

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-80160- CIV- RYSKAMP/VITUNAC

MICHAEL GUTTENTAG, on his own behalf and  
others similarly situated,

Plaintiff,

v.

ABERCROMBIE & FITCH STORES, INC., a foreign  
Corporation,

Defendant.

---

**PLAINTIFF, MICHAEL GUTTENTAG'S,**  
**MOTION FOR JUDICIAL DISQUALIFICATION AND/OR RECUSAL;**  
**MOTION TO HAVE INSTANT MOTION REFERRED TO CHIEF JUDGE MORENO;**  
**MOTION FOR STAY PENDING RESOLUTION OF DISQUALIFICATION/RECUSAL;**  
**AND REQUEST FOR EXPEDITED RULING**

Plaintiff, MICHAEL GUTTENTAG, by and through his undersigned counsel and pursuant to the Federal Rules of Civil Procedure, Local Rules for the Southern District of Florida, and 28 U.S.C. §144 and 28 U.S.C. § 455, requests the entry of an Order disqualifying and/or recusing the district judge assigned to this case, the Honorable Kenneth L. Ryskamp. In addition, Plaintiff requests the entry of an Order referring the portion of this Motion arising under § 455 to the Chief Judge of the Southern District of Florida, the Honorable Federico Moreno, for consideration. Plaintiff also requests that the case be stayed pending resolution of this Motion. Lastly, Plaintiff requests an expedited Order on this Motion. In support of the Motion, Plaintiff states:

1. This is a recently-filed action for overtime wages brought pursuant to the Fair Labor Standards Act ("FLSA"). D.E. 1. Plaintiff and the other similarly situated

employees assert that Defendant forced them to work off-the-clock, without compensation, by requiring them to punch-out on the timekeeping system and continue to keep working, thereby resulting in Defendant failing to pay Plaintiff and the similarly situated employees for all of their hours, including overtime hours, worked. D.E. 1.

2. Plaintiff respectfully requests that the district judge assigned to this case, Honorable Kenneth L. Ryskamp, disqualify and/or recuse himself pursuant to 28 U.S.C. § 455(a) or 28 U.S.C. § 144, because statements made by Judge Ryskamp lead to the inexorable conclusion: that he has an apparent or actual bias or prejudice against Plaintiff's counsel and Plaintiff. The apparent or actual bias or prejudice shown by Judge Ryskamp against Plaintiff's counsel and Plaintiff's FLSA claim creates appropriate grounds for disqualification and/or recusal.
3. As set forth in detail below, under the circumstances, Judge Ryskamp should disqualify and/or recuse himself, regardless of whether an actual personal bias or prejudice exists, as it is clear that his "impartiality might reasonably be questioned." 28 U.S.C. §455(a).
4. In the alternative, Plaintiff respectfully moves for the disqualification and/or recusal of Judge Ryskamp under 28 U.S.C. §144 based upon the personal bias and prejudice demonstrated against Plaintiff's counsel and Plaintiff. Therefore, disqualification and/or recusal pursuant to 28 U.S.C. §144 is mandatory. Plaintiff submits the affidavit of Michael Guttentag attached as Exhibit 1 in support of its request for the disqualification and/or recusal of Judge Ryskamp pursuant to 28 U.S.C. §144.

5. In addition, Plaintiff requests that the Motion, pursuant to 28 U.S.C. § 455 be referred to the Chief Judge of the Southern District of Florida, Honorable Federico Moreno, or such other judge designated for such purpose in the District.
6. Further, Plaintiff requests that this action be stayed pending a ruling on this Motion.
7. Finally, Plaintiff requests an expedited Order on this Motion.
8. Pursuant to Local Rule 7.1, counsel for Plaintiff has conferred for counsel for Defendant concerning the issues raised by this Motion. Plaintiff represents that Defendant opposes the relief sought herein.

WHEREFORE, Plaintiff, MICHAEL GUTTENTAG, requests the entry of an Order disqualifying and/or recusing Honorable Kenneth L. Ryskamp from this case, referring the Motion pursuant to 28 U.S.C. § 455 be referred to the Chief Judge of the Southern District of Florida, Honorable Federico Moreno, and staying this action pending the rulings on this Motion. Plaintiff also requests an expedited Order on this Motion.

## **MEMORANDUM OF LAW**

### **I. INTRODUCTION**

"Canon 2 [of the Code of Conduct for United States Judges] tells judges to 'avoid impropriety and the appearance of impropriety in all activities,' on the bench and off." Dinkins v. Leavitt, 2008 U.S. App. Lexis 22847, \*14 (11<sup>th</sup> Cir. 2008) (citations omitted). The Code of Conduct for United States Judges and case law make clear that judges should avoid even the appearance of impropriety. U.S. v. South Florida Water Management District, 290 F.Supp. 2d 1356, 1358 (S.D. Fla. 2003).

"The guarantee to the defendant of a totally fair and impartial tribunal, and the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." U.S. v. Alabama, 828 F. 2d 1532, 1539 (11<sup>th</sup> Cir. 1987). To ensure that the courts remain above reproach, the Congress passed statutory provisions governing the disqualification of federal judges. The relevant statutes are 28 U.S.C. §§ 144 and 455.

## **II. GOVERNING STATUTES**

### **A. 28 U.S.C. § 455**

28 U.S.C. § 455 provides, in pertinent part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding

...

Regarding subsection (a) of §455, the Eleventh Circuit repeatedly has stated:

The test for determining whether a judge's impartiality might reasonably be questioned is an objective one, and requires asking whether a disinterested observer fully informed of the facts would entertain a significant doubt as to the judge's impartiality.

Bivens Gardens Office v. Barnett Banks of Florida, 140 F.3d 898, 912 (11th Cir. 1998) (citing Diversified Numismatics, Inc. v. City of Orlando, 949 F.2d 382, 385 (11th Cir. 1991) and Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988)); see also Christo v. Padgett, 223 F.3d 1324, 1333 (11th Cir. 2000) (citing United States v. Kelly, 888 F.2d 732, 744-45 (11th Cir. 1989)). The intent underlying § 455(a) is "to promote public confidence in the integrity of the judicial process" and "to promote confidence in the judiciary by avoiding even the appearance of

impropriety whenever possible." Liljeberg v. Health Services Corp., 486 U.S. 847, 860 (1988); see also Parker, 855 F.2d at 1523 (quoting Liljeberg, 486 U.S. at 860, 865)).

Moreover, in light of the intent of the statute, disqualification should be granted under § 455(a) where a judge would harbor any doubt concerning whether disqualification is appropriate. Parker, 855 F.2d at 1524 (citing United States v. Alabama, 828 F.2d 1532, 1540 (11th Cir. 1987)). Neither actual partiality, nor knowledge of the disqualifying circumstances on the part of the judge during the affected proceeding, are prerequisites to disqualification under this section. U.S. v. Kelly, 888 F. 2d 732, 744-45 (11<sup>th</sup> Cir. 1989). The standard for recusal under section 455(a) is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." Id. (citing, United States v. Torkington, 874 F.2d 1441, 1446 (11th Cir. 1989) (quoting Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988), cert. denied, 490 U.S. 1066, 109 S. Ct. 2066, 104 L. Ed. 2d 631 (1989))).

Because § 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, the statute **does not give a judge discretion as to whether to recuse himself.** U.S. v. Garruda, 869 F. 2d 1574, 1581 (S.D. Fla. 1994) (citing, 28 U.S.C. § 455(a)). Rather, the statute tells the judge to disqualify himself if the public may perceive him, or his rulings, as being affected. U.S. v. Kelly, 888 F.2d at 744-45. Thus, "a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street." Garruda, 869 F. 2d at 1581 (citations omitted). Section 455(a) requires judges to resolve any doubts they may have as to whether they should hear a case in favor of disqualification. Id.

In United States v. Franco-Guillen, 196 Fed. Appx. 718 (10<sup>th</sup> Cir. 2006), the court found that the district court reversibly erred in failing to recuse itself under § 455. During sentencing, the district court made the following comments:

Oh yeah. Listen, I'm setting this aside. This is going to trial. I will not put up with this from these Hispanics or anybody else, any other defendants. You didn't have any kind of agreement like that with [counsel]. [Counsel] probably may have given you some idea of what he thought your sentence was; but when I took your guilty plea, you told me under oath that you understood that whatever he told you was merely his advice and was not a promise. Now, I'm not putting up with this. I've got another case involving a Hispanic defendant who came in here and told me that he understood what was going on and that everything was fine and now I've got a 2255 from him saying he can't speak English. And he is lying because he told me he could. So this--the plea agreement is set aside. You're going to trial my friend. When can you be ready.

The Tenth Circuit found that that the district court's references to the defendant's ethnicity, especially where those comments seemed to link ethnicity with a propensity to lie, created an appearance of bias sufficient for recusal: "[t]he judge's statements on the record would cause a reasonable person to harbor doubts about his impartiality, without regard to whether the judge actually harbored bias against Franco-Guillen on account of his Hispanic heritage." Id. at 719 (citing, Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) (giving as an example of an appearance of bias requiring recusal when a trial judge in a World War I espionage case allegedly said, "[o]ne must have a very judicial mind, indeed, not [to be] prejudiced against German-Americans" because their "hearts are reeking with disloyalty"))).

Disqualification/recusal under § 455(b) is mandatory because "the potential for conflicts of interest are readily apparent." Brown v. Brock, 169 Fed. Appx. 579, 583 (11<sup>th</sup> Cir. 2006) (citations omitted).

**B. 28 U.S.C. § 144**

Section 144 provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144.

Where a litigant submits a sufficient affidavit and certificate, recusal is **mandatory**; the presiding judge may take no further action in the litigant's case. United States v. Alabama, 828 F.2d at 1540. Moreover, the district court must take as true all of the facts stated in the affidavit. Id.; Berger v. United States, 255 U.S. 22, 36 (1921) ("The section withdraws from the presiding judge a decision upon the truth of the matters alleged."). The alleged facts must "show that the bias is personal, as opposed to judicial, in nature." Id. To warrant disqualification the affidavit "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." Berger, supra at 33-34.

In U.S. v. Townsend, 478 F. 2d 1072 (3d Cir. 1972), the court found that the district court reversibly erred in failing to recuse itself under § 144. In Townsend, the district court stated that the defendant's sentence would be thirty months in prison irrespective of whether a plea would be entered or defendant would be found guilty after trial; that he sentences all selective service violators to thirty months in prison if they are 'good people;' and that he felt a duty to pressure conscientious objectors into submitting to induction and that a uniform thirty months sentence

was the best way to effectuate that policy. Id. at 1073. The Townsend court concluded that these comments demonstrated "fair support to the charge of a 'bent of mind' that may prevent or impede impartiality of judgment" in selective service cases. Id.; see also, U.S. v. Thompson, 483 F. 2d 527 (3d Cir. 1973).

### **III. DISQUALIFICATION/RECUSAL IS MANDATORY IN THE INSTANT CASE**

#### **A. Disqualification/Recusal is Mandatory under §455(a) and (b) (1)**

In the instant case, Plaintiff respectfully submits that Judge Ryskamp's conduct demonstrates, at a minimum, an apparent bias or prejudice against Plaintiff and Plaintiff's counsel, such that disqualification/recusal is mandatory. Judge Ryskamp has made numerous comments which give the appearance of a lack of impartiality, thereby warranting dismissal under § 455. U.S. v. Holland, 655 F. 2d 44 (5<sup>th</sup> Cir. 1981).<sup>1</sup>

Specifically, in Hamm v. TBC Corp., Case No. 07-808-29-CIV-RYSKAMP, Plaintiff's counsel in the instant case represented the Hamm plaintiff in a collective action for overtime wages brought pursuant to the FLSA. The district court in the instant case, Judge Ryskamp, also presided over the Hamm case. In the course of the Hamm proceedings, the district court made comments which, at best, only can be perceived as having an actual or apparent bias or prejudice against Plaintiff's counsel and FLSA plaintiffs in general:

. . . I have had our law clerk check and the Shavitz firm has filed 1,332 cases in the Southern District of Florida since 2000, so we see these things continually, virtually never see them go to trial, I think that I have had one trial with all the cases that have been filed.

In looking at the statistical numbers, they are usually closed within three months of the time they are filed, so what is very clear to me is that most defendants are saying how much is it going to cost me to defend this case and what is the claim and the claim is so small it would cost most to have the lawyers defend it, **so they are basically nuisance type claims that get bought off**, of course the lawyer's

---

<sup>1</sup> In Bonner v. Prichard, 661 F. 2d 1201 (5<sup>th</sup> Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered on or before September 30, 1981.

fees are always – not always, but very often considerably more than the claim itself – and I think this is certainly an area for some Congressional oversight, I think there ought to be written into the statute a provision that a letter demand must be made upon the employer before a lawsuit can be filed because **the way this thing is working is just a lawyer’s retirement bill. . . . this has gotten out of hand, I think we have more of these cases in the Southern District of Florida than there are anyplace else in the country and that’s probably because of the Shavitz law firm.** . . . I think the problem needs to be resolved.

Transcript of Proceedings, Case No. 07-80829-CIV-RYSKAMP, at pp. 28-30 (emphasis added), copy attached to Guttentag Decl. as Exhibit "A."

In addition to the Hamm case, Judge Ryskamp repeatedly has personally challenged the integrity of Plaintiff’s counsel: “Counsel’s reason for filing the motion was solely to increase the dollar amount of his yet to be paid compensation;” “[t]he Court will not allow this litigation to proceed merely for compensation of counsel.” Gathagan v. The Rag Shop/Hollywood, Inc., Case No. 04-80520-CIV-RYSKAMP, D.E. 36, 29.

Based upon these comments, the district court’s impartiality might reasonably be questioned. Like the plaintiffs in Hamm and Gathagan, Plaintiff in the instant case also is represented by the Shavitz Law Group in a collective action for overtime wages brought pursuant to the FLSA. Judge Ryskamp’s comments, particularly in Hamm, demonstrate an apparent, if not actual, bias or prejudice against Plaintiff’s counsel and FLSA plaintiffs. Judge Ryskamp personally accused Plaintiff’s counsel, the Shavitz Law Group, as responsible for the filing of what he considers to be large amounts of “nuisance” claims where employers are “bought off.” See supra. He also disparages Plaintiff’s counsel’s FLSA practice “just a lawyer’s retirement bill.” See supra.

Based upon these comments, a “disinterested observer fully informed of the facts would entertain a significant doubt as to the judge’s impartiality.” See, Bivens, supra. Moreover, while this is not even a close case for disqualification/recusal under § 455(a), any doubts concerning

whether disqualification is appropriate must be resolved in Plaintiff's favor. See, Parker, Garruda, supra. Because Judge Ryskamp's comments would cause the "average person on the street" to "entertain a significant doubt" about Judge Ryskamp's impartiality in the instant case, there is no discretion and disqualification/recusal is mandatory. See, Kelly, Garruda, supra.

Further, Judge Ryskamp's generalized comments on the nature of FLSA claims – that they are nuisance claims where employers are bought off -- are analogous to the comments of the disqualified judge in Franco-Guillen. Judge Ryskamp is pre-judging every FLSA case that comes before him based upon his own biases or prejudices. More disturbing, taken together, the comments regarding the number of cases, the months within which they are closed, along with the alleged nuisance and fee-driven nature, demonstrate Judge Ryskamp's apparent bias or prejudice regarding the merits of any FLSA claim to which he is assigned. Indeed, Judge Ryskamp's comments, like the judge's comments in Franco-Guillen, personally attack the veracity of a party, in this case the Plaintiff, solely based upon matters extraneous to the merits of the claim. Any objective, reasonable person would, under the circumstances, have reason to doubt Judge Ryskamp's impartiality. Accordingly, disqualification is mandated under §455(a).

Judge Ryskamp's comments in Hamm also evince his propensity to step out of his role of an impartial judge, which provides additional grounds for disqualification/recusal. In U.S. v. Whitman, 209 F. 3d 619, 625 (6<sup>th</sup> Cir. 2000), the Sixth Circuit found that the case would be transferred upon remand to a different district judge. The Whitman court based its decision, in part, upon the haranguing of the defendant's counsel by the district court. However, the Whitman court was even more disturbed by the district court's perceived "mission:"

In addition to chastising Whitman's counsel, the district judge also spoke at length about his perceived mission as a federal judge. "I'm not attacking you personally. . . . That's the furthest thing from my mind, but I'm trying to begin the process of educating the bar so that the lawyers, the last bastion of making up their own

mind and doing what they want to do[,] will start to conform their conduct to the rules." "I'm trying to teach people, because I have decided there is not much left in the United States for me to try to do except improve the practice of law . . . ." "I didn't reach this conclusion overnight, it has taken me almost eight years to get to this point where I have resolved as to what the problems are and what we need to start to address . . . ." "The question at the end of the day is have you had a serious intellectual discussion--whether the person listened or not--on issues which would improve the practice of the law, that's all I want to do . . . ."

With all due deference to the district judge, the primary function of a judge is neither to "educate the bar" nor to "improve the practice of the law." Above all else, the mission of a federal judge is to "administer justice without respect to persons, and . . . faithfully and impartially discharge and perform all the duties incumbent upon [him] . . . under the Constitution and laws of the United States." 28 U.S.C. § 453 (judicial oath of office).

In the instant case, Judge Ryskamp similarly assumed a "mission," which is improper in his role as district court judge. Judge Ryskamp called for Congressional oversight, as well stated as his personal belief that there ought to be a pre-filing written demand as a condition precedent to filing an FLSA suit. See supra. All of these suggestions are to ameliorate what Judge Ryskamp referred to as "just a lawyer's retirement bill." See supra. However, Judge Ryskamp's function as an Article III judge is not to legislate or to ameliorate perceived deficiencies in federal law. His "mission" is to "administer justice . . . faithfully and impartially." See, Whitman, supra. Judge Ryskamp's personal disdain for the FLSA as "just a lawyer's retirement bill" demonstrates that he cannot fulfill his mission to faithfully and impartially administer justice to the Plaintiff in the instant case.

For the same reasons disqualification/recusal is mandated under §455(a), it also is mandated under § 455(b)(1), as Judge Ryskamp's comments demonstrate a personal bias or prejudice concerning FLSA plaintiffs. Judge Ryskamp has made the generalized conclusion, without regard to the facts, that the numerous FLSA claims filed in the Southern District of Florida are all nuisance claims which seek to buy off employer as a way of building a

“retirement fund” for attorneys. See supra. Judge Ryskamp’s personal bias or prejudice to FLSA Plaintiffs constitutes mandatory grounds for disqualification/recusal under § 455(b)(1) because "the potential for conflicts of interest are readily apparent." See, Brown, 169 Fed. Appx. at 583.

For all these reasons, Judge Ryskamp’s disqualification/recusal is mandatory under § 455 (a) and (b)(1).<sup>2</sup>

### **B. Disqualification/Recusal is Mandatory under §144**

In the instant case, Plaintiff has filed his own Declaration averring to Judge Ryskamp’s personal bias or prejudice either against him. See, Declaration of Michael Guttentag (“Guttentag Decl.”), attached hereto as Exhibit 1. Guttentag has reviewed portions of the transcript in Hamm. Guttentag Decl. at ¶ 5. Based upon Judge Ryskamp’s comments in Hamm regarding the "nuisance" nature of all FLSA claims, regardless of merit, Guttentag asserts that Judge Ryskamp has a personal prejudice against him as an FLSA plaintiff. Guttentag Decl. at ¶¶ 7-8.

Judge Ryskamp’s comments in Hamm demonstrate that he has pre-judged the case and has an actual bias or prejudice against FLSA cases, much in the same way the judges were biased against selective service cases in Townsend and Thompson. Judge Ryskamp’s comments which attack the merits of all FLSA claim demonstrate “fair support to the charge of a ‘bent of mind’ that may prevent or impede impartiality of judgment.” Townsend, supra. Moreover, the Guttentag Declaration demonstrates that Judge Ryskamp has an actual bias or prejudice against FLSA plaintiffs, given his characterization of FLSA claims as “nuisance” claims of little value

---

<sup>2</sup> While Plaintiff recognized that judicial rulings alone "almost never constitute a valid basis for a bias or partiality motion," they are a valid basis "if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Liteky v. United States, 510 U.S. 540, 551,554-55 (1994). Plaintiff submits that Judge Ryskamp’s ruling – as well as his comments – in Hamm demonstrate that Judge Ryskamp’s animus toward Plaintiff’s counsel and FLSA plaintiffs has risen to the level to satisfy the Liteky standard and for this additional reason, disqualification/recusal is required under § 455.

which “buy off” employers and are “just a lawyer’s retirement bill.” See supra. Based upon these facts, disqualification/recusal is mandatory.

For all these reasons, Judge Ryskamp’s disqualification/recusal is mandatory under §144.

#### **IV. THE MOTION UNDER §455 SHOULD BE TRANSFERRED TO THE CHIEF JUDGE**

A motion under § 455 may be referred to another judge. U.S. v. South Florida Water Management District, 290, F.Supp. 2d at n. 1. In the Southern District of Florida the practice is to refer such motions to the Chief Judge. Id. (citing, United States v. Paan, 915 F. Supp. 376, 377 (S.D. Fla. 1996); United States v. Craig, 853 F. Supp. 1413, 1415 (S.D. Fla. 1994)). It has been the policy of the Southern District of Florida for at least 20 years to refer such or similar motions to the chief judge for consideration. United States v. Craig, 853 F. Supp. 1413, 1415 (S.D. Fla. 1994)). (citing, Huff v. Standard Life Ins. Co., 643 F. Supp. 705, 707 (S.D. Fla. 1986); Lozano v. Maryland Cas. Co., 111 F.R.D. 455, (S.D. Fla. 1986).

Based upon the policy of the Southern District of Florida, Plaintiff requests that the portion of his Motion arising under § 455 be referred to the Chief Judge, the Honorable Federico Moreno.

#### **V. THE PROCEEDINGS IN THIS MATTER SHOULD BE STAYED PENDING RESOLUTION OF THIS MOTION**

District courts enjoy broad discretion to stay proceedings. Bocciolone v. Solowsky, 2008 U.S. Dist. Lexis 59170 (S.D. Fla. 2008). District “courts have inherent power to manage their dockets and stay proceedings.” Roblor Marketing Group Inc. v. GPS Industries Inc., 2008 U.S. Dist. Lexis 10359, \*14 (S.D. Fla. 2008). Stays are appropriate to promote judicial economy. Sosa v. Hames, 2006 U.S. Dist. Lexis 29849, \*2 (S.D. Fla. 2006). Stays are warranted until the

issue of disqualification is resolved. See, Jones v. United States, 2008 U.S. Dist. Lexis 49341 (S.D. Fla. 2008); Hermann v. Gutterguard, 2008 U.S. Dist. Lexis 22786 (N.D. Ga. 2008).

Plaintiff seeks through this Motion to have this matter re-assigned to a different judge based both upon the fact that the district judge's impartiality could reasonably be questioned and based upon the district court's actual personal bias and prejudice against Plaintiff's counsel and Plaintiff. See supra. Hence, it would be inappropriate and a waste of judicial resources to proceed in this matter until the present Motion is decided. Furthermore, both basic fairness and judicial economy<sup>3</sup> would be served by staying this action until the resolution of the instant Motion. See, Jones, Hermann, supra.

For these reasons, Plaintiff requests that a stay of proceedings be entered in this matter pending resolution of this Motion.

#### **VI. THE RULING ON THE INSTANT MOTION SHOULD BE EXPEDITED**

In FLSA collective actions, the statute of limitations continues to run against all potential opt-in plaintiffs until they opt-into the case by filing a consent to join. Grayson v. K Mart Corp, 79 F.3d 1086, 1106 (11<sup>th</sup> Cir. 1986) (construing § 216(b) as embracing principle that "only a written consent to opt-in will toll the statute of limitations on an opt-in plaintiff's cause of action"); Baez v. Ocean One Restaurant Group LLC, 2009 U.S. Dist. Lexis 21240, \*3-4 (S.D. Fla. 2009) (opting in to FLSA action stops the statute of limitations from running against potential members of the collective action). Accordingly, in FLSA cases, employees' claims continue to "die daily" until the plaintiff receives notice and opts into the lawsuit. Hoffman v. Sbarro, Inc., 982 F.Supp. 249, 260 (S.D.N.Y. 1987).

---

<sup>3</sup> Judicial economy would be served because if disqualification or recusal is granted, prior orders of the recused judge may be subject to review or vacation. See, South Florida Water Management District, 290 F.Supp2d at 1361.

Plaintiff filed the instant case as a nationwide collective action. D.E. 1. In order to preserve the claims of the potential Opt-In Plaintiffs, Plaintiff requests the Courts – both the district court to whom the case is assigned, the Honorable Judge Ryskamp, and the Chief Judge, the Honorable Federico Moreno, who has authority to decide the Motion pursuant to §455, see supra – to expedite resolution of the instant Motion.

**VII. CERTIFICATE OF GOOD FAITH**

I certify that, pursuant to 28 U.S.C. §144, the instant motion was brought in good faith.

**/s/ GREGG I. SHAVITZ**

Gregg I. Shavitz (Fla. Bar No. 11398)

Dated: March 27, 2009  
Boca Raton, Florida

Respectfully submitted,

**/s/GREGG I. SHAVITZ**

Gregg I. Shavitz (Fla. Bar No. 11398)

E-mail: [gshavitz@shavitzlaw.com](mailto:gshavitz@shavitzlaw.com)

Hal B. Anderson (Fla. Bar No. 93051)

E-mail: [hal.anderson@shavitzlaw.com](mailto:hal.anderson@shavitzlaw.com)

SHAVITZ LAW GROUP, P.A.

1515 S. Federal Highway, Suite 404

Boca Raton, Florida 33432

Telephone: 561-447-8888

Facsimile: 561-447-8831

Attorneys for the Plaintiff