

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

UNITED STATES OF AMERICA,	§	
	§	
	§	
v.	§	CAUSE NO.: EP-06-CR-1369FM
	§	
JOHN TRAVIS KETNER, and	§	
ELIZABETH “BETTI” FLORES	§	

**GOVERNMENT’S RESPONSE AND OPPOSITION TO
JOBE’S MOTION TO RECUSE THE HONORABLE FRANK MONTALVO
UNITED STATES DISTRICT JUDGE**

Comes now the United States of America by the United States Attorney for the Western District of Texas and the undersigned Assistant United States Attorney and files this, the Government’s Response and Opposition to Motion to Recuse the Honorable U.S. District Court Judge Frank Montalvo opposing Jobe’s motion¹, and for good cause shows the following.

**I.
JOBE’S MOTION IS BASED ON A HYPOTHETICAL,
AND LACKS STANDING AND RIPENESS**

The only independent authority Jobe cites as a basis for standing is *Travelers Ins. Co. V. Liljeberg Entrs.*, 38 F.3d 1404, 1410 (5th Cir. 1994), which case discusses timeliness of the filing of a recusal request, not standing. The Fifth Circuit explained in *Sample v. Morrison*, 406 f.3d 310, 312 (5th Cir. 2005):

“Article III of the U. S. Constitution limits federal courts’ jurisdiction to “cases” and “controversies.” U.S. Const. Art. III § 2. In order to give meaning to Article III’s case-or-controversy requirement, the courts have developed justiciability doctrines such as **standing** and ripeness doctrines. *United Transp. Union v. Foster*, 205 F.3d

¹Because of the length of the title of Jobe’s motion, the government will refer to it as “Motion to Recuse” herein.

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851, 857 (5th Cir. 2000); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Since **standing** and ripeness are essential components of federal **subject-matter** jurisdiction, the lack of either can be raised at any time by a party or by the court. *Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 348 (5th Cir. 1989); see also *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th cir. 1994). "Ripeness is a justiciability doctrine designed to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties..." *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 807-08, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003) (citation omitted.)²

The *Sample* Court was asked by a convicted federal felon who was incarcerated in the Bureau of Prisons to rule on the manner in which the Bureau of Prisons was calculating his good time credit. The Fifth Circuit in concluding that the Petitioner's claim lacked ripeness and dismissing his appeal for lack of subject matter jurisdiction noted, at p. 312, "... the temporally distant and speculative nature of Sample's claim."

A. Jobe's Motion is "distant and speculative in nature" thus failing to provide subject matter jurisdiction to the Court

By her Motion to Recuse, Movant, Martie Jobe, has asked this Honorable Court to recuse itself from something that does not exist and may never exist. Jobe invokes this Court's ruling in another matter³ as authority for standing to request immediate recusal at a time when no charges are pending against her. On page 5 of Jobe's Motion, the section title claims, "Judge Montalvo **Will Be** a Defense Witness In **Any** Criminal Case Regarding the Class Action Lawsuit **At Issue**" (emphasis added). This title, in and of itself, demonstrates the hypothetical nature of Jobe's claim. The basic

²The bolded emphasis appears in the actual ruling by the Fifth Circuit.

³On page 2 of the recusal motion Jobe seeks standing by claiming her situation is analogous to that of an issue this Court ruled upon regarding multiple representation of targets in one investigation.

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hypothetical premise is that the "class action lawsuit" is "at issue." To date, Jobe has not been charged by complaint, information or indictment with any criminal offense, let alone an offense the basis of which is a class action law suit. Thus, the "class action lawsuit" is not yet (and may never be) "at issue." The next clue in the title regarding the lack of ripeness of Jobe's requested relief is the word "any." Jobe cannot cite to "any" instance in which the "class action lawsuit" has been used in a criminal charge against her. The words "will be" also invoke a hypothetical claim in that there are circumstances, discussed below, in which, even if Jobe were to be charged as she anticipates, the Court could not be called by her to testify in her defense.

B. Jobe's standing is not analogous to that of the three targets in the Disqualification ruling.

Next, Jobe cites this Court's ruling in a matter regarding the disqualification of counsel,⁴ from representing multiple targets in the same investigation as authority for standing in the instant motion. It is not. In that Memorandum, the Court based its jurisdiction to decide the matter on several tenants of law: the Court's supervisory power to regulate lawyers' professional conduct, specifically Texas Disciplinary Rule of Professional Conduct 1.06 adopted federally in the Western District through the Western District of Texas Local Rules, Rule LAT-7(a); and the Court's "anomalous jurisdiction" which this Court explained permits a judge to "entertain the merits of matters arising from federal criminal investigations under its supervision." (Memorandum at p. 24.) The issue here, however, is not only standing based on Jobe's status as a target of a criminal

⁴The government believes Jobe is relying on the Memorandum Opinion and Order Regarding Attorney Stillinger's Motion to Strike and the Government's Motion to Disqualify, numbered as both EP-06-CR1369FM and EP-07-CR-1761FM, and authored by this Court and filed on July 26, 2007. For economy of space, that ruling will be referred to throughout the government's Opposition and Response as the "Memorandum."

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investigation, it is the fact that there is no subject matter on which the court may rule, or refuse to rule, because the proposed harm is futuristic and hypothetical, thus lacks ripeness.

In the Motion to Disqualify and the Court's Memorandum, there was a ripe, tangible issue before the Court. An attorney already represented three individuals whose investigation had the same origin. The attorney who was disqualified had, by her own admission,⁵ accepted funds from all three targets to represent them. The attorney had already provided legal services to all three targets, so much so, she explained to the Court, in her Motion for Clarification, she had already exhausted all fees she received from each target. The government will also aver that said counsel has spoken with and/or exchanged written correspondence with representatives of the U.S. Attorney's office about each of her client's cases. In other words, she was fully engaged in representation of all three targets, which conduct gave rise to the potential for conflict. Texas Rule of Professional Conduct 1.06., adopted federally in this district under Local Court Rule LAT-7(a), and the case law that interprets it, include a prohibition against multiple representation if a potential conflict exists. Since the attorney in the disqualification motion was already engaging in conduct that could lead to conflict, the Court had subject matter jurisdiction, a ripe issue, and standing so that the Court had the obligation to address it.

In the instant Motion to Recuse, however, no engagement of an issue has occurred over which the Court could preside. The mere fact that Jobe attempts to create standing and subject matter jurisdiction by filing a motion is not sufficient to present a claim for determination by the Court since the underlying event, unlike the multiple representations above, has not occurred. That event, of course, would be Jobe being charged with a crime which had as an element her

⁵See Stillinger's Motion for Clarification.

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representation of the "class action lawsuit." Not only has no such charge been instituted, but Jobe has not been informed that she will be charged with such a crime. Not every target of an investigation finds himself or herself under indictment. If, in the Motion to Disqualify upon which Jobe rests her assertion of standing, Ms. Stillinger was simply contemplating representation of three targets of the same investigation, the government would not have had standing (subject matter jurisdiction) to ask the Court for a review of the multiple representation since no attorney-client relationships existed, only the speculative intention to engage in multiple representation.

Moreover, Jobe's protestations that Ketner's plea related to her representation of "the class action lawsuit" cannot be substantiated by her. Jobe is asking this court to recuse itself on a hypothetical scenario, a situation that has not yet occurred and which may not occur.

1. There is no Standing based on the Court's supervisory power to regulate lawyers' professional conduct

Jobe erroneously asserts, in her Motion to Recuse at p. 2., that if the "Court has jurisdiction to disqualify counsel with respect to three unindicted individuals on the basis of its anomalous jurisdiction and supervisory role over this federal criminal investigation, so too does it have the jurisdiction and obligation to examine the recusal issues herein with respect to another unindicted individual." This conclusion is a disjunctive syllogism, illogically assuming that because the government had standing to bring the disqualification matter to the Court's attention and the Court had the jurisdiction to rule on the matter, therefore, Jobe has standing and the Court has jurisdiction to rule regarding the recusal. Jobe evidently believes that her status as a target is what confers standing on the Court. It does not.

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The Court's finding that the government had standing to request a determination of the existence of a conflict in the defense representation of three targets of the same investigation did not derive from the fact that the Court can supervise all matters regarding anything that might happen in the future to a target of an investigation under his supervision. There must first be an actual issue cognizable under law on which the judge can rule, not just a hypothetical fear on the part of a target that they might, someday, get charged with a crime based on a certain fact scenario. Jobe bases her perceived harm on assumptions, not facts. Thus, unlike the standing afforded the government in the disqualification matter, where attorney representation was on-going, Jobe can cite no current on-going activity that gives rise to legal recourse.

2. Jobe's hypothetical does not invoke the Court's anomalous or supervisory jurisdiction

In the Memorandum, the Court cites *Cf. Hunsucker v. Phinney*, 497 F.2d, 32 (5th Cir. 1974) for authority concerning its "anomalous jurisdiction." The concept of "anomalous jurisdiction" is usually discussed where an individual who feels they have been aggrieved by a court authorized search and seizure files a motion for return of the seized property pre-indictment. Rule 41(g) of the Federal Rules of Criminal Procedure provides that a person who believes they have been aggrieved by the seizure of their property pursuant to a court ordered search and seizure warrant, may make a motion for return of that property. While FRCP 41(h) provides the remedy of suppression of a search warrant after formal charges ensue in the court where the trial will occur, in accordance with FRCP 12(b)(3)(C), FRCP 41(g) does not require the existence of criminal charges to request a return of property. *U.S. v. In Re: Search of Law Office, Residence, and Storage Unit Alan Brown*, 341 F.3d 404, 409 (5th Cir. 2003).

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In *In Re: Search of Law Office*, at 409, the Fifth Circuit, once again, discussed the origin of the use of "anomalous jurisdiction" and the *Hunsucker* ruling. Citing *Hunsucker* at p. 32, the *In Re: Search of Law Offices* court, at 409 explained that "the jurisdiction [to order suppression or return of property] prior to indictment exists not by virtue of any statute but rather derives from the inherent authority of the court over those who are its officers."

"This I take to be an elementary principle, depending upon the inherent disciplinary power of any court of record. Attorneys are officers of the court....Thus power to entertain this motion depends on the fact that the party proceeded against is an attorney." *In Re: Search of Law Offices*, quoting *U.S. v. Maresca*, 266 F. 713, 717 (S.D.N.Y. 1920), at 31. *Hunsucker* at p. 34 even extended the court's equitable jurisdiction to law enforcement officers in possession of seized materials. However, the Court in *In Re: Search of Law Offices* at p. 409, citing *Hunsucker* at 32, cautions, "it does not automatically follow that this unique power should be exercised wherever it exists. Rather, such jurisdiction should be exercised with caution and restraint, and subject to equitable principles." In fact, the district court in *Hunsucker* declined to invoke its anomalous jurisdiction stating that the movant's attempt to obtain relief was *premature* and the Fifth Circuit agreed: "But even if the District Court's power over its officers provides a theoretical basis for jurisdiction, in this case, it does not follow that this unique power should be exercised wherever it exists." *Hunsucker* at 34 and 36.(Emphasis added)⁶

Jobe's recusal request, like defendant *Hunsucker's* return of property request, is premature.

⁶The facts herein are distinguishable from the issues in the Memorandum, where the three targets were already represented by counsel. In the instant Motion to Recuse, no proceeding exists wherein the Court could be a witness.

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Even "anomalous jurisdiction" would not recognize an "obligation to examine" the recusal issues raised by Jobe,⁷ much less require a judge to recuse himself, based on the supposition and guesswork of a movant. Additionally, there is no officer before the Court to whom equitable jurisdiction may attach. In the instance of a pre-indictment search warrant, the "officer" before the Court is the government attorney or federal law enforcement officer who authorized or executed the search; in the case of the disqualification issue on which this Court ruled, two officers were before the Court: the government attorney, who is obligated by the Texas Disciplinary Rules to bring the issue to light and the defense counsel, who, having accepted employment from three targets in the same investigation, subjected herself to the Court's obligation to consider the multiple representation matter.⁸ Jobe presents no issue where irreparable harm can be alleged against a government lawyer, nor any issue where a defense attorney may be disqualified for conflict. Jobe cannot artificially create an issue for a recusal where none yet exists by filing a motion.

II. THE SIXTH AMENDMENT DOES NOT CONFER STANDING

On page 2 of her Motion to Recuse, Jobe states: "Martie Jobe has not been charged with a crime in the above-entitled (sic) matter, and is thus "pre-indictment." The case law cited by Jobe substantiates the government's, not Jobe's, position in this regard. Citing *Washington v. Texas*, 388 U.S. 14, 18, 87 S.Ct. 1920, 1923 (1967), Jobe quotes the Supreme Court as saying, among other things, "The right of the *accused* to have compulsory process for obtaining witnesses in his favor

⁷Motion to Recuse at p. 2

⁸By this explanation, the government does not mean to accuse defense counsel of any misconduct regarding the disqualification issue. In fact, counsel for the three targets therein spoke freely with the government and, after thoroughly discussing the issues with the government and her clients, based on her knowledge and understanding of the facts, did not believe she had a conflict. The government recognizes that, as a result of a lengthy investigation, they may be in possession of a great deal more facts than a counsel can illicit from their clients.

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stands on no lesser footing that the other Sixth Amendment rights we have previously held applicable to the States." Motion to Recuse at p. 9. Jobe continues to quote the Supreme Court in *In re Oliver*, 333 U.S. 257, 68: "A person's right to reasonable notice of **a charge against** him, and an opportunity to be heard in his **defense**-a right to his day in court-are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (Emphasis added)

The *Washington* decision does not support Jobe's proposition that this Court should be recused even assuming, *aguedo*, that this Court could be compelled to testify as outlined by Jobe. Simply put, Jobe is not an **accused**. Jobe does not have **a charge against** her. Jobe is not acting in the **defense** of criminal charges. Jobe does not currently have a Sixth Amendment right to call and cross examine witnesses.

The Sixth Amendment to the U.S. Constitution, listed in the United States Code under "Jury trials for crimes, and procedural rights," states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Jobe cites the Memorandum as authority for her standing herein, however, the Court, in the Memorandum, addressed the applicability of Sixth Amendment protections pre-indictment. The Court, citing a great deal of well settled authority, explains that it has no authority to hear the disqualification issue under the Sixth Amendment as it does not attach at the target stage; it does not attach until the individual is officially charged with a crime.

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The right to present witnesses in one's own defense in a criminal trial derives from the Fifth and Fourteenth Amendment's due process guarantee. *Boykins v. Wainwright*, 737 F.2d 1539,1544 (11th Cir. 1984), *U.S. v. Hammond*, 598 F. 2d 1008, 1012 (5th Cir. 1979). In *Hammond*, at 1012, the Fifth Circuit relied on the Supreme Court decision in *Washington v. Texas* (cited by Jobe above), holding that the right of a defendant to present witnesses in their defense was so fundamental to *a fair trial* that it was incorporated in the Due Process Clause of the Fourteenth Amendment. (Emphasis added) Noting that since the *Washington* decision, cases dealing with a defendant's right to call witnesses to establish a defense forbore from referencing the Sixth Amendment in favor of discussing the right as based in due process, the *Hammond* Court "will likewise refer to this right as a due process right." *Hammond* at 1012. Jobe's assertions are merely speculative and do not invoke the above discussed Constitutional protections.

On page 11 of her Motion to Recuse, Jobe states the following: "***Were*** Martie Jobe ***to be charged*** and ***become a defendant*** in this matter, the only means by which Jobe's Sixth Amendment right to present a material witness in her defense ***would be...***" (Emphasis added) Thus, Jobe properly states the prerequisite criteria required for the attachment of such rights: that she must first be "charged and become a defendant."

Additionally, Jobe assumes that, should she be charged as she anticipates, the Sixth Amendment confers the right for her to call Judge Montalvo as a material witness. Jobe cites one case, *Wilson v. Lash*, 457 F.2d 106 (7th Cir. 1972) as authority that "[F]ederal courts allow the testimony of judges in the criminal cases where constitutional rights surrounding life and liberty are met." Motion to Recuse at p.9. A complete reading of the case also fails to reveal such a legal holding.

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Judges are assumed to be persons of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. *U.S. v. Dowdy*, 440 F.Supp. 894,896 (W.D.Va. 1977), citing *U.S. v. Morgan*, 313 U.S. 409, 421 (1941)(*Morgan IV*).⁹ The courts have traditionally compared the integrity of the decision making process by an administrative agency to that of a judge: "The integrity of the administrative process was deemed to merit the same respect as the integrity of the judicial process. Thus it is no more the function of a court to probe the mental processes of an administrative adjudicator than to subject a judge to scrutiny." *Feller v. Board of Education*, 583 F.Supp. 1526 (D. Connecticut 1984) citing *Fayerweather v. Ritch*, 195 U.S. 276, 306-07 (1904).

Absent extreme and extraordinary circumstances, courts have refused to issue subpoenas for oral testimony of decision makers as to the basis of their opinions. *South Terminal Corp. V. EPA*, 504 F.2d 646 (1st Cir. 1974), *KFC Nat'l Mfg. Corp. v NLRB*, 497 F.2d 298 (2nd Cir. 1974). To show extraordinary circumstances a presumption as to the regularity of the acts of public officials must first be overcome. *Dowdy* at 896 citing *Beverly v. U.S.*, 468 F.2d 732, 743 (5th Cir. 1972). Just as a judge cannot be subject to the probing of his or her mental processes that resulted in a decision, courts have held that the same is true for integrity of the administration process. *KFC* at 304. In ruling that the Secretary of an administrative agency should never have been subjected, by the court below, to examination regarding his mental process in reaching a decision, the *KFC* Court relied on the Supreme Court, in *U. S. V. Morgan*, 304 U.S. 1, 18, stating, "Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary.' Before delving

⁹There are four *Morgan* decisions recorded. See the entire *KFC* opinion for a discussion of the "*Morgan* quartet."

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into the mental processes of the judge, there must first be a *prima facie* showing of impropriety in rendering the decision. *Feller* at 1528, referencing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).

Movant Jobe does not make a *prima facie* case for an improper ruling by Judge Montalvo in the "class action lawsuit." To the contrary, she never questions this Court's integrity. In fact, it is because Jobe views this Court as "fair and reasonable"¹⁰ that she wishes to call him as a witness. Contrary to recusal motions which seek to disqualify a judge based on the fact that a judge has a bias or prejudice against or in favor of a party, subject matter or litigator, Jobe seeks to recuse this Court because this Court was so fair and just in approving a settlement in state court that she would desire his testimony on her behalf in a trial on charges that do not exist.

The government located two cases, although not factually analogous to the instant question, which may provide some guidance regarding the Court's responsibility to recuse itself when the premise for recusal is speculative, *Cheney v. U.S. District Court for the District of Columbia*, 541 U.S. 913, 915 (2004); or when the premise for recusal is frivolous, *Maier v. Orr*, 758 F.2d 1578, 1583 (1985). The *Cheney* case is one of many which find that information in a newspaper is not a predicate for recusal since newspaper reports are not actual facts on which the appearance of impartiality can be based. "The motion attaches as exhibits the press editorials on which it relies. Many of them do not even have the facts right." "A judge should not recuse himself on unsupported, irrational, or highly tenuous speculation." *Hinman v. Rogers*, 831 F.2d 937, 939(10th Cir. 1987), *In re United States*, 666 F.2d 690, 694(1st Cir. 1981). Since this Court is in no way privy to the government's future charging decisions, the Court does not have sufficient information on which

¹⁰Motion to Recuse, p. 6

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to base a recusal decision. However, since Jobe has acknowledged this Court's integrity¹¹, she should be confident this Court possesses the proper ability and ethics to recognize the need for recusal at the appropriate time, if ever.

Applying these decisions to Jobe's Motion to Recuse results in a denial of her requested relief. First, she has neither a Sixth Amendment right to compel witnesses in her defense nor a Fourteenth Amendment due process right to compel witnesses at trial, until there is a trial. Such rights do not attach unless and until she is formally charged.

III. CONCLUSION

Whereas, premises considered, the government requests this Honorable Court to deny standing of Jobe's Motion to Recuse based on the lack of subject matter jurisdiction, the lack of ripeness and the clearly speculative nature of her grounds for standing. Additionally, Jobe's reliance on the Sixth Amendment of the Constitution of the United States for standing is misplaced as she is not a defendant who has been charged with a criminal offense. Should this Court deem standing appropriate, however, the government requests this Court deny Jobe's Motion to Recuse as her claim

¹¹See Jobe Motion to Recuse p. 14 stating that Judge Montalvo's examination of the "class action law suit was "above reproach."

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that this Court will be a witness is speculative and a legal impossibility as this Court cannot be compelled to testify regarding the mental process by which he arrived at a result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of August, 2007, a true and correct copy of the Government's Response and Opposition to Jobe's Motion to Recuse was sent, via facsimile to (915) 532-0904, to Leon Schydlower, counsel for Martie Jobe.

/S/

Debra P. Kanof

Assistant U.S. Attorney

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

UNITED STATES OF AMERICA,

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SEALED

Plaintiff,

CAUSE NO.: EP-06-CR-1369FM

v.

**JOHN TRAVIS KETNER, and
ELIZABETH ‘BETTI’ FLORES**

ORDER

On this the date, came on the be considered Martie Jobe’s Motion to Recuse the Honorable Frank Montalvo as to Allow Him to Testify as a Defense Witness Regarding the Settlement of the Class Action Lawsuit at Issue and to Preserve this Court’s Appearance of Impartiality and the Government’s Response and Opposition to Jobe’s Motion to Recuse United States District Court Honorable Frank Montalvo.

Finding that Jobe’s Motion is lacking in standing; fails to invoke subject matter jurisdiction; lacks ripeness, and is based on speculation with no actual facts on which to base a recusal, the Court finds that the motion should be DENIED and it is so ORDERED.

Signed this the _____ day of _____, 2007.

FRANK MONTALVO
United States District Judge