IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAIME H. PIZARRO, CRAIG SMITH, JERRY MURPHY, RANDALL IDEISHI, GLENDA STONE, RACHELLE NORTH, and MARIE SILVER, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE HOME DEPOT, INC; THE ADMINISTRATIVE COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN; THE INVESTMENT COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN; and DOES 1–30. Defendants.	CIVIL ACTION FILE No. 1:18-CV-01566-SDG

PLAINTIFFS' MOTION FOR RECUSAL

Pursuant to 28 U.S.C. § 455(a) and for the reasons explained in the accompanying memorandum, Plaintiffs respectfully request that the assigned district judge enter an order of recusal and submit this case for random reassignment.

Respectfully submitted,

Date: April 15, 2022

/s/ T. Brandon Welch

T. Brandon Welch (GA Bar # 152409)
STILLMAN WELCH, LLC
3453 Pierce Drive, Suite 150
Chamblee, GA 30341
Telephone: (404) 895-9040
Facsimile: (404) 907-1819
brandon@stillmanwelch.com

/s/ Charles Field

*Charles Field
SANFORD HEISLER SHARP, LLP
2550 Fifth Avenue, 11th Floor
San Diego, CA 92103
Telephone: (619) 577-4253
Facsimile: (619) 577-4250
cfield@sanfordheisler.com

*Kevin H. Sharp
*Leigh Anne St. Charles
SANFORD HEISLER SHARP, LLP
611 Commerce Street, Suite 3100
Nashville, TN 37203
Telephone: (615) 434-7000
Facsimile: (615) 434-7020
ksharp@sanfordheisler.com

lstcharles@sanfordheisler.com

*David Tracey
SANFORD HEISLER SHARP, LLP
1350 Avenue of the Americas, 31st Floor
New York, NY 10019
Phone: (646) 402-5650
Facsimile: (646) 402-5651
dtracey@sanfordheisler.com

*Sean Ouellette
SANFORD HEISLER SHARP, LLP
700 Pennsylvania Avenue SE,
Suite 300
Washington, DC 20003
Telephone: 202-499-5200
Facsimile: 202-499-5199
SOuellette@sanfordheisler.com

*Norman Blumenthal
BLUMENTHAL NORDREHAUG
BHOWMIK DE BLOUW LLP
2255 Calle Clara
San Diego, CA 92037
Telephone: (858) 551-1223
Facsimile: (858) 551-1232
norm@bamlawca.com

* *admitted pro hac vice*

Attorneys for Plaintiffs and the Classes

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1D, I hereby certify that the foregoing complies with the font and point selections approved by the Court in Local Rule 5.1C, specifically, Times New Roman, 14 point.

This 15th day of April 2022.

/s/ T. Brandon Welch
T. Brandon Welch
Georgia Bar No. 152409

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2022, Plaintiffs' Motion for Recusal was served on the following counsel of record via the CM/ECF system:

David Tetrick, Jr.
King & Spalding LLP
1180 Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Fax: (404) 572-5139
dtetrick@kslaw.com

Darren A. Shuler
King & Spalding LLP
1180 Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Fax: (404) 572-5139
dshuler@kslaw.com

Danielle Chattin
King & Spalding LLP
1180 Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Fax: (404) 572-5139
dchattin@kslaw.com

Benjamin B. Watson
King & Spalding LLP
1180 Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Fax: (404) 572-5139
bwatson@kslaw.com

Attorneys for The Home Depot Defendants

/s/ Charles Field
*Charles Field
SANFORD HEISLER SHARP, LLP
2550 Fifth Avenue, 11th Floor
San Diego, CA 92103
Telephone: (619) 577-4253
Facsimile: (619) 577-4250
cfield@sanfordheisler.com

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<u>MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR RECUSAL</u>

INTRODUCTION

This class action, which was recently reassigned to Your Honor, alleges that Defendants breached their fiduciary duties under the Employee Retirement Income Security Act ("ERISA") by failing to prudently monitor four underperforming investments in The Home Depot FutureBuilder 401(k) Plan (the "Plan") and by allowing the Plan to pay excessive fees for investment advisory services offered by Financial Engines Advisors, LLC and Alight Financial Advisors, LLC ("AFA").

On December 17, 2021, while the case was assigned to the Honorable William M. Ray, III, the United States Chamber of Commerce (the "Chamber") filed a motion for leave to participate in the proceedings as *amicus curiae* in support of Defendants' then-pending Motion for Summary Judgment. *See* Dkt. No. 304. The Chamber's motion was granted, and it filed a brief as *amicus curiae* in support of Defendants' Motion for Summary Judgment, and later appeared at the hearing on the motion to advocate for Defendants' position. *See* Order Granting Chamber's Commerce for Leave to Participate as Amicus Curiae (Dkt. No. 307); Amicus Brief of Chamber of Commerce in Support of Defendants' Motion for Summary Judgment (Dkt. No. 308); Feb. 24, 2022 Tr. (Dkt. No. 332) at 5–6.

Plaintiffs submit this motion to bring the Chamber's involvement to Your Honor's attention. Given Your Honor's disclosed position on the Chamber's

Technology Litigation Advisory Committee, Plaintiffs respectfully submit that reassignment is appropriate.[1] Plaintiffs do not suggest that Your Honor cannot be impartial. Under 28 U.S.C. § 455(a), however, a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Any doubt must be resolved in favor of recusal. *See United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989). Plaintiffs submit that an "average layperson," *id.* at 745, might reasonably question whether affiliation with the litigation arm of an organization that has entered an appearance and taken a clear position advocating in favor of one party and against the other might influence the judge's decision-making in the same case.

Accordingly, Plaintiffs respectfully request that the Court enter an order of recusal.

PROCEDURAL BACKGROUND

Plaintiffs filed this case in 2018 on behalf of a class of participants in the Plan. They allege that Defendants, the Home Depot 401(k) Plan's named fiduciaries, breached their fiduciary duties in two ways. First, Defendants failed to prudently

[1] *See* Almanac of the Federal Judiciary Vol. 1 at 109 (Jan. 2022 Release); Hon. Steven D. Grimberg, United States Senate Committee on the Judiciary Questionnaire for Judicial Nominees at 3, *available at* https://www.judiciary.senate.gov/download/steven-grimberg-sjq_-public

monitor the Challenged Funds[2] and kept them on the Plan despite their chronic underperformance relative to appropriate benchmarks and the universe of similar funds. *See Pizarro v. Home Depot, Inc.*, No. 1:18-CV-01566, 2020 WL 6939810, at *1–2 (N.D. Ga. Sept. 21, 2020). Second, Defendants allowed the Plan to pay excessive fees for Financial Engines' and AFA's "managed accounts" program, an automated service that uses an algorithm to allocate participants' assets among various funds on the Plan's menu. *See id.* In doing so, Defendants breached ERISA's duty of prudence—"the highest known to law"—which required them to: (1) diligently monitor Plan investments on "an ongoing basis, and to remove and replace options that consistently underperform in relation to their identified benchmarks and/or peers"; and (2) to "ensure that the fees charged" to Plan accounts were "reasonable in relation to the market." *Id.* at *2.

In September 2020, the Court certified the Challenged Fund and Excessive Fee classes and denied Defendants' four motions for summary judgment. *See id.* at *18, 29.[3] On July 12, 2021, after discovery closed, the parties filed four motions:

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[2] The Challenged Funds are a suite of BlackRock Lifepath Target Date Funds, the Stephens Small Cap Growth Fund, the TS&W Small Cap Value Fund, and the J.P. Morgan Stable Value Fund.

[3] One of the motions, directed at plaintiff Marie Silver, raised an additional, statute-of-limitations argument. *See Pizarro*, 2020 WL 6939810 at *28 (discussing and rejecting this argument)

(1) Defendants' successive motion for summary judgment (Dkt. No. 228); (2) Plaintiffs' motion for partial summary judgment (Dkt. No. 240); (3) Defendants' motion to exclude Plaintiffs' expert Dr. Gerald Buetow (Dkt. No. 237); and (4) Defendants' motion to exclude Plaintiffs' expert Dr. Arthur Laffer (Dkt. No. 234).

After the parties' cross-motions for summary judgment were fully briefed, the United States Chamber of Commerce then moved for leave "to participate in these proceedings as *amicus curiae* in support of defendants' pending motion for summary judgment." Chamber's Motion for Leave to Participate as Amicus Curiae (Dkt. No. 304) at 1. The Chamber argued that it has "particular interest" at stake in this case because, like Home Depot, "[m]any of the Chamber's members sponsor or provide services to ERISA-governed defined contribution retirement plans" and have an interest in ensuring that courts apply ERISA with "flexibility" for fiduciaries. *Id.* at 2–3. The Chamber's accompanying brief urged the Court to relax ERISA's "strict" and "exacting" standards, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 158 n.17 (1985), into "flexible" and "deferential" guidelines, Amicus Br. (Dkt. No 304-1) at 2, 11, and to apply those standards to grant Defendants' motion for summary judgment, *id.* at 12–23. As Plaintiffs explain in their Response to the Chamber's brief, the amicus brief misstates the applicable law, misconstrues

Plaintiffs' claims, and ignores the voluminous evidence of imprudence in this case. *See* Pls' Response to Chamber's Amicus Br. (Dkt. No. 316) at 1–16.

The Chamber's Litigation Center, which co-counseled the brief, publicized the brief and its support for Home Depot's motion on its website.[4] Several media outlets also covered the filing and the Chamber's support for Home Depot.[5]

On February 24, 2022, Judge Ray heard oral argument on all four motions. At the close of the hearing, he indicated that the Court would "deny [Defendants'] motion to exclude Dr. Laffer" and took the remaining three motions under advisement. Feb. 24, 2022 Minute Entry (Dkt. No. 320); Feb. 24, 2022 Tr. at 167.[6]

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[4] U.S. Chamber of Commerce Litigation Center, "U.S. Chamber files amicus brief urging district court to grant summary judgment in ERISA case," ChamberLitigation.com (Dec. 17, 2021), *available at* https://www.chamberlitigation.com/cases/Pizarro%20v.%20Home%20Depot.

[5] Kelley Mejdrich, "Chamber Backs Home Depot in Massive ERISA Class Action, Law360.com (Dec. 20, 2021), *available at* https://www.law360.com/articles/1450567/chamber-backs-home-depot-in-massive-erisa-class-action; Abraham Jewett, "Chamber Of Commerce Supports Home Depot Against Allegations Retailer Mismanaged Employees' Retirement Savings" (Dec. 27, 2021), *available at* https://topclassactions.com/lawsuit-settlements/money/401k/chamber-of-commerce-supports-home-depot-against-allegations-retailer-mismanaged-employees-retirement-savings/.

[6] The court also stated that it "recommends parties conduct mediation and stated that it [was] willing to its delay ruling" on the motions until after mediation." Feb. 24, 2022 Minute Entry (Dkt. No. 320). Plaintiffs proposed mediation and submitted an opening offer on March 4, 2022, which Defendants rejected on April 5, 2022.

On March 4, 2022, however, Judge Ray entered an order of recusal, explaining that he recently inherited stock in The Home Depot, Inc. and therefore had an un-waivable conflict that required reassignment. *See* Dkt. No. 321. The case was subsequently reassigned to Your Honor. *See id.*

ANALYSIS

"The goal of [the federal recusal statute] is to avoid even the appearance of partiality" and, in doing so, to "promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988). To that end, the law requires that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), even if the judge is in fact impartial and unbiased. *See Kelly*, 888 F.2d at 744. "[W]hat matters" under the statute "is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994).

In requiring recusal even absent actual bias, § 455(a) "liberalize[d] greatly the scope of disqualification in the federal courts." *Murray v. Scott*, 253 F.3d 1308, 1310 (11th Cir. 2001). This broad rule "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice." *Liljeberg*, 486 U.S. at 864–865 n.12 (holding that trial judge erred in failing to recuse himself given his position on the board of a university with an interest in the outcome of the litigation). "[W]here the appearance of partiality exists, recusal is required regardless of the judge's own inner conviction that he or she can decide the case fairly despite the circumstances." *In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997); *accord Liljeberg*, 486 U.S. at 860–61.

The test, therefore, "is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988); *see Kelly*, 888 F.2d at 744–45 ("It is enough that the average layperson would have doubts about any judge's impartiality under these circumstances."). Judges should not recuse based on "unsupported, irrational, or highly tenuous speculation." *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986). But "any doubts must be resolved in favor of recusal." *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003). In "close cases," therefore, judges "must err on the side of recusal." *Murray*, 253 F.3d at 1313.

Those standards make recusal appropriate here. "[T]he participation of amici curiae … can result in the recusal of judges because of the identity of the amici and/or their counsel." *Variable Annuity Life Ins. Co. v. Clark*, 13 F.3d 833, 835 (5th Cir. 1994). In this case, a "fully informed," lay observer would understand that Your

Honor has disclosed membership in the Litigation Advisory Committee for the U.S. Chamber of Commerce, *see supra* n.1, which has entered an appearance in this litigation as *amicus curiae*, advocated in support of one party over the other, and professed a "particular interest" in the outcome of the case. Chamber's Mot. for Leave (Dkt. No. 304) at 2–3. A lay observer would also understand that the Chamber's Litigation Center served as co-counsel for the Chamber and publicized its support for Home Depot.[7] Under these well-published circumstances, a reasonable layman could plausibly suspect that that Your Honor's affiliation with the Chamber through its litigation arm might predispose the court to side with the Chamber's litigation position—and therefore with Defendants. *See Parker*, 855 F.2d at 1524 (holding that recusal was required because the "facts might cast doubt in the public's mind on [the judge's] ability to remain impartial").

Plaintiffs do not suggest that Your Honor would not try this case with a fair and open mind. Nor do they imply that your affiliation with the Chamber is in any way improper. In this unique case, however—in which the Chamber has actively intervened and taken a position in favor of Defendants—Plaintiffs submit that

[7] U.S. Chamber of Commerce Litigation Center, "U.S. Chamber files amicus brief urging district court to grant summary judgment in ERISA case," ChamberLitigation.com (Dec. 17, 2021), *available at* https://www.chamberlitigation.com/cases/Pizarro%20v.%20Home%20Depot.

reassignment is appropriate, as other respected jurists have similarly found recusal appropriate when they or their spouse belonged to an advocacy organization that participated in the litigation pending before the court. *See*, *e.g.*, *Perry v. Schwarzenegger*, 630 F.3d 909, 913 (9th Cir. 2011) (Reinhardt, J.) (explaining that Judge Reinhardt "long had a policy" of recusing himself from "any actions by this court when the organization of which [his] wife [was] the Executive Director makes any appearance or files any brief, amicus or otherwise, before this court").[8]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order of recusal and submit the matter for random reassignment.

Respectfully submitted,

Date: April 15, 2022

/s/ T. Brandon Welch

T. Brandon Welch (GA Bar # 152409)
STILLMAN WELCH, LLC
3453 Pierce Drive, Suite 150

[8] Your Honor's high-level advisory role in Chamber's Litigation Center, which advocates for the business interests of corporations who "sponsor or provide services to ERISA-governed defined contribution retirement plans," Chamber's Mot. for Leave at 2–3, is distinct from mere membership in a state bar association, which courts have held not to require recusal in other cases. *See Lawrence v. Chabot*, 182 F. App'x 442, 449 & n.1 (6th Cir. 2006) (noting the distinction "between a judge's relationship with business organizations and 'a nonprofit organization concerned with improvement of the legal profession and the public good'").

Chamblee, GA 30341
Telephone: (404) 895-9040
Facsimile: (404) 907-1819
brandon@stillmanwelch.com

/s/ Charles Field
*Charles Field
SANFORD HEISLER SHARP, LLP
2550 Fifth Avenue, 11th Floor
San Diego, CA 92103
Telephone: (619) 577-4253
Facsimile: (619) 577-4250
cfield@sanfordheisler.com

*Kevin H. Sharp
*Leigh Anne St. Charles
SANFORD HEISLER SHARP, LLP
611 Commerce Street, Suite 3100
Nashville, TN 37203
Telephone: (615) 434-7000
Facsimile: (615) 434-7020
ksharp@sanfordheisler.com
lstcharles@sanfordheisler.com

*David Tracey
SANFORD HEISLER SHARP, LLP
1350 Avenue of the Americas, 31st Floor
New York, NY 10019
Phone: (646) 402-5650
Facsimile: (646) 402-5651
dtracey@sanfordheisler.com

*Sean Ouellette
SANFORD HEISLER SHARP, LLP
700 Pennsylvania Avenue SE,
Suite 300

Washington, DC 20003
Telephone: 202-499-5200
Facsimile: 202-499-5199
SOuellette@sanfordheisler.com

*Norman Blumenthal
BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP
2255 Calle Clara
San Diego, CA 92037
Telephone: (858) 551-1223
Facsimile: (858) 551-1232
norm@bamlawca.com

* *admitted pro hac vice*

Attorneys for Plaintiffs and the Classes