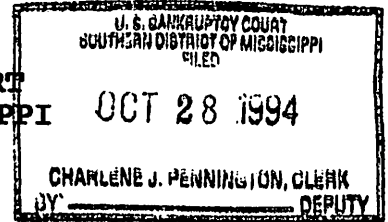


IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION



In re:

Miss Alva Company, Inc.	Case No. 9004114EEM
Austin One, Inc.	Case No. 9004115EEM
Austin Associates, Inc.	Case No. 9004181EEM
Austin D. Check	Case No. 9100017EEM
Austin Development Company, Inc.	Case No. 9100018EEM

MEMORANDUM OPINION

I have before me the *Objection And Request For Recusal* filed by Austin D. Check in each of the above cases. Mr. Check filed the request for recusal *pro se* in his individual bankruptcy case and on behalf of the corporate Debtors<sup>1</sup> in the related cases. In the *Objection And Request For Recusal*, Mr. Check states that in each of the above cases, he filed a complaint with the Clerk of the United States Court of Appeals for the Fifth Circuit against me, in my capacity as a Bankruptcy Judge for the Southern District of Mississippi. Mr. Check states that as a result of his filing the complaints, I have a conflict of interest and should recuse myself

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<sup>1</sup> While Mr. Check has a right to appear *pro se* in his individual case, he does not have the right to appear on behalf of the Debtors in the related cases. Nevertheless, in order to expedite the matter, I allowed Mr. Check to present his case for recusal in each of the present cases.

in each of the cases. After notice and a hearing in open court, and after considering the argument of Mr. Check and being otherwise advised in the matter, I hold that recusal is not mandated by 28 U.S.C. § 455.

In December of 1990, Miss. Alva Company, Inc., Austin One, Inc. and Austin Associates, Inc. filed petitions for relief under Chapter 11 of the Bankruptcy Code. Austin D. Check and Austin Development Company, Inc. filed chapter 11 petitions in January of 1991. In May of 1992 all of these cases, except Austin Development Company, Inc., were converted to cases under Chapter 7 of the Bankruptcy Code.

On August 9, 1994, Austin D. Check filed three separate complaints with the Clerk of the United States Court of Appeals for the Fifth Circuit, being docket numbers 94-05-372-0037, 94-05-372-0038 and 94-05-372-0039. The complaints were filed against me under the Judicial Conduct and Disability Act and alleged misconduct on my part throughout the course of the bankruptcy cases before this Court.

On August 12, 1994 an order was entered by Judge Henry A. Politz, Chief Judge of the United States Court of Appeals for the Fifth Circuit dismissing the three complaints filed by Mr. Check. In his order dismissing the complaints, Judge Politz held that the complaints were related to the merits of decisions which I have made during the course of the present bankruptcy cases and must be dismissed under 28 U.S.C. § 372(c)(3)(A)(ii).

On September 13, 1994, Mr. Check filed with the Clerk of the United States Court of Appeals for the Fifth Circuit a petition for review by the Fifth Circuit Judicial Council of Judge Politz's order dismissing his complaints. On October 20, 1994 an order was entered wherein an Appellate Review Panel of the Judicial Council of the Fifth Circuit affirmed the Order of Chief Judge Politz dismissing Mr. Check's complaints against me.

On August 9, 1994, the same day Mr. Check filed his complaints against me with the Fifth Circuit, he filed with this Court in each of the present bankruptcy cases a pleading entitled *Objection And Request For Recusal*. In the *Objection And Request For Recusal* Mr. Check states that he filed three complaints against me with the Clerk of the United States Court of Appeals for the Fifth Circuit and that as a result of the complaints I have a conflict of interest with Mr. Check and the bankruptcy cases presently before the Court.

On August 30, 1994, this Court sent out a notice of hearing on the *Objection and Request for Recusal* for September 16, 1994. Mr. Check was sent a copy of the notice.

On September 16, 1994, I conducted a hearing, as noticed, on Mr. Check's *Objection and Request for Recusal*. Mr. Check was afforded an opportunity to present the basis of his request for my recusal. In support of his request for recusal, Mr. Check presented the following:

Mr. Check: On August the, I believe it was August the 4th, a Complaint was filed in the Fifth Circuit Court of Appeals' office. And since that time a Petition has been filed

to the Judicial Court -- the Judicial Council [sic] Circuit Court of Appeals in New Orleans, and on that basis that was the rationale for filing the Motion for the recusal.

(Transcript of hearing, p. 3, attached as appendix A).

No additional grounds for recusal were given by Mr. Check.

Though Mr. Check has cited no authority in support of his request for recusal, I am proceeding under the assumption that he is relying on 28 U.S.C. § 455 which provides in part as follows:

**§ 455. Disqualification of justice, judge, or magistrate**

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

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

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

(2) Wherein private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in [sic] a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Even in the absence of a motion brought by a party before the court, I have an obligation to recuse myself from a proceeding where any of the situations set forth in § 455 exist. Liteky v. U.S., 510 U.S. \_\_\_\_\_, 114 S.Ct 1147, 1153, 127 L.Ed.2d 474, 486 (1994). After reviewing § 455, the only two possible grounds for recusal in the present case would be under either subsection (a) or subsection (b)(1) of § 455.

Subsection (a) and (b)(1) of § 455 both pertain to bias or prejudice held by a judge. The "extrajudicial source" doctrine<sup>2</sup> has long been used to define the type of bias or prejudice addressed by § 455(b)(1). Recently, the United States Supreme Court held that the "extrajudicial source" doctrine is applicable not only to subsection (b)(1) but also to subsection (a) of § 455, which is the broader "catch-all" recusal provision. Liteky v. U.S., 510 U.S. \_\_\_\_\_, 114 S. Ct. 1147, 1153, 127 L.Ed.2d 474, 486

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<sup>2</sup> The "extrajudicial source" doctrine states basically that the alleged bias or prejudice must originate from an extrajudicial source and must result in an opinion as to the case that is based on something other than knowledge obtained from participation in the case. See 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3542 (2d ed. 1984).

(1994). In explaining the "extrajudicial source" doctrine the Court stated:

The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: 'Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.' In re J.P. Linahan, Inc., 138 F.2d 650, 654 (CA2 1943). Also not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

Liteky, 114 S.Ct. at 1153, 127 L.Ed. at 488.

The Supreme Court went on to state that rarely will opinions developed during the course of a case suffice to require recusal. Liteky, 114 S.Ct. at 1155, 127 L.Ed. 2d at 490. "[J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion." Id. "[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." Liteky, 114 S.Ct. at 1156, 127 L.Ed. 2d at 491.

Although both subsections (a) and (b)(1) of § 455 require disqualification of a judge who holds a bias or prejudice in a case over which he is presiding, the two subsections differ in scope. Section 455(a) concerns the objective appearance of partiality. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855, (1988). "[W]hat matters is not the reality of bias or prejudice but its appearance." Liteky, 114 S.Ct. at 1153, 127 L.Ed. 2d at 486.

The Fifth Circuit Court of Appeals has stated the objective standard contained in subsection (a) as follows: "The standard for recusal is an objective one, that if a `reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality.'" A.L.P.A. v. Continental Airlines (In re Continental Airlines), 901 F.2d 1259, 1262 (5th Cir. 1990), *reh'g denied*, 918 F.2d 177 (1990), and *cert. denied*, 113 S.Ct. 87, 121 L.Ed. 2d 50, 61 U.S.L.W. 3257 (1992)(quoting Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796, 800 (5th Cir. 1986), *aff'd*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)).

Case law indicates that when considering recusal under § 455(a), using a reasonable man standard, a judge should not recuse himself solely because a meritless claim is asserted against him. "A judge is not disqualified merely because a litigant sues or threatens to sue him." U. S. v. Grismore, 564 F.2d 929, 933 (10th Cir. 1977), *cert. denied*, 435 U.S. 954 (1978); see also

Martin-Trigona v. Lavien, 573 F.Supp. 1237, 1243 (D.Conn. 1983), appeal dismissed, 770 F.2d 157 (1985), cert. denied, 475 U.S. 1058, 106 S.Ct. 1285, 89 L.Ed.2d 592 (1986); 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3542 at 577-78 (2d ed. 1984). "Neither is a litigant's intemperate and scurrilous attack on a presiding judge a valid ground for recusal." Martin-Trigona v. Lavien, 573 F.Supp. at 1243.

While subsection (a) of § 455 deals with the appearance of impartiality, subsection (b)(1) addresses actual bias or prejudice. U.S. v. York, 888 F.2d 1050, 1053 (5th Cir. 1989) Section 455(b)(1) is narrower in scope than subsection (a) because it deals specifically with bias or prejudice that can only be determined subjectively. In fact, much of the protection afforded by § 455(b)(1) is duplicated and expanded by § 455(a). Liteky, 114 S.Ct. at 1153, 127 L.Ed. 2d at 486.

I do not believe that either § 455(a) or § 455(b)(1) requires that I recuse myself in the present cases. The sole basis asserted by Mr. Check for my recusal is that he filed three complaints against me alleging judicial misconduct and appealed the order dismissing the complaints. The complaints were dismissed by the Chief Judge of the Fifth Circuit as being related to the merits of decisions which I have made in the present bankruptcy cases, and the order dismissing the complaints was upheld on appeal.

As previously stated, subsection (a) of § 455 employs an objective, reasonable man standard in order to guard against the



appearance of partiality. Case law holds that an unhappy litigant should not be allowed to "create" the appearance of impartiality and thus be able to force recusal of a judge under § 455(a) by simply filing a complaint against the judge regardless of the complaint's merit. See Martin-Trigona v. Lavien, 573 F.Supp. at 1243.

As § 455(b)(1) deals with subjective bias or prejudice, I am required to consider whether I hold any actual bias or prejudice toward Mr. Check or the related Debtors. I am unaware of any facts or opinions that I may have obtained either outside of or during the course of these bankruptcy cases that would render me biased or prejudiced in the performance of my duties as the bankruptcy judge in the present cases. I also do not believe that I hold any bias or prejudice against Mr. Check because he exercised his right under the Judicial Conduct and Disability Act to file the three complaints with the Fifth Circuit. Therefore, in accordance with § 455(b)(1), I have examined myself to the best of my ability and do not believe that I should recuse myself in the present cases.

For the foregoing reasons, a separate order consistent with this opinion will be entered denying Mr. Check's *Objection and Request for Recusal* filed in each of the present cases.

This the 28<sup>th</sup> day of Oct., 1994.

  
UNITED STATES BANKRUPTCY JUDGE

U. S. BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
FILED  
SEP 30 1994  
CHARLENE J. PENNINGTON, CLERK  
BY \_\_\_\_\_ DEPUTY

1 IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
2 SOUTHERN DIVISION OF MISSISSIPPI

3 CASE: 90-04115 CHAPTER 7  
4 DEBTOR: AUSTIN ONE, INC.,  
A MISSISSIPPI CORPORATION

5 CASE: 90-04181 CHAPTER 7  
6 DEBTOR: AUSTIN ASSOCIATES, INC.,  
A MISSISSIPPI CORPORATION

7 CASE: 90-04114 CHAPTER 7  
8 DEBTOR: MISS ALVA COMPANY INC.

9 CASE: 91-00017 CHAPTER 7  
10 DEBTOR: AUSTIN CHECK

11 CASE: 91-00018 CHAPTER 11  
12 DEBTOR: AUSTIN DEVELOPMENT CO.,  
A MISSISSIPPI CORPORATION

13  
14 BE IT REMEMBERED that on Friday, September 16,  
15 1994, at 11:00 a.m., at the United States Bankruptcy Court,  
16 100 E. Capitol Street, Room 106, Jackson, Mississippi, the  
above styled cases came on for hearing before the Honorable  
Judge Edward Ellington, and the following proceedings were  
held and done, to-wit:

17 APPEARANCES:

18 DEBTOR: AUSTIN D. CHECK  
19 CASE TRUSTEE: J. C. BELL  
20 ATTORNEY OF RECORD: TOMMY SWARTZ  
U. S. TRUSTEE: SHEILA SANDERS

21 REPORTED BY: Harvey J. Rayborn, CSR  
22 Brooks Court Reporting  
23 120 N. Congress #915  
Jackson, Mississippi 39201  
24 (601) 355-5150 Jackson  
(601) 249-3042 McComb  
25 (601) 693-7664 Meridian  
1-800-245-3376

ORIGINAL

C O N T E N T S

Style and Appearances .....	3
Certificate of Court Reporter .....	5

E X H I B I T S

No Exhibits Admitted

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## P-R-O-C-E-E-D-I-N-G-S

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2 THE COURT: Please be seated. The court has  
3 before it, at this time, five related bankruptcy cases:  
4 Miss Alva Company, Inc., Bankruptcy Case Number 90-04114;  
5 Austin One, Inc., Bankruptcy Number 90-04115; Austin and  
6 Associates, Inc., Bankruptcy Number 90-04181; Austin D.  
7 Check, Bankruptcy Case Number 91-00017, Austin Development  
8 Company, Bankruptcy Case 91-00018.

9 The particular matter which is set for hearing at  
10 this time is an objection and a request for recusal filed  
11 by Austin D. Check on August the 9th, 1994. A similar  
12 pleading was filed in each of the five cases and it has  
13 been noticed for hearing for today. And, at this time, I  
14 would recognize Mr. Check. You may stand at the podium.

15 MR. CHECK: On August the, I believe it was August  
16 the 4th, a Complaint was filed in the Fifth Circuit Court  
17 of Appeals' office. And since that time a Petition has  
18 been filed to the Judicial Court -- the Judicial Council  
19 Circuit Court of Appeals in New Orleans, and on that basis  
20 that was the rationale for filing the Motion for the  
21 recusal.

22 THE COURT: All right.

23 MR. CHECK: That's essentially what I've got, your  
24 Honor.

25 THE COURT: All right. Let the record show that

1 the hearing was noticed, also, in addition to others, but  
2 it was noticed to J. C. Bell, who is the Case Trustee in  
3 some of these cases, and Tommy Swartz, who is the attorney  
4 of record, and also they are present in the courtroom. Do  
5 they care to respond?

6 MR. SWARTZ: No, sir, we have no response.

7 THE COURT: All right. There's a representative  
8 here on behalf of the U. S. Trustee. Do you care to  
9 respond?

10 MS. SHEILA SANDERS: No, sir, your Honor.

11 THE COURT: All right. If there's nothing further  
12 to go into the record, then the record is closed and the  
13 Court will take the matter under advisement and we stand  
14 adjourned. Thank you.

15 Time Noted 11:06 a.m.  
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## 1 CERTIFICATE OF COURT REPORTER

2 I, Harvey J. Rayborn, Court Reporter and Notary  
3 Public in and for the County of Hinds, State of  
4 Mississippi, hereby certify that the foregoing 4 pages, and  
5 including this page, contain a true and correct transcript  
6 of the above styled proceeding, as taken by me in the  
7 aforementioned matter at the time and place heretofore  
8 stated, as taken by stenotype and later reduced to  
9 typewritten form under my supervision by means of computer-  
10 aided transcription.

11 I further certify that under the authority vested in  
12 me by the State of Mississippi that the witness was placed  
13 under oath by me to truthfully answer all questions in this  
14 matter.

15 I further certify that I am not in the employ of or  
16 related to any counsel or party in this matter and have no  
17 interest, monetary or otherwise, in the final outcome of  
18 this proceeding.

19 Witness, my signature and seal this 20th day of  
20 September, 1994.

21  
22   
23 Harvey J. Rayborn, CSR

24  
25 My commission Expires: 10/25/96

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION

In re:

Miss Alva Company, Inc.	Case No. 9004114EEM
Austin One, Inc.	Case No. 9004115EEM
Austin Associates, Inc.	Case No. 9004181EEM
Austin D. Check	Case No. 9100017EEM
Austin Development Company, Inc.	Case No. 9100018EEM

FINAL JUDGMENT

Consistent with the Court's opinion dated contemporaneously herewith, it is ordered that the *Objection And Request For Recusal* filed by Austin D. Check in each of the above cases should be, and hereby is, dismissed.

This constitutes a final judgment in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

SO ORDERED this the 28<sup>th</sup> day of October, 1994.

  
UNITED STATES BANKRUPTCY JUDGE