UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ANA FLORES, RENE FLORES, MARIA MAGDALENA HERNANDEZ, MAGALI ROMAN, MAKE THE ROAD NEW YORK, and NEW YORK COMMUNITIES FOR CHANGE,

Plaintiffs,

-against-

TOWN OF ISLIP, ISLIP TOWN BOARD, SUFFOLK COUNTY BOARD OF ELECTIONS,

Defendants.
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MEMORANDUM & ORDER
CV 18-3549 (GRB)(ST)

GARY R. BROWN, United States District Judge.

Before the Court is an application by defendants Town of Islip and Islip Town Board (together the "Town defendants") seeking the recusal of the undersigned from this matter pursuant to 28 U.S.C. §§455 (a) and (b)(1). The application is premised upon a discussion initiated by the undersigned, then serving as the assigned Magistrate Judge, relating to an attenuated, potential conflict. That disclosure, made out of an abundance of caution and early in the litigation on an undeveloped factual record, concerned this writer's involvement, some fifteen years earlier, as an Assistant United States Attorney in several prosecutions related to the MS-13, a criminal street gang mentioned in a few paragraphs of the 61-page complaint. Having been offered the opportunity to move for recusal, all parties, including the Town defendants, unanimously agreed that such a step would be unnecessary.

The undersigned then worked extensively, as the assigned Magistrate Judge, on this matter for 14 months, assisting the Honorable Arthur D. Spatt on this important and complex case. Subsequent to my confirmation and appointment as a United States District Judge, the case

was reassigned to me via random selection. Notwithstanding the fact that discovery and litigation in the case, which has been fulsome and extensive, revealed that the MS-13 question is a virtual non-issue, and plaintiffs expressly offered to remove those allegations from the complaint to avert any further issue, Town defendants now seek disqualification.

This opinion follows.

BACKGROUND

Plaintiffs commenced this action by the filing of a complaint on June 18, 2018, challenging the "at-large" voting system currently in effect in the Town of Islip under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, and seeking, *inter alia*, preliminary and permanent injunctive relief. Compl., Docket Entry ("DE") 1. That complaint contains, at most,[1] three paragraphs relevant to this decision:

> The community in Brentwood and Central Islip have repeatedly asked police and local officials to provide basic protection and support in response to a recent spate of violence from the MS-13 gang. Town officials ignored these requests. After press coverage reached a frenzy, state and federal authorities were compelled to intervene to begin addressing the violence that local law enforcement had ignored. (Compl. ¶ 5)
>
> *For years, the communities in Brentwood and Central Islip have suffered from MS-13 gang activity. Community members have consistently asked police and local officials to provide basic protection and support to the community in response to rising violent gang activity. The Town ignored their requests for help, however, and gang violence has continued to expand.* Recently, there has been a dramatic rise in gang-related killings in the minority Latino community in Islip, including the killing of four young people in April 2017. Only after these incidents garnered national press coverage did state and federal authorities intervene to begin addressing the violence that local law enforcement has been ignoring for years. (Compl. ¶ 102)

[1] The purported basis for disqualification ended in 2005 – some fifteen years ago. Thus, most of the allegations which are tied to "recent" events – other than the italicized language above – are largely irrelevant to this motion.

> Recent efforts by local law enforcement to combat MS-13 have generally been harmful, rather than helpful, to Islip's Latino community. SCPD has failed to adequately engage with Latino residents and has instead has [sic] taken what is viewed as a brute force approach. While the Town provides youth and family recreation services in other parts of the Town, such as transportation for summer youth programs and for seniors, it has failed to provide resources to protect Islip's Latino youth from MS-13. (Compl. ¶ 103)

(emphasis added).

On December 11, 2018, the undersigned presided over an initial conference, entered a detailed discovery schedule and confidentiality orders, and made provision for discovery of electronically stored information, all in preparation for plaintiffs' forthcoming preliminary injunction motion. DE 21 at 10-11. By that time, no factual materials had been made available to the Court. Thus, the Court's familiarity with the facts was limited to the allegations of the complaint. DE 21 at 6 ("I've reviewed the complaint . . . and again, this is an initial conference. I'm just getting familiar with it"). The Court expressly recognized the importance of this action as a Voting Rights Act case with potential impact on the civil rights of many citizens, DE 21 at 38, and acknowledged that the complaint contained material which might have been of marginal relevance to the case, some of which was subject of news coverage. *See, e.g.*, DE 21 at 15 ("as I look through the complaint . . . many of the things that were alleged which I'm not quite sure -- I'm not going to say they're irrelevant, but how relevant certain things are. . . . [S]ome things, you know, I'm familiar with just from reading the newspapers . . . ."). Toward the conclusion of the conference, the undersigned stated,

> In skimming through the complaint, I came across the allegation that with regard to the MS-13, the Town has been unresponsive and so forth. I won't go into the details. You all know it. And I'm going to point to [plaintiffs' counsel] who knows me for a long time and knows what I'm about to say but may not have put this together, which is until 2005 I was the chief federal prosecutor of the Long Island Criminal Division. Going back before that, I was very involved in various prosecutions of MS-13 and . . . related entities [such as] enemy gangs [and] allied groups.

> I may very well have my own opinions about whether federal and state authorities have in fact been responsive to that problem, so much so that if anyone makes a motion to recuse me, I will get off the case right now. I'll grant that motion. So before I do anything else, I'd ask you to think about that for a moment. Is there anybody that would like me to recuse myself and get a different magistrate judge on the case?

DE 21 at 35-36. After consultation (and the offer to adjourn to permit counsel to consult with their clients), counsel for all parties waived any potential conflict, declining the undersigned's offer to recuse. DE 36-37.

At that conference, defense counsel advised the Court of the possibility of "extensive litigation" concerning "governmental privileges, deliberative process privilege and legislative privilege," that would require resolution by the undersigned. DE 21 at 10. Additional discussion was held about court-facilitated settlement discussions. DE 21 at 35-36.

On March 1, 2019, plaintiffs made their motion for a preliminary injunction. DE 35. On March 19, 2019, the undersigned presided over a lengthy discovery conference dealing with various related issues. DE 64. At that conference, discovery limitations were discussed, including that witnesses who were not properly identified for and subject to deposition would likely be precluded from testifying at the preliminary injunction hearing. DE 64 at 43. At other times during the litigation, the undersigned issued rulings related to many applications and issues. *See, e.g.*, Electronic Orders dated 1/9/2019, 1/18/2019, 3/20/2019, 3/22/2019, 3/25/2019, 4/3/2019, 10/9/2019, 10/11/2019, 10/24/2019, 12/23/2019, 1/9/2020, and 1/15/2020.

Following massive filings, in April and May 2019, Judge Spatt held an evidentiary hearing that lasted 12 days and included the testimony of 16 witnesses. In a comprehensive 81-page opinion, Judge Spatt denied plaintiffs' motion for a preliminary injunction. DE 133. That

opinion, incorporated herein by reference and familiarity with which is assumed, covers, in painstaking detail, the facts underlying this matter.

On September 20, 2019, Judge Spatt denied a motion to set a trial date or dispositive motion schedule because the undersigned had not yet certified the case as trial ready. Electronic Order dated 9/20/2019. On January 23, 2020, this case was reassigned by random selection from Judge Spatt to the undersigned following this writer's confirmation and appointment as a United States District Judge.

In a sealed letter to the Court (which will be unsealed as part of this decision), counsel for the Town defendants contended as follows:

> Islip did not object to Your Honor serving as the assigned Magistrate Judge for pre-trial and discovery purposes. Respectfully, however, Islip does object to Your Honor presiding as the District Judge in this case, in light of Your Honor's candid disclosure at the initial conference.
>
> We write to ask for the Court's guidance on the appropriate procedure by which to raise Islip's objection. Specifically, we seek guidance as to whether Islip should bring a formal recusal motion through the Court's regular motion procedures, including a letter request for a pre-motion conference, or whether the Court might prefer to handle the issue summarily, as Your Honor appeared prepared to do at the initial conference.

DE 148-1. Following an objection by plaintiffs, DE 149-1, also to be unsealed, the Court instructed Town Defendants to file a disqualification motion. Electronic Order dated 1/28/2020.

By letter dated February 12, 2020, plaintiffs' counsel offered to withdraw the MS-13 allegations in an effort to resolve, without the need for further litigation, the disqualification issue. DE 154-23. Town defendants responded via email that "Islip does not agree to the proposal in your letter of February 12." DE 154-24. This motion followed.

LEGAL STANDARD

Town defendants rely on two statutory provisions in seeking disqualification. The first is found at 28 U.S.C. §455(b)(1), which provides, in relevant part, as follows:

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which . . . he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding.

A separate provision of the statute, which Town defendants incongruously describe as "an even simpler way of resolving this issue," DE 154-20 at 6, requires that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The statute provides that a subsection (b) conflict is unwaivable, whereas the court may accept a waiver to a subsection (a) conflict "provided it is preceded by a full disclosure on the record of the basis for disqualification." 28 U.S.C. § 455(e). Federal judges are also subject to the provisions of the *Code of Conduct for Federal Judges*, which, in relevant part, mirrors the language of these statutory provisions. *See* Canon 3D.

As to a subsection (a) disqualification, the Second Circuit has held:

> Disqualification under section 455(a) requires a showing that would cause "an objective, disinterested observer fully informed of the underlying facts [to] entertain significant doubt that justice would be done absent recusal." *In re Aguinda,* 241 F.3d 194, 201 (2d Cir. 2001) (citation and internal quotation marks omitted) (alteration in original); *see Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858–62, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988); *United States v. Bayless*, 201 F.3d 116, 127–28 (2d Cir. 2000).

United States v. Lauersen, 348 F.3d 329, 334 (2d Cir. 2003), *as amended* (Nov. 25, 2003), *adhered to on reh'g*, 362 F.3d 160 (2d Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005). "[T]his test deals exclusively with appearances. Its purpose is the protection of the public's confidence in the impartiality of the judiciary." *In re Basciano*, 542 F.3d 950, 956 (2d

Cir. 2008). "Where a case, by contrast, involves remote, contingent, indirect or speculative interests, disqualification is not required." *In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001).

There is a "presumption" that judges will conduct proceedings properly and impartially, which "should remain in effect until it is overcome by adequate proof." *Wolfson v. Palmieri*, 396 F.2d 121, 126 (2d Cir. 1968). As a result, the Second Circuit has affirmed denials of motions for recusal in more than one "remarkable case." *See, e.g.*, *Basciano,* 542 F.3d at 956 (holding that recusal not "routinely required" even in the face of "evidence that the defendant has plotted or threatened to kill" judge); *United States v. Bayless*, 201 F.3d 116, 119 (2d Cir. 2000) (finding that it was not plain error to refuse recusal motion where district judge's determinations led to calls for his impeachment and resignation).

These prescriptions give rise to a tension within the law of recusal. This is best summarized in the axiomatic phrase, "[a] judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is." *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988). Furthermore, where, as here, a judicial officer had invested significant time on a matter, considerations of judicial economy heightens the duty to deny inappropriate recusal motions. *United States v. El-Gabrowny*, 844 F. Supp. 955, 959 (S.D.N.Y. 1994) ("I have dealt with numerous applications and motions relating to various defendants in this case, including . . . matters relating to discovery, attorney disqualification, restraints on attorney speech, and bail, among others. It could easily be held that granting the motion at this point would represent a waste of judicial resources").

Judges are required to proactively identify and investigate potential conflicts. As the Supreme Court has held, § 455's enactment "placed the obligation to identify the existence of

those grounds upon the judge himself." *Liteky v. United States,* 510 U.S. 540, 548 (1994). The Second Circuit has observed,

> In this regard, it is important to understand that judges have an obligation to exercise reasonable effort in avoiding cases in which they are disqualified. Section 455 is not a provision that requires judicial action only after a party to the litigation requests it. The relevant provisions are directive and require some reasonable investigation and action on a judge's own initiative.

Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120, 130 (2d Cir. 2003). One learned treatise has further observed that "§ 455 calls upon judges to evaluate the merits of a movant's allegations and not simply the facial sufficiency of those allegations." Charles Gardner Geyh, *Judicial Disqualification: An Analysis of Federal Law* 84 (2d ed. 2010). The Second Circuit has explained the basis for this approach:

> Discretion is confided in the district judge in the first instance to determine whether to disqualify himself. The reasons for this are plain. The judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion. In deciding whether to recuse himself, the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over their case. Litigants are entitled to an unbiased judge; not to a judge of their choosing.

Drexel, 961 F.2d at 1312.

DISCUSSION

I. Timeliness and Waiver

Plaintiffs challenge Town defendants' motion on the grounds of timeliness and waiver. These concepts provide substantial obstacles for Town defendants. "It is well-settled that a party must raise its claim of a district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *Apple v. Jewish Hosp. & Med. Ctr*., 829 F.2d, 326 334 (2d Cir. 1987). The length of time is not dispositive, but the fourteen months that Town defendants waited before seeking disqualification far exceeds the

periods at issue in other cases. *See, e.g.*, *id.* (citing *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986) ("motion for recusal filed 'weeks' after trial is presumptively untimely")); *Raghavendra v. Trustees of Columbia Univ.*, 2012 WL 2878123, at *5 (S.D.N.Y. July 13, 2012) ("Recusal motions are often denied on the basis of untimeliness when there has been only a short delay.") (collecting cases).

In deciding the "serious threshold issue" of timeliness, the Second Circuit has noted,

> A number of factors must be examined, including whether: (1) the movant has participated in a substantial manner in trial or pre-trial proceedings; (2) granting the motion would represent a waste of judicial resources; (3) the motion was made after the entry of judgment; and (4) the movant can demonstrate good cause for delay.

Apple, 829 F.2d at 334. On balance, several of these factors weigh in favor of rejecting this motion as untimely. First, the Town defendants have actively participated in this heavily-contested litigation, including numerous proceedings before, and submissions to, the undersigned. Second, as noted, granting the motion would constitute a waste of judicial resources, as the undersigned has developed significant familiarity with this action, while reassignment via random selection would, most likely, lead to assignment to a judge entirely unfamiliar with this case. *See Da Silva Moore v. Publicis Groupe*, 868 F. Supp. 2d 137, 154 (S.D.N.Y. 2012), *objections overruled*, 2012 WL 12528637 (S.D.N.Y. Nov. 8, 2012) (factor weighed against motion where magistrate judge had expended "considerable time and attention in responding to the parties' discovery issues and disputes").

As to the third factor, this motion was not made subsequent to judgment, but nevertheless was filed well after a decision by Judge Spatt regarding a preliminary injunction. Interestingly, then, the facts provide the contrapositive of the usual rationale for this factor. Second Circuit law requires "a prompt application [to avoid] the risk that a party is holding back a recusal

application as a fallback position in the event of adverse rulings on pending matters." *In re IBM Corp.,* 45 F.3d 641, 643 (2d Cir.1995). Here, the situation is analogous: defendants obtained a substantial victory before Judge Spatt in connection with the preliminary injunction, actively litigating before the undersigned throughout, while fully aware of the facts upon which this application is predicated. Thus, Town defendants give the appearance that they "held back" on the recusal application, only unleashing it now in an effort to keep the case before Judge Spatt, which is simply impermissible.[2] *Apple,* 829 F.2d at 334 ("[A] movant may not hold back and wait, hedging its bets against the eventual outcome"); *see also IBM Corp*., 45 F.3d at 643 (2d Cir. 1995) ("holding back a recusal application as a fall-back position in the event of adverse rulings on pending matters."). I am not making that finding, but given the importance of such appearances here (as Town defendants have forcefully argued), the third factor weighs against Town defendants.

The last factor – good cause – requires some deeper analysis. Town defendants do not articulate arguments with regard to these factors, adhering, instead to the position that they "waived nothing and moved for recusal at the earliest meaningful opportunity." DE 154-31 at 7. Though their counsel thus gives the issue of waiver short shrift, it significantly undermines Town defendants' motion under § 455(a), as there was an explicit waiver and counsel waited fourteen months from said waiver before changing course and seeking disqualification. *See, e.g.*, *In Re Cargill, Inc.,* 66 F.3d 1256 (1st Cir. 1995) ("[L]ocal counsel's unqualified assent, combined with

[2] Consider Town defendants' contention that "Plaintiffs hope to keep the case with Your Honor [] to avoid a possible return to Judge Spatt, who ruled against Plaintiffs on many important factual issues at the preliminary injunction hearing." DE 154-31 at 2. Such language gives rise, however subtly, to the impression that some tactical considerations might have gone into this motion.

Cargill's subsequent silence for a substantial period of time, creates a sturdy foundation on which the validity of the waiver might rest . . . .").

One could posit that the unusual procedural facts here – precedent for which appears neither in the parties' submissions nor in the Court's independent research – *could* constitute good cause for failure to make the motion earlier, as well as an arguable reason to disregard Town defendants' express waiver of the potential conflict. The question turns on the viability of defendants' principal contention on this motion – that "[i]t is entirely reasonable, then, for Defendants to press a recusal objection only when the issue affects the presiding district judge, rather than the magistrate judge." DE 154-20 at 12. As such, the Court turns to that novel argument.

II. Distinction between a Magistrate Judge and District Judge in the Context of Recusal

As Justice Scalia observed, one of the critical changes wrought by the enactment of § 455 was rendering the standards for disqualification "applicable to *all* justices, judges, and magistrates (and not just district judges)." *Liteky,* 510 U.S. at 548 (emphasis original). These standards for recusal of a district judge and a magistrate judge have been consistently applied in the same manner. *See, e.g.*, *Creddille v. MTA Transit Auth.,* 2013 WL 633427, at *1 (E.D.N.Y. Feb. 20, 2013) (applying standards applicable to a district judge to a request for disqualification of a magistrate judge); *Wise v. City of New York*, 2013 WL 3190230, at *1 (E.D.N.Y. June 21, 2013) (same). In short, on the question of the difference in the substance and application of disqualification law to district and magistrate judges, the answer is simple: there is none.

Yet Town defendants would have the Court disregard their express waiver of a § 455(a) conflict. To justify more than a year of intervening litigation (during which the facts changed significantly), Town defendants argue as follows:

> Of course, at the time, the parties declined to press any objections to Your Honor's service as Magistrate Judge, which makes sense. As a Magistrate Judge, there was little opportunity for Your Honor's prior, extrajudicial views and knowledge of evidence to have an effect on merits decisions in the case. Discovery orders, scheduling rulings, and the variety of non-dispositive, pre-trial litigation under the purview of a magistrate would not be affected by one's views on gang activity, its effects, or the responsiveness of local and state officials. And even on the off chance that some ruling would be affected by such evidentiary issues, Defendants always had recourse to review from Judge Spatt, then sitting as the District Judge on the case.

DE 154-20 at 2. Claiming that "the ground has drastically shifted," "circumstances have fundamentally changed," and "the floor has shifted," counsel for Town defendants thereby concludes that "a 'reasonable person' would not view a *magistrate judge* in the same fashion as a *district judge*, when the concern is about the appearance of partiality regarding merits questions in the case." DE 154-20 at 2, 5, 10; DE 154-31 at 7-8 (emphasis in original). Indeed, defendants contend that any argument to the contrary "ignores the reality of the difference between a magistrate judge and a district judge." DE 154-20 at 11.

It seems, though, that Town defendants misapprehend the role played by magistrate judges in the federal justice system in general, and, more particularly, in this District. As the United States Supreme Court has observed:

> Congress intended magistrates to play an integral and important role in the federal judicial system. Our recent decisions have continued to acknowledge the importance Congress placed on the magistrate's role. Given the bloated dockets that district courts have now come to expect as ordinary, the role of the magistrate in today's federal judicial system is nothing less than indispensable.

Peretz v. United States, 501 U.S. 923, 928 (1991)(citations omitted). A quarter of a century later, the Court reinforced this view:

> The number of magistrate and bankruptcy judgeships exceeds the number of circuit and district judgeships. And it is no exaggeration to say that without the distinguished service of these judicial colleagues, the work of the federal court system would grind nearly to a halt.

Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 665 (2015). And this observation applies with particular force in this District, one of the busiest in the country, in which a magistrate judge is "assigned to each case upon the commencement of the action." Local Civ. R. 72.2; N.Y. CTY. LAWYERS ASS'N COMM. ON FED. CTS., THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK: A RETROSPECTIVE (1990-2014) (2015), https://img.nyed.uscourts.gov/files/forms/EDNY_Retrospective%20_1990-2014.pdf (last visited Mar. 16, 2020). In fact, Local Civil Rule 72.1 describes the vast authority vested in the magistrate judges in this District; this rule, according to the Rules Advisory Committee, "confirms and continues the Courts' intent to give their Magistrate Judges the maximum powers authorized by law." *See* Committee Note to Local Civ. R. 72.1.

Town defendants contend that they were not required to move for disqualification – and can now revoke their unequivocal, express waiver of any conflict – because "as Magistrate Judge, Your Honor would never have made findings of fact or ruled on dispositive legal questions." DE 154-31 at 8. This is erroneous. District judges routinely refer dispositive matters and preliminary injunction applications to magistrate judges for report and recommendation under 28 U.S.C. § 636(b)(1)(B), and Judge Spatt could have submitted such matters to the undersigned for review. *See, e.g.*, *VOX Amplification Ltd. v. Meussdorffer*, 50 F. Supp. 3d 355, 359 (E.D.N.Y. 2014) (preliminary injunction referred to the undersigned by Judge Spatt). Moreover, while serving as magistrate judge in this case, the undersigned had authority over significant matters on the litigation. *See, e.g.*, DE 21 at 10 (Town defendants' privilege issues), 35-36 (settlement discussions); DE 64 at 43 (possible preclusion of witnesses); *see also*

DE 64 at 46 (counsel for Town defendants contending that changing an expert report deadline by two days would constitute a "miscarriage of justice").

While defendants rely heavily on the availability of appeal to Judge Spatt, that does not answer the question presented. Certainly, as to non-dispositive issues, such an appeal would have been limited to a clear error review, while only dispositive determinations would be subject to *de novo* review, and only upon a party's specific objection. 28 U.S.C. §636(b). Thus, Town defendants' categorical assertion that "a district judge can literally undo or redo anything that arises from the decision of a magistrate judge," DE 154-20 at 12, is simply not true. More to the point, the approach articulated by Town defendants raises the specter of "holding back a recusal application as a fall-back position in the event of adverse rulings on pending matters." *IBM Corp*., 45 F.3d at 643; *see also Apple,* 829 F.2d at 334.

The proceedings in this case raise the issue squarely. For example, when the undersigned raised the possibility of precluding witnesses in the preliminary injunction hearing based on discovery failures, DE 64 at 43, should a party aggrieved by such a ruling have had the right to raise the question of recusal to challenge such a determination? Or in asking the undersigned to rule on deliberative process privileges, would Town defendants have had the right to rely on potential disqualification to challenge an adverse determination? Could such a challenge be properly raised in an objection to a Report & Recommendation? The mental exercise of phrasing such an objection – *e.g.*, "The Magistrate Judge had a conflict, which we waived, but now retract said waiver since we lost this issue" – demonstrates the flawed nature of this argument.

In sum, the premise introduced by Town defendants – that disqualification of a district judge should be considered differently than that of a magistrate judge – must be rejected. *Cf.*

Liteky, 510 U.S. at 548. The fourth factor cited by the Second Circuit weighs against Town defendants, as their rationale cannot be considered good cause for their untimely application. *Cf. Apple,* 829 F.2d at 334. Therefore, Town defendants should not be released from their waiver of a conflict under subsection (a), and the motion is untimely as to both subsections of the statute.

III. Substantive Analysis of the Recusal Application

While the above waiver and timeliness analysis disposes of the instant motion, the Court addresses the substantive analysis of the recusal application, as fairness is the cornerstone of our judicial system. *See* Fed. R. Civ. P. 1 (requiring that the Rules be applied "to secure the just . . . determination of every action and proceeding").

On this motion, Town defendants rely entirely on the information provided and the offer to recuse made by the Court at the initial conference described above. DE 154-20 at 10; DE 154-31 at 4. As noted, these disclosures were made at a time when the Court had no background on the facts other than reading the allegations of the complaint.[3] As such, the attorneys for the parties, fully versed in the facts, were in the best position in the first instance to apprise the judge of such matters on the case for the Court's consideration. Given that opportunity, counsel demurred, effectively informing the Court that this was a non-issue.

[3] Unfortunately, this opportunity afforded the parties in this case has been entirely misconstrued by counsel for the Town defendants. Town defendants argue, categorically, that "the offer to recuse is an admission that this Court must recuse, if requested," and "[t]hat Your Honor offered to recuse thus means that the high bar for recusal *necessarily* has been met." DE 154-20 at 10 (emphasis original). For the reasons noted, including the lack of factual information about the case available to the Court at the time of the initial conference, and the importance of this litigation, Town defendants' attempt to mischaracterize the colloquy as a considered, conclusive decision is misplaced. Indeed, that Town defendants, familiar with the facts and issues in the matter, declined to seek recusal at that time is far more telling than this Court raising the issue.

The subsequent course of this extensive litigation over more than a year demonstrates that the existence of anti-gang activity prior to 2005 cannot be viewed as "disputed evidentiary facts concerning the proceeding" under 28 U.S.C. § 455(b)(1). Significantly, Judge Spatt's exhaustive preliminary injunction determination only mentions the MS-13 in two paragraphs, in which he discusses references to the gang in a 2017 campaign mailer. *See* DE 133 at 31, 65. Significantly, the Court determined that the mailer "cannot reasonably be perceived as discriminatory," and specifically observed that "[i]n the last five years, MS-13 and other street gangs have increased in prominence in several parts of Suffolk County." DE 133 at 65. As the relevant period involved the last five years, the undersigned's knowledge, gained a decade earlier, cannot reasonably be said to number among the issues in dispute. And, despite fulsome discovery, Town defendants are unable to point to any facts persuasively suggesting otherwise. Thus, the facts presented to the parties do not require, or even suggest, disqualification. *Diamondstone v. Macaluso,* 148 F.3d 113, 121 (2d Cir. 1998) ("Disqualification is not required on the basis of 'remote, contingent, indirect or speculative interests.").

Moreover, upon careful consideration, and with the luxury of additional review and reflection, even assuming that the pre-2005 anti-gang activity constituted matters in dispute in this case, which it does not, awareness of such events would not appear disqualifying. While the undersigned personally handled and/or supervised several related cases, knowledge of anti-gang activities in the early part of this century was hardly unique – such efforts were regularly highlighted in the local and national press and were the subject of much public discussion.[4] "As

[4] *See, e.g.,* Gonzales, J., "Curbing The Gangs: Influential State Commission Turns Its Spotlight To Fighting Their Proliferation In Suburban Areas," *Newsday*, 11/2/05, 2005 WLNR 17720814; Ragavan, C., "Terror On The Streets: The FBI Prepares To Help Beleaguered Police Chiefs Fight A New Brand Of Gang Violence That's Spreading Like Wildfire," *U.S. News & World*

Judge Jerome Frank pithily put it: 'Impartiality is not gullibility. Disinterestedness does not mean child-like innocence.'" *Liteky v. United States*, 510 U.S. at 551. Thus, awarenss of these matters would not, even if disputed in the case, constitute a basis for disqualification. *In re Aguinda*, 241 F.3d 194, 204 (2d Cir. 2001)("[E]very judge inevitably has opinions on the controversies of the day.").

Finally, Town defendants' position that the issue of the MS-13 requires disqualification is undermined by plaintiffs' offer to remove the issue entirely from the case and avoid the need for litigation of this issue. Town defendants characterize plaintiffs as "unnaturally desperate for Your Honor to serve as District Judge, even going so far as to try to *take allegations out of the case* to allow it." DE 154-31 at 1, 6 (emphasis original). However, there is nothing unprecedented about attorneys taking steps to eliminate a potential conflict. *See, e.g.*, *Wise v. City of New York,* 2013 WL 3190230, at *1 (E.D.N.Y. 2013). The offer, which Town defendants urge this Court to consider, does suggest the attenuated nature of the issue.

Ultimately, however, the motives of the parties in bringing this matter before the Court are largely irrelevant. The questions that need to be substantively answered are straightforward and readily resolved. For the reasons discussed, the undersigned does not have "personal knowledge of disputed evidentiary facts concerning the proceeding," such that disqualification would be warranted under 28 U.S.C. §455(b)(1). For largely the same reasons, the Court finds that "an objective, disinterested observer fully informed of the underlying facts [could not] entertain significant doubt that justice would be done absent recusal." *Lauersen,* 348 F.3d at 334. Lastly, considerations of judicial economy also render recusal here inappropriate.

Rep., 12/13/04 , 2004 WLNR 21767792; Williams, L., "Gang Arrests Up 3-Week Sweep Nets Dozens In Suffolk," *New York Daily News*, 10/26/04 , 2004 WLNR 21466592.

CONCLUSION

For the reasons set forth herein, the Court finds that Town defendants' motion for disqualification is untimely, and that Town defendants' express waiver and subsequent participation in this litigation for more than a year bars the application. Moreover, evaluation of the purported bases for disqualification demonstrates that the motion is substantively meritless. Therefore, the motion by Town defendants seeking disqualification is DENIED in all respects.

SO ORDERED.

Dated: Central Islip, New York
March 19, 2020

/s/ Gary R. Brown
GARY R. BROWN
United States District Judge