

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

FILED UNDER SEAL

In re:  
HERBERT S. MONCIER  
BPR NO. 1910

**Respondent's Motion To Reconsider And For Additional  
Findings On Facts Specified by Respondent For  
Disqualification of This Court  
Under 28 U.S.C.A §§ 144 And 455(a)**

Respondent moves the Court Reconsider its Memorandum Order entered February 27, 2009 and received by Respondent on February 29, 2008 to apply and make findings on the facts specified by Respondent for disqualification.<sup>1</sup>

**Memorandum**

28 U.S.C. § 144 provides:

§ 144. Bias or prejudice of judge

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

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<sup>1</sup> Respondent does not seek to re-litigate Respondent's Motion to Disqualify filed February 24, 2008. Respondent moves this Court to address facts and assertions that the Court overlooked in its order of February 27, 2008. Counsel is mindful of a growing doctrine of waiver where a court fails to rule on issues plead and Counsel does not bring to the Court's attention its failure to address an issue or contention. see *United States v. Vonner*, 2008 WL 320773 (6th Cir. February 7, 2008) and *United States v. Bostic*, 371 F.3d 865 (6thCir, 2004).

further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 455(a) provides:

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

At page 3, first full paragraph this Court addressed Respondents motion as "It appears Respondent seeks to disqualify the undersigned based upon the fact that she is a magistrate judge." While it is correct Respondent asserted a magistrate judge does not have jurisdiction to conduct this hearing, Respondent also made factual assertions for disqualification pursuant to 28 U.S.C. §§ 144 and 455(a). This Court did not make findings pertaining to the factual assertions for disqualification.

The Court then at page 3 full paragraph two, observes that "Respondent has made no specific allegation of bias and proceeds to cite cases pertaining to bias. "Bias" is a 28 U.S.C. § 455(b) disqualification. Respondent did not plead 28 U.S.C. § 455(b). Respondent plead and relied on 28 U.S.C. § 455(a).

Further, this Court did not address the provisions of 28 U.S.C. § 144 that also requires

disqualification where there is "prejudice either against him or in favor of any adverse party." Under the facts plead and restated *infra*, this Court must find that its "impartiality might [NOT] be reasonably questioned" because this Court is "prejudiced . . . in favor of" Chief Judge Collier.

Pertaining to 28 U.S.C. § 144 the Court did not address or respond to the specific facts stated by declaration, and which are undisputed, in which this Court's "impartiality might reasonably be questioned."

Respondent restates the specific facts upon which the 28 U.S.C. § 144 declaration and 28 U.S.C. § 455(a) disqualification of this Court is requested.

1. Chief Judge Curtis Collier is the Complainant in this case.

2. Chief Judge Collier has stated his opinion in his Show Cause Order on a number of matters and Respondent denies and disputes Judge Collier's opinions.

3. Chief Judge Collier has stated his conclusions in his Show Cause Order on a number of matters and Respondent denies and disputes Judge Collier's conclusions.

4. Chief Judge Collier has limited Respondent to a hearing before this Court to determine whether Chief

Judge Collier's opinions and conclusions are accurate.

5. Chief Judge Collier is an essential witness in the hearing.

6. This Court serves at the pleasure of Chief Judge Collier.

7. This Court is a subordinate court to Chief Judge Collier.

8. Chief Judge Collier is an immediate supervisor of this Court.

9. Chief Judge Collier sits in review of this Court's findings.

10. The "facts" of the prior Orders of Chief Judge Collier in this case limiting the issue to the "accuracy" of Judge Collier's opinions and conclusions; requiring Respondent establish Chief Judge Collier's opinions and conclusions are "inaccurate"; this Court's predetermination that Chief Judge Collier speaks through his Show Cause Order and his mental impressions can not be inquired into; in combination with the "facts" specified as to the relationship between this Court and Chief Judge Collier, constitute 28 U.S.C. § 144 "facts" in which this Court's "impartiality might reasonably be questioned." requiring this Court to disqualify itself pursuant to 28

U.S.C. § 455(a).<sup>2</sup>

Respondent request this Court in making findings address whether this Court would want to be tried by a judge under these facts, or, under the legal terminology, whether an objectively "reasonable" person "might" question this Court's impartiality under these facts.

The issue is not whether this Court under these facts and circumstances believes it can be fair.

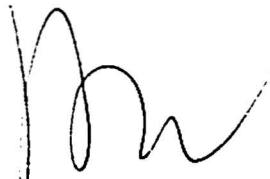
The issue is whether these facts and circumstances are sufficient that this Court's "impartiality might reasonably be questioned."

WHEREFORE, Respondent moves this Court make specific findings as to each specified fact in (1) through (10) *supra*, and, if the Court finds some, or all of those facts, are accurate, Respondent moves this Court make findings pursuant to 28 U.S.C. § 455(a) that the facts found to be accurate are sufficient this Court's "impartiality might reasonably be questioned" and that this Court disqualify itself.

This \_\_\_\_\_ day of March 2008.

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<sup>2</sup> One additional "fact" not specifically plead in the February 24, 2008 Order is whether this Court, at the present time, has an opinion as to the creditability of Chief Judge Collier. This Court does not know Respondent. If this Court has a preexisting opinion as to the creditability of Chief Judge Collier then this Court is disqualified pursuant to 28 U.S.C.A. § 455(b)(1).

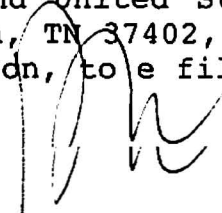


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Respondent

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BPR # 1910

**Certificate**

The undersigned certifies that on March 2, 2008, pursuant to the Court's directive, the foregoing has been served only upon Geneva Ashby, Division Manager, 209 Joel. W. Solomon Federal Building and United States Courthouse, 900 Georgia Avenue, Chattanooga, TN 37402, by United States Mail, with proper postage thereon, to be filed under seal.



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Herbert S. Moncier  
Respondent