

No. 14-31299

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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In re: DEEPWATER HORIZON

LAKE EUGENIE LAND & DEVELOPMENT, INC.; BON SECOUR FISHERIES, INC;  
FORT MORGAN REALTY, INC.; LFBP 1, L.L.C., d/b/a GW FINS;  
PANAMA CITY BEACH DOLPHIN TOURS & MORE, L.L.C.;  
ZEKES CHARTER FLEET, L.L.C.; WILLIAM SELLERS; KATHLEEN IRWIN;  
RONALD LUNDY; CORLISS GALLO; JOHN TESVICH; MICHAEL GUIDRY,  
on behalf of themselves and all others similarly situated; HENRY HUTTO;  
BRAD FRILOUX; JERRY J. KEE,  
*Plaintiffs-Appellees,*

v.

BP EXPLORATION & PRODUCTION, INC.; BP AMERICA PRODUCTION CO.; BP, P.L.C.  
*Defendants-Appellants,*

PATRICK A. JUNEAU, Claims Administrator,  
*Intervenor-Appellee.*

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**On Appeal from the United States District Court  
for the Eastern District of Louisiana  
MDL No. 2179, C.A. No. 12-970**

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**BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE*  
IN SUPPORT OF APPELLANTS, SUPPORTING REVERSAL**

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December 24, 2014

## CERTIFICATE OF INTERESTED PERSONS

No. 14-31299

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In re: DEEPWATER HORIZON

LAKE EUGENIE LAND & DEVELOPMENT, INC.; BON SECOUR FISHERIES, INC;  
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*Defendants-Appellants.*

PATRICK A. JUNEAU, Claims Administrator,

*Intervenor-Appellee.*

The undersigned counsel of record certifies that all of the interested persons and entities described in the fourth sentence of Rule 28.2.1 who have an interest in the outcome of this case are listed in the Certificate of Interested Persons contained in the brief of Defendants-Appellants, except for the following listed persons and entities. These representations are made in order that the judges of this Court may evaluate possible disqualification.

1. The Washington Legal Foundation (WLF), a proposed *amicus curiae*.

WLF is a nonprofit corporation organized under § 501(c)(3) of the Internal

Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

2. Richard A. Samp and Markham S. Chenoweth are counsel for WLF in this matter.

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## ***INTERESTS OF AMICUS CURIAE***

The interests of the Washington Legal Foundation (WLF)<sup>1</sup> are set forth more fully in the accompanying motion for leave to file. In brief, WLF is a public interest law firm and policy center with supporters in all 50 States, including many in Louisiana. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, the rule of law, and the ethical administration of justice.

WLF believes strongly that public support for the judiciary can be maintained only so long as the public perceives that court proceedings are administered fairly. An essential ingredient of any fair court system is the presence of an impartial decision-maker.

WLF is concerned that the Claims Administrator is continuing to decide thousands of claims (seeking recoveries totaling many billions of dollars) filed with the Court Supervised Settlement Program (CSSP), despite overwhelming evidence that a reasonable observer would question his impartiality. WLF is particularly concerned because the evidence indicates that the Claims Administrator, rather than candidly disclosing the relevant facts, has repeatedly

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<sup>1</sup> Pursuant to Fed.R.App.P. 29(c)(5), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

made statements whose effect has been to obscure the full extent of his prior activities adverse to Appellants' interests.

## **STATEMENT OF THE CASE**

The facts of this case are set out in detail in the brief of Appellants BP Exploration & Production, Inc.; BP America Production Co.; and BP, p.l.c. (collectively, "BP"). WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Pursuant to an order of the Judicial Panel on Multidistrict Litigation, much of the litigation arising from the April 2010 explosion of the *Deepwater Horizon* drilling platform was centralized in the U.S. District Court for the Eastern District of Louisiana. In February 2012, BP agreed to a class-action settlement of claims filed by those alleging economic harm caused by the oil spill. The settlement provided for creation of the Court Supervised Settlement Program (CSSP) to process and evaluate economic-loss claims. The settlement agreement provided that the program would be supervised by the district court and administered by a Claims Administrator selected by the court. The CSSP replaced an earlier claims-processing program established by BP (the Gulf Coast Claims Facility, or

“GCCF”), which operated under the independent direction of Kenneth Feinberg.<sup>2</sup>

In March 2012, the district court (at the recommendation of the parties) selected Patrick Juneau to oversee the transition from the GCCF to the CSSP. The court formally selected Mr. Juneau as Claims Administrator of the CSSP in May 2012 after it gave its preliminary approval to the settlement agreement. Mr. Juneau continues to serve as the Claims Administrator. A significant percentage of the claims filed by putative class members have not yet been resolved.

It was the Plaintiffs’ Steering Committee (PSC) that first recommended that Mr. Juneau be selected as the Claims Administrator. After the PSC suggested to BP in February 2012 that Mr. Juneau be selected, both sides met with Mr. Juneau on February 26 and 27, 2012 to discuss his possible selection. The record indicates that: (1) Mr. Juneau stated to Keith Moskowitz (an attorney representing BP) at a preliminary, February 26 meeting that he had previously “consulted” with Louisiana about the GCCF process; and (2) there was no further discussion at that meeting of the nature of his consultation.<sup>3</sup> Mark Holstein, Managing Counsel for

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<sup>2</sup> Feinberg previously served as Special Master of the September 11 Victim Compensation Fund.

<sup>3</sup> See Juneau Declaration, ¶¶ 20-21; Exh. 18 to Motion to Remove (handwritten note of Keith Moskowitz stating, “Consulted with La. (State) about the whole Feinberg process.”).

BP America, interviewed Juneau on February 27; Mr. Juneau said nothing at that interview regarding his prior consulting work for Louisiana. Holstein Declaration ¶ 7. In a sworn statement made in August 2013 to former FBI Director Louis Freeh, who had been appointed by the district court as a Special Master to investigate possible ethical violations or other misconduct within the CSSP, Mr. Juneau stated that prior to his appointment in March 2012, he “had really had no connection with the spill per se.” Exh. 16 to Motion to Remove.

It was not until late July 2014 that BP officials became aware of the nature and extent of the “consulting” work Juneau performed for Louisiana in connection with oil spill-related claims filed against BP. BP’s September 8, 2014 motion to remove Mr. Juneau as Claims Administrator provided evidence that the consulting work included advocating before the GCCF in support of the interests of Louisiana citizens who had filed claims against BP. That advocacy included:

- urging the GCCF to relax documentation requirements for citizens attempting to prove that they had suffered economic injury, including eliminating documentation requirements altogether in some cases;
- urging the GCCF to adopt fixed compensation formulas designed to make proof of economic loss easier;
- urging the GCCF to relax requirements for establishing that the oil spill was the actual cause of claimants’ economic losses; and
- urging the GCCF to limit the scope of the releases it was requiring claimants

to sign in return for compensation payments.

The motion noted the “direct overlap” between the issues covered by Mr. Juneau’s advocacy work before the GCCF and disputed policy issues he decided in his role as Claims Administrator for the CSSP. BP Motion to Remove at 6. It also noted that during the period when Mr. Juneau was providing oil-spill-related legal services for Louisiana (July 2010 through July 2011), Louisiana filed several significant pleadings in the Multi-District Litigation (MDL) that were directly adverse to BP’s interests. These included: (1) Louisiana’s February 1, 2011 joinder of a motion (filed by Class Counsel) calling upon the district court to “supervise” any communications between the GCCF and putative class members; and (2) Louisiana’s March 3, 2011 *parens patriae* lawsuit against BP, seeking to hold BP liable for damages suffered both by the State itself and by its citizens.

In his October 15, 2014 brief opposing the motion to remove, Mr. Juneau asserted that his advocacy work for Louisiana before the GCCF did not conflict with his role as a neutral decisionmaker in the CSSP because “Louisiana was never a claimant under the GCCF, and cannot be a party to the Settlement Agreement and thus can make no claim under it to the CSSP.” Opp. Br. at 4. Mr. Juneau repeatedly denied that his consulting work for Louisiana entailed any involvement in the MDL proceedings against BP. *Id.* at 3 (his representation of Louisiana

related “solely to acting in a non-litigation role to consult with Mr. Feinberg on the [GCCF]”); *id.* at 11 (he “never ‘served as [a] lawyer in the matter in controversy’”) (quoting 28 U.S.C. § 455(b)(2)); *id.* at 12 (he “has never served as a lawyer adverse to BP in the MDL before the Court”); *id.* at 13 (stating that “[a]lthough Louisiana certainly became adverse to BP upon filing its own action against BP, the law does not impute a client’s adversity to a lawyer who is serving the client in a different matter”); *id.* at 16 n.50 (“neither Mr. Juneau nor any member of his firm has ever litigated *any* claims against BP, in any context whatsoever.”) (emphasis in original).

BP thereafter—on October 29, 2014—filed a motion to supplement evidence in support of its motion to remove. The motion explained that BP gained access to highly relevant documents only after filing its motion to remove. The newly discovered documents included billing records submitted by Mr. Juneau to the State of Louisiana (and obtained by a third party under the Louisiana Public Records Act). The billing records indicate that Juneau and his law firm played an active role in researching and preparing the two Louisiana pleadings cited above: the brief joining Class Counsel’s motion that called upon the district court to “supervise” any communications between the GCCF and putative class members; and Louisiana’s March 3, 2011 lawsuit against BP. The newly discovered

documents also included documents obtained from the GCCF; Mr. Feinberg had not previously agreed to the release of those documents. The GCCF documents indicate that—contrary to Mr. Juneau’s prior representations—his work before the GCCF was *not* limited to his communications with Mr. Feinberg regarding settlement protocols; it also included direct advocacy in support of specific claimants who were seeking compensation from BP.

In a four-page order dated November 10, 2014, the district court denied both the motion to remove the Class Administrator and the motion to supplement. The court concluded that Mr. Juneau is not subject to the disqualification rules set forth in 28 U.S.C. § 455 because Mr. Juneau is neither a judge nor a special master. Order at 1. It also concluded that BP had “actual knowledge” of Mr. Juneau’s previous consulting work for Louisiana (based on Mr. Juneau’s disclosures during his February 26-27, 2011 meetings with BP representatives) and that the motion to remove was barred as untimely. *Id.* at 2. The court denied the motion to supplement the record, stating:

There is no reason why BP could not have obtained its “new” evidence before filing its Motion to Remove the Claims Administrator. Further, the alleged “new” evidence does nothing to change the essential facts set forth above that lead the Court to deny BP’s Motion to Remove.

*Id.* at 4. The Order included no discussion of any of the specific legal work that

Juneau performed for Louisiana in connection with oil spill proceedings or whether such work was adverse to BP's interests. The court stated that it was also denying the motion to remove for "the reasons more extensively set forth in the opposition memorandum" filed on behalf of Juneau. *Id.* at 1.

### **SUMMARY OF ARGUMENT**

Federal law provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Since its amendment in 2003, Rule 53 has extended the § 455 disqualification standards to special masters appointed by federal judges. Fed.R.Civ.P. 53(a)(2). The district court rejected BP's assertion that the Claims Administrator was subject to the § 455(a) disqualification standards, noting that Juneau is neither a judge nor a special master. Order at 1.

The district court erred in declining to apply the § 455(a) disqualification standards. The district court compounded its error by failing to provide any alternative standard by which it intended to evaluate Juneau's conduct; it simply ended its evaluation of Mr. Juneau's conduct once it determined that § 455(a) was inapplicable. For example, it did not address whether a claims administrator is subject to the Code of Conduct for United States Judges. The answer to that

question is “yes”; the Code of Conduct applies here because Mr. Juneau is an officer of the federal judicial system and performs “judicial functions” (*e.g.*, by deciding disputes between federal court litigants). *See* Code of Conduct for United States Judges, *Compliance with the Code of Conduct* (“Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code.”). The Code of Conduct includes a provision that largely mirrors the § 455(a) disqualification standard.

Furthermore, any judicial branch employee not covered by the Code of Conduct for United States Judges is subject to the Code of Conduct for Judicial Employees, which includes a similar appearance-of-impropriety standard. *See* Code of Conduct for Judicial Employees, Canon 3(F)(1)-(5). Accordingly, regardless of which standard governs Mr. Juneau’s conduct, the district court was required—in connection with the motion to remove—to determine whether Mr. Juneau’s impartiality in his role as Claims Administrator might reasonably be questioned.

The evidence submitted by BP to the district court overwhelmingly demonstrated that, in light of Mr. Juneau’s legal work on behalf of Louisiana, his impartiality might reasonably be questioned. The bills that Mr. Juneau submitted to Louisiana make clear that his legal work included assistance in preparing

pleadings filed by Louisiana in the MDL, pleadings that were undeniably adverse to BP's interests. The legal work also included extensive proceedings before the GCCF that were similarly adverse to BP's interests and that addressed issues that closely overlapped the issues that Mr. Juneau has been required to address in his role as Claims Administrator. Under those circumstances, case law is clear that Mr. Juneau's removal is required under the appearance-of-partiality standard, regardless whether he is actually capable of performing his Claims Administrator functions in an impartial manner.

Removal under the appearance-of-partiality standard is particularly warranted in light of Mr. Juneau's pattern of evasiveness in responding to inquiries about potential conflicts of interest. In connection with the investigation by Special Master Freeh into conflicts of interest among CSSP employees, Mr. Juneau testified under oath that prior to his appointment by the district court in March 2012, he "had really had no connection with the spill per se." That statement does not accurately describe the hundreds of thousands of dollars of legal work that he performed for Louisiana. But the obvious effect of that statement—if not its actual intent—was to steer Freeh away from asking any questions that might have uncovered conflicts between Mr. Juneau's legal work for Louisiana and his later judicial functions as Claims Administrator.

Mr. Juneau's repeated statements, in connection with his October 2014 brief opposing the motion to remove, that he *never* served as a lawyer adverse to BP are even less explicable, in light of documentary evidence that he played a major role in preparing pleadings filed by Louisiana in the MDL—including Louisiana's March 2011 complaint seeking an award of damages from BP. It is misleading for an attorney to state that he never "served as a lawyer adverse to" a party simply because the attorney did not attach his name to a pleading filed against the party, if the attorney nonetheless assisted in researching and preparing the pleading.

The likelihood that a reasonable observer would question the impartiality of a judicial decision-maker is heightened when, as here, the record indicates that the decision-maker has not been fully candid about the extent of his past activities that raise questions about his impartiality. One would reasonably expect a claims administrator capable of impartial decision-making to be willing to fully disclose his potentially conflicting activities and to explain why those activities would not interfere with his ability to act in an impartial manner.

Finally, the district court erred in concluding that the motion to remove should be denied as untimely. The district court stated that this Court requires motions to disqualify to be filed "at the earliest moment that a party has knowledge of facts that *might* cause disqualification." Order at 2 (emphasis added). That

statement does not accurately reflect Fifth Circuit case law. While the case law acknowledges that timeliness is *a factor* in weighing disqualification motions, it makes clear that there is no strict filing deadline. More importantly, this Court holds that timeliness is never an issue until the moving party has knowledge of the facts giving rise to the need for disqualification, not simply of facts that “might” warrant disqualification. As BP has demonstrated, it lacked such knowledge until the last several months; and as soon as it acquired the requisite knowledge, it moved expeditiously to seek Mr. Juneau’s removal. The district court is correct that Mr. Juneau told BP in February 2012 that he consulted with Louisiana in connection with GCCF proceedings, but knowledge of such consultation is not equivalent to knowledge that Mr. Juneau participated in the preparation of pleadings filed against BP in the MDL by Louisiana.

## **ARGUMENT**

### **I. ADMINISTRATOR JUNEAU IS SUBJECT TO ETHICAL CONSTRAINTS THAT REQUIRE DISQUALIFICATION WHERE HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED**

Impartiality and the appearance of impartiality in a judicial officer are “the *sine qua non* of the American legal system.” *Haines v. Liggett Group*, 975 F.2d 81, 98 (3d Cir. 1992). As the U.S. Supreme Court has long recognized, “[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased

but also must avoid even the appearance of bias.” *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 149 (1968).

As the court-appointed Claims Administrator, Mr. Juneau has been tasked with deciding economic-damage claims asserted against BP by parties to a federal court proceeding. Accordingly, he is permitted to undertake that role only so long as he avoids the appearance of bias. BP introduced overwhelming evidence that would cause a reasonable observer to doubt his ability to assess claims impartially. Yet, the district court responded by declining to engage in *any* analysis of the evidence of bias submitted by BP. Rather, the district court concluded in a single paragraph that there was no need to examine the issue because Mr. Juneau was not subject to the disqualification standards for federal judges established by 28 U.S.C. § 455. Order at 1.

The district court erred in concluding that § 455 is inapplicable. More fundamentally, the district court’s abdication of impartiality review for judicial officers tasked with deciding contested claims cuts against the bedrock principle that a fair trial before an impartial judge “is a basic requirement of due process.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009).

Section 455(a) states, “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might

reasonably be questioned.”<sup>4</sup> Federal appeals courts have generally understood § 455(a)’s reference to a “justice, judge, or magistrate judge of the United States” to encompass “anyone who is an officer of a judicial system performing judicial functions.” *See, e.g., United States v. Werner*, 916 F.2d 175, 178 (4th Cir. 1990); *Jenkins v. Sterlacci*, 849 F.2d 627, 631 (D.C. Cir. 1988). In light of their role in performing judicial functions, special masters have long been deemed subject to the § 455 disqualification standards, *ibid.*, as have land commissioners. *Werner*, 916 F.2d at 178.<sup>5</sup>

The district court concluded that Claims Administrator Juneau was not subject to § 455(a) because he was neither a judge nor a special master. Order at 1. But § 455’s applicability does not turn on Mr. Juneau’s status as a judge or a

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<sup>4</sup> Section 455(b) sets forth five additional, particularized grounds for disqualification. Court decisions have explained that § 455(b) constitutes an elaboration of the more generalized disqualification requirement set forth in § 455(a). *See, e.g., In re Kensington Int’l Ltd.*, 368 F.3d 289, 316 (3d Cir. 2004) (“Section 455(b)(1) is embraced within the perception that a reasonable person might entertain that the judge’s impartiality might reasonably be questioned.”). In addition to seeking Mr. Juneau’s removal under § 455(a), BP seeks removal under § 455(b)(2), which requires disqualification of a judicial officer who “served as lawyer in the matter in controversy.” WLF agrees with BP that § 455(b)(2) requires Mr. Juneau’s removal; but given that the more generalized § 455(a) standard so clearly requires removal, WLF does not separately address § 455(b)(2).

<sup>5</sup> The Federal Rules of Civil Procedure were amended in 2003 to ratify existing case law, by stating explicitly that special masters appointed by federal judges are subject to the § 455 disqualification standards. Fed.R.Civ. P. 53(a)(2).

special master; obviously, he is neither. Rather, the issue is whether he holds a judicial position in which, like a special master or a land commissioner, he “performs judicial functions.” Mr. Juneau unquestionably does so; the district court has authorized him to render decisions in thousands of cases involving claimed economic loss. As with a special master, Mr. Juneau’s decisions are subject to review by the district court but under a deferential standard of review; accordingly, Mr. Juneau’s decision will be the final word in the great majority of contested cases. Because Mr. Juneau is “an officer of a judicial system performing judicial functions,” he is subject to § 455(a)’s appearance-of-impartiality standard.

Moreover, regardless whether Mr. Juneau is subject to § 455(a), he unquestionably is subject to the Code of Conduct for United States Judges. *See Code of Conduct for United States Judges, Compliance with the Code of Conduct* (“Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code.”). The Code imposes a disqualification requirement for judicial officers that closely parallels the requirements of § 455(a): “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” Code of Conduct, Canon 3(C)(1). Accordingly, the district court’s determination that Mr. Juneau was not subject to § 455 did not excuse its failure to examine

whether Mr. Juneau's impartiality might reasonably be questioned in light of the legal work he conducted for Louisiana. Furthermore, even a determination that Mr. Juneau is not a judicial officer "authorized to perform judicial functions" (and thus is not subject to the Code) would not excuse the failure to examine whether Mr. Juneau's impartiality might reasonably be questioned. If Mr. Juneau did not qualify as a "judge" under the Code, then he would automatically be classified as a judicial employee. As such, he would be subject to the Code of Conduct for Judicial Employees, which includes its own conflict-of-interest/appearance-of-impropriety standard. *See* Code of Conduct for Judicial Employees, Canon 3(F)(1)-(5).

## **II. ADMINISTRATOR JUNEAU'S SERVICES AS A LAWYER IN THIS CASE CALL HIS IMPARTIALITY INTO QUESTION AND REQUIRE HIS REMOVAL**

From July 2010 through the end of July 2011, Mr. Juneau performed considerable legal work for Louisiana in connection with recovery of claims arising from the Deepwater Horizon oil spill. Much of that work was directly adverse to BP's interests; indeed, some of it involved pleadings Louisiana filed against BP in the MDL proceedings. The legal work continued until eight months before Mr. Juneau's appointment by the district court. Under those circumstances, 28 U.S.C. § 455(a) and the Code of Conduct for United States Judges require Mr.

Juneau's removal. This Court has explained that "in order to determine whether a court's impartiality is reasonably in question, the objective inquiry is whether a well-informed, thoughtful observer would question the court's impartiality." *Trust Co. v. N.N.P.*, 104 F.3d 1478, 1481 (5th Cir. 1997). Given the extensive legal work performed by Mr. Juneau that was adverse to BP's interests in this case, WLF has little doubt a well-informed observer would question Mr. Juneau's impartiality when assessing damage claims asserted against BP.

Mr. Juneau's appearance of partiality arises most directly from his involvement in the preparation of pleadings filed by Louisiana in the MDL proceedings. The first instance involved the Plaintiffs' Steering Committee's motion requesting the district court to "supervise" communications between the GCCF and claimants. BP opposed the motion as an unnecessary obstacle to the settlement of claims. On February 1, 2011, Louisiana filed a brief for the purpose of joining the PSC's motion, and later filed a second brief in response to a district court order requesting additional briefing on the issue. Both briefs were unquestionably adverse to BP. Neither brief bore Mr. Juneau's name; however, his billing records (submitted by BP in connection with its October 29, 2014 motion to supplement) demonstrate that he played a significant role in preparing those briefs. *See* Exh. 6 to BP Mot. to Supplement (time entries for Dec. 22 and 23, 2010; and

Jan. 17, 19, and 28, and Feb. 1, 9-17, 2011); ROA.22975-76, 22984, 22986, 22993, 22995-98.

The second instance involved Louisiana's March 3, 2011 *parens patriae* lawsuit filed as part of the MDL against BP, seeking to hold BP liable for damages suffered both by the State itself and by its citizens. Once again, Mr. Juneau's name does not appear on the pleading; lead counsel for the State was Megan Terrell. Nonetheless, Mr. Juneau's records indicate that, in the period leading up to the filing, he billed Louisiana for reviewing legal materials prepared by Terrell regarding BP's potential liability to the State for economic loss resulting from the oil spill. *Ibid.* (time entries for Nov. 23 and Dec. 23, 2010), ROA.22966, 22975-76. That lawsuit could not be more closely related to Mr. Juneau's current work as Claims Administrator: it sought *parens patriae* damages for injuries suffered by the very same Louisiana citizens who are pursuing economic injury claims with the CSSP.

Mr. Juneau's legal work for Louisiana also involved advocacy in support of the interests of Louisiana citizens who had filed claims against BP. That advocacy included:

- urging the GCCF to relax documentation requirements for citizens attempting to prove that they had suffered economic injury, including eliminating documentation requirements altogether in some cases;

- urging the GCCF to adopt fixed compensation formulas designed to make proof of economic loss easier;
- urging the GCCF to relax requirements for establishing that the oil spill was the actual cause of claimants' economic losses; and
- urging the GCCF to limit the scope of the releases it was requiring claimants to sign in return for compensation payments.

*See, e.g.*, ROA.21437-38. Indeed, Mr. Juneau even intervened with the GCCF on behalf of specific individuals pressing claims against BP. *See, e.g.*, Exh. 5 & 6 to BP Mot. to Supplement (Aug. 26, 2010 email from Patrick Juneau to Kenneth Feinberg; time entries for Aug. 26 and Sept. 8, 10, 14, 15, and 22, 2010), ROA.22939, 22945-47. As BP has explained, Mr. Juneau's advocacy before the GCCF was directly adverse to BP and addressed issues that closely overlapped the issues that Mr. Juneau has been required to address in his role as Claims Administrator.

Under these circumstances, case law is clear that Mr. Juneau's removal is required under the appearance-of-partiality standard, regardless whether he is actually capable of performing his Claims Administrator functions in an impartial manner. *See, e.g., Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983) (because the goal of § 455(a) is "to exact the appearance of impartiality," it is irrelevant whether the events creating the appearance of partiality "actually

affected the judge’s decision[-making].”). Any party would reasonably fear that a judicial officer could not be impartial if the judicial officer previously served as an adverse lawyer in the very same case or in a contemporaneous case raising virtually identical issues. It is precisely because the appearance of partiality is so great in such cases that § 455(b)(2) categorically mandates disqualification of a judicial officer who previously “served as lawyer in the matter in controversy.”

Indeed, the failure to remove Mr. Juneau may make it much more difficult for parties to settle large class action claims in the future. Defendants will be understandably reluctant to entrust their financial futures to a claims administrator if they will have no recourse against an administrator later revealed to harbor an undisclosed bias.

The appearance of partiality in this case is significantly magnified because, rather than fully disclosing the nature of his legal work for Louisiana, Mr. Juneau has repeatedly made evasive statements designed to downplay the extent of that work—beginning with his February 2012 statement to BP that he had merely “consulted” with Louisiana regarding the GCCF process. A reasonable observer is far more likely to question the impartiality of a judicial decision-maker who has been less than candid about matters bearing directly on his impartiality.

**A. Mr. Juneau’s Inaccurate Statements to Special Master Freeh Suggest an Intent to Deter Mr. Freeh from Asking About Mr. Juneau’s Conflicts of Interest**

On July 2, 2013, the district court appointed former FBI Director Louis B. Freeh as a Special Master to investigate conflicts of interest and alleged misconduct by certain individuals employed by the Claims Administrator. Mr. Freeh’s mandate also included “fact-finding as to any other possible ethical violations or other misconduct within the CSSP.”

In connection with that investigation, Mr. Juneau gave a sworn statement to Mr. Freeh on August 1, 2013. At the start of his questioning, Mr. Freeh asked, “There came a time when you were appointed the Court Claims Administrator for what’s been referred to as the Horizon or BP matter?” Instead of responding with a simple “yes,” Mr. Juneau responded, “I vividly remember all of that, yes. Interesting story behind all that.” He then launched into a lengthy account of being contacted by the parties in February 2012 to ascertain his interest in being appointed Claims Administrator. His account included the following passage:

Now, I knew from reading the newspaper—*I didn’t have any involvement in anything in the spill*. I didn’t represent any claimants in the spill, wasn’t representing defendants in the spill, *had really had no connection with the spill per se*. They asked me to come because they were considering some matters that had to do with some considerations of appointments. That’s all I really knew.

ROA.20445 (emphasis added). That statement was highly misleading, as the above discussion of Mr. Juneau's legal work on behalf of Louisiana makes clear. His law firm was paid hundreds of thousands of dollars for his advocacy for Louisiana (advocacy that was adverse to BP) before the GCCF and the MDL.

In his opposition to the motion to remove, Mr. Juneau claimed that the "no connection" statement was only intended to convey that he had "no connection with the spill per se" at the time of his February 2012 job interview, not that he had never performed legal work in connection with the spill. The district court accepted that interpretation, concluding:

In its proper context, Mr. Juneau's statement merely confirmed that he did not represent any party in MDL 2179, which was true. Mr. Freeh was not investigating or asking Mr. Juneau about his previous consulting work for the State of Louisiana.

Order at 2.

The district court's factual finding is clearly erroneous. First, as Mr. Juneau's time records demonstrate, it was *not* true that Mr. Juneau "did not represent any party in MDL 2179." Nor can Mr. Juneau's statement plausibly be read as asserting no more than that he had no involvement with oil-spill claims in February 2012. Mr. Juneau's use of the past-perfect verb tense ("I . . . had really had no connection with the spill") makes clear that the assertion of no involvement

extended back indefinitely in time. Had he intended to limit his non-involvement assertion to February 2012, he would have used the past tense (“I had no involvement.”).

Moreover, Mr. Juneau had clear motivation to seek to mislead Mr. Freeh, whose assignment as Special Master included investigating *any* conflict of interest among individuals involved with the CSSP. By volunteering (without waiting to be asked) that he had had no involvement with oil-spill litigation, Mr. Juneau decreased the likelihood that Mr. Freeh might ask a direct question about his past representation of clients on oil-spill matters. He undoubtedly was aware that any admission of such past representation could cause Mr. Freeh to begin probing about possible conflicts of interests, which might have led to a recommendation for Mr. Juneau’s removal.

Moreover, any such questions might well have revealed that eight months before his job interview, Mr. Juneau had engaged in discussions with the PSC about being retained by the district court to oversee the claims process. On July 21, 2011, Mr. Juneau abruptly and without explanation cancelled his contract to perform legal services for Louisiana, a contract that had called for Mr. Juneau to perform legal services for Louisiana for at least another year. Four days later, the PSC filed a motion requesting the district court to appoint a Special Master to

oversee the GCCF. One very plausible explanation for that timing: Mr. Juneau abruptly discontinued his oil-spill legal work once he learned of the possibility of a court appointment, surmising that he would be a more attractive (*i.e.*, more plausibly neutral) job candidate if he could assert that he was not performing oil-spill legal work for Louisiana. Providing misleading information to Mr. Freeh made it less likely that Mr. Freeh would ask whether Mr. Juneau had had discussions about a possible court appointment well before February 2012.

**B. Mr. Juneau's Inaccurate Statements in His Opposition to the Motion to Remove Suggest an Intent to Deceive the District Court Regarding the Nature of His Legal Work for Louisiana**

When BP filed its motion to remove, BP had not yet obtained copies of the bills submitted to Louisiana by Mr. Juneau for his legal work. Accordingly, BP did not yet have proof that Mr. Juneau had performed legal work for Louisiana in connection with the MDL proceedings. In the absence of such proof, BP based its motion to remove on the appearance of partiality created by Mr. Juneau's adverse-to-BP legal work before the GCCF.

In response, Mr. Juneau argued that BP's motion was untimely because BP had known all along about his work before the GCCF, and that the GCCF work was not closely related to his work as Claims Administrator. He asserted that his advocacy work for Louisiana before the GCCF did not conflict with his role as a

neutral decisionmaker in the CSSP because “Louisiana was never a claimant under the GCCF, and cannot be a party to the Settlement Agreement and thus can make no claim under it to the CSSP.” Opp. Br. at 4.

In addition, he expressly and repeatedly denied that he had *ever* participated in litigation against BP. *Id.* at 3 (his representation of Louisiana related “solely to acting in a non-litigation role to consult with Mr. Feinberg on the [GCCF]”); *id.* at 11 (he “never ‘served as [a] lawyer in the matter in controversy’”) (quoting 28 U.S.C. § 455(b)(2)); *id.* at 12 (he “has never served as a lawyer adverse to BP in the MDL before the Court”); *id.* at 13 (stating that “[a]lthough Louisiana certainly became adverse to BP upon filing its own action against BP, the law does not impute a client’s adversity to a lawyer who is serving the client in a different matter”); *id.* at 16 n.50 (“neither Mr. Juneau nor any member of his firm has ever litigated *any* claims against BP, in any context whatsoever.”)

The discovery of Mr. Juneau’s billing records—submitted to the district court in connection with BP’s October 29, 2014 motion to supplement—has made plain that Mr. Juneau’s opposition brief was highly misleading. If one accepts those billing records as accurate, they conclusively establish that: (1) Mr. Juneau’s legal work for Louisiana included litigation work; (2) Mr. Juneau “served as a lawyer adverse to BP in the MDL before the [district c]ourt”; (3) although “the law

does not impute a client's adversity to a lawyer who is serving the client in a different matter," Mr. Juneau was *not* serving Louisiana "in a different matter" (as his brief implies) but was doing so in the MDL; and (4) Mr. Juneau did, in fact, "litigate . . . claims against BP." It makes no difference that Mr. Juneau's name did not appear on court filings; he was paid substantial amounts of money by the taxpayers of Louisiana to assist with Louisiana's litigation against BP.

Moreover, based on the statements quoted above, one could infer that Mr. Juneau's opposition brief was designed to deceive the district court. BP's initial motion to remove did not argue that Mr. Juneau had participated in Louisiana's MDL litigation against BP. Accordingly, Mr. Juneau could have opposed the motion without asserting that he had not participated. One could infer that Mr. Juneau gratuitously included that assertion because he thought he could get away with it; he likely assumed that his billing records would not be released under the Louisiana Public Records Act and thus that his assertion could not easily be challenged.

In sum, Mr. Juneau's record of providing misleading information regarding the nature of his former legal work—both in his sworn statement to Special Master Freeh and in his district court opposition brief—considerably strengthens the case for his removal. A reasonable observer is far more likely to question Mr. Juneau's

partiality in light of that record; an impartial decision-maker would have fully and accurately disclosed his former, potentially-conflicting representations.

### **III. BP's MOTION TO REMOVE ADMINISTRATOR JUNEAU IS TIMELY**

The district court also denied the motion to remove (as well as the motion to supplement evidence) on grounds of untimeliness. The court stated that BP knew, at the time of Mr. Juneau's March 2012 appointment as Claims Administrator (30 months before filing its motion), that Mr. Juneau had previously been retained by Louisiana to perform "consulting work" in connection with the GCCF. Order at 1-2. The court held that a party forfeits its right to seek disqualification of a judicial officer unless it files its motion "at the earliest moment that a party has knowledge of facts that *might* cause disqualification." *Id.* at 2 (emphasis added).

The district court's untimeliness ruling misconstrued both the law and the facts. First, knowledge of facts that *might* warrant disqualification has never been deemed sufficient to trigger a party's duty to seek disqualification "at the earliest moment." Rather, case law establishes that the clock does not start running until the moving party is aware of "the circumstances upon which he bases his motion to disqualify." *United States v. York*, 888 F.2d 1050, 1056 (5th Cir. 1989). Nor do courts raise untimeliness bars when a party, although unaware of disqualifying

circumstances, could have discovered those circumstances by means of more diligent investigation. As one federal appeals court has explained, imposing on the moving party the burden of uncovering disqualifying information in an expeditious manner:

[D]oes not further the purposes of § 455(a), which mandates, at a minimum, the appearance of neutrality and impartiality in the administration of justice. . . . In the recusal context, we are satisfied that if there is to be a burden of disclosure, that burden is to be placed on the judge to disclose possible grounds for disqualification. . . . [T]he judge is in the best position to know the circumstances supporting a recusal motion.

*In re Kensington*, 368 F.3d at 313-14.

The district court's order denying the motion to remove included virtually no discussion of BP's factual claims; it simply stated in a conclusory manner, "It is beyond cavil that BP had *actual* knowledge of Mr. Juneau's previous consulting work on behalf of the State of Louisiana." Order at 1-2 (emphasis in original).

The district court was correct: Mr. Juneau told BP officials that he had performed "consulting work" for Louisiana in connection with the GCCF. But, as the district court itself apparently conceded, knowledge of such consulting work is not equivalent to being on notice that Mr. Juneau was performing legal work directly adverse to BP's interests and directly related to the work he currently performs as Claims Administrator. The record is uncontradicted that BP did not become aware

of the nature of Mr. Juneau’s GCCF consulting work until July 2014, and did not become aware until after filing its motion to remove (through its acquisition of Mr. Juneau’s legal bills submitted to Louisiana) that Mr. Juneau played an active role in researching and drafting pleadings filed by Louisiana against BP in the MDL proceedings. Given that record, the district court’s untimeliness finding is clearly erroneous.

The district court cited two grounds for denying the October 29 motion to supplement evidence: (1) it contended that “[t]here is no reason why BP could not have obtained its ‘new’ evidence before filing its Motion to Remove the Claims Administrator”; and (2) it concluded that the new evidence “d[id] nothing to change the essential facts” set forth in the motion to remove. Order at 4.

By blaming BP for failing to uncover Mr. Juneau’s billing records at an earlier occasion, the district court improperly reversed the burden of proof. As explained in *Kensington*, § 455 imposed the burden on Mr. Juneau to fully disclose the nature of his potentially conflicting representation of Louisiana. Moreover, the court’s assertion that the new evidence did nothing to change the essential facts is clearly erroneous: the evidence demonstrated for the first time that Mr. Juneau had litigated claims against BP in the MDL—in direct contradiction of claims made by Mr. Juneau in his opposition brief and of a factual finding made by the district

judge in his order denying the motion to remove.

Finally, the district court erred in concluding that § 455 imposes a strict time deadline on the filing of disqualification motions. Rather, the elapsed time between the discovery of disqualifying evidence and the filing of a motion to disqualify is but one factor in determining whether a party should be deemed to have forfeited its right to assert bias claims. *Kensington*, 368 F.3d at 316 (stating that “timeliness is just one factor—albeit a significant one—which engages our discretion in determining” disqualification issues); *York*, 888 F.2d at 1055. This Court explained in *York* that the § 455 timeliness requirement, by “forcing the parties to raise the disqualification issue at a reasonable time in the litigation,” “prohibits knowing concealment of an ethical issue for strategic purposes.” *Id.* There is no evidence that BP strategically concealed conflict-of-interest evidence while it waited to see whether Mr. Juneau might rule in its favor on some major issue to be decided in 2014. In the absence of such evidence, there is no basis for citing untimeliness as grounds for denying BP’s motion to remove and its motion to supplement evidence.

## CONCLUSION

*Amicus curiae* Washington Legal Foundation respectfully requests that the Court reverse the order of the district court and direct it to remove Patrick Juneau as the Claims Administrator.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I am an attorney for *amicus curiae* Washington Legal Foundation (WLF). Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X5), the word count of the brief is 6,983, not including the certificate of interested parties, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp  
Richard A. Samp

**CERTIFICATE OF SERVICE**

I hereby certify that on December 24, 2014, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court of the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp  
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