IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.,	:	CIVIL ACTION NO. 05-5368
Plaintiffs,	:	
v.	:	
ARNOLD LINCOW, ET AL.,	:	
Defendants.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. FEBRUARY 8, 2007

Presently before the Court is an affidavit and motion filed by Defendants Arnold Lincow, D.O., and 7622 Medical Center, P.C. (collectively, Dr. Lincow) seeking the presiding judge's recusal from this case (doc. no. 155). Dr. Lincow alleges that the presiding judge is biased or prejudiced against Dr. Lincow and/or that the presiding judge's actions and comments, in this case and an earlier case, demonstrate at least an appearance of impropriety sufficient to warrant the presiding judge's recusal.

Plaintiffs State Farm Mutual Automobile Insurance Co. and State Farm Fire and Casualty Co. (collectively, State Farm) oppose the motion to recuse (doc. no. 160). None of Dr. Lincow's co-Defendants has filed its own motion to recuse or has supported

Dr. Lincow's motion.

For the reasons that follow, Dr. Lincow's motion for recusal, evaluated under both recusal statutes--28 U.S.C. § 144 and 28 U.S.C. § 455--will be denied.

I. BACKGROUND

A. Facts of the Case Sub Judice

State Farm initiated this suit on October 13, 2005, against Dr. Lincow, Steven Hirsh, and several other individuals and entities, including doctors, medical offices, medical office administrators, and medical technicians.[1] Mr. Hirsh was allegedly the owner of a pharmacy that did business with the defendant doctors and other medical providers. Dr. Lincow was the owner of, inter alia, 7622 Medical Center, P.C. and other medical facilities at issue.

State Farm alleges that Defendants, through a common scheme, violated the Racketeer Influenced and Corrupt Organizations (RICO) statute by fraudulently submitting to State Farm and other insurance companies bills for medical services of patients. State Farm alleges that the medical services were not actually provided, not provided by a licensed physician, not medically necessary, and/or not reimbursable under Pennsylvania law.

This litigation has been contentious. There are about a

[1] The identities of the other Defendants are not relevant for purposes of this Memorandum.

dozen Defendants. To date, the Court has held six hearings and ruled on about twenty discovery motions; about ten more motions are currently pending. At the request of the parties, the discovery deadline has been extended to March 1, 2007.

On November 21, 2006, Dr. Lincow moved for the presiding judge to recuse himself and filed an affidavit explaining the basis for his motion (doc. no. 155 & ex. 4). The crux of Dr. Lincow's affidavit is that the presiding judge made disparaging remarks about Dr. Lincow during the course of Mr. Hirsh's criminal prosecution, over which the presiding judge also presided.[2] In that case, the Government prosecuted Mr. Hirsh for a violation of the wire fraud statute, 18 U.S.C. § 1343, for filing false insurance claims for medications that were never prescribed.[3] See United States v. Hirsh, Crim. No. 03-58 (E.D. Pa. filed Jan. 29, 2003) (Robreno, J.). The affidavit also alleges that certain comments by the presiding judge in the case sub judice evidence the presiding judge's bias toward Dr. Lincow.[4]

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[2] Mr. Hirsh has neither moved for the presiding judge's recusal nor supported Dr. Lincow's motion.

[3] Mr. Hirsh pled guilty, and the presiding judge sentenced him to one year and one day in custody, three years of supervised release, $750,000 of restitution, and a $100 special assessment.

[4] Dr. Lincow does not allege that any of the presiding judge's decisions are themselves biased against Dr. Lincow. Cf. Litkey v. United States, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or

B. Allegations of Bias and/or Appearance of Impropriety by the Presiding Judge

1. The presiding judge's statements in a prior criminal matter

The Court will recite, in detail, the statements made at Mr. Hirsh's arraignment and sentencing because Dr. Lincow alleges that these statements demonstrate the presiding judge's bias towards Dr. Lincow.

At Mr. Hirsh's arraignment, the Assistant United States Attorney (AUSA) stated the factual basis for Mr. Hirsh's guilty plea:

> The Defendant purchased the pharmacy from the owner, Gary Bruder, in February of 1996 and renamed it Ogontz Pharmacy. While he was there, Defendant and others working at his direction prepared claims for reimbursement for prescription[] medications to insurance companies and health benefit programs including Independence Blue Cross. Those are known as third party payers and are so identified in the information.
>
> The vast majority, approximately 99 percent of the billing for Ogontz Pharmacy was done by computer and would be electronically submitted when the pharmacist or technician entered information to fill a prescription.
>
> The insurers['] prescription plans were administered by claims processors such as Paid Prescriptions LLC, which processed claims for reimbursement on behalf of these health insurers.

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partiality motion."). In fact, as State Farm points out in its submissions, the Court's decisions appear in a number of instances to have been largely favorable to Dr. Lincow.

> Those claims for reimbursement again were electronically submitted by wire at the time that information was entered into the computer to fill a prescription. The claims processors would then pay claims for reimbursement to Ogontz Pharmacy on behalf of the insurers.
>
> Now, Your Honor, beginning in approximately 1996 while the Defendant was employed at Bruder Pharmacy working for Gary Bruder, he entered into a scheme to defraud that was already in progress between and among other individuals including Mr. Bruder and a physician.
>
> The manner in which the scheme operated was that the Defendant and the others would file false insurance claims for medications that were neither prescribed, nor dispensed to patients.
>
> The primary source of prescriptions, Your Honor, that were used in order to facilitate the scheme was the physician who owned the medical practice and the office in which Ogontz Pharmacy was located.
>
> . . . .
>
> In order to compensate the physician who was assisting in this scheme the Defendant paid an inflated monthly rent of $5,000 for the office space in the [physician's] Medical Building which was far in excess of the fair commercial rent for that area.
>
> This scheme was begun when the Defendant was an employee of Mr. Bruder, and he continued the scheme once he purchased the pharmacy from Mr. Bruder.

Hirsh, Trans. of Arraignment (Mar. 14, 2003), at 18-20. Although the identity of the "physician" was not disclosed at the hearing, it is apparently Dr. Lincow.

The following exchange then took place between the presiding judge, defense counsel, and the AUSA:

> THE COURT: How about the physician, is he -- what is the status of his role in this case?

[DEFENSE COUNSEL]: I think I have to differ [sic] to the Government in that, Your Honor.

[AUSA]: Your Honor, I could address that at sidebar, which might be more appropriate to do so.

THE COURT: Okay. Well, at some point, we'll have to address that.

[AUSA]: But, at this point, Your Honor, he's not been charged.

THE COURT: Okay. I address that because I had the decision whether to charge or conduct investigations of course solely with in [sic] the discretion of the prosecution, but I had another case in which a non-physician was charged on an office arrangement type and none of the physicians were charged either.

So, I hope that is not a local practice, although I couldn't do much about it, because that's entirely within your discretion. But it does not look like a fair thing to do if that's the case.

Id. at 22-23. After a Rule 11 colloquy, the presiding judge accepted Mr. Hirsh's guilty plea.

Several months later, the following exchange took place at Mr. Hirsh's sentencing hearing:

THE COURT: Okay, I've had a number of these cases. It seems, frankly, that there -- there is a -- and I have mentioned this before, this is a matter of executive discretion, but physicians are walking away. There seems to be a lack of desire to take the extra step here, for some reason. I -- I don't know, that's entirely up to you, but --

[AUSA]: Well, Your Honor, I could --

THE COURT: And then you -- and you may not know of the other cases, but I have Mr. Levin[5] here, I know, in

[5] This reference should probably be to "Mr. Lindy," Mr. Hirsh's counsel at the hearing.

another matter, where we had some poor schmuck, frankly, taking the brunt for the physician's conduct.

[AUSA]: Well, Your Honor, all I can only represent and, in fact, I -- I am now one of the persons in my office who is designated to investigate and prosecute healthcare fraud. I unfortunately did not have this investigation from the inception, which is not to criticize other assistants in my office, but neither the agent sitting to my left or myself were the persons who began this investigation. Attempts were made, Your Honor, to attempt to incriminate this physician.

THE COURT: Well, I just gave you two piece -- two pieces of evidence --

[AUSA]: Well, but Your -- but --

THE COURT: -- I mean, he was getting the rent and there are two people --

[AUSA]: Well, Your Honor, what we --

THE COURT: -- are saying, that as a purpose of -- of the payments. I mean --

[AUSA]: Well, Your Honor, unfortunately, we only have the testimony of two witnesses, plus I -- you know, certainly, in the government's view is an inflated rent. Whether or not the defense and of course, in the government's view, being able to carry its burden beyond a reasonable doubt that that was the purpose for --

THE COURT: Well, that's a decision you have to make, but I'm just -- I'm just commenting that, from the cases that I've seen, the -- the prosecution seems to end at the water's edge here. And for deterrence purposes, there isn't going to be much deterrence until you get it right to the people without whom the scheme can't work.

[AUSA]: We don't disagree, Your Honor. And there were attempts to make -- and let me just say, Your Honor, that was the reason why there were attempts to make recordings, multiple ones, in the hope to attempt to corroborate the testimony of the witnesses. And, unfortunately, the target was either sufficiently

> cagey, but we were unable to develop recordings that would --

Hirsh, Trans. of Sentencing (Sept. 24, 2003), at 18-20.

Later in the hearing, the presiding judge asked defense counsel whether he would like to add anything for the record:

> [DEFENSE COUNSEL]: Your Honor, I have nothing further. I don't mean to be glib here, but if I were sitting on a jury, I would convict the doctor based on this and this is something that I have been saying to the government for four years now.
>
> THE COURT: Well --
>
> [DEFENSE COUNSEL]: And I don't mean to be glib, I don't mean to be angry, but I am angry, Your Honor.
>
> THE COURT: Mm-hmm.

Id. at 47.

Then, the presiding judge explained his reasons for granting Mr. Hirsh's motion for a downward departure under the Sentencing Guidelines: "He cooperated against the -- the defendant Gary Bruder and also attempted to cooperate against the physician who was apparently receiving some kickbacks in this scheme. The cooperation was significant, according to the government it was reliable and truthful, although inchoate and unsuccessful as to the physician." Id. at 48.

Next, in proposing the sentence, the presiding judge stated:

> As far as the 1,000 pound gorilla, I guess, who would be this unidentified physician, I leave that up to the discretion of the executive authorities to look into that; perhaps even a suggestion that this still may be going on. So, that's something that the Court cannot -- cannot decide, other than to suggest that the

> public interest would be served by examining that situation closely.

Id. at 69-70 (emphasis added). Thereafter, the presiding judge sentenced Mr. Hirsh.

2. The presiding judge's actions in the case sub judice

Dr. Lincow points to two instances of the presiding judge's "hostile behavior" toward Dr. Lincow and his counsel in the case sub judice:

> At oral argument on June 29, 2006, this Court became very agitated and summarily concluded the proceedings by getting up and marching off the bench while Counsel were in mid-sentence. At oral argument on November 29, 2006, this Court was hostile and condescending to my attorney when it asked why he was "wasting" the Court's time with opposition to a second inspection of my medical facilities and further asked whether "he knew what authentication was."

Lincow Aff. ¶ 12.

II. DISCUSSION

Dr. Lincow has not indicated on which of the two recusal statutes--28 U.S.C. § 144 or 28 U.S.C. § 455--his present motion is based. For the sake of completeness, the Court will address the motion under both statutes.

A. Recusal Under 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. An affidavit made pursuant to § 144 does not automatically result in a judge's recusal. The affidavit must be both legally sufficient and procedurally compliant (including the requirement of timeliness) to warrant a judge's disqualification.[6] See Cooney v. Booth, 262 F. Supp. 2d 494, 500 (E.D. Pa. 2003) (Robreno, J.), aff'd sub nom., Cooney ex rel. Cooney v. Booth, 108 Fed. App'x 739 (3d Cir. 2004).

1. Legal sufficiency of the affidavit

All factual allegations contained in an affidavit filed under § 144 must be taken as true, even if the Court knows them

[6] The judge to whom the motion to recuse is directed first determines whether the affidavit is both legally sufficient and procedurally compliant; if so, the motion is then heard by another judge. See § 144(a); In re Kensington Int'l Ltd., 353 F.3d 211, 223 n.12 (3d Cir. 2003). If the affidavit fails one or both of the prongs, the motion to recuse is denied without referral to a different judge.

to be false. Cooney, 262 F. Supp. at 500 (citing United States v. Furst, 886 F.2d 558, 582 (3d Cir. 1989), and United States v. Rankin, 870 F.2d 109, 110 (3d Cir. 1989)). "Conclusory statements and opinions, however, need not be credited." United States v. Vespe, 868 F.2d 1328, 1340 (3d Cir. 1989). "Accepting the facts alleged as true, but not the conclusions, conjecture speculation or surmises, the court must answer whether 'a reasonable person would conclude that a personal bias, as distinguished from a judicial bias, exists.'" Cooney, 262 F. Supp. at 501 (quoting Mims v. Shapp, 541 F.2d 415, 417 (3d Cir. 1976) (alterations omitted)).

Dr. Lincow makes two factual allegations in his affidavit. One is that the presiding judge made disparaging remarks about Dr. Lincow during the Hirsh case. The other is that, in the case sub judice, the presiding judge acted inappropriately and/or made disparaging remarks about Dr. Lincow and/or his counsel.

The Court addresses each of these allegations in turn to determine whether they are legally sufficient to warrant recusal.

a. The presiding judge's statements during the Hirsh case

During the Hirsh case, the presiding judge inquired as to whether the Government would be prosecuting the physician at issue; opined that it would not be "fair" to not prosecute the

physician; expressed his concern that some "poor schmuck" would be "taking the brunt for the physician's conduct"; commented that there would not be "much deterrence until you get it right to the people without whom the scheme can't work," i.e. the physicians; and suggested that the "public interest" would be served if the Government were to investigate and prosecute the physicians.

The Court will also take as true Dr. Lincow's factual allegation that "[t]he Court knows that I am the 'unidentified physician' with whom Mr. Hirsh allegedly conspired." Lincow Aff. ¶ 9.

Thus, the issue is whether these comments by the presiding judge, and the presiding judge's alleged knowledge that the physician in question was Dr. Lincow, are legally sufficient to enable a reasonable person to conclude that the presiding judge has a personal bias against Dr. Lincow in this case. They are not.

The Supreme Court's directions in Liteky v. United States are particularly helpful:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they

> reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

510 U.S. 540, 555 (1994). In addition, the Supreme Court explained the terms "bias and prejudice" in relation to the necessity of a judge's recusal:

> The words connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . [,] or because it is excessive in degree . . . .

Id. at 550 (emphasis in original).

In Litkey, a criminal defendant moved to disqualify a district judge from presiding at his 1991 trial because the judge had presided at the defendant's 1983 criminal bench trial and had made certain statements and taken certain actions during the 1983 trial that, the defendant alleged, demonstrated the judge's bias against the defendant in the 1991 trial. Id. at 542. The Supreme Court held that comments made by the judge in the 1983 trial properly relied upon knowledge acquired during the course of a judicial proceeding and did not rise to the high level of "deep-seated and unequivocal antagonism" that would render fair judgment impossible. Id. at 556.

The Supreme Court's only example of a degree of antagonism so great as to warrant recusal was the district court judge's statements in the World War I espionage case against German-American defendants that "One must have a very judicial mind,

indeed, not to be prejudiced against the German Americans because their hearts are reeking with disloyalty." Id. at 555 (quoting Berger v. United States, 255 U.S. 22, 41 (1921) (alterations omitted)).

Expressing a belief based on facts learned during a judicial proceeding that a non-party should be investigated and/or prosecuted is not deep-seated antagonism toward that non-party; it is the judge doing his job. A judge who is "exceedingly ill disposed" toward a defendant at the completion of a trial, because the facts elicited at the trial showed the defendant to be a reprehensible person, should not recuse himself based on bias or prejudice. Id. at 550-51.

If Dr. Lincow's allegations are accepted as true, the presiding judge strongly encouraged the Government to investigate and prosecute Dr. Lincow. Simply, this is not unreasonable. In United States v. Wilkerson, during a pretrial conference, the district judge, while recognizing that charging decisions are squarely within the Government's purview, nevertheless chastised the Government for charging the defendant with armed bank robbery but not for carrying a firearm during the commission of a crime of violence. 208 F.3d 794, 796-97 (9th Cir. 2000). Thereafter, the Government added a firearm count to the indictment. Id. at 796. The district court denied the defendant's motion to recuse under § 455(a), and the Ninth Circuit affirmed. Id. at 797-98.

"[T]he [district] court's commentary on his role as 'representing the community' and that the community was 'tired' of armed robbery and guns did not demonstrate the kind of 'truly extreme' remarks that are required for recusal." Id. at 799 (alterations omitted).

It is routine for judges to make recommendations to AUSAs to take their investigations in certain directions. Indeed, it is a sentencing judge's role to inquire of the status of co-defendants and/or others who might have been involved in the illegal activity. This information is vital to the sentencing judge in imposing the proper sentence.

A judge's comments made in a prior criminal case regarding the probable culpability of a third party do not give rise to a duty to recuse in a later civil case in which that third party is now a defendant. Accepting Dr. Lincow's factual allegations as true for purposes of this motion, the judge's comments do not evidence any impermissible bias or prejudice against Dr. Lincow. See Litkey, 510 U.S. at 555.

b. The presiding judge's conduct on the bench in the case sub judice

Accepting all facts as true,[7] the presiding judge summarily

[7] The Court takes only facts as true; opinions are disregarded. Vespe, 868 F.2d at 1340. Thus, the Court gives no weight to Lincow's allegations that the presiding judge was

concluded a hearing by leaving the bench while counsel were in mid-sentence; asked Dr. Lincow's attorney why he was "wasting" the Court's time; and asked Dr. Lincow's attorney if "he knew what authentication was." Lincow Aff. ¶ 12.

Again, the Supreme Court's instructions in Litkey are helpful. There, the parties seeking the district judge's recusal alleged that the judge had "displayed impatience, disregard for the defense and animosity" toward the parties and their beliefs. 510 U.S. at 542. The Supreme Court held that such actions were not ground for recusal:

> [E]xpressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display [do not establish bias or partiality]. A judge's ordinary efforts at courtroom administration--even a stern and short-tempered judge's ordinary efforts at courtroom administration--remain immune.

Id. at 555-56 (emphasis omitted).

Here, the presiding judge's actions and comments during the hearings are not legally sufficient to enable a reasonable person to conclude that the presiding judge has a personal bias against Dr. Lincow in this case.

2. The affidavit's procedural requirements

The second paragraph of § 144, by its own terms, imposes

"agitated," "hostile," or "condescending." Lincow Aff. ¶ 12.

three procedural requirements on a party submitting an affidavit seeking a judge's disqualification: (1) the affidavit shall be filed at least ten days before the relevant court term ("or good cause shall be shown for failure to file it within such time"), (2) a party shall file only one such affidavit in a case, and (3) the affidavit shall be accompanied by counsel's certification that it is made in good faith. 28 U.S.C. § 144.

The affidavit at issue here clearly fails to meet two of these three requirements. While it is Dr. Lincow's only such affidavit in this case, it is both untimely and unaccompanied by a certificate of counsel.

a. Timeliness

"[I]n order for an affidavit to be deemed 'timely' under 28 U.S.C. § 144, the application for recusal must be made at the earliest moment after the movant obtains knowledge of the facts demonstrating the basis for disqualification." Heimbecker v. 555 Assocs., 2003 WL 21652182, at *4 (E.D. Pa. Mar. 26, 2003) (Davis, J.). The movant must be reasonably diligent in filing the affidavit. Furst, 886 F.2d at 581 n.30.

As this Court has previously explained:

> The reason for this requirement is obvious--a party with knowledge of facts that may implicate the need for the presiding judge to recuse himself may not sit idly by and gamble upon the outcome of a proceeding, secured in the knowledge that, if the wrong result ensues, it can always cry foul.

Cooney, 262 F. Supp. 2d at 503-04.

Here, Dr. Lincow does not specify when he learned that the presiding judge also presided over co-defendant Mr. Hirsh's criminal case in 2003 and/or made certain comments about Dr. Lincow during that case. Dr. Lincow filed his affidavit on December 21, 2006, thirteen months after the case began and almost three years after the presiding judge made the relevant comments on the record. Therefore, Dr. Lincow has failed to show that he was reasonably diligent in filing this motion.[8]

Dr. Lincow's affidavit is untimely under § 144, and therefore it is procedurally defective.

b. Certificate of counsel

The statute is clear that the affidavit "shall be accompanied by a certificate of counsel of record stating that it is made in good faith." 28 U.S.C. § 144. "The certificate requirement serves the significant purpose of preventing abuse by protecting against obviously untruthful affidavits and unjustified attempts by a party to disqualify a judge." Heimbecker, 2003 WL 21652182, at *4. "[T]he absence of a certificate of counsel constitutes a valid basis to deny a motion

[8] Given that the references to the presiding judge's conduct at the June 29, 2006, and November 29, 2006, hearings are predicated on the assertion of the presiding judge's bias during the 2003 Hirsh case, they are also untimely.

to disqualify under 28 U.S.C. § 144." United States v. Pungitore, 2003 WL 2257078, at *2 (E.D. Pa. Oct. 24, 2003) (Van Antwerpen, J.).

Here, no such certificate was filed by counsel. Therefore, the affidavit is procedurally defective on this separate ground.

B. Recusal Under 28 U.S.C. § 455

Section 455 states that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).[9] "The inquiry under § 455(a) focuses not on whether the particular judge subjectively harbored a bias, bur rather on 'whether the record, viewed objectively, reasonably supports the appearance of prejudice or bias.'" Pungitore, 2003 WL 2257078, at *4 (citing S.E.C. v. Antar, 71 F.3d 97, 101 (3d Cir. 1995)). The test is whether a "reasonable person, with knowledge of all the facts, would conclude that the judge's impartiality might be reasonably be questioned." Kensington, 368 F.3d at 301. An analysis under § 455(a) requires a determination of whether there is an appearance of impropriety, not necessarily whether there is actual bias. Furst, 886 F.2d at 580.

[9] A motion to recuse under § 455 is heard by the judge whose impartiality is being questioned. Kensington, 353 F.3d at 223 n.12. There is no mechanism, unlike under § 144, for referring the motion to a different judge.

"[T]he scope of § 455(a) is broader than § 144 and is unencumbered by the latter's stiff procedural requirements." Pungitore, 2003 WL 2257078, at *4. However, in deciding a motion for recusal under § 455(a), the Court need not accept the movant's factual allegations as true. Cooney, 262 F. Supp. 2d at 504. Rather, "the presiding judge may contradict the [m]ovant's factual allegations with facts derived from the judge's knowledge and the record." Id.

Therefore, the issue is whether the presiding judge's comments during Mr. Hirsh's case and/or comments and actions during the case sub judice create an appearance of impropriety. They do not.

1. The presiding judge's statements during the Hirsh case

During the Hirsh case, the presiding judge simply expressed his opinion to the Government that, in cases such at Mr. Hirsh's, the Government should investigate and prosecute, in addition to the pharmacists who were filling bogus prescriptions and paying inflated rent as a form of kickback, the physicians who were actually receiving the kickbacks. These comments are no different from a judge recommending that the Government go after the drug supplier as well as the drug user, or the person who contracted a killer for a hire in addition to the person who actually performed the killing.

In addition, Dr. Lincow states: "The Court knows that I am the 'unidentified physician' with whom Mr. Hirsh allegedly conspired." Lincow Aff. ¶ 9. Dr. Lincow does not, however, provide any support for this factual assertion. In fact, the presiding judge does now know that Dr. Lincow is the "unidentified physician," but only by the virtue of Dr. Lincow's claims to be so in his affidavit! Certainly, a party cannot educate a judge on a certain fact and then base its motion for the judge's recusal on that very fact. To put it another way: you cannot kill your parents and then be heard to complain that you are now an orphan.

At the Hirsh hearings, the presiding judge encouraged the Government to investigate and prosecute (1) the physician involved in the scheme with Mr. Hirsh and (2) physicians involved in other similar schemes. The presiding judge did not encourage the Government to prosecute Dr. Lincow specifically. (In fact, there is no evidence that the presiding judge even knew that Dr. Lincow was the "unidentified physician" in the Hirsh case before Dr. Lincow claimed in his current affidavit that it was him.) A civil litigant who might have committed a particular type of crime cannot base a motion for recusal on a judge's recommendation to the Government, in an earlier criminal case, that it be more vigilant in prosecuting that type of crime.

2. The presiding judge's conduct on the bench in the case sub judice

Dr. Lincow alleges that during two hearings the presiding judge took certain actions and made certain comments that evidence the judge's bias.

At the outset, comments made to counsel or parties in the course of litigation--including "expressions of impatience, dissatisfaction, annoyance, and even anger"--are not grounds for recusal. Litkey, 510 U.S. at 555-56. Therefore, these allegations will not support the recusal motion.

However, for purposes of completeness, the Court will explain more fully the circumstances of the two hearings at issue.

The affidavit alleges that at the June 29, 2006, hearing, the presiding judge summarily concluded the proceedings. It is unclear how a judge's summarily concluding a proceeding--and a judge must somehow conclude every proceeding over which he presides--evidences bias against Dr. Lincow. A judge's summarily concluding a proceeding might evidence that the judge is frustrated with the defense attorney (the implication here) or the plaintiff's attorney, that he had heard enough to make his decision, or simply that there was somewhere else he needed to be. A judge's concluding a proceeding--even "summarily"--does not create an appearance of impropriety sufficient to warrant

recusal.

The affidavit also alleges that the presiding judge made condescending remarks to Dr. Lincow's counsel at the November 29, 2006, hearing. At this hearing, the Court heard eight discovery-related motions. Some of the motions, or oppositions to the motions, were completely without merit. The presiding judge admonished Mr. Todd, Dr. Lincow's counsel, that "you have enough to fight over . . . . I think you are going to have to exercise some restraint as to what's worth fighting, and what is not." Trans. of Hearing (Nov. 29, 2006), at 35.

Dr. Lincow's opposition to this particular motion was without merit. State Farm had moved to compel a full and complete site inspection of 7622 Medical Center, P.C.,[10] and for sanctions[11] (doc. no. 117). Apparently, both sides had agreed on a particular date and time to perform the inspections, and State Farm had arranged with numerous attorneys, photographers, and others to be available. When the date and time arose, Mr. Todd inexplicably refused to allow State Farm to photograph and/or videotape certain portions of the medical center. Mr. Todd's refusal precipitated State Farm's motion to compel.

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[10] 7622 Medical Center, allegedly owned by Dr. Lincow, is also itself a defendant in this case.

[11] In spite of Dr. Lincow's unsupported opposition to the site inspection and the motion to compel the site inspection, the Court did not grant State Farm the sanctions it requested.

Mr. Todd's opposition to the site inspection was without merit under Federal Rule of Civil Procedure 34(a)(2),[12] and his opposition exposed State Farm to significant inconvenience and expense.

The presiding judge thus told Mr. Todd that he was "wasting our time" by opposing the motion. Trans. of Hearing (Nov. 29, 2006), at 35. The presiding judge's use of the word "our" referred to not only the presiding judge's time, but also the time of State Farm's attorneys, the court staff, and the litigants themselves who were present in the courtroom that day.

Finally, the presiding judge asked Mr. Todd "have you ever heard of authentication?" Id. at 34. Mr. Todd was arguing that if State Farm was allowed to videotape the premise of a medical center that a patient was not treated at, State Farm could somehow spring the videotape on the patient on the witness stand and confuse him or her. The presiding judge suggested to Mr. Todd that this was not a winning argument, because any videotape sought to be entered into evidence or shown to a witness would have be authenticated under the Federal Rules of Evidence.

Asking an attorney whether he has ever heard of a legal

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[12] The Rule permits any party to "serve on any other party a request to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)." Fed. R. Civ. P. 34(a)(2).

concept--even if, as Dr. Lincow alleges, it was done in a condescending manner--can hardly be the basis for a showing of bias.

Therefore, a reasonable observer would not believe that the presiding judge's actions and/or comments create an appearance of impropriety.

III. CONCLUSION

Dr. Lincow's motion for the presiding judge's recusal fails under both § 144 and § 455(a). Therefore, the motion will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.,	:	CIVIL ACTION NO. 05-5368
Plaintiffs,	:	
v.	:	
ARNOLD LINCOW, ET AL.,	:	
Defendants.	:	

O R D E R

AND NOW, this **8th** day of **February 2007,** after a hearing on the record, it is hereby **ORDERED** that Defendants Arnold Lincow, D.O., and 7622 Medical Center, P.C.'s motion for trial judge to recuse himself based on appearance of bias (doc. no. 155) is **DENIED** for the reasons stated in the accompanying Memorandum.

AND IT IS SO ORDERED.

S/Eduardo C. Robreno
EDUARDO C. ROBRENO, J.