Elihu Inselbuch (EI-2843)
CAPLIN & DRYSDALE, CHTD.
27th Floor
399 Park Avenue
New York, New York 10022
(212) 319-9240

Peter Van N. Lockwood
Walter B. Slocombe
Albert G. Lauber
Preston Burton
CAPLIN & DRYSDALE, CHTD.
1 Thomas Circle NW, Suite 1100
Washington, D.C. 20005
(202) 862-5000

Proposed Attorneys for Movant
Unsecured Creditors Committee
For Quigley Company, Inc.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

	:	Objection Deadline: October 12, 2004
	:	Hearing Date: October 22, 2004 @ 2:30pm
	:	
In the Matter of:	:	Chapter 11
	:	
QUIGLEY COMPANY, INC.,	:	Case No. 04 - 15739 (PCB)
	:	
Debtor.	:	
	:	

MOTION OF THE UNSECURED CREDITORS COMMITTEE FOR RECUSAL UNDER 28 U.S.C. § 455

The Unsecured Creditors Committee ("the Committee") of Quigley Company, Inc. ("Quigley" or "the Debtor"), by and through undersigned counsel, respectfully moves this Court for an Order mandating recusal, pursuant to 28 U.S.C. § 455. As grounds therefor, the Court is respectfully referred to the accompanying Memorandum of Law of the Unsecured Creditors Committee in Support of its Motion for Recusal Under 28 U.S.C. § 455. A proposed order consistent with this Motion is also attached.

Dated: New York, New York
October 4, 2004

Respectfully submitted,

CAPLIN & DRYSDALE, CHARTERED

By: _____

Elihu Inselbuch (EI-2843)
399 Park Avenue, 36th Floor
New York, New York 10017
(212) 319-7125

Peter Van N. Lockwood
Walter B. Slocombe
Albert G. Lauber
Preston Burton
One Thomas Circle, NW
Suite 1100
Washington, DC 20005
(202) 862-5000

Proposed Attorneys for Movant Unsecured Creditors Committee of Quigley Company, Inc.

Elihu Inselbuch (EI-2843)
CAPLIN & DRYSDALE, CHTD.
27th Floor
399 Park Avenue
New York, New York 10022
(212) 319-9240

Peter Van N. Lockwood
Walter B. Slocombe
Albert G. Lauber
Preston Burton
CAPLIN & DRYSDALE, CHTD.
1 Thomas Circle NW, Suite 1100
Washington, D.C. 20005
(202) 862-5000

Proposed Attorneys for Movant
Unsecured Creditors Committee
For Quigley Company, Inc.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

	:	Objection Deadline: October 12, 2004
	:	Hearing Date: October 22, 2004 @ 2:30pm
In the Matter of:	:	Chapter 11
QUIGLEY COMPANY, INC.,	:	Case No. 04 - 15739 (PCB)
Debtor.	:	

MEMORANDUM OF LAW OF THE UNSECURED CREDITORS COMMITTEE IN SUPPORT OF ITS MOTION FOR RECUSAL UNDER 28 U.S.C. § 455

INTRODUCTION

The Unsecured Creditors Committee ("the Committee") of Quigley Company, Inc. ("Quigley" or "the Debtor") was appointed by the United States Trustee on September 21, 2004. All members of the Committee are asbestos personal-injury claimants, who constitute the Debtor's only unsecured creditors. The Committee has filed a pending application to retain as its counsel the undersigned, Caplin & Drysdale, Chartered. By this motion, the Committee respectfully submits that it is appropriate for the Honorable Prudence Carter Beatty to recuse herself from further participation in this bankruptcy case pursuant to 28 U.S.C. § 455 because of personal bias and prejudice against the Committee's constituency, as well as the appearance of bias manifested by Judge Beatty at the initial hearing in this case on September 7, 2004 (the "September 7 hearing").

The purpose of the September 7 hearing was to consider the Debtor's motion for a preliminary injunction and temporary restraining order barring the prosecution of asbestos-related personal-injury lawsuits against the Debtor's parent corporation, Pfizer, Inc. *See* Transcript attached hereto as **Exhibit 1**. The defendants at this hearing were personal-injury plaintiffs represented by Weitz & Luxenberg, a prominent New York plaintiffs firm, which represents approximately 20% of the claimants against Quigley.

Near the outset of the hearing, counsel for the United States Trustee noted that the Debtor had filed under Chapter 11 principally for "the purpose of resolving the asbestos cases" (Tr. 10: 4-5). Judge Beatty responded as follows (Tr. 10: 5-6, 16-18):

> THE COURT: Trust me. There is no large body of claims that actually exists against Quigley. * * * They have already probably paid more than there could possibly be that were ever exposed to it.

> It was a totally commercial product. It was not a household product. And it was used in a specialized, manufacturing process, during which you needed a high-heat barrier.
>
> I don't actually think that going out and trying to get more people is what you should be doing. I don't think they have legitimate claims.

The first substantive issue discussed at the hearing concerned the scope of notice to be provided to asbestos claimants. Counsel for the Debtor stated that "[w]e are required to give notice to Counsel for Claimants" and that "[t]here are 160,000 claimants" (Tr. 12: 4-6). Judge Beatty stated her view that the number or legitimate claimants was much smaller (Tr. 10: 21-25, 11: 1-6):

> THE COURT: This is a company making a product. I don't know how many units they made. Only those people at Quigley's facility that were making these units, or the people at the facility where these units were put in place, are likely to have had any exposure.
>
> That number is certainly less than one hundred thousand people. I don't see any purpose to putting notice out, to figure out how to get more claims that barely meet any standard for injury. And where they can't meet the standard for injury, coming from this Defendant, I mean, this is not--

During colloquy with counsel for Weitz & Luxenberg, the discussion turned to whether certain asbestos-containing products had been manufactured by Pfizer or Quigley. Judge Beatty made the following remarks (Tr. 20: 4-9, 16-22; 22: 18-23):

> THE COURT: I don't buy into the idea that you guys don't have to prove source. You're going to have to prove source on this. I don't believe those lawsuits that are out there are lawsuits where you can prove that either Quigley or Pfizer was the source. * * *
>
> Someone has direct liability. This may not strike you as what you'd like me to say. I don't think any more companies need to be destroyed, for having a minor liability, in the asbestos business. * * *
>
> We keep getting ever increasing numbers of people that are being solicited to file asbestos claims. Are any of your clients in a

> position to assert that either Pfizer or Quigley has been the source of their exposure to asbestos? And how are they able to do that?

In colloquy with counsel for Weitz & Luxenberg concerning the equities of issuing a temporary restraining order, Judge Beatty stated as follows (Tr. 21: 22-25, 22: 2-9):

> THE COURT: I don't think your guys can be hurt by my issuing a temporary restraining order that precludes them from suing. And frankly, if they get held up for six months, I don't see where it's the biggest deal in the world. Whereas, right now, we have a mess out there, in the land of asbestos attorneys. They are going out and soliciting complaints from people who just barely, if they breathe just right, and to the left, then they might catch a wisp of something.

When counsel for Weitz & Luxenberg told the Court that his firm "represents twenty percent" of the claimants against Quigley (Tr. 28:11), Judge Beatty responded as follows (Tr. 28: 12-13):

> THE COURT: Haven't I seen the name of your firm on subway train ads, looking for more people?

ARGUMENT

The Committee respectfully submits that Judge Beatty's remarks at the September 7 hearing reflect bias against asbestos claimants and their attorneys, as well as bias with respect to certain substantive issues that will likely come before the Court in these bankruptcy proceedings. Judge Beatty made these remarks during the first hearing in this case, at a point when counsel for asbestos creditors had not yet had an opportunity to file a single pleading. Thus, her remarks cannot have been predicated on her evaluation of the parties' respective legal positions, but must of necessity be traceable to extrajudicial sources. For this reason, her remarks warrant her recusal from any and all further proceedings in this matter.

A. THIS MOTION FOR RECUSAL IS TIMELY

Bankruptcy judges are governed by 28 U.S.C. § 455 in recusal decisions. *See* Fed. R. Bankr. P. 5004. Section 455(a) instructs that "[a]ny justice, judge, or magistrate of the United Stats shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Section 455(b)(1) directs a judge to disqualify himself or herself "where he [or she] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

The Second Circuit has indicated that recusal motions must be made "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." Gil Enterprises, Inc. v. Delvy, 79 F.3d 241, 247 (2d Cir. 1996) (quoting Apple v. Jewish Hosp. & Medical Ctr., 829 F.2d 326, 333 (2d Cir. 1987)). There are two basic reasons for this requirement. First, a prompt motion for recusal allows the judge sufficient time to assess the motion on its merits before moving forward and taking steps that it may be inappropriate for that judge to take. Second, the prompt filing of a recusal motion "avoids the risk that a party is holding back a recusal application as a fall-back position in the event of adverse rulings on pending matters." In re IBM Corp., 45 F.3d 641, 643 (2d Cir. 1995).

The Unsecured Creditors Committee was appointed by the United States Trustee on September 21, 2004. The Committee has filed an application to retain as its counsel Caplin & Drysdale, Chartered, which is still pending. After being formed, the Committee required time to consult with its proposed counsel about the filing of a motion for recusal, a step that the Committee and its counsel do not believe should be taken lightly. This motion for recusal is being filed on October 4, 2004, within fourteen days of the Committee's formation. The motion is therefore timely.

B. RECUSAL IS WARRANTED UNDER § 455(b)(1)

Section 455(b)(1) directs a judge to disqualify himself or herself "where he [or she] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." The Second Circuit has held that recusal is appropriate under § 455(b)(1) when a judge demonstrates a personal bias regarding the outcome of the case or the disposition of particular issues in the case. *See* United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992) (citing United States v. Diaz, 797 F.2d 99, 100 (2d Cir. 1986) (*per curiam*)).

A party cannot demonstrate bias simply by pointing to a history of prior adverse rulings by the judge, or by citing remarks the judge has made in evaluating the parties' positions as outlined in their pleadings or briefs. *See* Liteky v. United States, 510 U.S. 540, 555 (1994) ("opinions 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"). Rather, a party seeking recusal under § 455(b)(1) must show that the views expressed by the judge are traceable to an extrajudicial source. *See* Apple, 829 F.2d at 333 (a showing of personal bias must be based on "extrajudicial conduct * * * not conduct which arises in a judicial context"). *Accord,* Lewis v. Tuscan Dairy Farms, Inc., 25 F.3d 1138 (2d Cir. 1994); Matima v. Celli, 228 F.3d 68, 81 (2d Cir. 2000). Similarly, a judge's occasional use of intemperate language or expressions of frustration will not necessarily indicate personal bias or prejudice. *See* Liteky, 510 U.S. at 555-56; Blanche Rd. Corp. v. Bensalem Township, 57 F.3d 253, 266 (3d Cir. 1995). Even "remarks reflecting strong views about a defendant will not call for a judge's recusal so long as those views are based on his

own observations during the performance of his judicial duties." United States v. Barry, 961 F.2d 260, 263 (D.C. Cir. 1992).

On the other hand, personal bias that stems from an extrajudicial source, or that rises to the level of "deep-seated favoritism or antagonism that would make fair judgment impossible," does require recusal under § 455(b)(1). United States v. Conte, 99 F.3d 60, 65 (2d Cir. 1996). The Supreme Court has described the requisite level of antagonism as "an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings." Liteky, 510 U.S. at 557-58 (Kennedy, J., concurring).

Applying these standards, courts have found recusal to be appropriate where a judge has used repeated, intemperate language against one party. For example, in Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979), the court of appeals ordered the recusal of the district court judge on the basis of his remarks when ruling on the plaintiff's preliminary injunction motion:

> This thing is the most transparent and the most blatant attempt to intimidate witnesses and parties that I have seen in a long time. I don't believe anything that anybody from Chrysler tells me because there is nothing in the record that is before me and in my experience in dealing with this case that gives me reason to believe that they are worthy of credence by anybody. They are a bunch of villains and they are interested only in feathering their own nests at the expense of everybody they can, including their own employees, and I don't intend to put up with it.

Chrysler Corp., 596 F.2d at 155. The Sixth Circuit concluded that the judge's remarks "were both unsupported by the record and unnecessary in the circumstances" and that he had "failed from the start of the [hearing] to view this case with the impartiality between litigants that [the parties are] entitled to receive." Id. at 155-56 (quoting Knapp v. Kinsey, 232 F.2d 458, 467

(6th Cir. 1956)). In so holding, the court of appeals sharply distinguished between permissible commentary and the manifestation of personal bias:

> Often some degree of bias develops inevitably during a trial. Judges cannot be forbidden to feel sympathy or aversion for one party or the other. Mild expressions of feeling are as hard to avoid as the feeling itself. But a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial. If, before a case is over, a judge's bias appears to have become overpowering, we think it disqualifies him.

Chrysler Corp., 596 F.2d at 156 (quoting Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941)).

During the September 7 hearing, Judge Beatty made a variety of remarks that disparaged asbestos claimants, the legitimacy of their claims, and the conduct of their lawyers. Judge Beatty's remarks also revealed bias on several specific issues that may come before this Court, such as the number of individuals who have been exposed to the Debtor's asbestos products; the ability of such claimants to prove product identification; and the number of claimants who manifest symptoms of asbestos disease. These remarks display a lack of "impartiality between litigants that [the parties are] entitled to receive." Chrysler Corp., 596 F.2d at 156.

Moreover, the bias manifested by Judge Beatty's remarks is evidently traceable to an extrajudicial source. The September 7 hearing was the first hearing in this bankruptcy case. As of that date, a committee representing asbestos claimants had not yet been appointed, much less retained counsel. Counsel for defendants in the TRO proceeding, Weitz & Luxenberg, had not had an opportunity to file any written pleading or other document. Thus, Judge Beatty's remarks cannot have been based on her evaluation of the facts or evidence, her evaluation of legal arguments advanced by counsel, or any other experience that she has had in

this case. Rather, Judge Beatty could only have been speaking from extrajudicial experience, and her comments are clearly "unsupported by the record." Chrysler Corp., 596 F.2d at 155. Indeed, her remarks explicitly suggest that her disparaging view of attorneys representing asbestos claimants is traceable in part to advertising that she has encountered on the subway. *See* Tr. 28: 12-13 ("Haven't I seen the name of your firm on subway train ads, looking for more people?"). We respectfully submit that Judge Beatty's personal bias rises to the level of "deep-seated favoritism or antagonism that would make fair judgment impossible" (Conte, 99 F.3d at 65) and therefore requires her recusal under § 455(b)(1).

C. RECUSAL IS ALSO WARRANTED UNDER § 455(a)

Under § 455(a), a judge is required to disqualify himself or herself "in any proceeding in which his [or her] impartiality might reasonably be questioned." Subsection (a) provides for recusal in circumstances that give rise to an appearance of partiality, even where actual partiality or bias is not shown. *See* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 (1988); *see also* Chase Manhattan Bank v. Affiliated FM Insurance Co., 343 F.3d 120, 127 (2d Cir. 2003). The determination whether the circumstances give rise to an appearance of partiality "is an objective one based on what a reasonable person knowing all the facts would conclude." Chase Manhattan Bank, 343 F.3d at 127 (citing Liljeberg, 486 U.S. at 860-61); *see also* Liteky, 510 U.S. at 548 (analysis under § 455(a) requires an objective consideration of the appearance of partiality, not the reality of bias or prejudice). The Second Circuit has stated the standard for recusal under § 455(a) as follows:

> Would a reasonable person, knowing all the facts, conclude that the trial judge's impartiality could reasonably be questioned? Or, phrased differently, would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done absent recusal?

Diamondstone v. Macaluso, 148 F.3d 113, 120-21 (2d Cir. 1998).

The disqualification analysis under § 455(a) "must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons." In re Allied-Signal, Inc., 891 F.2d 967, 970 (1st Cir. 1989). As the Second Circuit has explained, "a judge is as much obligated not to recuse himself when it is not called for as he is obliged to when it is." In re Aguinda, 241 F.3d 194, 201 (2d Cir. 2001). Even where recusal is not mandated by § 455(b)(1), however, the same facts will often be relevant to the analysis, and may warrant recusal, under § 455(a). "Section 455(b) focuses on interests and situations which raise conflicts, while 'the goal of section 455(a) is to avoid even the appearance of partiality.'" In re Certain Underwriters, 294 F.3d 297, 306 (2d Cir. 2002) (quoting Liljeberg, 486 U.S. at 860)).

In the instant case, the recusal analysis under § 455(a) is relatively straightforward because the Committee has brought its motion at the very beginning of the case, on the basis of remarks that Judge Beatty made at the very first hearing. Thus, in order to be "fully informed of the underlying facts" (Diamondstone, 148 F.3d at 120-21), a "disinterested observer" need do little more than read the transcript of the September 7 hearing. We respectfully submit that an objective person, after reading Judge Beatty's disparaging remarks during that hearing about asbestos claimants, their attorneys, and the legitimacy of their claims, would conclude that her impartiality can reasonably be questioned.

Moreover, this is clearly not a situation where the recusal motion is prompted by a judge's "adverse rulings on pending matters" (In re IBM Corp., 45 F.3d at 643) or by a

party's desire to "manipulat[e] the system for strategic reasons" (In re Allied-Signal, Inc., 891 F.2d at 970). The Committee filed its motion at the very outset of this case, on the basis of views expressed by Judge Beatty at the initial hearing. The Committee has filed this motion reluctantly; it had no predisposition against Judge Beatty on the basis of any rulings she has made in this case or in any other case. This motion is prompted solely by the biased and intemperate views that Judge Beatty expressed at the September 7 hearing – remarks that took the Committee and their lawyers completely by surprise. Those remarks create at least "the appearance of partiality" (Liljeberg, 486 U.S. at 860) and thus warrant Judge Beatty's recusal under § 455(a).

CONCLUSION

For the foregoing reasons, the motion for recusal under 28 U.S.C. § 455 should be granted.

Dated: New York, New York
October 4, 2004

Respectfully submitted,

Elihu Inselbuch (EI-2843)
Caplin & Drysdale, Chtd.
399 Park Avenue, 36th Floor
New York, New York 10017
(212) 319-7125

Peter Van N. Lockwood
Walter B. Slocombe
Albert G. Lauber
Preston Burton
Caplin & Drysdale, Chtd.
One Thomas Circle, NW
Suite 1100
Washington, DC 20005
(202) 862-5000

Proposed Attorneys for Movant
Unsecured Creditors Committee of
Quigley Company, Inc.