UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAWS FOR A TREAT LLC, Plaintiff, v. THE CHRISTMAS TREE SHOP and NANTUCKET DISTRIBUTING CO., INC., Defendants.	CIVIL ACTION NO. 3:05cv1304 (SRU)

MEMORANDUM OF DECISION

Paws For A Treat LLC brought this action against The Christmas Tree Shops, Inc. and Nantucket Distributing Co., Inc., alleging principally copyright, trademark and trade dress infringement in the sale of certain novelty pet products. Thomas J. O'Neill of Day, Berry & Howard, LLP ("Day, Berry") entered an appearance as counsel for the defendants. Because I am a former partner of Day, Berry, I *sua sponte* considered whether to recuse myself from this case. In a written notice and order dated November 2, 2005, I decided against recusal. In that notice, I invited any party to file a motion for recusal based on the facts disclosed in *Gardella v. International Paper Co.*, 2004 WL 2516189 (D. Conn. Nov. 3, 2004), or to bring to my attention facts that I overlooked. The plaintiff in this case has filed a motion for my recusal. For the reasons that follow, that motion (doc. # 17) is denied.

The plaintiff seeks my recusal pursuant to 28 U.S.C. § 455. Plaintiff does not suggest that I have an actual conflict in this case, but instead asserts that "the relationship Judge Underhill has with the defendants' counsel, the law firm of Day, Berry & Howard gives rise to a potential conflict of interest and the appearance of impropriety." Pl. Motion at 1. In its motion, the plaintiff acknowledges that it does not know "the extent of the interaction with or supervision of Attorney O'Neill by Judge Underhill that may have existed while he was a partner at Day,

Berry & Howard in the Stamford office, but that relationship raises the question of impartiality in this case." *Id.* at 3. Plaintiff also recites the disclosures made in *Gardella* as grounds for my recusal.

A federal judge's recusal from cases in which a lawyer from his former firm appears is addressed by Canon 3 of the Code of Judicial Conduct and by Advisory Opinion No. 24 (Sept. 1, 1972; revised July 10, 1998; last modified Dec. 9, 2002) issued by the Judicial Conference Committee on Codes of Conduct. Both of these authorities suggest that, for at least two years after taking the bench, a judge should recuse himself from cases in which his former firm appears. "The Committee recommends that judges consider a recusal period of at least two years, recognizing that there will be circumstances where a longer period may be more appropriate." Advisory Opinion No. 24. "A judge must recuse in all cases handled by the former law firm until all payments due the judge have been received, and for a reasonable period of time thereafter. . . . Recusal after payments end is necessary only if the reasonable period needed to allay impartiality concerns (generally, at least two years) exceeds the financial payment period." Canon 3, § 3.3-1(b). Moreover, "[a]fter 15 years on the bench, a judge need not recuse from cases handled by the judge's former law firm." *Id.* § 3.3-1(e).

I have reached the decision not to recuse based upon an examination of the particular circumstances of this case. "How long a judge should continue to recuse depends upon various circumstances, such as the relationship the judge had at the law firm with the lawyer appearing before the judge, the length of time since the judge left the law firm, and the relationship between the judge and the particular client and the importance of that client to the firm's practice. . . . In all cases in which the judge's former law firm appears before the judge, the judge should

carefully analyze the situation to determine whether his or her participation would create any appearance of impropriety." Advisory Opinion No. 24.

I do not believe that the actual facts concerning my relationship with Attorney O'Neill and Day, Berry give rise to an appearance of impropriety requiring my recusal from this case. Attorney O'Neill joined Day, Berry as a lateral hire. He and I worked in the same office for about one year before I left the firm. I do not recall supervising Attorney O'Neill on any significant matter; certainly, he was not assigned to the more significant cases I handled during that year. I did not maintain a personal relationship with Attorney O'Neill outside the office. I recall speaking with Attorney O'Neill only once since 1999, when we both found ourselves in a Blockbuster store with children in tow. In short, we never had a close personal or professional relationship.

Judges come into contact with and come to know many lawyers, but 28 U.S.C. § 455 does not require a judge to recuse himself from hearing any case handled by a lawyer he knows. My relationship with Attorney O'Neill is much more attenuated than my relationship with many lawyers who appear before me regularly. Some of those lawyers are my former law clerks, whom I closely supervised on a daily basis for their one- or two-year clerkships. Many judges begin hearing cases in which their former law clerks appear within one year after the clerkship. I wait two years, but am unaware of any authority suggesting that a period of more than two years should be observed. Here, I never worked closely with Attorney O'Neill and have not worked with him at all for over six years. Similarly, I have developed good professional relations with a number of lawyers whom I did not know before becoming a judge, notably lawyers in the United States Attorney's Office and criminal defense counsel. Likewise, I have come to know well a

number of lawyers who are active in various bar associations. These types of relationships, which are stronger than my relationship with Attorney O'Neill, are commonplace in the courts and no one could reasonably that suggest they give rise to the need to recuse.

Nor does the fact that Attorney O'Neill and I both worked in the Stamford office of Day, Berry give rise to an appearance of impropriety. It has been over six years since I worked at Day, Berry. It has been over five years since I attended a Day, Berry retreat. Since 2000, I have maintained frequent contact with only a handful of Day, Berry lawyers. The firm represented my wife and me in a minor matter that concluded nearly three years ago. In short, I have no present relationship with Day, Berry or with the vast majority of its attorneys.

I recall having no relationship whatsoever with The Christmas Tree Shops, Inc. or Nantucket Distributing Co., Inc., the parties now represented by Attorney O'Neill. Neither of those entities was a particularly important client of the Firm during my tenure there. I have learned nothing about this case that would suggest it is "so closely related to a matter handled by [my] former firm while [I] was there that it should be considered the same matter in controversy (i.e., common parties, overlapping factual issues, and the decision will have preclusive effect)." Canon 3, § 3.3-1(j).

After considering all of the circumstances of the present case and my past relationships with Day, Berry and Attorney O'Neill, I conclude that there is no appearance of impropriety in my hearing this matter and, accordingly, that I should not recuse. Federal judges have an obligation to recuse themselves whenever their impartiality could reasonably be questioned, but they also have an obligation not to recuse themselves when circumstances do not require it. *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988) ("A judge is as much obliged

not to recuse himself when it is not called for as he is obliged to when it is."). Considering all the circumstances, I believe I remain obligated to hear this case.

Accordingly, the motion for recusal (doc. # 17) is denied.

It is so ordered.

Dated at Bridgeport, Connecticut, this 24th day of January 2006.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge