorney Zappala bore animosity toward defendant, and was quoted in a newspaper article as saying he thought defendant should be investigated for violations of state ethics laws and the Hobbs Act.
- Subsequently, Orsini investigated defendant and swore out affidavits of probable cause to support search warrants which a United States Magistrate Judge issued and which, as this Court found, contained no material misstatements or omissions.
- One paragraph in the affidavit references information (that Eileen Young typed the Dixon report) that could possibly have come from District Attorney Zappala, who could possibly have been one of Orsini's confidential sources, but which also could have come from numerous other sources, including ACCO employees, other confidential sources or simply reading a newspaper.
- The Allegheny County District Attorney allegedly used his office for his own personal gain in completely unrelated and irrelevant matters, accusations which appear to have been included in the Motion to Suppress solely for their salacious publicity value, since

they have no *legal significance* to the issues raised in the Motion to Suppress.

Even though defendant's factual averments are inadequate to support any inference that Orsini and Zappala worked together to trump up charges and initiate this prosecution, let alone that the United States Attorney or any of her assistants engaged in the conspiracy, the defense team recycle those accusations in the motion for recusal, and level similar accusations at this Court, which now stands accused of joining the ranks of the conspirators by purportedly assisting the government in the shared goal of covering up the Orsini-Zappala conspiracy. See Defendant's Motion for Recusal, *e.g.* ¶¶ 88, 115, 10, 15-16, 27, 48, 53, 78, 108 (doc. no. 269); Defendant's Brief in Support of Motion for Recusal, *e.g.*, 7-8, 10-14, 17, 19, and throughout (doc. no. 270).

XII. DISCUSSION - - SURVEY OF TRAINING AND INSTRUCTIONAL PUBLICATIONS FOR FEDERAL TRIAL JUDGES

A. Federal Trial Judge Training

From the advent of this case, this Court has been aware that this criminal case is a complex and time-intensive matter, and that, in order to be a fruitful process for all parties and for the jury, it must be effectively managed. The Court recognized that the trial of this case would involve complex legal issues and a large number of documents, and from the first status conference, this Court began its attempts to accomplish its objective of streamlining the pretrial process. Although this case is different in many respects from the complex civil litigation with which this Court is intimately familiar, this Court also recognized that an orderly pretrial process would serve innumerable goals in the criminal context as well, as is consistently taught in training for federal trial judges.

Since the inception of this case, in an effort to fairly and efficiently handle this litigation, this Court has held approximately nine status conferences, and has already held two of the three scheduled preliminary pretrial conferences. When fashioning the comprehensive and detailed Pretrial Order in the beginning of this litigation, this Court consulted with the parties on numerous occasions to ensure that this case would be tried in a fair, just, efficient and orderly manner. In creating that portion of the Pretrial Order relating to issues such as pretrial discovery procedures, use of courtroom technology, summaries of evidence, and the like, this Court has endeavored to employ the case management techniques it has learned on the bench, at judge's training sessions, and in the decades beforehand in private practice.

B. Federal Judicial Center Publications

1. Case Management Guide

The Court has consulted numerous resources including a manual entitled "The Elements of Case Management: A Pocket Guide for Judges (Second Edition)," received by all judges at the District Court level and published by the Federal Judicial Center in 2006 (originally published in 1991). Although this source focuses mainly on management of civil litigation, its suggestions are equally applicable to criminal cases as well. In the introductory remarks to the manual, it states that case management, in essence, involves trial judges using the tools at their disposal with fairness and common sense in order to secure the just, speedy and inexpensive determination of every action. *Id*. at 1. Further, it notes that if a judge devotes time to case management early in a case, such effort can save vast amounts of time later on, and that saving time also means saving costs, both for the court and for the litigants. *Id*. The case management pocket guide, again, although in the context of civil litigation, covers issues regarding discovery,

pretrial proceedings, using courtroom technology and helping the jury to understand complex cases - - and this information is equally applicable to the criminal context.

At pages 4 and 7, the Guide states as follows:

> A judge's reputation for insisting that lawyers be on top of a case from the beginning works wonders in reducing dockets and moving them along. Of course, the judge too should be prepared for the conference, having read the pertinent pleadings and the lawyers' statements.
>
> * * *
>
> Judges should always set a firm date for the next event in the case, be it another conference, the filing of a motion, or any date requiring action by the lawyers. Every case in a judge's inventory should have a specific date calendered that will bring it to the court's attention. (emphasis added.)
>
> Setting a firm schedule at the conference is no substitute for defining and narrowing issues. Focusing lawyers' attention on the issues from the outset avoids unnecessary discovery, promotes early settlement, prevents pointless trials, and, where a trial is needed, furthers efficiency and economy. (emphasis added.)

With regard to the Court's inherent authority to manage a trial, the Case Management Pocket Guide states at page 16 as follows:

> At trial, the court's management power transcends the authority specifically conferred by the rules, statutes, and decisions. The judge has broad inherent power over the management of the case, attorneys, and parties. That inherent power, employed judiciously, enables the court to do what is necessary to produce just, speedy, and economical trials.

Further, the section at page 14 dealing with the use of Rule 1006 Summary Exhibits, which this Court has continually encouraged, over the repeated and forceful objections of the defense team and which the defense team argues "proves" the Court's purported bias, establishes that Rule 1006 is a common and highly recommended procedure, as follows:

> [P]roposed exhibits should be previewed with a view to holding down their number and volume. There is little point in inundating jurors with a mass of exhibits beyond their capacity to read and absorb. The judge may suggest that voluminous exhibits be redacted to eliminate unnecessary portions and cumulative exhibits can be eliminated. Sometimes

> information from numerous exhibits can be presented in a summary exhibit (as authorized by Federal Rule of Evidence 1006 Previewing proposed exhibits can also save valuable trial time since the judge can rule on evidentiary objections and receive into evidence unobjectionable exhibits. (emphasis added.)
>
> As to "Helping the Jury," the guide suggests at page 17 as follows:
>
> Since jurors are the people expected to decide the case, judges ought to make every effort to help them in this often difficult task. Assisting jurors has become increasingly important in an era of complex litigation. Judges cannot afford to be passive or permissive. They should take various steps to help the jury perform its function well. (emphasis added.)

2. Manual for Complex Litigation

While primarily focused on civil litigation, the Court found guidance in the Manual for Complex Litigation (Fourth Edition) (2004). However, as to management techniques, complex criminal cases are still "complex" cases, especially where 1,350 trial exhibits and an electronic database of 240,000 pages are involved. In its Introduction at page 3, the Manual states as follows:

> Much complex litigation, therefore, will take the judge and counsel into sparsely charted terrain with little guidance on how to respond to pressing needs for effective management. Practices and principles that served in the past may not be adequate, their adaptation may be difficult and controversial, and novel and innovative ways may have to be found. While this *Manual for Complex Litigation, Fourth* should be helpful within the limits of its mission, it should be viewed as open-ended, and judges are encouraged to be innovative and creative to meet the needs of their cases while remaining mindful of the bounds of existing law and any variations within their own circuits. (emphasis added.)

In Section 10.1 on Judicial Supervision, the Manual continues as follows:

> Although not without limits, the court's express and inherent powers enable the judge to exercise extensive supervision and control of litigation. The Federal Rules of Civil Procedure, particularly Rules 16, 26, 37, 42, and 83, contain numerous grants of authority that supplement the court's inherent power to manage litigation. Federal Rule of Civil Procedure 16(c)(12) specifically addresses complex litigation, authorizing the judge to adopt "special procedures for managing potential difficult or protracted actions that may involve complex

> issues, multiple parties, difficult legal questions, or unusual proof problems." (Footnote deleted.)
>
> In planning and implementing case management, the court should keep in mind the goal of bringing about a just resolution as speedily, inexpensively, and fairly as possible. Judges should tailor case-management procedures to the needs of the particular litigation and to the resources available from the parties and the judicial system. Judicial time is the scarcest resource of all: Judges should use their time wisely and efficiently and make use of all available help. Time pressures may lead some judges to believe that they should not devote time to civil case management. Investing time in the early stages of the litigation, however, will lead to earlier dispositions, less wasteful activity, shorter trials, and, in the long run, economies of judicial time and fewer judicial burdens. (emphasis added.)

The Manual also discusses "Pretrial Procedures" (including computerized data) at page 79 and "Use of Exhibits" at pages 141-142.

3. Use of Technology Guide

With regard to this Court's decisions regarding the use of courtroom technology and the discovery process, this Court found another publication by the Federal Judicial Center, entitled "Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial," (2001), to be instructive. It explains that because technology decisions "permeate" the discovery process,

> Judges should explore the uses of technology for discovery with the parties and lawyers at an early pretrial conference. Most difference can be resolved by the lawyers or their technical staff if they take the problems at an early point in the proceedings, before either side is heavily invested in one approach over another. In the absence of control by the court, problems may arise down the road.
>
> * * *
>
> Cost. Some of these problems are simply matters of cost. The advocate who needs to minimize costs will try to anticipate technology needs that will arise later in the case and obtain discovery in digital formats that are less expensive overall.
>
> * * *

Time. Some concerns involve speed and efficiency. Court may want to set out ground rules governing the use of technology simply to make the pretrial and trial processes move more efficiently. Pretrial rules or procedures may place considerable premium on the ability to meet deadlines. The advocate who can use technology to meet these deadlines with ease is less readily put on the defensive before the court during the discovery phase and has more time to prepare for trial.

* * *

Missteps by lawyers using technology during discovery can cause the court to waste time hearing and resolving disputes that could have been avoided entirely. In nearly every case, if the court either mandates a particular approach in a pretrial order or raises potential problems in order to representations from the parties, the downstream problems disappear.

* * *

Documents must be in digital format to be used with a computer retrieval and display system. This requirement leads parties to try to get the documents in the most efficient digital format during discovery and, in turn, sometimes generates arguments about format, compression, sharing expenses, and alteration of documents during normal digital processing. The gain in efficiency is very great, so the court may want to spend some time at the early discovery stage anticipating and avoiding later disputes. The principal aspects of these subjects are set out below.

Requiring parties to exchange documents in digital format.

When a case involves discovery of a significant number of documents, lawyers likely will consider exchanging the documents in digital format. For some lawyers, this threshold is 1,000 pages of useful documents; others may go as low as 100 pages. If the parties do not agree to such an exchange themselves, the court may want to require it.
. . . Their clients obligingly print out paper copies of digital documents for review and production. This creates a wasteful and time-consuming paradigm[7]: digital material is printed into hard copy, reviewed and produced; then both sides may turn the hard copy into digital format again so it can be searched and presented using display equipment at trial. If digital materials will be used at trial, then every effort should be made at the dawn of discovery to seek out and exchange the true "originals," which are digital files rather than their paper manifestations. Discovery may proceed more smoothly, with fewer disputes and requiring less time overall, if documents are exchanged in their "original"

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[7]The Guide speaks against the practice of "printing-out" everything from the electronic database - - the very practice which defense counsel claims has kept them from meeting deadlines. See doc. no. 224 at 13-15.

digital format at the outset. This reduces cost and reduces the opportunities for problems arising out of conversion. Digital files can be searched without further processing, thus eliminating the substantial cost of processing with optical character recognition (OCR) software.

* * *

Document numbering. Although the traditional hand stamping of numbers (also known as "Bates stamping" after the inventor of the device) on every page of discovery documents is not necessary in a digital process, some lawyers still find document numbering helpful. Documents in digital format can be numbered using software. Using this method to "stamp" documents with identification numbers is very fast, much less expensive, always produces a legible number, and does not change the originals. The automated process prevents duplicate numbers. It also eliminates gaps in the production numbering because privileged documents can be pulled after the electronic numbering process and the images can be renumbered sequentially.

Copying. Documents in digital format can be copied quickly, less expensively, and with better quality. . . .

Trial preparation. Many of the necessary elements of organizing for trial - witness lists, exhibit lists, deposition excerpts, facts that support certain positions, and witness examinations - can be completed more efficiently using digital files.

Trial displays. Documents in digital format can be displayed using courtroom technology, which may produce considerable savings in time. It is not necessary for the court to own the equipment; the parties can bring their own equipment to the courtroom.

Trial logistics. Judges who have experience with document-intensive cases note that the large number of exhibit binders for paper copies and the daily task of unpacking all the boxes of exhibits then packing them up again at the end of the day are hidden, but substantial costs that can be avoided by using documentary exhibits in digital format. These hidden costs extend to the court as well. Security personnel may have to come in early or stay overtime while the lawyers unpack in the morning and pack up after the court session is completed, otherwise the court can lose two hours of trial time each day. And the judge may not have enough room in chambers for all the exhibit binders.

In considering discovery disputes, the court may also benefit from having parties submit a CD containing the text of their motion, and the discovery materials in issue. References to the discovery materials can be linked to the documents themselves (and also to cases cited, statutes, and court rules) so that the court only has to click on the reference and the document appears in full text. This may be particularly helpful for judges who are traveling or working at home. No voluminous paper appendices or attachments are needed.

> Cost issues
>
> It would be a rare case involving discovery of more than 1,000 pages of useful documents that, if handled competently, was not substantially cheaper to conduct with documents in digital format rather than using paper copies. Lawyers may argue to the contrary, perhaps without an adequate appreciation of the facts, but cost is not a barrier to obtaining documents in (or scanning documents into) digital format. If there are a significant number of documents, and their content must be examined in order to conduct the case competently, the cost of doing whatever is going to be done with these documents will be cheaper in digital format than the manual alternatives. As to timing, it is nearly always cheaper from the perspective of the overall costs to put documents into digital format and the outset of the case, rather than waiting until mid-discovery or shortly before trial. . . .
>
> Even if an inexperienced lawyer must take these tasks to a contractor, the cost for this kind of litigation support is not overly burdensome.

Id. at 62-72 (emphasis added.)

C. ABA Standards

This Court has taken a hands-on approach to this litigation with the following objectives of pretrial procedure (as set forth in Standard 11-1.1 of the ABA Standards for Criminal Justice Discovery and Trial by Jury - Third Edition (1996) at page 1) in mind:

- permitting thorough preparation for trial,
- reducing interruptions and complications during trial and avoiding unnecessary and repetitious trials by identifying and resolving prior to trial any procedural, collateral, or constitutional issues, and
- effecting economies in time, money, judicial resources, and professional skills by minimizing paperwork, avoiding repetitious assertions of issues, and reducing the number of separate hearings.

Standard 11-1.1 explains that these objectives can be served by the full and free exchange of appropriate discovery; simpler and more efficient procedures; and procedural pressures for

expediting the processing of cases. *Id.* at 1. The Court has attempted to accomplish these objectives and has done so through the pretrial processes to date, and although defense counsel casts aspersions on this Court's motivations, the above-cited language from the publications listed above demonstrates that this Court's practices are commonly employed techniques for the effective management of complex litigation. It is obvious that without the use of these well-established techniques, the defense team would have totally halted this case and denied the public a fair, just, and timely trial - - on the timetable the defense team agreed-to in the March 1, 2006 Pretrial Order. Doc. no. 42.

XIII. DISCUSSION - - RECUSAL STATUTE – 28 U.S.C. § 455(A)

A. In General

Section 455(a) provides that "any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Unlike section 144, which requires recusal whenever a timely and legally sufficient affidavit is filed demonstrating that the presiding judge subjectively harbors a personal bias or prejudice against or in favor of a party, 28 U.S.C. § 144, the inquiry under section 455(a) is "whether the record, viewed objectively, reasonably supports the appearance of prejudice or bias." *United States v. Pungiatore*, 2003 WL 22657087, *4 (E.D.Pa 2003), *quoting SEC v. Antar*, 71 F.3d 97, 101 (3d. Cir. 1995). The test is whether a reasonable person, knowing all of the circumstances, would harbor doubts about the judge's impartiality. *In re Prudential Ins. Co. of Am. Sales Practice Litig., Agent Actions*, 148 F. 3d. 283, 343 (3d Cir. 1998); *United States v. DiPasquale*, 864 F. 2d 271, 279 (3d Cir. 1988).

The United States District Court for the Eastern District of Pennsylvania delineated the general standards governing a motion for recusal pursuant to section 455(a), as follows:

> Section 455(a) provides that "[a]ny justice judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Section 455(a) deals with recusal, or disqualification, on the basis of the appearance of impropriety, as opposed to actual bias. *See [United States v. Furst*, 886 F.2d 558, 580 (3d Cir. 1989)]. Under Section 455(a), recusal is required when a reasonable person, knowing all of the circumstances, would harbor doubts as to the judge's impartiality. *In re Prudential Ins. Co. of America*, 148 F.3d 283, 343 (3d Cir.1998); *United States v. Antar*, 53 F.3d 568, 574 (3d Cir.1995); *Vespe*, 868 F.2d at 1341. The weight of authority holds that, unlike a Section 144 determination [for actual bias], when deciding a motion for recusal under Section 455(a), the court need not accept the Movant's allegations as true. *See, e.g., Martinez-Catala*, 129 F.3d at 220; *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir.1986) ("Section 455 does not require the judge to accept allegations by the moving party as true"); *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1019-20 n. 6 (5th Cir.1981); *see also* 13A Charles A Wright, Arthur R Miller & Edward H. Cooper, Federal Practice and Procedure § 3550 (2d ed. 1984) ("If a party does move [for recusal] under § 455, and the motion is supported by an affidavit . . . , the court is not required to accept the factual statements as true" Instead, the presiding judge may contradict the Movant's factual allegations with facts derived from the judge's knowledge and the record. *See Mass. Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 872 F.Supp. 1346, 1349 (E.D.Pa.1994); *see also Martinez- Catala*, 129 F.3d at 220 ("To the extent that facts are in dispute, factual determinations are made by the judge whose recusal is in question"). Accordingly, after reviewing the Movant's affidavit in light of the record and surrounding facts and circumstances, the court finds that numerous allegations contained therein are inaccurate, unsupported and/or based on highly tenuous speculation.

Cooney v. Booth, 262 F.Supp.2d 494, 504-05 (E.D.Pa. 2003).

Because granting a motion to recuse "necessarily results in a waste of the judicial resources which have already been invested in the proceeding," *In re Int'l Business Machines Corp.*, 618 F.2d 923, 933 (2d Cir. 1980), a judge is "as much obliged not to recuse himself when it is not called for as he is obligated to when it is." *In re Drexel Burnham Lambert, Inc.*, 861

F.2d 1307, 1312 (2d Cir. 1988), *cert. denied sub nom. Milken v. SEC*, 490 U.S. 1102 (1989); *United States v. Bray*, 546 F2d 851, 857 (10th Cir. 1976); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 503 F.Supp. 368, 370 (N.D. Ohio 1980). It is "vital to the integrity of the system of justice that a judge not recuse himself on unsupported, irrational or highly tenuous speculation," *McCann v. Communic. Design Corp.*, 775 F.Supp. 1506, 1523 (D. Conn. 1991), *citing Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987), and the judge has an "affirmative duty not to recuse himself if the movant fails to establish a reasonable doubt concerning his impartiality." *Grand Entertainment Group Ltd. v. Arazy*, 676 F. Supp. 616, 619 (E.D. Pa. 1987).

Moreover, recusal motions must not be permitted to be used as "strategic devices to judge shop." *United States v. El-Gabrowny*, 844 F.Supp. 955, 959 (S.D.N.Y. 1994), *quoting Lamborn v. Dittmer*, 726 F.Supp. 510, 515 (S.D.N.Y. 1989); *see also Cooney*, 262 F.Supp. 2d at 508 ("although, at times, it may seem appealing or even wise to yield to another court, on the premise that the allegations of impartiality are a distraction to the main event, to do so, while a short term expedient, will reward the culprit, punish the other parties to the litigation and encourage the tactic of Judge shopping.") Although section 455(a) is designed to foster the public's confidence in the integrity of the judiciary which could be irreparably harmed if a case proceeded where there exits a reasonable factual basis for doubting the judge's impartiality, *In re School Asbestos Litig.*, 977 F.2d 764, 776 (3d Cir. 1992), Congress also recognized that the challenged judge "must be alert to avoid the possibility that those who question [the judge's] impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality [therefore,] must have a *reasonable* basis." *Pungiatore*, 2003 WL 22657087 at *4 (emphasis in original), *quoting* H.R. Rep. No. 93-1453, 93rd Cong., 2d Sess. 5 (1974),

reprinted in 1974 U.S.C.C.A.N. 6351, 6355.

B. Timeliness

Unlike section 144, section 455 does not contain an explicit timeliness requirement. Nevertheless, the vast majority of courts to have considered the issue have concluded that sections 144 and 455 are in *pari materia* and that motions for recusal under either provision must be filed in a timely manner, i.e., at the earliest possible moment after obtaining information disclosing an appearance of bias, partiality or impropriety. *See, e.g., United States v. Yonkers Bd. of Edu.*, 946 F.2d 180 (2d Cir. 1991); *Furst*, 886 F.2d at 581 n. 30; *United States v. Conforte*, 624 F.2d 869, 880 (9th Cir.), *cert. denied* 449 U.S. 1012 (1980); *In re Int'l Business Machines*, 618 F.2d at 932; *El-Gabrowny*, 844 F. Supp. at 959 (section 144 and all subsections of section 455 are construed in *pari materia* to require a timely motion to recuse, a threshold issue to be evaluated before matters of substance are reached.) *See also* Wright, Miller & Coopers, *Fed. Prac. and Procedure*, § 3550, Procedure for Disqualification, note 9 (collection of cases).

Implicit in section 455, therefore, is the requirement that any motion to recuse must be timely filed, which means as soon as practicable after learning of the facts upon which the movant relies as grounds for disqualification. *Puricelli v. Bor. of Morrisville*, 1993 WL 303285, *2 (E.D.Pa. 1993) (citations omitted). This is a duty of "reasonable diligence," *Cooney*, 262 F.Supp. 2d at 503, *citing Furst*, 886 F.2d at 581n. 30, which requires the movant to "raise its claim of the district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *Cooney*, 262 F.Supp. 2d at 503, *quoting Apple v. Jewish Hosp. and Medical Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987).

As the United States Court of Appeals for the Third Circuit stated in *Smith v. Danyo*, 585 F.2d 83, 86 (3d Cir. 1978), the "judicial process can hardly tolerate the practice of a litigant with knowledge of circumstances suggesting possible bias or prejudice holding back, while calling upon the court for hopefully favorable rulings, and then seeking recusal when they are not forth coming."

While defense counsel verbally announced that they would be moving "to remove" the Court at the June 16, 2006 eighth status conference, and defendant immediately provided a television interview thereon, the motion to recuse (doc. no. 269) was not filed until June 30, 2006.

C. The Merits

The Court finds that a reasonable person, aware of all of the circumstances, would not harbor any doubts about this Court's impartiality. Defendant alleges that this Court's limited number of rulings adverse to defendant, coupled with the inclusion of Local Rule 83.1 in the Pretrial Order and the scheduling of a post-trial contempt hearing, proves bias or prejudice on the part of the Court - - all of which occurred in written opinions of the Court. There is nothing extrajudicial. The Court's failure to declare Local Rule 83.1 unconstitutional[8] and the Court's scheduling of a contempt hearing do not constitute "facts" which cause a reasonable person to doubt this Court's impartiality.

The United States Court of Appeals for the Third Circuit has long held that under section 455(a), "only extrajudicial bias requires disqualification." *Johnson v. Trueblood*, 629 F.2d 287, 290-91 (3d Cir.1980), *cert. denied*, 450 U.S. 999 (1981). The Court defined extrajudicial bias as

[8]This decision is on appeal with the Court of Appeals at 06-3098 and 06-3099.

"bias that is not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings." *Id.* at 291. Court rulings should not be a basis for section 455(a) motion both because they can be corrected on appeal, *see id.*, and because "[d]isagreement with a judge's determinations certainly cannot be equated with the showing required to so reflect on his impartiality as to dictate recusal." *Jones*, 899 F.2d at 1356.

The United States Supreme Court cited the *Trueblood* case with approval in holding that the extrajudicial source rule applies not only to the bias and prejudice grounds for recusal of sections 144 and 455(b)(1), but also to the catch-all provision of section 455(a). *Liteky v. United States*, 510 U.S. 540, 547-48 (1994). The *Liteky* decision summed up the application of the extrajudicial source rule as follows:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. *See United States v. Grinnell Corp.*, 384 U.S., at 583, 86 S.Ct., at 1710. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

510 U.S. at 555 (emphasis added.)

Defendant has had a very limited number of rulings against him. Defendant has a right to appeal any adverse decision in this case, including the result of the contempt hearing (if such is

negative to defense counsel), to the Court of Appeals, at the conclusion of the case.

XIV. CONCLUSION

Therefore, after review of the motion to recuse and related filings, after noting that all of the defense team's "complaints" relate solely to judicial action (not extra-judicial activities), and based upon the Court's personal knowledge of the extensive record and the surrounding facts and circumstances of this matter, the Court rules, as the fact finder, that the numerous allegations contained in said filings are incorrect, inconsistent with the record, based upon speculation, or false, and thus fail to justify recusal.

This Court is compelled to resist the defense team's efforts to obtain another "umpire." No reasonable observer, knowing all of the circumstances, would harbor doubts as to this Court's impartiality and ability to adjudicate the proceedings fairly and rule on the merits. Recusal would be a complete waste of judicial and legal resources since recusal would require another member of the Court to become familiar with almost 300 docket entries and the 240,000 page electronic database. It further would be unfair to the litigants to subject them to such unnecessary delay, especially nearing the end of the pretrial process, with 300 Jury Questionnaires in the mail, and the trial to commence within 90 days - - October 16, 2006. Importantly, it also may appear to the public to be improper judge-shopping and manipulation of the criminal justice system.

If the defense team is permitted to engage in unfettered publicity (see Memorandum Opinion at doc. no. 212 - - upholding Local Rule 83.1 regarding Free Press - - Fair Trial), to divert this case into "conspiracy" theories, and to ignore the terms of the Pretrial Order (which they crafted and agreed to) (see doc. nos. 42, 152, and 224) and other scheduling orders of court,

there will be no fair trial - - there will be chaos.

> Law is order, and good law is good order. - Aristotle, from *Politics*.
>
> If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. Mr. Justice Frankfurter, concurring, *United States v. Mine Workers*, 330 U.S. 258, 312 (1947).
>
> There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Mr. Justice Harlan, *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 26 (1905).

A fair trial is more than a right of a defendant - - it is the right of the public. The public has a right to have a fair, just and timely determination of the issues raised in this important case of alleged public corruption, with the Judge selected officially and randomly, to avoid the appearance of improper judge-shopping. See the Mission of the United States District Court for the Western District of Pennsylvania at www.pawd.uscourts.gov.

SO ORDERED this 20th day of July, 2006.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All counsel of record

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No. 06-0026**
	)	**Electronically Filed**
CYRIL H. WECHT	)	

ORDER OF COURT

For the reasons set forth in the accompanying Memorandum Opinion and Order of Court, Defendant's Motion for Recusal of the Trial Judge (doc. no. 269) is HEREBY DENIED.

SO ORDERED this 20th day of July, 2006.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All counsel of record

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