IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

VLSI TECHNOLOGY LLC,	)	
	)	
Plaintiff,	)	C.A. No. 18-966-CFC-CJB
v.	)	
	)	
INTEL CORPORATION,	)	
	)	
Defendant.	)	
	)	

DECLARATION OF PROFESSOR BRUCE A. GREEN

1. I have been asked by counsel for Plaintiff VLSI Technology LLC ("VLSI") to provide an objective expert opinion regarding two questions posed in the Court's Memorandum Order dated October 17, 2022 ("October 17 Memorandum Order"). The October 17 Memorandum Order concerns the application of the Court's April 18, 2022 Standing Order ("April 18 Standing Order"), which would require the Plaintiff, as a limited liability company, to disclose "the name of every owner, member, and partner . . ., proceeding up the chain of ownership until the name of every individual and corporation with a direct or indirect interest in the party has been identified." As pertains to my assignment, the October 17 Memorandum Order asks how, without this information, the Court can assure itself "that it does not have a conflict of interest that precludes it from presiding over this case" and "that its presiding over the case will not create an appearance of impropriety."[1]

[1] I have not been asked to address questions of law raised by the October 17 Memorandum Order, such as whether an individual district judge has authority under Fed. R. Civ. P. 83(b) to issue a standing order requiring greater disclosure than presently required by Fed. R. Civ. P. 7.1 to enable the judge to make informed disqualification decisions.

I. QUALIFICATIONS

2. My qualifications to provide expert opinions on questions of judicial ethics are set forth more fully in my curriculum vitae (attached hereto as Exhibit A). In brief, I joined the full-time faculty of Fordham Law School in 1987, having previously served as a judicial law clerk and a federal prosecutor. I have regularly taught courses in Professional Responsibility, including on two occasions a seminar on "The Judicial Role and Responsibilities." I write on Professional Responsibility, including on judicial ethics, and co-author a casebook, Jefferson, Pearce, Green et al., Professional Responsibility: A Contemporary Approach (4th ed. 2020, West Academic Publ.). For the first three editions, I had primary responsibility for the chapter on "Special Ethical Rules: Prosecutors and Judges." My professional service relating to legal ethics includes chairing the committee that drafts the Multistate Professional Responsibility Examination, which includes questions that test familiarity with the ABA Model Code of Judicial Conduct. I previously chaired the ethics committees of the NY State Bar Association, the NY City Bar, the ABA Section of Litigation, and the ABA Criminal Justice Section, and served on the ABA Standing Committee on Ethics and Professional Responsibility during a three-year period when it was reviewing proposed amendments to the ABA Model Code of Judicial Conduct. I have also supervised student writings on judicial ethics,[2] and have organized and spoken at programs on judicial ethics. I was recently selected to co-edit a forthcoming special edition of the *Journal of Law and Contemporary Problems* titled, "Judges in the 21st Century: Confidence Lost?".

[2] See Ziona Hochbaum, Note, *Taking Stock: The Need to Amend 28 U.S.C. § 455 to Achieve Clarity and Sensibility in Disqualification Rules for Judges' Financial Holdings*, 71 FORDHAM L. REV. 1669 (2003).

3. For the time I have devoted to consideration of this matter, I am being compensated at my customary rate of $1,200 per hour. Payment of my fees is not contingent upon the content or substance of the opinions expressed in this report or any testimony.

II. RELEVANT FACTS

4. For purposes of understanding the relevant facts, I have reviewed the documents listed in the document attached hereto as Exhibit B.

5. The relevant facts are, in brief, as follows: Plaintiff, VLSI Technology LLC, has disclosed that it is 100% owned by a limited liability company, CF VLSI Holdings LLC ("VLSI Holdings"), which, in turn, has a majority owner and nine minority owners, all of which have been identified to the Court. Each of the ten entities is either a limited liability company or a limited partnership. Each of the nine minority owners owns less than a 10% interest in VLSI Holdings. The majority owner of VLSI Holdings, FCOF IV UST LLC ("FCO IV"), is "a closed end investment fund family comprised of six individual funds," which are managed by Fortress Investment Group, LLC. 2022-07-18 Stolarski Decl. at ¶ 5. "[T]he ultimate owners of FCO IV are hundreds of outside investors that are composed of pension and retirement funds, sovereign wealth funds, foundations, high net worth individuals, endowments and other institutional investors, each of which owns less than a 10% indirect interest in VLSI Holdings." *Id.* VLSI has represented that, with one limited exception, it does not know the identities of the investors in the ten entities that collectively own VLSI Holdings.

III. DISCUSSION

A. Background: The Scope of the Relevant Disqualification Provisions

6. The question of whether a federal district judge's financial holdings give rise to a conflict of interest or create an appearance of impropriety requiring the judge's disqualification is

governed by 28 U.S.C. § 455(b)(4) and by Canon 3C(1) of the Code of Conduct for United States Judges. The relevant provisions are similar.

7. Canon 3C(1) of the Code of Conduct for United States Judges provides that: "(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: . . . (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest . . . in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding." Canon 3C(3)(c) defines a "financial interest" as "ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party." The provision sets forth exceptions to the definition of "financial interest," including an exception that ownership in a mutual or common investment fund does not constitute a "financial interest" unless the judge controls the fund. *See* Canon 3C(3)(c)(i).

8. Section 455 is essentially the same. Section 455(b)(4) requires mandatory recusal when a judge "has a financial interest in . . . a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." It defines "financial interest" to mean "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party," but, like Canon 3C, it makes an exception for "[o]wnership in a mutual or common investment." *See* 28 U.S.C. § 455(c)(4)(i).

9. The October 17 Memorandum Order raises the question of whether, in this action, a district judge might be subject to disqualification if he has an ownership interest in any of the unidentified entities that has an interest in any of the Fortress-managed funds that, in turn, have an

interest in the Plaintiff's parent company, VLSI Holdings. If not, then it would be unnecessary to identify those entities to make an informed disqualification decision.

10. The federal Advisory Committee on Codes of Conduct has provided relevant guidance in Opinion No. 57, titled, "Disqualification Based on Stock Ownership in Parent Corporation of a Party or Controlled Subsidiary of a Party."[3] One question addressed in Opinion No. 57 was "whether a judge should recuse when the judge owns stock in the parent corporation of a controlled subsidiary that is a party." The Committee concluded that under Canon 3C, "the owner of stock in a parent corporation has a financial interest in a controlled subsidiary. Therefore, when a judge knows that a party is controlled by a corporation in which the judge owns stock, the judge should recuse. . . . When a parent company does not own all or a majority of stock in the subsidiary, the judge should determine whether the parent has control of the subsidiary. The Committee advises that the 10% disclosure requirement in Fed. R. App. P. 26.1 is a benchmark measure of parental control for recusal purposes." Although the Committee's mandate is limited to interpreting the Code of Conduct for United States Judges, the advisory opinion noted that "Canon 3C of the Code closely tracks the language of § 455."

11. Reported decisions are consistent with the advisory opinion. On one hand, federal judges recognize that they have a conflict of interest requiring their recusal if they have an ownership interest in a company that wholly owns a party to an action. *See, e.g., Catherines v. Copytele, Inc.*, 608 F. Supp. 1031 (E.D.N.Y. 1985). Here, as a hypothetical example, a judge's direct ownership interest in VLSI Holdings, the Plaintiff's parent company, would be disqualifying, because VLSI Holdings wholly owns the Plaintiff. On the other hand, a judge's

[3] This opinion is available at: https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02_0.pdf.

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