IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GIRSCH, *et al.*	)	
	)	
Intervening Plaintiffs,	)	Case No. 01 CH 21984
v.	)	
	)	
DENNIS J. HIFFMAN, *et al.*	)	
	)	Calendar 5
Defendants.	)	

DEFENDANTS' NOTICE AND REQUEST FOR JUDICIAL RECUSAL PURSUANT TO ILLINOIS SUPREME COURT RULE 63(C)

Dennis J. Hiffman, E. Thomas Collins, Jr., and Richard E. Hulina ("HCH"), by their undersigned attorneys, respectfully submit this Notice and Request for Judicial Recusal pursuant to Illinois Supreme Court Rule 63(C).

On January 25, 2019, Judge Patrick J. Sherlock and his former law partner, Peter B. Carey ("Carey"), petitioned this Court for an award of attorneys' fees for their representation of a prior derivative plaintiff (the "Fee Petition"). That has created an extraordinary and (as far as HCH have been able to determine) unprecedented situation—a sitting Circuit Judge of the Circuit Court of Cook County has asked his colleague, an Associate Judge of the Circuit Court of Cook County, to award him millions of dollars. Regardless of the Court's effort to be strictly neutral in ruling on the Fee Petition, these circumstances would lead a reasonable member of the public to question the Court's ability to remain impartial, not only regarding the Fee Petition, but also with respect to other rulings that could impact the Fee Petition.

Illinois Supreme Court Rule 63, modeled on Rule 2.11 of the ABA Code of Judicial Conduct, was promulgated for precisely this type of situation and mandates recusal to preserve the public's confidence in the integrity and impartiality of the Illinois judiciary. Under Rule 63(C), "a judge *shall* disqualify himself or herself in a proceeding in which the judge's

impartiality might reasonably be questioned," including situations involving even the "appearance of impropriety." Ill. S. Ct. R. 63(C) (emphasis added); *see also In re Marriage of O'Brien*, 2011 IL 109039, ¶ 43. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution similarly requires recusal and transfer to avoid the appearance of impropriety in situations like the one at issue here.

HCH therefore respectfully request that the Court recuse itself from the remainder of the case and transfer it to the Presiding Judge of the Chancery Division for transfer and reassignment to a judge outside of Cook County.

BACKGROUND

Melissa Pielet ("Pielet") filed this lawsuit in 2001 on behalf of herself, I.B.P. Limited Partnership ("IBP"), and TB Limited Partnership ("TB"). Pielet withdrew as Plaintiff on December 22, 2003. Alleged TB limited partners (Mark Munaretto, John Girsch, Edward Zifkin, and Mark Wheeles) and IBP limited partners (Munaretto and William Skrzelowski) (together, "Intervening Plaintiffs") intervened in February 2004.

On December 21, 2018, the Court entered a Judgment Order Following Trial ("Judgment"). (Judgment, Exhibit 1.) The Judgment ordered further proceedings to determine, among other things, the amount of fees to be awarded to "Plaintiffs' attorneys" pursuant to "Plaintiffs' request" (*i.e.*, the request by Intervening Plaintiffs' counsel, The Law Offices of Edward T. Joyce & Associates, PC). The Judgment is not final because several issues with respect to the judgment remain undecided, including: (1) the Parties' submissions as to Intervening Plaintiffs' and HCH's ownership percentages in the limited partnerships; (2) HCH's request that the Court reduce the award for several independent reasons; and (3) whether punitive damages should be awarded, and if so, in what amount.

On January 25, 2019, Judge Sherlock and his former law partner, Carey, filed their Fee Petition based on their representation of Pielet from 2001 until November 2003 (when they withdrew as counsel). They request 3% of common funds created from the Judgment for their fee award, which the Fee Petition calculates is currently $2,471,273.64 (and a lower amount under the "lodestar" method). (Fee Petition, Exhibit 2, at 4.)

ARGUMENT

These circumstances would cause a reasonable observer to question whether the Court, including all of Judge Sherlock's fellow Cook County judges, could impartially make any ruling affecting how much money, if any, Judge Sherlock and his former partner should be awarded. Under the standards of Rule 63(C) and the Due Process Clause of the U.S. Constitution, the Court should recuse itself and the case should be transferred to a court outside the Circuit Court of Cook County.[1]

I. ILLINOIS SUPREME COURT RULE 63(C) MANDATES RECUSAL.

A. Law

Rule 63(C) states that "a judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Ill. S. Ct. R. 63(C) (emphasis added). The Rule is written in mandatory, not permissive, terms. Rule 63 "mandates disqualification when a *reasonable person might question* the judge's ability to rule impartially."

[1] HCH are presenting this request for recusal at the earliest time after the circumstances giving rise to judicial disqualification—the filing of the Fee Petition—arose. The request is timely because no substantive rulings have been made since the Fee Petition was filed, and the Fee Petition has not yet been adjudicated. While Carey and Judge Sherlock received a portion of attorney's fees from the 2017 Shaffer Settlement, the Fee Petition at hand differs from the Shaffer Settlement circumstances in significant ways. First, the fees received from the Shaffer Settlement were stipulated by the parties to the settlement agreement—which did not include HCH—and those amounts were not to be paid by HCH (but only Shaffer). As to the instant Fee Petition, however, HCH will vigorously contest Carey and Judge Sherlock's right to fees, as well as the amount claimed. These are contested issues that the Court will need to decide when ruling on the Fee Petition. Second, as set forth herein, there remain several pending motions that may directly impact the fees awarded to counsel that are pending before the Court. Third, testimony and evidence presented at the October 2017 trial, from HCH's perspective, drew Carey's, and therefore by extension Judge Sherlock's, claim to fees into further question. Accordingly, the Court will play a significant role in determining whether Carey and Judge Sherlock are entitled to fees and, if so, in what amount.

Barth v. State Farm Fire & Cas. Co., 228 Ill. 2d 163, 176 (2008) (emphasis added); *see also People v. Buck*, 361 Ill. App. 3d 923, 932 (2d Dist. 2005) (stating the test is "whether a reasonable person, aware of the facts and the law, would believe that [he] was impartial"). The direction for a judge to disqualify himself under Rule 63(C) "includes 'situations involving the *appearance* of impropriety'" and does not require a finding of actual bias, prejudice or misconduct. *O'Brien*, 2011 IL 109039, ¶ 43 (emphasis added) (citing *Buck*, 361 Ill. App. 3d at 931). When the issue is whether a judge's impartiality might be questioned because another judge is involved in the litigation, an important recusal consideration is whether the judges of the same circuit have been associated with each other for a substantial length of time such that it is necessary "to grant a change of venue to maintain the reputation of the courts for strict impartiality in the administration of judges and to avoid even the appearance of impropriety." *Faris v. Faris*, 142 Ill. App. 3d 987, 998 (2d Dist. 1986).

The cases cited with approval by *Faris* would likewise require that this Court recuse itself and the case be transferred. *See DeLuca v. CBS Inc.*, 481 N.Y.S.2d 425, 105 A.D.2d 770 (N.Y. App. Div. 1984) (defamation case transferred to another county to avoid even the appearance of impropriety when the plaintiff was a Supreme Court justice and a resident of Suffolk County); *Burstein v. Greene*, 402 N.Y.S.2d 227, 61 A.D.2d 827 (N.Y. App. Div. 1978) (case transferred to another county where the plaintiff was the spouse of a Supreme Court justice of Nassau County); *Milazzo v. Long Island Lighting Co.*, 483 N.Y.S.2d 33, 106 A.D.2d 495 (N.Y. App. Div. 1984) (case transferred to another county when the plaintiff had been the secretary for two justices in the same county, even though the defendant had learned about the plaintiff's relationship to the justices four years prior to filing its motion for a change of venue). As Justice Schnake persuasively stated in *Faris*:

> While the opinion of the majority correctly states that no reported Illinois case addresses the singular situation found here, I would suggest that the issue has not reached our reviewing courts because of the exercise of common sense by litigants, counsel and judges at the trial level, where maintaining standards of fairness requires only routine administrative handling.
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> To avoid even the appearance of judicial impropriety is always of paramount importance . . . .

Faris, 142 Ill. App. 3d at 1003-04 (Schnake, J., dissenting); *see also Faris v. Faris*, 112 Ill. 2d 572, 573 (1986) (Simon, J., dissenting from denial of Petition for Leave to Appeal)) ("To avoid the appearance of judicial impropriety is always of paramount importance . . . ."); *People v. Wilson*, 497 N.E.2d 302, 304 (Ill. 1986) ("The rule commands that judges go beyond merely avoiding misconduct and abjure even that which might bring their impartiality into question.").

Also instructive are canons published by the Judicial Conference of the United States. *See* Judicial Conference, *Guide to Judiciary Policy*, Vol. 2B, Ch. 2: Published Advisory Opinions (last revised Dec. 6, 2018), *available at* https://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf. Although these canons are directed at federal judges, Canon 3 of the Code of Conduct for United States Judges has the same language as Illinois Rule 63 and overall the two sets of rules are otherwise similar. Relevant passages from the federal Published Advisory Opinions as to Canon 3, are excerpted below:

> ***Committee on Codes of Conduct Advisory Opinion No. 70: Disqualification When Former Judge Appears as Counsel***
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> This opinion addresses recusal considerations when former judges, including judges who resign pursuant to 28 U.S.C. § 371(a), appear as counsel before the court in which they once held judicial office. . . The Code of Conduct for United States Judges and 28 U.S.C. § 455(a) require recusal when the impartiality of a judge might reasonably be questioned. The Code also directs recusal where an appearance of impropriety might exist. These principles govern the duties of the judge when a former colleague appears as counsel. . . The Committee recommends that courts announce a policy that for a fixed period after the retirement or resignation of a colleague, judges recuse themselves in any case in which the former colleague appears as counsel. . .

> Even though a fixed period may have expired, a judge may be required to recuse in a case in which counsel for a party is a former judge with whom the sitting judge had a particularly close association. The standard applied here is the same as when a former associate or partner in a law firm, or a close friend, is an attorney in the case. . .
>
> A discrete problem arises when a former judge appears as counsel in a case that was filed in his or her former court before he or she resigned. In such circumstances, the presiding judge should confirm that the attorney's representation is not in violation of the applicable rules of professional responsibility. . . If a judge sits in a case in which a former colleague appears as counsel, care should be exercised in the courtroom to avoid using or permitting indications of familiarity. The former colleague should not use or be called by his or her former title. See Advisory Opinion No. 72 ("Use of Title 'Judge' by Former Judges"). First names and references to past association, events, or discussions should be avoided.
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> ***Committee on Codes of Conduct Advisory Opinion No. 72: Use of Title "Judge" by Former Judges***
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> This opinion considers the use of the title "judge" by former judges who have returned to the practice of law and whether sitting judges have any ethical responsibilities relating to such use. . . Canon 2A of the Code of Conduct for United States Judges instructs judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." A litigant whose lawyer is called "Mr.," and whose adversary's lawyer is called "Judge," may reasonably lose a degree of confidence in the integrity and impartiality of the judiciary. In addition, application of the same title to advocates and to the presiding judicial officer can tend to demean the court as an institution. Judges should insure that the title "judge" is not used in the courtroom or in papers involved in litigation before them to designate a former judge, unless the designation is necessary to accurately describe a person's status at a time pertinent to the lawsuit. The Committee notes that recusal obligations that may arise related to the appearance of a former judicial colleague are addressed in Advisory Opinion No. 70.

Although the above Federal standards apply to former judges, it would stand to reason that the concerns expressed therein are even more acute as to *active* judges like Judge Sherlock. These Federal standards, consistent with Illinois standards, over-emphasize the need to avoid any slight appearance of impropriety, even addressing the semantics of how a former judge turned advocate is addressed by a court.

Based on these fundamental principles, the courts have consistently gone to great lengths to avoid the appearance of impropriety. For example, when former Governor Otto Kerner (and

later a Seventh Circuit judge) appealed his criminal convictions to the Seventh Circuit Court of Appeals, the entire Seventh Circuit recused itself from hearing the appeal to avoid hearing an appeal brought by a judge of the Seventh Circuit. Instead, Chief Justice Burger designated judges from the Second, Eighth, and Tenth Circuits to hear the appeal. *See United States v. Isaacs*, 493 F.2d 1124, 1167-68 (7th Cir. 1973), *cert. denied*, 417 U.S. 976-77 (1974); *see also United States v. Claiborne*, 870 F.2d 1463, 1464 (9th Cir. 1989) (Chief Judge of Ninth Circuit requested Chief Justice Burger designate out-of-circuit judges to hear Judge Claiborne's appeal).

B. Analysis

In order to uphold the dictates of the Code of Judicial Conduct and avoid any appearance of impropriety, the Court should recuse itself and this case should be transferred outside of Cook County for all further proceedings. Rule 63(C) mandates recusal if the Court ruling on the Fee Petition (and other motions impacting a fee award) would risk the appearance of partiality and/or bias in favor of Judge Sherlock. *O'Brien*, 2011 IL 109039, ¶ 43. The Fee Petition presents an extraordinary circumstance that unquestionably gives rise to such an appearance of impropriety, and a reasonable person could undoubtedly question the Court's ability to rule impartially.

Judge Sherlock and Carey have initially asked this Court to decide whether to award them over $2.4 million, a significant amount of money that would, by itself, raise questions in the minds of reasonable observers regarding the ability of this Court to rule upon the petition impartially. Yet, this is just the beginning of the problem posed by the Fee Petition. Judge Sherlock and Carey seek 3% of the *final* judgment, but the amount of the final judgment is still undetermined. HCH have pending motions seeking to reduce the amount of the judgment, which may in turn, significantly reduce any fee award to Judge Sherlock. The amount of the final judgment could also go up because Intervening Plaintiffs have pending claims for punitive

damages, and the Court has ordered further proceedings on whether punitive damages should be assessed and added to the final judgment. HCH maintain that punitive damages should not be assessed, but Intervening Plaintiffs are seeking a punitive damages award of up to three times the net compensatory damages award to Plaintiffs. Further, Intervening Plaintiffs' counsel has sought a massive fee award separate and apart from the fees sought by Carey and Judge Sherlock in their Fee Petition, which may also impact the Fee Petition submitted by Carey and Judge Sherlock.

Thus, whoever presides over the remainder of this case will adjudicate issues concerning the final judgment that have the potential to deny, decrease, or increase any fee award to Judge Sherlock and Carey. Regardless of when a fee award is made, the very pendency of the Fee Petition creates an inescapable "appearance of impropriety" that requires the Court to recuse itself from these proceedings. Absent recusal, despite every effort to be impartial, a reasonable person would certainly question whether any ruling granting the Fee Petition or a ruling that increases the amount of the final judgment was influenced by Judge Sherlock's professional and personal familiarity with the Court. *See Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460-61 (7th Cir. 1985) (district court judge should have recused because "[t]he appearance of equal justice" required that the judge not be exploring the prospects of employment with one lawyer appearing in a case before him). Recusal is both appropriate and required here.

II. FEDERAL DUE PROCESS ALSO MANDATES RECUSAL.

Recusal is also warranted because the Fee Petition has raised an unconstitutional risk of bias or prejudice that would, absent recusal, lead to a violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Federal due process requires recusal where "an average judge" is not likely to be neutral or where there is an "unconstitutional potential for

bias." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 883-84, (2009) (holding that due process required an appellate judge to recuse where significant campaign contributions to the judge's election made by the appellant offered a "possible temptation to the average judge to lead him not to hold the balance nice, clear and true") (quotations and ellipses omitted). Like Rule 63(C), the U.S. Supreme Court has stressed that the standard for recusal under the Due Process clause does not require a showing of "actual bias." *See id.*; *see also Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016); *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017); *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986). In *Aetna Life,* the Court stated:

> The Due Process Clause "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.'"

475 U.S. at 825 (citing *In re Murchison*, 349 U.S. 133, 136 (1955)); *see also People v. Zymantas*, 191 Ill. App. 3d 55, 67 (1st Dist. 1989) (Pincham, J., concurring) ("Due process demands that a judge recuse himself from hearing a case not only where he is actually prejudiced, but also where his hearing the case would create even the appearance of partiality").

The Seventh Circuit has held similarly. In *Pepsico,* for example, the Seventh Circuit held that a district court judge should have recused himself when, during the pendency of a lawsuit, a recruiter working on behalf of the judge contacted (without the judge's knowledge) the law firms representing each of the opposing parties about possibly employing the judge after his retirement from bench. 764 F.2d at 460. Even though the court expressly found that the trial judge did not actually commit any impropriety, the Seventh Circuit still ruled that these facts created "an appearance of partiality" that mandated recusal. *Id.*

In *In re Continental Airlines Corporation*, 901 F.2d 1259 (5th Cir. 1990), the Fifth Circuit held that a bankruptcy judge's acceptance of an employment offer from the debtor's law

firm, on the day after the judge approved an award of $700,000 legal fees to that law firm, created the appearance of impropriety requiring the judge to recuse, even though the judge did not know he was being considered for employment with the law firm at the time he was considering the fee award. 901 F.2d at 1262-63. As in *Caperton* and *Pepsico*, the Fifth Circuit stressed that, though there was no evidence of actual bias or misconduct, the judge was nevertheless "required [under the Due Process Clause] to take the steps necessary to maintain public confidence in the judiciary" and recuse. *Id.* (citing, *inter alia*, *Pepsico*, 764 F.2d at 461).

Here, "a fully informed and objective observer" could certainly wonder whether the Court could make any further decisions in this lawsuit "with the requisite aloofness and disinterest" required of the Court, knowing that millions of dollars are at stake for a colleague. *Pepsico*, 764 F.2d at 461. The Due Process Clause requires that the Court avoid situations that will raise the question of "possible temptation[s]" for bias in favor of Judge Sherlock or that otherwise might compromise the public's faith in the integrity of the judiciary. *See Barth*, 228 Ill. 2d at 17. Recusal and transfer will reassure the parties, the bar, and public at large in the Court's strict impartiality in the administration of justice.

CONCLUSION

WHEREFORE, Defendants respectfully request that the Court take notice of the issues raised above and recuse itself from all future proceedings in this lawsuit. HCH further request that this lawsuit be transferred to the Presiding Judge of the Chancery Division for transfer to a judge outside of Cook County, and other relief deemed just.

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Respectfully submitted,

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