

IN THE CIRCUIT COURT OF SMITH COUNTY, MISSISSIPPI

THOMAS C. BROWN, JR.

PLAINTIFF

VS.

CIVIL ACTION NO. 2006-196

PHILLIPS 66 COMPANY, ET AL.

DEFENDANTS

**UNION CARBIDE CORPORATION'S MOTION FOR RECUSAL
OF THE HONORABLE EDDIE H. BOWEN, MOTION TO VACATE JUDGMENT
ENTERED BY THE COURT ON MAY 12, 2011, AND
MOTION FOR STAY OF ALL PROCEEDINGS¹**

COMES NOW Defendant Union Carbide Corporation and respectfully moves this Court for recusal of the Honorable Eddie H. Bowen from further presiding as the judge in the above styled cause of action, for an order vacating the judgment entered on May 12, 2011 by this Court in light of same, and for a stay of all proceedings until such time as this motion for recusal is finally resolved through appellate review, should same become necessary. Union Carbide Corporation respectfully requests expedited consideration of these matters because of the importance of the issues raised herein and the fast-approaching post-trial motion deadline of May 23, 2011. Pursuant to Rule 60(b) and Rule 16 of the Mississippi Rules of Civil Procedure, Rule 1.15 of the Mississippi Circuit and County Court Rules, Article 6, Section 165 of the Constitution of the State of Mississippi, Section 9-1-11 of the Mississippi Code Annotated, and Canons 2 and 3 of the Code of Judicial Conduct, Union Carbide Corporation files these motions and, in support of same, would show unto the Court as follows:

¹ Although Union Carbide Corporation is entitled to a mis-trial and/or new trial based, *inter alia*, on the recusal of Judge Bowen, it would be inappropriate to move for same in the instant pleading while simultaneously requesting recusal of the presiding judge from the case. Therefore, Union Carbide Corporation specifically reserves without prejudice its right to request a mis-trial and/or new trial in this action as well as request any other such relief as may be appropriate under the circumstances of this case. Filing this motion for recusal, for an order vacating the judgment, and for a stay of proceedings does not constitute a waiver of any additional, appropriate relief that may be requested by Union Carbide Corporation, nor does it constitute a waiver of any grounds to be asserted in any post-trial motions in this case.

Supporting Facts and Information

1. Mr. Thomas Brown, the plaintiff in this action, alleged exposure to asbestos supplied by Union Carbide and sold by Montello, Inc. to drilling mud companies for use as a specialty drilling mud additive. Mr. Brown also alleged similar exposure to asbestos supplied by Johns Manville and sold by co-defendant CPChem as a drilling mud additive. As a result of these alleged exposures, Mr. Brown claimed that he contracted asbestosis and was emotionally distressed due to a fear of developing cancer sometime in the future. Mr. Brown further asserted causes of action based on inadequate warnings and the defective design of the defendants' asbestos products.

2. The trial of this matter commenced on April 11, 2011. Jury selection occurred over the course of nine days, during which approximately 1,150 citizens of Smith County, Mississippi were summoned for potential jury service in this case. Those jury panel members who had past or present connections to asbestos litigation either personally or through a relative within the first degree of consanguinity were excused by the trial court for cause because of the great potential for bias, possible negative influence on remaining panel members, and presumed partiality among those individuals.² See e.g. Trial Transcript, Vol. 4 – Vol. 4, 44-45, April 14, 2011. As succinctly noted by the Court,

² The Court's general rule on for cause challenges with respect to potential jurors who had admitted connections to asbestos litigation was that only those who personally filed suit or whose first-degree relatives filed suit would be excused. Those potential jurors who admitted on their questionnaires that his or her grandparents, in-laws, aunts, uncles, cousins, close friends, etc. also filed asbestos cases were not excused by the trial court for cause. Indeed, because of the small community and overwhelming population of individuals with connections to asbestos litigation, Union Carbide Corporation and its co-defendant moved for a transfer of venue based on the factors outlined in the *Bailey* decision as well as other relevant decisions of the Mississippi Supreme Court. *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31 (Miss. 2004). Those motions were denied each time they were urged. As is explained in supplemental filings by Union Carbide Corporation, at least 987 residents of Smith County have filed asbestos personal injury lawsuits. Statistically speaking an asbestos personal injury plaintiff resides in 1 out of every 6 Smith County, Mississippi households. Indeed, of the 109 prospective jurors summoned

THE COURT: Okay. The Court is going out there to face the jury venire and will dismiss jurors that have been listed within the first degree as being screened for asbestos or asbestos cases or anything else dealing with asbestos.

Id. at 44:15-44:20.

Specifically, the Court preemptively excused for cause those jurors who admitted³ that they or their immediate family members: (1) had been screened in connection with asbestos litigation, or (2) had filed an asbestos lawsuit (regardless of whether or not the suit was still pending), or (3) had settled an asbestos case or claim.

3. Eventually, twelve jurors and two alternates were seated as the members of the jury, and the first witness for the plaintiff took the stand on April 20, 2011.

4. The trial of this matter stretched over the course of three calendar weeks. Plaintiff Brown's treating physicians (including two pulmonologists, one internist, and six radiologists), the Rule 35 Independent Medical Examiner, and the defendants' experts all testified that the plaintiff did NOT, in fact, have asbestosis.⁴ Plaintiff Brown stipulated prior to trial that he had

from Jury Panels 2, 3 and 4 and appearing in Court for potential jury duty, 53 had some admitted, confirmed or expressed belief by the juror of a connection to asbestos litigation and/or admitted bias against asbestos defendants—a shocking 48.6%. An even greater number of the prospective jurors shared a common surname with asbestos claimants from Smith and surrounding Mississippi counties, but Union Carbide was denied the right to individually voir dire each and every member of the final venire panel to explore these connections. Moreover, of the final 81 member petit jury panel seated in this case, 18 identified that themselves or a family member had been represented by Mr. Eugene Tullos, the local plaintiff's attorney in this case, one potential juror admitted that he leased land from Mr. Tullos, and another potential juror admitted that her grandmother worked for Mr. Tullos for close to 40 years.

³ In certain instances, either intentionally or because of a lack of personal knowledge, potential jurors failed to disclose on the juror questionnaire their individual or familial connections to asbestos litigation. For those panel members for whom Union Carbide was able to discover this omission, the Court accepted copies of asbestos personal injury complaints, executed releases, or other documentation in support and as proof of Union Carbide's assertions that the panel members did in fact fall into the Court's pre-determined category for potential bias and partiality.

⁴ In contrast, only two experts (those retained and compensated by Plaintiff's Counsel from Texas) diagnosed Mr. Brown with asbestosis. NO expert, however, (not even those retained by Plaintiff's

no lost wages, no loss of earning capacity, and no past medical expenses related to any claim or allegation in his lawsuit; and, by his own admission, he only presented proof at trial of alleged future economic damages in the amount of \$45,000 (for the purpose of monitoring for future illness).

5. Nevertheless, a jury verdict in the amount of \$22 million in compensatory damages (\$11 million in future medical expenses plus \$11 million in non-economic damages) and \$300 million in punitive damages was returned by the Smith County, Mississippi jury in this matter on May 4, 2011. The jury only apportioned fault to the two remaining defendants in the case - fifty percent liability to Union Carbide Corporation and fifty percent liability to CPChem. The Court then entered Judgment on the jury's verdict in the uncapped amount of \$322,000,000 on May 12, 2011.⁵

6. The Honorable Eddie H. Bowen served as trial judge in the case.

7. During the second week of the trial, Judge Bowen made one or more casual, off-the-record remarks to individual attorneys regarding the potential exposure of his own father to asbestos while working at Ingalls Shipbuilding on the Mississippi Gulf Coast. These informal,

Counsel) testified that Plaintiff Brown would, more likely than not, contract any form of cancer in the future. It is undisputed in the trial record that Plaintiff Brown is, in fact, NOT likely to contract any form of cancer from his alleged exposure to asbestos.

⁵ Defendant Union Carbide Corporation hereby reserves without prejudice its objections to the form and substance of the judgment entered on May 12, 2011 as well as due process objections with respect to its entry without prior notice. The form of the judgment was not circulated to Defendant Union Carbide Corporation prior to its entry, even though a specific request for same was made to plaintiff's counsel. Furthermore, the judgment itself is not in the typical form utilized in Mississippi Circuit Courts and contains significant misstatements of fact including, but not limited to, the correct filing date of this action - which is in the Year 2006, not 2004 as indicated in the judgment. (Not only is this the filed-stamped date of Mr. Brown's complaint in Smith County; but, during the trial of this matter, plaintiff's counsel also stipulated that this action was filed in 2006, not 2004.) In addition, the judgment fails to conform the future medical expenses (economic award of \$11,000,000) to the evidence (or lack thereof) presented at trial and further fails to apply the statutory caps on the non-economic and punitive damages awards as mandated by Mississippi law.

off-the-cuff statements first led counsel for Union Carbide Corporation to explore the possibility that Judge Bowen's father (whose identity was unknown to counsel at the time) might have some connection to actual asbestos litigation.

8. Indeed, because the Court did not reveal any individual or familial connection to asbestos litigation prior to trial required by the Judicial Canons, it did not occur to Union Carbide Corporation (prior to the circumstances described above) that the existence of such a blatant conflict of interest was even a possibility in this case. This is especially true in light of Judge Bowen's own rulings on bias, undue influence, and partiality with respect to potential jurors who have personal or first-degree familial connections to asbestos litigation.

9. Nevertheless, on May 10 and 11, 2011, counsel for Union Carbide Corporation discovered through diligent, independent research that Mr. Howard J. Bowen of Raleigh, Mississippi (SSN: XXX-XX-7430 and DOB: 9/21/1924), the father of Judge Eddie Bowen, previously filed not one, but two asbestos personal injury actions in the Circuit Courts of Mississippi naming as defendants manufacturers of products containing asbestos supplied by Union Carbide Corporation. His first asbestos lawsuit in 1989 was filed by Attorney James R. Hartzog; in 1992, the law firm of Dickie Scruggs, P.A. filed yet another asbestos personal injury action on behalf of Judge Bowen's father. *See*, attached hereto as Exhibit "A," Complaint in *John D. Abston, et al. v. GAF Corporation, et al.*, In the Circuit Court of Jackson County, Mississippi, Cause No. 89-5234(2) at Exhibit A, Page 1 (June 19, 1989); *See*, attached hereto as Exhibit "B," Amended Complaint in *Harrell B. Barry, et al. v. Westinghouse Electric Corporation, et al.*, In the Circuit Court of Jackson County, Mississippi, Cause No. 92-5018(1) at Exhibit A-1, Page 1 (August 5, 1992). Thus, at the time his father's two asbestos personal injury

complaints were filed, Judge Bowen was a licensed attorney with an active civil and criminal litigation practice in Mississippi.

10. Just like Plaintiff Brown, Judge Bowen's father asserted in each of his lawsuits that he had contracted asbestosis due to work place exposure to asbestos. In his 1989 asbestos complaint, Judge Bowen's father asserted - like Mr. Brown in the instant action - that the asbestos products to which he was exposed were defective in design and in warning. *See* Exhibit A, *Abston* Complaint, at 3-5. Judge Bowen's father demanded an amount not less than \$1,000,000 in damages as a result of his asbestosis and emotional distress. *Id.* at 4. The allegations contained in the 1992 asbestos complaint were not substantially different; however, the Judge's father did emphasize in that complaint, even more than in the 1989 filing, his pain and suffering resulting from his fear of future illnesses. *See* Exhibit B, *Barry* Complaint.

11. It is also important to note that at least the 1992 cause of action filed by the Judge's father, the *Barry* Complaint, remains open and pending to this day as to one or more asbestos defendants in the Circuit Court of Jackson County, Mississippi.

12. Both Judge Bowen's father and mother, Howard J. Bowen and Eunice Bowen, eventually settled their claims with a number of asbestos defendants including, most importantly, Union Carbide Corporation and Johns Manville. *See* Exhibit C, *Administrative Claim Form*, August 14, 1989; *See* Exhibit D, Release Executed by Howard J. Bowen and Eunice Bowen. In relevant part, the release executed by Judge Bowen's mother (for her loss of consortium claim) and father (for his personal injury claim) reads as follows:⁶ -

⁶ The image of the release has been redacted to remove the first five digits of the Social Security Numbers of the Judge's parents. The identities of approximately fifteen additional asbestos defendants who were included on the release with Union Carbide Corporation have also been redacted.

PARTIAL RELEASE

FOR AND IN CONSIDERATION of the sum of One Dollar (\$1.00), and other good and valuable consideration, the undersigned, Howard J. Bowen, Social Security No. [REDACTED] 7430, and his/her spouse, Eunice Bowen, for themselves, their heirs, administrators, executors, personal representatives, and assigns (said parties hereinafter collectively referred to as "Releasors"), do hereby release and forever discharge the

[REDACTED]

Union Carbide Corporation; United States Gypsum Company; their present and former parent corporations, subsidiary corporations, successor corporations, predecessor corporations, affiliated corporations, and each of the aforesaid or above-described corporation's or company's present and former successors, predecessors, and assigns, insurers, reinsurers, and their present and former directors, officers, agents, servants, employees, and stockholders of all such corporations or companies, and any and all other persons, firms, partnerships, associations or corporations who are, or may be in any manner whatsoever, liable for their acts, or for the acts of any of them (said parties hereinafter collectively referred to as "Releasees"), jointly and severally, of and from any and all claims, causes or rights of action, demands and damages of every kind and nature whatsoever, including, without limitation, all present and future claims that Howard J. Bowen and Eunice Bowen may now or hereafter have, including, but not limited to, loss of consortium, companionship, service, support, pain and suffering, injury and damage of any kind, including the wrongful death of Howard J. Bowen which the Releasors may now or hereafter have arising out of or being in any way related to the possible exposure of Howard J. Bowen to asbestos or asbestos-containing products mined, manufactured, sold, supplied, or distributed by Releasees, which may have caused injuries or damages to them either jointly or severally. It is expressly understood

See Exhibit D at Page 1.

13. The basis of the Judge's family's claims against Union Carbide was the Judge's father's alleged exposure to Calidria chrysotile asbestos fiber mined, milled, and manufactured by the company. Plaintiff Brown likewise alleged exposure to the exact same Calidria chrysotile asbestos (mined from the same source and milled in the same manner) as the Judge's father.

14. One additional asbestos settlement entered into by the Judge's father is of particular note when considered in light of Plaintiff Brown's case. Mr. Bowen submitted a claim to the bankruptcy trust operated on behalf of Johns Manville Corporation. See Exhibit F,

Affidavit of Marcy B. Croft, May 13, 2011. On April 3, 1989, Attorney Hartzog submitted a claim on behalf of Judge Bowen's father to the Johns Manville trust noting that Mr. Bowen alleged exposure to JM asbestos products while working at Ingalls from 1942 to 1943. As this Court is aware, Johns Manville (or "JM") was also the asbestos supplier for defendant CPChem in the instant action. Therefore, once again, it appears Judge Bowen's father alleged exposure to the asbestos products mined, milled, and/or manufactured by the same entities to which Plaintiff Brown alleged exposure.

15. Moreover, as discussed above, the medical records submitted to Union Carbide Corporation in support of Judge Bowen's parents' settlement included a diagnosis of asbestosis and demonstrated obstruction on pulmonary function tests – conditions also allegedly diagnosed in Plaintiff Brown. *See Exhibit E, Diagnostic Records* submitted by the Judge's father to Union Carbide Corporation for purposes of processing his settlement. Nonetheless, given that the diagnosis underlying Judge Bowen's parents' claims is a non-malignant disease process (asbestosis), should Mr. Bowen ever regrettably develop a form of asbestos-related cancer in the future, it is feasible that he or his heirs could attempt to pursue additional causes of action based on that malignancy diagnosis alone. Furthermore, if such a lawsuit were to go forward or if the Judge's father elected to continue to pursue his current pending action, the rulings made by Judge Bowen against Union Carbide Corporation on evidentiary and legal issues in the instant action would be beneficial to those cases.

16. Finally, and most importantly, it is undisputed that His Honor failed to disclose on the record prior to the trial in this matter (as required by the Code of Judicial Conduct) the following: (1) the filing and pendency of two asbestos personal injury actions by Judge Bowen's father; (2) the settlement of asbestos claims by Judge Bowen's father; (3) the settlement of loss

of consortium claims by Judge Bowen's mother; (4) the receipt of settlement funds by Judge Bowen's father from Union Carbide Corporation, a defendant in the instant action, for a non-malignant asbestos-related condition; (5) the receipt of settlement funds by Judge Bowen's mother from Union Carbide Corporation, a defendant in the instant action, for loss of consortium; (6) the similar allegations of asbestos exposure, particularly as to the source of the asbestos, between Plaintiff Brown and Judge Bowen's father; and, (7) the alleged fear of future illness or cancer of Judge Bowen's father and its similarity to Plaintiff Brown's fear of cancer allegations. Thus, the parties were not even given the opportunity to consider recusal before the trial in this action began.

Summary of Legal Authority

17. In Mississippi, there are three primary sources of legal authority for disqualifying judges through the process of recusal. These are Article 6 § 165 of the State Constitution, Section 9-1-11 of Mississippi Code Annotated, and the Canons of the Code of Judicial Conduct.

18. Article 6 § 165 of the Constitution bars a judge from hearing any matter "where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties." *See* Miss. Const. Art. 6 § 165. Mississippi Code Annotated § 9-1-11 tracks the language of the Constitutional section but adds an additional basis for recusal based on the judge's having served as counsel in the case. *See* Miss. Code Ann. § 9-1-11 (Supp. 2011). Finally, Canons 2 and 3 of the Code of Judicial Conduct provide additional legal authority for recusing a judge. These Judicial Canons enjoy the status of law and are enforced rigorously by the Mississippi Supreme Court. *See Walmart Stores, Inc. v. Frierson*, 818 So.2d 1135 (Miss. 2002).

19. **The Mississippi Supreme Court has clearly and succinctly set forth the standard to be applied when a trial judge considers under the Code of Judicial Conduct whether or not his recusal is warranted. Specifically, the Court has held that when a reasonable person knowing all of the facts and/or considering the totality of the circumstances *might*⁷ harbor doubts about the judge’s impartiality, then recusal is appropriate, necessary, and required. See *Dodson v. Singing River Hosp. Sys.*, 839 So. 2d 530 (Miss. 2003); *Miss. United Method. Conf. v. Brown*, 929 So.2d 907 (Miss. 2006); *Beckum v. State*, 917 So.2d 808 (Miss. 2005); *Hill v. Mills*, 26 So.3d 322 (Miss. 2010) (holding the test for recusal of a judge is “Would a reasonable person, knowing all of the circumstances, harbor doubts about the judge’s impartiality?”).**

20. The comments to the Canons of the Code of Judicial Conduct stress the importance of maintaining not only the integrity and independence of the judiciary, but also the perception of the citizens of Mississippi that all persons, both individuals and corporations, can and should have a fair and impartial judge presiding over their case. See Comment to C.J.C., Canon 1 (2011) (stating “[d]eference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges.”) Judges are required by Canon 3B to be “patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacities . . .” See C.J.C., Canon 3B(4) (2011). They are further required by the Canons to perform their duties impartially and fairly without bias or prejudice. *Id.* at Canon 3B(5) and Commentary thereto (2011).

⁷ Even if the Court were to erroneously consider the situation at hand to be a “close call,” the use of the word “might” makes clear that a judge should decide “close calls” in favor of removing himself or herself from the case. See *N.Y. City Housing Develop. Corp. v. Hart*, 796 F.2d 976, 980 (7th Cir. 1986); *In re Chevron U.S.A., Inc.*, 121 F.3d 165 (5th Cir. 1997).

21. The most often cited portion of the Judicial Code of Conduct, is Canon 3(E) which provides for judicial recusal where:

- (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. *See Id.* at Canon 3E(a);
- (b) the judge's current or former professional, personal, and familial relationships result in a financial interest in the subject matter in controversy. *See Id.* at Canon 3E(c); and/or
- (c) the judge or a person within the third degree of relationship to the judge is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding *See Id.* at Canon 3E(d)(iii); *In re Moffet*, 556 So.2d 723 (Miss. 1990).⁸

22. Recusal here is warranted by the constitutional, statutory, and canonical standards cited above as established by the facts and circumstances identified herein as well as the actual bias and prejudice demonstrated by Judge Bowen against Union Carbide Corporation and CPChem throughout the course of the trial.⁹

⁸ The analysis performed by the Fifth Circuit in the *Tramonte* case is also instructive on this point. *See Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1029-31 (1998) (noting that if members of the judge's family owned Chrysler vehicles such that they would fall into the putative class, the judge would be required to recuse herself under federal law and that even if the judge's family members are not yet parties to a class action, the fact that the judge could advance the interests of that relative by presiding over the litigation required recusal as her impartiality might reasonably be questioned).

⁹ Judge Bowen's actual bias and prejudice with respect to Union Carbide and CPChem became apparent over the course of the trial through, *inter alia*, (a) his demeanor toward certain attorneys and witnesses in the presence of the jury, (b) his rulings on evidentiary issues, (c) his comments in presence of the jury about the weight of the evidence, (d) his coaching of plaintiff's counsel in their examination of witnesses and with respect to objections, (e) his rulings that were simply incongruous with clear principles of Mississippi law, and (f) his entry of the judgment without application of the caps. In support of this argument, Union Carbide Corporation incorporates by reference as if fully restated herein the entirety of the Trial Transcript in this action. In addition, after the jury returned its verdict, Union Carbide Corporation immediately sought production of the audio tapes maintained by the Court Reporter in this action so that same could be utilized, where appropriate, in the appeal of this case as they are the best evidence of the tone and demeanor of the Court with respect to certain witnesses and attorneys. This request was denied by the Court. *See* Trial Transcript, Vol. 16, 3343:9-3345:2, May 4, 2011.

23. To be sure, however, the overriding, general standard contained in Canon 3E as is perhaps the simplest method by which recusal in this case can be considered and deemed necessary. Specifically, the Mississippi Supreme Court and the Code of Judicial Conduct hold that a judge is required to recuse himself when his "impartiality might be questioned by a reasonable person knowing all of the circumstances." *See* C.J.C., Canon 3E. This is known as the general standard for recusal of judges in Mississippi and is to be applied when the enumerated statutory and constitutional bases for recusal are inapplicable to the circumstances of a particular case.

24. Canon 2A of the Code of Judicial Conduct is instructive when considering the overall facts and circumstances surrounding the duty of a member of the judiciary to recuse himself in a situation such as that which has arisen in the instant action. Specifically, Canon 2A and its Commentary note in relevant part:

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . .

A judge must avoid all impropriety and appearance of impropriety. . . .

See Code Jud. Conduct, Canon 2 and Commentary.

25. Put simply, the Mississippi Supreme Court has held that when a reasonable person knowing all of the facts and/or considering the totality of the circumstances *might* harbor doubts about the judge's impartiality, then recusal is appropriate, necessary, and required. *See Dodson v. Singing River Hosp. Sys.*, 839 So. 2d 530 (Miss. 2003); *Miss. United Method. Conf. v.*

Additionally, as has been the custom and practice in each of the companion drilling mud cases tried to verdict, Union Carbide retained a third party to telephonically interview those jurors willing to speak about the trial and what may have influenced such an outlandish result. After the voluntary interviews were scheduled and at least one interview had already begun, the Court upon hearing about the scheduled interviews ordered Union Carbide to cease all interviews and not to speak to anymore of the jurors in this case.

Brown, 929 So.2d 907 (Miss. 2006); *Beckum v. State*, 917 So.2d 808 (Miss. 2005); *Hill v. Mills*, 26 So.3d 322 (Miss. 2010) (holding the test for recusal of a judge is “Would a reasonable person, knowing all of the circumstances, harbor doubts about the judge’s impartiality?”). This standard holds true whether a party is seeking recusal based on specific examples of partiality or on the general standard of the Canon.¹⁰ See *Washington Mut. Finance Grp. v. Blackmon*, 925 So.2d 780 (Miss. 2004).

26. Not surprisingly, the Comment to Canon 3E stresses the importance of full, formal disclosure on the record of “information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.” See C.J.C. Canon 3E Commentary (2011).

27. The totality of the circumstances and/or facts relating to the instant action which, therefore, must be considered are:

- Judge Bowen’s father and Plaintiff Brown both filed asbestos personal injury lawsuits;
- Judge Bowen’s father and Plaintiff Brown both alleged exposure to asbestos during their working career;
- Judge Bowen’s father and Plaintiff Brown both claimed Union Carbide Corporation and CPChem’s asbestos supplier, Johns Manville, were responsible for their injuries;
- Judge Bowen’s father and Plaintiff Brown both alleged design defect, inadequate warning, and emotional distress;

¹⁰ The determinative question in considering whether a judge who filed notice of relationship should have recused himself was not whether the judge would give favor or disfavor in trial of case, but rather was whether his impartiality might be questioned by a reasonable person knowing all of the circumstances. See e.g. *In re Moffet*, 556 So.2d 723 (Miss. 1990).

- Judge Bowen's father and Plaintiff Brown both alleged an identical permanent, progressive, and debilitating disease (asbestosis) as a result of claimed exposure to asbestos;
 - Judge Bowen's father and Plaintiff Brown both alleged that Union Carbide was responsible for their claimed injuries;
 - Judge Bowen's father and Plaintiff Brown both alleged impairment in their lung function from exposure to asbestos;
 - Judge Bowen's father settled his claim with Union Carbide and personally executed a release;
 - Judge Bowen's mother settled her claim for loss of consortium with Union Carbide and personally executed a release;
 - Judge Bowen was a practicing civil and criminal lawyer in the State of Mississippi at the time of his parents' settlement with Union Carbide;
-
- Judge Bowen's father submitted a claim to the bankruptcy trust processing claims for Johns Manville, CP Chem's asbestos supplier;
 - Judge Bowen did not disclose on the record information regarding his parents' alleged asbestos-related injuries or lawsuits;
 - One or more of Judge Bowen's father's lawsuits is currently pending;
 - There is at least a potential for future causes of action related to Judge Bowen's father's alleged exposure to Union Carbide's Calidria asbestos;
 - Judge Bowen's father is still living and is visited by Judge Bowen frequently, including on more than one occasion while the trial of this matter was on-going; and, *inter alia*,

- Judge Bowen instituted a rule with respect to the appearance of partiality, potential bias, and likely, negative influence among potential jurors that included striking jurors for cause when either of their parents had been screened for asbestos litigation, had filed an asbestos lawsuit (whether currently pending or dismissed), or had received asbestos settlement funds. Indeed, under the rule instituted by Judge Bowen with respect to jurors, the Judge himself would have been disqualified from serving on the jury in this case.¹¹

28. Given the totality of these circumstances, it simply cannot be disputed that an objective, reasonable person *might* harbor doubt as to Judge Bowen's impartiality.¹²

29. The Mississippi Constitution, statutory authority, rules, and case law provide a clear path for what must be done in circumstances such as these. Recusal of the judge is not only warranted under Mississippi law, but required. As such, Union Carbide Corporation respectfully requests that the Court grant its motion for recusal.

¹¹ This circumstance alone demonstrates that Judge Bowen's familial connections to asbestos litigation might cause a reasonable person to harbor doubts about his impartiality.

¹² Indeed, even a cursory review of the trial transcript, which is fully incorporated herein by reference, would further support this position in that the majority of substantive, key rulings during the trial of the instant action went against Union Carbide Corporation – from the denial of venue transfer, to evidentiary rulings in plain contradiction to the law and existing reports and recommendations of the Special Master, to contrary rulings on objections, to the refusal of the Court to allow certain cross-examination, to the refusal of certain jury instructions regarding affirmative defenses that were supported by the evidence and proper statements of the law, to the denial of directed verdict motions when the record clearly and overwhelmingly demonstrated that plaintiff failed to put on any proof of certain essential elements of his case, to the demeanor of His Honor toward certain attorneys and witnesses in the presence of the jury, to the refusal of the Court to order production of the audio tapes maintained by the Court Reporter at the trial, and, to the refusal of the Court to allow post-trial, voluntary, telephonic interviews of the jury members.

Finally, the entry and form of the May 12, 2011 judgment further supports this premise as it erroneously asserts a 2004 filing date and fails to apply the statutory caps on non-economic and punitive damages.

Request for Expedited Consideration, for Stay of Action, and to Vacate Judgment

30. Union Carbide Corporation respectfully requests that this Court stay the instant action until such time as the motion for recusal is finally resolved through appellate review (should same become necessary). A stay is the only method by which the integrity of the judicial system can be maintained and is necessary until such time as it is finally determined whether the Honorable Eddie Bowen should continue to preside, or should have ever presided, over this matter. Given that there are specific Mississippi Rules of Appellate Procedure regarding the expedited review of a denial of a motion to recuse, no party could be prejudiced by the imposition of a stay until these issues are addressed and concluded by the Mississippi Supreme Court.

31. Union Carbide Corporation further requests that this Court vacate the judgment entered on May 12, 2011 in this matter. Until such time as a final resolution on the motion for recusal can be had, it is a waste of judicial resources, the resources of the parties, and prejudicial to Union Carbide Corporation for such a judgment to be entered. Entry of the judgment, for example, triggers the time period by which post-trial motions must be filed – within ten days. Given that it is Union Carbide’s position that it is not appropriate for Judge Bowen to rule on the post-trial motions in this case and that it was not proper for His Honor to have presided over the trial of this matter at all, it is appropriate under Rule 60 that the May 12, 2011 form of the judgment be vacated until such time as the issue of recusal can be finally resolved.

32. Finally, Union Carbide Corporation respectfully requests expedited consideration of its motion for recusal, motion for stay of action, and motion to vacate judgment. Post-trial motion deadlines were triggered by entry of the judgment on May 12, 2011. Given the excessive amount of the compensatory and punitive damages awards in this case and the costs of appeal to

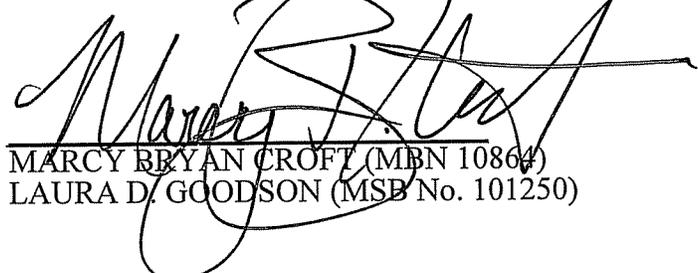
all parties, expedited consideration of Union Carbide's motions is warranted, necessary, and in the interest of judicial economy.

WHEREFORE, PREMISES CONSIDERED, Union Carbide Corporation respectfully requests that the Court enter an order recusing the Honorable Eddie Bowen from further proceedings in this cause of action, staying this case until the matter of the recusal is finally resolved, and vacating the judgment entered on May 12, 2011.

This the 16th day of May, 2011.

Respectfully submitted,

UNION CARBIDE CORPORATION



MARCY BRYAN CROFT (MBN 10864)
LAURA D. GOODSON (MSB No. 101250)

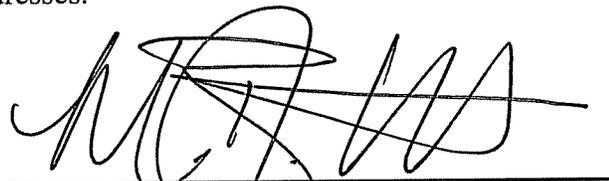
FORMAN PERRY WATKINS KRUTZ & TARDY LLP

200 South Lamar Street
City Centre, Suite 100
Post Office Box 22608
Jackson, Mississippi 39225-2608
Telephone: (601) 960 – 8600
Facsimile: (601) 960 – 8613

CERTIFICATE OF SERVICE

I hereby certify that I have served all counsel of record via electronic correspondence and have mailed via U.S. mail, postage prepaid, a true and correct copy of the foregoing pleading to plaintiffs' counsel at their usual business addresses.

THIS the 16th day of May, 2011.



MARCY BRYAN CROFT (MBN 10864)