

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LOPRESTI, et al., : Docket #
Plaintiff, : 02-CV-6492 (SJ)
: :
- versus - : U.S. Courthouse
: Brooklyn, New York
CITIGROUP, et al., :
Defendant : July 16, 2004
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TRANSCRIPT OF CIVIL CAUSE FOR HEARING ON RECUSAL MOTION
BEFORE THE HONORABLE VIKTOR V. POHORELSKY
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

For the Plaintiff: **Henry M. Grubel, Esq.**

For Citigroup: **David Lender, Esq.**

For Buck Consultants: **David Covey, Esq.**

For Lutheran Medical: **David Schubauer, Esq.**

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1 THE COURT: This is civil action
2 02-CV-6492:
3 LoPresti v. Citigroup, Inc., et al.

4 Would counsel please state their
5 appearances.

6 MR. GRUBEL: Henry Grubel, 37 Prospect
7 Street, Freeport, New York for the plaintiff.

8 MR. LENDER: Good afternoon,
9 your Honor.

10 David Lender from the law firm of
11 Weil, Gotshal & Manges representing Citistreet
12 and Statestreet.

13 MR. COVEY: Good afternoon, Judge.
14 I'm David Covey. I represent Buck
15 Consultants.

16 Someone else here for anybody?

17 No? Okay.

18 THE COURT: All right.

19 This is a hearing scheduled by the
20 Court on the -- oh sorry.

21 MR. SCHUBAUER: My name is David
22 Schubauer and I'm with the law firm of
23 Sichenzie, Ross representing defendants
24 Lutheran Medical Center, Wendy Goldstein,
25 Miles Tucker, William Meyers, Alan Schechter

1 and Howard Smith.

2 THE COURT: Are those all related in
3 some way to Lutheran?

4 MR. SCHUBAUER: I believe so. Yes.

5 MR. LENDER: Your Honor, just so you
6 have everybody. This is Peter Haggeman.

7 THE COURT: And is he an attorney?

8 MR. LENDER: Yes, with Weil, Gotshal.

9 THE COURT: All right.

10 As I was saying, we scheduled this
11 conference -- or a hearing, actually -- I
12 don't know if there's a major difference --
13 but on the plaintiff's motion to disqualify me
14 under, I think, both 28 U.S.C. Section 144 and
15 28 U.S.C. Section 455B.1.

16 It was only today that I learned that
17 upon reviewing the defendant's opposition that
18 Judge Johnson had apparently rejected the
19 motion in some fashion. Mr. Lender, I think
20 it's your papers that I was reading when I saw
21 that. Was that in your papers?

22 MR. LENDER: Your Honor, what I
23 understand is when Mr. Grubel originally filed
24 his motion to disqualify your Honor he did not
25 serve the papers in a bundled set pursuant to

1 Judge Johnson's rules. So Judge Johnson
2 actually rejected their papers originally.

3 In the letter that we sent to you
4 yesterday for whatever reason when the filing
5 was redone, it appears that our opposition was
6 not filed so we wanted to make sure that your
7 Honor had our opposition and we sent that down
8 to your Honor yesterday.

9 But I have a copy of the decision from
10 Judge Johnson right here.

11 THE COURT: Oh, could I see that?

12 MR. LENDER: I'd be happy to hand it
13 up.

14 THE COURT: Thank you. I'll give it
15 back to you.

16 (Pause in proceedings)

17 THE COURT: All right.

18 So, Mr. Grubel, was it subsequently
19 filed in the fashion that Judge Johnson
20 directed?

21 MR. GRUBEL: The reason that it was
22 filed the way it was, your Honor, if I may is
23 that the motion was --

24 THE COURT: Well, please, be good
25 enough to answer my question. I don't need to

1 know the reason why it was done originally.

2 MR. GRUBEL: Sorry, your Honor.

3 THE COURT: The question I asked is
4 Judge Johnson has an order here that says the
5 papers were rejected and he says "it can be
6 submitted according to the Judge's individual
7 rules when it is fully briefed."

8 My only question to you is has the
9 bundle been refiled?

10 MR. GRUBEL: As of this day with
11 affidavit in opposition from attorney Arrechio
12 (phonetic), from Mr. Covey's firm and their
13 having filed electronically their opposition.
14 We also tried it. We had problems with
15 incompatibility between Adobe 4 and Adobe 6.

16 THE COURT: Okay.

17 But you've attempted to do that?

18 MR. GRUBEL: Yes.

19 Everything has now been electronically
20 filed.

21 THE COURT: I'm going to address Mr.
22 Lender.

23 Do you quarrel with that in any way?
24 I mean is it now appropriately submitted?

25 MR. LENDER: Yes, your Honor.

1 As long as your Honor has a copy of
2 our papers, my understanding is that all the
3 papers have now been appropriately filed.

4 THE COURT: Okay.

5 MR. LENDER: So they're fine.

6 THE COURT: All right.

7 Well, let me return this to you.

8 MR. LENDER: Thank you.

9 THE COURT: I'll proceed to hold
10 whatever hearing I'm entitled to hold at this
11 point.

12 Let me confirm with Mr. Grubel, you
13 did not put in any reply papers. Is that
14 right, Mr. Grubel?

15 MR. GRUBEL: No.

16 THE COURT: Okay.

17 You did put --

18 MR. GRUBEL: Yes, your Honor.

19 THE COURT: You put your reply papers
20 in?

21 MR. GRUBEL: Yes.

22 THE COURT: Okay.

23 I don't have a copy of those.

24 MR. GRUBEL: Shall I hand them up?

25 THE COURT: By all means.

1 I presume these were filed so give me
2 whatever courtesy copy you may have.

3 MR. GRUBEL: I just want to show you
4 the stamp that I filed them.

5 THE COURT: Okay. All right.

6 Give me a moment to read this. I
7 should be able to do it quickly.

8 (Pause in proceedings)

9 THE COURT: All right.

10 I invited some discussion or education
11 on the extent to which I am permitted to deal
12 with the matters raised in this motion in
13 light of Mr. Grubel's belief as set forth in a
14 letter submitted to the Court after I
15 scheduled this hearing that my role is
16 circumscribed, that is that it is limited to
17 determining the legal sufficiency of the
18 motion, I suppose -- the legal sufficiency of
19 the submissions and I did get some briefing on
20 that from Mr. Lender or from the Weil firm.

21 So let me ask Mr. Grubel, what is it
22 that you think -- I mean I think the specific
23 language in your letter is that, "It is my
24 understanding of the law that your sole
25 function at this juncture is to pass on the

1 legal sufficiency of plaintiff's affidavit of
2 bias and prejudice that was submitted in
3 support of his motion to disqualify you
4 herein." So what do you mean by "passing on
5 the legal sufficiency?" What do you think
6 that means my role is? Where did you come to
7 that belief? What is it that gives you reason
8 to believe that that's my sole function other
9 than language of Section 144 which I did read
10 but it doesn't say anything about legal
11 sufficiency, so, do you understand my
12 question?

13 MR. GRUBEL: I think I covered that in
14 my papers and there are Supreme Court cases
15 that are cited in there and Second Circuit
16 cases that that's the judge's job.

17 THE COURT: Can you direct me to that
18 in your papers? Which papers are you talking
19 about?

20 MR. GRUBEL: Judge, it's in my reply.

21 THE COURT: Oh, your reply?

22 MR. GRUBEL: Yes, sir.

23 THE COURT: Okay, it's in your reply
24 papers then?

25 MR. GRUBEL: I think so.

1 THE COURT: All right.

2 I'll look at it again.

3 (Pause in proceedings)

4 THE COURT: I don't see any cases
5 cited here.

6 While you're looking for that, let me
7 turn to Mr. Lender and let me ask him what
8 that scope of review is.

9 It seems from your papers --

10 MR. LENDER: The Garafalo case?

11 THE COURT: Yes, the Garafalo case
12 that you agree at least in part that that's
13 what my role is at this point.

14 MR. LENDER: Your role, your Honor,
15 it's stated in the Garafalo case for the
16 eastern district of New York as well as
17 Occhipinti (phonetic) case which I think is
18 from the southern district of New York.

19 You're supposed to inquire, evaluate
20 the legal sufficiency of the affidavit and if
21 your Honor finds that they're insufficient as
22 a matter of law -- and I'm happy to go through
23 why the three allegations asserted are clearly
24 insufficient as a matter of law based on the
25 Second Circuit and eastern district principles

1 -- but if it's legally insufficient, you have
2 a duty not to recuse yourself.

3 THE COURT: Okay.

4 Then can you define what "legally
5 sufficient" means?

6 MR. LENDER: You essentially have to
7 analyze -- if you look at the case law which
8 we cited both in Garafalo and Occhipinti and
9 there's also a case, Ullo LoFendi (phonetic)
10 which is going to be the eastern district of
11 New York but they all basically say the same
12 thing.

13 The standard is whether a reasonable
14 person, knowing all the facts, would conclude
15 that the trial judge's impartiality could
16 reasonably be questioned and the cases are
17 also clear that where the grounds for recusal
18 do not exist the judge is obligated not to
19 recuse himself and, also, by the way all the
20 courts have said that the burden is very high
21 here and the reason for that is simple and
22 lots of courts have said it -- Occhipinti
23 citing Drexel from the Second Circuit said,
24 "An attorney cannot be allowed to basically
25 pick and choose judges based on making

1 unfounded allegations of bias and partiality."

2 What these courts are all concerned
3 about which, I believe, is exactly what's
4 going on here is that their concern is that
5 judges have to be alert to the possibility
6 that someone is actually questioning your
7 impartiality not because of concerns about
8 impartiality but because of concerns about the
9 fact of how you might rule on the motions that
10 are pending before you and it should be no
11 surprise to your Honor that this motion to
12 recuse you the second time --

13 THE COURT: I wouldn't call the first
14 one a motion.

15 MR. LENDER: Right.

16 But this second request to recuse your
17 Honor a year after our motion for a default
18 judgment hearing when we were here before you
19 was filed in conjunction with a Rule 11 motion
20 filed against me, personally, on the grounds
21 that the position we took in opposition to the
22 default judgment was somehow frivolous and it
23 should be no surprise that these motions were
24 filed actually together because, presumably,
25 they would like to try to somehow erase the

1 comments that your Honor made at the motion
2 for a default judgment hearing.

3 So, really, at the end of the day the
4 cases are very clear; it's whether a
5 reasonable person, knowing all the facts,
6 would conclude that your impartiality can be
7 questioned and they make it very clear the
8 burden is very high. They make it very clear
9 that where there is no impartiality, no
10 reasonable person would believe that -- and I
11 can talk about the cases if you wanted that
12 show that each of the three things they raise
13 clearly don't meet that bar and you have a
14 duty not to recuse yourself.

15 Obviously, you need to be alert to the
16 issues of what was --

17 THE COURT: Okay.

18 While you were speaking, Mr. Grubel
19 did hand up to me -- although it's not in his
20 papers -- what looks to be a printout from
21 some annotations of something. I'm not sure
22 exactly what it is. It says, "United States
23 Code Service" at the top and in it there's an
24 explication of the law under this statute, I
25 believe. Yes. Which says that the Court has

1 to accept the facts stated in the affidavit as
2 a basis for the belief that bias or prejudice
3 exists. Let me read it. This is what it
4 says, "The facts stated in the affidavit as
5 the basis for the belief that bias or
6 prejudice exists must be accepted as true by
7 the judge even though he or she knows the
8 statements to be false. However, the trial
9 judge must at the outset determine whether the
10 facts so stated would constitute legally
11 sufficient grounds for recusal." So that
12 doesn't seem to square with what you just told
13 me that the Court has to look at all the facts
14 known -- I forget the language -- but it
15 suggests a broader scope of review.

16 MR. LENDER: I will read to you from
17 the Occhipinti decision from the southern
18 district of New York, "When considering a
19 recusal motion this district has consistently
20 held that a judge must accept all factual
21 allegations raised in the affidavit as true
22 even she knows them to be false. However,
23 this does not prohibit the Court from
24 inquiring into the legal sufficiency of the
25 affidavit and if the allegations are found

1 insufficient as a matter of law, the judge has
2 a duty not to recuse himself." So it's not
3 just accepting a claim that you're biased.
4 You have to look at what the allegations are
5 and if you walk through the three separate
6 allegations, as a matter of law --

7 THE COURT: So I take the allegations
8 as true.

9 MR. LENDER: Correct.

10 THE COURT: But not the allegation of
11 bias?

12 MR. LENDER: Correct.

13 That's the determination that your
14 Honor --

15 THE COURT: That I get to make. I
16 mean I get to make the determination whether
17 those allegations if true are a basis for
18 recusal.

19 MR. LENDER: Right.

20 Because at the end of the day,
21 otherwise, every recusal motion would be
22 granted because the basis for every recusal
23 motion is that the judge is supposedly biased.
24 So if you have to accept the bias allegation
25 as true, every recusal motion would be granted

1 and that's just not the way it works.

2 You have to accept the facts as true
3 but then taking the facts as true, the facts
4 of this case being that you made comments at a
5 hearing in front of --

6 THE COURT: I don't remember them all
7 offhand but I understand the distinction
8 you're making.

9 Mr. Grubel, I'll give you a chance to
10 respond to that.

11 Do you understand the position that
12 Mr. Lender has taken with respect to my role
13 and do you challenge what he said?

14 MR. GRUBEL: No, what I'm saying is
15 that according to those cases, the Bergat
16 (phonetic) case and I think some other cases
17 which are a higher authority than the Second
18 and the southern district, that the cases
19 cited in what I handed to you, I think, answer
20 the questions that you pose.

21 THE COURT: Okay.

22 Well, I'm not sure I understand but
23 what Mr. Lender has said is I take the facts
24 that are stated in the affidavit to be true
25 and I decide whether those facts, taking them

1 to be true, are a sufficient basis for recusal
2 and that's the determination that I make to
3 determine whether the affidavit is legally
4 sufficient.

5 Do you quarrel with that?

6 MR. GRUBEL: No, I think you have to
7 make the judgment on the case whether it's
8 legally sufficient or not.

9 THE COURT: Okay.

10 MR. GRUBEL: If it is.

11 THE COURT: Got it. All right.

12 MR. GRUBEL: Then you go on from
13 there.

14 THE COURT: All right.

15 MR. GRUBEL: And I think what I handed
16 up to you discusses all these things. If you
17 want, I could give it to you.

18 THE COURT: Well, since they weren't
19 included in your papers it wouldn't be
20 appropriate for me now to consider those
21 without having given Mr. Lender an opportunity
22 to respond.

23 MR. GRUBEL: All right.

24 The Bergat case --

25 THE COURT: The Bergat case merely

1 states the overall proposition which I already
2 quoted from but I don't want to just take a
3 wholesale further submission at this point.

4 I now have a fair understanding of
5 what my role is and I believe actually what
6 counsel both agree my role should be at this
7 point.

8 So, Mr. Grubel, let me ask you to
9 address the argument made by Mr. Lender in
10 his papers that statements made by a judge in
11 legal proceedings about the strength or
12 weakness of a case furnish no basis -- those
13 are not facts to be recognized or to be
14 considered in determining whether a judge is
15 based or not.

16 Is that a fair statement of what your
17 position is, Mr. Lender? I don't want to
18 misstate it.

19 MR. LENDER: Yes, the law is clear.
20 It comes from the Supreme Court of the United
21 States.

22 THE COURT: Okay. I just wanted to
23 get that. So I'll let Mr. Grubel address it.

24 MR. LENDER: It has to be
25 extrajudicial.

1 THE COURT: Extrajudicial.

2 MR. GRUBEL: The reason that we did
3 not make this motion right after the hearing
4 was because we had no extrajudicial basis for
5 making the motion. But as set forth in our
6 papers, we have within the four corners of
7 that just recently learned of your
8 relationship with a member of the Weil,
9 Gotshal & Manges firm. Then as soon as we
10 learned of that, then we made the motion. We
11 did not make the motion based upon your
12 statements. We made the motion because of
13 your relationship with a member of Weil's firm
14 and the fact that in their papers they don't
15 deny what was said in their opposition papers.

16 THE COURT: They don't deny what?

17 MR. GRUBEL: The relationship that you
18 had with Mr. Obermaier or had with Mr.
19 Obermaier.

20 THE COURT: All right.

21 But I take it then that you agree that
22 what I said at the hearing, even though you
23 cite it in your papers, is not something that
24 I take into account and not something that any
25 Court should take into account in deciding

1 whether a motion for a recusal should be
2 granted?

3 MR. GRUBEL: I say that it becomes
4 only part -- I could not have made the motion
5 just based on those statements. I will say
6 that. But now, coupled with your relationship
7 with Mr. Obermaier that we just found out
8 about, we have a basis for the bias and they
9 did not deny that there was the things that we
10 alleged in our papers -- and I don't want to
11 go beyond the four corners of these papers
12 because I don't know how proper that is --
13 anything else. All we know is that it's
14 there. We just don't know what has happened.
15 There was no affidavit from Mr. Obermaier
16 submitted to this Court in opposition to our
17 motion. We did have one from your former
18 legal intern, Ms. Arrechio.

19 MR. LENDER: From my firm.

20 MR. GRUBEL: Right.

21 That was submitted but we have nothing
22 from Mr. Obermaier denying what we were
23 talking about.

24 THE COURT: Okay.

25 Well, now, let me ask you why the

1 previous employment relationship had with Mr.
2 Obermaier during the period of time from 1984
3 to 1991, why that relationship is a legally
4 sufficient basis for recusal?

5 MR. GRUBEL: Well, first of all, Mr.
6 Obermaier didn't come on board there as far as
7 I know until 1989. You were at the office
8 from 1984 on.

9 THE COURT: That's right.

10 So I presume that that pre-1989 period
11 has no effect?

12 MR. GRUBEL: Right.

13 THE COURT: Okay.

14 MR. GRUBEL: Except as to Mr. Morvillo
15 as a partner, any deals that, you know, was
16 going on where he was representing people but
17 that's got nothing to do with anything.

18 THE COURT: Okay.

19 MR. GRUBEL: When he came on board in
20 1989 from what I can --

21 THE COURT: I'm just going to take
22 your allegations as truth but by your
23 allegation, even taken at its broadest, the
24 broadest it would suggest is that from 1984 to
25 1991 I was employed in the U.S. Attorney's

1 Office and it's a matter of record that he was
2 not the United States Attorney in 1984 and he
3 didn't become United States Attorney until
4 1989.

5 But in any event, why is that
6 relationship a legally sufficient basis for
7 recusal?

8 MR. GRUBEL: It has the appearance --
9 appearance, that's all it is -- of impropriety
10 when coupled with the remarks that you made at
11 the hearing that was held a year ago. There
12 was no basis in my mind for what you were
13 saying because you were going to conduct a
14 hearing on an issue and you came into that
15 hearing room with the issue resolved in your
16 mind. It wasn't like you were on a fact-
17 finding mission and you called a hearing but
18 you didn't hold a hearing.

19 THE COURT: Okay.

20 MR. GRUBEL: And I --

21 THE COURT: I presume that --

22 MR. GRUBEL: May I continue?

23 THE COURT: Yes.

24 MR. GRUBEL: I can't inquire -- I
25 can't even hold a hearing on this. I don't

1 want to. I don't want to have a hall of
2 mirrors calling in people in this court, Mr.
3 Obermaier, to find out the truth or the not
4 truth, or whether there was any influence.
5 All I do know now is it wasn't denied. When I
6 say it wasn't denied --

7 THE COURT: What wasn't denied?

8 MR. GRUBEL: The thing that wasn't
9 denied was that there was a relationship with
10 Mr. Obermaier and the Court -- yourself --
11 that --

12 THE COURT: In the past.

13 MR. GRUBEL: That had an impact
14 currently on what's going on. You were the
15 deputy chief in charge of the criminal
16 division under Mr. Obermaier. You ascended to
17 that role when he came into office and I have
18 no idea -- I don't think it would be
19 appropriate to dig into this. I think that on
20 the surface that when you blend all this
21 together it comes to bias and prejudice. That
22 requires you to --

23 THE COURT: Okay.

24 Then I presume that your -- well, I
25 shouldn't presume anything.

1 inferences from the fact that there was a
2 prior relationship that there is somehow
3 something else and that's not actually stated
4 in your affidavit.

5 MR. GRUBEL: How can I state it?

6 THE COURT: That's right.

7 MR. GRUBEL: I can't state that.

8 THE COURT: So you don't have those
9 facts.

10 MR. GRUBEL: We're not like that. We
11 just have facts.

12 THE COURT: Good. No, I think that's
13 right. You shouldn't state a fact that you
14 don't know to be true or at least have a
15 reasonable belief to be true.

16 MR. GRUBEL: Absolutely not.

17 THE COURT: Okay.

18 So, then I must take it that it's your
19 belief that the mere fact that I have had a
20 relationship in an employment context with
21 someone who happens to be employed by a firm
22 that also happens to represent a party in this
23 case -- and for Mr. Moy it's even more distant
24 than that -- that that's a basis for a recusal
25 of the judge?

1 MR. GRUBEL: In this particular case
2 when you blend all the other aspects together,
3 what you said which surprised me, I had no
4 extrajudicial basis for that. I said what's
5 going on here? Then we found out what was
6 going on and the answer is under the total
7 circumstances -- not an isolation -- of the
8 case and the fact that they didn't submit an
9 affidavit in opposition from Mr. Obermaier,
10 yes, you should recuse.

11 THE COURT: Okay.

12 Mr. Lender, I think you've probably
13 dealt with those in your papers but if you
14 want to respond you may and then -- I'm sorry.

15 MR. COVEY: Mr. Covey.

16 THE COURT: Mr. Covey. I did get your
17 name but --

18 MR. LENDER: Just briefly, your Honor.

19 In terms of filing an affidavit
20 denying the allegations and the allegations
21 have to be accepted as true, I'm not sure I
22 even understand what Mr. Grubel's argument is.

23 The fact is they've alleged that you
24 worked at the U.S. Attorney's Office at the
25 same time as Mr. Obermaier and that at some

1 point, 13 years ago, you were a deputy chief
2 below him. Your Honor knows what kind of
3 contacts you've had with Mr. Obermaier over
4 the last ten years and you also know that Mr.
5 Obermaier has never made an appearance in this
6 action at all, he's never filed any papers,
7 never appeared before your Honor and we
8 actually made that clear in our papers. There
9 is no allegation that Mr. Obermaier was
10 somehow connected with this case in any
11 particular way.

12 I would just point out to your Honor,
13 we did cite the Occhipinti case which makes it
14 clear that the status of a law clerk can't
15 support recusal because under the petitioner's
16 argument in that case, essentially there would
17 be 100 people running around saying there were
18 recusals because think about how many law
19 clerks run through judges' offices all the
20 time.

21 There is another case, Ullo LoFendi,
22 which I made a reference to you before and
23 I'll give you the cite. It's 883 F. Supp.
24 885. I didn't look for this case until I got
25 their reply papers --

1 THE COURT: Did you say 883-885?

2 MR. LENDER: 883 F. Supp. 885.

3 THE COURT: Got it.

4 MR. LENDER: The eastern district of
5 New York, 1995. I only looked for that case
6 this morning when I saw the reply papers and
7 realized that now the whole argument seems to
8 center around your prior working relations
9 with Mr. Obermaier.

10 Well, in that case the facts were even
11 more extreme than here. Somebody tried to
12 recuse Judge Gleeson because an attorney for a
13 co-defendant -- an actual attorney in front of
14 the judge -- appearing in front of the judge -
15 - worked at the AUSA at the same time as Judge
16 Gleeson and like Occhipinti, Judge Gleeson
17 made the same point which is, "Wait a minute.
18 If that was a basis for recusal just because
19 we worked in the office together, again, think
20 about how many judges have been assistant U.S.
21 attorneys and think about how many assistant
22 U.S. attorneys are appearing in front of
23 judges all the time. That would mean that
24 hundreds of recusal motions would have to be
25 granted."

1 The fact that you had a prior working
2 relationship is clear as a matter of Second
3 Circuit law cannot form a legal sufficient
4 basis that somebody would reasonable believe,
5 therefore, that there is bias and to be
6 perfectly frank, the idea that somehow that
7 your comments about the motion for a default
8 judgment was somehow based on an influence of
9 a relationship 13 years ago with Mr. Obermaier
10 is almost insulting.

11 I think your comments were clear based
12 on what the merits of that motion was all
13 about.

14 THE COURT: Okay.

15 Mr. Covey, did you want to be heard?
16 I mean you don't have to be but if you wanted
17 to be and then I'll give Mr. Schubauer the
18 opportunity if he wants to be heard.

19 MR. COVEY: I don't understand Mr.
20 Grubel from the comments he's made today about
21 having an issue with Ms. Arrechio being an
22 associate of my office. If for some reason I
23 misheard it or am incorrect, her affidavit, I
24 think, makes it clear that legally -- I'm just
25 thinking about her relationship as a clerk or

1 an intern for you would not be sufficient to
2 permit the relief sought.

3 THE COURT: Okay.

4 Mr. Schubauer, did you want to be
5 heard?

6 MR. SCHUBAUER: I have nothing to add,
7 your Honor.

8 THE COURT: Okay.

9 I'm going to consider the matter and I
10 hope to be able to render a decision in about
11 15 minutes. So if you want to stick around
12 you can. It will be made a matter of record
13 and would be available by transcript if you
14 don't want to stick around. But I intend to
15 rule orally is what I'm saying and I hope to
16 be able to do that in 15 minutes. If I can't
17 for whatever reason, I'll come out and tell
18 you I can't and we'll have to wait for another
19 day on this but until a quarter to four, we're
20 adjourned.

21 Thank you.

22 MR. GRUBEL: Have these proceedings --
23 excuse me -- been on the record?

24 THE COURT: Yes.

25 (Off the record)

1 THE COURT: All right.

2 We're back on the record here in
3 LoPresti v. Citigroup, et al. and the Court is
4 prepared to render a decision on the motion.

5 The motion was made under Title 28
6 U.S.C. Section 144 and Title 28 U.S.C. Section
7 455. Title 28 U.S.C. Section 144 provides,
8 "Whenever a party to any proceeding in a
9 district court makes and files a timely and
10 sufficient affidavit that the judge before
11 whom the matter is pending has a personal bias
12 or prejudice either against him or in favor of
13 any adverse party, such judge shall proceed no
14 further therein but another judge shall be
15 assigned to hear such proceeding. The
16 affidavit shall state the facts and the
17 reasons for the belief that bias or prejudice
18 exists and shall be filed not less than ten
19 days before the beginning of the time at which
20 the proceeding is to be heard or good cause
21 shall be shown for failure to file it within
22 such time. A party may file only one such
23 affidavit in any case. It shall be
24 accompanied by a certificate of counsel of
25 record stating that it is made in good faith."

1 28 U.S.C. Section 455 provides -- and it's a
2 lengthy statute but the specific subsection
3 that the plaintiff is relying on here is
4 Section 455B.1 which provides as follows,
5 "He," referring to a judge, justice,
6 magistrate judge, "shall also disqualify
7 himself in the following circumstances: (1)
8 where he has a personal bias or prejudice
9 concerning a party or personal knowledge of
10 disputed evidentiary facts concerning the
11 proceeding."

12 The judge's role under section -- the
13 judge to whom the motion is directed, that is
14 the judge who is being sought to be
15 disqualified, has a somewhat limited role in
16 the case of a motion made under Section 144.
17 It does not appear that the judge is limited
18 under Section 455B.1. But under Section 144
19 the judge is limited to making a determination
20 whether the facts stated in the affidavit, if
21 true, provide a sufficient basis for recusal.
22 In other words, the judge is to -- and this
23 has been interpreted for me -- take the facts
24 as stated in the affidavit as true even if the
25 judge personally knows that they are not, but

1 to take them as true and determine whether
2 they provide a legally sufficient basis for
3 disqualification and that's the standard that
4 I'll apply with respect to Section 144. It
5 also appears to the Court that there's no
6 material difference between the standards for
7 recusal set out in Section 144 and Section
8 455B.1. That is they both address personal
9 bias or prejudice of the judge so that the
10 inquiry in terms of personal bias and
11 prejudice does not appear to be any different
12 under those two statutes.

13 Taking the limited role of accepting
14 the facts stated in the movant's affidavit
15 here to be true, the Court essentially finds
16 that there are four sets of facts that are
17 alleged in the affidavit as a basis for
18 recusal. The first concerns statements made
19 by this Judge at a hearing conducted
20 approximately a year ago that directed to a
21 motion for a default judgment that had been
22 made by the plaintiff and there are a series
23 of statements alleged in the movant's
24 affidavit that the movant declares -- shows a
25 bias or prejudice.

1 The remaining three factual
2 circumstances concern prior relationships by
3 the Judge with various other individuals who
4 have some connection to parties or to counsel
5 for the parties in this proceeding. The first
6 is my prior relationship with Ping Moy, who is
7 now employed as vice president and general
8 counsel for one of the parties in this case
9 and who, it is asserted, served at the same
10 time as I did as an assistant United States
11 attorney in the United States Attorney's
12 Office for the southern district of New York.
13 Secondly, it's asserted that an associate, now
14 employed by counsel for one of the parties,
15 Maria Arrechio, served as an intern in my
16 chambers at some point in the past. Finally,
17 it's asserted that I served in the United
18 States Attorney's Office during the time that
19 Otto Obermaier served as United States
20 Attorney and, indeed, served as a deputy chief
21 of the criminal division of that office -- the
22 United States Attorney's Office for the
23 southern district of New York -- prior to 1991
24 or up until 1991. Mr. Obermaier is a member
25 now of the firm that represents several of the

1 parties in this action. Mr. Obermaier has not
2 made an appearance in this case personally.

3 Taking the first set of facts, that is
4 the statements made by me at a prior hearing,
5 the Court is guided by a doctrine known as the
6 Extrajudicial Source Doctrine which applies in
7 disqualification motions and that doctrine was
8 examined at some length in a case decided by
9 the Supreme Court, that is Liteky v. United
10 States, 510 U.S. 540, dec'd. 1994 and that
11 opinion in turn was examined at some length by
12 Judge Glasser in the case of Garafalo v.
13 Gravano, 23 F. Supp. 2d 279, dec'd. EDNY 1998.

14 The doctrine states in essence that
15 judicial rulings and judicial statements
16 almost never constitute any valid basis for a
17 motion directed to bias or partiality and
18 quoting from Judge Glasser in the Gravano
19 opinion, "Thus, judicial remarks during the
20 course of the trial that are critical or
21 disapproving of or even hostile to counsel,
22 the parties or their case, ordinarily do not
23 support a basis for a partiality challenge.
24 They may do so if they reveal an opinion that
25 derives from an extrajudicial source and they

1 will do so if they reveal such a high degree
2 of favoritism or antagonism as to make fair
3 judgment impossible."

4 The Court, therefore, has examined the
5 statements alleged to be biased and
6 prejudicial and that are alleged to display
7 bias and prejudice that are cited in the
8 affidavit under those twin inquiries, that is
9 to determine whether they reveal an opinion
10 that derives from an extrajudicial source or
11 whether they reveal such a high degree of
12 favoritism or antagonism as to make fair
13 judgment impossible and the statements which
14 are noted in the motion are found on Page 4 of
15 the plaintiff's affidavit. The Court has
16 reviewed those statements and find that they
17 do not reveal an opinion that derives in any
18 way from an extrajudicial source. The Court
19 also finds that they do not reveal any high
20 degree of favoritism, indeed, don't reveal any
21 favoritism at all towards a party. They
22 reveal, perhaps, some favoritism or antagonism
23 to arguments advanced but the Court determines
24 upon review of that that they do not meet the
25 standard of revealing such a high degree of

1 favoritism or antagonism as to make fair
2 judgment impossible in this case.

3 So for those reasons, the statements
4 that are cited by the plaintiff do not provide
5 a valid basis for a bias or a partiality
6 motion.

7 The remaining facts; the prior
8 relationship of this Judge with persons who
9 are now in some manner associated with parties
10 or counsel for parties in this action simply
11 are insufficient in any -- they're totally
12 insufficient to satisfy the standards of
13 showing bias or prejudice. The facts alleged
14 only show that the Judge here as at some point
15 in the past had contact in an employment
16 setting with persons who are not even
17 appearing personally before the Court in this
18 case. The Court has found absolutely no
19 decision anywhere, nor has any decision been
20 cited to the Court where such a relationship
21 as set forth in the affidavit provided a basis
22 for disqualification of a judge and, of
23 course, the language in the Occhipinti case
24 which was cited by one of the defendants here;
25 this is United States v. Occhipinti, 851 F.

1 Supp. 523 at 527, just explains why such
2 relationships couldn't possibly provide a
3 valid basis for disqualification. I mean
4 judges come into contact inevitably in a
5 variety of ways with people over the course of
6 their careers in a variety of employment
7 circumstances and for those kinds of contacts
8 to provide a basis for recusal would mean the
9 judges would have to recuse virtually -- I
10 mean in literally hundreds and, perhaps,
11 thousands of cases. So the Court is
12 absolutely convinced that the relationships
13 cited by the plaintiff here are not a valid
14 basis for disqualification.

15 Plaintiff has also argued that taken
16 together, the relationships plus the
17 statements, provide a basis for
18 disqualification. Again, I've considered that
19 and I don't find that argument at all
20 persuasive, particularly in light of the
21 distance and time that separate the Court from
22 the relationships that are alleged and the
23 nature of the statements that are cited by the
24 plaintiff.

25 I do want to close by saying and

1 restating what the Court stated the first time
2 the Court was asked to consider disqualifying
3 itself in this matter and it's a statement
4 that comes out of Second Circuit decisions and
5 it has been cited by other courts as well and
6 that is that a judge is as much obligated not
7 to recuse himself when it is not called for as
8 he is obligated to when he is.

9 The facts alleged in the plaintiff's
10 affidavit, even taking them to be true,
11 provide no basis on which an objective
12 disinterested observer could entertain
13 significant doubt or any substantial doubt
14 that justice cannot be done in this case.

15 In these circumstances, this Court is
16 obligated not to recuse itself.

17 So that's the ruling of the Court and
18 it's on the record. A transcript of the
19 proceeding can be obtained through my clerk or
20 through the clerk's office and it's an
21 appealable order, obviously, although there
22 are time limits, I believe, that attach to it.
23 Appealable to Judge Johnson is what I mean.

24 Is there any other matter I need to
25 address before we adjourn?

1 MR. LENDER: Nothing for us, your
2 Honor.

3 Thank you.

4 MR. GRUBEL: We have no questions.

5 THE COURT: All right.

6 So we are adjourned.

7 Thank you.

8 (Matter concluded)

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C E R T I F I C A T E

I, ROSALIE LOMBARDI, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 19th day of July, 2004.

Rosalie Lombardi

Rosalie Lombardi
Transcription Plus II

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
CARMINE A. LOPRESTI, et al.,

Plaintiffs,

- v -

CITIGROUP, INC., et al.,

Defendants.
-----x

MEMORANDUM

CV-02-6492 (SJ)(VVP)

On July 16, 2004, in a decision delivered orally from the bench, I denied the plaintiff's motion to disqualify me. The motion was based in part on prior work-related relationships I had with three attorneys who are in some way connected either to one of the defendants in this action or to law firms that represent defendants in this action. For the reasons stated on the record the facts stated in the plaintiff's concerning my prior relationships with those attorneys were insufficient to warrant disqualification under the applicable statutes.

In an effort to alleviate the plaintiff's concern about my relationships with the attorneys identified in the plaintiff's motion, it may be helpful if the following additional facts are stated on the record. First, I have had no contact of any kind, directly or indirectly, with any of those attorneys concerning this case. In addition, as previously stated, I do not remember the last contact of any kind with Ping Moy, and indeed I was unaware that he was employed by one of the parties in this action until the plaintiff brought that fact to my attention. As for Otto Obermaier, I have had no contact of any kind with him, personal or professional, for at least ten years. Finally, as for Ms. Orrechio, my contact with her when she served as an intern in my chambers six years ago was limited, and I do not recall having had any contact with her since. As with Mr. Moy, I was unaware that she was employed as an associate by the firm that has appeared in this action until that fact was brought to my attention by the plaintiff.

In the circumstances, I can say with complete conviction that my prior relationships with those attorneys has not, and will not, affect my judgment in this action in any way.

/S/ VVP
VIKTOR V. POHORELSKY
United States Magistrate Judge

Dated: Brooklyn, New York
July 22, 2004